



California Fair Political Practices Commission

April 17, 1987

Michael C. Ciruolo
Ciruolo & Ciruolo
3306 Harrison Street
Oakland, CA 94611

Re: Your Request for Advice
Our File No. A-87-084

Dear Mr. Ciruolo:

You have requested advice on behalf of Inez Watts, a member of the Berkeley Rent Stabilization Board, concerning her duties under the conflict of interest provisions of the Political Reform Act (the "Act").^{1/} Your letter also requests advice concerning the tenant members of the Rent Stabilization Board and their ability to participate in decisions which may affect their financial interests. We have limited our advice to the duties of your client, Ms. Watts. The Commission does not provide advice to anyone other than an official or his or her authorized representative concerning the official's duties under the Act. (Regulation 18329(b)(8)(B).) However, the enclosed copy of the Overstreet Opinion, 6 FPPC Ops. 12 (No. 80-010, March 2, 1981) provides general guidance regarding the participation of tenant board members.

QUESTION

May Ms. Watts participate in decisions which would establish a formula for determining general rent adjustments for rent-controlled property in Berkeley?

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

CONCLUSION

Ms. Watts must disqualify herself from participating in any decision which would foreseeably and materially affect the income producing potential or fair market value of her real property.

FACTS

Ms. Watts was recently elected to the Berkeley Rent Stabilization Board. Pursuant to the Berkeley city charter, the Rent Stabilization Board has the power to determine, arbitrate and set rent levels, whether through general or individual adjustments, for any unit which has controlled rents under any Berkeley rent ordinance.

Section 121(3) of the city charter provides as follows:

Owners of rental property with rents controlled by the Berkeley Ordinance shall constitute the rental industry for purposes of the Article. Tenants constitute a large and significant part of the general public. Decisions by the Board have a material financial effect on members of the rental industry different from the general public.

This charter provision was adopted by the voters at the November 1982 municipal election.^{2/}

Ms. Watts owns a total of 13 rental units in the City of Berkeley. Six of these units are regulated under the Berkeley rent control ordinance, and thus are subject to the jurisdiction of the Rent Stabilization Board.

The Rent Stabilization Board is currently considering the concept of "indexing" general rent adjustments for rent-controlled properties. If such a decision is adopted, the rent adjustments permitted under the rent control ordinance would be based on the cost of living index prepared by the United States Government. These decisions would affect the calculation of

^{2/} The information regarding the Berkeley city charter provisions was furnished by Gregory R. McConnell, Executive Director of the Berkeley Rent Stabilization Board. A copy of Mr. McConnell's letter is enclosed.

rent adjustments for approximately 17,000 regulated rental units in Berkeley.

ANALYSIS

Section 87100 prohibits a public official from making, participating in, or using her official position to influence a governmental decision in which she knows or has reason to know she has a financial interest. An official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from the effect on the public generally, on, among other interests:

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

Section 87103(b).

Ms. Watts has an ownership interest in real property consisting of 13 rental units, six of which may be affected by decisions of the Rent Stabilization Board. Presumably, this interest is valued at \$1,000 or more. Therefore, she must disqualify herself from participating in any decision of the Rent Stabilization Board which would have a reasonably foreseeable material financial effect on her real property interest, distinguishable from the effect on the public generally.

Foreseeability

The decisions of the Rent Stabilization Board concerning rent adjustments will foreseeably affect Ms. Watts' real property interest. The intent of the decision is to provide a formula for calculating the amount of the rent adjustments permitted under the rent control ordinance. These decisions will directly affect the amount of income which can be generated by Ms. Watts' real property, and also may affect the property's fair market value. (See Overstreet Opinion, 6 FPPC Ops. 12 (No. 80-010, March 2, 1981.)

Materiality

Regulation 18702(b)(2) (copy enclosed) contains the guidelines for determining whether a decision will have a material financial effect on an official's interest in real property. This regulation provides that the effect of a

decision will be considered material if it will foreseeably 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 the effect 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 the effect is one thousand dollars (\$1,000) or more.

Regulation 18702(b)(2)(A) and (B).

We do not have any specific information concerning the rental income Ms. Watts currently receives for the six rental units in question. However, based on the fact that Ms. Watts owns six rental units subject to the city's rent control ordinance, it is most likely that a 5-percent increase or decrease in the rental income generated by her property would exceed \$50 per month and therefore be considered material. (See Hill Advice Letter, No. A-80-090 (copy enclosed), regarding application of the standards in Regulation 18702 to an official's real property interests.)

In your letter, you concluded that an effect on an official's rental income could not be the basis for disqualification. Your conclusion is based on Regulation 18702(b)(3)(A), which provides that the effect of a decision will be considered material if it will "directly increase or decrease the amount of income (other than rents) to be received by the official ... in an amount of one hundred dollars (\$100) or more." We agree that Regulation 18702(b)(3)(A) is not applicable to Ms. Watts' situation.^{3/} However, we disagree

^{3/} Furthermore, Regulation 18702(b)(3)(A) has been superseded by Regulation 18702.1(a)(4) (copy enclosed). On April 14, 1987, the Commission amended Regulation 18702 to delete subsection (b)(3)(A).

with your interpretation that, under the regulation, an effect on an official's rental income cannot provide the basis for her disqualification.

When Regulation 18702 is considered as a whole, it is clear that the standards set forth in subsection (b)(2), discussed above, apply to decisions which affect the amount of rental income an official can receive from real property (i.e., the income producing potential of the property). Regulation 18702 contains several other standards for determining whether an effect is considered material, and the standards vary with the type of economic interest in question. Subsection (b)(3)(A) of the regulation merely provides that increases or decreases in rental income are not to be considered for purposes of the \$100 materiality standard set forth in that particular subsection. It does not alter the plain meaning of subsection (b)(2) of the regulation, which contains the applicable materiality standards for decisions which affect an official's income from rental property.

Distinguishable from the Effect on the Public Generally

When a governmental decision will have a reasonably foreseeable material financial effect on an official's interest in real property, the official must refrain from participating in the decision unless the decision will affect the official's interest in the same manner as it will affect the public generally. (Section 87103.) In your letter, you noted that any decisions of the Rent Stabilization Board concerning general rent adjustments will affect not only Ms. Watts, but the rental industry in Berkeley, in general.

Regulation 18703 governs whether the effect of a governmental decision on an official's financial interests is considered distinguishable from the effect on the public generally. It provides as follows:

A material financial effect of a governmental decision on an official's interests, as described in Government Code Section 87103, 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.

(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) 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.

Regulation 18703.

In the Ferraro Opinion, 4 FPPC Ops. 62 (No.78-009, Nov. 7, 1978) (copy enclosed), the Commission found that persons owning three or fewer rental units were a large and diverse group which constituted a significant segment of the general public, but that owners of four or more rental units were members of the rental property industry. Ms. Watts owns more than three rental units; accordingly, she is considered a member of the rental property industry. She must disqualify herself from participating in decisions which would affect rental property owners unless the law which created the Rent Stabilization Board contains an express or implicit finding that decisions which affect the rental property industry in general do not

create a conflict of interest for board members who represent that industry. (Regulation 18703(c) and (d).)

In your letter, you assert that a determination that the "public generally" exception applies in Ms. Watts' situation would be consistent with the Commission's Overstreet Opinion, 6 FPPC Ops. 12 (No. 80-010, March 2, 1981). Your letter does not mention the current Berkeley city charter provisions or the fact that the current city charter provisions replaced the Berkeley rent control ordinance on which the conclusion in Overstreet was based.

In Overstreet, the Commission considered the application of the "public generally" exception to landlord and tenant members of the Berkeley Rent Stabilization Board. When Overstreet was decided, Berkeley's rent control ordinance included the following language:

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 a landlord or tenant.

Based on this language, the Commission concluded that the rent control ordinance contained an implicit finding and declaration of the type required by Regulation 18703, and that tenants and landlords were both large groups which constituted significant segments of the general public.

Since 1981, when Overstreet was adopted, the relevant provisions of Berkeley's rent control law have changed significantly. Section 121(c) of the city charter now states that tenants constitute a large and significant segment of the public and that owners of rent-controlled property subject to the Berkeley ordinance constitute the rental industry. That charter provision further states:

Decisions by the [Rent Stabilization] Board have a material financial effect on members of the rental industry different from the general public.

Thus, instead of an implicit finding and declaration of the type required by Regulation 18703, the city charter now contains an express finding and declaration that Rent Stabilization Board decisions affect owners of rent-controlled property in a manner that is distinguishable from the effect on the public generally. In view of this express finding, we conclude that the "public generally" exception does not apply

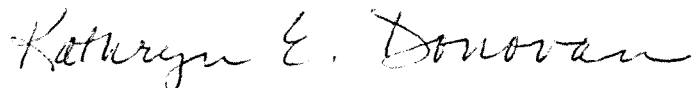
Michael C. Ciruolo
April 17, 1987
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in Ms. Watts' situation. This conclusion is consistent with the Overstreet Opinion and the Ferraro Opinion.

If you have any further questions concerning this matter, please contact me at (916) 322-5901.

Sincerely, .

Diane M. Griffiths
General Counsel



By: Kathryn E. Donovan
Counsel, Legal Division

DMG:KED:plh
Enclosures

CIRAOLLO & CIRAOLLO
ATTORNEYS AT LAW
3306 HARRISON STREET
OAKLAND, CALIFORNIA 94611
(415) 839-8678

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March 17, 1987

Fair Political Practice Commission
428 - "J" St., Ste. 800
Sacramento, CA 95814

ATTN: John H. Larson, Chairman

Dear Mr. Larson:

On page two of our March 11, 1987 letter to you, Fair Political Practice Commission Regulations Section 18072 et. seq. are inadvertently denominated as Government Code Sections.

We regret the error and any confusion it may have caused. Please view our request with the correction in mind.

Yours truly,



MICHAEL C. CIRAOLLO

MCC/dt

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March 11, 1987

Fair Political Practice Commission
428 - "J" Ste., Ste. 800
Sacramento, CA 95814

ATTN: John H. Larson, Chairman

Dear Mr. Larson:

I am writing on behalf of my client, Inez Watts, to request a formal ruling regarding potential conflict of interest. The conflict of interest question involves Ms. Watts' participation in decisions of the Berkeley Rent Stabilization Board and that of other members of the Board who have financial interests in the outcome of their votes.

By way of background, Inez Watts is currently the only black, female member of the Berkeley Rent Stabilization Board. She was recently elected, having received more votes than any other member of the Board. She is also the owner of record of thirteen rental units in the City of Berkeley, six of the units are regulated under the Berkeley Rent Control Ordinance. Seven are exempt since they provide Section 8 housing. These six units are out of about 17,000 regulated rental units in Berkeley. Other members of the Board are tenants of rental housing in the City of Berkeley. Under Article XVII Section 123 of the Charter of the City of Berkeley, the elected Rent Stabilization Board has the power to determine, arbitrate, and set rent levels, whether through general or individual adjustments for any unit which has controlled rents under any Berkeley Rent Ordinance, and to administer any Berkeley program which regulates rents and evictions in that city.

It is clear that Ms. Watts and tenant members of the Rent Board cannot participate in individual rent adjustment petitions that deal with their own property or the property on which the tenant members reside.

The question of conflict of interest deals with a broader, more general issue which is referred to locally as "indexing". The Rent Stabilization Board deals with the question of annual, general adjustments of rent as well as determinations of what kinds of cost may justify an increase in rent. Currently under consideration within the concept of indexing formula is the idea of having rents tied to the cost of living index prepared by the United States Government. At the moment, Ms. Watts is the only landlord member of the Rent Board. Tenant members of the Board have attempted to disenfranchise her from any decision process that would affect any general rent adjustment.

The specific question presented both as to Ms. Watts' participation and that of tenant members pertains to Section 18702 of the Government Code as to what is a material, financial effect of the decision making and voting process. It is obvious that any upward adjustment of rent or decrease of rent or maintenance of present rent levels in light of increasing costs of living factors would have a direct effect on the property that is owned by Ms. Watts as well as the property that is occupied by the tenant members of the Board.

While Ms. Watts' participation could affect rent levels, under Section 18702(3)(A) of the Government Code, it appears that "rent" is not to be considered as a material benefit in a conflict of interest situation and therefore could not be the basis for disqualification.

Further allowing Ms. Watts' participation would affect a significant segment of the public of which she is a part, which is consistent with the Fair Political Practices Commission's ruling in #80-010 of March 2, 1981. Despite that ruling, the Board has prevented Ms. Watts from participation. It should be noted that the potential financial effect to both Ms. Watts and the tenant commissioners would be, if the rent levels are maintained or decreased, beneficial to the tenant members of the Board, or if the rent levels are increased, a potential benefit to Ms. Watts.

We would request a determination of these questions: (1) Should Ms. Watts and/or tenant members of the Board be disqualified from voting on indexing questions? (2) Should Ms. Watts be considered a member of a significant segment of the public and not have a material benefit from voting? (3) Should the effect of indexing be a rent adjustment and exempt from conflict of interest under Government Code section 18702(3)(A)?

This matter has caused considerable controversy and affects many people in the City of Berkeley. We desire your investigation and attention to this matter, as well as the opportunity to fully brief our client's position prior to your decision.

On behalf of Inez Watts, we thank you for your assistance.

Yours Truly,



MICHAEL C. CIRAOLO

MCC/dt

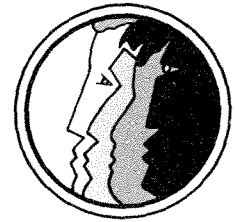
cc: Inez Watts



Rent Stabilization Board
Martin Luther King, Jr.
Civic Center Building
2180 Milvia Street
Berkeley, California 94704

City of Berkeley

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(415) 644-6128
TTY (415) 644-6915

March 19, 1987

John H. Larson
Fair Political Practice Commission
428 A "J" Street, Suite 800
Sacramento, CA 95814

Re: Conflict of Interest of Rent Board Member


Dear Mr. Larson:

In a letter dated March 11, 1987, the attorney for Inez Watts, a member of the Berkeley Rent Stabilization Board and a Berkeley landlord, requested a formal ruling regarding her participation in Rent Board decisions concerning rent increases. For your information I have enclosed a copy of our City Attorney's opinion on the conflict of interest issue.

I hope you can respond to the issues raised in Ms. Watts' letter at the earliest opportunity so the Board can have the benefit of your agency's view of the matter.

Thank you for your cooperation.

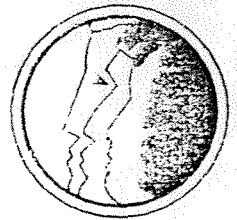
Sincerely,


GREGORY R. McCONNELL
Executive Director

Enclosure



City of Berkeley



Legal Department
Martin Luther King, Jr.
Civic Center Building
2180 Milvia Street
Berkeley, California 94704

M E M O R A N D U M

(415) 644-6330
TTY (415) 644-6915

Date: January 2, 1987

To: Gregory R. McConnell, Executive Director
Rent Stabilization Board

From: Manuela Albuquerque, City Attorney
By: Timothy J. Lee, Deputy City Attorney

Subject: Effect of Section 121(3) of the City Charter Regarding
Conflicts of Interest On Rent Board Commissioners

Issue

What effect does Section 121(3) of the City Charter concerning conflicts of interest have on a Rent Board Commissioner who owns six rental units in the City subject to the Rent Ordinance.

Conclusion

A Commissioner who owns controlled rental units may not participate in any decision of the Board in which it is reasonably foreseeable that the decision will have a material financial effect on the real property. A financial effect is considered material if:

- (1) the income producing potential of the property is increased \$1,000;
- (2) the income producing potential of the property is increased five percent of the gross monthly income and the effect is \$50 or more per month; or
- (3) the fair market value of the property is increased either \$10,000 or one half of one percent if the effect is \$1,000 or more.

If any of the above situations apply, State law disqualifies an official from participating in the decision. Thus, an analysis of the financial effect of a Board decision on the Commissioner's property must be made in each instance to determine if the Commissioner is disqualified from participating in the decision.

Analysis

Government Code Section 87100 provides:

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.

Government Code Section 87103 defines the type of financial interest which requires disqualification. It provides:

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:

(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, aggregating two hundred fifty dollars (\$250) or more in value received by or promised to the public official within twelve months prior to the time when the decision is made; or

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

Under the foregoing sections, four elements must be present before a public official is disqualified from participation in a governmental decision:

First, it must be reasonably foreseeable that the governmental decision will have a financial effect.

Second, the anticipated financial effect must be on a financial interest of the official, as defined in sections 87103(a) through (d).

Third, the anticipated financial effect must be material; and

Fourth, the decision's anticipated financial effect on the official's financial interest must be distinguishable from its effect on the public generally.

Of the four elements, the primary concern in the instant case is the third element of materiality since the other three elements do not raise any substantial questions. The first element is self-explanatory. If the decision will not foreseeably have any financial effect on the Commissioner, no conflict of interest exists. The second element is met if the Commissioner's investment in the controlled rental units is worth more than \$1,000 or the Commissioner received \$250 in rents from the controlled units within the last year. For purposes of this opinion it is assumed that this minimal threshold requirement has been met. The fourth element is present due to the express language of section 121(3) of the City Charter. It states:

Owners of rental property with rents controlled by the Berkeley Ordinance shall constitute the rental industry for purposes of this Article. Tenants constitute a large and significant part of the general public. Decisions by the Board have a material financial effect on members of the rental industry different from the general public.

In a prior opinion, we concluded that the Charter Amendment clearly expressed the voters' intention to distinguish the financial effects of Board decisions on owners of controlled rental units from the effect on the public generally. (A copy of the City Attorney Opinion dated June 3, 1983 is attached as Exhibit A.)

The remaining element of "materiality" of the financial effect is therefore determinative of whether a disqualifying conflict exists for the Commissioner in any given case. The Fair Political Practices Commission has adopted regulations defining the key phrases and elements of the statute in order to assist public officials in complying with the law. Section 18702 of the Regulations provides in relevant part:

18702. Material Financial Effect.

(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: . . .

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 the effect 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 the effect is one thousand dollars (\$1,000) or more.
(2 Cal. Admin. Code Section 18702(b)(2))

The limitation most likely to apply to the Commissioner in this case is the five percent per month increase in income producing potential. If it is reasonably foreseeable that a decision of the Board will increase the rents on the Commissioner's controlled units five percent per month, and the total increase in rents is at least \$50, the Commissioner is disqualified from participating in that decision. (The minimum \$50 increase is met if gross rents for the six controlled units total \$1,000 or more.)

Decisions of the Board such as the establishment of the annual general adjustment or indexing of net operating income must therefore be individually analyzed to determine if the 5% per month increase is reasonably foreseeable. If so, the Commissioner is precluded from participating in the Board's decision. It should be noted that the regulations define "participating in the making of a governmental decision" very broadly and includes advising or making recommendations to the decision-maker, and preparing or presenting any report, analysis, or opinion, orally or in writing, for the purpose of influencing the decision. (2 Cal. Admin. Code Section 18700) On the other hand, if a 5% per month rent increase is not reasonably foreseeable, no conflict exists and the Commissioner may participate fully in the decision.

Two other sections of the Commission regulations that arguably could apply to the Commissioner should be noted. Section 18702(b)(3) provides:

(3) Whether in the case of a source of income [including rent], as defined in Government Code Section 87103(c), of two hundred fifty dollars (\$250) or more received by or promised to a public official within 12

January 2, 1987

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months prior to the time the decision is made:

(A) The effect of the decision will be to directly increase or decrease the amount of income (other than rents) to be received by the official, or to confer a financial benefit or detriment upon the official or a member of the official's immediate family, in an amount of one hundred dollars (\$100) or more; or

(B) There is a nexus between the governmental decision and the purpose for which the official receives income; or

(C) In the case of a source of income which is a business entity, the business entity will be affected in a manner described in subsection (b)(1) above; or

(D) If the source of income is not a business entity, the decision will have a significant effect on the source.

The issue arises whether this source of income test imposes a different and stricter test of "materiality" on the Commissioner than the real property interest test. We conclude that it does not. Subsection(A) specifically excludes rental income and is therefore inapplicable on its face. Staff attorney John McLean of the Fair Political Practices Commission informed me that subsection(B) is intended to cover the situation where an official receives income in a private capacity to accomplish the same purpose that is before the official in an official capacity. For example, an official may be receiving payment as a consultant relating to a zoning matter that is pending before a body on which the official serves. The official is disqualified from participating in such a decision notwithstanding the absence of any direct monetary effect of the decision on the official. The staff attorney concluded that subsection(B) would not apply to the Commissioner since rent paid by the tenants to the Commissioner (as consideration for the use and occupancy of the rental unit) is distinct from the purpose for which the Commissioner serves on the Board (to promote and implement the Rent Control Ordinance).

Subsection(C) applies on its face only to business activities. Finally, the Commission staff attorney stated that in determining whether the decision will have "a significant effect on the source" under subsection (D), the Commission would look to the monetary amounts set forth for real property interests, i.e., the 5% per month standard discussed above.

The second section that arguably could apply is Section 18702.1(a)(4). It provides that "a public official shall not make, participate in making, or use his or her official position

January 2, 1987

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to influence a governmental decision if... It is reasonably foreseeable that the personal expenses, income, assets, or liabilities of the official or his or her immediate family will be increased or decreased by at least \$250 by the decision." While this section might appear on its face to apply and to be more limiting than the real property interest standard, the Commission staff attorney stated that this section was complementary to the other sections and was designed to cover situations not otherwise addressed in the regulations. Since the situation of the Commissioner is specifically covered by the standards for real property, the attorney concluded that this alternate standard would not be applicable.

It is important to note that the conclusions stated in this opinion are based in part upon the interpretations of the regulations provided by the Commission staff attorney through a process called informal assistance. The Fair Political Practices Commission is specifically authorized by the regulations to provide such informal assistance through discussion with a staff attorney of the Commission. (2 Cal. Admin. Code Section 18329(c)) In addition, the Commission also provides formal written advice (Section 18329(b)) and formal opinions (Section 18320) upon request of any person whose duties under the conflict of interest statute are in question or by the person's authorized representative. The Commissioner may wish to utilize such procedures to obtain a more formal opinion from the Commission on these issues.

Finally, the Board should be aware of the sanctions for violation of the statute. Government Code Section 87102 provides that the exclusive remedies for a violation or threatened violation are:

- (1) an injunction compelling compliance with the statutory requirements if disqualification;
- (2) an order setting aside as void any official action taken in violation of the statute; and
- (3) costs of suit and reasonable attorney's fees.

MANUELA ALBUQUERQUE
City Attorney

BY: 

TIMOTHY J. LEE
Deputy City Attorney

TJL:khd

CITY OF BERKELEY

DATE: June 3, 1983

Memorandum

TO: Edward Badgett, Assistant City Manager, Planning &
Community DevelopmentFROM: Attn: Jacqueline Foster, Director, Rent Stabilization
Board
Natalie E. West, City Attorney

SUBJECT:

SCOPE AND VALIDITY OF CONFLICT OF INTEREST PROVISION IN
CHARTER AMENDMENT ESTABLISHING AN ELECTED RENT BOARD
Page 1INTRODUCTION

The Berkeley City Charter was amended by the voters at the November 1982 municipal election to provide for an elected Rent Stabilization Board. ("Rent Board") composed of nine commissioners. When it takes office in July 1984, the elected Rent Board will replace the existing Rent Board composed of nine commissioners appointed by each member of the Berkeley City Council. In two prior opinions we addressed questions regarding the timing of this election, the length of the term of office of the Rent Board commissioners, the effective date of various provisions of the charter amendment, the scope of the elected Rent Board's powers, and the nature of the relationship between the elected Rent Board, the City Council, the City Manager and other city departments both generally and with particular respect to the manner in which Rent Board staff will be appointed, disciplined and discharged.

You have asked us to address the following additional issues:

ISSUES:

1. What is the effect of Section 121(3) of the Charter Amendment regarding conflicts of interest of Rent Board Commissioners?
2. Is the provision legally enforceable to the extent that it treats landlords differently from tenants?

CONCLUSIONS

1. Rent Board Commissioners who are Berkeley landlords with rents controlled under a Berkeley residential rent stabilization ordinance must disqualify themselves whenever it is reasonably

EXHIBIT A

44-431

CITY OF BERKELEY

DATE: June 3, 1983

Memorandum

TO: Edward Badgett, Assistant City Manager, Planning &
Community Development

FROM: Attn: Jacqueline Foster, Director, Rent Stabilization
Board

Natalie E. West, City Attorney

SUBJECT:

SCOPE AND VALIDITY OF CONFLICT OF INTEREST PROVISION IN
CHARTER AMENDMENT ESTABLISHING AN ELECTED RENT BOARD
Page 2

foreseeable that a decision by the elected Rent Board will have a material financial effect on their financial interests. Tenant commissioners may participate in all decisions except a petition for an individual rent adjustment relating to their own rental unit.

2. We have concluded that the conflict of interest provision does not violate the equal protection or due process rights of landlords with controlled rents but is rationally related to legitimate governmental interests in ensuring that the rent stabilization ordinance is construed in accordance with its legislative purposes.

ANALYSIS

1. Conflict of Interest

Section 121(3) of the charter amendment adopts the conflict of interest provisions of state and local law but goes on to define these provisions for purposes of the membership of the elected Rent Board as follows.

Owners of rental property with rents controlled by the Berkeley Ordinance shall constitute the rental industry for purposes of this Article. Tenants constitute a large and significant part of the general public. Decisions by the Board have a material financial effect on members of the rental industry different from the general public.

As we will explain in greater detail below, the effect of these provisions is to disqualify Berkeley landlords whose rents are controlled under the Rent Stabilization ordinance from participating in making any decisions which might materially affect their financial interests.

CITY OF BERKELEY

DATE: June 3, 1983

Memorandum

TO: Edward Badgett, Assistant City Manager, Planning &
Community Development

FROM: Attn: Jacqueline Foster, Director, Rent Stabilization
Board
Natalie E. West, City Attorney

SUBJECT:

SCOPE AND VALIDITY OF CONFLICT OF INTEREST PROVISION IN
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The relevant conflict of interest provisions of state law are found in the Political Reform Act of 1974. (Government Code Sections 81000 et. seq.) Specifically, Government Code Section 87100 prohibits public officials from influencing, participating in or making a governmental decision in which they have a financial interest. A public official has such a financial interest if "it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally," on specified financial interests of the public official which include an interest in real property worth more than one thousand dollars (\$1000) (Government Code Section 87103(b)). Thus, under the provisions of the Political Reform Act, Berkeley landlords with controlled rents would be excluded from participating on the Board if decisions of the Board have a "material financial effect" on their property which differs from "the effect on the public generally."

A. Effect on The Public Generally

By virtue of a regulation issued by the Fair Political Practices Commission ("FPPC"), members of a regulated industry are not considered members of the "public generally" and thus may not make decisions on a regulating board which materially affect their financial interest unless the regulating ordinance reflects a legislative intent that such members are intended to represent the interest of the regulated industry and that such representation will serve the public interest (2 Cal.Admin. Code Section 18703(c)). In 1980 the FPPC issued an opinion concluding that the City of Berkeley's Rent Stabilization ordinance reflected a legislative intent to permit participation by landlords with controlled rents on the Rent Board. The FPPC's conclusion was based on Section 6(r) of the City of Berkeley's

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rent stabilization ordinance which provides that Rent Board commissioners need not be disqualified from voting "solely on the basis of their status as a landlord or tenant."

As we have already noted, Section 121(3) of the charter amendment, defines owners of rental property with controlled rents as members of the rental industry, distinguishes them from tenants who are deemed a large and significant segment of the general public, and states that the decisions of the Board have an effect on members of the regulated industry which differs from that on the public generally. Thus, the literal language of the section appears to reflect a clear legislative intent to supercede Section 6(r) of the rent stabilization ordinance as construed by the FPPC and to stress that landlord representation on the elected Rent Board as advocates of the regulated industry is not deemed necessary to further the public interest. This conclusion is further buttressed by the fact that the ballot arguments both in support of and in opposition to the measure proposing the charter amendment strenuously debated the legal ^{1/} and practical effects of the FPPC opinion regarding landlord representation on the Board and assumed that the amendment would overrule the opinion.

^{1/} Supporters of the measure argued that the conflict of interest provision was necessary to overrule the FPPC decision and opponents claimed that the measure was illegal because it overruled this opinion.

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Accordingly we conclude that the charter amendment does not reflect any legislative intent to permit landlord representation on the elected Rent Stabilization Board to further the interests of the regulated industry and thus under 2 Cal. Admin. Code Section 18703, the effect of Board decisions on the regulated industry differs from that on members of the general public. ^{2/}

B. Material Financial Effect

A decision has a "material financial effect" on a public official's financial interest if it is reasonably foreseeable that the decision will have a significant effect on the official's real property. (2 Cal.Admin. Code

^{2/} Previous opinions of the FPPC have made it clear that tenants constitute a significant segment of the general public and thus language in the charter amendment which so provides is merely declaratory of existing law and appears designed to distinguish landlords from this significant segment of the public.

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Section 18702(a)). Determining whether the effect is a significant one under a FPPC regulation requires consideration of a set of monetary factors (2 Cal. Admin. Code Section 18702.) ^{3/} Although application of these factors to Berkeley landlords with controlled rents would result in disqualifying them from certain decisions rendered by the Board, most notably, the establishment of an annual general adjustment, such landlords would not necessarily be precluded from participating on all decisions rendered by the Board under this regulation alone. ^{4/}

^{3/} These factors include whether the income producing potential of the property would be increased or reduced by five per cent per month (2 Cal. Admin. Code Section 18702(b)(2)(A)(2).

^{4/} The last sentence of the conflict of interest provision is ambiguous. It provides, "[d]ecisions by the Board have a material financial effect on members of the rental industry different from the general public." This sentence could mean all decisions of the Board have such a material financial effect or it could mean that certain decisions of the Board have such a material financial effect. If we were to adopt the construction that regulated landlords may not participate in any decisions, the practical effect would be to render such landlords ineligible for membership on the board although the charter amendment section regarding eligibility (Section 121 (1)) does not so provide. The ballot arguments on the conflict of interest provision focused primarily on the merits of overruling the FPPC opinion and do not mention excluding landlords from participating on the Board. We therefore decline to adopt such a broad construction of the sentence.

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In short, we conclude that regulated landlords are not precluded from membership on the Board but are disqualified from participating in particular decisions which may materially affect their financial interests.

2. The Validity of the Conflict of Interest Provision

We next address concerns that a conflict of interest provision which disqualifies regulated landlords from participating in decisions of the Rent Board which may materially affect their financial interests is violative of such landlords rights to equal protection and due process.

A. Equal Protection

As we have already observed, tenants are deemed a significant segment of the public generally and thus need not disqualify themselves from decisions made by the Board except where the proceeding involves an individual rent adjustment petition affecting the tenant's particular rental unit. Accordingly we address whether this differentiation between landlords and tenants is violative of equal protection.

In Friedman v. Rogers (1979) 440 U.S. 1, the United States Supreme Court considered a due process and equal protection challenge to a Texas law mandating that four out of six members of the Texas Board of Optometry which regulates the practice of optometry be members of the Texas Optometry Association. ("TOA") The TOA denies membership to "commercial optometrists". The

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commercial optometrist plaintiff contended that he was denied equal protection and due process because four of the six members of the regulatory board were "professional" optometrists whose interests were antagonistic to "commercial" optometrists like himself. In rejecting this claim, the Court noted that where local economic regulations have been challenged solely on equal protection grounds, it has consistently deferred to legislative determinations that it is desirable to differentiate between different classes of persons. (Id at 17.) Unless the classification is inherently suspect or invades fundamental personal rights, the discriminatory classification is upheld if it is rationally related to a legitimate governmental interest (Id).

The Court concluded that the Texas legislature had a rational basis for establishing a Board dominated by professional optometrists because, based on its experience with both professional and commercial optometrists, it reasonably concluded that professional optometrists had demonstrated consistent support for the rules adopted by the Legislature which the Texas Board of Optometry was charged with enforcing. (Id at 18.)

Firstly, as in Friedman, the experience of Berkeley voters with the landlord members of the Board would be an adequate basis on which to exclude participation by such landlords. ^{5/} Secondly,

^{5/} The ballot arguments in support of the measure argued and Berkeley voters apparently agreed that the presence of landlords on the Rent Board had resulted in decisions contrary to the intent of the rent stabilization ordinance.

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as one California court recently noted, "[s]trong policy arguments may be made as to the desirability of eliminating, or severely restricting, industry members from boards There are meritorious arguments that many industry-dominated boards do not adequately serve consumer's interests." (Consumers Union of U.S. v. California Milk Producers Advisory Board (1978) 82 Cal.App.3d 433.)

Thirdly, the conflict of interest provision in the charter amendment does not mandate tenant participation on the Board, it merely excludes regulated landlords from participating in certain decisions of the Board and thus the effect of the discriminatory classification is far less prejudicial to regulated landlords than it was to the commercial optometrists in Friedman.

Finally, we note that the interest of even the smallest landlord in the annual adjustment is significantly different from that of a tenant since this decision affects not only the income of this landlord but the overall value of the property and thus the profit he or she can realize on resale. For all these reasons, we conclude that the conflict of interest provision does not result in depriving landlords of equal protection but is reasonably related to legitimate governmental interests in ensuring that the rent stabilization ordinance is construed in accordance with its legislative purposes.

B. Procedural Due Process

We next examine whether the disqualification of landlord commissioners from participation in certain decisions made by the Board results in depriving landlords of procedural due process because the possible presence of tenant commissioners with a pecuniary interest in that decision renders the Board unconstitutionally biased.

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At the outset it is important to note that the Rent Board exercises both quasi-legislative power, when it adopts standards further interpreting the Rent Stabilization Ordinance, and quasi-adjudicatory powers when it applies those standards to determine the rights of particular parties before it. Issuing regulations and establishing the annual adjustment is an example of an exercise of the former, the Individual Rent Adjustment process is an example of an exercise of the latter. We examine the due process claim in light of both these Board functions.

1. Quasi-legislative Power

The United States Supreme Court's decision in Friedman v. Rogers, supra, is virtually dispositive of this issue. As we have already observed, the plaintiff in Friedman made the undisputed claim that the commercial optometrists on the one hand, and professional optometrists on the other hand had antagonistic economic interests. For this reason, argued plaintiff, the statutorily mandated majority of professional optometrists on the Board of Optometry (four out of six) violated the due process rights of commercial optometrists by rendering the Board biased against-commercial optometrists. The court rejected this claim holding that the right to due process did not entitle the commercial optometrists to be regulated by a Board sympathetic to them although it did entitle the commercial optometrists to a fair and impartial hearing in any disciplinary hearing conducted against them. The Court held, in effect, that procedural due process required an impartial hearing only in an adjudicatory proceeding. California cases have likewise held that impartiality is a constitutional prerequisite in an adjudicatory hearing. (See e.g. American Motor Sales Corporation v. New Motor Vehicle Board (1977) 69 Cal.App.3d 983.) Indeed, in Birkenfeld v. City of Berkeley (1976) 17 Cal.3d 129, 145-147, the only

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not compel the conclusion that a Board dominated by the latter is likely to act in excess of its authority and thus violates the due process rights of commercial optometrists. The Court noted that commercial optometrists were still free to assert that, in a particular adjudicatory proceeding, the pecuniary interests of Board members would render the hearing unfair citing the facts in Gibson v. Berryhill (1973) 411 U.S. 564 as an example.

In Gibson, supra, the Alabama Optometric Association made up exclusively of independent practitioners charged Leo Optical Company with the unlawful practice of optometry before the Alabama Optometry Board whose membership was also restricted solely to independent practitioners. The Board suspended hearing the charges and then sued successfully to obtain an injunction against Leo Optical's practice of optometry. When the case was appealed the Board reactivated its administrative proceedings (Id at 567-569.) Leo Optical Company enjoined the proceedings on the grounds that each member of the Board stood to profit personally if Leo Optical's substantial practice in Alabama was suspended and thus, that the pecuniary interests of the Board members rendered the adjudicatory proceedings before the Board violative of due process. (Id at 571) The Court agreed. (Id 579.)

Thus, by virtue of the United States Supreme Court decisions we have discussed above, the mere fact that regulated landlords may be disqualified from participating in some individual rent adjustment petitions does not result in rendering the Board so unconstitutionally biased as to deprive landlords who are parties to Board proceedings of their rights to procedural due process. We do not preclude the possibility that a particular adjudicatory panel of the Board deciding a particular case may be properly challenged based on special circumstances which exist at the time, including the exact nature and degree of the pecuniary interests of the members which are claimed to render the panel

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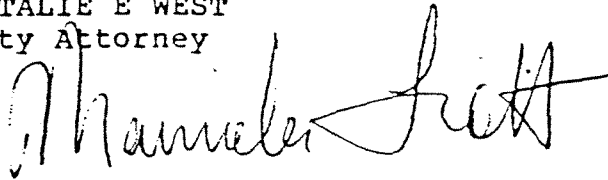
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partial, the number of members so affected and whether there is a sufficiently close nexus between the issues presented in the proceeding before the Board and the pecuniary interests of particular Board members.

Accordingly, we conclude that the possible disqualification of regulated landlord members from Board proceedings related to individual rent adjustment petitions, absent special circumstances, does not deprive landlords who are parties to such proceedings of due process.

NATALIE E WEST
City Attorney

By

MANUELA SCOTT
Senior Attorney

MS:DP

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F P I
MAR 16 10 57 AM '87

March 11, 1987

Fair Political Practice Commission
428 - "J" Ste., Ste. 800
Sacramento, CA 95814

ATTN: John H. Larson, Chairman

Dear Mr. Larson:

I am writing on behalf of my client, Inez Watts, to request a formal ruling regarding potential conflict of interest. The conflict of interest question involves Ms. Watts' participation in decisions of the Berkeley Rent Stabilization Board and that of other members of the Board who have financial interests in the outcome of their votes.

By way of background, Inez Watts is currently the only black, female member of the Berkeley Rent Stabilization Board. She was recently elected, having received more votes than any other member of the Board. She is also the owner of record of thirteen rental units in the City of Berkeley, six of the units are regulated under the Berkeley Rent Control Ordinance. Seven are exempt since they provide Section 8 housing. These six units are out of about 17,000 regulated rental units in Berkeley. Other members of the Board are tenants of rental housing in the City of Berkeley. Under Article XVII Section 123 of the Charter of the City of Berkeley, the elected Rent Stabilization Board has the power to determine, arbitrate, and set rent levels, whether through general or individual adjustments for any unit which has controlled rents under any Berkeley Rent Ordinance, and to administer any Berkeley program which regulates rents and evictions in that city.

It is clear that Ms. Watts and tenant members of the Rent Board cannot participate in individual rent adjustment petitions that deal with their own property or the property on which the tenant members reside.

The question of conflict of interest deals with a broader, more general issue which is referred to locally as "indexing". The Rent Stabilization Board deals with the question of annual, general adjustments of rent as well as determinations of what kinds of cost may justify an increase in rent. Currently under consideration within the concept of indexing formula is the idea of having rents tied to the cost of living index prepared by the United States Government. At the moment, Ms. Watts is the only landlord member of the Rent Board. Tenant members of the Board have attempted to disenfranchise her from any decision process that would affect any general rent adjustment.

The specific question presented both as to Ms. Watts' participation and that of tenant members pertains to Section 18702 of the Government Code as to what is a material, financial effect of the decision making and voting process. It is obvious that any upward adjustment of rent or decrease of rent or maintenance of present rent levels in light of increasing costs of living factors would have a direct effect on the property that is owned by Ms. Watts as well as the property that is occupied by the tenant members of the Board.

While Ms. Watts' participation could affect rent levels, under Section 18702(3)(A) of the Government Code, it appears that "rent" is not to be considered as a material benefit in a conflict of interest situation and therefore could not be the basis for disqualification.

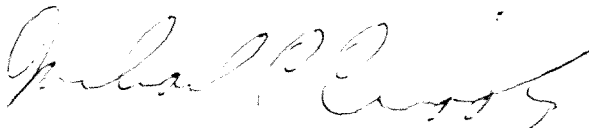
Further allowing Ms. Watts' participation would affect a significant segment of the public of which she is a part, which is consistent with the Fair Political Practices Commission's ruling in #80-010 of March 2, 1981. Despite that ruling, the Board has prevented Ms. Watts from participation. It should be noted that the potential financial effect to both Ms. Watts and the tenant commissioners would be, if the rent levels are maintained or decreased, beneficial to the tenant members of the Board, or if the rent levels are increased, a potential benefit to Ms. Watts.

We would request a determination of these questions: (1) Should Ms. Watts and/or tenant members of the Board be disqualified from voting on indexing questions? (2) Should Ms. Watts be considered a member of a significant segment of the public and not have a material benefit from voting? (3) Should the effect of indexing be a rent adjustment and exempt from conflict of interest under Government Code section 18702(3)(A)?

This matter has caused considerable controversy and affects many people in the City of Berkeley. We desire your investigation and attention to this matter, as well as the opportunity to fully brief our client's position prior to your decision.

On behalf of Inez Watts, we thank you for your assistance.

Yours Truly,



MICHAEL C. CIRAOLO

MCC/dt

cc: Inez Watts



California Fair Political Practices Commission

March 19, 1987

Michael C. Ciruolo
Ciruolo & Ciruolo
Attorneys at Law
3306 Harrison Street
Oakland, CA 94611

Re: 87-084

Dear Mr. Ciruolo:

Your letter requesting advice under the Political Reform Act was received on March 16, 1987 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Kathryn E. Donovan, an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days. You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

A handwritten signature in cursive script that reads "Diane M. Griffiths".

Diane M. Griffiths
General Counsel

DMG:plh

cc: Inez Watts

*Berkeley Rent Stab. Bd
2180 Milvia
Berkeley 94704*