

2. What types of contact with city staff may Mr. Dunham have regarding architectural drawings submitted for approval to the design review committee, planning commission or city council?

CONCLUSIONS

1. and 2. The Act prohibits Mr. Dunham from attempting to use his official position to influence a decision before the design review committee. Conditions of approval are part of the decisionmaking process because they are requirements the city may impose to approve a project. Therefore, when Mr. Dunham's architectural drawings are before the design review committee, Mr. Dunham may not discuss conditions for approval with city staff. At this point, Mr. Dunham is limited to responding to staff questions about the processing or technical evaluation of the drawings.

Futhermore, when the planning commission is about to review plans which it later will refer on to the design review committee, Mr. Dunham also is limited to responding to staff questions about the processing or technical evaluation of these drawings. He may not discuss conditions of approval with city staff until after the planning commission and design review committee have acted on those plans.

When the same or other architectural drawings are before the city council, however, Mr. Dunham may discuss with city staff conditions of approval, the drawings, and any other questions about the project.

FACTS

Mr. Dunham is a member of the five-person Design Review Committee of the City of Novato. Criteria for membership on the committee is residency, having a business, or being employed in Novato. Membership in a specific profession is not required.

The same city staff members serve as staff for the design review committee, planning commission and city council. Usually the planning commission reviews a project before the design review committee reviews it. The design review committee reviews and comments on master and specific development plans and also has authority to approve site plans, landscaping plans and architectural elevations. These decisions are final unless appealed to the city council.

When the design review committee approves a site plan, landscaping plan or architectural elevation, the design review committee also may impose conditions on the project. For example, the committee may require that any plan alterations be approved by the Department of Community Development, that design review approval expire within 2 years, unless a building permit has been issued, and that above-grade utility facilities, such as traffic signal poles and transformers, be painted a certain color.

Mr. Dunham is an architect who prepares architectural drawings for clients' projects. He submits these drawings to the design review committee, planning commission, or city council.

ANALYSIS

Section 87100 prohibits a public official from making, participating in making or in any way attempting to influence a governmental decision in which the official has a financial interest. An official has a financial interest in a decision that will have a foreseeable and material financial effect, different from the effect on the general public, on the official or the official's immediate family or on a source of income of \$250 or more provided to, received by or promised to the official within 12 months before a decision. (Section 87103(c).)

Mr. Dunham is a public official. (Section 82048.) He is disqualified from a decision that will have a foreseeable and material financial effect on a client who has paid or promised to pay him \$250 or more within 12 months before the decision. (Sections 87100 and 87103(c).) Disqualification also means he may not use his official position to influence a decision in which he has a financial interest. (Section 87100 and Regulation 18700.1, copy enclosed.)

Using official position to influence a decision

Regulation 18700.1 describes, as follows, the prohibited conduct of "using [one's] official position to influence a decision:"

(a) With regard to a governmental decision which is within or before an official's agency or an agency appointed by or subject to the budgetary control of his or her 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. Attempts to influence include, but are not limited to, appearances or contacts by the official on behalf of a business entity, client, or customer.

Regulation 18700.1(a).

Pursuant to subdivision (a), Mr. Dunham may not appear before the design review committee to represent a client. Appearing before the committee would be an improper attempt to use his official position to influence a decision.

Nevertheless, because the planning commission and the city council are not under the appointive or budgetary control of the design review committee, Mr. Dunham may appear before these agencies to represent a client, as long as he does not purport to act on behalf of the design review committee. Purporting to represent the design review committee includes using official stationery to communicate with another agency. (Regulation 18700.1(c).)

Necessary contacts with staff

Even if Mr. Dunham cannot represent a client before the design review committee, subdivision (b)(4) of Regulation 18700.1 allows the following limited contact with city staff:

(b) Notwithstanding subsection (a) an official is not attempting to use his or her official position to influence a governmental decision of an agency covered by subsection (a) if the official:

(4) Prepares drawings or submissions of an architectural, engineering or similar nature to be used by a client in connection with a proceeding before any agency. However, this provision applies only if the official has no other direct oral or written contact with the agency with regard to the client's proceeding before the agency except for necessary contact with agency staff concerning the processing or evaluation of the drawings or submissions prepared by the official.

Regulation 18700(b)(4).

Subdivision (b)(4) creates an exception to the prohibition on attempting to influence a decision, contained in subdivision (a). Subdivision (b)(4) allows Mr. Dunham to prepare architectural drawings for submission to the design review committee. This section also allows him to respond to questions from city staff about the processing or evaluation of his drawings. (Levinger Advice Letter, No. I-88-328, copy enclosed.) He, however, still may not appear before the design review committee.

You have asked whether "necessary contact about the processing or evaluation of drawings" allows Mr. Dunham to discuss with city staff conditions for approval of a project. "Conditions for approval" of a project means requirements the design review committee imposes on an applicant when approving a project. These conditions include procedures for altering approved plans, time limits for obtaining building permits, or a color scheme for above-ground utilities. All these elements are part of a decision. They do not concern the processing or evaluation of architectural drawings. Therefore, when his drawings are about to be reviewed by the design review committee, Mr. Dunham may not attempt to influence the committee's decision by discussing conditions of approval with city staff.

Furthermore, the same city staff reviews plans for the design review committee, planning commission, and the city council. The planning commission first reviews plans and then passes them on to the design review committee. Because the same city staff reviews all the plans, Mr. Dunham is prohibited from attempting to influence the same staff members about a decision that the design review committee eventually will consider. Therefore, Mr. Dunham may not negotiate conditions of approval with staff for a plan before the planning commission, which later will be referred to the design review committee.

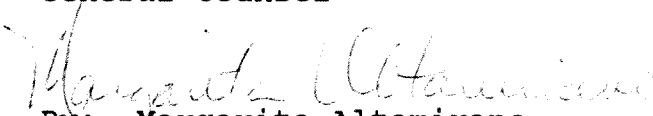
On the other hand, when the city council is about to review Mr. Dunham's architectural drawings, he may discuss with city staff conditions for approval of the project for which the drawings were prepared. He may do so because he will no longer be attempting to influence a decision to be considered by his own agency.

Natalie E. West
December 16, 1988
Page -6-

I hope this letter provides you with adequate guidance. Please call me at (916) 322-5901 if you have any questions about this letter.

Sincerely,

Diane M. Griffiths
General Counsel


By: Margarita Altamirano
Counsel, Legal Division

DMG:MA:aa

Enclosures

MEYERS, NAVE, RIBACK & WEST

MICHAEL R. NAVE
STEVEN R. MEYERS
NATALIE E. WEST
ELIZABETH H. SILVER
MICHAEL S. RIBACK
LESLIE OSTER
MICHAEL F. RODRIQUEZ

A PROFESSIONAL LAW CORPORATION
CIVIC CENTER COMPLEX
835 EAST 14TH STREET
SAN LEANDRO, CALIFORNIA 94577
(415) 577-3333
FAX (415) 577-3365

PENINSULA OFFICE
1220 HOWARD AVE., SUITE 250
BURLINGAME, CA 94010-4211
(415) 348-7130
FAX (415) 342-0886

MARIN OFFICE
1202 GRANT AVE., SUITE E
NOVATO, CA 94945
(415) 892-8878

OF COUNSEL
THOMAS F. BERTRAND
FRANCIS J. STILLMAN

REPLY TO:

San Leandro

October 26, 1988

Oct 27 9:19 AM '88
J. J. J.

Margarita Altamirano
Counsel, Legal Division
California Fair Political
Practices Commission
428 "J" Street, Suite 800
P.O. Box 807
Sacramento, California 95804-0807

Re: Request For Advice: Government Code Section 83114

Dear Ms. Altamirano:

This letter requests advice on behalf of Alan Dunham, a member of the Design Review Committee in the City of Novato. Mr. Dunham is also an architect.

QUESTIONS

When Mr. Dunham prepares architectural drawings for a project in Novato, can he discuss conditions of approval with City planning staff? What is the permissible scope of contact between a public official and agency staff under 2 California Administrative Code Section 18700.1 (b)(4)? Do the same restrictions apply when a member of the Design Review Committee prepares plans that are submitted for review by the Planning Commission or City Council, and the same persons who are "agency staff" as used in that regulation serve as planning staff for both the DRC and Planning Commission?

ANALYSIS

The City of Novato has a Design Review Committee composed of five members who are residents of Novato or maintain a business or are employed in the City of Novato. The general factual and legal backgrounds are set forth in my enclosed memorandum dated September 15, 1988, which I advised members of the Committee

Margarita Altamirano, Counsel
Legal Division
California Fair Political
Practices Commission
October 26, 1988
Page: 2

concerning the limitations that apply when they represent clients before the Committee. In the context of that memorandum, members of the Committee requested further guidance concerning the specific questions set forth above.

In Novato the same planning staff serves as staff to the Planning Commission, City Council and Design Review Committee. Usually a project will be reviewed by the Planning Commission before design review is obtained. Mr. Dunham who is a member of the Design Review Committee and practices architecture in Novato routinely works on projects which involve the submitting of plans and drawings to the planning department. These plans are usually reviewed by the staff and submitted to the Planning Commission for approval. The projects will eventually come before the Design Review Committee for design review and approval.

In attempting to interpret and apply Regulation 18700.1, we are unsure about the meaning of the words "evaluation" and "necessary contact" as used in paragraph (b)(4). That is, we understand that Mr. Dunham is allowed to prepare drawings in connection with his projects. However, he is restricted of having "No other direct, oral or written contact with the agency with regard to the clients proceeding before the agency except for necessary contact with agency staff concerning the processing or evaluation of the drawings or submissions that he has prepared." What, specifically, contacts can he have with the planning staff? Does this regulation mean that he can have contact with the City staff regarding the project up to the time that the project is considered by the Design Review Committee? Can he discuss conditions of approval with the planning staff with respect to planning commission approvals for the project? Can he discuss conditions of approval with the planning staff with regard to the design review approval of the project? A copy of the minutes from the meeting at which Mr. Dunham made his request is enclosed for your information.

Margarita Altamirano, Counsel
Legal Division
California Fair Political
Practices Commission
October 26, 1988
Page: 3

Thank you for your prompt response to this inquiry.
Please do not hesitate to contact me if you have any additional
questions.

Very truly yours,

MEYERS, NAVE, RIBACK & WEST



Natalie E. West

NEW/dks

Enclosures

. cc: Mark Westfall, Principal Planner

To consider three signs for a total of 51 sq. ft. of sign area at 350 Rowland Boulevard.

Kris Richardson gave Committee Members the landscape plan for Lynwood Square, labeled Exhibit "B," DR 88-018.

Chairman Kelly called for any comments from Committee Members. A discussion including suggestions and exchanges of ideas took place.

The consensus was that the Kragen Auto Works freestanding sign should be eliminated and the four signs on the building should remain. The sign proposed on the south face of the building should be relocated from the east corner to the west corner.

M/S Campbell/Kelly to delete the freestanding sign and leave the four signs on the building, moving the sign on the south face from the east corner to the west corner in agenda item C-1 (Kragen Auto Works).
Vote: (4-0-1), with Alan Dunham abstaining.

In the matter of C-2 (Sloat Garden Center) M/S Campbell/Luff to approve the three Sloat signs as submitted. Vote: (4-0-1), with Alan Dunham abstaining.

D. CONTINUED ITEMS:

E. NEW ITEMS:

E-1 DISCUSSION WITH CITY ATTORNEY ON LEGAL ISSUES

Mark Westfall, Principal Planner, related the purpose of this item is to discuss the memorandum from the City Attorney dated September 15, 1988 and addressed to members of the Design Review Committee.

Natalie West, City Attorney, then began by pointing out that California, as in most areas of the law, is ahead of other parts of the country in dealing with the issue before members of the Committee; that issue being whether or not a member of the Design Review Committee could appear before the Committee to present an application on behalf of a client.

City Attorney West explained and elaborated upon her memorandum and took questions from Design Review Committee Members. There ensued a lengthy discussion among the Committee Members and Ms. West.

Ms. West reviewed the entire FPPC (Fair Political Practices Commission) Regulation 18700.1(a), and particularly stressed the most relevant portions for the Committee Members, and discussed conflicts of interest that might arise while members are serving on the Design Review Committee.

In conclusion, City Attorney West invited members of the Design Review Committee to feel free to call her if they have any questions concerning a possible conflict of interest. She pointed out that many government officials are finding themselves facing enforcement

proceedings under the conflict of interest laws. She stated it would be better to check with her and avoid such problems since she has had an opportunity to gain expertise in these matters.

Ms. West cautioned against any discussions with staff that might be construed as negotiating conditions of approval, which can happen very easily, and she asked that extra care be taken in this area. She also stated that if any members think any of this language is ambiguous, or if they have some questions about what it means, she would be glad to write to the FPPC asking them to clarify certain phrases with an advice letter.

Alan Dunham took exception to certain areas of the law and said he found them ridiculous because as an architect he would be in the position of having to present plans to City staff and it would be difficult not to discuss conditions for approval.

Mark Westfall interjected that it might be ridiculous for Mr. Dunham to think that he could design a project without having that kind of contact with staff, but it isn't ridiculous for somebody involved with Fair Political Practices interpretation or advocacy to think that that is a conflict of interest (for an architect who is a member of the Design Review Committee) to have this type of close relationship with staff on a project in which staff has to make recommendations on that project to that Design Review Committee.

Attorney West suggested writing a letter to the FPPC telling them that Mr. Dunham is a member of the Design Review Committee, and that he routinely practices architecture in Novato which includes submitting plans and drawings to the Planning Department, and which will eventually come before the Design Review Committee for review. City ordinances are phrased this way and that way, and frequently call for the exercise of judgment by the staff. Then the City can ask how this regulation is supposed to apply to him insofar as he has contact with the staff concerning his clients' plans after they're submitted.

Mark Westfall stated he felt writing such a letter would be an excellent idea, but he would like to include the question of what does the word "evaluation," in Section 18700.1(b)4 mean?

Attorney West said one tries to figure out what the FPPC means by "necessary contact." But she felt questions usually would be triggered by a citizen calling them to voice an informal complaint. This is kept confidential until the FPPC conducts an investigation. Or, they can make a formal written complaint which carries a penalty for perjury, and that complaint becomes public.

Ms. West then discussed penalties for violations. Allowing that it is a complex statute, she stated her opinion that the basic principle is supposed to be that you must avoid actuality or the appearance of improper influence, and public conception is what led to these standards.

Attorney West then called attention of the Committee Members to the two areas that had been brought up to her that might be of particular concern for the Committee are: Any questions, or anything that comes up where a Committee Member is being asked to make or participate in the making of a decision involving a project with which there is a financial connection to the Committee Member, it is suggested that you find out what your responsibilities are; also, it is not just voting, it is the participating in the making of the decision or in any way attempting to use your position to influence the outcome. That is a very broad standard. You can't sit on the Committee and in any way debate or discuss the application, and it also means that you have to be very careful in the way you deal with everything else. It is difficult because some of the definitions the statute gives are so broad. There must, however, be some financial connection before you have to disqualify yourself. Aside from conflict of interest considerations, if you've listened to evidence outside the record, you need to state that at the beginning of the hearing, and summarize what it is such as site visits and things like that. This involves due process and the rules of procedure that are applicable to Committee Members in the hearing.

There followed a discussion, and many questions and answers involving various circumstances that might arise.

Mark Westfall brought up a couple of issues that he felt needed to be addressed, such as multiple enterprises. He asked "What if a member of the Committee represents one entity where he is not in actual conflict even though he represents another entity operated by these same principals," and Natalie West answered that the Committee Member must exclude himself in this case.

On one of a kind type of problems that might be peculiar to only one member, Natalie West asked that she be consulted at the time the question presents itself.

Attorney West then briefly reviewed the Brown Act, and cautioned Committee Members to be very careful whenever three members are together not to discuss anything that would put you in violation. Again, she offered to be available to phone calls from any members when a question comes up in this area.

Attorney West then left the meeting at 8:45 p.m.

Robert Luff left the meeting at 8:45 p.m.

F. INFORMAL PROJECT REVIEW:

G. APPROVAL OF MINUTES:

G-1 August 3, 1988

M/S Doughty/Kelly to approve the minutes as presented. Vote: 4-0 with Luff absent.

MEYERS, NAVE, RIBACK & WEST

MICHAEL R. NAVE
STEVEN R. MEYERS
NATALIE E. WEST
ELIZABETH H. SILVER
MICHAEL S. RIBACK
LESLIE OSTER
MICHAEL P. RODRIQUEZ

A PROFESSIONAL LAW CORPORATION
CIVIC CENTER COMPLEX
835 EAST 14TH STREET
SAN LEANDRO, CALIFORNIA 94577
(415) 577-3333
FAX (415) 577-3365

PENINSULA OFFICE
1220 HOWARD AVE., SUITE 250
BURLINGAME, CA 94010-4211
415) 348-7130
FAX (415) 342-0886

MARIN OFFICE
1202 GRANT AVE., SUITE E
NOVATO, CA 94945
415) 892-8878

OF COUNSEL
THOMAS F. BERTRAND
FRANCIS J. STILLMAN

REPLY TO:

MEMORANDUM

TO: Members of the Design Review Committee,
Through Mark Westfall, Principal Planner

DATE: September 15, 1988

FROM: Natalie E. West, City Attorney

RE: Presentation Of Plans By Members Of The Design Review Committee

Issue:

Can a member of the Design Review Committee appear before the Committee to present an application on behalf of a client?

Conclusion:

If the committee member receives fees of \$250 or more from a client in a year, the member must disqualify himself from making or participating in the making of any decision involving that client. This prohibition also means that a member of the Design Review Committee is prohibited from representing that client before the Committee.

Analysis:

The Political Reform Act, Government Code § 87100 et seq., regulates conflicts of interest involving public officials. Members of the Design Review Committee are public officials. See Government Code § 82048, 82041.

Public officials are prohibited from making, participating in the making of or in any way attempting to use their official position to influence governmental decisions in which they have financial interests. The Fair Political Practices Commission has determined that "attempts to influence include, but are not limited to, appearances or contacts by the official on behalf of a business entity, client, or customer." FPPC Regulation 18700.1(a). A copy of the entire regulation is attached hereto and I have underlined the most relevant portions for your convenience.

Members of the Design Review Committee
Through Mark Westfall
September 15, 1988
Page: 2

The regulation sets forth very narrow circumstances in which a member of a board or commission can appear before that body on behalf of a client. Those circumstances are not applicable to the Design Review Committee. Regulation 18700.1(b)(5) allows a member of a design committee to present drawings or submissions of an architectural, engineering or similar nature which the official has provided for a client if all of the following three criteria are met.

1. The Design Review Committee reviews plans and makes recommendations to the planning commission or other agency but does not have decision-making responsibility.
2. The ordinance establishing the Design Review Committee requires that the Committee include architects, engineers or persons in related professions and the official is appointed to fulfill the legal requirement and;
3. The official is a sole practitioner.

The Design Review Committee has a variety of different responsibilities. The Committee reviews and comments on masterplans and precise development plans. For those types of projects, the Committee's limited responsibilities meet the first standard. However, as discussed below, the other standards are not met. With respect to projects requiring design review, the powers and duties of the Design Review Committee are set forth in Novato Municipal Code Section 19-17. The Committee is given authority to approve the site plan, the landscaping plan and architectural elevations. Section 19-17(e) provides that the Committee's decision is final unless appealed to the City Council. Consequently, the Design Review Committee has decision-making power which moves it outside the purview of the first standard in the FPPC regulation.

With respect to membership of the Committee, NMC Section 2-11 establishes the Committee. The only criteria for membership are set forth in Section 2-11.2 which requires that members be residents of Novato or maintain a business or be employed in Novato. There is no requirement that membership include representatives of certain specified professions. Consequently, Novato's Design Review Committee does not meet the second criterion for exemption from the general prohibition against appearing before a Commission of which the official is a member.

Members of the Design Review Committee
Through Mark Westfall
September 15, 1988
Page: 3

Consequently, members of the Design Review Committee should refrain from representing clients before the Committee if the clients meet the statutory threshold for "source of income," "Source of income" includes any client from whom the Committee member received or incurred fees aggregating \$250 or more in value within one (1) year prior to the time the decision was made.

With respect to business entities, the prohibition applies if the committee member owns ten percent (10%) or more of the business entity and if his pro rata share of fees from the client aggregate \$250 or more in value within one (1) year prior to the decision.

I hope this information is of assistance. On Wednesday, September 21, 1988, I will meet with you to discuss conflicts of interest that may arise while you are serving on the Design Review Committee. I look forward to answering any questions you may have at that time.

Very truly yours,

MEYERS, NAVE, RIBACK & WEST


Natalie E. West

NEW/dks

att

(Regulations of the Fair Political Practices Commission
Title 2, Division 6 of the California Administrative Code)

18700.1. Using Official Position to Influence (87100)

(a) With regard to a governmental decision which is within or before an official's agency or an agency appointed by or subject to the budgetary control of his or her 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. Attempts to influence include, but are not limited to, appearances or contacts by the official on behalf of a business entity, client, or customer.

(b) Notwithstanding subsection (a) an official is not attempting to use his or her official position to influence a governmental decision of an agency covered by subsection (a) if the official:

(1) Appears in the same manner as any other member of the general public before an the 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.

(3) Negotiates his or her compensation or the terms and conditions of his or her employment or contract.

(4) Prepares drawings or submissions of an architectural, engineering or similar nature to be used by a client in connection with a proceeding before any the agency. However, this provision applies only if the official has no other direct oral or written contact with the agency with regard to the client's proceeding before the agency except for necessary contact with agency staff concerning the processing or evaluation of the drawings or submissions prepared by the official.

(5) Appears before a design or architectural review committee or similar body of which he or she is a member to present drawings or submissions of an architectural, engineering or similar nature which the

official has prepared for a client if the following three criteria are met:

(A) The review committee's sole function is to review architectural or engineering plans or designs and to make recommendations in that instance concerning those plans or designs to a planning commission or other agency;

(B) The ordinance or other provision of law requires that the review committee include architects, engineers or persons in related professions, and the official was appointed to the body to fulfill this requirement; and

(C) The official is a sole practitioner.

(C) 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.

(Gov. Code Section 87100)

History: New section filed 8/2/85; effective 9/1/85.

88-406
413

MEYERS, NAVE, RIBACK & WEST

MICHAEL R. NAVE
STEVEN R. MEYERS
NATALIE E. WEST
ELIZABETH H. SILVER
MICHAEL S. RIBACK
LESLIE OSTER
MICHAEL F. RODRIQUEZ

A PROFESSIONAL LAW CORPORATION

CIVIC CENTER COMPLEX
835 EAST 14TH STREET
SAN LEANDRO, CALIFORNIA 94577
(415) 577-3333
FAX (415) 577-3365

PENINSULA OFFICE

1220 HOWARD AVE., SUITE 250
BURLINGAME, CA 94010-4211
(415) 348-7130
FAX (415) 342-0886

MARIN OFFICE

1202 GRANT AVE., SUITE E
NOVATO, CA 94945
(415) 892-8878

OF COUNSEL
THOMAS F. BERTRAND
FRANCIS J. STILLMAN

REPLY TO:

San Leandro

October 26, 1988

Margarita Altamirano
Counsel, Legal Division
California Fair Political
Practices Commission
428 "J" Street, Suite 800
P.O. Box 807
Sacramento, California 95804-0807

OCT 29 8 18 AM '88
F P P C

Re: Request For Advice: Government Code Section 83114

Dear Ms. Altamirano:

This letter requests advice on behalf of Alan Dunham, a member of the Design Review Committee in the City of Novato. Mr. Dunham is also an architect.

QUESTIONS

When Mr. Dunham prepares architectural drawings for a project in Novato, can he discuss conditions of approval with City planning staff? What is the permissible scope of contact between a public official and agency staff under 2 California Administrative Code Section 18700.1 (b)(4)? Do the same restrictions apply when a member of the Design Review Committee prepares plans that are submitted for review by the Planning Commission or City Council, and the same persons who are "agency staff" as used in that regulation serve as planning staff for both the DRC and Planning Commission?

ANALYSIS

The City of Novato has a Design Review Committee composed of five members who are residents of Novato or maintain a business or are employed in the City of Novato. The general factual and legal backgrounds are set forth in my enclosed memorandum dated September 15, 1988, which I advised members of the Committee

Margarita Altamirano, Counsel
Legal Division
California Fair Political
Practices Commission
October 26, 1988
Page: 2

concerning the limitations that apply when they represent clients before the Committee. In the context of that memorandum, members of the Committee requested further guidance concerning the specific questions set forth above.

In Novato the same planning staff serves as staff to the Planning Commission, City Council and Design Review Committee. Usually a project will be reviewed by the Planning Commission before design review is obtained. Mr. Dunham who is a member of the Design Review Committee and practices architecture in Novato routinely works on projects which involve the submitting of plans and drawings to the planning department. These plans are usually reviewed by the staff and submitted to the Planning Commission for approval. The projects will eventually come before the Design Review Committee for design review and approval.

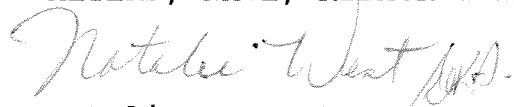
In attempting to interpret and apply Regulation 18700.1, we are unsure about the meaning of the words "evaluation" and "necessary contact" as used in paragraph (b)(4). That is, we understand that Mr. Dunham is allowed to prepare drawings in connection with his projects. However, he is restricted of having "No other direct, oral or written contact with the agency with regard to the clients proceeding before the agency except for necessary contact with agency staff concerning the processing or evaluation of the drawings or submissions that he has prepared." What, specifically, contacts can he have with the planning staff? Does this regulation mean that he can have contact with the City staff regarding the project up to the time that the project is considered by the Design Review Committee? Can he discuss conditions of approval with the planning staff with respect to planning commission approvals for the project? Can he discuss conditions of approval with the planning staff with regard to the design review approval of the project? A copy of the minutes from the meeting at which Mr. Dunham made his request is enclosed for your information.

Margarita Altamirano, Counsel
Legal Division
California Fair Political
Practices Commission
October 26, 1988
Page: 3

Thank you for your prompt response to this inquiry.
Please do not hesitate to contact me if you have any additional
questions.

Very truly yours,

MEYERS, NAVE, RIBACK & WEST

A handwritten signature in cursive script that reads "Natalie E. West". The signature is written in dark ink and is positioned above the typed name.

Natalie E. West

NEW/dks

Enclosures

cc: Mark Westfall, Principal Planner

88-406
88-412

To consider three signs for a total of 51 sq. ft. of sign area at 350 Rowland Boulevard.

Kris Richardson gave Committee Members the landscape plan for Lynwood Square, labeled Exhibit "B," DR 88-018.

Chairman Kelly called for any comments from Committee Members. A discussion including suggestions and exchanges of ideas took place.

The consensus was that the Kragen Auto Works freestanding sign should be eliminated and the four signs on the building should remain. The sign proposed on the south face of the building should be relocated from the east corner to the west corner.

M/S Campbell/Kelly to delete the freestanding sign and leave the four signs on the building, moving the sign on the south face from the east corner to the west corner in agenda item C-1 (Kragen Auto Works).
Vote: (4-0-1), with Alan Dunham abstaining.

In the matter of C-2 (Sloat Garden Center) M/S Campbell/Luff to approve the three Sloat signs as submitted. Vote: (4-0-1), with Alan Dunham abstaining.

D. CONTINUED ITEMS:

E. NEW ITEMS:

E-1 DISCUSSION WITH CITY ATTORNEY ON LEGAL ISSUES

Mark Westfall, Principal Planner, related the purpose of this item is to discuss the memorandum from the City Attorney dated September 15, 1988 and addressed to members of the Design Review Committee.

Natalie West, City Attorney, then began by pointing out that California, as in most areas of the law, is ahead of other parts of the country in dealing with the issue before members of the Committee; that issue being whether or not a member of the Design Review Committee could appear before the Committee to present an application on behalf of a client.

City Attorney West explained and elaborated upon her memorandum and took questions from Design Review Committee Members. There ensued a lengthy discussion among the Committee Members and Ms. West.

Ms. West reviewed the entire FPPC (Fair Political Practices Commission) Regulation 18700.1(a), and particularly stressed the most relevant portions for the Committee Members, and discussed conflicts of interest that might arise while members are serving on the Design Review Committee.

In conclusion, City Attorney West invited members of the Design Review Committee to feel free to call her if they have any questions concerning a possible conflict of interest. She pointed out that many government officials are finding themselves facing enforcement

proceedings under the conflict of interest laws. She stated it would be better to check with her and avoid such problems since she has had an opportunity to gain expertise in these matters.

Ms. West cautioned against any discussions with staff that might be construed as negotiating conditions of approval, which can happen very easily, and she asked that extra care be taken in this area. She also stated that if any members think any of this language is ambiguous, or if they have some questions about what it means, she would be glad to write to the FPPC asking them to clarify certain phrases with an advice letter.

Alan Dunham took exception to certain areas of the law and said he found them ridiculous because as an architect he would be in the position of having to present plans to City staff and it would be difficult not to discuss conditions for approval.

Mark Westfall interjected that it might be ridiculous for Mr. Dunham to think that he could design a project without having that kind of contact with staff, but it isn't ridiculous for somebody involved with Fair Political Practices interpretation or advocacy to think that that is a conflict of interest (for an architect who is a member of the Design Review Committee) to have this type of close relationship with staff on a project in which staff has to make recommendations on that project to that Design Review Committee.

Attorney West suggested writing a letter to the FPPC telling them that Mr. Dunham is a member of the Design Review Committee, and that he routinely practices architecture in Novato which includes submitting plans and drawings to the Planning Department, and which will eventually come before the Design Review Committee for review. City ordinances are phrased this way and that way, and frequently call for the exercise of judgment by the staff. Then the City can ask how this regulation is supposed to apply to him insofar as he has contact with the staff concerning his clients' plans after they're submitted.

Mark Westfall stated he felt writing such a letter would be an excellent idea, but he would like to include the question of what does the word "evaluation," in Section 18700.1(b)4 mean?

Attorney West said one tries to figure out what the FPPC means by "necessary contact." But she felt questions usually would be triggered by a citizen calling them to voice an informal complaint. This is kept confidential until the FPPC conducts an investigation. Or, they can make a formal written complaint which carries a penalty for perjury, and that complaint becomes public.

Ms. West then discussed penalties for violations. Allowing that it is a complex statute, she stated her opinion that the basic principle is supposed to be that you must avoid actuality or the appearance of improper influence, and public conception is what led to these standards.

Attorney West then called attention of the Committee Members to the two areas that had been brought up to her that might be of particular concern for the Committee are: Any questions, or anything that comes up where a Committee Member is being asked to make or participate in the making of a decision involving a project with which there is a financial connection to the Committee Member, it is suggested that you find out what your responsibilities are; also, it is not just voting, it is the participating in the making of the decision or in any way attempting to use your position to influence the outcome. That is a very broad standard. You can't sit on the Committee and in any way debate or discuss the application, and it also means that you have to be very careful in the way you deal with everything else. It is difficult because some of the definitions the statute gives are so broad. There must, however, be some financial connection before you have to disqualify yourself. Aside from conflict of interest considerations, if you've listened to evidence outside the record, you need to state that at the beginning of the hearing, and summarize what it is such as site visits and things like that. This involves due process and the rules of procedure that are applicable to Committee Members in the hearing.

There followed a discussion, and many questions and answers involving various circumstances that might arise.

Mark Westfall brought up a couple of issues that he felt needed to be addressed, such as multiple enterprises. He asked "What if a member of the Committee represents one entity where he is not in actual conflict even though he represents another entity operated by these same principals," and Natalie West answered that the Committee Member must exclude himself in this case.

On one of a kind type of problems that might be peculiar to only one member, Natalie West asked that she be consulted at the time the question presents itself.

Attorney West then briefly reviewed the Brown Act, and cautioned Committee Members to be very careful whenever three members are together not to discuss anything that would put you in violation. Again, she offered to be available to phone calls from any members when a question comes up in this area.

Attorney West then left the meeting at 8:45 p.m.

Robert Luff left the meeting at 8:45 p.m.

F. INFORMAL PROJECT REVIEW:

G. APPROVAL OF MINUTES:

G-1 August 3, 1988

M/S Doughty/Kelly to approve the minutes as presented. Vote: 4-0 with Luff absent.

MEYERS, NAVE, RIBACK & WEST

MICHAEL R. NAVE
STEVEN R. MEYERS
NATALIE E. WEST
ELIZABETH H. SILVER
MICHAEL S. RIBACK
LESLIE OSTER
MICHAEL F. RODRIQUEZ

A PROFESSIONAL LAW CORPORATION
CIVIC CENTER COMPLEX
835 EAST 14TH STREET
SAN LEANDRO, CALIFORNIA 94577
(415) 577-3333
FAX (415) 577-3365

PENINSULA OFFICE
1220 HOWARD AVE., SUITE 250
BURLINGAME, CA 94010-4211
(415) 348-7130
FAX (415) 342-0886

MARIN OFFICE
1202 GRANT AVE., SUITE E
NOVATO, CA 94945
(415) 892-8878

OF COUNSEL
THOMAS F. BERTRAND
FRANCIS J. STILLMAN

REPLY TO:

MEMORANDUM

TO: Members of the Design Review Committee,
Through Mark Westfall, Principal Planner

DATE: September 15, 1988

FROM: Natalie E. West, City Attorney

RE: Presentation Of Plans By Members Of The Design Review Committee

Issue:

Can a member of the Design Review Committee appear before the Committee to present an application on behalf of a client?

Conclusion:

If the committee member receives fees of \$250 or more from a client in a year, the member must disqualify himself from making or participating in the making of any decision involving that client. This prohibition also means that a member of the Design Review Committee is prohibited from representing that client before the Committee.

Analysis:

The Political Reform Act, Government Code § 87100 et seq., regulates conflicts of interest involving public officials. Members of the Design Review Committee are public officials. See Government Code § 82048, 82041.

Public officials are prohibited from making, participating in the making of or in any way attempting to use their official position to influence governmental decisions in which they have financial interests. The Fair Political Practices Commission has determined that "attempts to influence include, but are not limited to, appearances or contacts by the official on behalf of a business entity, client, or customer." FPPC Regulation 18700.1(a). A copy of the entire regulation is attached hereto and I have underlined the most relevant portions for your convenience.

Members of the Design Review Committee
Through Mark Westfall
September 15, 1988
Page: 2

The regulation sets forth very narrow circumstances in which a member of a board or commission can appear before that body on behalf of a client. Those circumstances are not applicable to the Design Review Committee. Regulation 18700.1(b)(5) allows a member of a design committee to present drawings or submissions of an architectural, engineering or similar nature which the official has provided for a client if all of the following three criteria are met.

1. The Design Review Committee reviews plans and makes recommendations to the planning commission or other agency but does not have decision-making responsibility.
2. The ordinance establishing the Design Review Committee requires that the Committee include architects, engineers or persons in related professions and the official is appointed to fulfill the legal requirement and;
3. The official is a sole practitioner.

The Design Review Committee has a variety of different responsibilities. The Committee reviews and comments on masterplans and precise development plans. For those types of projects, the Committee's limited responsibilities meet the first standard. However, as discussed below, the other standards are not met. With respect to projects requiring design review, the powers and duties of the Design Review Committee are set forth in Novato Municipal Code Section 19-17. The Committee is given authority to approve the site plan, the landscaping plan and architectural elevations. Section 19-17(e) provides that the Committee's decision is final unless appealed to the City Council. Consequently, the Design Review Committee has decision-making power which moves it outside the purview of the first standard in the FPPC regulation.

With respect to membership of the Committee, NMC Section 2-11 establishes the Committee. The only criteria for membership are set forth in Section 2-11.2 which requires that members be residents of Novato or maintain a business or be employed in Novato. There is no requirement that membership include representatives of certain specified professions. Consequently, Novato's Design Review Committee does not meet the second criterion for exemption from the general prohibition against appearing before a Commission of which the official is a member.

Members of the Design Review Committee
Through Mark Westfall
September 15, 1988
Page: 3

Consequently, members of the Design Review Committee should refrain from representing clients before the Committee if the clients meet the statutory threshold for "source of income," "Source of income" includes any client from whom the Committee member received or incurred fees aggregating \$250 or more in value within one (1) year prior to the time the decision was made.

With respect to business entities, the prohibition applies if the committee member owns ten percent (10%) or more of the business entity and if his pro rata share of fees from the client aggregate \$250 or more in value within one (1) year prior to the decision.

I hope this information is of assistance. On Wednesday, September 21, 1988, I will meet with you to discuss conflicts of interest that may arise while you are serving on the Design Review Committee. I look forward to answering any questions you may have at that time.

Very truly yours,

MEYERS, NAVE, RIBACK & WEST


Natalie E. West

NEW/dks

att

(Regulations of the Fair Political Practices Commission
Title 2, Division 6 of the California Administrative Code)

18700.1. Using Official Position to Influence (87100)

(a) With regard to a governmental decision which is within or before an official's agency or an agency appointed by or subject to the budgetary control of his or her 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. Attempts to influence include, but are not limited to, appearances or contacts by the official on behalf of a business entity, client, or customer.

(b) Notwithstanding subsection (a) an official is not attempting to use his or her official position to influence a governmental decision of an agency covered by subsection (a) if the official:

(1) Appears in the same manner as any other member of the general public before an the 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.

(3) Negotiates his or her compensation or the terms and conditions of his or her employment or contract.

(4) Prepares drawings or submissions of an architectural, engineering or similar nature to be used by a client in connection with a proceeding before any the agency. However, this provision applies only if the official has no other direct oral or written contact with the agency with regard to the client's proceeding before the agency except for necessary contact with agency staff concerning the processing or evaluation of the drawings or submissions prepared by the official.

(5) Appears before a design or architectural review committee or similar body of which he or she is a member to present drawings or submissions of an architectural, engineering or similar nature which the

official has prepared for a client if the following three criteria are met:

(A) The review committee's sole function is to review architectural or engineering plans or designs and to make recommendations in that instance concerning those plans or designs to a planning commission or other agency;

(B) The ordinance or other provision of law requires that the review committee include architects, engineers or persons in related professions, and the official was appointed to the body to fulfill this requirement; and

(C) The official is a sole practitioner.

(c) 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.

(Gov. Code Section 87100)

History: New section filed 8/2/85; effective 9/1/85.