



California Fair Political Practices Commission

September 15, 1993

John Whisenhunt
Supervising Deputy
Office of the County Counsel
County of Sacramento
700 "H" Street, Suite 2650
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-93-229

Dear Mr. Whisenhunt:

This is in response to your letter requesting advice on behalf of the Sacramento County Board of Supervisors as to whether members of Community Planning Advisory Councils ("CPACS") established pursuant to Chapter 2.36 of the Sacramento County ("County") Code are subject to the conflict-of-interest provisions of the Political Reform Act (the "Act").¹

QUESTION

Do the conflict-of-interest provisions of the Act apply to members of CPACS?

CONCLUSION

CPACS do not appear to be decisionmaking bodies subject to the disclosure and disqualification provisions of the Act. If this is the case, the conflict-of-interest provisions of the Act do not apply to its members. However, we have insufficient factual information to reach a definitive conclusion on this issue.

¹ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000 *et seq.* All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

FACTS and ANALYSIS

The conflict-of-interest provisions apply to all "public officials." (Section 87100.) Section 82048 defines the term "public official" as "every member, officer, employee or consultant of a state or local government agency." "Local government agency," in turn, means:

[A] county, city or district of any kind including a school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency of these, but does not include any court or any agency in the judicial branch of government.

Section 82041.

Under this definition, each community planning advisory council established pursuant to Chapter 2.36 of the Sacramento County Code is a local government agency. Therefore, if individuals who sit on CPACS are "members, officers, employees or consultants" of the CPAC, they are public officials.

Individuals who serve on CPACS could be "public officials" on the basis of their affiliation with CPACS only by reason of their status as "members," since it is clear that they do not serve as officers, employees or consultants of CPACS within the meaning of the Act. In ascertaining whether such individuals are members within the meaning of the Act, our regulation defining "member," Regulation 18700(a)(1), is determinative.² This regulation provides that:

"Public official at any level of state or local government" means every natural person who is a member, officer, employee or consultant of a state or local government agency.

"Member" shall include, but not be limited to, salaried or unsalaried members of boards or commissions with decisionmaking authority. A board

² Although the disqualification portion of the conflict-of-interest provisions applies to all public officials, the financial disclosure provisions only apply to those officials (other than those specified in Section 87200) who are designated in an agency's conflict of interest code. (Section 87302.) These officials are referred to as "designated employees." The definition of the term "designated employee" specifically excludes unsalaried members of boards or commissions which serve a solely advisory function. (Section 82019.)

or commission possesses decisionmaking authority whenever:

(A) It may make a final governmental decision;

(B) It may compel a governmental decision; or it may prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto which may not be overridden; or

(C) It makes substantive recommendations which are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency.

Regulation 18700(a)(1).

Thus, the pivotal test is whether a board or commission possesses decisionmaking authority. (In re Morrissey (1976) 2 FPPC Ops. 84.) A board or commission which does not possess decisionmaking authority pursuant to the provisions of Regulation 18700(a)(1) is solely advisory in nature. (In re Rotman (1987) 10 FPPC Ops. 1.) Accordingly, as a general rule, its members are not public officials.³

³ In reaching its conclusion that members of redevelopment project area committees are "public officials" who are subject to the Act's disqualification and disclosure provisions, the Commission observed in the Rotman Opinion on page 7:

Even if we were to conclude that project area committees do not possess decisionmaking authority, Regulation 18700(a)(1) provides that the term "member" is not limited to members of boards or commissions with decisionmaking authority. Thus, individuals may be "members" of a local government agency within the meaning of the regulation without possessing decisionmaking authority as described in subsections (a)(1)(A), (B), and (C).

But see, In re Morrissey, supra at page 88, wherein the Commission stated that "it would unnecessarily broaden the Act's requirements to characterize members of boards with no decisionmaking as 'agency officials.'" In determining whether a board is solely advisory, the presence or absence of decisionmaking power is an important factor. (Commission on Cal. State Gov. Org. and Econ. v. Fair Political Practices Commission (1978) 75 Cal.App.3d 716, 721.

Applying the test set forth above to the instant case, from the limited information provided, the Commission is inclined to believe that CPACS do not possess decisionmaking authority within the meaning of Regulation 18700(a)(1) and that therefore members of CPACS should not be considered "public officials" for purposes of the Act. However, we have insufficient factual information to reach a definitive conclusion on this issue. This determination should be made by the Sacramento County Board of Supervisors which is the code reviewing body for the county. (Section 82011(b).)

At the outset, we note that generally citizens' planning committees are formed to provide a mechanism for citizens and local organizations to advise county staff, the planning commission and the board of supervisors on various matters related to the preparation and adoption of the county's general plan for communities and subregions located in unincorporated areas of the county. (Miller Advice Letter, No. A-77-008.)

In your initial letter of June 1, 1993, you stated that the general purpose of the 16 CPACS in existence in Sacramento County is to review and provide recommendations to the County's Policy Planning Commission and Board of Supervisors with respect to land use applications involving community plans and the county's general plan. These facts were subsequently modified and clarified in your follow-up letter of June 18, 1993, wherein you stated that the decisionmaking body to which CPACS made recommendations depends upon the type of land use matter involved. For example, decisions concerning parcel maps are made by the county's Subdivision Review Committee (comprised of county staff members) whose decision is final unless appealed to the board of supervisors. Decisions concerning subdivisions are heard by the county's Project Planning Commission whose decision is final unless appealed to the board of supervisors. Rezones, community plan amendments and general plan amendments are reviewed by the county's Policy Planning Commission which makes a recommendation to the board of supervisors whose decision is final.

Pursuant to our telephone conversation of September 8, 1993, you informed me that in all instances, CPACS' recommendations are incorporated into staff's report to the appropriate decisionmaking body indicated above. If a CPAC disagrees with a decision or recommendation made by the decisionmaking body involved, and the matter either is appealed to the County Board of Supervisors (such as a parcel map or subdivision application) or is being considered by the County Board of Supervisors (such as a rezone, community plan or general plan amendment), a member or members of a CPAC may present the dispute to the entire County Board of Supervisors. You claim that this practice seldom occurs except when controversial land use applications are involved.

However, in all instances, whether county staff agrees or disagrees with the recommendations of a CPAC, it appears that the designated county committee or commission to which CPACS provide their recommendations, at a minimum, holds a hearing on the matter. Furthermore, if there is an objection to CPACS' recommendations, the county committee, commission, or board will receive the arguments, deliberate, and make its own independent review. You were uncertain as to what procedure is practiced in those instances where county staff agreed with CPACS' recommendations regarding land use applications.

Thus, under these facts, it is clear that CPACS do not have the power either to make a final governmental decision or to compel a governmental decision. What is less clear is whether CPACS' recommendations concerning specific land use applications (decisions which may affect financial interests) have been regularly accepted by the committee, commission or board designated by the county to make the decision involved.

You have advised us that in the past 16 months, the County Board of Supervisors approved thirty-one (31) of the thirty-five (35) applications where a CPAC recommended approval and denied four (4) of them; and of the thirteen (13) applications where a CPAC recommended denial, the County Board of Supervisors approved five (5) and denied eight (8) of them.

This survey seems to indicate that the County Board of Supervisors does not regularly accept the recommendations of CPACS without significant amendment or modification. However, the survey is severely limited in its usefulness. For example, the vast majority of CPACS have been in existence since the mid-1970's.⁴ Sixteen months over a time period that spans eighteen (18) years may not be statistically significant to reach an ultimate determination whether CPACS' recommendations have been routinely approved by the County Board of Supervisors. Moreover, the survey only applies to land use applications that came before the County Board of Supervisors. The survey sheds no light on whether the recommendations of CPACS are routinely followed by the County Subdivision Review Committee or the County Project Planning Commission.

⁴ Antelope (1990); Carmichael (1975); Citrus Heights (1978); Elk Grove (1976); Franklin/Laguna (1989); Rio Linda/Elverta (1975); South Sacramento (1975); Southeast (1989); Vineyard (1989); Orangevale (1990); Arden/Arcade (1975); Cordova (1979); Consumnes (1979); Fair Oaks (1975); Natomas (1975); and North Highlands/Foothill Farms (1975).

The extent of CPACS' influence over the final decision is essentially a factual question. We have previously advised that one possible indication is the procedural form of the decisionmaking. (Hirsch Advice Letter, No. A-82-109.) For example, if the application along with a CPAC'S recommendation are placed on a consent calendar and no discussion or hearing will occur unless there is an objection to the CPAC'S recommendation, then the CPAC has decisionmaking authority. On the other hand, if a CPAC'S role is limited to independently reviewing the application and making a recommendation to the county committee, commission, or board involved and the county committee, commission, or board actually holds a hearing on the application, receives arguments, deliberates and makes its own independent decision, then CPAC'S role is probably solely advisory.

However, even under these circumstances, the facts may indicate that CPACS' recommendations are being routinely accepted by the county committee, commission, or board. In that situation, the CPAC is not considered a solely advisory body. Thus, a survey of the percentage of cases where the recommendations of CPACS have been followed by the County Board of Supervisors, County Project Planning Commission, or County Subdivision Review Committee provides you with the best information necessary to determine whether the recommendations of CPACS are routinely approved.

The extent of CPACS' influence over the final decision is essentially a factual question. Are CPACS' advice and recommendations the subject of vigorous debate before the decisionmaking body involved? Are CPACS' recommendations frequently rejected or seldom, if ever, rejected? As indicated above, this is a difficult decision, and one the Commission cannot conclusively reach. However, it appears from the information you have provided that CPACS are not decisionmaking bodies subject to the disclosure and disqualification provisions of the Act.⁵

⁵ You state that your written request for advice arises out of a September 24, 1992 letter to the County Board of Supervisors from the Chairperson of the Rio Linda-Elverta CPAC. The Chairperson has asked the County Board of Supervisors to establish a policy whereby CPAC members would be entitled to county funded legal representation in criminal or quasi-criminal proceedings charging a conflict of interest. While not directly on point, the Commission has issued several letters on a related subject that we think will be of interest to you. (Skolnik Advice Letter, No. I-91-240; Schectman Advice Letter, No. A-87-226; copies enclosed.) Those letters address the following issue: do the conflict-of-interest provisions of the Act require that local officials disqualify themselves from participating in governmental decisions regarding whether the city should provide them with a criminal or civil defense?

If you have any further questions regarding this matter, please feel free to contact me at (916) 322-5901.⁶

Sincerely,

Wayne Ordos
Executive Director

Deanne Stone

By: Deanne Stone
Senior Commission Counsel

Enclosures

⁶ Copies of Commission regulations and Opinions are available in many law libraries. Alternatively, copies of these materials and Commission advice letters may be obtained from the Commission at a cost of 10¢ per page.