



California Fair Political Practices Commission

October 21, 1985

Michael D. Martello
Assistant City Attorney
City of Thousand Oaks
P.O. Box 1496
Thousand Oaks, CA 91360

Re: Your Request for Advice
Our File No. A-85-190

Dear Mr. Martello:

This letter is sent in response to your request for advice on behalf of Thousand Oaks Planning Commissioner Felix G. Masci concerning his obligations under the conflict of interest provisions of the Political Reform Act.^{1/} You also asked for general advice and guidance.

You summarized the factual background for your questions as follows:

The Planning Commissioner is an attorney engaged in the general practice of law within the City limits of Thousand Oaks as a sole practitioner. Each Commissioner is nominated by a Councilmember and there is a close relationship between that Commissioner and that nominating Councilperson. The five Planning Commissioners are appointed by the City Council. The Council also appoints the City Attorney and the City Manager who hires the rest of City staff.

The Commission has approval authority over development permits, subdivision maps, special use permits and other development permits with appeal

^{1/} The Act is contained in Government Code Sections 81000-91015. All statutory references are to the Government Code, and all regulatory references are to Title 2, Division 6 of the California Administrative Code.

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rights to the City Council. The Planning Commission hears appeals of administrative planning staff decisions on minor items, projects, or modifications to permits. The Planning Commission also reviews amendments to zoning ordinances and the general and specific plans and makes recommendations to the City Council.

The Planning Commission meets the first four Mondays of the month and is staffed and assisted by the City's Planning Department, Public Works Department, Utilities Department and the City Attorney's Office. Every application before the Commission first undergoes a staff analysis, involving numerous staff meetings, telephone calls with the applicant (or its representatives such as its attorney, architect or engineer), culminating in a recommendation to the Commission from those staff agencies. The staff advises the Commission on the proposed development's compliance with the codes, standards, and policies set down by the City Council and the Planning Commission. Once approved by the Planning Commission, a project may often require further staff review and staff approval of subsequent phases or more detailed matters that have been delegated at the hearing by the Commission to the staff. An example of this delegation is the direction by the Commission to the Planning Department to perform subsequent review and approval of a landscape plan, building colors, etc., or delegating the final approval of street modifications to the Public Works Director.

Concerning planning issues, to a certain extent the Commission can direct staff actions and work including the prioritization of staff projects. Due to this close working relationship, obviously the staff seeks to be responsive to the Commission and individual Commissioners. The key issue here is whether any possible undue influence or pressure upon staff is created by the Planning Commissioner acting privately as an applicant's attorney resulting in a legal conflict of interest.

DISCUSSION

As you know, a public official may not make, participate in, or use his official position to influence a governmental

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decision in which he has a financial interest in the outcome. Section 87100. An official has a financial interest in a decision when it is reasonably foreseeable that the decision will have a material financial effect on, among other interests, a source of income to the official of \$250 or more in the 12 months preceding the decision. Section 87103(c).

Accordingly, Mr. Masci should not make, participate in, or use his official position to influence a governmental decision which could have a material financial effect on any of his clients who have paid, or promised to pay, him \$250 or more in the 12 months preceding the decision.^{2/}

All of the questions in your letter raise the issue of what it means for an official to use his official position to influence a governmental decision. The Commission recently adopted a new regulation, 2 Cal. Adm. Code Section 18700.1, which answers all of your questions.

Questions Relating to Commissioner Masci

All of the questions presume that Commissioner Masci is hired as an attorney to provide legal advocacy services for a private party/applicant. I will also assume that Commissioner Masci has received, or has been promised, \$250 or more in income from the client.

Your first question was as follows:

1. Can the Commissioner meet with, talk directly to and interact with planning staff on an application for a permit or a modification thereof which is to be approved administratively by staff and is not scheduled to go before the Planning Commission? Note: Any decision of the planning staff is appealable by the applicant or any interested person to the Planning Commission and, therefore, this item has a potential of going to the Commission.

^{2/} Income of an individual is defined in the Act to include the individual's pro rata share of any income to a business entity in which the individual has a 10% or greater ownership interest. Section 82030(a). Since Mr. Masci owns 100% of his law practice, 100% of the income to the practice is attributed to him as an individual.

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This activity is clearly prohibited even though the matter may not go before the Planning Commission. Regulation Section 18700.1(a) provides:

With regard to a governmental decision which is within or before an official's agency or an agency appointed by or subject to the budgetary control of his or her agency, the official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official contracts, or appears before, or otherwise attempts to influence, any member, officer, employee or consultant of the agency. Attempts to influence include, but are not limited to, appearances or contacts by the official on behalf of a business entity, client, or customer.

The Planning Commission, as an agency, includes the planning staff of the city. Thus a planning commissioner may not contact or otherwise attempt to influence planning staff concerning a pending matter on behalf of a client.

Your second question asked:

2. If the Commissioner has no direct contact or meetings with staff, writes no letters to staff, and makes no telephone calls, can the Commissioner advise an applicant on negotiating strategies, City approval, City procedures, policies, etc. (i.e. what person on the City staff to talk to, and how to structure the public presentation before the Commission, etc.) out of presence of planning staff or the Planning Commission? Staff may or may not know that the Commissioner is indirectly involved.

The statute and the regulation only prohibit direct contacts with the agency or its staff. Thus Commissioner Masci may advise a private client on anything he wishes assuming he disqualifies himself from the decisionmaking process. The disqualification must be made a part of the public record in the proceeding. See 2 Cal. Adm. Code Section 18700(b)(5). Of course, he must be careful not to have any contact, whether formal or informal, with other planning commissioners or planning staff regarding the matter.

General Questions

You also raised a series of general questions on this topic. The following answers are given as general assistance and not pursuant to Section 83114(b). Again the questions presume that a planning commissioner is hired as an attorney to represent a private party/applicant.

1. Can the Commissioner attend and represent a client in a public hearing before the Planning Commission on which he/she sits, so long as he/she discloses the representation, abstains from any Commission deliberation after the hearing is closed, and does not vote on the matter?

Section 87100 prohibits this activity. See 2 Cal. Adm. Code Section 18700.1(a) (quoted above). There are three parts to the prohibition in Section 87100. When an official has a financial interest in a decision, he may not (1) make the decision, (2) participate in the decision, nor (3) use his or her official position to influence that decision. It is the Commission's interpretation of the last part of the prohibition that when an official appears before his own agency, he is using his official position to influence that agency. Thus disqualification from actual voting is not enough to comply with Section 87100; the official also must not participate in the decision in any way, and he must not represent anyone before his agency in connection with the decision.

2. Can the Commissioner meet with, talk directly to and interact with staff on a matter that has come before the Commission or is set to come before the Commission (such as attempting to expedite a project through the planning process, or negotiating design, public financing, or wording of conditions) so long as he/she abstains from voting at the hearing and does not appear or participate concerning the application at that public hearing?

This is basically the same question as your first question relating to Commissioner Masci. A planning commissioner may not contact or otherwise interact with planning staff on behalf of a client for the purpose of influencing the matter whether or not the matter is scheduled to come before the planning commission.

3. Can the Commissioner (attorney) file a lawsuit against the City on behalf of a client which involves any of the following circumstances:
 - a. The suit is a personal injury suit arising out of a dangerous condition of public property. (The concern here is that the Commissioner may have to depose staff members such as the traffic engineer on behalf of his client and would also be in a position to gain access to or request the compilation of studies or reports relating to facts giving rise to injury.)
 - b. The suit challenges a discretionary planning decision of a City Council board or commission made before he/she became a Commissioner.
 - c. The suit challenges a mandatory act of staff (item which did not go to the Commission) involving a project development permit or issuance of a building permit.

With respect to these questions, I refer you to an Attorney General's Opinion, 64 Op. Atty. Gen. 282 (1981), which cites California State Bar Ethics Opinion No. 1977-46 (54 State Bar J. 60) (1979).

Since all of these questions involve lawsuits against the city, I assume that the city's decisions concerning these lawsuits will be made by the City Council with the assistance and advice of the City Attorney. Since the Planning Commission is subordinate to the City Council, a planning commissioner could negotiate with the City Council and the City Attorney under Section 87100 so long as he does not use his official stationery, otherwise represent himself as a planning commissioner, or purport to represent the views or policies of the planning commission. See 2 Cal. Adm. Code Section 18700.1(c).

In addition, under the general guidelines for conflicts based on sources of income, he may not use his official position to further his client's interests in any manner. Under 2 Cal. Adm. Code Section 18702(b)(3)(B), in the case of a source of income, an official may not make, participate in, or attempt to influence, any governmental decision where there is a "nexus" or connection between the decision and the reason for which the official receives income. Thus a planning commissioner may not request studies or reports or otherwise

use his official position to seek to obtain information from the City at the request of a client or in order to aid or further his private client's action against the city.

I would also refer you to Section 1125 which deals with the incompatibility of certain activities for public officials and employees and which is not a part of the Political Reform Act. This section may more directly address the concerns reflected in these questions.

Your final questions were as follows:

The following questions assume that the Commissioner is not receiving compensation for services rendered but is assisting a nonprofit group in preparing or negotiating an application which will ultimately go before the Planning Commission or Planning staff.

1. Could he/she participate in the review and negotiations with staff; and
2. Could he/she appear before the Planning Commission representing the nonprofit applicant?
3. If he represented the client for no compensation and did not appear on a client's behalf before the Planning Commission, could he/she vote on the application?

The conflict of interest provisions of the Political Reform Act are limited to conflicts of interests based on private economic interests. If a planning commissioner has not received income of \$250 or more from a nonprofit group, Sections 87100 and 87103 do not apply with respect to that group. However, I refer you again to the Attorney General's opinion and State Bar opinion cited above and also to the common law rules regarding conflicts of interest. As I noted above with respect to the lawsuits, the concerns reflected in your questions may be more directly addressed by Section 1125. Under this statute, a city council may adopt a statement of incompatible activities which limits or regulates the outside activities of city officials and employees.

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I trust that the foregoing discussion responds to your questions. If I can be of further assistance, please feel free to contact me at (916) 322-5901.

Sincerely,

A handwritten signature in cursive script, appearing to read "Diane Maura Fishburn", with a long horizontal flourish extending to the right.

Diane Maura Fishburn
Staff Counsel
Legal Division

DMF:plh



City of Thousand Oaks

JEP 3 4 28 11

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MARK G. SELLERS
CITY ATTORNEY

August 27, 1985

Diane Fishburn
Fair Political Practices Commission
1100 K Street
Sacramento, California 95814

Re: Request for Formal Written Advice Pursuant to
2 Cal. Adm. Code Section 18329

Dear Ms. Fishburn:

On July 16th and July 18th I spoke to you by telephone seeking informal advice on a potential conflict of interest affecting one of the City's Planning Commissioners. I want to thank you, again, for your courtesy and prompt response to that inquiry. We now seek a formal written response as a follow-up to that inquiry.

As outlined below, our initial informal inquiry involved one Planning Commissioner and two basic questions. We also wish to request your guidance relating to the activities of commissioners in general and unrelated to Commissioner Masci's law practice.

Re: Commissioner Masci

The Planning Commissioner who is the subject of the first portion of this request is Mr. Felix G. Masci, Planning Commissioner, 401 West Hillcrest Drive, Thousand Oaks 91360. The requestor is Mark G. Sellers, City Attorney of Thousand Oaks, same address.

FACTUAL SUMMARY

The Planning Commissioner is an attorney engaged in the general practice of law within the City limits of Thousand Oaks as a sole practitioner. Each Commissioner is nominated by a Councilmember and there is a close relationship between that Commissioner and that nominating Councilperson. The five Planning Commissioners are appointed by the City Council. The Council also appoints the City Attorney and the City Manager who hires the rest of City staff.

The Commission has approval authority over development permits, subdivision maps, special use permits and other development permits with appeal rights to the City Council. The Planning Commission hears appeals of administrative planning staff decisions on minor items, projects, or modifications to permits. The Planning Commission also reviews amendments to zoning ordinances and the general and specific plans and makes recommendations to the City Council.

The Planning Commission meets the first four Mondays of the month and is staffed and assisted by the City's Planning Department, Public Works Department, Utilities Department and the City Attorney's Office. Every application before the Commission first undergoes a staff analysis, involving numerous staff meetings, telephone calls with the applicant (or its representatives such as its attorney, architect or engineer), culminating in a recommendation to the Commission from those staff agencies. The staff advises the Commission on the proposed development's compliance with the codes, standards, and policies set down by the City Council and the Planning Commission. Once approved by the Planning Commission, a project may often require further staff review and staff approval of subsequent phases or more detailed matters that have been delegated at the hearing by the Commission to the staff. An example of this delegation is the direction by the Commission to the Planning Department to perform subsequent review and approval of a landscape plan, building colors, etc., or delegating the final approval of street modifications to the Public Works Director.

Concerning planning issues, to a certain extent the Commission can direct staff actions and work including the prioritization of staff projects. Due to this close working relationship, obviously the staff seeks to be responsive to the Commission and individual Commissioners. The key issue here is whether any possible undue influence or pressure upon staff is created by the Planning Commissioner acting privately as an applicant's attorney resulting in a legal conflict of interest.

QUESTIONS

The following questions assume that the Planning Commissioner is hired as an attorney to render legal services for a private party (applicant). The Commissioner is advocating a private client's interests:

1. Can the Commissioner meet with, talk directly to and interact with planning staff on an application for a permit or a modification thereof which is to be approved administratively by staff and is not scheduled to go before the Planning Commission? Note: Any decision of the planning staff is appealable by the applicant or any interested person to the Planning Commission and, therefore, this item has a potential of going to the Commission.

2. If the Commissioner has no direct contact or meetings with staff, writes no letters to staff, and makes no telephone calls, can the Commissioner advise an applicant on negotiating strategies, City approval, City procedures, policies, etc. (i.e. what person on the City staff to talk to, and how to structure the public presentation before the Commission, etc.) out of presence of planning staff or the Planning Commission? Staff may or may not know that the Commissioner is indirectly involved.

Commissioners in General

Apart from the inquiries concerning Mr. Masci, other questions arise concerning the interaction between a Commissioner and staff and the City generally. We understand your policy requiring the name of the person and position which is the subject of the inquiry but request, in the interest of clarification of this area of the code generally, that you consider the following questions, generically, to members of the City boards and commissions who may be attorneys, engineers, architects or other professionals.

QUESTIONS

- A. The following questions assume that the Planning Commissioner is hired as an attorney to render professional services for a private party (applicant). The Commissioner is advocating a private client's concern.
 1. Can the Commissioner attend and represent a client in a public hearing before the Planning Commission on which he/she sits, so long as he/she discloses the representation, abstains from any Commission deliberation after the hearing is closed, and does not vote on the matter?
 2. Can the Commissioner meet with, talk directly to and interact with staff on a matter that has come before the Commission or is set to come before the Commission, (such as attempting to expedite a project through the planning process, or negotiating design, public financing, or wording of conditions) so long as he/she abstains from voting at the hearing and does not appear or participate concerning the application at that public hearing?
 3. Can the Commissioner (attorney) file a lawsuit against the City on behalf of a client which involves any of the following circumstances:

- a. The suit is a personal injury suit arising out of a dangerous condition of public property. (The concern here is that the Commissioner may have to depose staff members such as the traffic engineer on behalf of his client and would also be in a position to gain access to or request the compilation of studies or reports relating to facts giving rise to injury.)
- b. The suit challenges a discretionary planning decision of a City Council board or commission made before he/she became a Commissioner.
- c. The suit challenges a mandatory act of staff (item which did not go to the Commission) involving a project development permit or issuance of a building permit.

B. The following questions assume that the Commissioner is not receiving compensation for services rendered but is assisting a nonprofit group in preparing or negotiating an application which will ultimately go before the Planning Commission or Planning staff.

1. Could he/she participate in the review and negotiations with staff; and
2. Could he/she appear before the Planning Commission representing the nonprofit applicant?
3. If he represented the client for no compensation and did not appear on a client's behalf before the Planning Commission, could he/she vote on the application?

Once again, thank you for your attention and cooperation in this matter, and if we can provide any other or further information, please do not hesitate to contact us.

MARK G. SELLERS
City Attorney

By:


MICHAEL D. MARTELLO
Assistant City Attorney

gw:B/96

xc: Felix G. Masci
City Council
Grant R. Brimhall
Philip E. Gatch