



California Fair Political Practices Commission

September 2, 1988

Richard L. Friedman, Staff Counsel
Department of Housing and Community
Development
Legal Affairs Office
921 - 10th Street, Suite 702
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-88-286

Dear Mr. Friedman:

We have received your request for advice regarding the duties of the newly-formed California Housing Partnership ("Partnership") under the conflict of interest of code provisions of the Political Reform Act.^{1/} This letter confirms the telephone advice I previously provided.

QUESTIONS

Is the Partnership required to adopt a conflict of interest code; and, if a code is necessary, do the board members have a filing obligation prior to adoption of the code?

CONCLUSION

The Partnership is a state agency under the provisions of the Political Reform Act and must adopt a conflict of interest code. Statements of economic interests (Form 730) will not be required to be filed until the code has been adopted by the Partnership and approved by the Commission.

FACTS

The Partnership was formed under Health and Safety Code Section 52353, et seq., to raise equity capital for the purpose of acquiring or rehabilitating housing and related facilities for low-income households in areas where nonprofit housing

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

development corporations do not exist. The Partnership is a nonprofit corporation pursuant to Corporations Code Section 5000.

The Partnership's primary purpose is to raise equity funds from corporations or individuals to acquire and rehabilitate housing and related facilities, primarily for the benefit of low-income households. In addition, the Partnership may enter into limited partnerships with individuals, corporations, agencies, organizations and institutions and may make loans or grants to nonprofit corporations for low-income housing.

The Partnership has been appropriated \$500,000 from the state's Homeownership Assistance Fund to defray startup and initial operating costs. The appropriation must be fully repaid to the state within five years.

The incorporators of the nonprofit corporation are appointed by: (1) the Governor, subject to Senate confirmation; (2) the Senate Rules Committee; and (3) the Speaker of the Assembly. The incorporators serve as the initial board of directors. They are comprised of a city or county official experienced in assisting nonprofit housing developers to provide housing for low-income households; and various persons with experience or knowledge in each of the following subjects: (1) the banking industry; tax, securities or partnership law; (2) housing repair or rehabilitation; management of rental or cooperative housing; (3) development of programs utilizing equity capital; and (4) working with the private and public sector to help preserve existing low-income or very low-income housing.

The enabling legislation (Section 52550 of the Health and Safety Code) specifically provides that the Partnership is not a state agency and that its officers and employees are not officers or employees of the state.

ANALYSIS

A state agency is defined as every state office, department, division, bureau, board and commission, and the Legislature. (Section 82049.)

It may have been the intention of the drafters of the enabling legislation that the Partnership be recognized as something other than a state agency for certain purposes such as the Brown Act and for reasons of liability. However, the enabling legislation cannot exclude the Partnership from the definition of a state agency under the Act without specifically amending the Act.

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The Commission responded to a similar question from the State Compensation Insurance Fund (the "Fund") in In re Vonk (1981) 6 FPCC Ops. 1 (copy enclosed). In that opinion it was the Fund's contention that it was not a state agency for three reasons. First, the Fund contended it was by statute exempt from all requirements applicable to state agencies; second, based upon the Act, it was not a state agency as set out in Commission Regulation 18249 or in the Commission's Siegel Opinion (In re Siegel (1977) 3 FPCC Ops. 62, copy enclosed); and third, that it did not make decisions within the conflict of interest provisions of the Act.

We will look at each of the issues in Vonk separately and apply the Commission's findings to the Partnership.

In Vonk the Fund contended that an amendment to Insurance Code Section 11873 exempted it from the Act. That section states that the Fund shall not be subject to the provisions of the Government Code made applicable to state agencies generally or collectively, unless the section specifically names the Fund as an agency to which the provision applies.

The Commission rejected this argument, based on Franchise Tax Board v. Cory (1978) 80 Cal. App. 3d 772. In Cory, the Court of Appeal held that a statute which changes the scope or effect of an existing statute is an amendment to the existing statute. (Id. at p. 776.) The Act may be amended to further its purposes by a two-thirds vote of both houses of the Legislature. Various notice and other procedural requirements also apply. (Section 81012(a).) Therefore, the Commission held that the amendments to Insurance Code Section 11873 did not exempt the Fund from the requirements of the Act, since the procedural requirements in Section 81012(a) were not allowed.

Similarly, Health and Safety Code Section 52550 does not exclude the Partnership from the definition of a state agency under the Act, since the procedural requirements in Section 81012(a) were not allowed.

As to the second question posed in Vonk, the Commission held that the Fund was a state agency under Regulation 18249 (copy enclosed), which defines "state agency" for lobbying purposes. The Commission also ruled that the Fund was a public agency pursuant to the criteria established in In re Siegel, supra.

We will first examine Regulation 18249 to see if the Partnership is a state agency for lobbying purposes. Regulation 18249 provides that an agency is a state agency if all of the following criteria are met:

(a) The agency is authorized by statute, executive order or the California Constitution.

(b) At least one voting member is an elected state officer or is appointed by an elected state officer or an agency official or a state agency.

(c) The agency is financed in part by any state funds or is subject to appropriation in the state budget.

(d) An area larger than one county is included in its jurisdiction.

The Partnership was authorized by statute, it will be initially funded by money from the state, its members are all appointees of the Governor, the Senate Rules Committee and the Speaker of the Assembly, and its jurisdiction is larger than a single county. Thus, applying the definition of state agency for the lobbying provisions of the Act, the Partnership is a state agency.

In re Siegel, supra, sets out specific criteria for determining whether an agency is public rather than private in nature. That criteria is:

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

The impetus for formation of the Partnership was created by the California Legislature. The initial source of funds for the Partnership is the Homeownership Assistance Fund, a state fund appropriated by the Legislature. There presently are programs on the local, state and federal level which provide governmental housing programs for low income families. Finally, the enabling legislation of the Partnership itself requires the Partnership to be accountable to the Governor, annually, for its operations, activities and financial condition. Such would not be required if the Partnership were

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a private entity. Furthermore, the Partnership is exempt from taxation, as are government agencies.

Based on the criteria of the Siegel Opinion, the Partnership is considered public rather than private in nature.

The third consideration in the Vonk Opinion is whether the Partnership will be making decisions which could affect financial interests. In this regard, the enabling legislation provides that the representation of varied interest groups on the board of directors shall be deemed essential to obtain information for the development of policy and decisions of the board of directors. Such decisions of the board may include, acquisition of real property from private sources, designation of areas for the development of low-income housing and other facilities, and the establishment of partnerships with private individuals, or private or governmental corporations, agencies, organizations and institutions. (Health and Safety Code Section 52551(c).)

Health and Safety Code Section 52551(c) acknowledges that the members and officers of the Partnership will be participating in governmental decisions. It further provides that those members shall not make or participate in making any decision in which they have a financial interest as described in Section 87103. These statutory provisions indicate that the Partnership will be making governmental decisions.

Based on the above analysis, we conclude that the Partnership is a state agency for purposes of the Act. Therefore, the Partnership is required to adopt a conflict of interest code for its officers and employees.

To assist the Partnership in the development of the code, enclosed is Commission Regulation 18750 which describes the procedure state agencies are to follow to promulgate a conflict of interest code.

Once a code has been developed by the Partnership and approved by the Commission, its members and officers shall be required to file statements of economic interests under the provisions of the code. It is my understanding that the Governor's appointees have received the statement of economic interest Form 730 for filing. These individuals will not have a filing obligation until after the code has been approved by the Commission. Those appointees may disregard the form at this time.

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I hope the above information has been helpful. If you have additional questions or need assistance developing the code, please feel free to call me at (916) 322-5901.

Sincerely,

Diane M. Griffiths
General Counsel

Jeanette E. Turvill

By: Jeanette E. Turvill
Legal Assistant
Legal Division

by Ked

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Enclosure

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

LEGAL AFFAIRS OFFICE
921 10th Street, Suite 702
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Telephone (916) 323-7288

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July 19, 1988

Ms. Jeanette Turvill
Fair Political Practices Commission
428 J Street, Suite 800
Sacramento, CA 95814

Subject: Conflict of Interest Code
California Housing Partnership

Dear Ms. Turvill,

Thank you for taking the time to discuss my questions yesterday. As we discussed, our department's Director has been selected by the Governor to be an incorporator and initial director of a nonprofit corporation to be created pursuant to Health and Safety Code 52535 (Chapter 1355, Statutes of 1987). Under this Chapter's provisions, the Governor selects 5 directors, the Senate Rules Committee selects one director, and the Speaker of the Assembly selects one director. By statutory definition, this corporation is not a state entity.

The Governor's office has sent each selected incorporator a Disclosure Statement which is normally required by the Political Reform Act. I, however, am not certain that this entity will be subject to the Political Reform Act's disclosure requirements since it is expressly not a state entity. Furthermore, even should it be subject to these requirements, I do not believe that a Disclosure Statement could be required until it has adopted a Conflict of Interest Code which would define those interests which need to be disclosed.

I have enclosed a copy of Chapter 1355 for your review. I would greatly appreciate your conclusions as to whether disclosure statements are needed, and whether a Conflict of Interest Code must be adopted, so that I may adequately advise our Director, and the other director's as to their statutory obligations.

Thank you very much for your assistance.

Sincerely,


Richard L. Friedman
Staff Counsel

cc: Christine Diemer Reed, Director
Derry Knight, Chief Counsel

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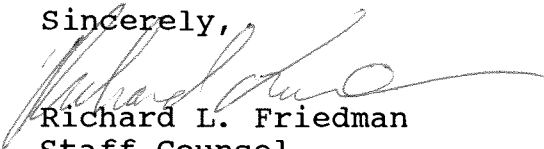
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