



FAIR POLITICAL PRACTICES COMMISSION

428 J Street • Suite 620 • Sacramento, CA 95814-2329
(916) 322-5660 • Fax (916) 322-0886

September 8, 2014

Alexander Abbe
Assistant City Attorney
City of Santa Clara
1500 Warburton Avenue
Santa Clara, CA 95050

Re: Your Request for Advice
Our File No. A-14-158

Dear Mr. Abbe:

This letter responds to your request for advice, on behalf of Santa Clara Planning Commissioner Keith Stattenfield, regarding his duties under the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Government Code Section 1090. Moreover, this letter is based on the facts presented. The Fair Political Practices Commission does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTIONS

1. Does the Act prohibit Commissioner Stattenfield from submitting written comments during the 45-day comment period on an Environmental Impact Report (EIR) related to a large commercial development, located within 500 feet of his primary residence?
2. May the Commissioner appear as a member of the public during the public hearing on the EIR when the Planning Commission or City Council considers the project?

CONCLUSION

1. Commissioner Stattenfield may submit written comments during the 45-day comment period on an EIR just as any other member of the general public.

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. The Commissioner may appear as a member of the public during the public hearing on the EIR before the Planning Commission and the city council.

FACTS

Essex Property Trust, Inc., recently submitted a development application to the City for a proposed mixed-use development project consisting of 476 apartment units and approximately 86,000 square-feet of retail space at 3700 El Camino Real in the City of Santa Clara, on the former site of a now-closed department store. Commissioner Stattenfield's primary residence is located within 500 feet of the project site.

The City recently circulated a Draft Environmental Impact Report (DEIR) for the proposed project. Although most of the potential environmental impacts from the project could be reduced to less-than-significant levels through the adoption of various mitigation measures, the DEIR identifies several environmental impacts that will remain significant even after mitigation. Specifically, the DEIR states that as proposed, the project could result in significant unavoidable traffic impacts at three intersections, at least one of which is in the close vicinity of Mr. Stattenfield's primary residence. As a result, it is likely that the traffic levels on the streets surrounding his residence would be substantially altered by the project.

The Planning Commission will consider the project, and the DEIR later this year, and make recommendations to the City Council. Mr. Stattenfield intends to abstain from participating in any Planning Commission actions concerning the project. Mr. Stattenfield would, however, like to provide comments to the City concerning the DEIR as a member of the public during the public hearings before the Planning Commission, and later the City Council.

In advance of those public appearances, Mr. Staffenfeld would also like to provide written comments to the City during the DEIR "comment period." The City is legally obligated to provide a written response to comments concerning the environmental impacts of the proposed project received during the comment period. These written responses, together with the comments and the DEIR, would make up the Final EIR for the project. If Commissioner Startenfeld appears at the public hearing as a member of the public, but does not provide any written comments on the DEIR, the City could still attempt to provide verbal responses to his comments at that same meeting. However, there would not be an opportunity to provide a thorough analysis or a written response, and Mr. Staffenfeld's verbal comments would not be made a part of the Final EIR.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or 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 individual has a disqualifying conflict of interest in a given governmental decision.

Your letter assumes Commissioner Stattenfield has a conflict of interest by virtue of his real property located within 500 feet of the proposed project site. Thus, we do not need to analyze all the steps of the standard analysis. Rather you ask specifically about the commissioner representing his own interests before his agency and the city council.

Influencing:

An official “attempts to use his or her official position to influence a decision” if “the official contacts, or appears before, or otherwise attempts to influence any member, officer, employee or consultant of the agency.” (Regulation 18702.3.)

There are two situations that are considered using one’s official position to influence a governmental decision. The first is when a governmental decision is within or before the official’s own agency or an agency appointed by or subject to the budgetary control of the official’s agency. Regulation 18702.3(a) states that an 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.”

This provision, absent an exception, would prohibit the commissioner from representing his own interests or those of clients before the planning commission or any city agency appointed by or subject to budgetary control of the planning commission.

The second situation is when the government decision is before an agency that is not the official’s own agency or appointed by or subject to his or her own agency’s budgetary control. Under this situation, Regulation 18702.3(b) states that an “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.” This would allow the commissioner to appear before the city council so long as he did not purport to act as a representative of the planning commission. This prohibition from acting as a representative of the planning commission includes, but is, not limited to, using agency letterhead in any communication or using your agency staff to contact members of other agencies.

Exceptions

Regulation 18702.4 provides a list of exceptions to the general disqualification rules of the Act. You asked specifically about Regulation 18702.4(a)(1), which provides that making or participating in making a governmental decision shall not include:

“Appearances by a public official 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 the official’s personal

interests as defined in Title 2, California Code of Regulations, section 18702.4(b)(1);”

Moreover, Regulation 18702.4(b)(3) provides:

“(b) Notwithstanding Title 2, California Code of Regulations, section 18702.3(a), an official is not attempting to use his or her official position to influence a governmental decision of an agency covered by that subsection if the official:

“(1) Appears in the same manner as any other member of the general public before an agency in the course of its prescribed governmental function solely to represent himself or herself on a matter which is related to his or her personal interests. An official’s “personal interests” include, but are not limited to:

“(A) An interest in real property which is wholly owned by the official or members of his or her immediate family.

“(B) A business entity wholly owned by the official or members of his or her immediate family.

“(C) 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.” (Emphasis added.)

We have consistently advised that this exception is very narrow and is not intended to apply to every decision in which an official has a conflict of interest, but only those decisions where the official’s personal economic interests will be affected and no one else but the official can represent his or her concerns relative to those interests. Consequently, the exception would not permit an official to represent anyone else’s interest. In addition, we have cautioned that comments should be strictly limited to the official’s personal interests, and the official should make clear that he or she is not speaking in the interest of any other person or group, and that he or she is not acting in an official capacity. (See *Simonian* Advice Letter, No. A-09-174 and *Adams* Advice Letter, No. I-06-129.) Under your facts the exception would allow the commissioner to appear before the planning commission as any other member of the public could.

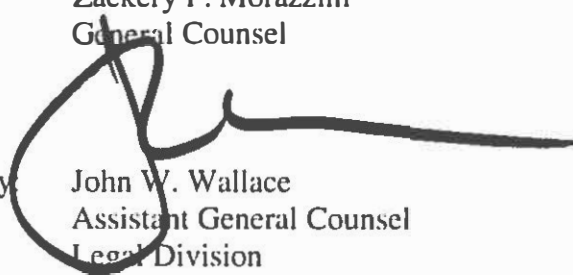
Finally, you ask about written communications that the commissioner might provide during the 45-day comment period required by state law for the EIR. While the exception for appearing in the same manner as any other member of the general public before an agency in the course of its prescribed governmental function has generally been applied to appearances in public meetings, the rationale would appear to apply to these specific comment letters as well.

In the *Hold* Advice Letter, No. A-14-100, in response to a question as to whether an official could provide written comments to her own agency pursuant to City regulations that allowed property owners within 300 feet of the project property to file a request for a public hearing, we advised that since the rules also applied to individuals similarly situated to the official, the official would be allowed to comment. Thus, the commissioner may submit written comment during the 45-day comment period on the EIR just as any other member of the general public.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By  John W. Wallace
Assistant General Counsel
Legal Division