



# California Fair Political Practices Commission

April 28, 1992

Mr. Jeffrey R. Epp  
Assistant City Attorney  
City of Escondido  
201 North Broadway  
Escondido, CA 92025-2798

Re: Your Request for Advice  
Our File No. A-92-195

Dear Mr. Epp:

This is in response to your letter requesting advice on behalf of the Board of Trustees of The Center for the Arts-Escondido regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup>

## QUESTION

Is The Center for the Arts-Escondido a "local government agency" so that its Board of Trustees is subject to the disclosure and disqualification provisions of the Act?

## CONCLUSION

The Center for the Arts-Escondido is a local government agency under the Act. As a result, the Trustees are "public officials" and are subject to the conflict-of-interest provisions of the Act.

## FACTS

You are the Assistant City Attorney for the City of Escondido and are seeking advice on behalf of the members of the Board of Trustees (hereinafter "Trustees") of The Center for the Arts-Escondido. In June 1985, the City Council of Escondido placed on

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<sup>1</sup> 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 Sections 18000, *et seq.* All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

the ballot a measure to approve the construction of an arts and cultural center. The voters approved the ballot measure.

The Center for the Arts-Escondido (hereinafter "corporation") is a California nonprofit corporation incorporated on October 17, 1989. The corporation was incorporated by the Escondido Community Development Commission for the purpose of operating and managing the arts, theatre and conference center approved by the voters in 1985.

The arts center is presently under construction and completion is expected during 1993-94. The projected cost of the facility is \$73.4 million. These monies have come from tax increment revenue generated by the Escondido Redevelopment Area. The Escondido Community Development Commission is overseeing construction of the facilities.

The Center for the Arts-Escondido is governed by a Board of Trustees. The Articles and Bylaws of the corporation provide for a Board consisting of twenty-one persons. Twelve of the Trustees are to be appointed by the Escondido City Council, and the remaining nine Trustees are to be selected by the other members of the Board. Two Escondido City Councilmembers sit as Trustees.

Operating expenses of the arts center are funded primarily by private donations at this time, with event-generated revenue expected when construction of the arts center is complete. In addition, the City of Escondido placed \$2.29 million in trust in 1989, with direction that the principal remain in trust and income be used for the arts center's operating expenses.

Currently, the average interest income is \$150,000 each year. The city has also budgeted an amount not to exceed \$500,000 from the city's general fund toward the arts center's operating costs each year. The annual operating budget of the arts center will be approximately \$4,000,000 in the next two to three years, making the city's expected contribution less than 1/8 of the total budget.

The corporation has replaced the Felicita Foundation, which was a private entity providing cultural and arts activities in the city for a number of years. The corporation's principal responsibility is to operate and manage the arts, theatre and conference center.

The corporation is not subject to the Public Records Act. Finally, it has been the objective of the City Council of the City of Escondido that the arts center not be run on an ongoing basis by the city. In fact, the city council desires to have a separate Board and substantial private interests involved in the operations of the arts center as much as possible.

### ANALYSIS

The Political Reform Act was enacted by the people of the State of California in 1974. The purpose of the disclosure and disqualification provisions of the Act was to ensure that public officials, whether elected or appointed, would perform their duties in an impartial manner, free from bias caused by their own economic interest or the economic interests of persons who have supported them. (Section 81001(b).)

#### The General Rule

Section 87100 prohibits a public official from making, participating in making, or attempting to use his or her official position to influence a governmental decision if the decision will have a reasonably foreseeable and material financial effect, distinguishable from the effect on the public generally, on the official, or on a member of the official's immediate family, or on any of the official's economic interests.

#### Local Government Agency

The question posed by your letter is whether The Center for the Arts-Escondido is a "local government agency." If it is deemed to be an agency, then the Trustees of the Board are "public officials" and they will be subject to the disclosure and disqualification requirements of the Act.

Section 82041 defines "local government agency" as:

... a county, city or district of any kind including school districts, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission, or other agency....

While this definition is helpful where an entity clearly functions under the direct aegis of local government, the definition is not helpful in a case such as this. Here, the question is whether, under Section 82041, the corporation qualifies as an "other agency" of the City of Escondido.

We turn, then, to Commission Opinions on this subject matter. In 1977, the Commission considered the definition of "local government agency" in In re Siegel (1977) 3 FPPC Ops. 62. In the Siegel Opinion, the Commission set forth four criteria by which it determined whether an entity was public or private under the Act. These criteria have been consistently applied by the Commission in its determination of this question. (In re Leach (1978) 4 FPPC Ops. 48; Sheeks Advice Letter, A-90-026, Albuquerque Advice Letter, A-88-422; Francis Advice Letter, A-86-214; Hopkins Advice Letter, A-81-038.)

The Siegel Opinion set forth the following four-part test:

- (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 services 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.

While the Siegel factors are not intended to be a definitive litmus test for determining whether an entity is public for purposes of the Act, by applying the factors to the set of facts presented in your letter, we can draw conclusions with respect to the status of the corporation. Ultimately, the test must still be a factual analysis on a case-by-case basis. (In re Vonk (1981) 6 FPPC Ops. 1.)

The first criterion is whether the impetus for formation of the corporation originated with a government agency. Generally, the first factor has been met where an entity is created by some official action of another governmental agency. For example, in the Siegel Opinion, although the agency was created as a nonprofit corporation, the city council was intimately involved in the creation of the corporation in question.

In this case, your letter specified that the corporation was incorporated by the Escondido Community Development Commission. In fact, the Commission's general counsel prepared all of the organizational documents and handled the incorporation of the corporation.

Moreover, the Escondido City Council approved the Civic Center Master Plan and it placed a ballot measure before the voters to decide whether the arts center's construction should go forward. As a result, as in the Siegel Opinion, the City of Escondido was intimately involved in the creation of the arts center. Therefore, the first part of the test has been met since the impetus for formation of the corporation originated with a government agency.

The second criterion is whether the corporation is substantially funded by, or its primary source of funds is, a government agency. In Siegel, the city was a certain, continuing

source of capital to the corporation. Here, the construction costs of \$73 million will be paid for by tax increment revenue generated by the Escondido Redevelopment Area.

Clearly, if it were not for these monies generated by the Escondido Redevelopment Area, the arts center would not be able to be constructed.<sup>2</sup> At this time, your letter specifies that the vast majority of the arts center's funding is from public monies.<sup>3</sup>

In addition, the City of Escondido has placed \$2.29 million in trust for the arts center and deemed that the income be used for the arts center's operating expenses. The city has also budgeted \$500,000 per year to the arts center's operating costs. Therefore, the city is intimately involved in the funding of the arts center. Because tax increment revenue is the primary source of funds for the arts center at this time, the second Siegel factor has been fulfilled.

The third criterion is whether one of the principal purposes for formation of the corporation is to provide services or undertake obligations which public agencies are legally and traditionally authorized to perform. In the Leach Opinion, promotion of the downtown business district, promotion of the city, and operation of the convention bureau were found to be activities performed equally by cities and nongovernmental entities.

The corporation was formed for the purpose of providing a theatre, cultural and arts center for the people of the City of Escondido and the surrounding area. In the case of operating and managing an arts and cultural center, public agencies are clearly legally authorized to perform these services. In fact, many local government agencies do perform these duties.

As a result, public agencies have traditionally been authorized to perform the same duties as the corporation will perform once the arts center is built. Hence, the third criterion has been met.

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<sup>2</sup> We have found substantial public funding where state funds were allocated to capitalize the entity (Keene Advice Letter, I-89-613); the entity was funded by federal block grants and loans from a city (Schofield Advice Letter, A-89-540); the entity received 75% of its funding from city and county room taxes (Giuffre Advice Letter, A-89-066); and, where the entity works with property purchased by the city in addition to loans from the city (Albuquerque Advice Letter, A-88-422).

<sup>3</sup> If the facts as they relate to the Siegel criteria change in the future, you are encouraged to contact us to determine whether the corporation satisfies the definition of a local government agency.

Finally, we turn to a consideration of whether the corporation is treated as a public entity in the context of other statutory provisions. Based on information supplied by you, the corporation is no longer subject to the California Public Records Act. This fact alone, however, is not determinative. You have not provided any other information concerning, and we are not aware of, how the corporation may be treated under other laws. However, we believe that, because the corporation unquestionably fits the first three criteria set forth in Siegel, it is a public entity.


The corporation has been formed, is substantially funded and pursues goals established by the City of Escondido. A local government agency, the Escondido Community Development Commission is overseeing the construction of the \$73 million facility. A majority of the Trustees is appointed by the city council. Given these factors, we believe that there exist opportunities for conflicts of interest to arise. In such a case, the Commission has an obligation to ensure that the corporation's Trustees "shall perform their duties in an impartial manner, free from bias caused by their own financial interests ...." (Section 81001(a); see also In re Vonk, supra.)

Thus, in light of the Siegel factors, we conclude that The Center for the Arts-Escondido is a public entity for purposes of the Act and that its Trustees are therefore "public officials" under the Act. As a result, the Trustees are subject to the Act's disclosure and disqualification provisions.

To assist you further, I have taken the liberty of enclosing a pamphlet entitled "A Guide to the Conflict of Interest Provisions of the Political Reform Act of 1974."

I trust this letter addresses your concerns. If you have any further questions, feel free to contact me at (916) 322-5901.<sup>4</sup>

Sincerely,

  
Scott Hallabrin  
Acting General Counsel

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Enclosure

Prepared by Chris Micheli, Legal Intern

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<sup>4</sup> Copies of Commission regulations and Opinions are available in many law libraries. Alternatively, copies of these materials and Commission advice letters may be obtained from the Commission at a cost of 10¢ per page.