



## FAIR POLITICAL PRACTICES COMMISSION

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May 20, 1999

Rachel E. O'Malley  
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San José, California 95192-0115

**Re: Your Request for Advice  
Our File No. A-99-110**

Dear Dr. O'Malley:

This letter is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup>

### QUESTIONS

- 1) As a member of the general public, may you submit written comments to the Parks and Recreation Commission regarding the negative declaration of environmental impact, that relates to the Jessie Street Marsh project (the "marsh project") which is currently undergoing California Environmental Quality Act ("CEQA") review before the Parks and Recreation Commission?
- 2) As a member of the general public, may you testify at an open meeting of the Parks and Recreation Commission regarding the marsh project?
- 3) As a member of the general public, may you testify at an open meeting of the Santa Cruz City Council regarding the marsh project?
- 4) Does the "public generally" exception apply to your situation?

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<sup>1</sup> Government Code sections 81000 - 91014. Commission regulations appear at title 2, sections 18109 - 18995, of the California Code of Regulations.

## CONCLUSIONS

- 1) No. You may not submit written comments to the Parks and Recreation Commission regarding the marsh project.
- 2) No. You may not testify as a member of the public before the Parks and Recreation Commission regarding the marsh project.
- 3) Yes. You may testify at an open meeting of the city council as a member of the public.
- 4) No. The “public generally” exception does not apply to your situation.

## FACTS

You were appointed to the Parks and Recreation Commission by the Santa Cruz City Council. You own a house immediately adjacent to, and within 300 feet, of a city-owned property known as the “Jessie Street Marsh.” The marsh property will be restored environmentally and developed as a park. It is currently the subject of a CEQA review.

The Parks and Recreation Commission (“commission”) is advisory to the city council. As a commissioner, you are a public official and file a statement of economic interests. The commission meetings are held subject to the Brown Act. The commission makes recommendations to the city council, which is the ultimate decisionmaker regarding the marsh project.

Due to the proximity of your home to the marsh property, you have acknowledged that you have a conflict of interest in commission decisions concerning the marsh project and you will not participate in your official capacity. However, as an Assistant Professor of Environmental Studies and as a member of the public, you would like to submit written comments and appear in your private capacity regarding the scientific adequacy of the assessment of the biological impacts on endangered species and wetland habitat (negative declaration of environmental impact under CEQA), for the proposed marsh restoration. The written comments to the commission become part of the record and are also submitted to the city council with the commission’s recommendation.

## ANALYSIS

Section 87100 prohibits a public official from making, participating in making or otherwise using his or her official position to influence a governmental decision in which he or she knows or has reason to know that he or she has a financial interest.

Regulations 18702 - 18702.3 discuss when a public official is making, participating in making or attempting to use his or her official position to influence a governmental decision. A public official "makes a governmental decision," when, among other things, the official votes on a matter, appoints a person, commits his or her agency to a course of conduct, enters into a contract on behalf of his or her agency, or determines not to act in one of the foregoing manners. (Regulation 18702.1.) A public official "participates in a governmental decision," when, among other things, the official negotiates with a governmental entity, or advises or makes recommendations to the decisionmaker. (Regulation 18702.2.)

### QUESTIONS 1 AND 2

You have already acknowledged that you have a conflict of interest and that you will not participate in your official capacity. Therefore, you need to disqualify yourself by disclosing your financial interest as part of the agency's official record. (Regulation 18702.1(a)(5), copy enclosed.) However, you would like to submit written comments and/or testify in your private capacity before the commission regarding the marsh project.

With regard to a governmental decision which is within or before an official's 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 contacts, or appears before, or otherwise attempts to influence any member, officer, employee, or consultant of the agency. (Regulation 18702.3(a), copy enclosed.)

Regulation 18702.4(b) sets forth a narrow exception that allows an otherwise disqualified official to appear in the same manner as any other member of the general public. Regulation 18702.4(b) states that an official is not attempting to use his or her official position to influence a governmental decision if the official:

"(1) Appears in the same manner as any other member of the general public before an agency in the course of its prescribed governmental function solely to represent himself or herself on a matter which is related to his or her personal interests. An official's "personal interests" include, but are not limited to:

(A) An interest in real property which is wholly owned by the official or members of his or her immediate family.

(B) A business entity wholly owned by the official or members of his or her immediate family.

(C) A business entity over which the official exercises sole direction and control, or over which the official and his or her spouse jointly exercise sole direction and control.

(2) Communicates with the general public or the press."

You may not participate as a member of the general public, either by written or verbal comments to the commission because the above exception must be construed narrowly. (*See* 58 Cal.Jur.3d Statutes, § 116 (1993 Supp. -- exceptions to the general rule of a statute are strictly construed.) You may only comment on issues related solely to the effect of the decision on *your* personal interests and you may not testify on behalf of any other person or group.

You have stated that you want to submit comments regarding the adequacy of the assessment of the biological impacts on endangered species and wetland habitat (the negative declaration of the environmental impact under CEQA). Therefore, you are not subject to the above exception which would only allow you to comment on the effect of the decision on your property interest. Since you do not meet the criteria of the exception, you may not submit written or oral comments to the commission regarding the marsh project.

### QUESTION 3

In addition, you would like to testify as a member of the public before the city council. Regulation 18702.3(b) applies as follows:

“With regard to a governmental decision which is within or before an agency not covered by subsection (a), 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 acts or purports to act on behalf of, or as the representative of, his or her agency to any member, officer, employee or consultant of an agency. Such actions include, but are not limited to the use of official stationery.”

Therefore, you may not participate in your official capacity, but you may participate as a member of the public before the city council. In this situation, you are not limited to only representing your personal interests (Regulation 18702.4(b)), but may comment as a member of the public as to the negative declaration of the environmental impact under CEQA.

However, this participation is only possible if the city council is the ultimate decisionmaker. If the process allows the city council to return the matter to the commission, you may not comment before the city council because the matter would still be considered to be before your agency. (Regulation 18702.3(a).)

### QUESTION 4

You have also inquired if the “public generally” exception applies to you. Regulation 18707 provides in pertinent part:

“(b) General Rule: Except as provided in Government Code sections 87102.6 and 87103.5, the material financial effect of a governmental decision on a public official's economic interests is indistinguishable from its effect on the public generally if both subdivisions (b)(1) and (b)(2) of this regulation apply:

(1) Significant Segment: The governmental decision will affect a ‘significant segment’ of the public generally as set forth below:

(A) For decisions that affect the official's economic interests (excluding interests in a business entity which are analyzed under subdivision (B)):

(i) Ten percent or more of the population in the jurisdiction of the official's agency or the district the official represents, or

(ii) Ten percent or more of all property owners, all home owners, or all households in the jurisdiction of the official's agency or the district the official represents, or

(B) For decisions that affect a business entity in which the official has an economic interest, fifty percent of all businesses in the jurisdiction or the district the official represents, so long as the segment is composed of persons other than a single industry, trade, or profession; or,

(C) For decisions that affect any of the official's economic interests, the decision will affect 5,000 individuals who are residents of the jurisdiction; or,

(D) The decision will affect a segment of the population which does not meet any of the standards in subdivisions (b)(1)(A) through (b)(1)(C), however, due to exceptional circumstances regarding the decision, it is determined such segment constitutes a significant segment of the public generally.

(2) Substantially the Same Manner: The governmental decision will affect the official's economic interest in substantially the same manner as it will affect the significant segment identified in subdivision (b)(1) of this regulation.” (Regulation 18707(b)(1) and (b)(2).)”

In order for this exception to apply, the decision must affect ten percent or more of the population or property owners in substantially the same manner as it affects your economic interest, which is your residential property. Since your property is within 300 feet of the marsh property, ten percent of the population or property owners would have to live or own residential property within 300 feet of the marsh restoration project to be affected in “substantially the same manner” as you. (*See Blakely* Advice Letter, No. A-95-202, where we advised that where an official's residential property was within 300 feet of a project site, the public generally exception

applied only if a significant segment of the public owned residential property within 300 feet of the project; *Furth* Advice Letter, No. A-99-035.) Since a significant segment of the public probably does not own residential property within 300 feet of the marsh project, the public generally exception does not apply.

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

Sincerely,

Steven G. Churchwell  
General Counsel

A handwritten signature in cursive script that reads "Jill Stecher / ts".

By: Jill Stecher  
Staff Counsel, Legal Division

SGC:JS:tls

Enclosures