



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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July 14, 2020

Claire Lai
Assistant City Attorney
City of South San Francisco
Meyers Nave
555 12th Street, Suite 1500
Oakland, California 94607

Re: Your Request for Advice
Our File No. I-20-067

Dear Ms. Lai:

This letter responds to your request for advice on behalf of South San Francisco Planning Commissioner Alex Tzang, regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹ Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090. Because your inquiry is general in nature, we are treating your request as one for informal assistance.²

Also note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTIONS

1. In his personal capacity as an architect, may Commissioner Tzang interact with staff in the City’s Economic and Community Development Department and Building Division regarding clients’ land use projects and entitlement applications within South San Francisco?

2. In his personal capacity as an architect, may Commissioner Tzang represent his clients in Design Review Board meetings as long as he does not present himself as acting for or on behalf of the Planning Commission?

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.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

3. If Commissioner Tzang is prohibited from engaging in the contacts and representation described above, may another staff person or professional in Alex Tzang Group represent the firm's clients during meetings with City staff regarding client projects, and during the City's Planning Commission and Design Review Board meetings, provided that Commissioner Tzang recuses himself from such meetings?

CONCLUSIONS

1. No. Commissioner Tzang is prohibited from making, participating in making or influencing decisions relating to his clients' land use projects and entitlement applications to the extent that this involves contacting staff who are under the authority or budgetary control of the Planning Commission, as well as staff of the Economic and Community Development Department and the Building Division that are shared with the Planning Commission, as discussed below.

2. No. As members of the Design Review Board are appointed by the Planning Commission, Commissioner Tzang is prohibited from representing his clients in Design Review Board meetings.

3. Yes. Another Professional with the Alex Tzang Group may represent clients during meetings with City staff regarding client projects, and during the City's Planning Commission and Design Review Board meetings, provided that Commissioner Tzang recuses himself from the decisions.

FACTS AS PRESENTED BY REQUESTER

The City is a general law city with a Planning Commission comprised of seven members, including Commissioner Tzang. The Planning Commission makes recommendations to the City Council in land use and zoning matters, such as general and specific plan amendments and land subdivisions and approves planning entitlements such as use permits and variances. The City also has a Design Review Board that meets regularly to consider design review applications and provide comments on related drawings and plans. This Board also makes recommendations to the Planning Commission and the City's chief planner consistent with the City's zoning code and design review guidelines. The Design Review Board is established pursuant to the City's zoning code. Its members are appointed by the Planning Commission for an initial term of four years. The City's Economic and Community Development Department, which includes the chief planner and planning staff, provides staff and administrative support for the Planning Commission and Design Review Board. Applicants and their architects and designers are expected to attend Planning Commission and Design Review Board meetings to present their proposals and answer questions.

The City's Economic and Community Development Department is divided into the Planning Division, the Economic Development and Housing Division, and the Building Division. The Planning Division is the primary department that works with the Planning Commission and the Design Review Board to handle development project applications and land use entitlements requests. The Building Division is a division under the City's Economic and Community Development Department. It is separate from the Planning Division and employs different staff.

As you indicated in a subsequent email, the Design Review Board will review such design review applications, drawings, and other related submittals and make recommendations to the

Planning Commission and Chief Planner when a project is subject to design review under the City's zoning code depending on which is the final approving authority as designated by the zoning code. These two entities are required to consider the Design Review Board's recommendations in making a decision. However, the Design Review Board is only an advisory body and final decision-making authority rests with either the Planning Commission or the Chief Planner. The Economic and Community Development Department provides staff support for the Design Review Board – for instance, Planning Division staff attends Design Review Board meetings, provides clerical support, and prepares agenda packets.

The Building Division is responsible for enforcing structural and safety codes such as building, plumbing, mechanical, electric and energy codes. It is also responsible for issuing building permits, monitoring construction activities and enforcing accessibility, energy conservation and other state-mandated requirements. The Building Division's role essentially comes into play after a project has obtained its land use entitlements, and thus the Planning Commission does not generally work with or have any authority over the Building Division.

Alex Tzang Group

In his personal and professional capacity, Commissioner Tzang is a licensed architect and sole owner of Alex Tzang Group, an architectural and design firm. This firm operates as a solo business and while it employs administrative staff, Commissioner Tzang is the only professional architect. In the course of his business, Commissioner Tzang provides a range of architectural design and permit application submittal services to property owners in San Mateo County, including within South San Francisco. In particular, Commissioner Tzang's practice in South San Francisco only works with clients on residential projects and focuses on single family residential additions, such as single-story additions or accessory dwelling units (ADUs). As a professional architect, Commissioner Tzang advises clients on architectural and design issues; prepares and electronically submits drawings, plans, and entitlement applications to municipal planning and building departments; and engages with departmental staff on those submittals including responding to staff questions.

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 interests or the 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 an interest. Regulation 18704 defines "making," "participating in making," and "influencing" a governmental decision.

Making a Governmental Decision: A public official "makes a governmental decision" when the official, "official authorizes or directs any action, votes, appoints a person, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency."

Participating in Making a Governmental Decision: A public official “participates in a governmental decision if the official provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review.”

Influencing a Governmental Decision: A public official “ ‘uses his or her official position to influence a governmental decision’ if he or she ‘contacts or appears before any official in his or her agency or in an agency subject to the authority or budgetary control of his or her agency for the purpose of affecting a decision.’ A public official also ‘uses his or her official position to influence a governmental decision’ if he or she contacts or appears before any official in any other government agency for the purpose of affecting a decision, and the public official acts or purports to act within his or her authority or on behalf of his or her agency in making the contact.”

Economic and Community Development Department and Building Division Staff

Commissioner Tzang is a member of the Planning Commission and would like to interact with staff of the Economic and Community Development Department and Building Division on behalf of his clients’ projects. You state that the Building Division’s role essentially comes into play after a project has obtained its land use entitlements, and thus the Planning Commission does not generally work with or have any authority over the Building Division. However, both are within the same City Department, the Economic and Community Development Department. Accordingly, we must determine whether communications with staff of the Economic and Community Development Department and Building Division, will constitute appearances before or communications with Commissioner Tzang’s own agency.

As previously advised in the *Farrell* Advice Letter, No. I-03-121:

“[I]t is important to realize that staff does not exist in a vacuum; it is not a generic entity with its own identity. Rather, staff is a component of the agency to which it is assigned. An ‘agency’ includes the staff assigned exclusively to a public official’s agency (*Larmore* Advice Letter, No. A-00-275; *Martello* Advice Letter, No. A-85-190) as well as staff that are shared between that and another agency (*West* Advice Letter, No. A-88-413).”

In the past, for instance, we have advised that a member of a design review board could not meet or communicate with a staff member of another city department on behalf a client if: (1) the staff member is assigned or involved in a project, analysis, presentation, or other matter that is or will be brought before the design review board; and (2) it is reasonably foreseeable that the design review board’s decision regarding the item in which the staff member is involved will have a material financial effect on one or more of the member’s economic interests. In short, when staff is shared for a project which is, or will be, before the official’s agency, *meeting or otherwise communicating with the shared staff* regarding the project is an appearance or communication with the official’s own agency. (*Farrell* Advice Letter, *supra*, emphasis added.)

Accordingly, as a member of the Planning Commission, Commissioner Tzang is prohibited from appearing before or communicating with any Economic and Community Development Department and Building Division staff assigned to or working on the project if the project is before the Planning Commission for a decision or may still come before the Planning Commission for a

decision. In other words, so long as the project may still come before the Planning Commission, any appearance before or communication with City staff assigned to or working on the project, including the Economic and Community Development Department and Building Division staff, is an appearance before or communication with City staff shared with the Planning Commission and, therefore, and appearance before or communication with Commissioner Tzang's own agency that is prohibited by the Act.

However, to the extent that the project is past Planning Commission Review and that any further decisions involving the project will not come before the Planning Commission, an appearance or communication with the Economic and Community Development and Building Division staff, is prohibited only to the extent that Commissioner Tzang acts or purports to act in his official capacity.

Design Review Board

You note that members of the Design Review Board are appointed by the Planning Commission. As such, they are subject to the authority or budgetary control of the Planning Commission, and Commissioner Tzang is prohibited from representing his clients in Design Review Board meetings, or from otherwise attempting to influence decisions of the Design Review Board or its staff. (Regulation 18704(c)(1).

Appearance or Communication by Alex Tzang Group Representative

In addition to potential appearances or communication by Commissioner Tzang, you ask about appearances and communications by Alex Tzang representatives, other than Commissioner Tzang, provided the commissioner recuses himself from the decision. Under the Act, only public official are prohibited from taking part in decisions in which they have a financial interest. The Act does not limit appearances or communication by representatives of a business, even if an official has an interest in the business. Provided that Commissioner Tzang recuses himself from any decisions concerning client projects, another professional with the Alex Tzang Group may represent clients during meetings with City staff, and during the City's Planning Commission and Design Review Board meetings.

Regulation 18704(d): Exception for Submission of Architectural Documents

We note the conclusions above do not apply to the submission of architectural documents that meet the exception provided in Regulation 18704(d)(6)(A). Under this exception, "making, participating in, or influencing a governmental decision" does not include the submission of architectural documents on a client's behalf before the official's agency, so long as the official does not make contact with the agency other than contacts with staff concerning the process or evaluation of the documents the official prepared.

The exception in 18704(d)(6)(A) states:

"(A) Drawings or submissions of an architectural, engineering, or similar nature prepared by a public official for a client to submit in a proceeding before the official's agency if:

“(i) The work is performed pursuant to the official’s profession; and

“(ii) The official does not make any contact with the agency other than contact with agency staff concerning the process or evaluation of the documents prepared by the official.”

Commission staff has narrowly construed this exception, finding that it is limited to the preparation of technical documents and necessary contact with agency staff concerning the processing or evaluation of the drawings or submissions prepared by the official. (*Rumansoff* Advice Letter, No. I-94-045.) “Necessary contact” has been narrowly construed to only allow an official to respond to questions from agency staff regarding the evaluation of drawings and submissions prepared by the official or relating to their movement through the approval process. (*Woody* Advice Letter, No. I-99-061 and *Holbert* Advice Letter, No. I-90-080.)

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

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary W. Norton
Senior Counsel, Legal Division

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