

Memorandum

to: Honorable Brad Sherman
Honorable Ernest J. Dronenburg Jr.
Honorable Matthew K. Fong
Board Member, First District
Honorable Gray Davis

Date: October 26, 1994

From: E. L. Sorensen, Jr.

Subject: **Contribution Disclosure Opinion 94-11**

1) A disqualified Board Member may not participate if a quorum can be convened of qualified Members, even if they are not present at the Board meeting. 2) Based on the current facts, when deciding petitions for reassessment of state-assessed property, the vacancy on the Board will not affect the Board's ability to bring back a disqualified Member pursuant to section 15626(i)(5).

Questions Presented

As a result of at least two upcoming matters, the following questions regarding the application of the Kopp Act (Government Code section 15626) have been raised:

1) For purposes of Government Code section 15626(i)(5), which allows legally required participation, may a disqualified Board Member be brought back if a quorum can be convened of other Members, including the State Controller, who are not disqualified, even if they are not present at the Board meeting?

2) When deciding petitions for reassessment of state-assessed property, does the fact that there is currently a vacancy on the Board affect the ability of the Board to apply the legally required participation exception of section 15626(i)(5)?

Conclusions

1) A disqualified Board Member may not participate pursuant to section 15626(i)(5) if a quorum can be convened of qualified Members, including the State Controller, even if such Members are not present at the Board meeting.

2) Since the Board is statutorily required to decide petitions for reassessment of state-assessed property by the end of the calendar year, and the vacancy will not be filled in time for a new Member to participate in making the decision, the fact that there is currently a vacancy on the Board will not affect the Board's ability to bring back a disqualified Member pursuant to section 15626(i)(5).

Analysis

The California State Constitution, Article 13, Section 19, mandates the Board to annually assess the value of "(1) pipelines, flumes, canals, ditches, and aqueducts lying within 2 or more counties and (2) property, except franchises, owned or used by regulated railway, telegraph, or telephone companies, car companies operating on railways in the State, and companies transmitting or selling gas or electricity." (Commonly referred to as "state assesses.") Revenue and Taxation Code section 744(a) provides that: "Decisions of the board on petitions for reassessment of state-assessed property shall be completed on or before December 31."

The State Controller sits as a Member of the Board. Government Code section 7.9(a) allows the Controller to designate a deputy to act in his or her place with respect to the exercise of statutory powers and duties. The Controller may not delegate constitutional duties to a deputy.

In order for the Board to have a quorum, three Members must be present and entitled to participate. (Contribution Disclosure Opinion (CDO) 91-5, and 62 Cal. Atty. Gen. Ops. 698, 699-700.) If the Deputy State Controller cannot participate because the matter at issue involves a constitutional duty of the Board, he or she cannot be counted for purposes of establishing a quorum. (CDO 91-24.)

Government Code section 15626(i)(5) states in pertinent part that:

This section shall not prevent any member of the board from making, or participating in making, a governmental decision to the extent that the member's participation is legally required for the action or decision to be made.

Aside from restating the statute, the Board's regulations do not address what constitutes legally required participation. Section 15626(i)(5) is essentially the same as Government Code section 87101. 2 Cal. Code of Regs. section 18701, adopted by

the Fair Political Practices Commission ("FPPC") to interpret the concept of legally required participation for purposes of Government Code section 87101, is often used for guidance in interpreting section 15626. Regulation 18701(a) states:

A public official is not legally required to make or to participate in the making of a governmental decision ... unless there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision.

Regulation 18701(c)(2) provides further that the regulation shall be construed narrowly and shall:

Not be construed to allow a member of any public agency, who is otherwise disqualified ..., to vote if a quorum can be convened of the other members of the agency who are not disqualified ..., whether or not such other members are actually present at the time of the disqualification.

Using the FPPC's regulation as guidance, with regard to the first question, we are of the opinion that a disqualified Board Member may not participate pursuant to section 15626(i)(5) when there is an absent Board Member who is qualified to participate. This would include the absent State Controller in those matters which cannot be constitutionally delegated to the Deputy State Controller.

With regard to the second question, the California State Constitution, Article. 5, Section 5(b), in pertinent part, provides that the Governor shall nominate a person to fill a vacancy on the State Board of Equalization. That person shall take office upon confirmation by the Legislature or, if no action is taken by the Legislature, within 90 days of the nomination. An extension is provided if the 90 day period ends when the Legislature is not in session. Despite this constitutional provision, a vacancy has existed on the Board since April 1992.

Although not binding, we again turn to the FPPC for guidance in interpreting how a vacancy would affect the provision that participation be legally required before a disqualified member is brought back to participate in a decision.

Based on regulation 18701, in CDO 93-7 we advised that when disqualification leaves the Board with insufficient Members to form a quorum, and there exists no alternative

source of decision, the Board Members should, by lot or some other random form of selection, determine which Member or Members should be brought back to form a quorum. We further advised that "prior to finding that a Board Member's participation is legally required, a determination should be made that there is no alternative source of decision consistent with the purpose and terms of the statute authorizing the decision."

The FPPC has written several advice letters which essentially state that where it is possible to fill a vacancy, the use of the legally required participation exception is not appropriate. Conversely, when the vacancy cannot be filled prior to when the decision is legally required, and there is no alternate source of decision, the FPPC says that the legally required exception is applicable. (See, FPPC Advice Letters Phillips A-82-111; Sutton A-90-643; Schectman A-92-198.)

Given that the vacancy on the Board has existed since April 1992, and there is an upcoming election in November which will fill the position for the new term, there is no reasonable doubt that the seat in question will remain vacant until January 1995. Therefore, since an appointment has not been made to fill the vacancy, and the Board is required to decide petitions for reassessment of state-assessed property by the end of the calendar year, we are of the opinion that the member's participation is legally required and that a quorum should be established as provided for in 18 Cal. Code of Regs. section 7008(d).



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