



California Fair Political Practices Commission

March 11, 1986

Melvin L. Nutter
Wells Fargo Bank Building
100 Oceangate, Suite 720
Long Beach, CA 90802

Re: Your Request for Advice
Our File No. A-86-042

Dear Mr. Nutter:

Thank you for your request for advice concerning Government Code Sections 87401 and 87402.^{1/} The facts, as stated in your letter and in our telephone conversation, are as follows:

You are a former member and chairman of the California Coastal Commission. You are a practicing attorney at law and have been asked if you are available to advise and represent the owner of several large parcels of land in the Coastal Zone.

The parcels in question, as far as you know, have not been the subject of any coastal development permit applications before the Coastal Commission. However, they are located within a region for which a Land Use Plan has been prepared by local government. While a member of the Coastal Commission you participated in a hearing in which the Land Use Plan was denied. You also participated in a hearing in which the Coastal Commission suggested modifications to the Land Use Plan.

While the Land Use Plan covers a broad area and affects hundreds of parcels, both the Land Use Plan as submitted and the suggested modifications contain general policy provisions that could affect the use of the specific parcels in questions. For instance, the Coastal Commission suggested the

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated.

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Land Use Plan be modified to prohibit the alteration of stream beds except under certain very limited situations. A stream is located on one of the parcels.

The Land Use Plan assigns to the parcels (as well as to all other parcels in the plan area) limitations on the kind of uses and the intensity of development to be permitted. The suggested modifications propose different uses and a lower intensity of development for the parcels in question.

The owner of the parcels is satisfied with the provisions contained in the Land Use Plan as submitted to the Coastal Commission, but not with the modifications suggested by the Commission.

As is its right, the local government elected not to accept the suggested modifications and instead resubmitted its Land Use Plan, without substantial change, to the Coastal Commission. You retired from the Coastal Commission before the Commission reviewed the resubmitted plan. Since your retirement the Commission has voted to deny the plan as resubmitted and has voted to certify the plan subject to many suggested modifications. The new suggested modifications affect the parcels in question much as the previous suggested modifications did.

Procedurally, the local government may elect to accept the suggested modifications or may elect to submit a new plan or even its old original plan to the Coastal Commission for further review. The owner of the parcels in question has a right to participate in subsequent hearings on the Land Use Plan. He may elect to file one or more coastal development applications with the Coastal Commission for projects that may or may not be consistent with the Land Use Plan as submitted by local government or as the suggested modifications might revise the Land Use Plan.

QUESTION

You have asked whether you may provide coastal planning or permit advice to the landowner, discuss with Commission representatives the Land Use Policies on behalf of the landowner, and represent the landowner before the Coastal Commission as he tries to frame a development plan for his parcels.

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DISCUSSION

Section 87401 provides:

No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply:

(a) The State of California is a party or has a direct and substantial interest.

(b) The proceeding is one in which the former state administrative official participated.

Section 87402 provides:

No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401.

You are clearly a "former state administrative official." Section 87400. The question then, is whether you participated in any "proceeding" which would prohibit you from advising the landowner or representing the landowner in discussions with staff or before the Coastal Commission.

Section 87400(c) defines "Judicial, quasi-judicial or other proceeding" as meaning:

... any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency, including but not limited to any proceeding governed

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by Chapter 5 (commencing with Section 11500) of Division 3 of Title 2 of the Government Code.

In previous advice to the Coastal Commission, we stated:

Generally, much of your planning activities would appear to be a proceeding affecting a large number of persons and thus exempt from the provisions of AB 1048. However, you indicate that occasionally a land use plan for large landholdings becomes a kind of planned unit development similar to a conditional use permit. In such a situation, the matter would become a matter affecting a specific party. Where you are making a decision which would impact upon a specific party or a specific property, you are engaged in an action which would be subject to the bill.

Thus, if the plan imposes specific conditions on a party owning a specific piece of property, the former employee may not work for that party on that plan. On the other hand, if the plan is imposing specific conditions on many property owners within the jurisdiction of the plan, the former employee may work on the plan. We understand that the latter situation is more common than the former.^{2/}

You have indicated that both the Land Use Plan as submitted and the suggested modifications contain general policy provisions that could affect the use of the specific parcels in question. If any of the general policy provisions affect only the property owned by your potential clients or by your potential clients and a very limited number of other individuals, the planning activities of the Commission with respect to those parcels would be considered to be a "proceeding" within the meaning of the statute. However, if all of the specific conditions imposed on your potential clients' property are also imposed on many other landowners, the Commission's activities would not be considered to be a proceeding.

If you conclude that you participated in a proceeding within the meaning of the statute, the question becomes whether any proceeding in which you might become involved on behalf of the landowners would be the same proceeding in which you previously participated. This is a question which can be

^{2/} See Advice Letter No. A-80-105.

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answered only with additional facts not before us at this time. See enclosed Advice letter to Ruth Galanter, No. 82-079. You may wish to contact us for more specific advice as it becomes clear what matters the landowner will become involved in.

If you should have any questions, or if I can be of further assistance, please do not hesitate to contact me at (916) 322-5901.

Very truly yours,



John G. McLean
Counsel
Legal Division

JGM:plh
Enclosure

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February 3, 1986

Fair Political Practices Commission
428 J Street
Sacramento, California 95814

Re: Request for Advice

Gentlemen:

This is a request for advice pursuant to Government Code Section 83144(b) from a former member and chairman of the California Coastal Commission.

I am a practicing attorney at law and have been asked if I am available to advise and represent the owner of several large parcels of land in the Coastal Zone. By letter dated December 12, 1980, a copy of which is enclosed for your reference, you provided general advice to Coastal Commission employees and commissioners concerning the application of Government Code Sections 87400 to 87405. I require more specific advice.

The parcels in question, as far as I know, have not been the subject of any coastal development permit applications before the Coastal Commission. However, they are located within a region for which a Land Use Plan has been prepared by local government. While a member of the Coastal Commission I participated in a hearing in which the Land Use Plan was denied. I also participated in a hearing in which the Coastal Commission suggested modifications to the Land Use Plan.

Both the Land Use Plan as submitted and the suggested modifications contain general policy provisions that could affect the use of the specific parcels in question. For instance, the Coastal Commission suggested the Land Use Plan be modified to prohibit the alteration of stream beds except under certain very limited situations. A stream is located on one of the parcels.

The Land Use Plan assigns to the parcels (as well as to all other parcels in the plan area) limitations on the kinds of uses and the intensity of development to be permitted. The suggested modifications propose different uses and a lower intensity of development for the parcels in question.

The owner of the parcels is satisfied with the provisions contained in the Land Use Plan as submitted to the Coastal Commission, but not with the modifications suggested by the Commission.

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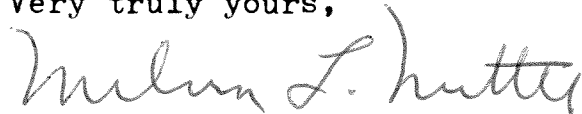
As is its right, the local government elected not to accept the suggested modifications and instead resubmitted its Land Use Plan, without substantial change, to the Coastal Commission. I retired from the Coastal Commission before the Commission reviewed the resubmitted plan. Since my retirement the Commission has voted to deny the plan as resubmitted and has voted to certify the plan subject to many suggested modifications. The new suggested modifications affect the parcels in question much as the previous suggested modifications did.

Procedurally, the local government may elect to accept the suggested modifications or may elect to submit a new plan or even its old original plan to the Coastal Commission for further review. The owner of the parcels in question has a right to participate in subsequent hearings on the Land Use Plan. He may elect to file one or more coastal development applications with the Coastal Commission for projects that may or may not be consistent with the Land Use Plan as submitted by local government or as the suggested modifications might revise the Land Use Plan.

Under what circumstances may I provide coastal planning or permit advice to the landowner? Is it permissible for me to discuss with Commission representatives the Land Use Policies on behalf of the landowner? May I represent the landowner before the Coastal Commission as he tries to frame a development plan for his parcels?

Your prompt attention to this request will be appreciated.

Very truly yours,



Melvin L. Nutter

MLN/cc

enclosure

State of California



Fair Political Practices Commission

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Technical Assistance •• Administration •• Executive/Legal •• Enforcement •• Statements of Economic Interest
(916) 322-5662 322-5660 322-5901 322-6441 322-6444

December 4, 1980

Roy Gorman
Coastal Commission
631 Howard Street, 4th Floor
San Francisco, CA 94105

Dear Roy:

Thank you for the letter from William Boyd, former Chief Counsel of the Commission, asking us for several interpretations of AB 1048 (Maxine Waters) which will become effective January 1, 1981. Your staff and our staff have had several telephone conversations about the scope of the bill and the operations of your agency. Several of your employees have expressed concerns about the provisions of AB 1048 and have indicated that they may leave your agency prior to the effective date of the bill.

AB 1048, which was sponsored by the Commission, is a very narrowly drawn bill which attempted to remedy a situation which we believe is not widespread throughout state government. The bill was drafted to apply to state employees who while working on a governmental matter which affects a specific party leave state service to work for the same party on that same matter. The bill was not intended to be a broad "revolving door" law such as the one adopted by Congress which covers federal employees. Thus, there are no prohibitions restricting a former employee from lobbying his or her former agency on regulations, on matters outside of the employee's scope of employment while in state service, or on matters which have arisen since the employee has left.

Turning to your specific questions, we offer the following advice:

A. Permit Analyst

1. The permit analyst may not accept employment with a permit applicant which would require the analyst to represent or advise the applicant in further proceedings before the Commission on that

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Government Code Section 87401 and 87402 clearly forbid such activity since the analyst would be working on the same proceeding on which he or she participated while a state employee. 1/

2. The permit analyst may accept employment with a permit holder to represent or advise the permit holder in carrying out the development. This assumes that the coastal commission is finished with its review of the permit and that there is no further involvement by the Commission on the project. An employee may not work on the project if the permit holder has to appear before the Commission or its staff on that project, and the former employee will either represent or advise him on the appearance.

Further, if the permit applicant received conditional approval of a development from the Coastal Commission and the Commission has approved some but not all of the conditions, the former employee may work for the permit applicant on the conditions which have been approved by the Commission. On the conditions which are still pending before the Commission, the former employee is prohibited from appearances before the Commission as well as assisting the permit applicant as to those pending conditions.

1/ 87401. No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof:

(a) By making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if;

(b) The State of California is a party or has a direct and substantial interest; and

(c) If the proceeding is one in which the former state administrative official participated.

87402. No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401.

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3. The permit analyst may accept employment with a former permit applicant on future permit applications or hearings before the Commission on different developments. AB 1048 does not restrict former employees from appearing before their former agency on matters on which they did not participate while employees.

The employees can represent the permit applicant on a new permit hearing after the original permit has lapsed.

4. A former employee may represent permit applicants who apply for permits which have been affected by decisions on which the employee has worked while with the Commission if those decisions were not specifically related to the employer. The bill prohibits only working on the same matters which were before the Commission while the employee was on the state payroll, not future matters which could be affected by the decisions of the employee.

B.1. The answers are the same as above for employees who participated in supervising or advisory roles provided that such employees were involved personally and substantially on the specific decisions. Government Code Section 87400(d). 2/ There are no restrictions on employees not involved personally and substantially even though the decisions were made by the Commission while the employees were working for the Commission.

Planning

You have outlined the planning process by which the Coastal Commission adopts local coastal plans and asked us questions relating to this aspect.

Under the Coastal Act, there are three distinct phases which are subject to the jurisdiction of the Coastal Commission: the land use plan, the approval of zoning pursuant to the provisions of the general plan and specific coastal development permit approval.

2/ 87400(d) "Participated" means to have taken part personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee, but excluding approval, disapproval or rendering of legal advisory opinions to departmental or agency staff which do not involve a specific party or parties.

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The land use plan under your statute is very specific. Public Resources Code Section 30108.5 defines the "Land Use Plan" as meaning "the relevant portions of a local government's general plan, or local coastal elements which are sufficiently detailed to indicate the kinds, location and intensity of land uses, the applicable resource protection and development policies and, where necessary, a listing of implementing actions."

Thus, when considering a land use plan, the Commission is not only considering general rules of applicability, such as access to the beach, but also specific rules applicable to specific pieces of property.

Either the regional commissions or the state commission must approve the land use plan and following the approval of a land use plan, the Coastal Act requires that zoning decisions be made in conformance with the land use plan. The local government must approve the zoning ordinance although these ordinances are subject to review by the regional commission and the state commission. Public Resources Code Section 30513. In some instances, both the land use plan and the zoning ordinance may be before the Commission or regional commission at the same time.

Finally, approvals of permits are based both on the land use plan and the zoning. After the local coastal program has been approved, coastal development permits are obtained from the local government although in some instances, the regional commission or the Commission also has authority to review the local government decisions if appealed. Public Resources Code Section 30600 and 30603. In limited cases, coastal permits must also be obtained from the regional commission or Commission. Public Resources Code Section 30601.

We believe that each part of the overall approval process is a different proceeding. Each has a distinct element of decision-making and different types of review. The land use plan is approved by the regional or state commission following submission by the local government, the zoning ordinances are approved by the local government (subject to review by the regional or state commission) and the coastal development permit are approved by the local government subject to review by the Commission.

Finally, AB 1048 applies only to proceedings before a state agency and thus the decisions by the local governments do not come within the scope of the bill.

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The questions you have raised under the Planning Section are not easily answered without more specific facts about the particular plan which is before the Commission.

Generally, much of your planning activities would appear to be a proceeding affecting a large number of persons and thus exempt from the provisions of AB 1048. However, you indicate that occasionally a land use plan for large land-holdings becomes a kind of planned unit development similar to a conditional use permit. In such a situation, the matter would become a matter affecting a specific party. Where you are making a decision which would impact upon a specific party or a specific property, you are engaged in an action which would be subject to the bill.

Thus, if the plan imposes specific conditions on a party owning a specific piece of property, the former employee may not work for that party on that plan. On the other hand, if the plan is imposing specific conditions on many property owners within the jurisdiction of the plan, the former employee may work on the plan. We understand that the latter situation is more common than the former.

A.1. A planner may accept employment from a local government to work on the implementation of the land use plan on which the planner worked while at the Commission.

2. and 3. A planner may accept employment from a landowner to work on coastal development permits under a land use plan on which the planner worked while at the Commission. Since we have determined that approval of a coastal development permit is a different proceeding than the approval of a land use plan, AB 1048 does not prohibit such activity on the part of a former employee. The fact that a landowner owns a "significant" amount of land in the jurisdiction and was involved in discussions with the planner during the formation of the land use plan does not alter our answer.

B. As to other professionals, our answer is the same as above. The employees must have worked on the matter personally and substantially before the provisions of the bill are applicable to them.

Finally, you have also asked us whether the provisions of AB 1048 apply to commissioners as well as employees. Government Code Sections 87401 and 87402 apply their terms to "state administrative officials." The term "state administrative official" is defined in Government Code Section 87400(b) as:

December 4, 1980

(b) "State administrative official" means every member, officer, employee or consultant of a state administrative agency who as part of his or her official responsibilities engages in any judicial, quasi-judicial or other proceeding in other than a purely clerical, secretarial or ministerial capacity.

We believe that this definition applies to commissioners and that they are covered by the terms of the bill.

We understand that you may have more questions about the applicability of the bill to your agency. We look forward to assisting you in every way.

Sincerely,

Robert M. Stern

Robert M. Stern
General Counsel

RMS:nc