California
Fair Political
Practices Commission

January 2, 1992

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-91-523

Dear Ms. Gelb:

You are seeking advice on behalf of Councilmembers Shirely Dean, Mary Wainwright, Nancy Skinner, and Carla Woodworth regarding their duties and responsibilities under the conflict-of-interest provisions of the Political Reform Act (the "Act")[1] with respect to pending decisions 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 21, 1991 and in several subsequent telephone conversations with you, as well as telephone conversations with Brian Kelly of your office on December 3, Lillian Mayers of your office on December 30, 1991, and Councilmember Woodworth on December 9, 1991.

QUESTIONS

Do Councilmembers Dean, Wainwright, Skinner, or Woodworth have a disqualifying conflict of interest with respect to the following: (1) pending resolutions concerning whether the city council should sue the city's rent board so as to stop the rent board's implementation of regulations that will likely result in raising the rents for many rent-controlled units in the city? (2) a city council decision to retain special counsel to represent the city council in such litigation?

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[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, unless otherwise indicated.

CONCLUSION

Whether one or more of the councilmembers can participate in decisions on the pending resolutions regarding initiating litigation and/or in a decision to retain special counsel depends on whether the decisions will foreseeably and materially affect a councilmember's financial or property interests.

FACTS

Pending before the Berkeley City Council ("city council") are several resolutions to determine whether or not the city council will sue the city's rent board. The rent board has adopted proposed regulations which are anticipated to result in increases in the rents on many rent-controlled units in the jurisdiction. The purpose of the litigation would be to prevent these regulations from being implemented. Should the city council determine to proceed with the lawsuit, retention of special counsel would be required, as the city attorney has disqualified herself from participating in an action involving one of her clients (the city council) against another (the rent board).

There are four rent board regulations with which some members of the city council appear to take issue.

You have indicated that two of the regulations, #1262 ("Base Year Net Operating Income") and #1280 ("Individual Rent Adjustments for Historically Low Rents"), if implemented, would result in raising the minimum rent ceilings on rental units deemed to have had historically low rent.

As explained by Mr. Kelly, a third regulation - #1113 - ("Inflation Adjustment Order") implements the California Court of Appeal's unpublished decision in Searle v. Berkeley Rent Control Board and permits a prospective rent increase to compensate for inflation for the period from 1979 through 1990. You have indicated that the implementation of this regulation would result in an increase of approximately 28% in 1991 rent levels.

The fourth regulation, #1100 ("Conditions for Taking Annual General Adjustments"), permits an across-the-board inclusion of an adjustment for inflation so as to protect landlords' net operating income.

Councilmember Dean is a part owner, and her son is a 50% owner, of a duplex; her son occupies one unit and the other unit is rented. Under the city's rent control ordinance, the rental unit is exempt from the rent control laws. It is understood that Councilmember Dean's financial interest in the property is worth more than one thousand dollars.

Councilmember Wainwright owns at least seven four-unit rental properties, which are either vacant or rented in whole or in part. The rent for at least one of the rental units is subsidized by federal housing funds, administered through the Berkeley Housing Authority, and thus exempt from the city's rent control ordinance; the other rental units, not subsidized with federal housing funds, are subject to the city's rent control laws. It is understood that Councilmember Wainwright's financial interest in each of her rental properties is worth more than one thousand dollars.

Councilmember Skinner and Councilmember Woodworth each live in rent-controlled rental units. Councilmember Skinner occupies her rental property on a month-to-month tenancy. Councilmember Woodworth occupies her rental unit under terms of a twelve-month lease which commenced in July, 1991 and concludes at the end of June, 1992, at which time the lease converts into a month-to-month tenancy.

The population of the city is approximately 103,000, divided relatively equally between renters (45,446) and non-renters (45,446).[2] Of the residential units in the city, 24,512 (approximately 56%) are rental units, and 18,941 (approximately 44%) are owner occupied units. Approximately 5,000 property owners are registered with the city's rent control board.

Other facts relevant to the analysis are discussed below.

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 dollars ($1,000) or more (Section 87103(b)).

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

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[2] For certain technical purposes, approximately 11,000 persons are not classified by the city as either renters or non-renters.

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.)

The foreseeability analysis involved in your inquiry first addresses the fact that the proposed decisions (on the resolutions) involve the preliminary question of whether to initiate litigation. In other words, the decisions pending before the city council are not themselves ones that may foreseeably result in an effect, but rather decisions that, once made, will result in another event occurring that may result in an effect.

The fact that the city council is acting on decisions predicate to an event that may result in a financial effect does not make the city council's decisions immune from conflict-of-interest analysis under the Act. The decisions on the resolutions are the necessary first steps to give rise to the possibility that a particular effect may occur. A vote in favor of the resolutions means the event (the litigation) will occur and can result in a particular financial effect. As indispensable prerequisites, these necessary predicate decisions are encompassed by the Act's conflict-of-interest provisions.

The fact that the ensuing litigation may or may not result in preventing the rent board regulations from being implemented does not make the city council's decisions immune from conflict-of-interest analysis either. The Commission has previously advised that decisions of a planning commission that require review and approval of the city council, and decisions of the city council which are thereafter submitted to the voters for approval, are decisions which are covered by the Act's conflict-of-interest provisions even if the final arbiter is another body. (Russell Advice Letter, No. A-88-484; Skousen Advice Letter, No. I-88-162; Benjamin Advice Letter, No. A-86-061.) We believe this advice is analogous to the issue raised in your inquiry, and conclude that the fact that it is the outcome of the litigation that will be responsible for (potential) resulting financial impacts upon the councilmembers does not immunize the councilmembers from decisions concerning whether to initiate the litigation, since it is these very decisions by the city council that expose the councilmembers to the potential resulting financial impact.

Having resolved this preliminary matter, we believe that to the extent the proposed resolutions and resulting lawsuit will have an impact on potential changes in the rent that may be lawfully charged on rental units in the city under the city's rent control ordinance, any councilmember with a property interest that is, in one form or another, subject to the city's rent control ordinance will be foreseeably affected.

Councilmember Dean's property interest is specifically exempted from application of the city's rent control provisions. Therefore, the decision to initiate litigation, or whatever result occurs if the litigation is undertaken, will not affect the amount of rent that can be charged for her rental unit in the same manner if her rental unit had been subject to the city's rent control provisions. It is foreseeable that the rent charged for a unit exempted from the city's rent control provisions would in some manner be affected by the prevailing allowable rental rates for controlled rental units under the city's rent control provisions. However, Ms. Mayers has informed us that in the City of Berkeley, there is no correlation between rental rates for controlled and non-controlled units, and that rental rates for units not subject to the city's rent control provisions are often two or three times higher than the rates for controlled units. Therefore, because there appears to be no correlation in the City of Berkeley between the rents charged for units that are, and are not, subject to the city's rent control provisions, the foreseeability aspect of the Act's conflict-of-interest provisions does not appear to have been satisfied with respect to Councilmember Dean.

Because some of Councilmember Wainwright's property interests are subject to the city's rent control provisions, foreseeability appears to be present. While any unit currently subsidized by federal housing funds and administered through the Berkeley Housing Authority is exempt from the city's rent control ordinance, the other rental units are subject to the city's rent control laws.

Councilmember Skinner and Councilmember Woodworth each live in rental units subject to the city's rent control provisions. Therefore, because implementation of the rent board regulations will determine whether their respective rents will change, foreseeability appears to be present. Whether as tenants in rental units subject to the city's rent control ordinance they possess the requisite "interest" for purposes of the Act's conflict-of-interest provisions, and whether, if so, such an interest is materially affected by the council decisions, is discussed below.

Materiality

Councilmember Dean

Because Councilmember Dean's property interest is exempted from coverage by the city's rent control ordinance, materiality is not an issue for purposes of her property interest.

Councilmember Wainwright

Some of Councilmember Wainwright's rental units are covered by the city's rent control ordinance. If the proposed rent board regulations are implemented, the rents on those units subject to the city's ordinance could be raised more than is presently permitted. The councilmember's rental properties that are subject to federal housing subsidies are not subject to this potential.[3]

Because the proposed rent board regulations will be applicable on a city-wide basis, none of Councilmember Wainwright's properties subject to the city's rent control ordinance can be considered the subject of the decision, and the "distance tests" of Regulation 18702.3(a) and (b) are not applicable. However, materiality will be determined based upon the foreseeable effect in terms of dollars on Councilmember Wainwright's properties that are subject to the city's rent control ordinance, pursuant to Regulation 18702.3(c). (Elam Advice Letter, No. I-89-467.)

Councilmember Wainwright will thus have a disqualifying conflict if, as a result of the decisions on the contemplated lawsuit, any of her property interests 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).) (Rodriguez Advice Letter, No. A-90-360; 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.)

You have indicated that Councilmember Wainwright has informed your office that "she believes the proposed regulations will affect her financial interests by more than $1000 per year." However, such a statement is incomplete for purposes of the required materiality analysis. It is not clear whether this statement refers to fair market or rental value; to all of her property interests or only those subject to the city's rent control provisions; to all of her properties cumulatively or individually; or to all of her rental units cumulatively or each rental unit individually.

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[3] You have indicated that a tenant participating in the federal subsidy program can be evicted only when the terms of the lease are broken. Otherwise, a tenant remains in the subsidy program unless he or she voluntarily vacates. Thus, the fact that a unit is subject to the federal subsidy program means that the city ordinance will not impact it, nor can a landlord somehow engineer an eviction so as to make the rental unit thereafter subject to the city's ordinance.

If the city council takes no action and the rent board regulations go into effect, the rent Councilmember Wainwright will be permitted to charge on her rental units that are subject to the city's rent control ordinance will be permitted to increase. If the city council acts to initiate litigation and the litigation prevented implementation of the rent board regulations, the rent Councilmember Wainwright will be permitted to charge on her rental units that are subject to the city's rent control ordinance will remain unchanged.

Therefore, Councilmember Wainwright's participation in the city council's decision whether to initiate litigation will be prohibited if, as a result of the litigation, it is reasonably foreseeable that any of her properties subject to the city's rent control ordinance will be impacted by ten thousand dollars ($10,000) or more in fair market value, or that any of the properties subject to the city's rent control ordinance will be affected by at least one thousand dollars ($1,000) in rental value for a twelve-month period (Regulation 18702.3(a)(3)(a); Regulation 18702.3(a)(3)(b).) (Rodriguez Advice Letter, supra.) Because the Commission does not act as a finder of fact, we leave this determination to you. (In re Oglesby (1975) 1 FPPC Ops. 71.) We believe that this determination requires an analysis of whether it is reasonably foreseeable that, if implemented, the rent board regulations will result in the requisite financial impact on at least one of Councilmember Wainwright's property interests, and whether, if initiated, it is reasonably foreseeable that the lawsuit may result in such a financial impact not occurring.

Councilmembers Skinner and Woodworth

For tenant renters, Regulation 18702.4 is normally used to determine whether a material financial effect occurs with respect to their respective leasehold interests. Among other things, this regulation provides that a decision results in a material financial effect when the decision increases or decreases the amount of rent for the leased property by $250 or 5%, whichever is greater, during any 12-month period subsequent to the decision. (Regulation 18702.4(d).)

You have indicated that both Councilmembers Skinner and Woodworth would have their respective rents increased by more than $250 or 5% as a result of the implementation of the rent board regulations.[4]

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[4] Councilmember Skinner's rent is presently $5280 annually ($440 per month). As a result of the implementation of the rent board regulations her rent will increase by $1478 annually, or approximately 28%. Councilmember Woodworth's rent is presently $5184 annually ($432 per month). As a result of the implementation of the rent board regulations her rent will increase by $780 annually, or approximately 8.6%.

In re Overstreet (1981) 6 FPPC Ops. 12, the Commission indicated that in a rent-control jurisdiction in which tenant eviction was provided for only in limited circumstances, a month-to-month tenancy could, in effect, "qualify" as a leasehold interest for purposes of conflict-of-interest analysis. However, as a result of the Commission's amendment of Regulation 18233 in 1986, a month-to-month tenancy no longer constitutes a real property or leasehold interest for purposes of Section 82033. (Ennis Advice Letter, No. I-91-299.) Regulation 18233 specifically provides that

> The terms "interest in real property" and "leasehold interest" as used in Government Code Section 82033 shall not include the interest of a tenant in a periodic tenancy of one month or less."

Therefore, that portion of In re Overstreet which treats, under certain circumstances, month-to-month tenancies in a rent control jurisdiction as a leasehold interest for purposes of Regulation 18702.4 is no longer controlling.

Because Councilmember Skinner currently occupies her rental unit on a month-to-month tenancy, the provisions of Regulation 18702.4 are not applicable because such a tenancy does not constitute a "leasehold interest" for purposes of the conflict-of-interest provisions of the Act. (Regulation 18233.) As such, she would not have an interest subject to the materiality analysis and not have a disqualifying conflict-of-interest for purposes of the pending city council resolutions.

However, because Councilmember Woodworth currently occupies her rental unit under the terms of a twelve-month lease, and not a month-to-month tenancy, the provisions of Regulation 18702.4 are applicable to determine whether the materiality thresholds are met with respect to the pending city council decisions. On the basis of the information that you have provided, it appears that the implementation of the rent board's regulations will affect her rent by more than $250 and by more than 5%. Therefore, Councilmember Woodworth may not participate in the city council decisions concerning the contemplated lawsuit against the rent board unless the effect on her interest is not distinguishable from the effect on the public generally.

Public generally exception

An official otherwise 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.)

If the requisite financial impact as provided for in Regulations 18702.3(a)(3)(a), 18702.3(a)(3)(b), or 18702.3(c) is not present or otherwise not applicable, it is unnecessary to determine whether the impact on the councilmember in question is distinguishable from the public generally. (Moe Advice Letter, No. A-90-757.) For this reason, it is unnecessary to examine the application of Regulation 18703 to Councilmember Dean.

The financial effect of a decision is distinguishable from the effect on the public generally unless the decision's effect is substantially the same as it is on all members of the public or a significant segment of the public. (Regulation 18703; *Dorsey* Advice Letter, No. I-91-201; *Shaw* Advice Letter, No. 1-91-126; *Jorgensen* Advice Letter, No. A-90-017; *In re Legan* (1985) 9 FPPC Ops. 1; *In re Owen* (1976) 2 FPPC Ops. 77.) The "public generally" is comprised of the entire jurisdiction of the agency in question. (*In re Legan,* supra.) A group that is large in number and heterogeneous in quality can constitute a significant segment of the public for the purposes of the public generally exception. (*In re Ferraro* (1978) 4 FPPC Ops. 62.)

Councilmember Wainwright

If Councilmember Wainwright has a disqualifying conflict because, as a result of the decisions on the contemplated lawsuit, any of her property interests will be affected by ten thousand dollars ($10,000) or more in fair market value (Regulation 18702.3(a)(3)(a)) or any of her property interests will be affected by one thousand dollars ($1,000) in rental value for a twelve-month period (Regulation 18702.3(a)(3)(b)), (see discussion, supra), she may still participate in the decisions if the impact on her interests is substantially the same as it is on all members of the public or a significant segment of the public.

In In re Ferraro, supra, the Commission concluded that owners of four or more rental units were considered to be the "rental property industry." Pursuant to Regulation 18703, an industry, trade or profession will not normally be considered a "significant segment" of the community. Unless an exception is applicable, therefore, this means that Councilmember Wainwright, as an owner of four or more rental units, is considered to be a part of the "rental property industry" which would not qualify as a significant segment of the community for purposes of the public generally exception under Regulation 18703.

An industry, trade or profession may, however, constitute a significant segment of the community either when the ordinance creating the official's agency contains an express provision so providing (Regulation 18703(c)), or if such an expression is implicit (Regulation 18703(d)). The Commission's opinion in *In re*

Overstreet, supra, concluded under the then-existing city rent control provisions (Measure D) that tenants constituted a significant segment of the public, and that the rental property industry constituted a significant segment of the public generally, for purposes of decisions by the city's rent board. This analysis, however, would not be applicable to the city council, since there is no "creating ordinance" for the city council that expressly or impliedly references an industry, trade or profession as a significant segment of the public.

You have indicated that the city voters' passage of "Measure I" in November, 1988 permitted members of the city's rent board who were either tenants or landlords to participate in decisions affecting rental property generally in the city. This measure was enacted after the voters approved a charter amendment subsequent to the opinion in Overstreet (Measure G) that specifically excluded the rental property industry as a significant segment of the public. You have concluded that Measure I is applicable only to the city's rent board, and that other elected officials, including members of the city council, are not included in its coverage. While we express no opinion on this interpretation of the city ordinance,[5] we note that the Commission's opinion in Overstreet also reached its conclusions with respect to both tenants and the rental property industry within the context of the city's rent control provisions.

Based on the city's interpretation of the scope and application of Measure I, it does not appear that the public generally exception for an industry, trade or profession contained in Regulation 18703(b), (c), and (d) is applicable to Councilmember Wainwright. Moreover, the number of property owners registered with the city's rent control board - 5,000 - appears to be too small a number to constitute a significant segment of the public generally for purposes of Regulation 18703(a). Therefore, Councilmember Wainwright's participation in the city council's decision whether to initiate litigation against the rent board would therefore be precluded if, as a result of the litigation, at least one of her properties subject to the city's rent control ordinance will be affected by ten thousand dollars ($10,000) or more in fair market value, or if at least one of the rental properties subject to the city's rent control ordinance will be affected by at least one thousand dollars ($1,000) in rental value for a twelve-month period.

Councilmembers Skinner and Woodworth

The financial effect of a decision is not distinguishable from the effect on the public generally when the decision's effect is substantially the same as it is on all members of the public or a significant segment of the public. (Regulation 18703; Dorsey

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[5] The city is in the first instance the responsible party for interpretation of city provisions. (Kunkel Advice Letter, No. I-89-598.)

Advice Letter, supra; Shaw Advice Letter, supra; Jorgensen Advice Letter, supra; In re Legan, supra; In re Owen, supra.) Accordingly, Councilmember Woodworth would be permitted to participate in the pending city council decisions if her status as a renter placed her in a significant group that would be affected by the decisions in substantially the same manner.

In In re Overstreet, supra, the Commission concluded that "tenants in general" were a group large in number and diverse in nature so as to constitute a significant segment of the public generally. (See also In re Ferraro, supra.) While this conclusion was premised on the context of the city's rent control board and the city's rent control provisions, it seems particularly well suited to the City of Berkeley, where - as you've indicated - approximately one half of the population are renters and where more than one half of the city's residential units are rental units.

Therefore, even if as a result of the litigation Councilmember Woodworth will incur a foreseeable increase in the amount of rent for her leased property by $250 or 5%, whichever is greater, during any 12-month period subsequent to the decision to initiate litigation (Regulation 18702.4(d)), the public generally exception of Regulation 18703 appears to permit her participation in the pending decisions if this effect is substantially similar to the effect on the other tenants in the city. Based on the facts you have provided, it appears that the tenants in the city will be similarly affected.

Because Councilmember Skinner occupies her rental unit on a month-to-month tenancy, it is not necessary to either determine whether the impact of the decisions on her is distinguishable from the public generally (Moe Advice Letter, supra), or to apply the provisions of Regulation 18703 to her. In any event, if Councilmember Skinner occupied her rental property on something other than a month-to-month tenancy, the fact that she is a renter in a jurisdiction wherein tenants are considered to represent a significant segment of the jurisdiction's public would also enable her to participate in the pending decisions, pursuant to Regulation 18703.

To summarize, with respect to the pending city council decisions, it appears that

(a) Councilmember Dean may participate in the decisions because she does not have a disqualifying conflict of interest, as her property interests are unaffected by the city's rent control provisions;

(b) Councilmember Wainwright may not participate in the decisions if, with respect to those of her property interests that are subject to the city's rent control provisions, the requisite financial thresholds of Regulation 18702.3 are met and result in a

disqualifying conflict of interest, and because she does not appear to qualify for an exception under the "public generally" provisions of Regulation 18703; and

(c) Councilmember Woodworth may participate in the decisions because although she appears to have a disqualifying conflict of interest pursuant to Regulation 18702.4, she appears to qualify for an exception under the "public generally" provisions of Regulation 18703; and

(d) Councilmember Skinner may participate in the decisions either because she does not have an "interest" subject to disqualification pursuant to Regulation 18233.

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 specific 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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