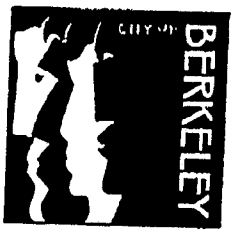

Office of the City Attorney

January 14, 2002

Karen Getman, Chairwoman
Fair Political Practices Commission
428 "J" Street
Sacramento, CA 95812

VIA FACSIMILE
(916) 322-0886
(916) 322-3711

RE: Consideration of *In Re Siegel* and Proposed Regulation 18245 entitled "Local Government Agency"

Honorable Chairwoman Getman and Members of the Commission:

We are writing in connection with item 10 on your agenda to urge the Commission to finally address the problems caused by the over broad application of the Commission's *In Re Siegel* opinion to reach private non-profit groups and their staff and volunteers and treat them as public officials. The Commission recognized the irony of penalizing private citizens for their philanthropy and community contributions by sweeping them under the broad disclosure and disqualification provisions of the Political Reform Act. The effect of the Commission's historical practice in applying the *In Re Siegel* opinion is to deter citizens from joining community groups that have any dealing with the government in case they end up getting treated as public officials under the Act and have to master and conform to a complex and often Byzantine body of law. Over five years ago, the Commission tried to rein in its practices to conform to its statutory mandate to regulate the conflict of interest of public officials (not private philanthropists) and it commenced the adoption of a regulation to solve this longstanding problem. Unfortunately, in 1996, after the Commission directed that the staff re-notice the regulation in question with amendments proposed by the City Attorney's Department, the regulation adoption process was never completed due to the overwhelming burdens imposed on the Commission to construe, defend and implement Proposition 208. I have attached a copy of the prior letter written to the Commission in connection with the prior regulation. A brief history of this issue follows.

As the Commission is aware, the Political Reform Act only applies to public officials. Presently, the Commissions' decisions as to whether a private, nonprofit corporation is a "local government agency" under the Act is a factual case by case inquiry governed by the following four criteria of *In re Siegel (1977)* 3 FPPC Ops. 62:

2180 Milvia Street, Berkeley, CA 94704 Tel: 510.981.6950 TDD: 510.644.6903 Fax: 510.981-6960
E-mail: attorney@ci.berkeley.ca.us

(1) Whether the impetus for formation of the corporation originated with a local government agency;

(2) Whether it is substantially funded by, or its primary source of funds is, a government agency;

(3) Whether one of the principal purposes for which it is formed is to provide services or undertake obligations which public agencies are legally authorized to perform, and which, in fact, they traditionally have performed; and

(4) Whether the corporation is treated as a public agency by other statutory provisions

In this day and age of public-private partnerships, government funding is a part of many non-profits' budgets under criteria 2. Under criteria 3, public entities have broad power to undertake actions for the public good and have historically exercised that power. As a result, virtually anything a non-profit does is also something that the government has the authority to do and has historically undertaken itself. Moreover, in any community with active citizen participation, such citizens often urge the government to undertake a venture and when their lobbying efforts are successful, they often partner in some private capacity (by forming a non-profit) to do their private part to help accomplish this result (friends of a park, museum, downtown chambers of commerce and the like are common examples). Thus, it can often be said that the government was some impetus towards creation of the group under criteria 1 as well. Under these broad and extra-statutory criteria, a private housing development corporation, a public access cable TV corporation and an energy corporation to be formed to assist have been found to be public officials subject to the Act. (See attached Commission Advice Letters to the City of Berkeley dated December 2, 1988, January 22, 1993 and February 27, 2001).

The League of California Cities, City Attorney's Department, FPPC Committee respectfully requests that the Commission consider a new regulation that would apply the conflict of interest provisions of the Political Reform Act (hereinafter the "Act") to private, nonprofit corporations only in situations where a public agency could exercise control over the decisions of the nonprofit corporation. This regulation would supercede (not codify) the present criteria set forth under *In re Siegel*. The LCC City Attorney's FPPC Committee further requests that the Commission hold an Interested Persons Meeting to discuss the merits of this regulation.

Proposed regulation 18245, which if approved would be added to Chapter 2, Division 6, Title 2 of the California Code of Regulations, would read as follows:

18245 Local Government Agency

A nonprofit corporation is not a local government agency within the meaning of Government Code Sections 82041 or 82049 unless any of the following apply:

(1) A majority of the members of the nonprofit corporation consists of one or more government agencies or the elected officials of one or more government agencies;

(2) A majority of the board of directors of the nonprofit corporation consists of one or more government agencies or the elected officials of one or more government agencies;

(3) A majority of the board of directors is appointed by one or more government agencies, or by one or more elected officials or employees of government agencies acting in their official capacities;

(4) A government agency, or one or more elected officials or employees of government agencies acting in their official capacities, has veto power over the appointment of a majority of the directors of the nonprofit corporation or has removal power over a majority of the directors;

(5) A government agency, or one or more elected officials or employees of government agencies acting in their official capacities, otherwise has the authority to control the decisions of the nonprofit corporation as reflected in the corporation's articles and bylaws.

Unlike *In re Siegel*, this proposed regulation sets forth a clear and manageable standard. (See attached letter dated June 7, 1996 to the Commission from Robert Boehm of the League of California Cities).

Please let me know if there is any additional information we can provide. Thank you very much for your consideration of this critically important matter.

Very truly yours,

MANUELA ALBUQUERQUE
City Attorney

Enclosures

Robert Boehm, City Attorney, City of Chico, Memo to FPPC, June 7, 1996
Liane Randolph, Legal Div., FPPC, Memo to FPPC, August 23, 1996
FPPC, Albuquerque Advice Letter A-88-422, December 2, 1988
FPPC, Gelb Advice Letter I-92-624, January 22, 1993
FPPC, Rasiah Advice Letter, A-01-020, February 27, 2001

OFFICE OF THE
CITY ATTORNEY

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Chico, CA 95927

(916) 895-4826
FAX (916) 895-4825

June 7, 1996

Via Facsimile
Original to follow by U.S. Mail

Attention: Margaret Figeroid, Commission Secretary
Fair Political Practices Commission
428 J Street, Suite 800
P.O. Box 807
Sacramento, CA 95812

Re: **Proposed Regulation 18245, entitled "Local Government Agency" (Pre-Notice Discussion at FPPC Meeting of June 12, 1996)**

Ladies and Gentlemen:

The FPPC Committee of the City's Attorneys Department, League of California Cities, requests that the Commission consider a regulation which would apply the conflict of interest provisions of the Political Reform Act (hereinafter the "Act") to a private, nonprofit corporation only in those situations where one or more public agencies are in a position to exercise control over the decisions of the nonprofit corporation. In particular, we request the Commission to consider adding a new Section 18245 to Chapter 2, Division 6, Title 2 of the California Code of Regulations which would read as follows:

18245 Local Government Agency

A nonprofit corporation is not a local government agency within the meaning of Government Code Section 82041 unless any of the following apply:

(1) A majority of the members of the nonprofit corporation consists of one or more government agencies or the elected officials of one or more government agencies;

(2) A majority of the board of directors of the nonprofit corporation consists of one or more local government agencies or the elected officials of one or more government agencies;

(3) A majority of the board of directors is appointed by one or more government agencies, or by one or more elected officials or employees of governmental agencies acting in their official capacities;

(4) A government agency, or one or more elected officials or employees of government agencies acting in their official capacities, has veto power over the appointment of a majority of the directors of the nonprofit corporation or has removal power over a majority of the directors.

(5) A government agency, or one or more elected officials or employees of government agencies acting in their official capacities, otherwise has the

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> authority to control the decisions of the nonprofit corporation. "Control" includes, but is not limited to a veto or consent power over the nonprofit corporation's decisions and activities. "Control" does not include the agency's interaction with a nonprofit corporation limited to ensuring compliance with contractual obligations so long as fulfilling the contract with the public agency is not the corporation's sole purpose [as defined by the corporation's articles and/or by-laws].

We have had many interesting discussions with your legal staff regarding this proposed regulation which have led to a number of modifications to the regulation. At the conclusion of those discussions, we appeared to be close to a meeting of the minds on the content of the regulation save an except for the bracketed words, "as defined by the corporation's articles and/or by-laws", which modifies the words, "the corporation's sole purpose", in the last line of Subpart (5). We believe these added words are necessary to provide a yardstick by which to measure a nonprofit corporation's purpose and thereby avoid the possibility of arbitrariness in interpreting and applying the regulation.

The Commission first formally considered the applicability of the conflict rules in the Act to nonprofit corporations in In re Siegel (1977) 3 FPPC Ops. 62. At that time, the Commission fashioned four criteria for evaluating whether a particular nonprofit corporation would be considered a local government agency for purposes of the conflict of interest rules in the Act and implementing regulations. The criteria are:

(1) Whether the impetus for formation of the corporation originated with a local government agency;
(2) Whether it is substantially funded by, or its primary source of funds is, a government agency;
(3) Whether one of the principal purposes for which it is formed is to provide services or undertake obligations which public agencies are legally authorized to perform and which, in fact, they traditionally have performed; and
(4) Whether the corporation is treated as a public agency by other statutory provisions.

Most cities and other local government agencies having broad governmental powers, such as counties, frequently have relationships with nonprofit corporations which fall within one or more of the four Siegel criteria. Many such nonprofit corporations are formed for the purpose of soliciting donations from members of the general public in order to provide all or a portion of the funds required for the construction or operation of public facilities owned and operated by local government agencies such as libraries, museums, recreational facilities and performing arts facilities. Others are formed for the purpose of providing services benefiting the community or a particular segment of the community, which, in turn, are funded in whole or in part by local government agencies. Such nonprofit corporations include those which operate recreational programs, educational programs, cable television facilities and animal shelters; others which provide a wide range of social services such as psychological counseling services, child care services and services for the physically and developmentally disabled; and others which promote local business and tourism or develop low income and senior citizen housing.

If adopted, Regulation 18245 would supersede In re Siegel by applying the conflict of interest rules in the Act to a nonprofit corporation only where the nonprofit corporation meets one of the Regulation's control-related criteria.

The City Attorneys' FPPC Committee submits the following as justification for regulation 18245:

- The fundamental policy reason underlying the Committee's request for a regulation which would remove nonprofit corporations not controlled by public agencies from the conflict of interest rules in the Act is that subjecting the many well-meaning persons who contribute their time to such corporations to the disclosure requirements in such rules deters such persons from accepting uncompensated positions as directors or officers of the corporation, or serving in other uncompensated positions with decision-making authority. This is particularly troublesome when a nonprofit corporation seeks to add high-profile or wealthy individuals to their boards in order to attract publicity and/or encourage donations. Such persons generally have many disclosable financial interests which they usually are unwilling to include on a disclosure statement. A further policy reason underlying the request is that many smaller nonprofit corporations arguably subject to the Act's conflict rules under the Siegel criteria simply do not have personnel with the time or knowledge necessary to adopt and properly administer a local conflict of interest code.

- Evaluating nonprofit corporations under the Siegel criteria often leads to what many consider to be arbitrary results which do not further the purposes of the Act. This is because the criteria tend to be vague and in some cases nonsubstantive. Moreover, In re Siegel offers no real direction as to how the criteria are to be applied in a particular case. For example, it is unclear how much government funding would be required before a nonprofit corporation would be considered to be "substantially funded" by a government agency, or what services provided by a nonprofit corporation are the kind of services "traditionally performed" by government agencies. In addition, it is unclear why the fact that a nonprofit corporation was formed at the impetus of a government agency should even be considered in determining whether the nonprofit corporation will be subject to conflict rules. Similarly, it is unclear why the fact that a nonprofit corporation is performing services that government agencies are authorized to perform should make a difference in that some government agencies, such as charter cities, have broad powers authorizing them to provide virtually all of the services commonly provided by nonprofit corporations. Finally, In re Siegel and its progeny fails to specify how many of the four criteria must be met for a nonprofit to be considered a local government agency for purposes of the conflict rules in the Act, and offers no guidance as to the relative weight to be assigned to the individual criteria in a particular case. By contrast, proposed regulation 18245 is a reasonable substantive standard which can be readily understood and applied to a particular case.

- Unlike other statutory provisions which are generally applicable to government agencies, but also applied to private corporate entities, there is nothing in the Act which expressly or even impliedly authorizes an extension of the Act's conflict rules to nonprofit corporations. By contrast, the Brown Act, which regulates the conduct of all meetings of the legislative body of a local government agency, contains an express provision extending that Act's open

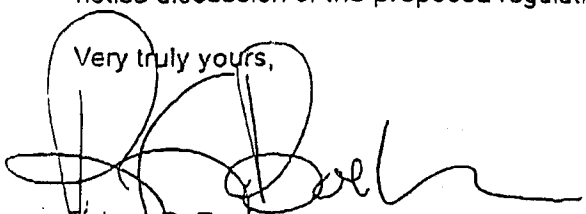
meeting provisions to private nonprofit and for-profit corporations meeting the criteria set forth therein (see Government Code §54952).

- The Act's legislative history does not support extending the Act's conflict of interest rules to nonprofit corporations. The Act was adopted by the people of this State to address campaign abuses and self dealing by government officials. There is nothing to suggest that the voters intended its provisions to extend to the many citizens of this state who devote substantial uncompensated time and effort to the many worthwhile causes addressed by nonprofit corporations.

- The directors of a nonprofit corporation carry out their duties subject to the standards of conduct set forth in the Corporations Code (see Corporations Code §5220, et seq. setting forth standards of conduct applicable to nonprofit public benefit corporations and Corporations Code §7230, et seq. setting forth standards of conduct applicable to nonprofit mutual benefit corporations). Such standards address self dealing, are relatively comprehensive and are enforceable by the Attorney General. Therefore, it is not clear that there is really any need to subject nonprofit corporations to the conflict of interest rules in the Act, save and except in those situations where the nonprofit is clearly nothing more than the alter ego of a public agency

The City Attorney's FPPC Committee thanks the Commission for consideration of the proposed regulation on nonprofit corporations. We will have a representatives present to respond to any concerns or questions the Commission may have about the proposal at its pre-notice discussion of the proposed regulation on June 12, 1996.

Very truly yours,



Robert G. Boehm
Chair, LCC City Attorneys
Department FPPC Committee

cc: Leanne Randolph, FPPC legal staff
Steve Churchwell, FPPC legal staff
Members, City Attorneys FPPC Committee
JoAnne Speers, LCC Staff Counsel
Daniel S. Hentschke, President, CA Dept., LCC
Tom Curry, Ist Vice Pres., CA Dept., LCC
David Hirsch, 2nd Vice Pres., CA Dept.,
LCC Natalie West, Director, CA Dept., LCC
Manuela Albuquerque, Berkeley City Attorney

File: CA/P/20:30-7/Chrono

State of California

Memorandum

To: Chairman Mehta, Commissioners Porter, Rushford, Scott, and Seiler

August 23, 1996

From: Liane Randolph, Legal Division

Subject: Adoption of Regulation 18245 -- Definition of a Government Agency

Issue Presented and Staff Recommendation

This regulation was proposed by the City Attorneys Association of the League of California Cities and pre-noticed at the Commission's June meeting. The regulation will supersede the factors the Commission set out in the *Siegel* Opinion. (*In re Siegel* (1977) 3 FPPC Ops. 62.) The City Attorneys Association has recommended that the regulation focus on whether the government agency controls the nonprofit corporation. Staff and the City Attorneys Association disagree, however, on whether subsection five, which encompasses corporations whose decision-making processes are controlled by a government agency, should be included in the regulation. Staff recommends that the regulation be adopted with subsection five and Option Two included.

Discussion

A. Impetus for Regulation 18425

As discussed in the pre-notice memorandum to the Commission, the disclosure and disqualification provisions of the Act were designed to ensure that public officials, whether elected or appointed, would perform their duties impartially, free from bias caused by their own financial interests or the financial interests of persons who have supported them. (§ 81001(b).).[1]

Thus, under the Act, every public official must disclose all his or her economic interests that could foreseeably be affected by the exercise of the official's duties. (§§ 81002(c), 87200-87313.) Moreover, section 87100 provides that "no public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." The Act defines a "public official" in relevant part as "every member, officer,

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[1] Government Code sections 81000-91015. All references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations sections 18000 et seq.

employee or consultant of a state or local government agency." (§ 82048.) Section 82041 defines "local government agency" broadly as:

> [A] county, city or district of any kind including school districts, or any other local or regional political subdivision, or any department, divisions, bureau, office, board, commission, or other agency . . . .

This definition does not give clear direction in a case where the agency is a nonprofit corporation, yet is acting, in whole or in part, as a quasi-governmental agency. In a 1977 opinion, *In re Siegel* (1977) 3 FPPC Ops. 62, the Commission recognized that in some cases a nonprofit corporation can be "an almost fictional entity created by the City to accomplish the City's purposes." Thus, as the opinion stated:

> [T]he question becomes whether the "Corporation" is itself a "local government agency." In analyzing this question, we believe several criteria should be considered, and that the true nature of the entity, not merely its stated purpose, should be analyzed in determining whether the entity is public or private within the meaning of the Act.
>
> (*In re Siegel*, 3 FPPC Ops. at 64.)

In *Siegel*, the Commission determined that a nonprofit corporation formed to acquire, maintain and operate a water system was a local government agency under the Act. The Commission used the following four criteria in reaching this conclusion:

> (1) Whether the impetus for formation of the corporation originated with a government agency;
>
> (2) Whether it is substantially funded by, or its primary source of funds is, a government agency;
>
> (3) Whether one of the principal purposes for which it is formed is to provide services or undertake obligations which public agencies are legally authorized to perform and which, in fact, they traditionally have performed; and
>
> (4) Whether the corporation is treated as a public entity by other statutory provisions.

B. The Purpose of Regulation 18245

The fundamental concern expressed in the *Siegel* opinion was that if a nonprofit corporation is acting as a local government agency, the public is entitled to the same disclosure and conflicts-of-interest protections as if the corporation were organized as a local government agency. Local government officials have expressed concern about the application of the *Siegel* factors over the years. They believe that the factors have failed over the years to substantively assist corporations and agencies in identifying when a nonprofit corporation is a government agency.

Accordingly, the City Attorneys Association of the League of California Cities has proposed a regulation that would set out several substantive factors, only one of which would have to be met before the organization would be considered a local government agency. These factors essentially focus on whether the corporation is *controlled* by the local agency. That is, if the nonprofit organization is not formed and controlled by a government agency, then it is presumed not to be performing government functions. The *Siegel* factors, which this regulation would supersede, included such factors as whether the corporation received funding from the government agency and whether the corporation performed traditional government functions. The City Attorneys Association wanted to draft a regulation without this language because, as they accurately pointed out, it would seem highly unlikely that a government agency would substantially fund a nonprofit corporation and cede government duties without retaining some control over the corporation's activities. The fact that the agency was controlling the corporation would be the determinative factor. Staff agreed with this analysis and focused primarily on control issues.

Subsections one through four focus on control exercised by the government agency through appointment or veto of board members or directors of the nonprofit agency. Staff drafted subsection five to encompass situations where the agency did not control membership of the board, but maintained supervision of the corporation by controlling the corporation's decisions. Subsections one through four illustrate the most likely scenarios where government agencies may control the corporation, but subsection five gets to the core issue -- if there is control, then the corporation is functioning as an alter ego of the government agency.

At the pre-notice discussion of this regulation, the City Attorneys Association expressed discomfort with subsection five, as proposed by FPPC staff. Staff strongly supports subsection five as originally written. If control is truly the determinative factor, as asserted by the City Attorneys Association, then subsection five ensures that if the government agency maintains control over the corporation and the corporation makes governmental decisions, then the corporation's officials will be subject to the conflict-of-interest provisions. Absent this "catch-

all" language, staff recommends that the parties return to the drawing board and reexamine whether control should be the only consideration.

C. Options Presented in the Regulation

There are four options for the Commission to consider in adopting Regulation 18245. The first option is the staff proposal. The City Attorneys Association previously indicated its support for subsection five after staff added the language in Option Two, which explained control and added caveat language clarifying that control did not include the agency's interaction with a nonprofit corporation limited to ensuring compliance with contractual obligations. Staff's original language is reflected in subsection five with Option Two included.

The second option is the City Attorneys Association's proposal. At the pre-notice meeting, the City Attorneys Association requested the addition of Option One. Option One would retain the language of subsection five, but include "as reflected in the corporation's articles and bylaws," following the words "otherwise has the authority to control the decisions of the nonprofit." The City Attorneys Association strongly supported this language because they wanted limiting language on the broader criterion in subsection five. Staff opposes this language because corporate bylaws can be drafted broadly enough to encompass numerous purposes, even if the corporation is currently operating to fulfill one function.

A third option would be to combine the current language in subsection five with the language in both Option One and Option Two. As noted, staff opposes this language because of the "as reflected" clause. The fourth option would be to eliminate subsection five altogether. Staff strongly opposes that option.

There is a fundamental policy disagreement between staff and the City Attorneys Association that forms the basis of the dispute over the language of subsection five. The City Attorneys Association objected to staff's language in Option Two adding "so long as fulfilling the contract with the public agency is not the corporation's sole purpose." Staff supports this language. Staff believes that if the corporation is acting solely as an alter ego of the government agency, then the corporation should be covered by this regulation. Therefore, if a corporation's only function is to fulfill a contract with the city, under the city's direction and control, then the corporation's directors should be subject to the conflict-of-interest provisions if they are making governmental decisions.

The City Attorneys Association, on the other hand, argues that cities should be able to turn over basic functions to a nonprofit corporation without being concerned that the board members would incur filing obligations. They contend the fact that the corporation exists only to work for the city should not be relevant. Staff strongly disagrees with the City Attorneys Association on this issue. Staff believes that, even if the city has not taken seats on the

governing body of the corporation as described in subsections one through four, if the city maintains detailed oversight over the corporation's *sole function*, then the corporation is acting merely as a city department and should be subject to the Act. Option Two of subsection five is intended to add this as a consideration in determining whether the corporation is controlled by the government agency.

Finally, it is important to note that the corporation will only be subject to the Act if, in addition to meeting the criteria in proposed Regulation 18245, the corporation is making governmental decisions. If the corporation does not make governmental decisions pursuant to Regulation 18700(a)(1), then the corporation's officials will not incur filing obligations and it will not be necessary for the corporation to adopt a conflict of interest code. (See e.g., *Milne* Advice Letter, No. A-94-260.)

Adopt 2 Cal. Code of Regs. Section 18245 to read:

18245. Nonprofit Corporation as Public Agency.

(a) A nonprofit corporation is not a government agency within the meaning of Government Code Section 82041 or Section 82049 unless any of the following apply:

(1) A majority of the members of the nonprofit corporation consists of one or more government agencies or the elected officials of one or more government agencies;

(2) A majority of the board of directors of the nonprofit corporation consists of one or more government agencies or the elected officials of one or more government agencies;

(3) A majority of the board of directors is appointed by one or more government agencies, or by one or more elected officials or employees of government agencies acting in their official capacities;

(4) A government agency, or one or more elected officials or employees of government agencies acting in their official capacities, has veto power over the appointment of a majority of the directors of the nonprofit corporation or has removal power over a majority of the directors;

(5) A government agency, or one or more elected officials or employees of government agencies acting in their official capacities, otherwise has the authority to control the decisions of the nonprofit corporation. [Option One: as reflected in the corporation's articles and bylaws.] [Option Two: "Control" includes, but is not limited to, a veto or consent power over the nonprofit corporation's decisions or activities. "Control" does not include the agency's interaction with a nonprofit corporation limited to ensuring compliance with contractual obligations; however, if the corporation's sole purpose is to fulfill the contract with the public agency, there is a rebuttable presumption that the corporation is controlled by the public agency.]

COMMENT: This regulation shall not be construed to affect the obligations that the Political Reform Act imposes on entities and members of governing boards of entities that are expressly delegated governmental powers, such as joint powers authorities created pursuant to Government Code Section 6500 et seq.

AUTHORITY CITED: Section 83112, Gov. Code.
REFERENCE: Section 82041, Gov. Code.

California Fair Political Practices Commission

RECEIVED

December 2, 1988

Manuela Albuquerque
City Attorney
City of Berkeley
Legal Department
Martin Luther King, Jr.
Civic Center Building
2180 Milvia Street
Berkeley, CA 94704

Re: Your Request for Advice
Our File No. A-88-422

Dear Ms. Albuquerque:

We have received your request for advice regarding whether the non-profit Housing Development Corporation located in Berkeley is an "agency" subject to the provisions of the Political Reform Act ("the Act").[1/]

QUESTION

Is the Housing Development Corporation (hereafter "corporation") a "local government agency" and, therefore, are the activities of certain persons affiliated with it subject to the financial disclosure and disqualification provisions of the Act?

CONCLUSION

The Corporation is a "local government agency" under the Act and the activities of "public officials" affiliated with the corporation are subject to the financial disclosure and disqualification provisions of the Act.

1/ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

428 J Street, Suite 800 • P.O. Box 807 • Sacramento CA 95804-0807 • (916) 322-5660

FACTS

In 1985 the Mayor of the City of Berkeley committed Community Development Block Grant funds to hire a consultant to solicit citizen input and work with city staff in an effort to revitalize an area in South Berkeley. The consultant submitted a plan to acquire real property in the targeted area and to build low income housing on the real property. The plan included, among other things, a recommendation that the city establish a citizen's committee (hereafter "committee") to make recommendations on the plan to the city council. It also recommended that the developer be a company, a joint venture or an entity created for the specific purpose of developing the housing and that, after development, the housing eventually be held by a low income owners' cooperative.

The committee was formed in 1985. In early 1986, on the basis of recommendations from the committee, the city directed the consultant to implement the revitalization plan in three phases. Phase I was to facilitate community involvement in the process. Phase II was to prepare a detailed site development plan and to acquire the site. Phase III was for pre-construction activities, issuing a public contract and negotiating a disposition and development agreement which included project design and financing as well as relocation and infra-structure construction. The committee was to be intimately involved in each of these phases and became recognized as having a major role in the policy decisions of the revitalization plan.

In mid-1987 the committee recommended that the corporation be established as the developer for the housing and that the corporation's directors be the same as the committee members. The city council accepted this recommendation and directed that the city hire attorneys to do the incorporation. The corporation was thereafter formed as a nonprofit corporation with authority to make nearly all decisions regarding development of the housing. The legal authority for the corporation's formation is set forth in Government Code Sections 37364 and 50570.[2]

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[2] Section 37364 empowers cities to provide affordable housing to persons of low or moderate income by sale, lease or other disposal of city-owned real property at less than fair market value. (Footnote [2] continued on next page.)

After formation of the corporation, it and the city negotiated several agreements. One, a disposition and development agreement, requires the corporation to develop the housing and plans for financing the construction and related costs. However, the city retains the right to approve all plans and financing schemes and the duty to pay certain expenses associated with the project, including the corporation's administrative and pre-development costs. The city also promises to assist the corporation in its attempts to seek other private and public financing. The city has provided the corporation with access to administrative and pre-development costs by way of an interest-free loan in the sum of $225,000. This loan will be forgiven if it cannot be paid from the proceeds of any permanent financing obtained by the corporation. The city has also retained the right to approve the corporation's use of these funds. To date, all funds received by the corporation have been from the city.

In conjunction with the disposition and development agreement, the city will lease the real property for the project to the corporation for 55 years for the sum of one dollar and subject to restrictions associated with use for low to moderate income housing. Ownership of the housing will vest in the city upon expiration of the lease.

ANALYSIS

The Act was adopted by California voters as part of the initiative process in 1974. Among the purposes that the Act expressly sought to accomplish were disclosure by public officials of assets and income that may be affected by their official actions and disqualification of the officials from acting so that conflicts of interest could be avoided. (See

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(Footnote 2/ continued.)
Section 50570 permits local agencies to sell, lease or otherwise transfer real property to any housing corporation or nonprofit corporation "upon such terms and conditions ... the local agency may deem to be best suited to the development of the parcel for housing available to persons and families of low or moderate income at affordable housing costs .... The deed or other instrument of conveyance shall provide that whenever the ownership of the land or the mortgagor corporation is no longer composed of a majority of the nonprofit ... sponsors, title to the land shall revert to the local agency."

Section 81002(c).) To effect these purposes, the Act included a chapter on conflicts of interest[3] which sets forth disclosure and disqualification requirements for "public officials" serving in decisionmaking positions at various levels of state or local government.

Section 82048 defines "public official" as:

> ... every member, officer, employee or consultant of a state or local government agency ....

The issue posed in your letter is whether the corporation is a "local government agency." If it is, then "public officials" of the corporation will be subject to the disclosure and disqualification requirements of the Act.

Section 82041 defines "local government agency" as follows:

> ... 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.

While this definition is helpful where an entity clearly functions under the direct aegis of local government, the definition is not helpful in a case such as the corporation's. Here, the inquiry is whether, under Section 82041, the corporation qualifies as an "other agency" of the City of Berkeley.

Since neither the Act nor Commission regulations further define what "other agency" means, we turn to Commission opinions on the subject. In In re Siegel (1977) 3 FPPC Ops. 62 (copy enclosed), the Commission set forth four criteria by which it determined whether an entity was public or private under the Act. These criteria have been consistently applied by the Commission in its determination of this question. (See In re Leach (1978) 4 FPPC Ops. 48; Francis Advice Letter, A-86-214; Hopkins Advice Letter, A-81-38, copies enclosed.)

3/ See Chapter 7 of Title 9 of the Government Code (Sections 87100-87500).

Accordingly, we apply these criteria in an attempt to determine whether the corporation is a "local government agency" under the Act.

The first criterion is whether the impetus for formation of the corporation originated with a government agency. This was undoubtedly the case in formation of the corporation. It's existence was conceived by the committee and recommended to the city council. Thereafter, the city council instructed the city manager to hire attorneys to form the corporation. So, in this case, the city was more than the impetus for formation of the corporation. Its own attorneys drafted the documents by which the corporation was formed.

The second criterion is whether the corporation is substantially funded by, or its primary source of funds is, a government agency. Under its disposition and development agreement with the city, the corporation is required to develop a housing project for persons of low and moderate income and to also develop plans for financing the project. The city and the corporation have also signed a loan agreement. In this agreement, the city, among other things, has agreed to buy the real property for the housing, loan funds to the corporation for administrative and pre-development costs, sell tax exempt bonds (if feasible) and assist the corporation in obtaining private and public financing for the development. Currently, the city has loaned approximately $225,000 to the corporation for administrative and pre-development costs, but the loan is interest-free and, if not repaid through new financing, will be forgiven by the city. Apparently, these have been been the only funds received by the corporation to date from any source. Also, the real property upon which the development will occur will be leased by the city to the corporation for a period of 55 years for one dollar and ownership of the development will vest in the city upon expiration of the lease.

Though it is possible that the corporation will eventually obtain non-government financing in its effort to build housing, we believe that the corporation nevertheless meets the second criterion set forth in the Siegel Opinion. This is so because the city has agreed to furnish all of the real property upon which the housing will be built at essentially no cost to the corporation. According to your letter, the estimated value of acquiring the property is approximately $1.7 million, which represents approximately 38% of the estimated cost of the entire redevelopment. Furthermore, ownership to the property and its improvements will vest in the city after expiration of the lease to the corporation. We believe, therefore, that the city is the primary source of funding for the corporation.

The third criterion is whether one of the principal purposes for formation of the corporation is to provide services or undertake obligations which public agencies are legally and traditionally authorized to perform. The provision of adequate housing for low and moderate income families is without question an obligation that public agencies have been legally and traditionally authorized to perform. Government Code Section 37364, a provision under which the corporation was formed, enunciates the legislative finding that "real property of cities can be utilized, in accordance with a city's best interests, to provide housing affordable to persons and families of low or moderate income." On these grounds, we conclude that the corporation meets the third criterion of the Siegel Opinion.

The final criterion, whether the corporation is treated as a public entity by other statutory provisions, is problematic. As we read your letter, the corporation appears to be purely a public benefit corporation formulated under the Nonprofit Public Benefit Corporation Law set forth at Corporations Code Section 5110, et seq. While such a corporation is tax exempt like a government entity, there appears to be nothing else which would demonstrate that these types of corporations are treated the same as public entities by other statutory provisions.

However, we do not believe that the corporation's failure to meet the fourth criterion exempts it from treatment as a local government agency under the Act. The corporation has been formed, is substantially funded and pursues goals established by the city. Its activities will lead to the construction of housing of an estimated value well in excess of $1 million. The housing may also affect the value of other real property in the area where it is built. Given these factors, we believe that opportunities for the types of conflicts of interest anticipated by the Act very well could arise.

In such a case, the Commission has an obligation to ensure that the corporation's officers, employees and other members "shall perform their duties in an impartial manner, free from bias caused by their own financial interests ...." (Section 81001(a); see also the In re Vonk (1981) 6 FPPC Ops. 1.)

Accordingly, we believe that the corporation is a "local government agency" under the Act and the activities of its officers, employees, and other members are subject to the Act's financial disclosure and disqualification requirements.

Should you have any questions, please contact me at (916) 322-5901.

Sincerely,

Diane M. Griffiths
General Counsel

By: Scott Hallabrin
Counsel, Legal Division

DMG:SH:ld

Enclosures

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California Fair Political Practices Commission

RECEIVED
JAN 25 1993
CITY ATTORNEY

January 22, 1993

Marjorie Gelb
Assistant City Attorney
City of Berkeley
2180 Milvia Street
Berkeley, CA 94704

Re: Your Request for Informal Assistance
Our File No. I-92-624

Dear Ms. Gelb:

This is in response to your letter requesting advice on behalf of the City of Berkeley's public access corporation concerning their duties under the conflict-of-interest provisions of the Political Reform Act (the "Act").[1/] Since you are seeking general assistance and not inquiring about a specific decision before you, your letter is considered a request for informal assistance.[2/]

QUESTION

Is the City of Berkeley's public access corporation a "local government agency" subject to the provisions of the Political Reform Act?

CONCLUSION

The public access corporation is a "local government agency" subject to the disclosure and disqualification provisions of the Political Reform Act?

1/ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000 et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

2/ Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Government Code Section 83114; 2 Cal. Code of Regs. Section 18329(c)(3).)

428 J Street, Suite 800 • P.O. Box 807 • Sacramento, CA 95812 • (916) 322-5660

FACTS

The City of Berkeley created a cable task force to help the city perform its cable assessment and to negotiate its cable franchise renewal with the cable company. Pursuant to the recommendations of the cable task force, the city negotiated for a designation of Public Education and Government ("PEG") access stations and a substantial capital commitment for equipment in order to allow the public, the government and schools to produce and broadcast cable programs.

One of the recommendations by the task force was the creation of a nonprofit public access corporation ("corporation") to administer the PEG cable stations, coordinate the production and broadcast of programming of private citizens and the government, and teach the public how to use the equipment. It is envisioned that the corporation will have a board of directors, an executive director and other employees.

ANALYSIS

"Local government agency" is defined in Section 82041 as:

> [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 determining whether a particular entity is a private entity or a local government agency, the Commission in its Siegel Opinion (In re Siegel (1977) 3 FPPC Ops. 62), stated that certain criteria should be considered. These criteria are:

> (1) Whether the impetus for formation of the corporation originated with a government agency;
>
> (2) Whether it is substantially funded by, or its primary source of funds is, a government agency;
>
> (3) Whether one of the principal purposes for which it is formed is to provide services or undertake obligations which public agencies are legally authorized to form and which, in fact, they traditionally have performed; and
>
> (4) Whether the corporation is treated as a public entity by other statutory provisions.

We will examine each criterion and see how each applies to the corporation.

Impetus for Formation

You have agreed that the first criterion has been met. The formation of the corporation originated with the city council. On the recommendation of the task force and with the concurrence of the city manager, the city council approved the creation of the corporation.

The first criterion has been met.

Funded by a Government Agency

In your letter you indicated that the city will fund the corporation.

The second criterion has been met.

Services are Legally Authorized or Traditionally Performed by a Government Agency

The third criterion is whether or not one of the principal purposes for formation is to provide services or undertake obligations which public agencies are legally authorized to perform and have traditionally performed.

It is your contention that public cable access corporations have rarely been administered by governments. You support that with a statement that the National Federation of Local Cable Programmers advised that public access corporations have always been administered by the cable operator, or private nonprofit corporations.

The Commission has considered this criterion as it relates to public cable access corporations in its Cormier Advice Letter, A-84-202, (copy enclosed). The Cormier Advice Letter cites Section 53066(a)[3/] in making its determination that the third criterion is met. While the cable industry has not been in existence long enough for there to be a tradition of government operated cable television systems, it appears the statutes anticipated such an occurrence.

The third criterion is met.

Treatment by Other Statutes

You have indicated that the corporation is not subject to the Brown Act or any other law which impacts government only. It is unclear from your letter whether the corporation will be formed under the Nonprofit Public Benefit Corporation Law set forth at

3/ Section 53066 previously Section 53066.1.

Corporations Code Section 5110 et seq. While such a corporation is tax exempt like a government entity, there appears to be nothing else which would demonstrate that these types of corporations are treated the same as public entities by other statutory provisions.

However, as we have previously stated, the criteria set forth in the Commission's Seigel Opinion are guidelines to assist in determining whether an organization is a "local government agency." Whether the organization meets all of the criteria is not determinative of the issue. (Albuquerque Advice Letter, No. A-88-422.) Therefore, the failure of the corporation to meet this criterion does not preclude a conclusion that it is a "local government agency."

Having considered all of these factors, we note that the corporation has been formed, is funded by, and is legally authorized to perform duties of a government agency. On this basis, we conclude that the cable access corporation is a local government agency under the Act and is subject to its disclosure and disqualification provisions.

If you have any questions, or need to discuss this further, please feel free to contact our Legal Division at (916) 322-5901.

Sincerely,

Jeff Marshner
General Counsel

By: Jeanette E. Turvill
Political Reform Consultant
Legal Division

SH/JET/jt
Enclosure

FAIR POLITICAL PRACTICES COMMISSION
P.O. Box 807 • 428 J Street • Sacramento, CA 95812-0807
(916) 322-5660 • Fax (916) 322-0886

RECEIVED
MAR 01 2001
CITY ATTORNEY

February 27, 2001

Prasanna W. Rasiah, Deputy City Attorney
Office of the City Attorney
1947 Center Street, First Floor
Berkeley, CA 94704

Re: **Your Request for Advice**
Our File No. A-01-020

Dear Mr. Rasiah:

This letter is in response to your request for advice on behalf of the City of Berkeley's Community Energy Services Corporation regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").[1]

QUESTION

Will the City of Berkeley's Community Energy Services Corporation continue to qualify as a "local government agency" subject to the conflict-of-interest provisions of the Act, after it ends its affiliation with the City of Berkeley and the Berkeley Energy Commission?

CONCLUSION

Yes. The Community Energy Service Corporation will continue to be a local government agency, and its members will remain subject to the conflict-of-interest provisions of the Act, including the disclosure and disqualification requirements.

---

[1] Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18996, of the California Code of Regulations.

FACTS

On May 21, 1985, the Berkeley City Council authorized the creation of a non-profit organization to support energy conservation and other similar objectives in Berkeley. The resolution authorized City Council members to each appoint a citizen to the Energy Services Organization founding board of directors. On November 20, 1986, the board adopted by-laws and the name Community Energy Services Corporation ("CESC").

The CESC has an annual budget of approximately $650,000, and maintains $361,000 in contracts with the City for the services it provides (including $290,000 in funding from the federal Community Development Block Grant program). The balance of roughly $289,000 is made up of grants from the U.S. Department of Energy (to influence local commercial and residential energy efficiency projects), and fees for services from private sources. Future sources of revenue have not been set out in detail, but may include the same proportion of City, other governmental and private funding.

The Community Energy Services Corporation was formed to promote energy conservation, renewable energy, local energy self-reliance and environmental quality in the City of Berkeley. The CESC supplies technical and management services for the City's municipal energy efficiency projects, commercial energy efficiency services and audits for the City's Commercial Energy Conservation Ordinance. The non-profit corporation also provides construction services, energy efficiency education, home repair services and other efforts focusing on the prudent use of energy and physical resources.

The CESC is currently merged with the Berkeley Energy Commission, such that the membership of the Energy Commission is the same as that of the CESC Board of Directors. The Energy Commission advises the City Council on policy matters, such as energy conservation and alternative energy development. The City Council appoints members to the Energy Commission, who are automatically co-appointed to the CESC Board of Directors. However, the CESC plans to end its affiliation with both the City of Berkeley and the Energy Commission.

To approve the separation of the CESC from the Energy Commission, the City Council plans to pass a resolution, which would also recognize the CESC as an entity separate from the City of Berkeley. As part of its separation from the Energy Commission, the articles and by-laws of the CESC would also be amended to effectuate its status as a separate entity. The CESC Board would become self-appointing, and the terms of its current members would expire in 18 months or upon the appointment of new directors to replace the current Board. Municipal control over CESC operations would be limited to holding CESC subcontractors to qualification standards when the corporation bids for construction projects with the City, as with any other organization that chooses to engage in the competitive bidding process.

ANALYSIS

Section 87300 of the Act requires every state and local agency to adopt a conflict-of-interest code applicable to its "designated employees." For the purposes of Section 87300, "agency" is understood to mean any state agency or local government agency. (*Maas* Advice Letter, No. A-98-261.) "Local government agency" is defined in Section 82041 as:

> "... 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."

Whether a particular entity is a private entity or a local government agency is essentially a factual determination, which must be made on a case-by-case basis. (*In re Vonk* (1981) 6 FPPC Ops. 1.) To that end, the Commission has adopted a four-part factual test for deciding whether a particular entity is a local government agency. (*In re Siegel* (1977) 3 FPPC Ops. 62.) Under this "*Siegel* test," the following four criteria must be considered:

> (1) Whether the impetus for formation of the entity originated with a government agency;
> (2) Whether the entity is substantially funded by, or its primary source of funds is, a government agency;
> (3) Whether one of the principal purposes for which the entity was formed is to provide services or undertake obligations which public agencies are legally authorized to perform and which, in fact, they traditionally have performed; and
> (4) Whether the entity is treated as a public entity by other statutory provisions.

While the *Siegel* test is not intended to be a definitive litmus test for determining whether an entity is a private entity or a local government agency (*Vose* Advice Letter, No. I-97-578), through application of its four test criteria, one can draw certain conclusions about the entity in question. We therefore will apply the *Siegel* test and from there determine whether the CESC would still be considered a local government agency if it ends its affiliation with the City of Berkeley and the Energy Commission.

Impetus for Formation

Your letter requesting advice acknowledges that the Berkeley City Council established the CESC. Because the City is a government agency (Section 82003) and because the impetus for formation of the CESC originated with a government agency, the first criterion of the *Siegel* test is met. (*Burgess* Advice Letter, No. A-00-058; *Cool* Advice Letter, No. A-99-084; *Francis* Advice Letter, No. A-86-214.)

Funded by a Government Agency

Approximately 56% of the CESC's budget comes from the City of Berkeley. The balance of its funds come from the federal government and private sources. We do not find it significant that a portion of those funds come from the federal Community Development Block Grant program. We have taken the position in previous advice letters that if an entity receives most of its funding from federal grant monies, it meets the second factor. (*Matthews* Advice Letter, No. A-99-276; *Prestidge* Advice Letter, No. A-95-323, modified in *Vose* Advice Letter, No. I-97-578 on issues not affecting the analysis herein.) Although you do not specify what percentage of CESC's budget comes from private sources, it is clear that the CESC is substantially funded by a government agency, and would continue to be so funded after separating from the City of Berkeley and the Energy Commission. Therefore, the second criterion of the *Siegel* test is met.

Services Which Public Agencies Traditionally Perform

There have been statutes addressing energy conservation issues as a governmental function since at least 1975, when the Warren-Alquist State Energy Resources Conservation and Development Act, which was passed in 1974, became operative. (Pub. Res. Code §§ 25000 et seq.) You also acknowledge in your letter the 1979 Energy Conservation Assistance Act (Pub. Res. Code §§ 25410-25421), and the existence of the State Energy Resources Conservation and Development Commission, which was established by the Warren-Alquist State Energy Resources Conservation and Development Act. In addition, the California Alternative Energy and Advanced Transportation Financing Authority Act, which established the California Alternative Energy and Advanced Transportation Financing Authority, was enacted in 1980 to, inter alia, "provide industry within this state with an alternative method of financing in providing and promoting the establishment of . . . (1) Facilities utilizing alternative methods and sources of energy." (Pub. Res. Code § 26002)

As the purpose of the CESC is to promote energy conservation, renewable energy, local energy self-reliance and environmental quality in the City of Berkeley, functions which are also performed, at least in part, by the organizations listed above, it appears that the CESC provides services that governmental agencies have traditionally been authorized to perform, and the third criterion of the *Siegel* test is met.

Treated as a Public Entity by Other Statutes

You contend in your letter that, after the CESC separates from the City of Berkeley and the Energy Commission, "municipal control" over the CESC would be the same as for that of other organizations that bid for construction projects with the City. However, "municipal control" is not the issue. Rather, it is whether other statutory schemes treat the CESC as a public agency. Although CESC, as a non-profit public benefit corporation, enjoys

certain tax benefits also enjoyed by public agencies, you have provided no facts which would indicate that CESC is treated as a public entity by any other statutes. The tax benefits, alone, are not enough to satisfy this criterion of the *Siegel* test is not met. (*Albuquerque* Advice Letter, No. A-88-422.)

After applying the Siegel test to the facts presented in your letter, we find that three of the four criteria for an entity to be considered a local government agency will still be satisfied after CESC separates from the City and the Energy Commission. It is not necessary that all four of the criteria be satisfied for an entity to be considered a local government agency. (*O'Shea* Advice Letter, No. A-91-570.) It is only necessary that the entity satisfies enough of the four criteria for its overall character to correspond to that of a local government agency.

Based on the facts you have provided, the functions to be performed by the CESC after separation will still be governmental in nature and, thus, will continue to present opportunities for individuals to affect their economic interests through the decisions in which they participate. One of the purposes of the Act is to assure that public officials perform their duties in an impartial manner, free from bias. (Section 81001(b).) The Act is to be liberally construed to accomplish this purpose. (Section 81003.) With this in mind, we believe that CESC will sufficiently meet the *Siegel* criteria after separation from the City and the Energy Commission to still be considered a local government agency within the meaning of the Act.

You suggest in your letter that simply forming a new non-profit corporation and transferring the contract, including those with the City, would eliminate the governmental impetus for its formation, thus taking the new corporation out of the "local government agency" sphere. We do not believe that forming a new corporation, alone, would accomplish this goal. It is only necessary that enough of the *Siegel* factors be satisfied so that the overall character of the entity corresponds to that of a local government agency. In this case, the new corporation would still be substantially funded by governmental agencies, and it would be pursuing goals established by the City. Therefore, we believe that other factors would also have to change in order to change the character of the CESC from that of local government agency to private organization.

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

Sincerely,

Luisa Menchaca
General Counsel

Holly B. Armstrong

By: Holly B. Armstrong
Staff Counsel, Legal Division

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