



FAIR POLITICAL PRACTICES COMMISSION

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July 29, 2002

Howard Laks, AIA
Howard Laks Associates Architects
1545 Twelfth Street
Santa Monica, CA 90401

Re: Your Request for Advice
Our File No. A-02-155

Dear Mr. Laks:

This letter is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹

QUESTION

May you, a member of the Architectural Review Board ("ARB"), discuss with the city planning staff the North Main Street Mixed-Use Project appeal, that is before the planning commission but not before the ARB?

CONCLUSION

Yes, you may discuss the project with the city planning staff. So long as you do not purport to act in an official capacity as an ARB member, you are not "making," "participating in making," or "influencing" a governmental decision by meeting with city staff to discuss a project appeal that is before the planning commission but not before the ARB.

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

FACTS

You are a member of the City of Santa Monica Architectural Review Board. As a practicing architect within the City of Santa Monica, you have designed a development project that was subject to the review of the ARB. You recused yourself from the review of this specific item when presented to the ARB. The ARB disapproved the project. Your client (the property owner) has appealed the decision of the ARB to the planning commission. You are not a member of planning commission. Additionally, in a phone call on July 26, 2002, you provided the name of the development project as the North Main Street Mixed-Use Project.

ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials will perform their duties in an impartial manner, free from bias caused by their financial interests. (Section 81001(b).) Specifically, section 87100 prohibits any 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. Evidently, you were satisfied that you had a conflict of interest when the development that you designed came up for review in front of your board and you recused yourself. We will assume for the purposes of this letter that you do have a conflict of interest with regard to that project. Therefore, under the Act, you are prohibited from "making," "participating in making," or otherwise using your official position to "influence" a governmental decision concerning that project. (Section 87100.)

Your question concerns whether you are prohibited from discussing with the city planning staff a project appeal that is before the planning commission, but not before the ARB. To determine if you have a disqualifying conflict of interest that would limit your communication with the city planning staff, we apply the standard eight-step analysis the Commission has adopted. (Regulation 18700 (b)(1) - (8).)²

The first step is used to determine if you are a public official. Under the Act, a "public official" is defined, in part, as a "member, officer, employee or consultant of a state or local government agency." (Section 82048.) As a member of Santa Monica's ARB, you are a public official and subject to the conflict-of-interest provisions of the Act.

The second step of the analysis is used to determine whether you are "making," "participating in making," or "influencing" a governmental decision. If the determination is made that you are not engaging in any of these actions, then the conflict-of-interest rules are not implicated and our analysis ends. Therefore, the threshold question is whether you are "making," "participating in making," or "influencing" a governmental

² These steps are addressed in the FPPC document entitled, "Can I Vote? Conflicts of Interest Overview" which is enclosed for your information.

decision by meeting with city staff to discuss a project appeal that is before the planning commission but not before the ARB.

Making a Governmental Decision

Under the analysis prescribed by step two, a public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, appoints a person, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Section 87100; regulation 18702.1(a).) Based on the facts you have provided, the ARB has already rendered a decision on your development project. Therefore, it appears that you will not “make” a decision on this project as a member of the ARB.

Participating in Making a Governmental Decision

A public official “participates in making a governmental decision” when, acting within the authority of his or her position and without significant substantive or intervening review, the official negotiates, advises or makes recommendations to the decisionmaker regarding the governmental decision. (Section 87100; regulation 18702.2.) Based on your facts, the ARB will not play any part in the decisionmaking on the project appeal before the planning commission. As a result, you will not be “participating” in a decision on this issue.

Influencing a Governmental Decision

The issue you raise concerns using your official position to “influence a governmental decision.” There are two rules as to whether a public official uses or attempts to use his or her official position to influence a governmental decision. The first rule applies when the relevant governmental decision is within or before the public official’s own agency, or an agency appointed by or subject to the budgetary control of the public official’s agency, but the public official is not a decisionmaker per se. (Regulation 18702.3(a).) In that case,

“... 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.” (*Ibid.*)

Under this rule, attempts to influence a decision include appearances or contacts on behalf of a client.³ However, the Act would not prohibit an official's employee or partner from representing a client before the official's agency even where the employee or partner uses letterhead that includes the official's name. (*Novak* Advice Letter, No. I-97-365.) We note this exception because on your letterhead, you have "associates" listed.

The second rule applies when the relevant governmental decision is within or before an agency other than the public official's own agency, or an agency appointed by or subject to the budgetary control of the public official's agency. (Regulation 18702.3(b).) Under this rule:

"[T]he 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." (*Ibid.*)

To determine whether your meeting with city staff would constitute "influencing a governmental decision," we first examine whether the ARB and the planning commission comprise a single agency. While in some contexts a city itself is considered a single agency, with respect to regulation 18702.3, the Commission will generally treat each public body, even within a single city, as separate public agencies. (*Hons* Advice Letter, No. I-00-255 and *Stout* Advice Letter, No. I-88-313.)

In the *Larmore* Advice Letter, No. A-00-275, we addressed the issue of whether the City of Santa Monica Planning Commission is a separate agency from the ARB. In that advice letter, we determined that the City of Santa Monica Planning Commission and the ARB are not a single agency because the ARB did not have budgetary or appointive control over the planning commission. If the situation has not changed since 2000, when we rendered that advice, then the planning commission and the ARB are not a single agency but are two separate agencies for purposes of the Act's conflict-of-interest rules, and regulation 18702.3(a) does not apply.

As a result, meeting with city staff regarding a governmental decision relating to your project appeal which is before the planning commission, and not before the ARB, does not implicate the Act's conflict-of-interest rules, so long as in such meetings, you do not act or purport to act on behalf of the ARB. If you do, then you would be "influencing a governmental decision" under subsection (b) of regulation 18702.3. In this regard, it must be clear to those meeting with you that you are not acting on behalf of the ARB, or your actions may constitute a violation under the Act's eight-step conflict-of-interest analysis.

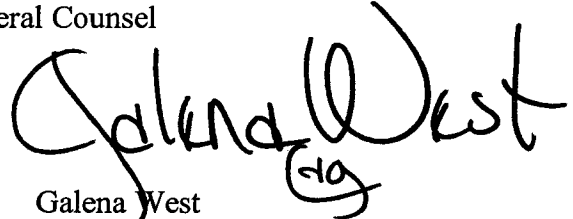
³ The Commission has recognized an exception for presentation of architectural, engineering, or similar drawings by an official to his or her own agency. (Regulation 18702.4(b), enclosed.)

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

Sincerely,

Luisa Menchaca
General Counsel

By:

A handwritten signature in black ink that reads "Galena West". The signature is written in a cursive style. Below the signature, there is a small circular stamp containing the initials "GJ".

Galena West
Counsel, Legal Division

GE:jg

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