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

May 29, 2012

David De Berry, City Attorney
Wayne Winthers, Acting City Attorney
Orange Civic Center
300 E Chapman Avenue
Orange, CA 92866

Re: Your Request for Advice
Our File No. A-12-072

Dear Mr. De Berry:

This letter responds to your request for advice regarding provisions of the Political Reform Act (the "Act").[1] Please be aware that nothing in this letter should be construed to evaluate any conduct that has already taken place. In addition, this letter is based on the facts presented to us. The Commission does not act as the finder of fact in providing advice. (*In re Ogelsby* (1975) 1 FPPC Ops. 71.)

QUESTIONS

1. Does the Levine Act, Section 84308, apply to the City of Orange's oversight board, i.e., is the oversight board considered an "agency" as defined by Section 84308?

2. If so, does it apply when an elected official who has been appointed to the Oversight Board is making a decision on a recognized obligation payment schedule?

CONCLUSIONS

1. Yes, the oversight board is considered an "agency" as defined by Section 84308(a)(3). It is a local government agency under the definitions in Sections 82003 and 82041 of the Act. Consequently, the restrictions of Section 84308 apply to appointed members of the oversight board.

---

[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. Yes, the restrictions of Section 84308 apply when an elected official who has been appointed to the oversight board is making a decision about an item on the recognized obligation payment schedule that is a "license, permit or other entitlement for use."

FACTS

ABX1 26 resulted in the dissolution of redevelopment agencies throughout the state of California. ABX1 16 created a successor agency to the redevelopment agency to wind up the redevelopment agency's affairs and an oversight board which in general oversees the actions of the successor agency and may direct the successor agency to take specified actions. In most cases, the cities in which the former redevelopment agencies were located have chosen to become the successor agency and the city council sits as the board of the successor agency.

Members of the oversight board are appointed pursuant to Health and Safety Code Section 34179 primarily to represent various taxing entities within the former redevelopment agency's jurisdictional boundaries. Health and Safety Code Section 34179(e) provides that the "oversight board shall be deemed to be a local entity for purposes of the Ralph M. Brown Act, the California Public Records Act, and the Political Reform Act of 1974."

Among other duties, the oversight board is required to direct the successor agency to dispose of all assets and property of the former redevelopment agency that were funded by tax increment; cease performance under any agreements that do not meet the definition of enforceable obligations; possibly transfer housing functions and assets to other local or state entities; consider early termination of agreements between the redevelopment agency and any public entity providing funding for bonds or for construction or operation of facilities owned and operated by the public entity, if it would be in the best interest of the taxing entities; and determine whether any contracts with private parties should be terminated or renegotiated to reduce liabilities and increase revenues to taxing entities.

In addition, the oversight board must approve actions by the successor agency to establish new repayment terms for any outstanding loans; refund outstanding redevelopment agency debt to provide savings; set aside reserves for outstanding redevelopment agency bonds; merge project areas; continue to accept certain grants or other financial assistance; and establish the recognized obligation payment schedule as discussed below.

One of the oversight board's chief duties is to review the recognized obligation payment schedule ("ROPS") that was prepared by the successor agency. A ROPS is defined in Health and Safety Code Section 34171 as the "document setting forth the minimum payment amounts and due dates of payments required by enforceable obligations for each six-month fiscal period as provided in subdivision (m) of Section 34177." Enforceable obligations are in turn defined to include, among other things, the dissolved redevelopment agency's bond issuances, loans, court

judgments, agreements that have been entered into and contracts and agreements necessary for the administration of the successor agency.[2]

Those bond issuances, loans, and agreements that the successor agency determines are enforceable obligations are then placed on a ROPS. The ROPS ultimately determines the extent to which the successor agency will be authorized to receive and use revenues to make payments on the enforceable obligations. The successor agency then submits the ROPS to the oversight board for approval. The oversight board may direct the successor agency to "cease performance in connection with and terminate all existing agreements that do not qualify as enforceable obligations."[3] Upon oversight board approval the ROPS is submitted to the county auditor-controller and the state department of finance. The Department of Finance may review oversight board actions.

Once approved, the successor agency is authorized to make payments with respect to those items listed on the ROPS. An example of an item listed on the ROPS would be a fully-executed contract that was entered into by the former redevelopment agency and a private entity a year or more prior to the dissolution of the redevelopment agency. Pursuant to that contract the former redevelopment agency is required to make scheduled payments to or receives scheduled payments from the private entity and may have been doing so for a year or more.

If the FPPC concludes that the Levine Act applies, does the oversight board's approval of the ROPS constitute "a proceeding involving a license, permit or other entitlement for use ... pending before the agency" under Section 84308(b) and is the oversight board "rendering any decision in a proceeding involving a license, permit or other entitlement for use pending before an agency" under Section 84308(c)?

In other words, would a board member be required to review the entire ROPS, a sample of which you enclosed, and (1) not accept, solicit or direct a contribution of $250 from an entity or person which is a party to or has an interest in an enforceable obligation on the ROPS while the ROPS is pending before the oversight board; and (2) determine whether any entity or person which is a party to or has an interest in an enforceable obligation on the ROPS contributed $250 or more within the last 12 months to that board member, disclose that fact and record an abstention on any decision as to whether the enforceable obligation should be included on the ROPS?

ANALYSIS

Contributions and Conflicts of Interest for Appointed Members of Boards

Section 84308 of the Act aims to ensure that appointed members of boards or commissions are not biased by contributors or potential contributors of large campaign

---

[2] Health and Safety Code Section 34171(d).
[3] Health and Safety Code Section 34181.

contributions, who might appear before them in a proceeding involving a license, permit or entitlement for use.

Section 84308 imposes two requirements on officers subject to the section. First, Section 84308(b) states: "[n]o *officer of an agency* shall accept, solicit, or direct a contribution of more than two hundred and fifty dollars ($250), from any party, or his or her agent, or from any participant or his or her agent, while a proceeding involving a license, permit, or other entitlement for use is pending before the agency and for three months following the date a final decision is rendered in the proceeding . . .." (Emphasis added.)

Second, Section 84308(c) requires that if an officer has received a contribution of more than $250 during the past 12 months from a party or participant in a proceeding involving a license, permit or other entitlement for use pending before an agency, the officer must disclose that fact on the record of the proceeding and must disqualify himself or herself from participating.

1. *Is the City of Orange's oversight board is an agency covered by Section 84308?*

Section 84308(a)(3) defines an agency as follows:

> "'Agency' means an agency as defined in Section 82003 except that it does not include the courts or any agency in the judicial branch of government, local government agencies whose members are directly elected by the voters, the Legislature, the Board of Equalization, or constitutional officers. However, this section applies to any person who is a member of an exempted agency but is acting as a voting member of another agency."

Section 82003 of the Act defines "agency" to mean "any state agency or local government agency." Section 82041 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." In addition, Health and Safety Code Section 34179(e) provides that the oversight board is deemed to be a local entity for purposes of the Political Reform Act. Further, the *Whitnell* Advice Letter, No. I-12-060 concluded that oversight boards are local government agencies that must adopt their own conflict-of-interest codes under Section 87300 and are subject to Section 87100.

The oversight board is considered an "agency" covered by Section 84308(a)(3), because it is a local government agency under the definitions in Sections 82003 and 82041 of the Act. Consequently, the restrictions of Section 84308 apply to appointed members of the oversight board. We have previously advised that Section 84308 applied to redevelopment agencies unless the redevelopment agency board was comprised of the city council or board of supervisors in its entirety without any other members. (See e.g., *Smith* Advice Letter, No. A-04-184; *Markman* Advice Letter, No. I-94-223.)

Section 84308(a)(4) defines "officer" to mean "any elected or appointed officer of an agency, any alternate to an elected or appointed officer of an agency, and any candidate for elective office in an agency."

Under Health and Safety Code Section 34179, the oversight boards are composed of seven members:

- One member appointed by the Board of Supervisors
- One member appointed by the Mayor
- One member appointed by the largest special district
- One member appointed by the County Superintendent of Education
- One member appointed by the Chancellor of the California Community Colleges
- One member appointed by the Board of Supervisors – member of the public
- One member appointed to represent employees of the former redevelopment agency

The appointed members of the oversight board who are elected officials or who are running for an elected office are those who will have to abide by the restrictions of Section 84308 because they receive campaign contributions.

2. *Does Section 84308 apply when an elected official who has been appointed to the Oversight Board is making a decision on a recognized obligation payment schedule?*

The restrictions of Section 84308 apply to proceedings involving a license, permit, or other entitlement for use pending before the officer's agency. Section 84308(a)(5) defines a "license, permit, or other entitlement for use" to mean "all business, professional, trade and land use licenses and permits and all other entitlements for use, including all entitlements for land use, all contracts (other than competitively bid, labor or personal employment contracts), and all franchises."

Regulation 18438.2 further defines proceedings involving a license, permit or other entitlement for use under Section 84308:

> "(a) For purposes of Government Code Section 84308, a 'proceeding involving a license, permit or other entitlement for use" includes any proceeding to grant, deny, revoke, restrict, or modify a license, permit or other entitlement for use.
> (b) A proceeding involving a license, permit or other entitlement for use is 'pending before' an agency:
> (1) When the application has been filed, the proceeding has been commenced, or the issue has otherwise been submitted to the jurisdiction of an agency for its determination or other action;

(2) It is the type of proceeding where the officers of the agency are required by law to make a decision, or the matter has been otherwise submitted to the officers of the agency for their decision; and

(3) The decision of the officer or officers with respect to the proceeding will not be purely ministerial."

Examples of the types of decisions covered by Section 84308 include decisions on professional license revocations, conditional use permits, rezoning of real estate parcels, zoning variances, tentative subdivision and parcel maps, consulting contracts, cable television franchises, building and development permits, public street abandonments, and private development plans. Section 84308 applies to professional contracts, such as engineering, accounting and legal agreements which are not competitively bid, labor or personal employment contracts. (*Washington* Advice Letter, No. I-91-521.)

Decisions of general application are not covered by Section 84308. In the case *City of Agoura Hills v. Local Agency Formation Commission* (1988) 198 Cal.App.3d 480, 496-499, the court found that the restrictions of Section 84308 did apply to LAFCOs, but that sphere of influence proceedings are generally not subject to Section 84308 because they involve general planning and policy decisions where the interests affected are "many and diverse." Section 84308 is intended to apply to decisions which have a direct and significant effect upon specific parties. (*Pleines* Advice Letter, No. A-87-220.) These types of decisions seem particularly susceptible to the influence of large campaign contributions. Thus, Section 84308 imposes contribution limitations, as well as disclosure and disqualification requirements, to limit the actual and apparent corrupting influence of large campaign contributions in these proceedings.

You ask whether the restrictions of Section 84308 apply when an elected official who has been appointed to the oversight board is making a decision on a recognized obligation payment schedule.

The successor agencies and oversight boards have assumed the duties of winding down the affairs of local redevelopment agencies. Redevelopment agencies issued bonds secured by tax increments to provide funding for various projects and improvements. The successor agencies have outstanding bonds on which they are committed to make debt service payments. The successor agencies may have various other obligations, such as a lease for office space, contracts with consultants and other project costs. One of the main tasks that the oversight boards perform is reviewing a list of all contractual obligations and payments owed by the successor agencies, to provide for remaining payments while disposing of assets and winding down the former redevelopment agency's activities. The successor agencies may also hold title to parcels of real property and are responsible for the orderly disposition of the properties in a manner that maximizes value but is also expeditious. There are property maintenance costs and expenditures for brokers, title services, etc., in relation to the sale of properties that are included on the ROPS.

The Orange Redevelopment Agency oversight board's recognized obligation payment schedule that you provided contains 115 items comprising total outstanding debts or obligations of $89,500,039, with total payments scheduled during the fiscal year of $11,449,014.

Elected officials who have been appointed to the oversight board should review the items on the ROPS, as the restrictions of Section 84308 will apply to their decisions about items on the ROPS that constitute a "license, permit, or other entitlement for use" as described above.

Disqualification: Accordingly, Section 84308 prohibits oversight board members from participating in any board proceeding involving a license, permit, or other entitlement for use pending before the board, if the individual board member has received a contribution of more than $250 within the preceding twelve months or for three months following any such board proceeding, from any person, company or entity who is the subject of the proceeding or from any person who actively supports or opposes a particular decision in the proceeding and who has a financial interest in such decision as defined in Section 87103.

Disclosing Contributions: In addition, prior to rendering any decision, each officer who received a campaign contribution of more than $250 within the preceding 12 months from a party, participant or agent of a party or participant must disclose the fact on the record of the proceeding. If there is a public hearing, the officer should make the disclosure on the public record at the beginning of the hearing. If no public hearing is held, the disclosure should be included in the written record of the proceeding. Similarly, a party or participant to a proceeding must disclose on the record of the proceeding any campaign contribution of more than $250 made within the preceding 12 months by the party or participant, or his or her agent, to any officer of the agency.

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

Sincerely,

Zackery P. Morazzini
General Counsel

Hyla P. Wagner

By: Hyla P. Wagner
Senior Counsel, Legal Division