



California Fair Political Practices Commission

December 12, 1991

Marjorie Gelb, Assistant City Attorney
Berkeley City Attorney's Office
2180 Milvia Street
Berkeley, CA 94704

Re: Your Request for Advice
Our File No. A-91-511

Dear Ms. Gelb:

You are seeking advice on behalf of Councilmembers Ann Chandler, Shirley Dean, and Mary Wainwright regarding their duties and responsibilities under the conflict-of-interest provisions of the Political Reform Act (the "Act")¹ with respect to a pending decision before the Berkeley City Council. As the authorized representative of the councilmembers, we provide you with advice pursuant to Regulation 18329.

The following advice is based upon the facts provided in your letter of November 8, 1991 and in several telephone conversations with you.

We are also in receipt of a letter, dated November 7, 1991, from Robert Kish, who, on behalf of an unnamed client, has expressed an interest in this matter and takes issue with some of the factual and legal analysis you have offered in your letter. (A copy of Mr. Kish's letter, summarizing his contentions, was sent to you via facsimile transmission on November 19, 1991.) The Commission does not act as a finder of fact and will not attempt to resolve whatever factual disputes that may exist concerning this matter. We reiterate the Commission's long-standing policy that the advice provided in this letter is applicable only to the extent the facts you have provided are correct and that all material facts have been presented. (In re Oglesby (1975) 1 FPPC Ops. 71.) If the facts provided are inaccurate or otherwise

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.

incomplete, the advice may be changed or modified; if necessary, the advice may be withdrawn.

Also, the Commission does not provide advice with respect to past conduct. (Regulation 18329.) Although you have indicated that a first reading of the proposed ordinance has already occurred, and the vote thereon included the participation of the three councilmembers, the ordinance has or will be amended and returned to the council for a (new) first reading. Therefore, this advice is prospective only, applicable to the forthcoming decision, and does not constitute any guidance or counsel on actions that have already been taken.

QUESTION

Do Councilmembers Chandler, Dean, or Wainwright have a disqualifying conflict with respect to a pending ordinance before the city council that will restrict the conversion of certain residential dwelling units to tenancies-in-common (a fractional, undivided interest in land coupled with a right to exclusive occupancy of a unit within the property)?

CONCLUSION

Whether one or more of the councilmembers can participate in the pending decision that will restrict the conversion of certain residential dwelling units to tenancies-in-common depends on whether the decision will foreseeably and materially financially affect a councilmember's property interests.

FACTS

Pending before the Berkeley City Council is an ordinance which will limit the sale of "tenancies-in-common," or "TICs." The ordinance defines a TIC as a fractional, undivided interest in land coupled with a right to exclusive occupancy of a unit within the property. The right to exclusive occupancy is not included on the face of the deed but instead is provided for in a separate written agreement or representation. You have indicated that the purpose of the ordinance is to restrict the conversion of certain residential rental dwelling units to TICs for an interim period, during which the city would formulate a new policy regarding the depletion of housing stock.

Because the express purpose of the ordinance is to maintain the status quo pending formulation of a new housing policy, certain exceptions are included in the proposed ordinance. Among the two relevant for purposes of this analysis are (1) the exclusion from application of the ordinance to existing TICs, and (2) the exclusion from application of the ordinance to TICs in

buildings with three or fewer units.

Of the three councilmembers on whose behalf this advice is being requested, only Councilmember Ann Chandler is an owner of a TIC; since 1984 she has owned one unit of a two-unit TIC. Because it is not a rental property, her property interest is not subject to the city's rent control laws.

Neither Councilmembers Shirely Dean or Mary Wainwright are TIC owners. Councilmember Dean is a less-than-fifty percent owner of a two-unit duplex; because one unit is occupied by her son, who is a 50% owner of the duplex, Councilmember Dean's property interest is not subject to the city's rent control laws. You have indicated that should she either sell her property interest outright, or convert her interest into a TIC and then sell it, the revenue generated from either sale would be the same.

Councilmember Mary Wainwright owns at least seven four-unit rental properties. Of these, some are governed by Berkeley Housing Authority and not subject to the city's rent control laws; some are subject to the rent control provisions and some are vacant.

Each of the councilmembers' financial interest in their respective properties is worth more than one thousand dollars.

You have indicated that although a first reading of the ordinance has already occurred and that the three councilmembers participated in the vote at the first reading, an amendment to the ordinance changing the duration of the proposed moratorium has or will be made, and that the ordinance will be returning to the council for a (new) first reading.

ANALYSIS

A public official is prohibited from making, participating in, or using his or her official position to influence a governmental decision in which the official knows or has reason to know he or she has a financial interest. (Section 87100.) A public official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on - among other things - any real property in which the official has a direct or indirect interest worth one thousand (\$1,000) or more. (Section 87103(b).)

As elected members of the Berkeley City Council, the three councilmembers are public officials (Section 82048) and must disqualify themselves from any governmental decisions which will have a reasonably foreseeable material financial effect, distinguishable from the public generally, on their real property interests. (Section 87103(b).)

Foreseeable Material Financial Effect

Foreseeability

The effect of a decision is reasonably foreseeable if there is a substantial likelihood that it will occur. While certainty is not required, an effect that is merely a possibility is not reasonably foreseeable. (Downey Cares v. Downey Community Development Com. (1987) 196 Cal.App.3d 983; In re Thorner (1975) 1 FPPC Ops. 198.) The Act, however, does seek to prevent even the appearance of a possible conflict of interest. (Witt v. Morrow (1977) 70 Cal.App.3d 817, 823.)

To the extent that the proposed ordinance will have an impact on housing stock in the jurisdiction, it appears that all three councilmembers have ownership interests in property that, in one form or another, will be foreseeably affected by the proposed ordinance. The foreseeability factors particular to each councilmember are additionally addressed below. Whether the effect is material, and therefore disqualifying, requires separate analysis.

Materiality

Councilmember Chandler has an ownership interest in a TIC that, because of an express exception provided for in the proposed ordinance, is exempted from the ordinance.

Councilmember Dean has no ownership interest in a TIC. She is, however, a part (less than 50%) owner of a duplex that, because of an express exception provided for in the proposed ordinance, is exempted from the ordinance.

Councilmember Wainwright has no ownership interest in a TIC but owns at least seven rental properties, none of which appear to be exempted from the ordinance.

None of the three councilmembers' economic interests is directly involved in the pending decision on the proposed ordinance. None of the councilmembers or their respective economic interests has initiated the proceeding in which the decision will be made, or is a named party in the proceeding, or is seeking a license, permit, or other entitlement. (Regulation 18702.1(b).) When an official's property interest is indirectly involved in a decision, materiality is to be evaluated under Regulation 18702.3.

Because the proposed ordinance will apply a city-wide moratorium on TIC conversions, there is no particular property or properties which can be considered the subject of the decision,

and the "distance tests" of Regulation 18702.3(a) and (b) are not applicable. Instead, materiality will be determined based upon the foreseeable effect in terms of dollars on the councilmembers' properties, pursuant to Regulation 18702.3(c). (Elam Advice Letter, No. I-89-467.) A councilmember will thus have a disqualifying conflict if as a result of the decision on the proposed ordinance, her property interest will be affected by either ten thousand dollars (\$10,000) or more in fair market value (Regulation 18702.3(a)(3)(a)) or one thousand dollars (\$1,000) in rental value for a twelve-month period (Regulation 18702.3(a)(3)(b).) (Hongisto Advice Letter, No. I-89-577.) Whether the effect of the decision is positive or negative is of no consequence under the Act. (Young Advice Letter, No. A-89-149.)

Councilmember Chandler

Councilmember Chandler's ownership interest in her duplex TIC is currently valued at \$140,000. Because she has maintained and lived in this interest since 1984, it is not affected by the proposed moratorium.² Under Regulation 18702.3(c), her participation in the proposed ordinance decision would be precluded under the Act's conflict-of-interest provisions if the ordinance would affect her interest by \$10,000, or approximately 7.1% of the value of her ownership interest.

In the appraisal you have provided, the appraiser has declined to opine as to the precise dollar value of impact on various portions of the real estate market in the jurisdiction, because of the lack of "empirical data with which to develop an answer." Nevertheless, the appraisal suggests that because the proposed moratorium is intended for a limited duration, "there will probably be little noticeable impact, especially with the current recession expected to continue well into 1992."

While it is clearly foreseeable that a one-time, interim moratorium on TIC conversions will have the likely result of enhancing the (property) value of existing TICs, such as Councilmember Chandler's, whether such an enhancement will rise to the level of the financial thresholds provided for in Regulation 18702.3 is a factual determination.

Although a complete and permanent ban on future conversions of rental housing to TICs might permit a more definitive calculation of financial impact, particularly with respect to existing TICs, the appraisal obtained apparently concludes that "little noticeable" financial impact will result from a single

² We note that even if the proposed ordinance did not contain an express exception for existing TICs, Ms. Chandler's interest would not be directly effected. The ordinance seeks to curtail new TIC conversions, not to repeal existing TICs.

interim prohibition on conversions. If it is reasonable for the city to rely on the appraisal to conclude that a financial impact is clearly foreseeable, and the city determines that a disqualifying financial impact pursuant to Regulation 18702.3 will not occur, Councilmember Chandler would not be precluded from participating in the forthcoming decision on the proposed ordinance.

Councilmember Dean

You have not provided information concerning the value of Councilmember Dean's ownership interest in her two-unit apartment building. Because the building has three or fewer units it is not affected by the proposed interim moratorium, which prohibits conversion of rental properties to TICs of four or more units.

However, in view of Councilmember Dean's opportunity to convert her property interest into a TIC interest under the exception, her participation in the decision would be precluded under the Act's conflict-of-interest provisions, pursuant to Regulation 18702.3(c), if as a result of the ordinance her interest would be affected by \$10,000.

You have previously indicated that the market value of Councilmember Dean's property interest would be identical whether it was sold outright or as a TIC interest. This conclusion appears to be based on the premise that as a part owner-occupied rental property, it is exempt from the city's rent control ordinance; therefore, the market value of the property would not be affected by ordinance-mandated restrictions on available rent that could be assessed. Although no facts supportive of this representation have been provided, to the extent such an observation were factually accurate, it would suggest that the proposed ordinance would have no financial impact on Councilmember Dean's property interest.

The appraisal you have provided does not resolve the question, because "empirical data with which to develop [such] an answer" was lacking. Instead, the appraisal suggests that because the proposed moratorium is intended for a limited duration, "there will probably be little noticeable impact, especially with the current recession expected to continue well into 1992."

While it is foreseeable that a one-time, interim moratorium on TIC conversions will have the likely result of enhancing the (property) value of existing properties still eligible for TIC conversion under the exception for three-or-fewer unit buildings, such as Councilmember Dean's, whether such an enhancement will rise to the level of the financial thresholds provided for in Regulation 18702.3 is a factual determination.

Similar to the discussion infra, although a complete and permanent ban on future conversions of rental housing to TICs might permit a more definitive calculation of financial impact, particularly with respect to property interests that remain eligible for conversion under an exception, the appraisal obtained apparently concludes that "little noticeable" financial impact will result from a single interim prohibition on conversions. If it is reasonable for the city to rely on the appraisal to conclude that a financial impact is clearly foreseeable, and the city determines that a disqualifying financial impact pursuant to Regulation 18702.3 will not occur, Councilmember Dean would not be precluded from participating in the forthcoming decision on the proposed ordinance.

Councilmember Wainwright

We have not been provided any information concerning the value of Councilmember Wainwright's ownership interest in her seven four-unit rental properties. These properties are affected by the proposed moratorium, which prohibits conversion of rental properties to TICs of four or more units.

The fact that Councilmember Wainwright will have no opportunity to convert these property interests into TIC interests means that her participation in the decision would be precluded under the Act's conflict-of-interest provisions, pursuant to Regulation 18702.3(c), if in so doing the value of any of her property interests would be affected by \$10,000 in fair market value.³ The financial thresholds applicable for disqualification purposes are to be applied to each of her properties, and not cumulatively. (Rodriguez Advice Letter, No. A-90-360.)

You have not provided sufficient facts to enable us to evaluate the foreseeability or materiality considerations pertinent to Councilmember Wainwright's properties. The appraiser's conclusion that "there will probably be little noticeable impact" on property values because the proposed moratorium is intended for a limited duration means that - to the extent it is reasonable to rely on the appraisal - the fair market value of each of Councilmember Wainwright's properties may not be impacted sufficiently for purposes of requiring disqualification. However, the appraisal does not address the financial impact, if any, of the fact that the properties, because they are covered by

³ The other disqualifying threshold of \$1,000 in rental value over a twelve month period, would appear not to be applicable in this context, since the rents currently assessed to tenants of Councilmember Wainwright's properties are controlled either under the city's rent control ordinance or under federal housing guidelines as administered by the Berkeley Housing Authority.

the moratorium, are not eligible for conversion to TICs for the duration of the moratorium.

You have previously indicated that some of Councilmember Wainwright's rental properties are governed by Berkeley Housing Authority and not subject to the city's rent control laws, some are subject to the rent control provisions, and some are vacant.

While it is foreseeable that an interim moratorium on TIC conversions will have the likely result of enhancing the (property) value of existing properties still eligible for TIC conversion under an applicable exception, whether the interim moratorium will have the result of decreasing the (property) value of existing properties ineligible for TIC conversion, and whether such a decrease will amount to the level of the financial thresholds provided for in Regulation 18702.3, is a factual determination.

Although a complete and permanent ban on future conversions of rental housing to TICs might permit a more definitive calculation of financial impact, particularly with respect to properties no longer eligible for conversion to TICs, the appraisal obtained apparently concludes that "little noticeable" financial impact will result from a single interim prohibition on conversions. If it is reasonable for the city to rely on the appraisal to conclude that a financial impact is clearly foreseeable, and the city determines that a disqualifying financial impact pursuant to Regulation 18702.3 will not occur, Councilmember Wainwright would not be precluded from participating in the forthcoming decision on the proposed ordinance.

Finally, we note that to the extent it is reasonable to rely on the appraiser's conclusion that the financial impact of the proposed ordinance, while foreseeable, is limited, such reliance is premised on the fact that the proposed moratorium on TIC conversions is for a limited duration. We have suggested infra that a complete and permanent ban on future conversions of rental housing to TICs might permit a more definitive calculation of financial impact. We also note that serial "interim" moratoria could very well rise to the level of a complete ban for purposes of determining disqualifying financial thresholds for a councilmember's property interests that would thereafter be either permanently prohibited from, or eligible for, TIC conversions. We therefore reiterate that our advice in this letter is premised in part on the limited and temporary nature of the moratorium contained in the proposed ordinance.

Public generally exception

An official disqualified from participating in a decision may nevertheless participate in a decision if the effect of the decision on the official's interest is not distinguishable from

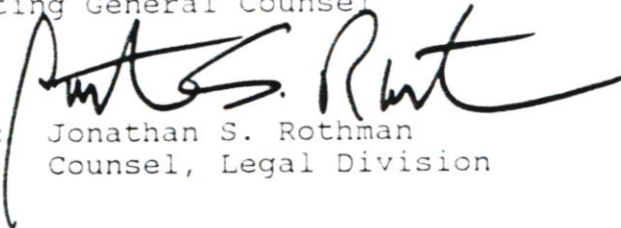
the effect on the general public; the decision must affect the official's interest in substantially the same manner as it would affect a significant segment of the public. (Regulation 18703.)

However, if the requisite financial impact as provided for in Regulation 18702.3(a)(3)(a), Regulation 18702.3(a)(3)(b), or Regulation 18702.3(c) is not present, it is unnecessary to determine whether the impact on Councilmembers Chandler, Dean, and Wainwright is distinguishable from the public generally. (Moe Advice Letter, No. A-90-757.)

I trust this letter has provided you with the guidance you requested. If you have any further questions regarding this matter, or if you wish to supplement your advice request with additional facts, please contact me at (916) 322-5901.

Sincerely,

Scott Hallabrin
Acting General Counsel



By: Jonathan S. Rothman
Counsel, Legal Division

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