



FAIR POLITICAL PRACTICES COMMISSION

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

March 28, 2000

Anne Hoffman
Malibu Homeowners for Reform
161 Westlake Boulevard
Malibu, California 90265

**Re: Your Request for Advice
Our File No. A-00-074**

Dear Ms. Hoffman:

This letter is in response to your request for advice about the campaign provisions of the Political Reform Act (the "Act").¹

QUESTIONS

1. Is the attached flyer a political ad?
2. Is it legal for a committee to receive information from an educational group and use that information for political ads? If so, does the committee have to receive the information in the same manner as the public or can it be given directly to the committee?

CONCLUSIONS

1. The attached flyer, which is reprinted in this letter, does not contain express advocacy.
2. Yes. The Act does not prohibit this type of payment. However, the payment will be considered a contribution from the educational group to the PAC, unless the PAC obtained the information from public sources, or provided full and adequate consideration in exchange for the information.

¹ Government Code sections 81000 - 91015. Commission regulations appear at title 2, sections 18109 - 18996, of the California Code of Regulations.

FACTS

The City of Malibu will be holding a local election in April. Citizens for Fair Zoning ("CFZ") is a small group of citizens that formed during the first week of February 2000 in anticipation of a meeting of the Malibu City Council on February 10, 2000, referred to as the "Code Enforcement Meeting." The purpose of the group is to increase public awareness about the need for code enforcement and zoning reform. At the city council meeting, your group distributed 125 flyers.

You and other CFZ members became increasingly concerned with city policies governing code enforcement. Consequently, you decided to form a political action committee in order to influence the April election. On March 1, 2000, you founded the committee, Malibu Homeowners for Reform (the "homeowners' PAC"). The is registered with the state as a general purpose recipient committee and David Hansen is its treasurer. The homeowners' PAC has paid for political ads in the local newspaper. You are an active member of both CFZ and the homeowners' PAC. Both entities have their own mailing address and bank account. The homeowners' PAC purchased CFZ's old telephone number for its own use.

After the city council meeting on February 10, 2000, you and other CFZ members wrote another flyer. You have not distributed this flyer to the public. However, a cartoon on the flyer was taped for Cable distribution on the same videotape where you spoke on behalf of the homeowners' PAC. In addition, both the homeowners' PAC and CFZ use the words "reform" and "zoning" in their literature. Excluding pictures and the cartoon, the CFZ flyer states:

ATTENTION MALIBU HOMEOWNERS!

Have you:

- ¥ Applied for a building permit in the city of Malibu lately?**
- ¥ Been given a citation from the city for a code violation?**
- ¥ Tried to sell a home in Malibu and had to disclose non-permitted areas or other violations?**

If you are a homeowner, then you need a change in the city's permit processing and zoning reform. Here's why:

This couple just wants a backyard pool. Why do they have to spend \$20,000 on an archaeological dig to get the permit? The city has arbitrarily classified **half of Malibu's home lots (several square miles)** as potential archeological sites. We are wasting millions of dollars on these studies and we should follow the lead of other cities. They limit archeological digs to important locations or sites discovered during building. In Malibu, the scientists who create these overreaching standards are the very people who perform the studies and benefit financially, and this is wrong.

Do you have a converted garage? The city of Malibu is looking for you. They will make you add a two-car enclosed garage and outdoor paved spaces and rebuild your addition to current code. **But it is silly** for everyone to add expensive big garages with geology and other studies if there is no public nuisance. The homeowner should be able to preserve his views, and save up to \$100,000 in costs if it is within neighborhood standards. We don't want the city to increase development artificially with unnecessary requirements for more concrete when we want to preserve our rural character.

Do you have an older guesthouse, or a horse corral or a workshop without a permit on file? These structures are supposed to be **grandfathered** but Malibu is telling homeowners to demo these structures or get a new permit at great expense. Historically, the County rarely enforced permits for corrals, barns, and workshops, leading Former Planning Director Craig Ewing, to say, "We don't know how much of that is legal work and how much is **just poor county records.**"

Many cities in California **leave these buildings alone** and don't require a building permit until the owner applies for a major remodel. Malibu should do the same so that elderly homeowners and innocent buyers will not be criminalized and financially wrecked. These buildings add to the rural and scenic beauty of our town.

Do you want to add a closet, bathroom, a garden remada or other minor addition to your home? The city will require geology, archeology, and biology reports and other expensive reviews and may tell you to bring your entire property up to current building codes. Most cities we surveyed only require these expensive studies and rebuilding if **an area larger than 50%** of your home is being added.

We need our remodeling rules to be more reasonable and affordable. Every time someone has to sell their older home because of expensive permit requirements, the probability is that a new buyer will demo the home and build one 3-4 times the size of the previous home. **The city's extreme requirements have the effect of increasing development in Malibu.**

Congratulations on your new home! You think that all the hard work of obtaining permits is over. But when you go to remodel that Tuscan kitchen in a few years, you will have to face new city requirements and have to go through the expensive permit process all over again. We need to **stem the tide of intrusive city regulation of homeowners.** The policies which allow the city to dictate the color of your home, ban red tile roofs and ban your security lighting need to be reversed.

CITIZENS FOR FAIR ZONING is dedicated to improving the residential permit process and zoning code and lessening the financial and regulatory burden on single family homeowners. The goals of cityhood were to stop commercial development, limit residential development by halting subdivisions and preserve the natural environment. The purpose of cityhood **was not to stop us from doing basic remodeling to keep Malibu beautiful nor to stop us from building our dream home.**

Regarding grandfathering, **CITIZENS FOR FAIR ZONING** wants equal privileges for all homeowners. People with grandfathered structures have to comply with the **same laws and pay the same fees that owners of new homes have to pay**. But there are state guidelines that homeowners have vesting rights and they shall not be required to bring their entire property up to code each time the Uniform Building Code is revised every three years. Down the line, this provides protection for new homeowners too.

Malibu's radical planning regulations are creating an unsafe situation and encouraging bootlegging because homeowners are afraid to make even a minor repair because of arbitrary, excessive and burdensome permitting requirements. Fines should be reduced from \$1,000/DAY and code violations changed from criminal misdemeanors to infractions.

REFORMS ARE NEEDED!

Call us and share your opinion on needed improvements. Call your city officials and let them know your concerns.

CITIZENS FOR FAIR ZONING needs your help to continue our educational work to alert homeowners on the need to make the zoning and permit laws more community friendly. We are your group for Homeowners' Protection. Please send contributions to [address]. If you want more info call [phone number] and we'll call you back.

Citizens for Fair Zoning is not a P.A.C. and is not regulated by campaign funding rules because it is not sponsored by nor affiliated with any political candidate. Therefore, individual contributions are not limited.

ANALYSIS

Political action committees must disclose their monetary activities. (Sections 84200-84216.5.) An individual or an organization becomes a "committee" by: (1) receiving contributions of \$1,000 or more in a calendar year; (2) making independent expenditures of \$1,000 or more in a calendar year; or (3) making contributions of \$10,000 or more in a calendar year. (Section 82013.) Thus, there are three types of committees under the Act: recipient committees, independent expenditure committees, and major donor committees.

A. CFZ's Flyer

1. Will CFZ become an independent expenditure committee?

CFZ will qualify as a independent expenditure committee and incur reporting obligations if it makes independent expenditures of \$1,000 or more in a calendar year. (Section 82013(b).)

An "expenditure" is a payment² made for political purposes. (Section 82025; Regulation 18225(a).) Therefore, a payment made by a non-political, educational organization, such as CFZ, is usually not an expenditure. However, Regulation 18225, which defines "expenditure," specifies that the term "expenditure" includes any payment made by a non-political organization for a communication that "expressly advocates the nomination, election or defeat of a clearly identified candidate, or the qualification, passage or defeat of a clearly identified ballot measure." (Regulation 18225(b).)

2. What is "express advocacy"?

A communication "expressly advocates" the nomination, election or defeat of a candidate or the qualification, passage or defeat of a measure if: (1) it contains express words of advocacy such as "vote for," "elect," "support," "cast your ballot," "vote against," "defeat," "reject," "sign petitions for," or (2) it otherwise refers to a clearly identified candidate or measure so that the communication, taken as a whole, unambiguously urges a particular result in an election. (Regulation 18225(b)(2).)

The United States Supreme Court formulated the express advocacy standard in *Buckley v. Valeo* (1976) 424 U.S. 1 to avoid problems of overbreadth in regulating speech, i.e., the application of reporting requirements to communications involving public issues that also happen to involve campaign issues. (*Buckley* at 80.) In *Buckley*, the court recognized that the distinction between the discussion of issues, and the advocacy of the enactment or defeat of ballot measures containing those issues (e.g., affirmative action, immigration reform, bilingual education) may often dissolve in practical application. This problem is also present in communications about candidates because candidates campaign for office by associating themselves with public issues. Not only do candidates campaign on the basis of their positions on various issues, but the campaigns themselves generate issues of public interest.

In *Buckley*, the Court indicated that express advocacy will contain words of advocacy of election or defeat such as "vote for," "support," "reject," or "Smith for Congress." (*Id.* at 44, n. 52.) Subsequent court decisions have clarified the scope of express advocacy. The court in *Federal Election Commission v. Massachusetts Citizens for Life* (1986) 479 U.S. 238, 249, indicated that a communication need not include the catch phrases listed in *Buckley* in order to be express advocacy. The fact that the message at issue was "marginally less direct" than such phrases did not change the fact that the "essential nature" of the communication went beyond issue discussion to express electoral advocacy. (*Massachusetts Citizens for Life* at 249.)

² A "payment" means a "payment, distribution, loan, advance, deposit, gift or other rendering of money, property, services or anything else of value, whether tangible or intangible." (Section 82044.)

Similarly, in *Federal Election Commission v. Furgatch* (9th Cir 1987) 807 F.2d 857, cert den., 484 U.S. 850 (1987), the court stated that the list in Buckley “does not exhaust the capacity of the English language to expressly advocate the election or defeat of a candidate.” (*Furgatch* at 863.) To limit the concept of express advocacy to certain key phrases would preserve First Amendment rights “only at the expense of eviscerating” the Federal Election Campaign Act and would permit independent campaign spenders to “remain just beyond the reach of the Act by avoiding certain key words while conveying a message that is unmistakably directed to the election or defeat of a named candidate.” (*Id.*) Instead, to be express advocacy under the Act, speech “must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.” (*Id.* at 864.) As the regulation makes clear, express advocacy includes speech that “taken as a whole, unambiguously urges a particular result in an election.”

The court in *Furgatch* parsed the express advocacy standard into three components:

1. A communication is “express” if its message is “unmistakeable and unambiguous, suggestive of only one plausible meaning.”
2. A communication “advocates” if it presents “a clear plea for action, and thus speech that is merely informative is not covered by the Act.”
3. “It must be clear what action is advocated.” (*Id.* at 864.)

The court also held that the subjective intent of the speaker alone is not determinative; what the readers or viewers understand is equally as significant. (*Id.* at 863.)

3. Does the flyer contain express advocacy?

The flyer that you have attached to your request, and that is reprinted in this letter, highlights CFZ’s frustration with current zoning laws, building codes and the city’s building permit process. In addition, it urges the reader to call local city officials, and to send contributions to CFZ in order for the group to continue its educational work. It does not, however, mention any candidate who will be running in the next election, or make any other reference to the election. Applying the standards for express advocacy in Regulation 18215, we conclude that the attached flyer does not expressly advocate the election or defeat of a candidate or ballot measure. It does not contain “magic words” urging voters to take action. In addition, when taken as a whole, the flyer does not unambiguously urge a particular result in an election.

You indicate that the information contained in the flyer is similar to information that is being distributed by the homeowners’ PAC in local newspaper advertisements. This fact does not change our advice. The flyer does not make any reference to the homeowners’ PAC, and it does not appear that the two entities are distributing their communications together.

Accordingly, since the flyer does not contain express advocacy, payments made by CFZ to distribute the flyer will not be considered "expenditures," and CFZ will incur no reporting obligations under the Act by distributing the flyer.

B. Providing Educational Information to the Homeowners' PAC

1. Will CFZ become a recipient committee?

Nothing in the Act prohibits CFZ from providing information to the homeowner's PAC. However, CFZ may become a committee by doing so. CFZ will qualify as a recipient committee and incur reporting obligations if it receives contributions of \$1,000 or more in a calendar year. (Section 82013(a).) A "contribution" is a payment made for political purposes. (Section 82015(a); Regulation 18215.) Generally, payments made to a non-political organization, such as CFZ, will not be considered contributions. However, Regulation 18215, which defines "contribution," specifies that a "contribution" includes:

"Any payment made to a person or organization other than a candidate or committee, when, at the time of making the payment, the donor knows or has reason to know that the payment, or funds with which the payment will be commingled, will be used to make contributions or expenditures

"There shall be a presumption that the donor does not have reason to know that all or part of the payment will be used to make expenditures or contributions, unless the person or organization has made expenditures or contributions of at least one thousand dollars (\$1,000) in the aggregate during the calendar year in which the payment occurs, or any of the immediately preceding four calendar years." (Regulation 18215(b)(1).)

Under the regulation, if CFZ makes political contributions or expenditures of \$1,000 or more, the donations it receives after that point will be considered contributions. If these contributions total \$1,000 or more in a calendar year, CFZ will become a committee.

2. Will CFZ be making political contributions?

You would like to know whether CFZ will be making a political contribution if it provides educational information to the homeowners' PAC. Under the Act, a nonmonetary payment made to a political action committee is presumed to be a contribution, unless full and adequate consideration is received in return. (Regulation 18215(a)(2)(D).) We have advised that providing survey data to a committee which either requests the information or uses the information for political purposes results in a nonmonetary contribution to the committee.

(Hicks Advice Letter, No. I-98-007.) If, however, the results of the survey have been made available to the public, no contribution will result. In addition, providing information to a committee that neither requests nor uses the information is not a contribution.

Accordingly, if CFZ provides information to the homeowners' PAC and does not receive full and adequate consideration in return, it will be making a contribution to the committee, unless it makes the same information available to the public.³

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

Sincerely,

Luisa Menchaca
Assistant General Counsel



By: Julia Bilaver
Staff Counsel, Legal Division

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³ The value of the contribution would be the fair market value of the information, i.e., the amount the committee would have to pay on the open market to obtain the same information. (Section 82025.5.)