
City Attorney

City of Oakland
Public Ethics Commission
June 7, 2004

In the Matter of)
) Complaint No. 03-17
)

David Mix filed Complaint No. 03-13 on December 3, 2003.

I. SUMMARY OF COMPLAINT AND ALLEGATIONS

Mr. Mix filed Complaint No. 03-17 alleging that the City of Oakland violated provisions of the state Elections Code when it negotiated an agreement with the East Bay Regional Park District ("Park District") to pay the Park District to perform vegetation management services on Park District property in exchange for the Park District's favorable vote to establish a Wildfire Prevention Assessment District ("Wildfire District") from which the City's payments to the Park District would be made. **Attachment 1.**

II. BACKGROUND

On November 4, 2003, the Oakland City Council took action to initiate the creation of a Wildfire District within the Oakland Hills area of the City. The Wildfire District permits a financial assessment on real property located within the district to fund City-provided services and programs for fire suppression, prevention and preparedness.

The City Council formally and finally adopted the Wildfire District in January, 2004, following a "majority protest" ballot procedure among affected property owners. Basically, a local agency may not adopt a benefit assessment district if a "majority protest" exists among affected property owners. A majority protest exists if ballots submitted in opposition to the proposed district exceed ballots submitted in favor of a proposed assessment. The ballots are weighted according to the proportional financial obligations of the affected property owners: The greater a property owner's proposed assessment, the greater voting power he or she has. (The "majority protest" process has been upheld against constitutional challenges alleging violation of due process and equal protection. See generally, Not About Water Committee v. Solano County (2002) 95 Cal.App.4th 982.)

Mr. Mix alleges that the City of Oakland negotiated an agreement with the Park District (and possibly other governmental entities) that sought to obtain the Water District's favorable vote for the Wildfire District by promising to allow the Park District to perform fire prevention services on Park district land that would otherwise be performed

by the City. He alleges that the City agreed to pay for the Park District to perform those fire prevention services by using money raised from the Park District's share of the Wildfire District assessment.

Mr. Mix alleges that such an agreement violates Chapter 6, Article 2 of the California Elections Code which generally prohibits any person from agreeing or contracting for any money or other "valuable consideration" because he or she voted or agreed to vote for any particular person or measure. [See Elections Code Section 18621.]

III. ANALYSIS

The Commission's authorizing ordinance directs the Commission to "review all policies and programs which relate to elections and campaigns in Oakland and to report to the City Council regarding the impact of of such policies and programs on City of Oakland elections and campaigns." [O.M.C. Section 2.24.020] While Commission staff questions whether this authorization is sufficient to confer Commission jurisdiction over the issue Mr. Mix raises in his complaint, the Commission has previously undertaken review of specific election and campaign practices to determine whether to refer a matter to another governmental or law enforcement agency for further investigation.

On March 18, 2004, Mr. Mix filed a lawsuit in Alameda Superior Court contesting the formation of the Wildfire District. In his prayer for relief, he seeks a judicial determination that the Wildfire District is "illegal and void and of no effect." He also seeks to recover his costs and reasonable attorney fees.

One of the allegations Mr. Mix makes in support of his lawsuit is that the City of Oakland "tainted and polluted" the election process by engaging in negotiations and tentative agreements with the Park District and the Peralta Community College District to "refund their annual assessments." He further alleges that the City "discounted the assessment of known public properties and public utilities by 50% in what is believed to be a vote controlling activity."

The City has filed a number of legal challenges to the wording of Mr. Mix's complaint. Those challenges will be ruled upon in late-June, according to Mr. Mix. Should Mr. Mix's lawsuit survive these challenges, then a period of discovery may proceed to permit the parties to obtain information necessary to prove and defend against any allegations raised in the pleadings.

Commission staff believes it would be inappropriate for staff to conduct any further factual investigation or analysis of Complaint No. 03-17 at this time. Such an investigation or analysis could work to prejudice or advantage a party in the litigation in any number of ways. While Mr. Mix correctly asserts that he is seeking a civil remedy in his lawsuit and a referral for a criminal investigation in his Commission complaint, the requested remedies arise from the same set of facts and may involve an analysis of the same legal issues.

Commission staff does not believe it should be developing a factual record or issuing a legal analysis that could prejudice or advantage a party in a pending, closely related case, especially when the Commission has no direct jurisdiction to determine the legal issues before it. Additionally, the Commission may benefit later from a judicial determination of the legal issues that Mr. Mix presents in his pending Commission complaint. Finally, Mr. Mix is free to file a criminal complaint with the District Attorney at any time if he believes it is necessary to proceed with such a remedy before the resolution of his civil lawsuit.

IV. STAFF RECOMMENDATION

Commission staff recommends that the Commission direct staff to postpone any further investigation or analysis of Complaint No. 03-17 until final resolution of Mr. Mix's civil lawsuit. The Commission may wish to request staff to provide periodic reports on the status of the civil complaint.

Respectfully submitted,

Daniel D. Purnell
Executive Director

*** City Attorney approval as to form and legality elates specifically to the legal issues raised in the staff report. The City Attorney's approval is not an endorsement of any policy issues expressed or of the conclusions reached by staff on the merits of the underlying complaint.*