



FAIR POLITICAL PRACTICES COMMISSION

428 J Street • Suite 620 • Sacramento, CA 95814-2329

(916) 322-5660 • Fax (916) 322-0886

September 17, 2008

Jon Givner
Deputy City Attorney
City and County of San Francisco
City Hall – 1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Re: Your Request for Advice
Our File No. I-08-117

Dear Mr. Givner:

This letter responds to your request for advice on behalf of San Francisco City Planning Commissioner Michael Antonini regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ This letter should not be construed as advice on decisions that may have already taken place. Our advice is based on the facts presented, and the Fair Political Practices Commission ("Commission") does not act as a finder of fact when it provides advice. (In re Oglesby (1975) 1 FPCC Ops. 71.) Because your inquiry is general in nature and does not involve a specific governmental decision, we are treating your request as one for informal assistance.²

QUESTION

Providing that Commissioner Antonini is disqualified under the Act's conflict-of-interest provisions, does the "public generally" exception allow him to, nevertheless, make, participate in making, or influence government decisions regarding the adoption of the proposed Eastern Neighborhoods Plan ("the Plan") to rezone four San Francisco neighborhoods?

CONCLUSION

No. Based on the facts presented, the public generally exception does not apply to Commissioner Antonini's circumstances.

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 Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice Regulation 18329(c) enclosed.)

FACTS

In a series of meetings over the coming months, the Planning Commission will consider a proposed plan to rezone an area of the City of San Francisco (the "City") that includes more than 2,000 acres and 16,000 properties. Commissioner Antonini has requested that you seek written advice on his behalf regarding whether his financial interests give rise to a conflict-of-interest under the Act, and if so, whether the "public generally" exception applies in his case. You also wish to know whether the specialized form of the "public generally" exception in Regulation 18707.9 also applies.

Since 2001, the City's Planning Department has been working to develop the the Plan to rezone four San Francisco neighborhoods: the Mission; the Central Waterfront; East South of Market; and Showplace Square/Potrero Hill (collectively "the Plan Area").

The proposed Plan calls for transitioning about half of the existing industrial areas in these four neighborhoods to mixed use zones that encourage new housing. The City's Planning Department has proposed various zoning changes throughout the Plan Area as part of the Plan. Specifically, the Department has proposed prohibiting residential and larger office or retail zoning in areas designated as "Production, Distribution and Repair" zones; creating a variety of different mixed-use zones in different neighborhoods; creating two special use districts; and rezoning some of the residential properties in the Plan Area.

Aside from redesignating parcels, the proposed rezoning also would adjust height limits both up and down in various areas, change parking requirements in mixed-use areas, increase open space, and replace existing density requirements with a bedroom-mix requirement.

The Eastern Neighborhoods Plan Area is over 2,000 acres in size and contains 16,887 properties, including individual condominium units. Overall, the Area contains 30,699 residential housing units, including single-family homes and multi-unit buildings. The Planning Department does not have data to determine the total number of property owners (or, specifically, homeowners) and renters in the Plan Area.

The Planning Department released draft Eastern Neighborhood Area Plans in December 2007 for public comment, and the Planning Commission now is considering the adoption of the proposed Plan in a series of hearings and votes. Ultimately, adoption of the Plan will require approval of the Planning Commission and the City's Board of Supervisors.

Commissioner Antonini has requested advice because he has an ownership interest in real property in the Plan Area. Through a family trust that he and his wife control, Commissioner Antonini owns a 25% share in a condominium in the Area. One of Commissioner Antonini's sons lives in the condominium, and Commissioner Antonini

receives no rental income from it. Although we do not know the exact value of the property, the value of Commissioner Antonini's share exceeds \$2,000.

You have concluded that Commissioner Antonini has a financial interest of more than \$2,000 in real property within the Plan Area, and you are not aware of any facts to rebut the presumption that the Plan will have a direct, material financial effect on that property.

A large number of properties – more than 5,000 - will be affected by the proposed Plan. But the City's Planning Department and other relevant agencies are unable to assess the monetary impact of the proposed Plan on either Commissioner Antonini's property or other properties in the Area. The City has not hired an assessor to determine the foreseeable impact of the Plan on specific property values, but City experts have concluded that the endeavor likely will be too speculative for accurate assessment. Generally, the *City experts* believe that the effects of the Plan on many property owners probably would be diffuse, but the exact degree and amount of these effects is very difficult to estimate. Even if an assessment would not be unduly speculative, the proposal to zone various properties in the Area in a number of different ways suggests that any assessment could be costly and time-consuming.

You have no reason to believe that Commissioner Antonini's property will gain or lose value in a way that is significantly different from other property owners. But, because of the multi-faceted and complex nature of the Plan (as the maps reflect), you also do not have data to establish that his property value will be affected in substantially the same way as 5,000 others, as the FPPC has defined that test. Therefore, you are seeking guidance as to whether, based on the facts described in this letter, Commissioner Antonini can establish that the public generally exception applies.

You wish to know whether "public generally" exception permits Commissioner Antonini to participate in the decisions, notwithstanding the apparent conflict.

In addition, your colleague Andrew Shen supplemented your request for advice. In his August 12, 2008 letter, Mr. Shen did not add additional facts but asked us to also consider the potential application of Regulation 18707.9(a) to Commissioner Antonini's circumstances. He stated that because Commissioner Antonini's property is not rental property, and because "decisions regarding the Eastern Neighborhoods Plan do not involve the respective rights of landlords and tenants," he was not sure whether the special rule in Regulation 18707.9 applies to these facts.

ANALYSIS

Based on the facts presented, we assume for purposes of this analysis that Commissioner Antonini has a conflict of interest in making, participating in making, and

influencing government decisions involving the Plan. Therefore, we discuss only Step 7, the “public generally” exception.

The “Public Generally” Exception – General Rule

Even if a public official determines that his or her economic interests will experience a material financial effect as a result of the governmental decision before the official, he or she may still participate under the “public generally” exception if the material financial effect of a governmental decision on a public official’s economic interests is indistinguishable from its effect on the public generally. (Section 87103; Regulation 18707.)

Regulation 18707.1 provides that in order to meet the public generally exception, for real property interests, the decision must affect either 10-percent of all property owners or all residential property owners in the jurisdiction or the district the official represents (Regulation 18707.1(b)(1)(B)(i)), or 5,000 property owners or residential property owners in the jurisdiction. (Regulation 18707.1(b)(1)(B)(ii). If the effect of the decision reaches these thresholds, it must next be determined whether the decision affects these other properties in “substantially the same manner” as it affects the official’s real property. (Regulation 18707(b)(4).) The phrase “substantially the same manner” is defined in Regulation 18707.1(b)(2).

You include information about the project size and the number of properties in the project area, but do not include property owner information as required under Regulation 18707.1(b)(1)(B)(i). For instance, your request for advice does not include the percentage of all property owners or all residential owners in the jurisdiction that would be affected by the Plan. Additionally, you do not include information regarding the number of property owners or residential property owners in the jurisdiction of the San Francisco Planning Commission.³

We are unable to determine if the public generally exception in Regulation 18707.1 applies because you have not provided sufficient facts to determine whether a “significant segment” as defined in Regulation 18707.1(b)(2) will be affected by the Plan.⁴ Therefore, this analysis ends because the first prong of a two-part test set forth in Regulation 18707.1(b) is not met.

³ You state that the city’s planning department “does not have data to determine the total number of property owners” in the Plan Area.

⁴ Because the Commission is not a finder of fact, the official must make a good faith effort to assess the effect of the decision by using some reasonable and objective methods of valuation. (*Doi* Advice Letter No. 1-04-076; *Moock* Advice Letter, No. A-01-140; *O’Harra* Advice Letter, No. A-00-174.) Such a good faith effort may require that additional information regarding the potential financial effect be gathered; a public official is not required to but may choose to utilize professional services, such as those of a professional appraiser, to assist in assessing the financial effect of a decision for conflict-of-interest purposes. (*Ho* Advice letter, No. A-00-241.)

Public Generally Exception – Regulation 18707.9

In addition to the basic rule for the “public generally” exception found in Regulation 18707.1, there are six specialized forms of the exception provided in Regulations 18707.2-18707.9.

In your request, you also seek advice as to the applicability of the public generally exception under Regulation 18707.9 for “residential property units.” This section provides a special rule for defining when certain “residential property units” constitutes a “significant segment” of the jurisdiction for purposes of applying the public generally exception.

Regulation 18707.9 as you point out in your letter of August 12, 2008, was adopted by the Commission to codify the *Ferraro* and *Overstreet* opinions⁵ to determine a specialized “significant segment” for owners of residential rental properties. It only applies when the official owns rental property. Because Commissioner Antonini does not own any residential rental property subject to the decisions in question, Regulation 18707.9 does not apply and we therefore will not further analyze its application.

Segmentation

If the “public generally” exception does not apply for a particular official, the official may still be able to participate in separate decisions pertaining to various parts of the redevelopment plan that do not financially affect his or her economic interests. We have previously advised under Regulation 18709 that large and complex decisions may, under certain circumstances, be divided into separate decisions so that an official who has a disqualifying interest in one component of the decision may still participate as to other components in which the official has no financial interest.

Regulation 18709 allows for segmenting decisions so that a governmental body can make the decisions in which an official is not able to participate first, and then continue to make decisions regarding the rest of that project, allowing the official to participate to the maximum extent possible.

Regulation 18709 states:

“(a) An agency may segment a decision in which a public official has a financial interest, to allow participation by the official, provided all of the following conditions apply:

“(1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the decision in

⁵ *In re Ferraro*, 4 FPPC Ops. 62 (1978) and *In re Overstreet*, 6 FPPC Ops. 12 (1981).

which the official has a disqualifying financial interest;

“(2) The decision in which the official has a financial interest is segmented from the other decisions;

“(3) The decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official’s participation in any way; and

“(4) Once the decision in which the official has a financial interest has been made, the disqualified public official’s participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified.

“(b) For purposes of this regulation, decisions are “inextricably interrelated” when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision.

“(c) Budget Decisions and General Plan Adoption or Amendment Decisions Affecting an Entire Jurisdiction: Once all the separate decisions related to a budget or general plan affecting the entire jurisdiction have been finalized, the public official may participate in the final vote to adopt or reject the agency’s budget or to adopt, reject, or amend the general plan.”

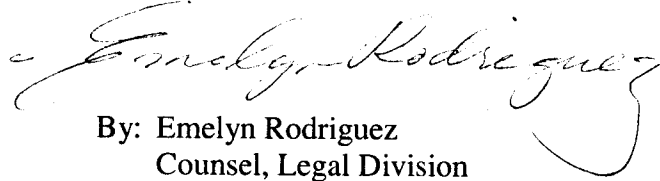
Under the guidelines of this regulation, any decision regarding the Plan in which Commissioner Antonini’s real property interest is involved must be made first, and all other decisions that will not affect this area would follow. In the past the Commission has advised that some decisions may be too interrelated to be considered separately. For example, if the resolution of one decision will effectively determine the result of the other decision, the decisions may not be segmented. (See generally *Yang* Advice Letter, No. I-06-198; *Stone* Advice Letter, No. A-06-007; *Barker* Advice Letter, A-05; *Hull* Advice Letter, No. A-04-052.)

In order to apply this rule, you will need to determine, based on the decisions before the Planning Commission, whether the decisions can be segmented, as described above. If the decision in which Commissioner Antonini would have otherwise had a prohibited conflict of interest may be separated from the remaining decisions as described above, he may then participate in the remaining decisions.

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

Sincerely,

Scott Hallabrin
General Counsel

A handwritten signature in cursive script that reads "Emelyn Rodriguez". The signature is written in black ink and is positioned above the typed name and title.

By: Emelyn Rodriguez
Counsel, Legal Division

ER:jgl

Enclosure