

February 26, 2014

Cary S. Reisman
City Attorney, City of Los Alamitos
Wallin, Kress, Reisman & Kranitz, LLP
2800 28th Street, Suite 315
Santa Monica, CA 90405

Re: Your Request for Advice
Our File No. A-14-022

Dear Mr. Reisman:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ Please note that because the Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance (*In re Oglesby* (1975) 1 FPPC Ops. 71), this letter is based on the facts presented. We also note that we do not provide advice on past conduct and our advice is based solely on the provisions of the Act.

QUESTION

Once Los Alamitos City Councilmember Troy Edgar has identified a conflict of interest and is no longer able to participate in an upcoming governmental decision, what actions are appropriate to take if he wants to participate as a member of the public in the community opposition to the decision?

CONCLUSION

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

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.

FACTS

You are the City Attorney for the City of Los Alamitos seeking information on behalf of Councilmember Troy Edgar related to the Act's conflict-of-interest provisions.

Specifically, the City of Los Alamitos is considering filing litigation against an institutional property owner under various legal theories, including creating a public nuisance and failure to comply with CEQA. Councilmember Edgar owns a home within 300 feet of the property at issue, and has acknowledged that he has a disqualifying conflict of interest that precludes him from participating in or influencing the impending City Council decision concerning the potential litigation.

You state that the activities on the subject property have an actual impact on Councilman Edgar's property in terms of the general value and quality of life of the neighborhood. Therefore, he would like to join and take a leadership role in a community group opposing the activities on this property. As part of his leadership role, he would like to appear on behalf of the group in front of the legislative body² that owns the subject property. You have already advised him that he may not appear in front of the Los Alamitos City Council on behalf of any property owner other than himself.

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.

Councilmember Edgar has identified, correctly, that he has a conflict of interest under the Act based on the fact that his home is within 300 feet of the property that will be at the center of the City's upcoming litigation decisions. The conflict disqualifies him 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, he 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 himself; and (3) leave the room for the duration of the discussion and/or vote on the item(s). (Section 87105.)

² For purposes of this letter, we are assuming the legislative body to which you refer is an "agency" as that term is defined under the Act. (See Section 82003 ["Agency" means any state agency or local government agency"].)

Even when a public official has a conflict of interest, however, there are levels of participation that are allowed under the Act. The following describes the types of activities in which Councilmember Edgar may participate.

1. Appearances before the Los Alamitos City Council.

Even if a conflict of interest is present, a public official may appear before his or her agency as any other member of the general public in the course of its prescribed governmental function in order to represent himself or herself on matters related solely to his or her “personal interests.” (Regulation 18702.4(a)(2), (b)(1).) Such an appearance, properly made, does not constitute making, participating in making, or influencing a governmental decision. An official’s “personal interests” includes an interest in real property that is wholly owned by the official or members of his or her immediate family. (Regulation 18702.4(b)(1)(A).)

We assume that Councilmember Edgar’s home is wholly owned by him or an immediate family member. Therefore, as you correctly advised, Councilmember Edgar may address the Los Alamitos City Council on the subject topic so long as he avoids giving the impression that he is speaking in the interest of any other person or group, or that he is acting in any official capacity.

2. Meeting with friends, neighbors, and other members of the community, other than city officials, to rally their opposition to the project.

Regulation 18702.3(a) provides that with regard to a governmental decision that is within or before the official’s own agency, or any agency appointed by or subject to the budgetary control of the 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.

The Act does not, however, prohibit Councilmember Edgar from discussing the project generally with friends, neighbors, and other members of the community, even if he does so in an attempt to rally their opposition to the project, unless they are members, officers, employees or consultants of the city. (See *McHugh* Advice Letter, No. 1-98-324; *Root* Advice Letter, No. I-97-397; see also Regulation 18702.4(b)(2).) Furthermore, nothing in the Act prohibits Councilmember Edgar’s personal participation, even in a leadership role, in the neighborhood opposition group. Also, he is free to encourage friends, neighbors and other members of the community to appear before the Los Alamitos City Council or other agencies to express their concerns about the project. However, if he asks these individuals to discuss his own concerns about the effect of the project on *his* property with members, officers, employees or consultants of the city, he would be “otherwise attempting to influence” members of the city council or the planning commission. (*Benjamin* Advice Letter, No. A-00-210.)

3. Appearing on behalf of the opposition group before the legislative body that owns the subject property.

Regulation 18702.3(b) sets forth the rule for determining when an official is attempting to use his or her official position to influence the decision of an agency other than the public official's own agency, or an agency appointed by or subject to the budgetary control of, the public official's agency. Regulation 18702.3(b) provides that an official is attempting to use his or her official position to influence a decision if 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 another agency.

Assuming the above-referenced legislative body is not an agency appointed by or subject to the budgetary control of the Los Alamitos City Council, Councilmember Edgar may appear before and discuss the subject property with that agency and its members or staff, so long as he is not attempting to use his official position as a city councilmember to influence their decision. (*Benjamin Advice Letter, supra; Lea Advice Letter, No. A-95-096.*) However, Regulation 18702.4(a)(2) makes clear that an official may make "appearances" as a member of the general public "before an agency in the course of its prescribed governmental function" to represent *himself or herself on matters related solely to his or her personal interests*. Therefore, Councilmember Edgar may not appear before that legislative body on behalf of the entire group in opposition to actions on the subject property.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Jack Woodside
Senior Counsel, Legal Division

JW:jgl