



# California Fair Political Practices Commission

January 9, 1990

Denis A. Eymil  
County Counsel  
Government Center  
Hanford, CA 93230

Re: Your Request for Advice  
Our File No. A-89-638

Dear Mr. Eymil:

You have requested advice regarding the obligations of the members of the Kings County Local Assessment Committee under the conflict-of-interest provisions of the Political Reform Act (the "Act")<sup>1/</sup>

## QUESTION

Is the Kings County Local Assessment Committee exempt from the requirement that it adopt a conflict of interest code?

## CONCLUSION

The local assessment committee is not exempt from the requirement that it adopt a conflict-of-interest code. Members of the committee are subject to the Act's financial disclosure and disqualification provisions.

## FACTS

The Kings County Local Assessment Committee (the "committee") was appointed, pursuant to Health and Safety Code Section 25199.7 to meet with the proponent of a hazardous waste disposal facility

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<sup>1/</sup> Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000 et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

Page Two  
January 9, 1990

in Kings County. Proponents of hazardous waste disposal facilities must file an application with the Office of Permit Assistance and with the applicable city or county. Within 90 day of receiving notice of the filing of a notice of intent, the legislative body of the affected local agency appoints a seven member local assessment committee.

The membership consists of three representatives of the community, two representatives of environmental or public interest groups, and two representatives of affected businesses and industries. A local assessment committee shall, among other things:

- 1) Negotiate with the proponent for the proposed hazardous waste facility project on the detailed terms of, provisions of, and conditions for, project approval which would protect the public health, safety, and welfare, and the environment of the city or county and would promote the fiscal welfare of the city or county through special benefits and compensation;
- 2) Represent, in negotiation with the project proponent, the interests of the residents of the city or county and adjacent communities;
- 3) Receive and expend the technical assistance grants, which includes the hiring of an independent contractor to assist the committee in reviewing the project and negotiating terms and conditions with the proponent;
- 4) Adopt rules and procedures necessary to perform its duties.

The local assessment district will then advise the legislative body of the city or county of the terms, provisions, and conditions for project approval. The legislative body may use this advice for its independent consideration of the project. The local assessment committee will cease to exist after final administrative action by state and local agencies has been taken on the permit application for the project for which the committee was convened.

#### ANALYSIS

Section 87302 provides that conflict of interest codes shall enumerate the designated employees within the agency who make or participate in making decisions which may foreseeably have a material financial effect on any financial interest. Section 82019 defines a designated employee as any officer, employee, member or consultant of any agency who possesses decisionmaking authority. The term "designated employee" does not include any unsalaried member of a board of commission which performs a solely advisory function.

A board possesses decisionmaking authority if:

- (A) It may make a final governmental decision;
- (B) It may compel a governmental decision; or it may prevent a governmental decision by reason of an exclusive power to initiate the decision or by reason of a veto which may not be overridden; or
- (C) It makes substantive recommendations which are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency.

Regulation 18700(a)(1)

Commission Regulation 18700(b) provides in part that a designated employee makes a governmental decision when he or she is acting within the authority of his or her office, and

- (1) Votes on a matter;
- (2) Appoints a person;
- (3) Obligates or commits his or her agency any course of action;
- (4) Enters into any contractual agreement on behalf of his or her agency; or
- (5) Determines not to act, within the meaning of subparagraphs (1), (2), (3) or (4)....

A designated employee participates in the making of a governmental decision when he or she:

- (1) Negotiates, without significant substantive review, with a governmental entity or private person regarding the decision; or
- (2) Advises or makes recommendations to the decision-maker, either directly or without significant intervening substantive review, by:
  - (A) Conducting research or making any investigation which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision; or

(B) Preparing or presenting any report, analysis or opinion, orally or in writing, which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision.

Regulation 18700(c)

The question we are faced with is whether the committee is solely advisory. In Commission on Cal. State Gov. Org. & Econ. v. Fair Political Practices Com. 75 Cal. App. 3d 716, 721 (1977), the court stated that "the word advisory denotes indirect, relatively passive, hortatory and nonbinding counsel or guidance, as contrasted with active management, decisionmaking and the imposition of obligatory orders or decrees." The court further noted that "the presence or absence of decisionmaking power is thus an important factor in identifying the wielder of a solely advisory function."

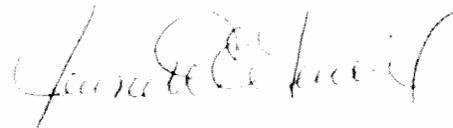
Based on the functions and powers of the committee, we do not believe that it is solely advisory. The committee has the authority to enter into negotiations with the proponent of the project representing the interests of the residents of the city and county. The committee further has the authority to expend funds to obtain a consultant to assist in negotiating terms and conditions of the project.

In support of your contention that the committee is solely advisory, you have pointed out that the legislative body may use the advice of the committee in making its independent consideration of the project. However, taking into consideration the authority and powers given the committee, it is not serving in a solely advisory capacity but rather serves as an integral part of the land use decision and is thus participating in the making of a governmental decision. Accordingly, the Kings County Local Assessment Committee is not a solely advisory body. Its members are covered by the conflict of interest provisions of the Political Reform Act. The committee must, therefore, adopt a conflict of interest code.

If I can be of any further assistance, please feel free to call me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan  
General Counsel



By: Jeanette E. Turvill  
Political Reform Consultant  
Legal Division

OFFICE OF  
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October 31, 1989

General Counsel  
Fair Political Practices Commission  
P. O. Box 807  
Sacramento, CA 95804

Re: Local Assessment Committee  
Health and Safety Code Section 25199.7,  
Written Advice Request

Dear Sir:

This office represents the Kings County Local Assessment Committee, which has been appointed pursuant to Health and Safety Code Section 25199.7 to meet with the proponent of a hazardous waste disposal facility in Kings County. Section 25199.7 has very recently been amended by the Legislature, and we have taken the liberty of enclosing a copy of the revised statute with this letter for your convenience.

On behalf of the committee, we request written advice from your office on whether the committee must adopt a conflict of interest code to cover its unsalaried appointed members, its consultant, and the one county staff person assigned by the county planning department to assist the committee.

The committee consists of seven unsalaried members appointed pursuant to subdivision (d) of section 25199.7. In addition, pursuant to subdivision (3) of subdivision (d), the county has provided a staff person to assist the committee in performing its duties. The committee has also employed a consultant under the provision of subdivision (g) to assist it and advise it in carrying out its functions. The consultant hired is Brown, Vence Associates a private corporation having no relationship other than contractual with either Kings County or its LSAC.

Under the provisions of the statute the committee meets, enters into a dialogue, and attempts to reach an understanding with the proponent of the facility on the terms and conditions under which the facility would be acceptable to the community.

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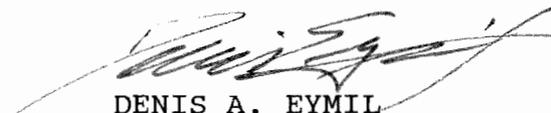
General Counsel  
Fair Political Practices Commission  
October 31, 1989  
Page Two

After doing this, the committee then advises the decision-making body (in this case, the county planning commission) of the terms, provisions and conditions which it recommends to be imposed for project approval. This would include a statement of any matters upon which the committee and the proponent have reached an understanding and any other matters which the committee deems appropriate. It is contemplated that the committee's report to the planning commission will include recommendations on all matters considered and discussed. The planning commission may then "... use this advice for its independent consideration of the project". (emphasis supplied) (See subdivision (E) of subdivision (d)). Certainly, nothing that the committee recommends binds the planning commission to any course of action.

It is our tentative conclusion that the local assessment committee is solely an advisory agency and that, under the provisions of Government Code Section 82019, it would be exempt from the requirement of adopting a conflict of interest code under Government Code section 87300 et seq. However, there is language in a fairly recent appellate court case which might compel the opposite conclusion. (See Commission on Cal. State Gov. Org. and Econ. v Fair Political Practices Commission (1977) 75 Cal.App.3d 719. In addition, in discussions with FPPC staff, we have been advised that this is a very close question and should be addressed in writing. Because of this uncertainty, we hereby request written advice on whether the committee must adopt a conflict of interest code.

At the suggestion of FPPC staff, we have also enclosed a copy of the rules the committee has adopted for its own governance. If you have any questions or need additional information, please let us know.

Very truly yours,



DENIS A. EYMIL  
Kings County Counsel

PDM/bf



# California Fair Political Practices Commission

November 8, 1989

Denis A. Eymil  
County Counsel, Kings County  
Government Center  
Hanford, CA 93230

Re: Letter No. 89-638

Dear Mr. Eymil:

Your letter requesting advice under the Political Reform Act was received on November 6, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Jeanette Turvill, in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, we will contact you shortly to advise you as to the information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

A handwritten signature in cursive script that reads "Kathryn E. Donovan".

Kathryn E. Donovan  
General Counsel

KED:plh



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Kathryn E. Donovan  
General Counsel

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