FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 19, 1984

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1984-58

The Honorable Philip Johnson
Mayor of Cupertino
10300 Torre Avenue
Cupertino, California 95014

Dear Mayor Johnson:

This responds to your letter of October 31, 1984, requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and the Presidential Election Campaign Fund Act ("the Fund Act") to an assertion of an alleged claim by the City of Cupertino ("Cupertino") against Reagan-Bush '84, President Reagan's authorized principal campaign committee ("Reagan-Bush '84" or "the committee").

You state that the Reagan-Bush '84 committee held a campaign rally on September 3, 1984, at De Anza Community College in Cupertino, California. You add that arrangements for this rally were made between the committee and the college and that Cupertino did not learn of the rally until several days before the event. You further explain that because the city anticipated that this rally would draw a large crowd and because the city had no police force of its own, it obtained police and security services from the sheriff's department of Santa Clara County under a contract. The cost for these services was $16,812.67. After the announcement of the rally, the city manager unsuccessfully attempted to persuade the committee to pay for these police services. A committee representative referred the city manager to the Secret Service, which has also apparently declined to reimburse Cupertino for these services. You further state that after the rally Cupertino submitted a bill to Reagan-Bush '84. On October 2, 1984, the city received a reply from the chief counsel for the committee, who stated that because no agreement had been entered into between the committee and Cupertino, the expense was not incurred pursuant to 11 CFR 9002.11(a). Thus, he said that the committee was "legally precluded from paying the bill."

You ask whether the Fund Act and Commission regulations preclude Reagan-Bush '84 from making payment to Cupertino for the expenses in question.

A threshold issue raised by your inquiry is whether the situation you present qualifies for treatment as an advisory opinion request. Commission regulations require that a request set forth "a specific transaction or activity that the requesting person plans to undertake or is presently undertaking and intends to undertake in the future." 11 CFR 112.1(b). Furthermore, requests regarding the activities of third parties do not qualify as advisory opinion requests. 11 CFR 112.1(b). According to your request, the City of Cupertino views itself as a creditor of Reagan-Bush '84, and in that capacity is asserting a claim against the committee that has heretofore been denied on the basis that the Fund Act precludes payment. Since your request involves your continuing efforts to collect on the alleged claim, and necessarily involves prospective activity as well, the Commission concludes that your request qualifies for treatment as an advisory opinion request.

Under the Fund Act, a candidate may use payments from the Presidential Election Campaign Fund only to defray qualified campaign expenses or to repay loans the proceeds of which were used to defray such qualified campaign expenses. 26 U.S.C. 9004(c). The term "qualified campaign expense" is defined as an expense incurred by the presidential candidate or his authorized campaign committee to further his election, if incurred within the expenditure report period. 26 U.S.C. 9002(11). In the case of a major party, see 26 U.S.C. 9002(6), the expenditure report period begins on the first day of September before the election, or, if earlier, the date the candidate is nominated, and ends 30 days after the date of the presidential election. 26 U.S.C. 9002(12)(A).[1] Furthermore, both the Fund Act and the regulations provide that an expense is considered as incurred only if it is incurred by a person authorized by the candidate or the candidate's committee to incur such expense on behalf of the candidate or committee. 26 U.S.C. 9002(11); 11 CFR 9002.11(b).

Your question raises two issues: (1) whether the committee did, in fact, incur the subject expense on the basis of the various communications that occurred between city personnel and committee personnel, or on any other basis; and (2) whether, assuming the committee did not authorize the expense within a few days before or after the date of the event, it is thereby precluded by the Fund Act and Commission regulations from making payment on Cupertino's claim at this time.

In regard to issue (1), the Commission concludes that it presents a factual dispute going to the validity of Cupertino's claim as a matter of contract law, quasi-contract, or other legal theory. The rights and obligations on such claims are outside the Commission's jurisdiction.[2] See Advisory Opinions 1981-42 and 1975-102.

With respect to issue (2), the Commission concludes that the Fund Act does not preclude payment of the claim described in your request if it represents an otherwise qualified campaign

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[1] The Commission notes that all events and actions relating to the question posed in this request occurred during the expenditure report period. The rally itself was held on September 3. Both the police services and the initial contact between the City and the committee occurred after President Reagan's nomination. After the rally the City billed the committee for the services and received a reply dated October 2, 1984. The City filed this request on November 1, 1984.

[2] If the appropriate forum should determine that this expense was, in fact, incurred by the committee during the expenditure report period, the expense would be payable by the committee as a qualified campaign expense.

expense. The Fund Act requires that Federal payments to an eligible candidate be used only to defray qualified campaign expenses incurred by or pursuant to the authority of a candidate or his/her authorized committee. 26 U.S.C. 9004(c). The Fund Act does not define or set forth criteria for determining whether and when an expense is incurred. Commission regulations do, however, provide that expenses related to winding down and ending a general election campaign must be necessary administrative costs, or must be documented by a "written arrangement or commitment" before the expenditure report period closes. 11 CFR 9004.4(a)(4).

The expense described herein relates back to an event held near the beginning of the expenditure report period and is not associated with winding down the campaign. In addition there is a campaign nexus between the event held on September 3 and the expenses underlying Cupertino's claim. But for this event Cupertino would not have had any apparent reason to incur the subject costs. In this case the expenditure report period ended December 6, 1984, and the bill was presented on or about September 18, 1984, for costs related to a September 3 event. The bill was presented well within the expenditure report period, and the underlying claim arose with respect to services provided in that period. Accordingly, the Fund Act would not preclude the committee from paying the claim. By the same token the Fund Act does not mandate that the committee pay any expense it did not incur. As indicated above with respect to issue (1), the Commission does not have authority to decide if an expense was incurred where that decision necessarily requires a determination of the validity of a claim asserted by a putative creditor of a candidate or political committee.

This response constitutes an advisory opinion concerning application of the Act, and regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely yours,

(signed)

Lee Ann Elliott
Chairman for the
Federal Election Commission

Enclosures (AOs 1975-102 and 1981-42)

P.S. Commissioner Aikens voted against approval of this opinion and will file a dissenting opinion at a later date.