


September 20, 2010

**FILED**

SEP 28 2010

Honorable Richard J. Loftus  
Presiding Judge  
Santa Clara County Superior Court  
191 North First Street  
San Jose, CA 95113

DAVID H. YAMASAKI  
Chief Executive Officer/Clerk,  
Superior Court of CA County of Santa Clara  
BY D. ALDYCKI 

Subject: Santa Clara County Civil Grand Jury Report 2009 – 2010 Final Report  
Is a Conflict of Interest Guiding the Santa Clara Valley Water District in Alviso?

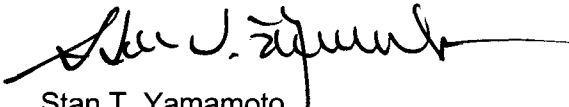
Dear Judge Loftus:

The Santa Clara Valley Water District (District) has completed its review of the Santa Clara County Civil Grand Jury Final Report (Report) which is dated June 18, 2010. Pursuant to Penal Code section 933(c), please find attached the District's response to the Grand Jury's findings and recommendations.

After careful review of the findings and recommendations, the District finds points of agreements and points of disagreement. As the information in the Grand Jury's final report has received considerable public exposure, the District respectfully requests that the attached District response be posted on the Grand Jury's website along with the Grand Jury's final report. Also attached is the 2006 advice letter of the Fair Political Practices Commission (Attachment One). This advice letter considered Director Santos's financial interests as indirectly involved in the Alviso Slough Restoration Project; and being indirect, such interests were presumed not to be material. The District believes that this advice letter is particularly significant in light of the District's response. In addition, as the Board of Directors believed it would be helpful to demonstrate the numerous public meetings held with respect to the Gold Street Educational Center Project, a chronology of those meetings is also provided (Attachment Two).

As it is the District's intent to be accountable and transparent, we appreciate and welcome external review.

Respectfully submitted,

  
Stan T. Yamamoto  
District Counsel

Attachments (2)

cc: Board of Directors (7), B. Goldie, M. Moye

# **Santa Clara Valley Water District Response to Grand Jury Report - “Is a Conflict of Interest Guiding the Santa Clara Valley Water District in Alviso?”**

## **Finding #1**

**The SCVWD plans to build an additional outdoor education center (Gold Street Education Center) at a cost between \$1.1 million and \$1.3 million in Alviso. The attendance data provided by SCVWD for the existing education centers do not support the need for another education center.**

**District Response to Finding #1: Respondent partially disagrees with the finding.**

The Santa Clara Valley Water District (“District” or “Respondent”) agrees with the first sentence of the finding and disagrees with the second sentence.

The Gold Street Education Center Project’s (“the Project”) goal is to establish a venue to promote the public’s education on the District’s mission of water supply, flood protection, and stream stewardship. This Project would be located near the wetlands where the Guadalupe River meets the Bay; the location is unique in that it provides an opportunity for the public to actually see the condition of how water supply, flood protection, and environmental stewardship are all tied together.

Unlike the Coyote Creek Outdoor Classroom that was constructed by the District in 2002 and can only be accessed for scheduled school visits, the Project will be open to all members of the public every day. A parking area to be constructed as part of the Project will also provide the public a means of accessing the City of San Jose’s (“CSJ”) trailhead (to be constructed across the river and adjacent to Gold Street), the Guadalupe River Trail, and the soon-to-be constructed CSJ pedestrian bridge spanning Alviso Slough downstream of the UPRR bridge and connecting trail users to the San Francisco Bay Trail.

Unlike the Coyote Creek Outdoor Classroom, the Gold Street site will be landscaped with native and drought-tolerant plants to educate the public on water conservation. The site is situated next to a trail; therefore, the Project could be part of a larger lesson on the environment and public access to the ecosystems in the area.

## **Recommendation #1**

**In lieu of building the Gold Street Education Center, the SCVWD should consider less costly methods of satisfying stated education goals, like the addition of strategically placed interpretive signage on hiking and biking trails bordering the Alviso Slough, and Bay and/or at the Marina, detailing history and current conditions of water issues related to Alviso.**

**District Response to Recommendation #1: The recommendation has been implemented.**

In July 2009, the SCVWD Board adopted the Initial Study/Negative Declaration environmental document for the proposed Gold Street Educational Center, but did not approve the project; instead, the Board directed staff to explore the option of placing elements of the proposed

educational center at the Alviso County Marina. Staff met with Santa Clara County Parks and Recreation staff several times between July and October 2009, and prepared a cost estimate and schedule for potentially installing interpretive signage at the Alviso County Marina. Staff reported the cost and schedule estimates to the SCVWD Board, but noted that obtaining a permit from the Bay Coastal Development Commission (BCDC) to construct a gazebo-like outdoor classroom structure at the Marina would be challenging because of height limitations imposed by BCDC to minimize obstruction of views of the salt ponds and the Bay from this location.

The Board also held a special Board meeting in the Alviso community on October 13, 2009 to solicit input on the option of placing educational center elements at the Alviso County Marina. Of those present, 28 spoke in favor of keeping the educational center at the Gold Street site. Some emphasized the importance of keeping the County's operation separate from District educational intents, especially with the likely increase in traffic to the Marina due to the construction of a public boat ramp to Alviso Slough, which the County just opened on June 5, 2010.

On October 27, 2009, after consideration of the options prepared by staff, the SCVWD Board approved the educational center project at the Gold Street site and directed staff to proceed with the design phase of the project.

Recommendation 1 also mentions placing interpretive signage along the hiking and biking trails bordering Alviso Slough. The current design for the project includes placing an additional sign on the levee trail adjacent to the Gold Street site that describes to the reader how water supply, flood protection, and stream stewardship are all connected at this particular viewpoint.

\* \* \* \* \*

**Finding #2**

**The SCVWD provided the Grand Jury with a summary of their outdoor classroom program attendance. After repeated requests, the Grand Jury was told the data verifying the summary figures do not exist.**

**District response to Finding #2:** Respondent disagrees wholly.

The Grand Jury was provided with the following data regarding visits to the outdoor classrooms: Dates of school visits, names of schools, names of the cities where the schools are located and number of students in each class visiting the outdoor classrooms. The District also provided the subjects covered in the lessons for each outdoor classroom. The information is accurate and was provided by the Education Program Coordinator who personally verifies the data (See Exhibit A).

**Recommendation #2**

The SCVWD should maintain accurate records that verify the outdoor classroom program attendance to properly evaluate the need for any additional education centers.

**District response to Recommendation #2:** The recommendation has been implemented.

The District collects data on program participation, including what schools visit the outdoor classrooms, how many students from each school participate in each class visit and how many of these classes occurred at each of the three outdoor classroom locations. The District's

attendance records of outdoor classroom program participation, as presented to the Grand Jury, are accurate. The Education Program Coordinator is present at these classes and personally verifies these numbers. The data collected by the District on participation is sufficient for program evaluation purposes (See Exhibit A).

\* \* \* \* \*

**Finding #3**

The Gold Street Education Center site is located directly adjacent to Director Santos's mobile home park. Director Santos should have properly recused himself from all aspects of voting, decision making and influencing the project. His failure to recuse himself may have been a violation of conflict-of-interest laws.

**District Response to Finding #3: Respondent agrees with the finding in part.**

Director Santos identified the conflict of interest in a timely fashion and recused himself from Board discussions and votes related to the Gold Street Education Center Project ("the Project") as required by law and Board policy. Director Santos would have had an obligation to avoid influencing any decision related to the Project. The District disagrees that conflict of interest laws have been violated.

**Director Santos's Participation in Board Meetings Was Proper**

The report appears to find significance in Director Santos's activities with respect to the Project in the period February 2003 to September 2004. However, the report fails to identify any property interest reported by Director Santos during this period that constituted a conflict or potential conflict of interest or any competent evidence that such an interest existed. The report speculates without factual basis and appears to conclude based on that speculation that subsequent changes in the ownership of the property impacted by the Project - occurring more than a year after September 2004 - created a conflict of interest for Director Santos's earlier participation in the Project. Clearly this conclusion is not supported by the evidence and is inconsistent with definition of a conflict of interest.

The evidence establishes that Director Santos succeeded to an interest in a company managing property adjacent to the Project in October 2005. As noted above, prior to that time, Director Santos did not own any property or any other interest in property that created a conflict of interest or potential conflict with his responsibilities and obligations as a member of the Board of Directors. Accordingly, prior to October 2005, Director Santos was under no obligation to recuse himself from or otherwise limit his participation in matters related to the Project.

As noted in the Report, between October 2005 and June of 2006, the District did not undertake any action related to the Project. Accordingly, there is no evidence that Director Santos failed to take appropriate action with respect to his property interests or the Project.

In subsequent Board meetings in which the Project was considered by the Board directly, or indirectly as part of another item), in June 2006 (District budget), October 2008 (District's Five-

Year Capital Improvement Program), July 2009 and October 2009, Director Santos gave notice of the conflict and recused himself from discussion and votes.<sup>1</sup>

**Recommendation #3**

Director Santos should fully and consistently recuse himself and refrain from otherwise influencing any aspect of the Gold Street Education Center Project. Director Santos should adhere to all conflict-of-interest laws and policies to which he is subject.

**District Response to Recommendation #3:** The recommendation has been implemented.

Although the District disputes the finding, the District has in place appropriate policies and procedures to address conflicts of interests and agrees that each Board member is required to abide by conflict of interest laws and Board policies.

\* \* \* \* \*

**Finding #4**

SCVWD directors were aware that Director Santos advocated for the Gold Street site location for the education center. SCVWD directors were also aware that Director Santos had a personal financial interest in the adjacent mobile home park and that Director Santos did not recuse himself from voting on Gold Street Education Center consistently or otherwise refrain from influencing the decision making regarding the project. The directors failed in their fiduciary responsibility to the SCVWD and their constituents by acquiescing to Director Santos' promotion of the Gold Street Education Center project at considerable expense to rate payers.

**District Response to Finding #4:** Respondent disagrees with the finding.

The District disagrees with the three issues raised by this finding: that Director Santos did not fully disclose the basis for his conflict of interest with respect to the Project, that the Board failed to require Director Santos's recusal from matters related to the Project, and that the Board did not require Director Santos to refrain from influencing the Project. In response, the District notes:

- There was no basis to find or to suspect a conflict of interest before October 2005, and the report's conclusion that Director Santos's activity in 2003-2004 related to the Project constituted a conflict of interest - based on property in which he had no interest - is clearly erroneous.
- The evidence shows that once Director Santos's interest in the property creating a conflict with the Project occurred, the Board was apprised of the extent of those property interests.
- The evidence also shows that Director Santos gave notice of his conflict with respect to the Project and recused himself as required from Board discussions and votes directly related to the Project. Likewise, Director Santos recused himself as required from

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<sup>1</sup> On those occasions that the Project was included in voting on a matter for which Director Santos was not required to recuse himself (i.e., a budget that included funding for the project among other items), the evidence shows that Director Santos noted that he intended to disqualify himself from discussion of the Project and that his vote on the item excluded approval/disapproval of the Project.

Board discussions indirectly related to the Project (i.e., in which the Project was included as one of many items in the District's overall budget or capital programs) and gave notice that his vote on such items excepted the Project (in one exception, the Board's minutes failed to note an exception in Director Santos's vote).

- The two instances in which the Report purports to find improper influence, an August 2009 meeting between Director Santos and an unnamed Board member and presentations by community members at an October Board meeting, the allegations are not supported by sufficient evidence to demonstrate that the Board failed in its obligations.

#### Detailed Facts Related to the Conflict Were Disclosed to the Board

As noted above (District Response to Finding #3), there is no evidence that a conflict of interest or potential conflict of interest related to the Gold Street Education Center Project existed prior to October 2005. Consequently, activity undertaken by Director Santos prior to that time did not violate any law, regulation or policy of the Board. Moreover, Director Santos acceded to his interest in the company managing the property adjacent to the Gold Street Education Center Project under a private agreement and there is no evidence that any member of the Board of Directors was aware, or should have been aware, of that property interest. Director Santos's property interest was disclosed to the Board of Directors in a timely fashion in October 2005 and the Board was advised of the property interests - in detail - and the District's assessment of the conflicts of interest, or potential conflicts, created by those property interests. Given this disclosure, Director Santos's subsequent references to his "property interests" as a basis for recusing himself from or limiting his participation in District matters was neither misleading, nor insufficient to satisfy his obligations to the Board.

#### Director Santos Recused Himself from Board Proceedings Related to the Project

In June 2006, the next occasion that the Project came before the Board (as an item of the District budget), Director Santos properly gave notice of his conflict and recused himself in accordance with applicable requirements.

In October 2008 the Board considered the District's Five-Year Capital Improvement Program (CIP) and the Project was one of many items in that Program discussion. Director Santos gave appropriate notice of his conflict and did not participate in the discussion that related to the Project. Director Santos did vote on the entire CIP; the minutes of the meeting do not reflect an exception in his vote with respect to the Project.

In July 2009 the Board undertook the final initial study of the Project. Director Santos gave notice of his conflict and did not participate in the discussion of the Project or the Board's vote to adopt the final initial study. Similarly, in October 2009 Board meetings related to approval of the Project, Director Santos gave notice of his conflict and did not participate in the discussion of the Project or the Board's vote on the matter.

#### The Evidence Is Unclear that the Board Ignored Improper Influence by Director Santos

In addition to recusal from Board discussions/votes, Director Santos would not have been permitted to discuss the Project with other Board members. To the extent that there is a factual basis for the conclusion that Director Santos met with another Board member in August 2009 to discuss the location of the Project, such contact could have constituted impermissible "influence." The meeting was not solicited or requested by Director Santos and there is no

evidence that it was brought to the attention of the full Board or that discussion constituting influence occurred. Accordingly, there is insufficient evidence to determine that the Board knew of this incident, or should have been aware of it, and failed to take appropriate corrective action.

In the first of the October Board meetings referenced above, the Board received substantial public comment in favor of the Project. There is no evidence that the Board should have viewed the public support as orchestrated or solicited by Director Santos or should have questioned influence by Director Santos. Director Santos was precluded from participating in the Board discussion in this meeting.

**Recommendation #4**

The SCVWD Board should re-evaluate its commitment to the Gold Street project given Director Santos' conduct and Board members' acquiescence to Director Santos' inappropriate involvement in the project.

**District Response to Recommendation #4:** Respondent will not implement the recommendation.

The evidence fails to demonstrate a failure by the Board to discharge its obligations or that it failed to give proper consideration to the Project. There is no evidence that the Board took any action concerning the Project without disclosure of a conflict of interest. The Board has implemented a policy that permits "line item" consideration of budget items for which a conflict has been identified; by this process a conflicted Board members vote will be restricted to those budget items for which no conflict exists. Furthermore, newly implemented Board procedures - talking points provided at each meeting - provide specific guidance to assist a Board member in giving notice of a conflict and stating their intention to recuse themselves from Board action.

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**Finding #5**

Director Santos has significant property interests in Alviso that greatly limit his ability to ethically participate in SCVWD projects in Alviso. Under Board governance policies, the Board commits itself and its members to ethical, businesslike, and lawful conduct including that members must have loyalty to the SCVWD unconflicted by personal interests. Director Santos' conduct with respect to Alviso-based projects does not adhere to Board policies.

**District Response to Finding #5:** Respondent disagrees with this finding.

Despite his lengthy service on the District Board, the Report identifies only two specific instances where it is alleged that property interests of Director Santos pose a conflict of interest with District matters. The Report also questions whether Director Santos may participate in non-Board activities (i.e., the AWTF, the Collaborative) because of those conflicts, but there is no evidence, and the Report appears to concede, that his participation in those outside activities is not central to or required by his position. Based on the foregoing, there is insufficient basis to conclude that Director Santos is incapable of meeting the requirements of the applicable Board policies.

**Recommendation #5**

If Director Santos cannot conform to Board governance policies because his conflicts of interest are too pervasive, he should either divest himself of his property interests or

resign from the SCVWD Board.

**District Response to Recommendation #5:** Respondent will not implement the recommendation.

The recommendation is neither warranted by the evidence or reasonable under the circumstances. Although it is clear that Director Santos has interests that pose, in certain circumstances, conflicts of interests with matters coming before the Board, there is no evidence that he is incapable of discharging his responsibilities or conforming to applicable Board policies and procedures. Likewise, the evidence fails to demonstrate that the requirement that he recuse himself on occasion interferes with the proper functioning of the Board.

The Board has adopted a practice under which property interests of Board members disclosed in annual Form 700 filings are mapped; District staff has created aerial maps depicting each Board member's real properties with a radius of 500'. The maps for each Board member have been provided to the entire Board and to District staff. Potential conflicts - based on proximity to proposed projects - can be assessed and addressed by the Board when the matter comes before the Board. Annually, after each Form 700 is filed, District staff updates and distributes the revised aerial maps.

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**Finding #6**

Director Santos has been attending the Alviso and Lower Guadalupe Collaborative meetings, Alviso Water Task Force meetings, and other community meetings. At these meetings, he has berated SCVWD staff, and advanced personal or other interests without explicit SCVWD Board authorization, which is a violation of the SCVWD Board's code of conduct, per Board Governance Policy 6.

**District Response to Finding #6:** Respondent agrees with this finding in part and disagrees in part.

Director Santos has a practice of attending the indicated meetings. Except as noted above for those matters in which a conflict of interest exists, his participation in such meetings does not violate Board policy. The Report does not cite specific evidence with respect to the allegation of improper conduct by Director Santos in any of these meetings.

**Recommendation #6**

At these meetings, Director Santos should adhere to the conduct required of him by SCVWD Board Governance Policy 6.

**District Response to Recommendation #6:** Respondent has implemented the recommendation.

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**Finding #7**

On June 6, 2006, the SCVWD Board minutes reflect that Director Santos abstained



from voting on portions of the budget related to the Alviso Slough Restoration Project. Later, on Oct. 14, 2008, SCVWD Board minutes reflect that Director Santos voted in favor of the SCVWD's Capital Improvement Projects (CIP) that included funding for improvements to the Alviso Slough, even though he had abstained from that vote in 2006. On Nov. 10, 2009, Director Santos voted to approve the specific ASRP plan, after having abstained in 2006.

**District Response to Finding #7: Respondent agrees in part and disagrees in part.**

Pursuant to advice of the District Counsel, Director Santos initially recused himself from decision-making related to the Alviso Slough Restoration Project ("ASRP"). The advice was based on the fact that Director Santos owned property that was located within 500 feet of the ASRP and, therefore, such a property interest is considered "directly" involved in decisions related to the ASRP, posing a conflict of interest. In warning that the Director's property interests may pose a potential conflict, the District's counsel also advised that Director Santos should seek clarification of his responsibilities/obligations with respect to the ASRP from the Fair Political Practices Committee ("FPPC").

The District Counsel solicited an opinion from the FPPC on behalf of Director Santos. The FPPC advised Director Santos that he was not required to recuse himself from matters related to the ASRP.<sup>2</sup> The FPPC's conclusion was based on the factual determination that the ASRP constituted "repairs, replacement, or maintenance of existing streets, water, sewer, storm drainage, or similar facilities" and, as a result, established an exception to the general rule that would define Director Santos's property interests as "directly" involved in decision-making related to the ASRP. Because the ASRP was properly characterized as "repairs" or "maintenance," under similar FPPC precedent, Director Santos's property interests would be deemed to be "indirectly" involved in matters related to the ASRP. In the absence of evidence that decisions regarding the ASRP would have a "material" effect on the interests of Director Santos, he is not required to recuse himself from decisions related to the ASRP.

There is no evidence that completion of the ASRP will have a financial impact on the property interests of Director Santos beyond the general statement that "[t]he Grand Jury believes an increase in recreation and commerce in Alviso would enhance property values in Alviso, including the significant property interests of Director Santos." To disqualify an individual on the basis of a conflict of interest, there must be evidence that some financial effect is more than a "mere possibility."

Based on the information provided by the FPPC, Director Santos could reasonably conclude that his participation in matters related to the ASRP did not pose a conflict of interest. Consequently, although he had recused himself initially from participation in matters related to the ASRP, after October 2006 he had a reasonable basis for resuming his participation.

**Recommendation #7**

Director Santos should fully and consistently recuse himself and refrain from otherwise influencing any aspect of a project in which he has declared a conflict of interest, such

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<sup>2</sup> See FPPC Response to Request for Informal Assistance, I-06-179, October 30, 2006 (copy enclosed). The advice provided to the District Counsel by the FPPC has been cited as authority on two separate occasions in which the agency provided advice on the definition of a "restoration" project consistent with the advice given to the District Counsel. (See FPPC Advice Letter, A-08-214, January 27, 2009, p. 8; FPPC Advice Letter, A-07-214, September 5, 2007, p. 5)

as the ASRP.

**District Response to Recommendation 7:** Respondent will not implement the recommendation.

The evidence fails to demonstrate a conflict of interest with respect to the ASRP that requires Director Santos to recuse himself from Board action. The initial declaration of a conflict of interest failed to take into account an exception codified in applicable regulations; upon consideration of this exception, a reasonable basis existed to determine that a conflict did not exist.

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**Finding #8**

Director Santos is a long-time member and staunch advocate of the South Bay Yacht Club, a nonprofit organization. As a member of the SCVWD Board, he has advocated that the Board fund improvements to the SBYC and its clubhouse at both SCVWD Board and community meetings. His unconflicted loyalty is owed to the SCVWD (Board Policy 6.1), but his demonstrated allegiance has been to the SBYC.

**District Response to Finding #8:** Respondent disagrees with this finding.

Membership in an organization such as the South Bay Yacht Club does not present a conflict of interest and does not in and of itself constitute disloyalty to the District. There is no evidence that Director Santos has received any personal benefit as the result of District decisions or activity related to the SBYC; nor is there any evidence that Director Santos's participation in any activity related to the SBYC was for the purpose of likely to result in personal benefit.

**Recommendation #8**

Director Santos should adhere to SCVWD Board Governance Policy 6.1 that requires him to be unconflicted by loyalties to other organizations. In order to abide by this policy, he should recuse himself from discussing, voting, or influencing the SCVWD regarding the SBYC to avoid the actual or appearance of ethical impropriety.

**District Response to Recommendation #8:** Respondent will not implement the recommendation.

The evidence fails to demonstrate that the membership in the SBYC poses a conflict of interest. The District notes that Director Santos is obligated under Board policy 6.1 to avoid the appearance of a conflict and, therefore, the District Counsel will review matters coming before the Board involving the SBYC where the appearance conflict of interest might exist and provide appropriate direction and guidance to Director Santos.

\* \* \* \* \*

**Finding #9**

The SCVWD Board did not adhere to its own good governance policies when it acquiesced to Director Santos' promotion of projects where it was apparent he had personal and/or financial interests.

**District Response to Finding #9:** Respondent disagrees with this finding.

As discussed in the preceding items, there is no evidence that the Board acted improperly in considering projects supported by Director Santos. Furthermore, as demonstrated above, the evidence demonstrates that Director Santos took appropriate action to identify conflicts of interest, to limit his participation in matters where a conflict existed, and to give notice of conflicts affecting the discharge of his responsibilities.

**Recommendation #9**

The SCVWD Board should consistently adhere to its own governance policies.

**District Response to Recommendation #9:** Respondent has implemented this recommendation.

## Santa Clara Valley Water District Outdoor Education Summary, 2007--present

Date	Schools	City	Grade	# of classes	CCOC	Morley	Alamitos	CHR
9/12/07	Noble	San Jose	3	1			20	
10/5/07	John Muir Middle	San Jose	6-8	1			11	
10/16/07	Luigi Aprea	Gilroy	5	2			68	
10/17/07	Casa Di Mir	Campbell	3	2			20	
10/18/07	Luigi Aprea	Gilroy	5	2			52	
10/22/07	Antonio del Buono	Gilroy	3	2				40
10/23/07	Antonio del Buono	Gilroy	3	2				40
10/24/07	Antonio del Buono	Gilroy	3	2				40
11/7/07	Fr. American	Sunnyvale	4	1			21	
3/26/08	Argonaut	Saratoga	5	1	28			
5/6/08	St. Joseph	Cupertino	3	1		32		
5/15/08	Baldwin	San Jose	4	1			38	
5/16/08	Baldwin	San Jose	4	1			38	
5/20/08	Evergreen	San Jose	3	3			60	
5/21/08	Evergreen	San Jose	3	2			50	
		<b>Totals</b>		<b>24</b>	<b>28</b>	<b>32</b>	<b>378</b>	<b>120</b>
9/26/08	Lucha	San Jose	5	1		30		
10/3/08	McEntee	San Jose	5	2		60		
10/10/08	McEntee	San Jose	5	2		60		
11/12/08	San Jose City College	San Jose	college	1			20	
2/19/09	Horace Mann	San Jose	5	2	62			
2/20/09	Horace Mann	San Jose	5	2	62			
3/20/09	Slonaker	San Jose	5	2		70		
4/2/09	Luigi Aprea	Gilroy	5	2			70	
4/3/09	Luigi Aprea	Gilroy	5	2			50	
5/1/09	Rogers	San Jose	5	2		60		
5/15/09	Painter	San Jose	5	2		68		
5/19/09	Evergreen	San Jose	3	3			60	
5/20/09	St. Joseph	Cupertino	3	1		32		
5/21/09	Evergreen	San Jose	3	2			40	
6/5/09	Cureton	San Jose	5	2		60		
6/25/09	CDM	San Jose	6	1			12	
		<b>Totals</b>		<b>29</b>	<b>124</b>	<b>440</b>	<b>252</b>	<b>0</b>
10/12/09	Easterbrook Discovery	San Jose	5	1			35	
11/9/09	Easterbrook Discovery	San Jose	5	1			35	
3/1/10	Miller Middle	San Jose	6-8	1			12	
3/10/10	Luigi Aprea	Gilroy	5	2			68	
3/17/10	Luigi Aprea	Gilroy	5	2			68	
3/17/10	San Jose State	San Jose	college	1	16			
4/14/10	Alum Rock	San Jose	6	1		9		

## Santa Clara Valley Water District Outdoor Education Summary, 2007--present

Date	Schools	City	Grade	# of classes	CCOC	Morley	Alamitos	CHR
4/22/10	San Jose State	San Jose	college	1	20			
4/29	Sierra School	Santa Clara	4 &5	1	15			
5/10	St. Joseph	Cupertino	3	1		32		
5/20/10	San Jose Unified	San Jose	6-8	1		9		
5/21/10	Rachel Carson	San Jose	3	3			72	
5/26/10	San Jose Unified	San Jose	6-8	1		9		
6/7/10	Work2Future	San Jose	High Sch	2			44	
		<b>Totals</b>		<b>19</b>	<b>51</b>	<b>59</b>	<b>334</b>	<b>0</b>

**CCOC**=Coyote Creek Outdoor Classroom, 791 Williams Street, San Jose...This property is owned by the water district. Presentations began in the fall of 2002.

This two-hour tour includes a visit to a flood plain, wells and creek access. Lessons include water quality testing, stream profiling, causes of flooding, groundwater, weather and watershed stewardship.

**Morley**=Morley Park Outdoor Classroom, 615 Campbell Technology Parkway, Campbell...The park is owned by the city of Campbell. The water district owns and operates the percolation ponds adjacent to the park. Presentations began in the fall of 2003.

This two-hour tour includes a percolation pond, public art display, wetlands and upland habitats. Lessons include watershed, groundwater, urban runoff, wetlands, weather, water conservation, pollution prevention and water quality testing.

**Alamitos**=Alamitos Groundwater Recharge Facility, 5750 Almaden Expressway, San Jose...This outdoor facility is owned and operated by the water district. Presentations began in the late 1980s.

This two-hour tour includes a percolation pond, gravel dam, weather station, drop structure and spillway, urban runoff display and nature labyrinth. Lessons include the water cycle, purposes of dams and reservoirs, watershed stewardship, pollution prevention and water conservation.

**CHR**=Christmas Hill Park, 7049 Miller Avenue, Gilroy... The park is owned by the city of Gilroy. Presentations began in May, 2006.

This two-hour tour includes a visit to Christmas Hill Park and creek access. Lessons include weather, watershed stewardship, water quality testing, water conservation, pollution prevention and stream profiling.



1 of 2 DOCUMENTS

CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION  
ADVICE LETTERS

Our File No. I-06-179

*2006 Cal. Fair-Pract. LEXIS 159*

October 30, 2006

[\*1] Debra L. Cauble, District Counsel, Santa Clara Valley Water District, 5750 Almaden Express Way, San Jose, California 95118-3686

RE: Your Request for Informal Assistance

Dear Ms. Cauble:

This letter is in response to your request for advice on behalf of Santa Clara Valley Water District Director Richard P. Santos regarding the conflict-of-interest provisions of the Political Reform Act (the "Act"). n1 Because we do not have sufficient information to offer you formal written advice, we provide you with informal assistance. Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; regulation 18329(c), copy enclosed.)

**QUESTION**

May Director Santos make, participate in making, or otherwise use his official position to influence governmental decisions regarding the Alviso Slough Restoration Project?

**CONCLUSION**

Director Santos has an economic interest in a business entity, sources of income, and real property that is located within 500 feet of the restoration project. So long as the financial effect of governmental decisions relating to the project on his [\*2] economic interests is not material, he may participate in the decisions.

**FACTS**

The Santa Clara Valley Water District (the "Water District") is an independent special district that provides comprehensive water supply management and protection from flooding within its boundaries, which include the entire County of Santa Clara. The population of Santa Clara County is approximately 1.7 million persons. The Water District is governed by a seven-member board of directors (the "Board"). Five members are elected from geographical districts, and two are at-large members appointed by the board of supervisors. Richard P. Santos is an elected member of the Board, representing district 3. His district includes the cities of Milpitas and Sunnyvale, and the Alviso, Berryessa, and Evergreen areas of the City of San Jose.

Alviso, located on the east bank of the Alviso Slough, which is the last reach of the Guadalupe River before it enters San Francisco Bay, has historically experienced significant land subsidence due to groundwater pumping. This has led to major damage from floods and construction of higher levees for protection. As the flood control agency for Santa Clara County, the Water District [\*3] is involved in various projects intended to protect Alviso from flooding and to achieve other goals authorized by its enabling legislation. Alviso's population is approximately 2,128 with just over 500 households.

In January 2004, the Board received a staff report regarding flood hazard mitigation for Alviso. It included potential short and long-term measures. After considering the report, the Board directed staff to prepare a project, the Alviso Slough Restoration Project (the "Project"), that would include removal of seven acres of vegetation and root mass on both banks of the Alviso Slough in an effort to restore it to its pre-1983 condition. The purpose of the Project is to provide flood protection and economic revitalization of Alviso through improved navigability of the Slough. The Project contemplates removal of vegetation to a depth of four feet between the Gold Street Bridge and the County Marina (the "Project Area").

The Water District is working with members of the community to identify community interest in the Project through a series of meetings. The Project documents state the Project's objectives of maintaining one-percent flood protection, restoring the Slough's open [\*4] water channel width to pre-1983 conditions, restoring historic public access and aesthetics, and improving navigation so the community can expand on boating and other recreational opportunities. Decisions regarding the Project that will come before the Board include approval of an environmental impact report, budget decisions, and approval of the Project itself.

In October 2005, Director Santos became a limited partner in a family limited partnership, the Santos Alviso Partnership LP (the "Partnership"). The assets held by the Partnership include real property in the Alviso area, including two properties located within 500 feet of the Project Area. In our telephone conversation of September 21, 2006, you advised that one property consists of a mobile home park, and the other is occupied by a six-unit apartment building. Director Santos owns a greater than 10% share of the partnership, and the value of his interest exceeds \$ 2,000.

## **ANALYSIS**

The Act's conflict-of-interest provisions ensure that public officials will "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." [\*5] (Section 81001(b).) Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).) The general rule, however, is that a conflict of interest exists whenever a public official makes a governmental decision that has a reasonably foreseeable material financial effect on one or more of his or her financial interests.

### **Step 1. Is Director Santos a Public Official?**

Section 82048 defines a public official as "every member, officer, employee or Consultant of a state or local government agency." As a member of the Board of Directors of the Santa Clara Valley Water District, a local government agency, Director Santos is a public official.

### **Step 2. Will Director Santos be making, participating in making or influencing a governmental decision?**

A public official "makes a governmental decision" when the official, acting within the authority of his or her office or position, votes on a matter, [\*6] obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.) A public official "participates in a

governmental decision" when, acting within the authority of his or her position and without significant substantive or intervening review, the official negotiates, advises, or makes recommendations to the decision maker regarding the governmental decision. (Regulation 18702.2.) A public official is attempting to use his or her official position to influence a governmental decision if, for the purpose of influencing the decision, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Regulation 18702.3.)

Director Santos will make governmental decisions when, as a member of the Board, he is called upon to vote on the EIR, approval of the Project, and any other matters relating to the Project. (Regulation 18702.1.) He would be participating in making governmental decisions if he makes recommendations to other Board members, and he would be attempting to use his official position to influence a governmental decision if he expresses his views [\*7] to other Board members, staff, or consultants of the District. (Regulation 18702.2 and regulation 18702.3.)

### **Step 3. What are Director Santos' economic interests?**

The Act's conflict-of-interest provisions apply only to conflicts of interest arising from certain enumerated economic interests. These economic interests are described in section 87103 and regulations 18703-18703.5, inclusive:

- . A public official has an economic interest in a business entity in which he or she has a direct or indirect investment of \$ 2,000 or more (Section 87103(a); regulation 18703.1(a)) or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d); regulation 18703.1(b).)
- . A public official has an economic interest in real property in which he or she has a direct or indirect interest of \$ 2,000 or more. (Section 87103(b); regulation 18703.2.)
- . An official has an economic interest in any source of income, including promised income, totaling \$ 500 or more within 12 months prior to the decision. (Section 87103(c); regulation 18703.3.)
- . A public official has an economic interest in any source of gifts to him or her if the gifts [\*8] total \$ 360 or more within 12 months prior to the decision. (Section 87103(e); regulation 18703.4.)
- . A public official has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is commonly referred to as the "personal financial effects" rule. (Section 87103; regulation 18703.5.)

#### *Business Entities*

Director Santos has an economic interest in the Partnership because he has a \$ 2,000 or more investment in the Partnership (section 87103(a); regulation 18703.1(a)), and because he is a partner. (Section 87103(d); regulation 18703.1(b).) Presumably, the business is also a source of income of \$ 500 or more.

#### *Real Property*

Under section 82033, an "interest in real property" is defined to include "a pro rata share of interests in real property of any business entity or trust in which the individual ... owns, directly, or indirectly or beneficially, a 10-percent interest or greater. Because Director Santos has a greater than 10-percent interest in the Partnership, he has an economic interest in his pro rata share of real property owned by the Partnership, including the real property that is located [\*9] within 500 feet of the Project. Assuming this pro rata interest is worth \$ 2,000 or more, the real property would be an economic interest.

#### *Sources of Income*



In addition to the Partnership as a source of income to Director Santos, each source of income to the Partnership, including each renter of Partnership property, is a source of income to the director if the director's pro rata share of the income equals or exceeds \$ 500 within the 12-month period leading to a relevant governmental decision.

#### *Personal Finances*

A public official always has an economic interest in his or her personal finances and those of his or her immediate family. (Regulation 18703.5.) A governmental decision will have an effect on this economic interest if the decision will result in the personal expense, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing. (Ibid.)

#### **Step 4. Will the Director's economic interests be directly or indirectly involved in decisions he will make, participate in making or influence as a public official?**

##### *Director Santos' Interest in Business Entities and Sources of Income*

Regulation 18704.1 provides that a person, [\*10] including business entities and sources of income, is directly involved in a decision before an official's agency when that person, either directly or by an agent, either initiates the proceeding in which the decision will be made, is a named party, or is the subject of the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person. (Regulation 18704.1(a)(2).) You have not provided facts suggesting that the Partnership, or any of its renters, will initiate or be the subject of a governmental decision. Accordingly, they are not directly involved in the Project. Business entities and sources of income that are not directly involved in governmental decisions under the rules quoted above are regarded as indirectly involved. (Regulation 18704.1(b).)

##### *Director Santos' Interest in Real Property*

Ordinarily, real property that is located within 500 feet of the boundaries (or the proposed boundaries) of the property that is the subject of a governmental decision is [\*11] directly involved in the decision. Accordingly, Director Santos' economic interest in the real property that is within 500 feet of the Project Area would be directly involved in the Board's decisions regarding the Project. (Regulation 18704.2(a).) However, regulation 18704.2(b)(2) provides an exception that, notwithstanding regulation 18704.2(a), real property is indirectly involved in decisions that solely concern "repairs, replacement, or maintenance of existing streets, water, sewer, storm drainage, or similar facilities."

As you have described it, the Project will consist of repairing, replacing or maintaining the storm drainage capacity of the Alviso Slough as it once existed. The Alviso Slough's capacity to control flooding was reduced when decisions were made during the past twenty years to raise levees rather than excavate sediment. This is the cause for the growth of vegetation that has reduced the extent of open water. By removing vegetation and restoring the Alviso Slough to its pre-1983 condition, its flood reducing capacity will be increased. Based on this information, and on advice we have provided in similar situations, n2 [\*12] it appears that the primary purpose of the project is to clear the slough of choking roots and vegetation, and that this is a "repair or maintenance" activity by the District, notwithstanding the community's secondary desire to use the widened, open channel for boating and other recreational activities. Accordingly, for purposes of section 87103 and regulation 18703.1(a) the Partnership's property that is within 500 feet of the Alviso Slough is indirectly involved in decisions to restore it to its former width. n3

#### *Personal Finances*

Under section 18704.5 a public official is deemed to be directly involved in a governmental decision that has *any* financial effect on his personal finances, even a penny's worth.

### Step 5. What is the applicable materiality standard?

A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official's economic interest is material. (Regulation 18700(a).) Different standards apply to determine whether a reasonably foreseeable financial effect on an economic interest will be material, depending on the nature of the economic [\*13] interest and whether that interest is directly or indirectly involved in the agency's decision.

#### *Director Santos' Interest in Business Entities and Sources of Income*

You have not provided detailed information about the Partnership; so we will assume that it is not as large as companies whose shares are publicly traded. Small businesses (i.e., net income of less than \$ 500,000) that are indirectly involved in a governmental decision are governed by the materiality standard set forth in regulation 18705.1(c), which provides that the financial effect of a governmental decision is material if it is reasonably foreseeable that:

"(A) The governmental decision will result in an increase/decrease in the entity's gross revenues for a fiscal year in the amount of \$ 20,000 or more; or

(B) The governmental decision will result in the business entity incurring/avoiding additional expenses or reducing/eliminating existing expenses for a fiscal year in the amount of \$ 5,000 or more; or

(C) The governmental decision will result in an increase/decrease in the value of the business entity's assets or liabilities of \$ 20,000 or more." (Regulation 18705.1(c)(4).)

The applicable materiality [\*14] standard for sources of income (e.g., Partnership renters) that are indirectly involved in a governmental decision varies depending on whether the source of income is a business entity, or an individual. The applicable materiality standard for business entity sources of income is governed by regulation 18705.3(b)(1), which directs us to the standard set forth in regulation 18705.1(c). (This is the same materiality standard cited above for application for an economic interest in a business entity.)

For sources of income who are individuals, the applicable materiality standard is set forth in regulation 18705.3(b)(3):

"The effect of a decision is material to an individual who is a source of income to an official if any of the following applies:

(A) The decision will affect the individual's income, investments, or other tangible or intangible assets or liabilities (other than real property) by \$ 1,000 or more; or

(B) The decision will affect the individual's real property interest in a manner that is considered material under Title 2, California Code of Regulations, section 18705.2(b)."

#### *Director Santos' Interest in Real Property*

As stated above, under section 18704.2(a), [\*15] the real property in which Director Santos has an interest is considered indirectly involved in governmental decisions identified. Under regulation 18705.2(b), the financial effect of a governmental decision that is indirectly involved is presumed not to be material. The presumption may be rebutted by "proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real property in which the public official has an economic interest, which make it reasonably foreseeable that the decision will have a material financial effect on the real property in which the public official has an interest." (Regulation 18705.2(b)(1).)

*Personal Finances*

Regulation 18705.5 provides that: "A reasonably foreseeable financial effect on a public official's personal finances is material if it is at least \$ 250 in any 12 month period. When determining whether a governmental decision has a material financial effect on a public official's economic interest in his or her personal finances, neither a financial effect on the value of real property owned directly or indirectly by the official, nor a financial effect on the gross revenues, expenses, [\*16] or value of assets and liabilities of a business entity in which the official has a direct or indirect investment interest shall be considered." Accordingly, any financial effects on Director Santos' interest in the partnership and the Partnership's real property are not analyzed separately under the "personal financial effects" rule.

**Step 6. Is it reasonably foreseeable that the financial effect of the governmental decision on Director Santos' economic interest will meet the applicable materiality standard?**

Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the facts of each particular case. As used here, "reasonably foreseeable" means "substantially likely." (Regulation 18706; *In re Thorner* (1975) 1 FPPC Ops. 198.) A financial effect need not be a certainty to be considered reasonably foreseeable. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable. (Ibid.) Determination of foreseeability is a factual determination that is ultimately for the public official to make.

**Steps 7 & 8. The "public generally" and "legally required participation" exceptions. [\*17]**

Even if a material financial effect on a public official's economic interest is reasonably foreseeable, he or she still may not be disqualified if the financial effect of the governmental decision on the public official's economic interest is indistinguishable from its effect on the public generally (section 87103, regulations 18700(b)(7) and 18707(a)), or if the official is legally required to participate (section 87103; regulation 18708). You have not presented any facts indicating that either of these exceptions is applicable to your situation.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca

General Counsel

By: Valentina Joyce

Counsel, Legal Division

**FOOTNOTES:**

n1 Government Code sections 81000 - 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

n2 *Stoval Advice Letters*, Nos. A-06-124 and A-04-111.

n3 We would caution Director Santos, however, that if he is called upon to vote on decisions involving construction projects or improvement to the Alviso Slough, the Partnership's real property would be directly

involved in those decisions under the [\*18] general rule.

# GOLD STREET EDUCATIONAL CENTER PROJECT

September 16, 2010

## Board meetings where Gold Street Educational Center Project was discussed

DATE OF BOARD MEETING	COMMENTS
November 19, 2002	Staff Report presented to Board for Lower Guadalupe Project proposing Gold Street Educational Center as a potential enhancement opportunity
February 18, 2003	
June 17, 2003	
July 8, 2003	
June 24, 2008	
March 24, 2009	
July 28, 2009	
September 22, 2009	
October 13, 2009	
October 27, 2009	
June 15, 2010	

## Other Public meetings where Gold Street Educational Center Project was discussed

DATE OF BOARD MEETING	COMMENTS
2005 – Present (numerous)	Alviso Water Task Force (AWTF) Monthly Collaborative meeting. Gold Street was discussed in some of the meetings
October 8, 2008	Design Workshop
December 03, 2008	With AWTF

**More information can be obtained at [www.valleywater.org](http://www.valleywater.org)**