

RAVI MEHTA  
CHAIRMAN



FAIR POLITICAL PRACTICES COMMISSION

October 18, 1995

Mr. Thomas Cook  
604 North Ball Street  
Owosso, Michigan 48867

Re: Confirmation of Telephone Advice  
Our File No. A-95-321

Dear Mr. Cook:

This will serve as confirmation of telephone advice provided to you regarding the revolving door provisions of the Political Reform Act (the "Act").<sup>1</sup> You called to request advice about consulting work you are conducting related to the preparation and state review of local government general plan housing elements.<sup>2</sup>

QUESTIONS

1. Now that you have left your position as Deputy Director at the Department of Housing and Community Development (HCD), how is your ability to communicate with the Department restricted by the Act?

2. Does HCD's review of housing elements (pursuant to Government Code Section 65585 et seq.) constitute administrative action covered by the Act's revolving door provisions?

3. Is it permissible under the Act's revolving door provisions for your client to submit a report which you prepared to HCD?

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<sup>1</sup> 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, Sections 18000-18995. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

<sup>2</sup> Please note that nothing in this letter should be construed to evaluate any conduct which has already taken place. The Commission provides prospective advice only.

### CONCLUSIONS

1. For one year you may not represent any other person for compensation before HCD. This prohibition would preclude you from making any formal or informal appearance, or any oral or written communication, if the appearance or communication is for the purpose of influencing the Department's administrative or legislative action.<sup>3</sup>

In addition, you are permanently prohibited from representing another person or aiding, advising, counseling, consulting or assisting in representing another person before any court or state administrative agency (or officer or employee thereof) in any judicial or other proceeding in which you participated as a state administrative official.

2. HCD's review of housing elements for sufficiency under state law would constitute administrative action under the Act.

3. Your client's provision of a report you wrote but which does not have your name on it and does not otherwise identify you, would not be considered making a written communication for the purpose of influencing the Department's administrative action.

### FACTS

Until September 30, 1994, when you moved to Michigan, you were a Deputy Director at HCD in Sacramento. During your three and one-half year tenure with HCD, you reviewed housing elements of the general plans for a number of communities and signed letters to local governments pursuant to the requirements of state law (Government Code Section 65580 et seq.).

A housing element is the section of a community's general plan which analyzes existing and projected housing needs. While you worked at HCD, you did not review a housing element from the City of Malibu, as one had never been submitted. You did write letters to private citizens in response to general questions about the requirements of housing element law as they might apply in Malibu.

Earlier this year, you were hired as a consultant by the Malibu Bay Company (MBC), a private land development company in the City of Malibu, to evaluate the City of Malibu's draft housing element of their general plan for its compliance with state law and to help identify planning approaches to support residential development for a range of households for all income levels. The evaluation you prepared was for the use of MBC and their attorneys, and your contract with MBC gives them exclusive use of your work product.

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<sup>3</sup> We note that the time period of your one-year ban ended September 30, 1995.

You stressed that you would not contact or communicate with HCD or its employees concerning this matter. You have not done so, and MBC has not asked you to do so. You have completed the analysis and it has been presented to the City of Malibu. The client now intends to submit that report, without your name attached to it, to HCD. You understand that HCD is now in the process of reviewing the draft housing element of the City of Malibu as required by state law. You requested advice as to how the Act's revolving door provisions restrict your contact with HCD and whether your client's submission of the report to HCD is permissible under the Act.

#### ANALYSIS

Officials who have left state service are subject to two types of restrictions under the Act. The first is a one-year prohibition on making any appearance before the former agency for the purpose of influencing administrative or legislative action or any action involving contracts. The second is a permanent prohibition on influencing any judicial or other proceeding in which the official participated while in state service.

#### One-Year Ban

Section 87406(d)(1) of the Act provides that:

No designated employee of a state administrative agency ... for a period of one year after leaving office or employment, shall, for compensation, act as agent or attorney for, or otherwise represent, any other person, by making any formal or informal appearance, or by making any oral or written communication, before any state administrative agency, or officer or employee thereof, for which he or she worked or represented during the 12 months before leaving office or employment, if the appearance or communication is made for the purpose of influencing administrative or legislative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.

(Emphasis added.)

You were a designated employee at the Department of Housing and Community Development. Pursuant to Section 87406, for one year after the date you left HCD, you may not, for compensation, act as representative or agent for any person before the

Department for the purpose of influencing<sup>4</sup> administrative or legislative<sup>5</sup> action or any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. (Section 87406.)

"Administrative action" is defined in Section 82002 as the proposal, drafting, development, consideration, amendment, enactment or defeat by any state agency of any rule, regulation or other action in any rate-making proceeding or any quasi-legislative proceeding, including any proceeding regarding adoption of regulations governed by Government Code 11340 et seq.

HCD's role in reviewing housing elements as set forth in Government Code Section 65585 is as follows. Prior to adoption of its housing element, the planning agency of each city or county must submit a draft to HCD. HCD reviews the draft and reports its written findings to the planning agency. In preparation of its findings, HCD may consult with or consider written comments from any public agency, group, or person regarding the draft element. In its written findings, HCD determines whether the draft housing element substantially complies with the requirements of Article 10.6 of the Government Code (housing elements). Prior to adoption of its draft housing element, the local legislative body must consider the findings made by HCD.

HCD's review of housing elements pursuant to Government Code Section 65585 et seq. constitutes administrative action for purposes of the revolving door statute. Therefore, you would be prohibited from making any formal or informal appearances to influence HCD's review of housing elements.

With respect to your client's submission of a report to HCD, however, the Commission has previously advised that a former agency official could draft proposals on a client's behalf to be submitted to the agency as long as the former employee was not identified in connection with the client's efforts to "influence administrative action." (Harrison Advice Letter, No. A-92-289); Miller Advice Letter, No. I-93-098; and Kingma-Rymek Advice

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<sup>4</sup> "Influencing legislative or administrative action" includes influencing by any means, including but not limited to the provision or use of information, statistics, studies or analyses. (Section 82032.)

<sup>5</sup> Section 82037 defines "legislative action" as the drafting, introduction, consideration, modification, enactment or defeat of any bill, resolution, amendment, report, nomination or other matter by the Legislature or by either house or any committee, subcommittee, joint or select committee thereof, or by a member or employee of the Legislature acting in his or her official capacity. "Legislative action" also means the action of the Governor in approving or vetoing any bill.

Letter, No. A-95-141.) Thus, if MBC submits the report, without your name on it and without your otherwise being identified with it, to HCD for its consideration in reviewing the City of Malibu's housing element, it would not constitute a prohibited written appearance under the Act.

Any communications such as telephone calls or meetings with agency staff that are intended to influence administrative or legislative action are prohibited under Section 87406. However, communications to administrative agencies which are not for the purpose of influencing administrative or legislative action are not restricted by Section 87406. For example, you could attend informational meetings with HCD, or request information from HCD concerning existing laws, regulations, or policies, as long as you do not attempt to influence administrative or legislative action. (See Bagatelos Advice Letter, No. I-91-202; and Regulation 18202(a)(1).) In addition, using your expertise to advise clients and prepare analyses as to various requirements of housing law or procedures of HCD would not be prohibited under this section as long as you are not identified in connection with any efforts of the client to influence the administrative action of the Department.

#### Permanent Prohibition

The Act also contains a permanent prohibition on former state officials' involvement in certain proceedings in which they participated while working for the state. Sections 87401 and 87402 provide:

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 87401.

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.

Section 87402.

The Department of Housing and Community Development is a state administrative agency. (Section 87400(a).) Section 87400(b) defines a "state administrative official" as 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. As Deputy Director of HCD, you would be considered a state administrative official.

However, this restriction is limited to judicial, quasi-judicial or other proceedings in which you participated. Section 87400 provides:

(c) "Judicial, quasi-judicial or other proceeding" means 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 by Chapter 5 (commencing with Section 11500) of Division 3 of Title 2 of the Government Code.

(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.

(Emphasis added.)

As a Deputy Director at HCD, you are deemed to have "participated" in any proceedings in which employees whom you supervised were personally and substantially involved. (Brown Advice Letter, No. A-91-033.)

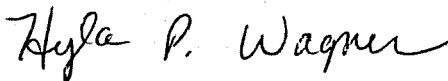
Under Section 87400(c) set forth above, a "proceeding" includes any particular matter involving a specific party or parties in a state administrative agency. Sections 87401 and 87402 prohibit your participation in the same proceeding in which you participated as a state employee, but do not restrict your ability to participate in new proceedings. HCD's review of the City of Malibu's housing element constitutes a "proceeding" under the above definition, because such proceedings are not of a regulatory or general nature, but involve a specific party, the City of Malibu. (Chalfant Advice Letter, No. A-92-509; and Fong Advice Letter, No. A-88-024.)

However, you are not barred from providing advice to MBC regarding the City of Malibu's housing element if neither you nor the employees you supervised reviewed a housing element for the City of Malibu, or rendered advice to the City of Malibu about the housing element it submitted, while you were Deputy Director at HCD. Providing general information to private citizens in Malibu about the requirements of housing element law would not constitute prior participation in this proceeding.

If you have any further questions regarding this matter, please feel free to contact me at (916) 322-5660.

Sincerely,

Steven G. Churchwell  
General Counsel



By: Hyla P. Wagner  
Counsel, Legal Division