



FAIR POLITICAL PRACTICES COMMISSION

P.O. Box 807 • 428 J Street • Sacramento, CA 95812-0807
(916) 322-5660 • Fax (916) 322-0886

September 16, 1999

Judith Andrea Trice
City of Richmond
City Hall, Room 330
2600 Barrett Avenue
Post Office Box 4046
Richmond, California 94804

**Re: Your Request for Advice
Our File No. I-99-233**

Dear Ms. Trice:

This letter is in response to your request for advice on behalf of Mr. Michael Woldemar regarding the provisions of the Political Reform Act (the "Act").¹ Because your questions are general in nature, we provide you with informal assistance.²

QUESTIONS

1. Do the provisions of Regulation 18702.4(b)(5) — the "design review board exception" to the Act's general conflict of interest rules — apply to a design review board which has authority to make final decisions on some kinds of applications, but on other applications is limited to making recommendations to the Planning Commission?
2. Is Mr. Woldemar a "sole practitioner" as the term is used in Regulation 18702.4(b)(5), when he is the only licensed architect employed by his firm which, however, retains another licensed architect as a consultant under contract with the firm?
3. If we assume that the exception provided at Regulation 18702.4(b)(5) applies to Mr. Woldemar, may he then represent clients seeking design review approvals in presentations to, and discussions with, city staff, the Design Review Board, the Planning Commission, and the City Council?

¹ Government Code sections 81000 - 91014. Commission regulations appear at title 2, sections 18109 - 18995, of the California Code of Regulations.

² Informal assistance does not provide immunity under Section 831149(a) or (b). Regulation 18329(c)(3).

CONCLUSIONS

1. The provisions of the "design review board exception" may be invoked by members of the city's Design Review Board, if otherwise appropriate, even though the Board is authorized to make some final decisions on purely design-related issues of strictly local impact. Regulation 18702.4(b)(5) does not require that a board's "sole function" be to "make recommendations" on technical plans or designs.

2. Mr. Woldemar is a sole practitioner, as the term is used in Regulation 18702.4(b)(5). A contractual association between two licensed architects, which creates neither a partnership nor an employment relationship between the architects, preserves the character of the official as a "sole practitioner" under this regulation.

3. Mr. Woldemar may not, in an official capacity, contact or appear before the Planning Commission, City Council, or their staff. The "design review board exception" governs only his presentations to members and staff of the Design Review Board, and any subordinate bodies.

FACTS

Michael Woldemar, a licensed architect, is a member of the Design Review Board (the "Board") for the City of Richmond. The Board was recently created by the City Council, by amendment to the city's zoning ordinance (Richmond Municipal Code Chapter 15.04).

The Board was established to review architectural and engineering plans and designs. (Section 15.04.030.020 of the city ordinance.) The ordinance provides that the Board will sometimes make recommendations for final action by the Planning Commission (on applications where the Planning Commission has final decisionmaking authority), but in other cases will act as the final decisionmaker (when the matter involves design issues not required to be decided by the Planning Commission). You have advised us that the Board may have final decisionmaking authority on approximately fifty percent of the matters before it, applications of strictly localized import which do not require the planning or "big picture" expertise of the Planning Commission. All final actions, whether by the Board or by the Planning Commission, may be appealed to the City Council. (Sections 15.04.930.020(A), 15.04.030.030(B), and 15.04.030.080(B), (C).)

The city ordinance requires that the membership of the board include one architect. (Section 15.04.930.030.) Mr. Woldemar was appointed to fulfill this requirement. Together with his wife, Mr. Woldemar owns an architecture and planning business located within the city. A substantial number of his clients will appear in the ordinary course of business before the Board. Mr. Woldemar indicates that he is the only licensed architect who is an employee of his firm, although the firm retains a consultant on contract as a "project manager." This consultant is also a licensed architect.

ANALYSIS

Section 87100 prohibits a public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. An official has a "financial interest" in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or on any of the official's economic interests, which are defined at Section 87103. An official with a financial interest in a governmental decision is said to have a "conflict of interest" in that decision, and may not take any role in decisionmaking *unless* the circumstances warrant application of one of the narrow exceptions to the broad mandate of Section 87100.

Since you are asking about the application and effect of one of the exceptions to the general prohibition of Section 87100, we will *assume* for purposes of analysis that a conflict of interest would exist when one of Mr. Woldemar's clients appears before the Board. Given this assumption, we can advise you on the applicability of Regulation 18702.4(b)(5), and related provisions of the Act. The analysis will be simplified by treating your questions in reverse order, beginning with a discussion of what the exception permits when it is available.

A. The Operation and Effect of Regulation 18702.4(b)(5); Answer to Question 3.

Regulation 18702.4(b)(5) provides as follows:

"(b) Notwithstanding Title 2, California Code of Regulations, section 18702.3(a), an official is not attempting to use his or her official position to influence a governmental decision of an agency covered by that subsection if 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."

The scope of this exception is, by its terms, very narrow. The exception applies, if at all, only to the prohibition against using one's official position to "influence" a decision, as defined at Regulation 18702.3(a). An official with a financial interest in a decision, who is entitled to invoke this exception, is *still* not permitted to "make" a governmental decision, as defined at Regulation 18702.1, nor to "participate in making" a governmental decision, which is defined at Regulation 18702.2. This exception refers only to subdivision (a) of Regulation 18702.3, which describes matters before the official's own agency, or before agencies under the control of the official's agency. Finally, this exception refers only to presentations before design review boards. Permissible presentations before all other agencies are described by Regulation 18702.3(b).³

These basic observations determine the answer to your third question, whether and to what extent Mr. Woldemar may represent clients seeking agency action from various persons and agencies? If applicable to Mr. Woldemar in the first instance, this exception would permit him to present — to the Design Review Board — architectural or engineering plans, drawings or similar technical submissions prepared by Mr. Woldemar.

Regarding appearances before the Planning Commission or the City Council, the Act does not bar Mr. Woldemar from appearing as an advocate *in his private capacity*. (Regulation 18702.3(b); *Novak* Advice Letter, No. I-97-365 ; *Wallace* Advice Letter, No. I-95-120.) The Act also permits other members of Mr. Woldemar's firm to represent clients before the City Council or Planning Commission, without restriction on their presentations. (*Id.*) Otherwise, Regulations 18702.1, 18702.2, and 18702.3(b) restrict Mr. Woldemar's ability to make, participate in making, or use his official position to influence decisions by these bodies.

B. Application of the Design Review Board Exception; Answers to Questions 1 and 2.

Having described the operation, effect, and limited scope of Regulation 18702.4(b)(5), we return to the logically prior questions; can this exception be invoked by a member of this Board at all, and is Mr. Woldemar a "sole practitioner" within the meaning of this regulation?

The latter question is easily managed. Regulation 18702.4(b)(5) cannot plausibly be read to include *only* architects working entirely without staff support. Consequently, when a licensed architect employs non-professional (or at least non-licensed) staff in his or her architectural firm, the licensed architect is still viewed as a "sole practitioner" within the meaning of the regulation. (*Roush* Advice letter, No. A-92-224.) A contractual association between a sole practitioner and another licensed architect, which creates neither a partnership nor an employment relationship

³ To be perfectly clear, the "design review board" exception applies to design review boards, and any other boards or bodies subject to the budgetary control and direction of the design review board. The members and staff of city councils and planning commissions are not normally subject to the control of design review boards, and contacts with or presentations before these bodies are governed by Regulation 18702.3(b), and *not* by Regulation 18702.4(b)(5).

between the architects, preserves the character of the official as a "sole practitioner" under this regulation. Thus, so long as the licensed architectural "consultant" is neither his employee nor his partner, Mr. Woldemar qualifies as a "sole practitioner" within the meaning of Regulation 18702.4(b)(5). (*Roush* Advice letter, *supra*.)

Your initial question, whether the "design review board exception" is applicable when a board *also* acts as final decisionmaker on certain applications, has not previously been discussed in our advice letters. Under Regulation 18702.4(b)(5)(A), the exception applies only when;

"[the review committee's sole function is to review ... plans or designs *and* to make recommendations ... concerning those plans or designs to a planning commission or other agency." (Emphasis added.)

The crucial language is ambiguous. The "sole" function seems to be described as *two* functions; to review technical plans, *and* to make recommendations thereon to another body. On the other hand, it is also possible to characterize this language as describing a single "compound" function. We are left to decide whether both of these "functions," taken together, are the "sole function" referenced in the regulation or, if not, which of the two is the function establishing inclusion within the exception. The language itself does not commend one alternative over another, but we can we look to the purpose of the regulation to guide interpretation of the words in question.

The problem addressed by the "design review board exception" was described in an FPPC staff memorandum dated April 29, 1985, submitted to the Commission when it was considering the addition of Regulation 18702.4(b)(5):

"The issue involved professionals who are asked to sit on design or architectural review boards for the purpose of providing technical expertise and experience in the review of proposed projects. These persons are clearly making and participating in governmental decisions, and under subsection (4) they can prepare plans for the review by their boards, but they cannot present them. In the small cities where the majority of professionals are in private practice, these rules may restrict the number of persons who would be willing to sit on these boards. Therefore, a limited exception is set forth in subsection (b)(5) to address this very specific situation. It applies only to boards where by law the membership must include architects, engineers and related professionals."

From a survey of 26 cities conducted prior to the date of this memorandum, FPPC staff had learned that a large majority of existing design review boards made *decisions* on applications of limited impact, as well as recommendations to planning commissions on larger matters. Staff also learned, in response to a specific inquiry, that in every case where a design review board had decisionmaking authority, appeal to the planning commission or city council was also permitted.

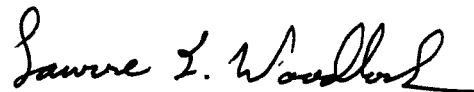
Staff apparently concluded that it was not essential to their purpose that such boards be *exclusively* advisory bodies, at least when any decision by a design review board was subject to review by a planning commission or city council through an appeals process. On the other hand, the purpose of a "design review board exception" is advanced if professional board members are not disqualified from invoking the exception simply because a board has some decisionmaking authority, which appears to have been the norm for such boards when the regulation was adopted.

We conclude that, so long as any decision by a design review board may be reviewed and reversed on appeal to a planning commission or city council, members of that board will not be denied recourse to the provisions of Regulation 18702.4(b)(5) simply because the board is empowered by law to make (appealable) decisions in certain instances. To decide otherwise would require cities and counties to choose between encouraging professional membership on these boards, or undermining the utility of such boards by preventing them from deciding even the most trivial design-related applications without item-by-item oversight by superior agencies. The goals of the Act do not require that local jurisdictions be forced to make this choice.

If you have any other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Steven G. Churchwell
General Counsel



By: Lawrence T. Woodlock
Staff Counsel, Legal Division

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