



FAIR POLITICAL PRACTICES COMMISSION

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July 24, 2002

Dawn C. Honeywell
Burke, Williams & Sorenson, LLP
18301 Von Karman Avenue, Suite 1050
Irvine, CA 92612

**Re: Your Request for Informal Assistance
Our File No. I-02-101**

Dear Ms. Honeywell:

This letter is in response to your request for advice on behalf of unidentified members of the Irwindale City Council and of the City of Irwindale's housing and planning staff regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Since you have not named the specific public officials or staff members on whose behalf you are requesting this advice, we can only provide you with informal assistance in response to your questions.² The Commission does not act as a finder of fact when providing informal assistance; this assistance is based on the facts you provide. (*In re Oglesby* (1975) 1 FPPC Ops. 71; Govt. Code § 83114.)

QUESTIONS

1. How do the conflict-of-interest provisions of the Act affect members of the City of Irwindale's ("City") Community Redevelopment Agency Board ("Board") who wish to:

(a) purchase home construction plans from a developer hired by the Board to oversee the construction of in-fill housing within the city's redevelopment area?

(b) hire the same contractor who constructs the in-fill housing, to construct an identical single family home on property that he or she owns?³

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; regulation 18329(c)(3) – copy enclosed.)

³ You also inquire whether this contractual arrangement would violate Government Code section 1090. The Commission's advice and assistance is limited to the provisions of the Act. Other provisions of the law, such as Government code section 1090, may have some bearing on your situation. The Commission does not have jurisdiction to interpret or enforce section 1090 since the Commission's jurisdiction is limited to the Act. Questions concerning section 1090 should be addressed to the state Office of the Attorney General.

(c) purchase an in-fill housing unit or receive benefits under the City's low and moderate income home rehabilitation program?

2. Do the conflict-of-interest provisions of the Act prohibit a Board member who receives benefits under the City's home rehabilitation program from:

(a) voting on potential changes to that program?

(b) participating in decisions concerning foreclosures should loan defaults occur under the program?

CONCLUSIONS

1.(a) – (c) No. In these situations, a Board member will not be making, participating in making, or influencing governmental decisions, within the meaning of the conflict-of-interest provisions of the Act.

2.(a) & (b) A Board member receiving benefits under the home rehabilitation program does not have a conflict of interest disqualifying him or her from making, participating in making, or influencing a decision regarding third party foreclosures under defaulting program loans. A Board member receiving or applying for these benefits would have a conflict of interest in voting on program changes if the changes can be reasonably seen as affecting his or her personal finances by \$250 or more over a 12-month period, unless the "public generally" exception applies.

FACTS

The City of Irwindale is a small community located in the San Gabriel Valley region of Los Angeles County. The City has a population of slightly over 1,000 residents, distributed over approximately 300 households. Members of the Irwindale City Council ("Council") also sit as members of the Irwindale Redevelopment Agency Board.

The City, through its redevelopment agency, is planning to construct 15 in-fill single family homes for low and moderate-income families. These homes are to be located within the City's redevelopment area. Five of these homes will be sold to very low income families, five to low income families, and the remaining five homes will be sold to moderate income families or as market rate housing. It is planned that the in-fill homes will be sold on a random basis to participants in a housing lottery. The sales prices for these houses will be subsidized by the City in amounts ranging between \$40,000 and \$100,000 per unit. Although the City is negotiating exclusively with a specific developer to construct the in-fill housing, the Council has yet to select a developer for this project.

The City also has a home rehabilitation program to provide low and moderate income homeowners with grants of up to \$25,000 or loans of up to \$100,000 for the rehabilitation of their residential property. This program is offered to homeowners city-wide and is not restricted to housing located within the redevelopment area. Grant and

loan applications are processed on a "first-come/first-served" basis. Funding for this program and the in-fill housing program is derived from the redevelopment agency tax increment collected through county property taxes. In order to maintain its eligibility to receive these funds, 20 percent of the City's allocation from this tax increment must be spent on low and moderate income housing programs. Consequently, and in light of the small number of residences within the City's boundaries, historically sufficient funds have been available to approve all grant or loan requests submitted by eligible applicants.

ANALYSIS

Section 87100 prohibits a public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest (regulation 18700, subdivisions (b)(1)-(8)), which is discussed below.

1. Are Board members and members of the City's housing and planning staff public officials?

The conflict-of-interest prohibition applies only to public officials. As elected members of the Council who are appointed to the Board, the Board members are public officials. (Section 82048; regulation 18701(a).) A public official also includes the employees of a county, city or district of any kind, or any department, division, bureau, office, board, commission or other agency of the foregoing. (Sections 82041 and 82048.) Members of the City's housing and planning staff are, therefore, public officials.

2. Will these public officials make, participate in making, or influence a governmental decision?

The conflict-of-interest provisions restrict a public official's ability to make, participate in making, or influence governmental decisions that can be reasonably foreseen as materially affecting his or her financial interests.⁴

Home Construction and Home Construction Plans

A public official's decision to purchase home construction plans from a private contractor or to retain a private contractor to build his or her own residence, when that private contractor is also doing work for the City, is not a vote, does not commit the

⁴ Public officials "make" governmental decisions by voting on a matter, obligating or committing their agency to any course of action, or entering into any contractual agreement on behalf of their agency while acting within the authority of their public position. (Section 87100; regulation 18702.1.) A public official "participates in making a governmental decision" when, acting within the authority of his or her position, the official negotiates, without significant substantive review, with a governmental entity or private person regarding a governmental decision, or advises or makes recommendations to a decisionmaker, either directly or without significant intervening substantive review. (Section 87100; regulation 18702.2.) A public official is attempting to use his or her official position to "influence a governmental decision" before his or her own agency if, for the purpose of influencing a decision, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Section 87100; regulation 18702.3.)

Board or the City to any course of action, and does not create a contractual relationship between the contractor and the Board or City. Similarly, this decision is not one that involves advising a governmental decisionmaker, negotiating with a governmental entity or private person regarding a governmental decision, and does not involve the official in contacting or appearing before any member, officer, employee, or consultant of his or her agency.

For these reasons, a public official's decision to purchase home construction plans from a contractor who does business with the City or to retain a contractor to build his or her private residence who does business with the City is not making, participating in making or influencing a governmental decision, within the meaning of the Act. Thus, the official's decision to undertake these actions is not prohibited under the conflict-of-interest provisions of the Act.

Home Rehabilitation Program and In-Fill Housing Lottery

We have previously advised that the conflict-of-interest provisions of the Act generally do not prohibit a public official from taking part in public benefit programs. This would apply to the home rehabilitation loan and in-fill housing programs, so long as it is in a public official's private capacity and the official does not otherwise take any action to affect the outcome on his or her application. Thus, a public official may apply for these programs. However, while a public official may file an application just as any other member of the public, he or she may not engage in any contacts with individual members of the Board or the City's housing or planning staff for the purpose of influencing their decision regarding his or her application. (Regulations 18702.3 and 18702.4.)

Voting on Program Changes and Foreclosures

Your third question concerns Board members "making" or "participating in making" a governmental decision related to the programs in question. (Section 87100; regulation 18702.1(a).) Consequently, we will continue our standard conflict-of-interest analysis for the limited purpose of addressing your third question.

3. What are the Board members' economic interests?

The economic interests that might give rise to a conflict of interest are defined in regulations 18703-18703.5. You have not attempted to provide the financial conditions of each Board member. However, the benefits obtained by a Board member under the program create a potential economic interest in the recipient, as described below.

Source of Income

A public official has an economic interest in a source of income, including promised income, aggregating \$500 or more over the 12-month period immediately preceding the time when the relevant governmental decision is made. (Section 87103.) However, "income" does not include loans made to public officials by a commercial lending institution in the regular course of business on terms available to the public

without regard to official status. (Section 87103(c); *Stausboll* Advice Letter, No. I-99-128.) The term “commercial lending institution” is not defined in the Act. In *Alperin* Advice letter, No. I-94-340 and *Wilsey* Advice Letter, No. A-84-023, we described that a governmental agency may function as a commercial lending institution when the agency regularly provides loans on terms available to the general public, and the loan is made without regard to the official status of the borrower. The receipt of such a loan does not create any greater potential for bias than loans from a commercial lending institution made in the regular course of business. (*Sharkey* Advice Letter, No. A-96-029.)⁵

The account you provide of the origin, structure, purposes and operation of the home rehabilitation program suggests that the Irwindale Redevelopment Agency is, with regard to this program, functionally indistinguishable from institutions that are recognized “commercial lending institutions.” In this regard we understand that the programs’ constituency are all homeowners within the City that meet the income eligibility criteria, and that the eligibility criteria are uniformly applied by the Board without regard to the official status of an applicant. The pre-established program guidelines are specific, clearly defined, and objective. As long as program guidelines continue to be followed with respect to any public official obtaining benefits under the program, the Redevelopment Agency, and hence the City, falls under the “commercial lending institution” exception and will not be a source of income or gifts to that official.⁶

Personal Finances

A public official always has an economic interest in his or her personal finances, and may have a conflict of interest in any decision foreseeably resulting in an increase or decrease in the personal expenses, income, assets or liabilities of the official or his or her immediate family, in the amount of \$250 or more over a 12-month period. (Regulation 18703.5.)

4. Is this economic interest directly or indirectly involved in the decision?

A public official is deemed to be directly involved in a governmental decision which has any financial effect on his or her personal finances or those of his or her immediate family. (Regulation 18704.5.)

⁵ The following illustrations are instances in which the Commission has previously treated governmental agencies as commercial lending institutions for purposes of the income exclusion provision in section 87103(c): city-administered redevelopment funds received from County Community Development Block Grants (*Sharkey, supra*); City of Indio Redevelopment Agency loans (*Hall* Advice Letter, No. I-99-288); small business loan obtained from a nonprofit public benefit corporation funded through federal grants (*Wannenmacher* Advice Letter, No. I-98-225); Federal Small Business Administration and Federal Emergency Management Agency emergency relief loans (*Alperin* Advice Letter, *supra*); and loans from credit unions and a nonprofit farm loan cooperative (*Wilsey* Advice Letter, No. A-84-023).

⁶ The discounts and grants might be considered to be “gifts” since the official will not be providing consideration of equal or greater value. However, regulation 18942(a)(10) excludes these from the definition of “gift.”

5. & 6. Will there be a reasonably foreseeable material financial effect on this economic interest?

Program Changes

A conflict of interest may arise only when the reasonably foreseeable impact of a governmental decision on a public official's economic interests is material. (Regulation 18700(a).) An effect upon economic interests is considered reasonably foreseeable if there is a substantial likelihood that it will occur. (Regulation 18706.) A reasonably foreseeable financial effect on a public official's personal finances is material if it is at least \$250 in any 12-month period. (Regulation 18705.5.) When determining whether a governmental decision has a material financial effect on a public official's economic interest in his or her personal finances, a financial effect on the value of real property owned directly or indirectly by the official is not considered. (*Id.*)

You provide two examples of program changes that a Board member who receives program benefits might be called upon to vote for or against: (1) a change that would extend repayment periods, and (2) a change that would raise the amount subject to the program. If existing loan recipients would be eligible for these benefits, they could be materially financially effected should the effect be \$250 or more over a 12-month period. For example, doubling the repayment period for a loan could roughly half the monthly payment. Over a 12-month period this could reduce an official's loan repayment expenditures by \$250 or more. In such case, the decision would have a reasonably foreseeable material financial effect upon the public official's personal finances and he or she would have a conflict of interest disqualifying him or her from involvement in the decision.

On the other hand, if the Board member is ineligible to receive the advantages of the program changes (for instance, the Board member may exceed the income guidelines or the benefits might be prospective to new recipients only), the decision would have no reasonably foreseeable material financial effect upon the public official's personal finances and there would be no conflict of interest prohibiting his or her voting on the program changes.

Loan Defaults and Foreclosure

You also inquire whether a Board member who receives program benefits may vote on decisions concerning foreclosure of property in connection with program loan defaults. There appears to be no causal connection between a loan default by another recipient of program loans and the personal finances of a public official who has received a grant or loan under the program. As long the decision whether to institute a foreclosure action cannot be reasonably foreseen as having an effect of \$250 or more upon a public official's personal finances, there is no conflict of interest barring the official from voting on the foreclosure.

7. Will the governmental decision have an economic impact upon the public official which is indistinguishable from the impact upon the public generally?

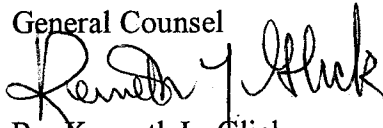
A conflict of interest does not in all instances disqualify a public official from making, participating in making, or influencing a governmental decision. There is a narrow exception that may apply when the economic impact upon the public official is indistinguishable from the impact upon the public generally. (Regulation 18707.) When the economic interest affected by a decision is a public official's personal finances (regulation 18703.5), the economic impact will be indistinguishable from the impact upon the public generally if the governmental decision will affect a significant segment of the public generally in substantially the same manner. (Regulation 18707.1(b)(1) and (b)(2).) A "significant segment" of the public generally is ten percent or more of the population of the jurisdiction of the official's agency, or 5,000 individuals who are residents of the jurisdiction. (Regulation 18707.1(b)(1)(A)(i)(ii).)

The City's population totals slightly above 1,000 residents and ten percent of the population would be approximately 100 individuals. The facts do not indicate whether 100 or more individuals are eligible to receive benefits under the home rehabilitation program. Similarly, we do not know whether 100 or more individuals are currently receiving benefits under this program. We also do not know whether the program changes will affect all eligible individuals or individuals receiving benefits, in substantially the same manner. In the absence of this information, it is not possible to determine whether a significant segment of the public generally would be potentially affected in substantially the same manner by changes to this program. This is a question that an individual Board member must make if he or she wishes to be involved in a decision on program changes that will have a reasonably foreseeable material financial effect on his or her personal finances. That official may wish to seek our advice to determine whether the "public generally" exception applies to a specific governmental decision.⁷

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

Sincerely,

Luisa Menchaca
General Counsel



By: Kenneth L. Glick
Counsel, Legal Division

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⁷ The eighth step of our standard conflict-of-interest analysis pertains to the "legally required participation" exception. (See regulation 18708.) This rule generally applies when several public officials in the same agency are simultaneously disqualified from making, participating in making, or influencing a governmental decision. Since you have not supplied facts suggesting that such is the case, we will not discuss this exception.