

State of California



Fair Political Practices Commission

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April 5, 1984

George C. Thacher
City Attorney
300 Forest Avenue
Pacific Grove, CA 93950

Re: Advice Letter No. A-84-048

Dear Mr. Thacher:

This letter responds to the questions you raised concerning my letter of November 7, 1983. Specifically, you questioned the FPPC's regulation interpreting the statutory prohibition against a public official "in any way attempt[ing] to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." (Government Code Section 87100.^{1/}) This regulation, 2 California Administrative Code Section 18700(e), interprets Section 87100 as prohibiting a public official from "furthering or attempting to affect in any manner any decision:

- (1) Within or before his agency; or
- (2) Before any agency which is appointed by or subject to the budgetary control of his agency.

My letter to you discussed a situation in which an architect was a member of a city's Architectural Review Committee. The architect had private clients whose projects occasionally came before his committee for approval. I stated that, with regard to those Committee decisions in which the official had a financial interest, he could not further or attempt to affect a decision by appearing before the Committee on a client's behalf, or by assisting a client, or a client's representative, in the

^{1/} Hereinafter all statutory references are to the Government Code unless otherwise indicated.

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preparation or presentation of matters directly related to a request before the Committee (by preparing the necessary papers for the request, coaching the client on how to most persuasively present the request, or preparing drawings for use solely before the Committee).

In your follow-up letter, you asserted that the architect, or any other official, should only be prohibited from engaging in those activities which involve direct communication with the official's agency, or an agency subject to his agency's control. However, the wording of 2 Cal. Adm. Code Section 18700(e) makes it clear that this regulation is intended to prohibit those activities of the official involving both direct and indirect contact with an agency. The rationale for this is that a public official, even when he is working in his private capacity, is likely to have greater influence in matters before these agencies than other members of the public. In addition, he has the benefit of information that he acquires from his position.^{2/}

In your letter, you raised the issue of whether a public official may speak publicly about a project. In a recent letter to Lowell Smith, A-84-063, March 27, 1984, copy enclosed, we stated that an official may speak to newspapers and to citizens groups about projects. However, he may not attempt to influence a decision before his agency, or one subject to agency's control, by contacting people who will be affected by a project with the intent of heightening or lessening the opposition that they will express to the agency. (See the Harron advice letter, A-83-184.)

^{2/} A 1975 draft of 2 Cal. Adm. Code Section 18700 contains the following statement:

Former ... Section 18700(d) (1) (B) was deleted from this draft. That subsection provided that use of 'official position to influence a governmental decision' included 'acquiring and using confidential information obtained through his or her official position.' The concept of acquiring and using confidential information is now intended to be included within Section 18700(d) (1) [later renumbered 18700(e)] by the amended inclusion of the phrase 'or attempting to affect.'

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Please contact me again if you have any additional questions or comments.

Very truly yours,

Janis Shank McLean

Janis Shank McLean
Counsel
Legal Division

JSM:plh
Enclosure

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March 1, 1984

Janis Shank McLean, Counsel
Legal Division
Fair Political Practices Commission
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Sacramento, California 95804

Re: Advice Letter A-83-226

Dear Ms. McLean:

You prepared the referenced advice letter in response to a request I made last fall. I am writing not to request another formal opinion but to argue a small, though highly significant, point critical to the result reached in A-83-226. My concern, by the way, results in no small part from discussions with a local, small community architect/planning commissioner who may well be forced to leave City service because of A-83-226.

The Political Reform Act, as you recite in your letter, provides that making, participating in the making and "in any way attempting to use his or her official position to influence a governmental decision" in which an official knows he/she has an interest are all prohibited. Having dispensed with the first two as inapplicable to the questions, the focus is on just what it means to use an official position to influence a decision. The applicable guideline says it means "furthering or attempting to affect in any manner any decision...." A key element, however, appears to have been lost in the translation of the statute to guideline form - - use of "official position." If it hasn't been lost, it was certainly ignored. Either way, interpretations of the guideline should assume that "furthering or attempting to affect in any manner any decision" must be by use of official position. Unless my reading of "use of official position" is too restrictive the broader - - in my view - - guideline definition is overly proscriptive, at least as interpreted, of just what an architect (or any other professional) may or may not offer a client.

continued...

Advice letter A-83-226, i.e., the applicable guideline as interpreted, prohibits, among other things, the architect/planning commissioner from (1) filling out applications for land use entitlements, (2) preparing drawings for use solely before the commission, (3) counselling a client about how best to present an item to the commission. I question whether in each of these prohibited activities, the architect/commissioner is using his "official position" to influence a decision. Is it to be assumed that in each of these instances there comes with the position knowledge or per se influence which renders the process unfair? Granted, if read literally the guideline doesn't leave you much room in dealing with the examples given. But it appears the better interpretation of the statute - - and certainly the statute prevails in cases of discrepancy with an implementing administrative guideline - - would leave the architect/commissioner free to perform the tasks cited by example. Isn't the better interpretation of "using...official position" to prohibit things like attempting to influence planning staff by direct contacts and making public statements about a proposed project? In the examples given an architect/commissioner is simply not using his/her official position to influence a decision.

The practical problem created by A-83-226 is that architects are in the position of either turning down all projects which need any approval by their commission or board, or doing the hair splitting required by A-83-226. If architects were, on the other hand, able to accept a project and perform all architectural services short of appearance before their commission/board, contact with city staff, and communications with colleagues on the commission, they would be able to accept more work and, in my opinion, avoid the official influence conflict.

Please give the matter some thought. Thank you.

Sincerely,


George C. Thacher
City Attorney

GCT:cc

cc: Mike McNally