BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of:	)	
	)	
Opinion requested by:	)	No. 80-010
Martin Overstreet	)	
Berkeley Rent Stabilization	)	March 2, 1981
Board	)	
	)	

BY THE COMMISSION: James Parrinello, attorney for Martin Overstreet, has asked a question based upon the following facts:

Mr. Overstreet is a Commissioner on the Rent Stabilization Board of the City of Berkeley. In his private capacity, he has a 37 percent partnership interest in Amberhill Properties, a limited partnership owning approximately 164 rental units in 26 separate properties. The Rent Stabilization Board administers and was established by a local ballot measure, Measure D (the Rent Stabilization and Eviction for Good Cause Ordinance), adopted by the citizens of Berkeley at the June 3, 1980, election. In the process of administering Measure D, the Rent Stabilization Board will be called upon to make decisions which will directly control the amount of income which can be generated by residential rental property and which will probably affect the fair market value of such property as well.[1/]

In addition, Zona Sage, Director of the Rent Stabilization Board has requested an interpretation of the Political Reform Act as it applies to the following facts:

1/ Measure D does exempt certain classes of residential rental property from its application, including rental units in nonprofit cooperatives owned and controlled by a majority of the residents, newly constructed rental units, and buildings consisting of four or fewer units, one of which is occupied by the owner.

In addition to serving as the director of the Rent Stabilization Board, Ms. Sage also acts as general counsel to the Board and in that capacity advises the Board concerning litigation. Ms. Sage rents her residence, and her landlord is a party adverse to the Board in litigation in which an injunction has been issued prohibiting her as a tenant of one of the plaintiffs from availing herself of one of the rights established in Measure D, i.e., the right to withhold rent in response to a landlord's violation of the ordinance.

Ms. Sage's questions were initially answered by the staff of the Fair Political Practices Commission pursuant to Government Code Section 83114(b), but we have now decided pursuant to 2 Cal. Adm. Code Section 18329(b) to answer her questions in the context of this formal opinion. To the extent that the conclusions of this opinion differ from those of the advice Ms. Sage was previously provided by FPPC staff, we note that Ms. Sage was entirely justified in relying upon that advice until the adoption of this opinion, subject to the provisions of Government Code Section 83114(b).

CONCLUSION

Mr. Overstreet should not make, participate in making or attempt to use his official position to influence decisions which would have a material financial effect on Amberhill Properties, or upon the individual rental properties owned by Amberhill, distinguishable from their effects on a significant segment of the public generally. However, with regard to the general implementation of Measure D, there is an implicit finding in the Measure, consistent with Commission regulation 2 Cal. Adm. Code Section 18703, that the rental property industry constitutes a significant segment of the public generally.

Ms. Sage should not make, participate in making or attempt to use her official position to influence decisions which would have a material financial effect on the property she leases, distinguishable from the effect the decisions will have on a significant segment of the public generally. Tenants also, however, constitute a significant segment of the public with respect to decisions implementing Measure D.

ANALYSIS

The general provisions of the Political Reform Act concerning conflicts of interest provide as follows:

> 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.
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> Government Code Section 87100.[2/]
>
> An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on:
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> (a) Any business entity in which the public official has a direct or indirect investment worth more than one thousand dollars ($1,000);
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> (b) Any interest in real property in which the public official has a direct or indirect interest worth more than one thousand dollars ($1,000);
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> (c) Any source of income . . . aggregating two hundred fifty dollars ($250) or more in value provided to, received by or promised to the public official within twelve months prior to the time when the decision is made; or
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> (d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.
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> . . .
>
> Section 87103.

Amberhill Properties is a source of income to Mr. Overstreet, as well as being a business entity in which he has an investment and is a partner. In addition, Section 82033 provides in part that "[i]nterests in real property of an individual includes a pro rata share of interests in real property of any business entity or trust in which the individual or immediate family owns, directly, indirectly or beneficially, a 10 percent interest or greater." Consequently, as

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[2/] All statutory references are to the Government Code unless otherwise noted.

Mr. Overstreet owns a 37 percent interest in Amberhill Properties, he has a 37 percent interest in every piece of rental property owned by Amberhill, and if that interest in any piece of property is worth more than $1,000, Mr. Overstreet must disqualify himself from any decision that will affect that property in a manner distinguishable from its effects on the public generally.

With respect to Ms. Sage, Section 82033 provides that although the term "interest in real property" includes a leasehold interest worth more than $1,000, "a leasehold interest does not include a lessee's interest in a lease on real property which expires within 10 years of the first day of the period covered by the filer's statement of economic interest." This exception for leases of less than 10 years clearly applies to disclosure, as it references a filer's statement of economic interests; its application to disqualification has been less clear. This exception was added to Section 82030 by Ch. 607, Stats. 1978, which also excluded diversified mutual funds and common trusts funds from the definition of "investment" contained in Section 82034. The Legislative Counsel's digest of this bill provides that:

> Existing law . . . defines "interest in real property" as including any leasehold interest if the fair market value of the interest is greater than $1,000.
>
> The bill would provide, <u>for purposes of the financial disclosure provisions of the Political Reform Act</u>, that a leasehold interest does not include a lessee's interest in a lease on real property which expires within 10 years of the first day of the period covered by the filer's statement of economic interest.
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> Existing law . . . defines "investment" as including an interest in a diversified mutual fund, as specified, or a common trust fund, as specified, when the value of such an interest exceeds $1,000.
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> This bill would exclude such interest from the definition of investment.
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> . . .

(Emphasis added.)

Thus the exclusion of short leases from the term "interest in real property" was discussed in terms of the disclosure provisions of the Act, while the provisions dealing with mutual funds and common trust funds were simply referred to as exclusions from the definition of "investment." We find this distinction reveals a real difference in legislative intent, and that the exclusion of short leases from the definition of "interest in real property" can reasonably be read to apply to disclosure only. Consequently, although filers of statements of economic interests who are lessees are not required to disclose their leases if the leases will expire within 10 years of the first day of the period covered by the statement they are filing, all public officials must disqualify themselves from making, participating in making or using their official positions to influence any decision which will have a material financial effect on their leasehold interests (if those interests are worth more than $1,000), regardless of how long those interests will run, provided that the effect of the decision is distinguishable from its effects on the public generally. We note, however, that decisions which will affect the fair market value of a piece of rental property will not necessarily affect the value of a leasehold interest in the property. The effects on a leasehold interest must take into account the terms of the lease, the time it has left to run, limits the lease might contain on the uses to which the property may be put by the lessee, etc.

We find that the value of Ms. Sage's interest in the property she rents is greater than $1,000. Our regulation concerning the value of leasehold interests, 2 Cal. Adm. Code Section 18233, provides that for purposes of disclosure, the value may be computed as the total amount of rent owed by the filer during the period covered by the statement being filed. There are two problems in the application of this standard to the particular questions we now face. First, Ms. Sage occupies her residence by virtue of a month-to-month rental agreement, not a lease for a fixed period of time. Second, the standard does not address value for purposes of disqualification, which involves a determination of the value of an official's interest at the particular point in time at which the official is called upon to make or participate in making a decision. Ms. Sage is litigating, as a private party in a suit which does not involve the Rent Stabilization Board, her landlord's decision to raise the rent on the unit she occupies with one other person, from $475 to $500 per month. If we follow the general guideline established by the regulation, that the value of a rental interest is the

amount of rent one pays, Ms. Sage's interest is worth at least $237.50 per month. To find that her interest is worth more than $1,000 at the time she is called upon to make a decision affecting that interest, we would therefore be required to find that it is reasonably foreseeable that she would be legally entitled to occupy the rental unit for a period of time somewhere between four and five months after the decision is made. Although the month-to-month agreement under which Ms. Sage rents her residence may have originally allowed the landlord to recover its possession at any time upon thirty days notice, Measure D by its terms allows the landlord to recover possession of the unit only upon a showing that one of a limited number of situations exists, i.e., only upon a showing of good cause. We see no need to set forth here the list of reasons which constitute good cause, but after reviewing them, we conclude that they are sufficiently narrow for us to say that it is reasonably foreseeable that most tenants covered by Measure D will be able to occupy their residences indefinitely if they continue to pay the rent. Consequently, we conclude that Ms. Sage's rental interest is worth more than $1,000.

There is no doubt that certain decisions facing the Rent Stabilization Board will have a material financial effect on Amberhill Properties and the residential real property owned by it in substantially the same manner that those decisions will affect other landlords in Berkeley. Similarly, Ms. Sage, as a tenant, will be affected materially by some decisions in a manner which is substantially the same as the effect the decision will have on tenants throughout Berkeley. The next question in our analysis of the extent of required disqualification for Mr. Overstreet and Ms. Sage is therefore whether landlords or tenants, respectively, should be considered significant segments of the public generally.

As to Ms. Sage, we found in the Ferraro opinion, 4 FPPC Opinions 62, 67 (No. 78-009, Nov. 7, 1978), that persons owning three or fewer units of residential rental property in the City of Los Angeles were a group large in number, diverse in nature and with a lack of group identity, and therefore constituted a significant segment of the public generally. If landlords of residential properties of three or fewer units are a group large in numbers and diverse in nature, then certainly tenants in general must also be. There is at least one tenant for every owner of a building who leases it, and it is equally obvious that many rental properties consist of multiple residential units. Finally,

tenants are diverse in nature, representing every occupation and interest group.

Consequently, Ms. Sage can participate in decisions of the Rent Stabilization Board which will have a material financial effect on her interest in the property she rents, if those decisions will affect her interests in substantially the same manner as they will affect tenants in general in Berkeley. Thus, in carrying out her duties to advise the Rent Stabilization Board concerning litigation, if the litigation concerns the constitutionality of Measure D or an interpretation of it which will apply to all tenants in Berkeley, Ms. Sage is not required to disqualify herself from participating in the Board's decisions concerning the litigation by making substantive recommendations to them. On the other hand, if the effect of litigation concerning the Board on her interest in real property will be distinguishable from the litigation's effects on tenants in general, she should disqualify herself. This could occur, for example, if the litigation primarily involved a question of fact, the application of an already articulated standard to only her landlord or to only a few landlords, rather than a question of law.

With respect to Mr. Overstreet, the question is somewhat different. In the Ferraro opinion, supra, we also concluded that the owners of four or more units of rental property constitute the rental property industry. Our regulation on the effect a decision will have on the public generally, 2 Cal. Adm. Code Section 18703, provides that:

> A material financial effect of a governmental decision on an official's interests ... is distinguishable from its effect on the public generally unless the decision will affect the official's interest in substantially the same manner as it will affect all members of the public or a significant segment of the public. Except as provided herein, an industry, trade or profession does not constitute a significant segment of the general public.
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> . . .
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> (c) An industry, trade or profession constitutes a significant segment of the public if the statute, ordinance or other provision of law which creates or authorizes the creation of the official's agency or office contains a finding and declaration, including an express reference to Section 87103 of the Government Code, to the following effect:

> The Legislature [or other authority] declares that the individual[s] appointed to the office of _____ is [are] intended to represent and further the interest of the [specified industry, trade or profession], and that such representation and furtherance will ultimately serve the public interest. Accordingly, the Legislature [or other authority] finds that for purposes of persons who hold such office the [specified industry, trade or profession] is tantamount to and constitutes the public generally within the meaning of Section 87103 of the Government Code.

> (d) . . . After January 1, 1979, in the absence of an express finding and declaration of the type described in subsection (c) of this section, such an industry, trade or profession constitutes a significant segment of the public generally only if such a finding and declaration is implicit, taking into account the language of the statute, ordinance or other provision of law creating or authorizing the creation of the agency, the nature and purposes of the program, any applicable legislative history, and any other relevant circumstance.

The Political Reform Act addresses the integrity of governmental processes, not the content of government programs. It does not make the furtherance of a particular industry an impermissible legislative motive, either as the sole reason for setting up a particular program or as one of many reasons. In doing this, the legislative body has made a determination that the public interest coincides with the interests of the industry, and thus when a representative of that industry acts to benefit the industry, there is no conflict of interests. The determination provided for in the regulation cited above is that just such a legislative motive was present. As Measure D does not contain an explicit finding of the type described in subsection (c) of the regulation, the question becomes whether such a finding and declaration are implicit in it. The stated purpose of Measure D is as follows:

> The purposes of this Ordinance are to regulate residential rent increases in the City of Berkeley and to protect tenants from unwarranted rent increases and arbitrary, discriminatory, or retaliatory evictions, in order to help maintain the diversity

> of the Berkeley community and to ensure compliance with legal obligations relating to the rental of housing. This legislation is designed to address the City of Berkeley's housing crisis, preserve the public peace, health and safety, and advance the housing policies of the City with regard to low and fixed income persons, minorities, students, handicapped, and the aged.
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> Measure D, Section 3.

However, the findings cited in Measure D relate not only to rents but also to the condition of existing housing, citing the Housing Element of the Berkeley Master Plan when it states that existing housing should be maintained and improved, and noting that the City Council's finding of a housing emergency was based not only on rising rents, but also on a shortage of decent housing and an increased deterioration of existing housing stock. Measure D, Section 2. Finally, Section 12i of the measure provides that none of its provisions shall be applied so as to prohibit the Board from granting a rent adjustment to a landlord who has demonstrated that it is necessary to provide him or her with a fair return on investment.

As to the appointment of commissioners on the Rent Stabilization Board, Measure D provides that all residents of Berkeley are eligible to serve and that commissioners shall be appointed by members of the Berkeley City Council in accordance with the Fair Representation Ordinance of the City of Berkeley. Measure D, Section 6b and d. The stated purpose of the Fair Representation Ordinance (No. 4780-N.S.) is to make Berkeley's appointed boards, commissions and committees representative of the entire Berkeley community so as to provide for the widest possible community participation.

Measure D does not require any particular member of the commissioners to be from the rental property industry, but it does contemplate that members of the industry may be appointed by requiring disclosure of all of a commissioner's interests and dealings in real property. Measure D, Section 6c. In addition, it has a provision specifically addressing conflict of interest, although it does not specifically mention Section 87103 of the Political Reform Act, which provides as follows:

> Commissioners shall not necessarily be disqualified from exercising any of their powers and duties on the grounds of a conflict of interest

> solely on the basis of their status as landlord or tenant. However, a Commissioner shall be disqualified from ruling on a petition for an individual adjustment of a rent ceiling under Section 12, where the Commissioner is either the landlord of the property or a tenant residing in the property that is involved in the petition.
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> Measure D, Section 6r.

This provision seems to contemplate two different sets of circumstances in which a conflict of interest could be alleged -- one in which a decision specifically concerns the property a landlord owns or a tenant rents, in which case both the landlord and tenant are disqualified from participating; and a second set of broader decisions of more general applicability in which a conflict would arise because of one's membership in a large group, "landlords" or "tenants," which will be affected by the decision. Section 6r of Measure D specifically allows participation in this second type of situation.

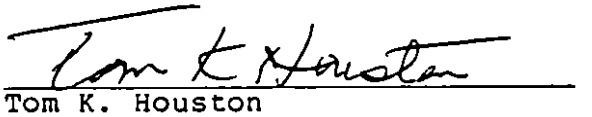
We are dealing here with a system of regulation in which both sides affected by the regulation have identifiable, quantifiable and directly conflicting financial interests. In its findings and other provisions, including its conflict of interest provision, Measure D seems to recognize this fact and to contemplate that any landlords appointed to the Rent Stabilization Board will further and represent the interests of the rental property industry, in the same manner that tenant members will further and represent the interests of tenants. Thus Measure D aims at a balancing of tenant and landlord financial interests in order to better serve the overall public interest. Consequently, we conclude that Measure D does contain an implicit finding and declaration of the type required by our regulation. Therefore, with respect to decisions of the Rent Stabilization Board implementing Measure D, the rental property industry in the City of Berkeley is a significant segment of the public generally, and Mr. Overstreet is not disqualified from participating in any decision which will have a material financial effect on Amberhill Properties, or on the individual residential rental units owned by it, if the decision will have a similar effect throughout the Berkeley rental property industry.

Approved by the Commission on March 2, 1981. Concurring: Gupta, McAndrews and Wade. Commissioners Houston and Metzger dissented.

Colleen C. McAndrews
for the Commission

Commissioners Houston and Metzger dissenting:

We dissent from that part of the majority opinion which addresses the question posed by Mr. Overstreet. We can find no evidence that the citizens of Berkeley, in enacting Measure D, intended major landlords to be considered a "significant segment of the public." Certainly, there was no intention that landlords appointed to the Board would further and represent landlord interests and that such representation would further the public interest. This, however, is the explicit or implicit finding required by Commission regulation 2 Cal. Adm. Code Section 18703(d).



Tom K. Houston
Chairman