



FAIR POLITICAL PRACTICES COMMISSION

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January 4, 2010

Robert Zweben
City Attorney
City of Albany
1730 Solano Avenue
Berkeley, California 94707

**Re: Your Request for Advice
Our File No. A-09-265**

Dear Mr. Zweben:

This letter is in response to your request for advice on behalf of Albany City Council members Peggy Thomsen, Farid Javandel, and Mayor Marge Atkinson regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Your letter seeks further advice with respect to the questions raised in two prior advice letters: *Thomsen* Advice Letter, No. A-09-159, and *Zweben* Advice Letter, No. A-09-219.

Please note that our advice is based solely on 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. Also note our advice is based solely on the facts presented in your request; the Commission does not act as a finder of fact when it provides advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTIONS

1. If there is a meeting between Pierce Street neighbors and a member of the city council to discuss issues related to the Pierce Street Park, can council members with conflicts of interests attend the meeting? If the council members can attend, can the council members participate in discussions at the meeting?

2. If members of city staff or city council members attend a meeting with public officials from another agency or state elected officials to discuss the acquisition of the Pierce Street

¹The 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.

property, would it be permissible for the council members who have a conflict of interest to attend the meeting to express their views?

CONCLUSIONS

1. Even if a conflict of interest is present, Regulation 18702.4(a)(2) allows a public official to appear like any 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 the official's personal interests, as discussed below. This exception applies to city council meetings, community meetings, informational meetings, and workshops or hearings.

2. An official with a conflict of interest may not attempt to contact any individual members of the agency for purposes of influencing their decision regarding a project if they have a conflict of interest. If the meeting is not a "public meeting" the disqualified council members cannot attend. If the meetings are open to the public, the council members may attend and participate just as any other member of the general public, but must limit their participation to their own personal interests.

FACTS

The relevant facts in the *Thomsen* Advice Letter, No. A-09-159 were as follows:

"The City of Albany is trying to obtain a parcel of land for a new park. The land is within 500 feet of your home. You ask, if your recuse yourself from the city council's open and closed session consideration of the issue, may you act in your private capacity with your neighbors to acquire the park.

"You also ask whether you or Councilmember Javandel may participate in city council decisions regarding allocation of East Bay Regional Park WW Bonds to parks in the city, including the parks near your homes."

The relevant facts of the *Zweben* Advice Letter, No. A-09-219, were as follows:

"The City of Albany intends to apply for funding from the East Bay Regional Park District (the 'District') for various projects that would expand and improve the city's park and recreation facilities. The funding is available through the District's Measure WW allocation of funds to cities based on population. The City of Albany has been allocated \$771,363 and has up to the year 2018 to use the funds. To obtain this funding, cities submit applications that include a specific dollar amount requested, for each individual project.

"At the direction of the city council, the city's Parks and Recreation Commission (the 'Commission'), with input from the Waterfront Committee, has studied potential projects, compiled a list of thirteen projects and made recommendations

to the city council. City staff has also made recommendations regarding the thirteen projects. The city council is now selecting from that list the projects for which funding will be sought and deciding the dollar amount that will be requested for each project.

“One vote has already taken place for funding of a project to acquire land for ‘Pierce Street Park.’ Councilmembers Thomsen and Javandel recused themselves from discussions and voting on this project because they believed they had a disqualifying conflict of interest. They have indicated that they will also recuse themselves from future votes on any project funding because they believe those votes could affect the project in which they have a conflict of interest. Their belief is based on the fact that the city council has the power to revisit a decision regarding a particular project, including the Pierce Street Park project.

“Mayor Atkinson lives within 500 feet of one of the other projects (‘Ohlone Greenway’) that has not yet been voted on by the city council.”

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 own financial interests or the financial interests of persons who have supported them.” (Section 81001(b).) 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.

The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest.² (Regulation 18700(b).) Your question only concerns the second step, whether your conduct, or that of your spouse, will be considered “making, participating in making, or influencing a decision” in which you have a conflict of interest. Your facts indicate that the council members with the conflicts of interest will abstain from voting on or otherwise participating in decisions regarding the Pierce Street Park project. You have not requested advice as to whether you have a conflict of interest with regard to this

² Regulation 18700(b) sets out the eight-step process: To determine whether a given individual has a disqualifying conflict of interest under the Political Reform Act, proceed with the following analysis: (1) Determine whether the individual is a public official; (2) Determine whether the official will be making, participating in making, or using or attempting to use his/her official position to influence a government decision; (3) Identify the public official’s economic interests; (4) Determine whether that interest is directly or indirectly involved in the governmental decision; (5) Determine the applicable materiality standard; (6) Determine whether it is reasonably foreseeable that the governmental decision will have a material financial effect on the economic interest; (7) Determine if the reasonably foreseeable financial effect is distinguishable from the effect on the public generally; and (8) Determine if the public official’s participation is legally required despite the conflict of interest. Also enclosed is the fact sheet, “Can I Vote? Conflicts of Interest Overview,” which further explains your responsibilities under the Act.

project; therefore we do not analyze this issue. However, you wish to determine whether the officials may participate in various settings in their private capacities.

1. If there is a meeting between Pierce Street neighbors and a member of the city council to discuss issues related to the Pierce Street Park, can council members with conflicts of interests attend the meeting? If the council members can attend, can the council members participate in discussions at the meeting?

Even if a conflict of interest is present, an exception under Regulation 18702.4(a)(2) allows a public official to appear, as any 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 the official's personal interests. (Regulations 18702.4(a)(2) and 18702.4(b)(1) enclosed.) "Personal interests" include:

- An interest in real property which is wholly owned by the official or members of his or her immediate family;
- A business entity wholly owned by the official or members of his or her immediate family.
- A business entity over which the official exercises sole direction and control, or over which the official and his or her spouse jointly exercise sole direction and control. (Regulations 18702.4(a)(2) and (b)(1).)

Since each of the officials in question have real property near the Pierce Street Park site, the officials' can utilize this exception if the property is wholly owned by the official or members of his or her immediate family. We have previously applied this exception to community meetings, informational meetings, and workshops or hearings. (*Adams Advice Letter, No. I-06-129.*) Please note, however, this is a very narrow exception and does not permit the official to address the interests of other property or business owners. Comments should be made under the same time limits and procedures applicable to comments from members of the public.

2. If members of city staff or city council members attend a meeting with public officials from another agency or state elected officials to discuss the acquisition of the Pierce Street property, would it be permissible for the council members who have a conflict of interest to attend the meeting to express their views?

The regulation does not allow an official to attempt to contact any individual members of the agency for purposes of influencing their decision regarding the given project if they have a conflict of interest, other than at these public meetings within the parameters of the exception. (*Oderman Advice Letter, A-00-082.*)

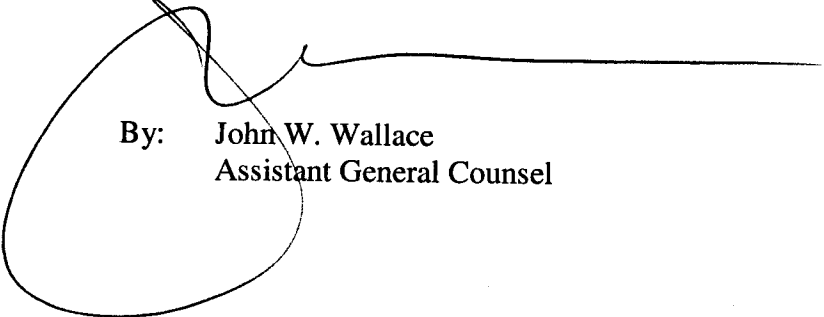
It is unclear whether the meeting you are referring to in your third question is an open public meeting or is a private meeting between representative of the two agencies. In any case, the disqualified council members will have no greater access to meetings than any other member of the public. If the meeting is not a "public meeting" the council members cannot attend. If the

meetings are open to the public, the council members may attend and participate just as any other member of the general public, but must limit their participation to their own personal interests.

If you have any additional questions, please feel free to call me at (866) 275-3772.

Sincerely,

Scott Hallabrin
General Counsel



By: John W. Wallace
Assistant General Counsel

JWW:jgl