



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
428 J Street • Suite 620 • Sacramento, CA 95814-2329
(916) 322-5660 • Fax (916) 322-0886

February 11, 2015

John Bakker
Principal
Meyers / Nave
555 12th Street, Suite 1500
Oakland, CA 94607

Re: Your Request for Advice
Our File No. A-15-246

Dear Mr. Bakker:

This letter responds to your request for advice on behalf of the City of Dublin regarding the conflict of interest code provisions of the Political Reform Act (the "Act").¹ We base this letter on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTION

Is Mike Porto, a consultant hired by the City of Dublin for planning and engineering services, a public official under the Act, and must the city designate Mr. Porto in the city's conflict of interest code as required under Section 87302 of the Act?

CONCLUSION

Mr. Porto is a consultant and therefore a public official under the Act. Thus, Mr. Porto's positions must be designated in the city's conflict of interest code and Mr. Porto must file statements of economic interests as required by the Act.

FACTS

Mr. Porto has for many years served as a planning consultant for the City of Dublin (the "City"). He also provides services to the City as an on-call engineer. Mr. Porto provides services through two separate contracts between the City and Stevenson, Porto and Pierce, the firm that employs Mr. Porto. Mr. Porto is the President of the firm. Mr. Porto's role in the City is to serve as the staff planner on various development applications proposed by developers. In this position, he makes presentations from time to time to both the City Council and the Planning Commission. He

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.

also prepares written staff reports. The information that Mr. Porto provides to decision makers is reviewed and approved by the Planning Manager, and it is in many cases reviewed and approved by the Community Development Director, the Assistant City Manager, and the City Manager, all of whom are city employees. Mr. Porto is paid by the City with city funds, although the City does charge development applicants for the costs of processing development applications.

Under the terms of the planning services contract, Mr. Porto is responsible for the following:

“Provision of Planning, Public Works, and other development services including, but not limited to, environmental, architectural, landscape architectural, ecological and/ or biological consulting services to the City of Dublin regarding project coordination of development entitlements. In addition, project management and coordination for specific assistance on specialized projects, programs and studies for the Community Development and Public Works Departments . . .”

The scope of work for services provided to the Community Development Department includes:

“Interjurisdictional development coordination of sphere of influence amendments, annexations, general plan amendments, specific plan amendments and implementation of special programs and studies such as entitlement negotiations to implement the Heritage Park Specific Plan, Moller Ranch Development Plan, Schaefer Ranch Unit 3 and project management and oversight for environmental documents ranging from environmental impact reports, supplemental environmental impact reports, mitigated negative declarations, negative declarations as well as preparation of Notices of Preparation and Determination. Services to include site design, architectural elevations, color blocking, material coordination and implementation of design details and standards not put forth by the development community as a part of the overall project design.”

The scope of work for services provided to the Public Works Department includes:

“Plot plan review, site design, grading studies, topographic analysis, improvement plan, grading plan and final map review. Engineering design and environmental support for Capital Improvement Projects as well as development driven projects and specialized administrative support as needed.”

In providing planning services, Mr. Porto works for the City’s Planning Division. Mr. Porto and several other planners on the City’s staff report to the Assistant Community Development Director, who reports to the Community Development Director.

The scope of services for Mr. Porto’s engineering services contract provides for development review and drafting support including all of the following:

- “Serve as engineering project manager and primary engineering reviewer for a wide variety of land development, subdivision and building permit applications.”

- “Act as an extension of City staff, protecting the interests of the City and its residents throughout the life of each development project.”
- “Review and manage multiple land development, subdivision and building permit applications from initial planning entitlement through improvement plan and final map approval, construction and final sign-off of improvements.”
- “Review various planning entitlement applications such as Tentative Maps, Site Development Reviews and Conditional Use Permits.”
- “Develop conditions of approval.”
- “Review parcel maps, final maps, tract improvement plans, grading plans, street improvement plans, plot plans and building permit plans for conformance with published City and State regulations and engineering standards of practice . . .”
- “Review plans for conformance with the requirements of the RWQCB NDPEs Municipal Regional Permit (MRP) . . .”
- “Work collaboratively with Public Works staff and other City departments such as Planning, Building, Fire and Environmental Services during the review process.”
- “Coordinate the review and approval process with outside agencies . . .”
- “Correspond directly with applicants and their design teams.”
- “Attend meetings with applicants and staff and conduct various other duties at City Hall in order to efficiently coordinate project reviews with City staff.”
- “Write memorandums summarizing plan review comments for transmittal to the applicant.”
- “Write staff reports for City Council meetings.”
- “Preparation of agreements including long term encroachment agreements, stormwater operations maintenance agreements and subdivision improvement agreements.”
- “Administration of surety bonds associated with various agreements.”
- “Preparation of grant deed and grant of easement documents and review of associated plat maps and legal descriptions.”
- “Perform field inspections of projects under construction.”
- “Prepare and revise City Standard Plans, Details, and other drawings.”

- “Prepare plats, maps, and informational exhibits.”
- “Prepare shapefiles, metadata, other information for City GIS.”
- “GPS data collection, inventory management, and GIS integration.”
- “Prepare CAD procedures and workflows.”

ANALYSIS

The Act requires public officials to disclose certain assets and income if their official actions may foreseeable affect these interests. In appropriate circumstances, officials must also disqualify themselves to avoid conflicts of interest. (Section 81002(c).) To accomplish this purpose, the Act requires public officials who make or participate in the making of governmental decisions to file statements disclosing their economic interests. (Sections 87300 *et seq.*)

Under Sections 87300, every public agency must adopt a conflict of interest code enumerating the positions within the agency that involve the making or participation in the making of decisions that may foreseeably have a material effect on any financial interest. The disclosure obligations of these filers are set by the conflict of interest code adopted by their respective agencies. Persons so designated in the conflict of interest code are known as “designated employees,” a term that includes officers and employees of an agency, as well as an agency’s *consultants*. (Section 82019.)

To determine whether Mr. Porto must be designated in the City’s conflict of interest code and file statements of economic interest as a designated employee, we must determine whether he is a consultant under the Act. However, we note that the term “consultant” has a very specific meaning under the Act, which may vary from the definition typically used for the term in commercial parlance. For purposes of the Act, a “consultant” is defined in Regulation 18700.3(a) as an individual who, pursuant to a contract with a public agency:

“(1) Makes a governmental decision whether to:

“(A) Approve a rate, rule, or regulation;

“(B) Adopt or enforce a law;

“(C) Issue, deny, suspend, or revoke any permit, license, application, certificate, approval, order, or similar authorization or entitlement;

“(D) Authorize the agency to enter into, modify, or renew a contract provided it is the type of contract that requires agency approval;

“(E) Grant agency approval to a contract that requires agency approval and to which the agency is a party, or to the specifications for such a contract;

“(F) Grant agency approval to a plan, design, report, study, or similar item;

“(G) Adopt, or grant agency approval of, policies, standards, or guidelines for the agency, or for any subdivision thereof; or

“(2) Serves in a staff capacity with the agency and in that capacity participates in making a governmental decision as defined in Regulation 18704(a) and (b) or performs the same or substantially all the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency’s Conflict of Interest Code under Section 87302.

As provided in Regulation 18704:

“(a) Making a Decision. A public official makes a governmental decision if the official authorizes or directs any action, votes, 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.

“(b) Participating in a Decision. A public official participates in a governmental decision if the official provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review.”

In this case, you have provided facts indicating that Mr. Porto is generally responsible for developing and coordinating projects, reviewing projects, and reporting information to the responsible decision makers. While this characterization of the Mr. Porto’s responsibilities suggests that he is not necessarily making decisions, it is unnecessary for us to consider whether Mr. Porto is making decisions as defined in Regulation 18704(a) in light of our conclusion that Mr. Porto is participating in decisions in a staff capacity.

Regulation 18701(a) provides two tests to determine if an individual is a consultant. The first test is whether the individual (1) serves in a staff capacity with the agency and (2), in that capacity, participates in making a governmental decision. The second test is whether the individual (1) serves in a staff capacity with the agency and (2), in that capacity, performs the same or substantially the same duties of an individual holding a position specified in the agency’s conflict-of-interest code. (See *McKee* Advice Letter, No. A-14-050.)

The phrase “serves in a staff capacity” has been construed by the Commission to include only those individuals who are performing substantially all the same tasks that normally would be performed by one or more staff members of a governmental agency. Implicit in the notion of service in a staff capacity is an ongoing relationship between the contractor and the public agency. We have advised that a contractor serves in a staff capacity where the contract calls for work to be performed “over more than one year” on “high level” projects. (*Ferber* Advice Letter, No. A-98-118.) Alternatively, we have advised that a contractor does not act in a staff capacity where the work is to be performed on one project or a limited number of projects over a limited period of time (*Sanchez* Advice Letter, No. A-97-438), where the relationship between the contractor and the agency would last only 12-16 months with no ongoing relationship contemplated (*Harris* Advice

Letter, No. A-02-239), and where, under a multi-year contract, the contractor would perform only on a sporadic basis (*Maze* Advice Letter, No. I-95-296 and *Parry* Advice Letter, No. I-95-064).

Under the facts you have provided, Mr. Porto has been serving as a planning consultant for the City for many years and serves the city as an on-call engineer. In these positions, Mr. Porto provides multiple high-level planning and engineering services that would typically be performed by other planning division staff. In fact, one of Mr. Porto's numerous duties specifically states that he will "act as an extension of City staff, protecting the interests of the City and its residents throughout the life of each development project." Based upon Mr. Porto's duties as a planning consultant and on-call engineer, we find that Mr. Porto is serving in a staff capacity in both positions. Thus, the determinative question is whether Mr. Porto is participating in making governmental decisions under Regulation 18704 without significant intervening review.

You have suggested that Mr. Porto does not participate in making governmental decisions without significant intervening review because "the information that Mr. Porto provides to decision makers is reviewed and approved by the Planning Manager, and it is in many cases reviewed and approved by the Community Development Director, the Assistant City Manager, and the City Manager." However, significant intervening review is much more than just the review and approval by one or more superiors. For instance, we have previously advised that significant intervening review is not just the mere review of the recommendations by superiors, but rather the independent checking of the results without solely relying on the data of the consultant. (*Greenwold* Advice Letter, No. I-90-349.) Similarly, in the *Kaplan* Advice Letter, No. A-82-108, we stated that a consultant participates in a decision, even if it is "reviewed" by several of his superiors, if: (1) superiors rely on the data or analysis prepared by the consultant without checking it independently, (2) superiors rely on the professional judgment of the consultant, or (3) the consultant may in some other way actually influence the final decision.

In this case, Mr. Porto performs multiple aspects of project design and review and acts as a manager and coordinator for City development projects. In performing these duties, Mr. Porto is serving in a capacity that very much affects the viability of each of the projects he is assigned. Notwithstanding review by Mr. Porto's superiors, it clearly appears that the decisions makers regarding any particular project are relying on Mr. Porto's professional judgment in making their decisions. Accordingly, Mr. Porto is a "consultant" under the Act and must file statements of economic interest. To the extent that the City has not previously designated "consultants" in its conflict of interest code, the City must amend its code as soon as possible.²

² Under Section 87306(a), amendments or revisions to a conflict of interest code must be submitted to the code reviewing body within 90 days after changed circumstances necessitating the amendment have become apparent.

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

Sincerely,

Hyla P. Wagner
General Counsel

A handwritten signature in black ink, appearing to read "B. Lau", with a long horizontal flourish extending to the right.

By: Brian G. Lau
Senior Counsel, Legal Division

BGL:jgl