

State of California



Fair Political Practices Commission

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Technical Assistance • • Administration • • Executive/Legal • • Enforcement • • Statements of Economic Interest
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June 12, 1981

Thomas Toomey
San Francisco City
Attorney's Office
206 City Hall
San Francisco, CA 94102

A-81-137

Dear Mr. Toomey:

You have asked the Fair Political Practices Commission to comment on an opinion 81-15 rendered by your office on April 9, 1981, on the subject of members of the San Francisco Board of Supervisors voting on condominium conversions.

The Board is currently considering an ordinance which states that there shall be no further condominium conversions of residential buildings of more than one unit unless there is a finding that the city's rental vacancy rate is greater than five percent.

One supervisor owns an apartment complex with eight residential dwelling units and another owns one with seven units, although the latter apartment complex could be divided into four and three units for condominium purposes. Additional facts have been provided to us by city officials. There are over 300,000 rental units in San Francisco. An ordinance enacted in July, 1979 restricts the number of condominium conversions to no more than 1,000 units a year. In 1980, this maximum was reached in August. At that time, applications for 1981 were accepted but reached the 1,000 level by October 8, 1980. Applications for 1982 were accepted until November 5, 1980. Thus, at this date no further applications will be accepted for 1981 or 1982 and the earliest date for additional condominium conversions is 1983.

Statistics indicate that in 1980, 81% of the conversions (168 projects total) were less than five units. Seven and eight units accounted for 1.7% and 1.1% respectively of conversions approved. Thus far, in 1981, of the 111 projects, 64%

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were less than five units. Seven and eight units accounted for 4.5% and .9% respectively. The biggest project in 1980 was 68 units, the largest in 1981 has been 204 units.

Less than 10 percent of the applications for conversions are rejected by the city, and usually it is the larger proposals over 20 which are refused.

According to the City Assessor, Samuel Ducca, a condominium conversion ordinance will have no effect on the value of apartments. He bases his opinion on the following facts: high interest rates are making it difficult to sell condominiums, there is a low demand for condominiums, there is a high demand for apartments, and there is a high cost in converting apartments to condominiums. Mr. Ducca believes that once an apartment is converted to a condominium, the value goes up by at least 40% because at that point the condominiums are each valued individually rather than as a complex.

Mr. Ducca's views differ from Supervisor Richard Hongisto, one of the supervisors who owns apartments. Hongisto believes that the value of his apartments will be affected by at least 10% if the condominium moratorium is approved. The other supervisor, Lee Dolson, believes that the value of his apartments will not be affected by the vote. Finally, neither supervisor has any intention at this time to convert his apartments to condominiums.

LEGAL ANALYSIS

Government Code Section 87100* states:

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.

Section 87103 defines a financial interest as follows:

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:

* All references are to the Government Code unless otherwise noted.

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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).

(b) Any real property in which the public official has a direct or indirect interest worth more than one thousand dollars (\$1,000).

(c) Any source of income, other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater.

Under the Political Reform Act, the elements which must be met before a public official is required to disqualify himself or herself are the following: an official must have a financial interest; it must be reasonably foreseeable that the decision will have a material financial effect on the interest, and the effect on the official's financial interest must be distinguishable from its effect on the public generally.

As guidance to what is a material financial effect, the Commission has adopted a regulation, 2 Cal. Adm. Code Section 18702, which states in pertinent part:

...(a) The financial effect of a governmental decision on a financial interest of a public official is material if the decision will have a significant effect on the business entity, real property or source of income in question.

(b) In determining whether it is reasonably foreseeable that the effects of a governmental decision will be significant within the meaning of the general standard set forth in paragraph (a), consideration should be given to the following factors:...

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(b) (2) Whether, in the case of a direct or indirect interest in real property of one thousand dollars (\$1,000) or more held by a public official, the effect of the decision will be to increase or decrease:

(A) The income producing potential of the property by the lesser of:

(1) One thousand dollars (\$1,000) per month, or

(2) Five percent per month if it is fifty dollars (\$50) or more per month; or

(B) The fair market value of the property by the lesser of:

(1) Ten thousand dollars (\$10,000) or

(2) One half of one percent if it is one thousand dollars (\$1,000) or more.

The regulation states that consideration should be given to the figures listed. Thus, while the figures are not binding, they are guidelines to be followed in determining materiality. In this case, we must determine whether it is foreseeable that the value of the property will be increased or decreased by the guidelines set forth above.

Foreseeability was extensively discussed in an early Commission opinion requested by Tom Thorner on behalf of Jack McPhail, a member of the Board of Directors of the Marin Municipal Water District, 1 FPPC Ops. 198. The Commission stated that the question of whether financial consequences are reasonably foreseeable depends on the facts of each particular case.

The facts in the McPhail case and the conclusion reached by the Commission are helpful in determining the "foreseeability" in the instant case. Director McPhail had a business which sold ready-mix concrete, building materials, major appliances, fuel, heating, air conditioning and sheet metal products. The question was whether McPhail could vote on requests for variances from a water moratorium already imposed and whether he could participate in or vote to lift the moratorium.

The Commission considered the following situations:

a. McPhail has no known connection with the project but may later bid on or supply to the project building materials, appliances and/or fuel. The Commission did not find a material financial effect was reasonably foreseeable.

b. McPhail was preparing to or has made a bid to supply one or more of its products but no award has been made. The

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Commission stated that as a general rule when the bid is made with a serious hope that the contract will be awarded, there is reasonable foreseeability.

c. A customer who was a regular customer and normally buys principally or only from McPhail, was preparing to bid on the project and if awarded the contract, probably would purchase some of McPhail's products. The Commission did not issue a definitive ruling but indicated that what is foreseeable must depend on the facts and circumstances of each specific situation. However, the Commission explained that extra degree of remoteness is added to the foreseeability of the financial effect because the contributor had not yet been awarded the contract but had merely put in a bid.

d. The type of customer described in (c) already has been awarded the contract but has not yet purchased or agreed to purchase any of McPhail's products for the project. The Commission stated that while there is no certainty that McPhail would receive business, there is such a high probability that McPhail would receive business that the financial effect is reasonably foreseeable.

From our discussions with officials in San Francisco, there is a difference of opinion as to whether the ordinance would have a foreseeable material financial effect on the supervisors. The Assessor, Samuel Ducca, claims at this time there will be no effect on the value of the apartments. On the other hand, Supervisor Hongisto believes that the value of his apartment building could be affected by 10%.

We believe that several specific factual considerations warrant a finding that the proposed ordinance would not have a material financial effect on the value of the apartments. If a person today wished to convert an apartment to a condominium, the person would not even be able to apply for such a conversion because there will be no further condominium conversions until 1983, since conversions are limited to 1,000 a year under the current ordinance. Finally, neither of the supervisors has a present intention to convert although they may wish to do so in the future.

Although the two supervisors affected by this opinion disagree as to the foreseeability of the decision under discussion, the assessor, who has the official responsibility to assess the value of real property in San Francisco, has clearly stated that it is his view that the proposed ordinance will not have a foreseeable material financial effect on the apartment holdings.

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For all the reasons given above and based on the facts provided to us, we conclude that neither supervisor has a conflict of interest in this matter.

If we can be of any further assistance, please feel free to give us a call.

Sincerely,

Robert M. Stern
General Counsel

RMS:nc

CITY AND COUNTY OF SAN FRANCISCO

GEORGE AGNOST
CITY ATTORNEY
CITY HALL

April 10, 1981

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APR 13 12 57 PM '81

Ms. Barbara Milman
Conflicts Division
Fair Political Practices Commission
1100 K Street
Sacramento, California 95814

Dear Ms. Milman:

The San Francisco Board of Supervisors has before it a proposed ordinance which, if adopted, would prohibit the conversion of rental dwellings to condominiums. Two members of the Board own seven and eight units respectively of rental property which would be subject to the prohibition contained in the proposed ordinance.

The matter appeared on the Board calendar on Monday, April 6, 1981. I appeared at the Board meeting and verbally advised Supervisor Hongisto (the owner of seven units) and Supervisor Dolson (the owner of eight units) that in my opinion the governmental decision, i.e., the ordinance, would have a material financial effect on their real property and that under the Ferraro opinion it was distinguishable from its effect on the public generally and therefore they should not participate in the debate nor vote on the ordinance.

The ordinance was sent back to committee and the Board directed me to put my opinion in writing and send my opinion to the Fair Political Practices Commission requesting your opinion on the matter.


I therefore respectfully request that you render an opinion on this matter.

I am enclosing a copy of the opinion which I have sent to our Board of Supervisors and a copy of the proposed ordinance which is before the Board.

If you wish further information please contact me and I will supply it.

Very truly yours,

GEORGE AGNOST
City Attorney


By THOMAS A. TOOMEY, JR.
Chief Deputy City Attorney

P.S. For your general information there are 11 members of the Board of Supervisors and six votes are required to pass an ordinance. The six vote requirement does not change if two members abstain.

CITY AND COUNTY OF SAN FRANCISCO

GEORGE AGNOST
CITY ATTORNEY
CITY HALL

April 9, 1981

OPINION NO. 81-15

SUBJECT: Participation by members of the Board of Supervisors in legislation prohibiting the conversion of existing residential buildings to condominiums where members own existing residential buildings.

REQUESTED BY: Board of Supervisors

PREPARED BY: Thomas A. Toomey, Jr.
Chief Deputy City Attorney

QUESTION PRESENTED

Are two members of the Board of Supervisors who own seven and eight rental units respectively disqualified from participating in deliberations concerning voting on legislation which would prohibit the conversion of their rental units to condominiums?

CONCLUSION

Yes.

FACTS

The Board of Supervisors is considering passage of an ordinance which provides that no existing residential building which contains more than one habitable residential rental dwelling may be approved for conversion to a condominium following the effective date of the ordinance until the city's rental vacancy rate is determined to be greater than five percent. The ordinance further makes a finding that the current vacancy rate is less than the required five percent.

One member of the Board of Supervisors owns eight and another owns seven residential dwelling units subject to the proposed prohibition ordinance.

ANALYSIS

Charter Section 8.105(c) provides that no officer or employee shall make, participate in the making or in any way

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attempt to use his office or employment to influence a governmental decision in which he knows or has reason to know he has a financial interest, as defined by California Government Code Section 87103.

Government Code Section 87103 as it pertains to a financial interest in real property provides in relevant part:

"87103. Financial Interest. 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:

(b) Any real property in which the public official has a direct or indirect interest worth more than one thousand dollars (\$1,000);

The Fair Political Practices Commission (hereinafter FPPC) has promulgated regulations to aid in applying this basic standard to specific situations. In a determination whether a governmental decision will have a material financial effect upon the official, Regulation 18702 provides, in part, that consideration shall be given to the following factors:

"(2) Whether, in the case of a direct or indirect interest in real property of one thousand dollars (\$1,000) or more held by a public official, the effect of the decision will be to increase or decrease:

(A) The income producing potential of the property by the lesser of:

1. One thousand dollars (\$1,000) per month; or
2. Five percent per month if it is fifty dollars (\$50) or more per month; or

(B) The fair market value of the property by the lesser of:

1. Ten thousand dollars (\$10,000); or
2. One half of one percent if it is one thousand dollars (\$1,000) or more."

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Therefore, a public official has a prohibition financial interest in a decision when:

1. It is reasonably foreseeable that the governmental decision will have a financial effect on real property of the official worth more than one thousand dollars.
2. The anticipated financial effect is material, and
3. The governmental decision's anticipated financial effect on the official's financial interest must be distinguishable from its effect on the public generally.

The supervisors involved have been advised verbally that they must abstain from participating in or voting on the condominium moratorium ordinance. No evidence has been submitted regarding the money value of the property or the effect on the value of that property of the prohibition on condominium conversion.

One strand in the bundle of rights of ownership of property in San Francisco is the right to engage in permitted forms of subdivision, including condominium conversions. The proposed ordinance finds that there have been an increasing number of condominium conversions in San Francisco since the adoption of the Subdivision Code in 1975. Given the present housing market in San Francisco and the increasing number of condominium conversions it is certainly reasonably foreseeable a prohibition on the exercise of this valuable property right would have a material financial effect on the property owned by the supervisors. One of the supervisors has stated that in his view if his units could be condominiumized he would expect that the market value would be materially affected.

It must be concluded that the ordinance prohibiting condominium conversions would have a material financial effect on the financial interest of supervisors who own real property containing seven or eight rental units. Further this anticipated financial effect is distinguishable from the financial effect of the ordinance on the public generally. Therefore you are advised that those supervisors owning seven or eight rental units may not participate in deliberations concerning or vote on the ordinance.

In determining that the financial effect is distinguishable from its effect on the public generally this office has consulted an analogous opinion rendered by the State Fair Political Practices Commission, 4FPPC Opinion 62.

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In the matter of: Opinion requested by John Ferraro, Councilman Los Angeles, No. 78-009 dated November 7, 1978.

The Ferraro Opinion asked the following question:

"May councilmen who owns single-family rental properties vote on or participate in the consideration of a proposed rent control ordinance?"

The conclusion was:

"The interests of owners of three or fewer rental units will not be affected by rent control decisions in a manner distinguishable from the effect upon a significant segment of the public generally, and therefore are not disqualified. Since each the councilmen owns only one rental unit, each may participate in and vote on the rent control ordinance."

The Ferraro Opinion did not address the questions of foreseeability and materiality because of the holding that the rent control ordinance in question did not affect the interests of the councilmen in a manner distinguishable from its effect on a significant segment of the public generally. The opinion does, however, draw a line which separates those who are in the rental property industry and those who are not.

Commission regulation 2 California Administrative Code Section 18703 basically provides that a material financial effect of a governmental decision on an official's interests is distinguishable from its effect on the public unless the decision will affect the official's interest in substantially the same manner as it will affect all members of the public. And that regulations provides in relevant part,

. . . an industry, trade or profession does not constitute a significant segment of the general public.

The Ferraro opinion turns on this language, holding that the residential real property business constitute an industry but that those who own three or fewer rental units are not part of the rental property industry. At page 66 the opinion states as follows:

"While those owning large numbers of rental units can be considered part of an "industry," it is

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difficult to characterize the owner of a small number of units as part of the rental property industry. The small landlord may just rent a room in his home, may have inherited a home from relatives or may have retained ownership of his old home when he moved to a new one. His interest is likely to be incidental and not relied upon as a major source of income. The owners of a small number of rental units are a diverse segment of the population representing all occupations and interests and whose only common bond is the ownership of rental property. Owners of a small number of rental units are analogous to small investors in the stock market. The small investor may occasionally buy and sell stock, but he or she is not part of the securities industry. Likewise, owners of a small number of rental units cannot be considered part of the rental property industry.

While it is relatively easy to conclude that persons owning a large number of rental units are part of the industry and that those who own only one or two units are not, it is much more difficult to determine where to draw the line between those who are and are not part of the industry. Despite the difficulty of drawing such a line, we believe that, in order to provide guidance to public officials as to their responsibilities under the conflict of interest provisions of the Act, it is necessary that such a line be drawn. In analogous situations, the courts have approved the drawing of such lines. See, e.g., Marshall v. United States, 414 U.S. 417, 428 (1974); Oregon v. Mitchell, 400 U.S. 112, 294-95 (1970) (separate opinion of Stewart, J.).

In determining where to draw a line separating members of the industry from other investors, the most relevant and easily applied consideration is how many units the official owns. We think that persons owning three or fewer rental units are most likely small investors only incidentally involved in the real property field. Therefore, we conclude that such persons are not part of the rental property industry. Conversely, we think that the interests of persons owning four or more rental property units are likely to be sufficiently substantial so as to make them members of the rental property industry. We understand that this

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demarcation between the owners of three and four rental units may lead to anomalous results in certain circumstances. However, on the whole, we believe that it is a practical and appropriate line between incidental investors on the one hand and active participants in the rental property industry on the other."

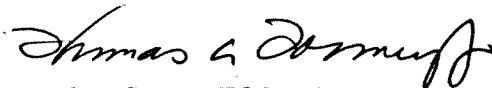
Government Code Section 83112 empowers the FPPC to adopt rules and regulations to carry out the purpose of the Political Reform Act of 1974. Government Code Section 83114 empowers the FPPC to render opinions regarding the duties of any person under the Political Reference Act. The Ferraro opinion was issued pursuant to this power. Constitutional construction of a law by the executive agency charged with the duty of executing and enforcing the law is to be given great weight. McLaren v. Fleischer (1919) 181 Cal. 607 185 P 967; Pasadena v. Railroad Commission of California (1923) 192 Cal.61, 218 P 412.

Like the right of a property owner to charge rent, the right of that property owner to subdivide the property into condominium is a valuable element of the overall ownership of the property. Therefore the line drawn in Ferraro with respect to rent control legislation is directly applicable to the instant question involving a proposed moratorium on condominium conversions.

You are therefore advised that members of the Board of Supervisors may not participate in or vote on the ordinance if they are the owners of four or more rental units which are subject to the ordinance.

Respectfully submitted,

GEORGE AGNOST, City Attorney



By

THOMAS A. TOOMEY, JR.
Chief Deputy City Attorney

Approved:



City Attorney

3773B

1 AMENDING PART II, CHAPTER XIII OF THE SAN FRANCISCO MUNICIPAL CODE (SUB-
2 DIVISION CODE) BY ADDING SECTIONS 1397.0 THROUGH 1397.2 TO PROHIBIT
3 THE CONVERSION OF EXISTING RESIDENTIAL BUILDINGS TO CONDOMINIUMS
4 WHENEVER THE RENTAL VACANCY RATE IS LESS THAN FIVE PERCENT AND
5 CREATING A VACANCY SURVEY ADVISORY COMMITTEE

6 Be it ordained by the People of the City and County of San Francisco:

7 Section 1. Findings.

8 The Board of Supervisors finds that since the adoption of the
9 Subdivision Code in April 1975 there has been an increasing number
10 of condominium conversion subdivisions in San Francisco. The Board
11 finds that during 1978 applications involving a total of 57
12 multi-family residential buildings containing 1,027 dwelling units
13 have been filed for condominium conversions, as compared with a
14 total of 16 buildings in 1977 involving 817 units, 6 buildings
15 involving 54 units in 1976, and 3 buildings containing 64 units in
16 1975. The Board further finds that in response to the rising rate
17 of condominium conversions there has been increasing concern
18 throughout the community that conversions result in a loss of rental
19 housing which adversely affects the people of San Francisco,
20 particularly low and moderate income households and the elderly.
21 The Board further finds that the rate of condominium conversions
22 should be related to the vacancy rate for the City's rental housing
23 stock so as to reduce the adverse impacts on the low and moderate
24 income households and the elderly. The Board finds that an
25 acceptable vacancy rate sufficient to allow reasonable residential
26 mobility for the public, to provide a lessening of the pressure on
27 rents, and to provide sufficient units available to persons
28 displaced by condominium conversions is five percent (5%). The
29 Board further finds that the City's current vacancy rate is less
30 than said five percent (5%) level, based on the 1973 Rent and

1 Vacancy Report of the Department of City Planning, the most recent
2 statistical survey of rents in San Francisco, and that the City's
3 rental vacancy rate shall be rebuttably presumed to be less than
4 five percent (5%) until a new rental vacancy survey is conducted.
5 The Board further finds that until the City's rental vacancy rate is
6 determined to be greater than five percent (5%), it is necessary for
7 this Board of Supervisors to prohibit the conversion of multi-family
8 residential buildings into condominiums.

9 Section 2. Part II, Chapter XIII of the San Francisco
10 Municipal Code (Subdivision Code) is hereby amended to add Sections
11 1397.0 through 1397.2 to Article 9 to read as follows:

12 SEC. 1397.0 Prohibition.

13 No existing residential building which contains more than one
14 (1) habitable residential rental dwelling, excluding those which
15 have never before been occupied, shall be approved for conversions
16 to a condominium following the effective date of this ordinance
17 until the City's rental vacancy rate is determined to be greater
18 than five percent (5%). No tentative subdivision map nor any type
19 of parcel map shall be accepted, processed or approved by the
20 Director of Public Works for the conversion of any such residential
21 building to a condominium during said period; provided, however,
22 that this section shall not apply to any application for such
23 conversion duly filed or registered with the Director of Public
24 Works in accordance with all applicable standards and procedures
25 governing such applications prior to June 1, 1981.

26 SEC. 1397.1 Determination of the City's rental vacancy rate.

27 In order to determine the City's vacancy rate for residential
28 rental dwelling units, as called for in Section 1397.0 of this code,
29 the Department of City Planning shall conduct an annual rental
30 vacancy survey. The findings of each such annual survey shall be

1 given a conclusive presumption of validity for a period of one (1)
2 year subsequent to publication of such report and thereafter shall
3 be given a rebuttable presumption of validity.

4 Any person who wishes to rebut the presumption of validity of
5 the most recently established vacancy rate for rental units in San
6 Francisco may petition the City Planning Commission for a hearing to
7 establish that the vacancy rate as determined by a valid citywide
8 statistical survey is in fact greater than five percent (5%). The
9 City Planning Commission shall conduct a hearing, take evidence, and
10 make a finding regarding the vacancy rate. In the event the City
11 Planning Commission makes a finding that the vacancy rate is greater
12 than five percent (5%), said finding shall be applicable to all
13 subsequent applications for condominium conversions until the next
14 annual vacancy survey is conducted.

15 Rental vacancy rate shall mean the percentage of all dwelling
16 units offered for rent in the City and County of San Francisco,
17 exclusive of rooms in residential hotels which are determined by a
18 statistically-valid sample to be vacant at a particular point in
19 time.

20 SEC. 1397.2 Vacancy Survey Advisory Committee.

21 There shall be an advisory committee established for the
22 purpose of overseeing the conduct of the rental vacancy survey. The
23 composition and duties of this committee shall be as follows:

24 (a) The name of the committee shall be the Vacancy Survey
25 Advisory Committee.

26 (b) The Committee shall be comprised of five (5) members to be
27 appointed by the Mayor and confirmed by the Board of Supervisors;
28 two of these members shall be representatives of tenants or tenant
29 organizations; two shall be licensed real estate brokers or
30 representatives of private real estate firms engaged in condominium

1 conversions; and one shall be a private individual who, by
2 profession, is engaged in survey research activities.

3 (c) All members of the Committee shall serve without
4 compensation, and shall serve at the pleasure of the Mayor.

5 (d) The Committee shall generally act as an advisory committee
6 to the Director of Planning in conducting the Annual Rental Vacancy
7 Survey. The Committee's responsibilities shall include, but not
8 necessarily be limited to, review and comment on the selection of
9 any contractor selected by the Department of City Planning to carry
10 out the survey; review and comment on the methodology to be used in
11 conducting the survey; and review and comment on any final report
12 issued by or submitted to the Department of City Planning pursuant
13 to an Annual Rental Vacancy Survey for the purpose of establishing
14 the citywide rental vacancy rate.

15 (e) Any action of the Committee shall ^{require the vote of at} ~~be taken by a simple~~
16 ~~majority vote provided there are no less than three members present.~~
^{least three members of the Committee.}

17 (f) The Committee is authorized to establish by-laws for the
18 conduct, scheduling, advertisement, and record-keeping of its
19 meetings.

20 (g) Any comments or reports issued by the Committee shall be
21 made in writing to the Director of Planning, and shall be made
22 available to the public upon request.

23
24 APPROVED AS TO FORM

25 GEORGE AGNOST, City Attorney

26
27
28 By: 

29 3714c

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