

July 28, 2003

SDEC Informal Advice Letter IA03-08

Jay Hyde
1035 Myrtle Way
San Diego, CA 92103

Re: Request for Advice Regarding the Ability of City Board and Commission
Members to Influence Municipal Decisions on Behalf of Clients

Dear Mr. Hyde:

This advice letter has been prepared in response to your question to the City of San Diego Ethics Commission regarding the extent to which a City board or commission member may influence City decisions on behalf of a client. Your question does not identify any specific persons or actual set of facts, but is instead of a general and hypothetical nature. Accordingly we consider your question to be a request for informal advice. The Commission's response is detailed below.

SHORT ANSWER

The City's commission members provide an invaluable service to the City of San Diego, a service that is especially appreciated because it is performed without the benefit of financial compensation. Many commission members volunteer their time to City service outside of private sector occupations. A significant number are attorneys, architects, engineers, and consultants, some of whom have clients with business before the City. These commissioners must be particularly cautious not to use their City position to influence City business on behalf of those clients. As a basic rule, a commission member is not permitted to appear before his or her own commission for the purpose of influencing that commission on behalf of a client. By acknowledging and understanding this basic conflict of interest rule, however, commissioners should be able to see how they can perform their City duties in a manner that is compatible with their occupational pursuits and the duties they owe to their clients.

**POTENTIAL CONFLICT WITH CLIENTS
WHO ARE A SOURCE OF INCOME**

The conflict of interest rules applicable to City Officials are codified in the City's Ethics Ordinance, which is set forth in Chapter 2, article 7, division 35 of the San Diego Municipal Code [SDMC]. The term, "City Official" includes any member of a City commission who is required to file an annual statement of economic interests disclosure form pursuant to a conflict of interest code adopted by the City Council. SDMC § 27.3503. A principal reason behind the adoption of the Ethics Ordinance was "to embrace clear and unequivocal standards of disclosure and transparency in government so as to avoid conflicts of interest and the appearance of conflicts of interest." SDMC § 27.3501. As a means of achieving this goal, the Ethics Ordinance prohibits City Officials from exercising improper influence on municipal decisions. Section 27.3561 of the SDMC provides:

It is unlawful for any City Official to knowingly influence a municipal decision if it is reasonably foreseeable that the municipal decision will have a material financial effect on:

- (a) the City Official or a member of his or her immediate family, if the material financial effect is distinguishable from its effect on the public generally; or
- (b) any of the following economic interests:

. . . .

- (4) any person from whom a City Official or a member of the City Official's immediate family has received (or by whom you have been promised) \$500 or more in income within twelve months prior to the municipal decision.

This local prohibition is derived from similar provisions (Cal. Gov't Code §§ 87100, 87103) in the state's Political Reform Act [PRA] that preclude a public official from making a decision, participating in the making of a decision, and influencing a decision, in instances where that decision could affect a client from whom he or she has received \$500 or more within the previous twelve months. Thus, City commissioners must be aware of three aspects of the basic prohibition relating to the decisionmaking process when they have clients with matters pending before their commissions. The first two aspects: (1) making a decision and (2) participating in a decision, are outside the scope of this advice letter.¹ The third prohibition, relating to influencing a municipal decision, is the subject of this advice letter, and is also the subject of title 2, section 18702.3 of the California Code of Regulations. Title 2 encompasses a body of regulations created by the state's Fair Political Practices Commission [FPPC] to carry out the purposes and provisions of the PRA. In adopting this particular regulation, the FPPC has clarified what it means to influence a governmental decision:

¹ City Officials who have a financial interest in a decision are generally required to recuse themselves from voting on that decision and from participating (e.g., advising, negotiating, making recommendations) in that decision.

With regard to a governmental decision which is within or before an official's agency or an agency appointed by or subject to the budgetary control of his or her 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. *Attempts to influence include, but are not limited to, appearances or contacts by the official on behalf of a business entity, client, or customer.*

Cal. Code Regs. tit. 2, § 18702.3(a) (emphasis added).

SCOPE OF THE PROHIBITION

The term "agency" as used in FPPC regulation 18702.3, does not mean only the City of San Diego as a whole. While the City is itself an "agency," this term also includes each and every department, board, commission, and similar entity within the City. As set forth in the PRA, the state defines "local government agency" to mean "a county, city or district of any kind including school district, or any other local or regional political subdivision, *or any department, division, bureau, office, board, commission or other agency of the foregoing.*" Cal. Gov't Code § 82041 (emphasis added).

Thus, Regulation 18702.3 prohibits a commission member from appearing before his or her own commission for the purpose of influencing that commission on behalf of a client.² A member of a commission may not avoid this prohibition by simply disqualifying himself or herself from the decision. Regulation 18702.3(b)(4) explicitly provides that a public official is "deemed to be attempting to use his or her official position to influence a governmental decision whenever the official appears before his or her own agency to try to influence an agency decision on behalf of a client." *In re Buchert*, FPPC Adv. Ltr. I-99-242. A member of a City commission is therefore "prohibited by the [Political Reform] Act from appearing before [that commissioner's] Commission on behalf of any of his clients to answer questions from the Commission about the client's project, even if he first disqualified himself from voting on the project." *Id.*

It is important to note that this prohibition extends beyond the immediate scope of a commissioner's particular commission; it also applies to the City staff associated with that commission. For example, the City of San Diego's Planning Commission, as an agency, includes City staff in the Planning Department and any other City staff who are involved in the business of the Planning Commission by reviewing projects, making recommendations, rendering advice, making approvals, or otherwise assisting in the processing of a project. A planning commissioner "may not appear before his own agency (the planning commission) or make any contact with the city planning staff regarding a matter which is, or may come, before the planning commission."

² City Officials are also prohibited from appearing before any other "agency appointed by or subject to the budgetary control of his or her agency." This prohibition applies more squarely to the Mayor and members of the City Council, who play an important role in appointing persons to the many "agencies" within the City and have budgetary control over City departments.

In re Bowler, FPPC Adv. Ltr. I-93-287. The FPPC has opined that “as a general rule [a Planning Commissioner] is prohibited from speaking with planning staff and other City employees about a client’s project, if that project is subject to approval by the Planning Commission, because such contact would be deemed an attempt to use his official position to influence a governmental decision regarding a matter that is before his own agency.” *In re Buchert*, FPPC Adv. Ltr. I-99-242. The prohibition also extends to matters that may not ever come before a commission. Interacting with planning staff members on administrative matters were “clearly prohibited even though the matter may not go before the Planning Commission.” *In re Martello*, FPPC Adv. Ltr. A-85-190. In other words, the prohibition of contact with staff doesn’t rest on the existence of an actual project pending before the commission; instead, the prohibition is in effect as to any staff member involved in supporting or assisting the commission with regard to commission business.

While you did not identify the City’s Planning Commission as the subject of your query, it has clearly proved to be a useful example in advice letters issued by the FPPC. Please keep in mind, however, that the local and state conflict of interest laws applicable to Planning Commission members apply equally to every other City Official.

EXCEPTIONS

The laws set forth above are not meant to be seen in absolute terms, but are instead meant to provide the scope of a basic prohibition. The FPPC recognizes that many local commissions are filled with professionals who conduct business in the specialty that makes their presence on their particular commission so valuable. For this reason, it has established a number of exceptions that allow commission members to lawfully conduct business in a manner that does not violate the spirit and intent behind the state’s conflict of interest laws.

A. *Personal Interest Exception*

FPPC regulations provide that it is not considered using an official position to influence a governmental decision if a commissioner “[a]ppears 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.” Cal. Code Regs. tit. 2 § 18702.4(b)(1). In other words, a commission member may, during a meeting of the commission, and as a member of the general public, represent his or her own personal interests. The regulation defines “personal interests” to include the following:

- (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.

Thus, the “personal interest” exception allows a commissioner to appear before his or her commission under certain circumstance. It is important, however, to keep in mind that this exception is rather narrow and requires the commission member to make it clear that he or she is not acting in an official capacity. Additionally, a commissioner who appears before his or her own commission at a public meeting under the “personal interest” exception may not contact the individual commission members before, during, or after that meeting to discuss the decision.

B. Technical Documents Exception

Regulation 18702.4(b)(4) provides another exception that allows for the presentation of certain technical drawings by a commission member to his or her own commission, even when on behalf of a client. This exception applies when an official:

Prepares drawings or submissions of an architectural, engineering or similar nature to be used by a client in connection with a proceeding before any agency. However, this provision applies only if the official has no other direct oral or written contact with the agency with regard to the client's proceeding before the agency except for necessary contact with agency staff concerning the processing or evaluation of the drawings or submissions prepared by the official.

This exception applies only to the preparation of technical documents. The preparation of non-technical documents or other materials does not fall within this exception. *In re Grocott*, FPPC Adv. Ltr. A-02-028. This exception also “does not permit an official to have any direct contact with the agency regarding the client’s project except for necessary contact with agency staff concerning the processing or evaluation of the drawings or submissions prepared by the official.” *In re Buchert*, FPPC Adv. Ltr. I-99-242. The term “necessary contact” has been “narrowly construed to allow an official only to respond to questions from agency staff regarding the evaluation of drawings and submissions prepared by the official or relating to their movement through the approval process.” *Id.* Finally, the exception does not allow an official to “contact agency staff with respect to any drawings or submission prepared by someone other than the official.” *Id.* As you can see, the exception provided by 18702.4(b)(4) is narrow and does not permit a commission member to have contact with City staff except as stated.

C. Design Review Committee Exception

Another exception allowed by Regulation 18702.4(b) concerns instances where the commission is a type of “design review committee” and certain criteria are met. According to Regulation 18702.4(b)(5), this narrow exception is dependant on the following criteria. The commission member is not improperly influencing a governmental decision if he or she:

- (5) Appears before a design or architectural review committee or similar body of which he or she is a member to present drawings or submissions of an architectural, engineering or similar nature which the official has prepared for a client if the following three criteria are met:
- (A) The review committee's sole function is to review architectural or engineering plans or designs and to make recommendations in that instance concerning those plans or designs to a planning commission or other agency;
 - (B) The ordinance or other provision of law requires that the review committee include architects, engineers or persons in related professions, and the official was appointed to the body to fulfill this requirement; and,
 - (C) The official is a sole practitioner.

D. Appearance before the City Council and other City Bodies

The prohibitions discussed in this advice letter apply to a commissioner's ability to influence the commissioner's agency. As broadly as "agency" is defined, it does not extend to areas over which the commissioner's commission has no control. The FPPC evaluated this issue in the case of a Los Gatos Planning Commissioner's ability to influence the town council on behalf of a client. Finding that such influence was not unlawful, the FPPC stated:

The town council is not under the budgetary or appointive control of the planning commission. Therefore, [the commissioner] may appear before the town council regardless of the extent of [the commissioner's] economic interest in the subject of the decision before the town council. For example, before the town council [the commissioner] may represent his own interests in a project he wholly owns *or his client's interest in a project owned by the client*. He may also speak with the town council staff about the processing and evaluation of his architectural drawings and similar submissions.

In re Levinger, FPPC Adv. Ltr. I-88-328 (emphasis added).

Similarly, a commissioner may be permitted to influence a commission other than his or her own. In *In re Larmore*, FPPC Adv. Ltr. A-00-275, a member of the Santa Monica Architectural Review Board was not prohibited from trying to influence a matter before the Santa Monica Planning Commission. After finding that the Planning Commission did not come under the budgetary or appointive control of the Architectural Review Board, and that the two city entities did not share members, the FPPC determined that the two entities "are not a single agency but are two separate agencies for purposes of the [PRA's] conflict of interest rules." The FPPC concluded that the Architectural Review Board member's meeting with city staff regarding a

decision before the Planning Commission (a decision that would never be before the Architectural Review Board) was not prohibited.

When commissioners do attempt to influence the City Council or another City agency, they must be careful not to do so in their capacity as commissioners. Instead, they must make it clear that they are acting solely in their individual capacity. They must also be careful to interact only with the staffs associated with these separate "agencies," and not the staffs that support or assist their own commission.

E. Appearance by Other Members of Firm

The prohibitions discussed in this advice letter pertain specifically to the City Official who sits on a City commission. It does not extend to other members of that official's firm who are not themselves public officials. The FPPC advised in *In re Buchert*, FPPC Adv. Ltr. I-99-242, that the Political Reform Act "does not prohibit an employee or partner in a disqualified planning commissioner's architectural business from representing a client of the business before the planning commission." Additionally, in *In re Miralles*, FPPC Adv. Ltr. I-02-182, the FPPC confirmed that an official's employee or partner could represent a client before the official's agency "even where the employee or partner uses letterhead that includes the official's name." The disqualified commissioner, however, must be careful not to assist such an employee or partner with regard to the presentation of the client's matter to the commission. The prohibition against influencing the decision includes influencing the decision through an intermediary. While a disqualified commissioner is not prohibited from attending the public meeting of his or her commission in his or her capacity as a member of the public, that commissioner may not in any way assist in the presentation of the matter to the commission by providing information or advice to the presenter. *In re Buchert*, FPPC Adv. Ltr. I-99-242.

Please note that the ability of an employee or partner to represent a client's interests before a commission does not also allow the disqualified commissioner to hire someone else or associate with another firm for the same purpose. Because attempting to influence a governmental decision is a concept that is broadly construed, a commissioner who hires someone else to present his or her project or plans to his or her own commission would be attempting to influence the other commissioners in violation of the Political Reform Act. *In re Freeman*, FPPC Adv. Ltr. I-90-664. In the same regard, a disqualified commissioner may not ghostwrite a document that is presented to his or her own commission. *In re Levinger*, FPPC Adv. Ltr. I-88-328.

CONCLUSION

The law set forth in this advice letter applies to members of City of San Diego boards, commissions, task forces, and similar bodies who are required to file an annual statement of economic interests. The basic rule applicable to such persons precludes them from appearing before the body on which they sit for purposes of representing the interests of their clients. The rule also disallows contact with any City staff who have responsibilities involving supporting or assisting their commission. Such actions would violate the spirit and letter of the San Diego

Mr. Jay Hyde

July 28, 2003

Page 8

Ethics Ordinance, the Political Reform Act, and the regulations of the FPPC. This prohibition, however, is subject to several exceptions that allow attorneys, architects, and other professionals the ability and opportunity to conduct business in a manner that is not incompatible with the service they provide to the City by sitting on one of its boards or commissions.

I hope this letter sufficiently answers your questions. If you require additional assistance, please contact our office.

Sincerely,

Charles B. Walker
Executive Director

CBW:jm