



FAIR POLITICAL PRACTICES COMMISSION

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March 22, 2013

Elvera Berson
Planning Commissioner
City of Novato
111 Portsmouth Drive
Novato, CA 94949

Re: Your Request for Advice
Our File No. A- 13-026

Dear Ms. Berson:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Please note this letter is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTION

Once you have identified a conflict of interest, what actions are appropriate to take if you want to participate in the discussion as a citizen, rather than a planning commissioner?

CONCLUSION

Please see below regarding specific conclusions that apply to your communications with your agency and other persons after you have identified a conflict of interest.

FACTS

You are a planning commissioner for the city of Novato, currently chairing the commission. A developer is planning a project that is within about 150 feet of your property. A group of residents has formed in opposition to this project, and the project will come before both the planning commission and the city council in the coming months. You have asked whether

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

you may participate in neighborhood groups, whether vocally or by monetary contribution or testify before the city council or planning commission either in person or in writing, communicate with the local newspaper in interviews or letters to the editor, sign petitions regarding the project, and other related activities.

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." (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.

You have identified, correctly, that you have a conflict of interest under the Act based on your property's 150 foot proximity to a development project that will be at the center of upcoming decisions before the planning commission. The conflict disqualifies you from voting on, participating in, or influencing decisions involving that project. As a result, following the announcement of the agenda item to be discussed or voted upon but before either the discussion or votes commences, you must: (1) publicly identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in Regulation 18702.5(b)(1)(B), on the record of the meeting and immediately prior to the discussion of the item; (2) recuse yourself; and (3) leave the room for the duration of the discussion and/or vote on the item(s). (Section 87105.)

You have asked whether the Act permits you to appear before the city council in your jurisdiction regarding this project. The limitations regarding "influencing a decision" apply to your own agency and any agency under its budgetary control. To our knowledge, the city council is not under the planning commission's budgetary control, so your appearances before the city council are not implicated.

Even when a public official has a conflict of interest, however, there are levels of participation that are allowed under the Act and the First Amendment. The following describes the types of activities in which you may participate. We attach the *Tann* Advice Letter, No. 12-134, which you might find helpful.

1. Communications with the press or public.

A public official is not attempting to use his or her official position to influence a governmental decision of an agency if the official communicates with the general public or the press. (Regulation 18702.4(b)(2).) For instance, we have previously advised that a city councilmember may express his or her opinion to reporters and media outlets by writing a newspaper article or appearing on a radio program regarding the matter in which he or she has a conflict of interest under the Act. (*Edelen* Advice Letter, No. I-07-059 and *Acker* Advice Letter, No. A-01-117.)

Therefore, the Act does not prohibit you from discussing the project with the press, friends, neighbors or other members of the community, even if you do so in an attempt to rally support or opposition to the project, unless they are members, officers, employees, or consultants of the planning commission or the city. (*McHugh* Advice Letter, No. I-98-324.)

2. Appearance to represent a “personal interest” before an official’s own agency:

You would like to voice opinions regarding the project as a member of the public during planning commission meetings. Under the Act, an official may comment as a member of the public if she has a personal interest that would not be adequately represented absent her participation as a member of the public. An example of this is a property that you or a member of your immediate family wholly owns, such as the property you described. (Regulations 18702.4(a)(2) and (b)(1).) The Commission construes exceptions to the general conflict-of-interest rules narrowly. (See *Oderman* Advice Letter, No. A-00-082 and *Torrance* Advice Letter, No. A-94-084.) Under this exception, you must limit your comments to your personal interests and make clear that you are not speaking in the interest of any person or group, nor are you acting in your official capacity. (*Mitchell* Advice Letter, No. A-12-011.)

Similarly, you may not discuss your support or opposition of a decision in which you have a conflict of interest with other commission members or consultants outside any public meetings. (*Id.*; see also *Simonian* Advice Letter, No. A-08-096.) You may, however, participate in the public meetings in the same way a member of the public would. If the public comment period allows for written correspondence with the planning commission, you may appear in that manner as well. (Regulation 18702.4(b).)

3. Other Communications

Both the Act and the First Amendment allow your personal participation in your neighborhood groups, signing petitions, and contributing in local causes. We do suggest, however, that you consult the planning commission’s Statement of Incompatible Activities for specific information, if any, on this point.

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

Sincerely,

Zackery P. Morazzini
General Counsel



By: Heather M. Rowan
Senior Counsel, Legal Division

HMR:vll