



FAIR POLITICAL PRACTICES COMMISSION

P.O. Box 807 • 428 J Street • Sacramento, CA 95812-0807

(916) 322-5660 • Fax (916) 322-0886

October 13, 1999

Travis Pitts
Executive Director
California Building Standards Commission
1130 K Street, Suite 101
Sacramento, California 95814-3927

**Re: Your Request for Advice
Our File No. I-99-261**

Dear Mr. Pitts:

This letter is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Since you have not provided the name of the official on whose behalf you are requesting advice, we are treating your request as one for informal assistance.² (Regulation 18329(a)(2).)

QUESTIONS

One of the commissioners of the California Building Standards Commission provides contractual services to the International Conference of Building Officials ("ICBO"), a publisher of model codes. When adopting and revising the California Building Standards Code, does the commissioner have a conflict of interest in:

1. The decision to adopt or approve ICBO's model code to serve as the basis for a building standard?
2. The decision to adopt or approve a model code by a different publisher to serve as the basis for a building standard?

¹ Government Code sections 81000 - 91014. Commission regulations appear at title 2, sections 18109 - 18995, of the California Code of Regulations.

² Informal assistance does not provide the immunity conferred by formal written advice. (Regulation 18329(c)(3).)

3. The decision to approve an amendment to a building standard based on ICBO's model code?

4. The decision to approve an amendment to a building standard based on a model code by a different publisher?

CONCLUSIONS

1. Yes. The commissioner has a conflict of interest in the decision to adopt ICBO's model code. ICBO is a disqualifying source of income of \$250 or more to the commissioner, and it is reasonably foreseeable that the decision will have a material financial effect on ICBO.

2. Yes. The commissioner has a conflict of interest in the decision to adopt another publisher's model code since this decision cannot be separated from the decision to adopt ICBO's model code.

3. No. It does not appear reasonably foreseeable that the decision to amend a building standard based on ICBO's model code will have a material financial effect on ICBO.

4. No. It does not appear reasonably foreseeable that the decision to amend a building standard based on another publisher's model code will have a material financial effect on ICBO.

FACTS

The California Building Standards Commission ("CBSC") is composed of the Secretary of the State, the Consumer Services Agency, and ten appointed commissioners. The ten commissioners are appointed to represent the public, specific elements of the design and construction industry, and local governments. You are seeking advice on behalf of a commissioner who was appointed to represent mechanical or electrical engineers.

Among other things, the commissioners approve, adopt, codify and publish the California Building Standards Code (the "State Code"). The State Code is a collection of all state building standards, and is divided into 11 parts, including the California Building Code, the California Electrical Code, the California Mechanical Code, and the California Plumbing Code. These standards are based upon the latest editions of model codes published by private organizations. Each part of the State Code is based on a different model code and published separately.

The adoption of the State Code is a multiagency task presided over by the CBSC. The CBSC has the authority to adopt some parts of the State Code, while various state agencies have the authority to adopt other parts of the code, subject to CBSC approval. After the CBSC approves or adopts a set of building standards, the agency with the responsibility of administering those standards may propose amendments, which are reviewed by the CBSC.

The CBSC once believed that the Legislature had mandated the model codes to be incorporated into the State Code.³ But in 1997, a California appellate court held that the statute specifying certain model codes did not compel the CBSC to adopt those model codes.⁴ A contrary interpretation, the court decided, would have resulted in an unlawful delegation of legislative power. Thus, the CBSC now has the exclusive statutory authority to pick which model codes it will adopt or approve as the basis for a particular building standard.

In an upcoming decision, the CBSC will select the model codes to serve as the basis for the 2001 edition of the State Code. One model code is represented by the nonprofit corporation, ICBO, one of three members of the International Code Council, which is the publisher of the model code. One of the CBSC commissioners provides contractual services to ICBO that are unrelated to the publishing of model codes. In addition to publishing a model code, ICBO provides plan checking services to government agencies to ensure that a proposed plan, such as a mechanical plan, complies with certain requirements. ICBO subcontracts with professional engineers, including the CBSC commissioner, to provide that service.

When the CBSC chooses a model code for one of the 11 parts of the State Code, the CBSC then contracts with the publisher of that model code to avoid copyright infringement. Under the contract, the publisher will publish that part of the State Code for which CBSC adopted or approved the model code, including any amendments approved by the CBSC. You believe that the decision to adopt a model code has a significant financial impact on the publisher of that model code. On the other hand, you believe that the decision to amend a model code after it has been adopted has no financial impact on the publisher. This is because after CBSC adopts a model code to serve as the basis for a set of building standards, subsequent amendments do not create any new rights, or affect existing rights.

ANALYSIS

The conflict of interest provisions of the Act prohibit public officials from making, participating in making, or in any way attempting to use their official position to influence a governmental decision in which they have a financial interest. (Section 87100.) A CBSC commissioner is a public official for purposes of the Act. (Section 82048.)

³ See the model codes listed in Health & Saf. Code § 18938(b).

⁴ *International Assoc. of Plumbing and Mechanical Officials v. California Building Standards Com.* (1997) 55 Cal.App.4th 245.

A. Economic Interest

An official has a disqualifying 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 the official,⁵ or on the following enumerated economic interests:

1. Any business entity in which the official has a direct or indirect investment worth \$1,000 or more.
2. Any real property in which the official has a direct or indirect interest worth \$1,000 or more.
3. Any source of income of \$250 or more provided to the official within 12 months before the decision.
4. Any business entity in which the official is a director, officer, partner, trustee, employee, or holds any position of management.
5. Any donor of gifts worth \$300 or more provided to the official within 12 months before the decision. (Section 87103.)

One of the CBSC commissioners provides contractual services to ICBO, a publisher of one of the model codes being considered by the CBSC. Presumably, this commissioner has received \$250 or more from ICBO within the last 12 months. As a source of income, ICBO is a potentially disqualifying economic interest to that commissioner.⁶

Once an official identifies his or her economic interest, that official must evaluate whether it is reasonably foreseeable that a decision will have a material financial effect on that economic interest. This determination takes three steps. First, the official must determine whether the economic interest will be directly or indirectly involved in the decision. (Regulation 18700(b)(4).) Based upon the type of involvement, the official must then locate the appropriate materiality standard set forth in Commission regulations. (Regulation 18700(b)(5).) After finding the relevant materiality standard, the official must decide whether it is reasonably foreseeable that the materiality standard will be met. (Regulation 18700(b)(6).)

⁵ A decision will have a financial effect "on the official" if the decision affects his or her personal expenses, income, assets, or liabilities, or those of his or her immediate family. (Section 87103.) This is known as the "personal financial effects" rule. (Regulation 18703.5).

⁶ Nothing in your facts indicates that the commissioner has any other relevant economic interests, or that the personal financial effects rule applies. Therefore, we limit our analysis to the commissioner's economic interest in ICBO as a source of income.

B. Direct or Indirect Involvement

You have requested advice regarding four decisions: (1) the decision to adopt or approve ICBO's model code, (2) the decision to adopt or approve another publisher's model code; (3) the decision to approve an amendment to a set of building standards based on ICBO's model code, and (4) the decision to approve an amendment to a set of building standards based on another publisher's model code.

A nonprofit corporation that is a source of income is directly involved in a decision if the entity is a named party in, or the subject of, the decision. (Regulation 18704.1(a)(2).) An entity is the subject of a decision if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit or contract with the person. (*Id.*) If the nonprofit corporation is not directly involved in the decision, it is indirectly involved for purposes of locating the relevant materiality standard. (Regulation 18704.1(b).)

ICBO is directly involved in the decisions that may result in the approval, rejection or revision of its model code, and is indirectly involved in the decisions that will not have that result. Decisions 1, 2 and 3 may result in the approval, rejection or revision of ICBO's model code. Therefore, the commissioner is *directly* involved in these decisions. Decision 4, on the other hand, will not result in the approval, rejection or revision of ICBO's model code. Thus, the commissioner is *indirectly* involved in that decision.

C. Applicable Materiality Standard

1. Direct Involvement

When a nonprofit corporation that is a source of income is directly involved in a decision, the pertinent materiality standard is set forth in Regulation 18705.3(a). Under that standard, any reasonably foreseeable financial effect on the entity is deemed to be material.

2. Indirect Involvement

When a nonprofit corporation that is a source of income is indirectly involved in a decision, the pertinent materiality standard is set forth in Regulation 18705.3(b)(2). The monetary thresholds in the regulation vary depending upon the gross receipts of the nonprofit corporation. In general, the higher the gross receipts, then the higher the monetary impact of a decision must be for its effect to be material.

D. Foreseeability

Once the official finds the relevant materiality standard, he or she must determine whether it is reasonably foreseeable that the materiality standard will be met. An effect is

considered reasonably foreseeable if there is a substantial likelihood that it will occur. (Regulation 18706.) A material financial effect need not be a certainty as a result of the decision, but it must be more than a mere possibility.

1. Direct Involvement

When an economic interest is directly involved in a decision, as in three of the decisions discussed here, the official must determine whether it is substantially likely that *any* financial effect will occur as a result of the decision. (Regulation 18700(b)(6).) This is a one-penny rule: if any financial effect is reasonably foreseeable, the official will have a disqualifying financial interest in the decision.

a. The Decision to Adopt or Approve ICBO's Model Code

When the CBSC adopts or approves a model code, the CBSC then contracts with the publisher of that model code. Under the terms of the contract, the publisher will publish part of the State Code, including any amendments approved by the CBSC. Based on these facts, it appears reasonably foreseeable that the decision to adopt or approve ICBO's model code will have a material financial effect on ICBO. Since ICBO is a source of income to the commissioner, the commissioner may not make, participate in making, or use his or her official position to influence the decision to adopt ICBO's model code.

b. The Decision to Adopt a Different Model Code

In general, a public official must analyze each governmental decision independently to determine whether a conflict exists. But some decisions may be too interrelated to be considered separately. For example, in a decision to select one of two auto park sites, a decision to select one of the sites is essentially a decision against the other auto park site. (*Boogaard* Advice Letter, No. I-90-347.) In this case, a decision to adopt a model code other than ICBO's model code is a decision against ICBO's model code. The two decisions are therefore too interrelated to be considered separately. As such, the commissioner is disqualified from both decisions.

c. The Decision to Amend ICBO's Model Code

You believe that the decision to amend a model code after it has been adopted has no financial impact on the publisher. This is because after CBSC adopts a model code to serve as the basis for a set of building standards, subsequent amendments do not create any new rights, or affect existing rights. Taking this assessment at face value,⁷ the commissioner does not have a conflict of interest in the decision to amend ICBO's model code.

⁷ The Commission does not act as a finder of fact when it renders advice. (In re Oglesby (1975) 1 FPPC Ops. 71, 77.) You may rely on informal assistance to the extent that the facts are accurate, and all material facts have been disclosed.

2. Indirect Involvement

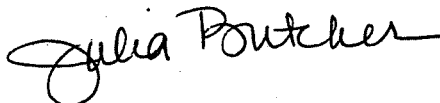
a. The Decision to Amend a Different Model Code

ICBO is indirectly involved in the decision to amend a model code published by a different private organization. To determine whether the commissioner has a conflict in this decision, the commissioner must determine whether it is substantially likely that the relevant materiality standard in Regulation 18705.3(b)(2) will be met as a result of the decision. We do not know the indirect materiality standard applicable to ICBO. Nevertheless, based on the facts provided, the commissioner does not have a conflict of interest in this decision. When the CBSC amends a model code that has already been adopted, this decision will not result in the selection of a different publisher. Therefore, it is unlikely that a decision to amend a model code published by an organization other than ICBO will have a material financial effect on ICBO, under any materiality standard. As such, the commissioner may participate in this decision.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Steven G. Churchwell
General Counsel



By: Julia Butcher
Staff Counsel, Legal Division

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