



FAIR POLITICAL PRACTICES COMMISSION

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June 18, 2008

Gregory E. Simonian
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Re: Your Request for Advice
Our File No. A-08-096

Dear Mr. Simonian:

This letter responds to your request for advice on behalf of Councilmember Jerry Holloway regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws such as common law conflict of interest or Government Code Section 1090.

QUESTIONS

1. In determining whether real property in which Councilmember Holloway has an interest is located within 500 feet of the boundaries (or the proposed boundaries) of the property that is the subject of a governmental decision under Regulation 18704.2, is the "straight line" distance between his parcel and the nearest boundary of the property that is the subject of the decision measured by reference to (i) an imaginary vertical plane at each parcel's boundary; (ii) the shortest surface distance without regard to obstacles, but taking into consideration differences in elevation; or (iii) the legal boundary points of each parcel at the surface?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

2. Assuming Councilmember Holloway is disqualified under the Act from participating in city council or planning commission decisions on the property in question, would he still be permitted to take any of the following actions:

A. During city council public hearings on a development project, leave the dais, but remain seated with the public in the council chambers during the deliberations and vote?

B. During the city council public hearings on the project, and after leaving the dais, participate in the public comment period like other members of the public and express his support or opposition to the project? Does the outcome vary if he leaves the council chambers entirely after making public comments and before the city council discusses and decides the item?

C. During planning commission public hearings on the project, participate in the public comment period like other members of the public and express his support or opposition to the project? Does this outcome vary if he leaves the planning commission chambers entirely after making public comments and before the planning commission discusses and decides the item?

D. Outside of public meetings, discuss his support or opposition to the project with one other city council member who does not have a disqualifying conflict of interest?

E. Meet with friends, neighbors, and other members of the community, other than city officials, to rally either their support or opposition to the project?

F. Meet with the individual owners of the neighboring properties over which vehicular access and public road rights-of-way will be required in an effort to support or oppose the project?

G. Appear before or discuss the project with other agencies such as the LAFCO to express his personal (not official) support or opposition to the project?

H. Communicate his personal support or opposition to the project with reporters and other media outlets?

CONCLUSIONS

1. The distance between Councilmember Holloway's parcel and the nearest boundary of the property that is the subject of the decision is measured by using a conventional map and marking a 500-foot buffer zone around the boundaries of the project showing a straight-line 500-foot distance from the project in all directions, regardless of the contours of the property.

2.A, B & C. Councilmember Holloway may remain in a public meeting of the city council or the planning commission and appear before these bodies at these meetings if he publicly identifies his disqualifying economic interest, recuses himself from voting and limits his remarks solely to his personal interests.

2.D. Councilmember Holloway may not discuss the project with another city councilmember outside of any public city council meetings.

2.E & F. The Act does not prohibit Councilmember Holloway from discussing the project generally with friends, neighbors, or other members of the community, including owners of properties over which vehicular access and public road rights-of-way will be required for the project, provided that (i) these individuals are not members, officers, employees or consultants of the city and (ii) he does not ask them to discuss his concerns about the effect of the project on his property with members, officers, employees or consultants of the city.

2.G. Councilmember Holloway may appear before and discuss the project with other agencies such as LAFCO, so long as he does not attempt to use his official position to influence the other agency's decision by acting or purporting to act on behalf of, or as the representative of, the city council or the city.

2.H. Councilmember Holloway may communicate his personal support or opposition to the project with reporters and other media outlets.

FACTS

Jerry Holloway, a member of the Rancho Santa Margarita City Council, owns a home on a parcel in the vicinity of a proposed development of 80.1 acres within the city's sphere of influence (the "Development Property"). As proposed, the development would consist of 197 single family homes and would require vehicular access and public road rights-of-way over neighboring parcels that are not owned by the developer. Councilmember Holloway's parcel is depicted on a map you enclosed indicating that the boundaries of his parcel are located within 500 feet of the nearest boundary of the Development Property. You state that Councilmember Holloway has an economic interest of at least \$2,000 in his home. His parcel is located substantially more than 500 feet from neighboring parcels over which vehicular access and public road rights-of-way will be needed for this development.

The following governmental decisions may come before the city's planning commission or the city council with respect to the development: directing staff whether to commence planning for the proposed development before vehicular access and public road rights-of-way have been formally secured over neighboring parcels; directing staff regarding the degree of planning to complete before vehicular access and public road rights-of-way have been secured; approving and certifying an environmental impact report; approving zoning and general plan amendments; approving the site plan;

approving tentative subdivision maps; initiating or supporting requests to LAFCO to annex the Development Property to the city; and approving a pre-annexation development agreement. You anticipate that these decisions may be considered at different times and during different public hearings, depending on timing and the manner in which the developer chooses to proceed. However, you anticipate that the planning commission and the city council will consider the zoning and general plan amendments and conduct a project-level environmental review before considering the other matters.

ANALYSIS

Question 1

In construing Regulation 18704.2, we have approved the method of measuring the 500-foot mark of a project by marking a 500-foot buffer zone around the boundaries of the project showing a straight-line 500-foot distance from the project boundaries in all directions. (See, e.g., *Peck* Advice Letter, No. I-04-007, *Weste* Advice Letter, No. A-05-213, *Libow* Advice Letter, No. A-03-052). This is done regardless of the contours of the property. (*Ball* Advice Letter, No. A-01-279). This method employs the use of a conventional map that is a two-dimensional representation of three-dimensional space from an "overhead" view, just like the one you provided showing that the councilmember's property is within 500 feet of the Development Property. The methods you describe in your letter, to the extent they would yield a different result, may not be employed in calculating distance under Regulation 18704.2.

Question 2

You have listed eight governmental decisions that are expected to come before the city's planning commission or the city council relating to the project and ask whether Councilmember Holloway may take certain actions with respect to those decisions without making, participating in making or in any way using or attempting to use his official position to influence those governmental decisions. While generally we analyze each governmental decision separately, we will in this case address the narrow question you have asked regarding each of the actions Councilmember Holloway may take.

A. During city council public hearings on the project, leave the dais, but remain seated with the public in the council chambers during the deliberations and vote.

Regulation 18702.5 requires that a public official enumerated in Section 87200 (including a city council member) who has a conflict of interest in a decision noticed at a public meeting, must (1) immediately prior to the discussion of the item, orally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in Regulation 18702.5(b)(1)(B), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and vote on the item. Because Councilmember Holloway's position is enumerated in Section 87200, these requirements apply to him. Therefore, he must leave the room and cannot

remain in the audience during the city council's consideration of the matter, unless one of the exceptions listed in Regulation 18702.4 applies. (See discussion of these exceptions below).

B. During the city council public hearings on the project, and after leaving the dais, participate in the public comment period like other members of the public and express his support or opposition to the project and

(i) remain in the council chambers; or

(ii) leave the council chambers entirely after making public comments and before the city council discusses and decides the item.

Regulation 18702.4 states that even if a conflict of interest is present, a public official may appear before his or her agency as any other member of the general public in the course of its prescribed governmental function in order to represent himself or herself on matters related solely to his or her "personal interests." Such an appearance, properly made, does not constitute making, participating in making, or influencing a governmental decision. (Regulation 18702.4(a)(2) and 18702.4(b)(1).) An official's "personal interests" include, but are not limited to, an interest in real property that is wholly owned by the official or members of his or her immediately family. (Regulation 18702.4(b)(1)(A).)

The facts indicate that Councilmember Holloway owns real property within 500 feet of the Development Property. So long as this property is wholly owned by him and members of his immediate family, Councilmember Holloway may make an appearance before the city council during public meetings as a member of the general public to represent his interest. To avail himself of this exception, Councilmember Holloway must nevertheless, following the announcement of the agenda item to be discussed or voted upon but before either the discussion or vote commences, publicly identify the type of economic interest he holds (an interest in real property). Ordinarily, he would need to give the address of the location of the property but this is not required where the property is his principal or personal residence. If the governmental decision is to be made during an open session of a public meeting, his identification of his economic interest must be made orally and shall be made part of the official public record.² He must recuse himself from voting on the matter and leave the dais to speak from the same area as members of the public. (Regulation 18702.5).

Councilmember Holloway must limit his comments to his personal interests, and should make clear that he is not speaking in the interest of any other person or group and that he is not acting in any official capacity. (*Burns* Advice Letter, No. A-06-178, citing to *McHugh* Advice Letter, No. I-98-324; *Gallagher* Advice Letter, No. I-94-279; and *Larsen* Advice Letter, No. A-87-151.)

² For closed sessions and consent calendars, special rules found in Regulation 18702.5(c) and (d) apply.

If Councilmember Holloway has followed all the requirements of Regulation 18702.5(b)(1) and (b)(2) relating to the public identification of his economic interest, has recused himself from voting on the matter, and limited his comments to his personal interests, under Regulation 18702.5(d)(3), he may "listen to the public discussion of the matter with members of the public." We construe this to include listening to the city council members' discussion and vote.³

C. During planning commission public hearings on the project, participate in the public comment period like other members of the public and express his support or opposition to the project.

In determining whether a public official is using or attempting to use his or her official position to influence a governmental decision, Regulation 18702.3(a) applies the same rule, whether the official is attempting to influence his or her own agency, or an agency appointed by or subject to the budgetary controls of his or her agency. The "personal interests" exception under Regulation 18702.4(b) applies when an official is attempting to use his or her official position to influence a governmental decision of any agency covered by Regulation 18702.3(a).

Under the Rancho Santa Margarita Municipal Code, city council members appoint city residents to serve on the planning commission. Accordingly, if Councilmember Holloway follows all the requirements of Regulation 18702.5(b)(1) and (b)(2) relating to the public identification of his economic interest and limits his comments to his personal interests, he may appear before the planning commission as any other member of the general public in the course of the planning commission's prescribed governmental function in order to represent himself on matters related solely to his personal interests.

D. Outside of public meetings, discuss his support or opposition to the project with one other city council member who does not have a disqualifying conflict of interest

As discussed above, Regulation 18702.4(b) provides an exception to the rule prohibiting a public official from otherwise appearing before his or her agency to influence a decision in which he or she has a conflict of interest. As such, the regulation is subject to the traditional statutory construction that exemptions be construed narrowly. (See *Mason* Advice Letter, No. A-08-029; *Oderman* Advice Letter, No. A-00-082; and *Torrance* Advice Letter, No. A-94-084.) Regulation 18702.4 makes clear that an official may make "appearances" as a member of the general public "before an agency in the course of its prescribed governmental function" to represent himself or herself on matters related solely to his or her personal interests. (Regulation 18702.4(a)(2) and (b)(1).)

³ If the discussion and vote is made during a closed session of a public meeting, Councilmember Holloway may not be present when the decision is considered or knowingly obtain or review a recording or any other non-public information regarding the decision. (Regulation 18702.5(c).)

The regulation provides no other circumstances where the exception applies. Thus, Councilmember Holloway may not discuss his support or opposition to the project with another city council member outside of any public city council meetings. (*Burns* Advice Letter, supra; *Oderman* Advice Letter, supra.)

E. Meet with friends, neighbors, and other members of the community, other than city officials, to rally either their support or opposition to the project.

Regulation 18702.3(a) provides that with regard to a governmental decision that is within or before the official's own agency, or any agency appointed by or subject to the budgetary control of the official's agency, 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*. The Act does not prohibit Councilmember Holloway from discussing the project generally with friends, neighbors, and other members of the community, even if he does so in an attempt to rally their support or opposition to the project, unless they are members, officers, employees or consultants of the city. (See *McHugh* Advice Letter, supra; *Root* Advice Letter, No. I-97-397; Regulation 18702.4(b)(2).) Councilmember Holloway is free to encourage friends, neighbors and other members of the community to appear before the city council, the planning commission or other agencies to express *their* concerns about the project. However, if he asks these individuals to discuss *his concerns about the effect of the project on his property* with members, officers, employees or consultants of the city, he would be "otherwise attempting to influence" members of the city council or the planning commission. (*Benjamin* Advice Letter, No. A-00-210.)

F. Meet with the individual owners of the neighboring properties over which vehicular access and public road rights-of-way will be required in an effort to support or oppose the project.

Again, the Act does not prohibit Councilmember Holloway from discussing the project generally with individual property owners, even if he does so in an effort to support or oppose the project, provided that (i) the individual property owners are not members, officers, employees or consultants of the city; and (ii) he does not ask them to discuss his concerns about the effect of the project on his property with members, officers, employees or consultants of the city.

G. Appear before or discuss the project with other agencies such as the LAFCO to express his personal (not official) support or opposition to the project

Regulation 18702.3(b) sets forth the rule for determining when an official is attempting to use his or her official position to influence the decision of 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) provides that an official is attempting to use his or her official position to influence a decision if 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 another agency. Accordingly, Councilmember Holloway may appear before and discuss the project with another agency, such as LAFCO, and its member or staff, so long as he is not attempting to use his official position as a city council member to influence their decision. (*Benjamin Advice Letter, supra; Lea Advice Letter, No. A-95-096.*) He would be attempting to use his official position to influence the other agency's decision if, for the purpose of influencing the decision, he acted or purported to act on behalf of, or as the representative of, the city council or the city. In his discussions with the other agency's members or staff, he must emphasize that he is contacting them as an individual property owner and he is not acting in his capacity as a city council member or representing the city.

H. Communicate his personal support or opposition to the project with reporters and other media outlets.

An official is not attempting to use his or her official position to influence a governmental decision of an agency, as described in Regulation 18702.3(a), if the official communicates with the general public or the press. (Reg. 18702.4(b)(2).) We have advised that under the proper circumstances, a city council member may express his or her opinion to the public or the press by, for example, writing a newspaper article or appearing on a radio program regarding a matter in which he or she has a conflict of interest under the Act. (*Edelen Advice Letter, No. I-07-059; Acker Advice Letter, No. A-01-117.*) Thus, Councilmember Holloway may communicate his personal support or opposition to the project with reporters and other media outlets.

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

Sincerely,

Scott Hallabrin
General Counsel



By: Valentina Joyce
Counsel, Legal Division

VJ:jgl