

November 19, 1992

REPORT TO THE HONORABLE  
MAYOR AND CITY COUNCIL

DISCLOSURE OF FINANCIAL INTERESTS BY  
ECONOMIC DEVELOPMENT CORPORATION

At its meeting of November 2, 1992, the City Council asked the City Attorney to determine whether the Economic Development Corporation ("EDC") was obliged to disclose financial interests. (City Council Docket Item No. S-405.) This report is in response to that request.

BACKGROUND

I reviewed EDC's Articles of Incorporation and Bylaws as well as the City Clerk's entire file pertaining to Item S-405 on Council Docket of November 2, 1992, to obtain the following background information:

EDC is a nonprofit corporation organized under the General Nonprofit Corporation Law of the State of California (codified at Corporations Code section 5000 et seq.). The primary purpose of EDC is to further the economic development of the greater San Diego, California, area and to promote and assist the development of business, including small business concerns, in that area.

EDC is funded by a number of sources, including The City of San Diego ("City"), County of San Diego, private contributions and other miscellaneous revenue sources. According to information provided by City staff at the November 2, 1992, Council meeting, the City currently provides more than 50% of EDC's funding.

EDC and the City for several years have entered into an agreement annually or biennially to memorialize their expectations of the activities of EDC. The most recent agreement between the City and EDC was authorized for execution at the November 2nd meeting.

ANALYSIS

Whether EDC as a corporation or any of its officers or employees have an obligation to file economic disclosure statements depends on whether EDC is determined to be either 1) a local government agency under the Political Reform Act of

1974 (the "Act"); or, 2) one of the types of "consultants" required to file disclosure forms under the Act and under a conflict of interest code adopted by the City. The two issues are analyzed below:

1. Is EDC a "Local Government Agency?"

If EDC is determined to be a "local government agency" under the Political Reform Act, EDC must adopt a conflict of interest code and its officers and employees will have to file economic disclosure forms pursuant to that code. For the reasons set forth below, I find that EDC is not a "local government agency" within the meaning of the Political Reform Act and, therefore, EDC is not required to adopt its own conflict of interest code.

Government Code section 87300 requires governmental agencies to adopt conflict of interest codes. "Agencies" include "local government agencies." Government Code section 82003. The term "local government agency" is defined in Government Code section 82041 to read

"Local government agency" means a county, city or district of any kind including school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency of the foregoing.

But is EDC an "agency" of the City within this definition? I think not. EDC clearly is not a political subdivision, nor is it a City department, division, bureau, board or commission. But is EDC another form of "agency" within the meaning of the above-cited definition? Again, I think not. Although an "agency" relationship is created between EDC and the City by virtue of their contract, contractual agency does not appear to fit within this definition. EDC is not a branch of the City, such as a department would be. And, although the City is one member of EDC, it is not the only member. EDC is a nonprofit corporation which has both private and public members. EDC is also not a joint powers agency. Although EDC has characteristics of a quasi-public entity in that it has public members and has public benefit goals, being a quasi-public entity is not sufficient to render EDC a local government agency within the meaning of the Act. Therefore EDC is under no requirement to adopt a conflict of interest code.

2. Is EDC a "consultant" for purposes of the Political Reform Act, and if so, is EDC itself, or its officers or employees required to file disclosure forms?

The second question is whether EDC is a "consultant" to the City for purposes of triggering financial disclosure requirements under the Act. Under that Act, local governments must adopt conflict of interest codes covering designated employees. Government Code section 87303. The term "designated employee" includes "consultants." Government Code section 82019. The term "consultant," as interpreted by the agency charged with administering the Act, the Fair Political Practices Commission ("FPPC"), means

Any natural person who provides, under contract, information, advice, recommendation or counsel to a state or local government agency, provided, however, that "consultant" shall not include a person who:

(A) Conducts research and arrives at conclusions with respect to his or her rendition of information, advice, recommendation or counsel independent of the control and direction of the agency or of any agency official, other than normal contract monitoring; and

(B) Possesses no authority with respect to any agency decision beyond the rendition of information, advice, recommendation or counsel.

2 Cal. Code of Regs. Section 18700(a)(2).

To determine whether EDC in its contract with the City provides the type of service to the City that brings it within the definition of "consultant"

I note that under the definition cited above the term "consultant" refers only to "natural persons." Therefore, if it is found that EDC provides the type of services to the City that trigger operation of the Act, the officers or employees who actually work on the contract must file disclosure forms pertaining to their own economic interests, not those of EDC as a corporation. The analysis is supported by FPPC private advice letters.

requires a factual analysis of

the scope of services in the contract itself. I recommend that this determination be made by the City department charged with administering the contract.

In the present case, EDC's contract with the City is administered by the City Manager's office, through the Economic Development Division. According to the City Manager's Conflict of Interest Code, which was recently revised and approved by

Council Resolution No. R-280763 on September 29, 1992, the Manager determines on a case by case basis whether a particular consultant is required to file a disclosure form and, if so, what the scope of disclosure will be.

Appendix B to that Conflict of Interest Code reads in relevant part as follows:

The City Manager, Assistant City Manager, Deputy City Managers, Management Assistants, Program Directors and Management, may determine in writing that a particular consultant, although a "designated position" is hired to perform a range of duties that is limited in scope and thus is not required to fully comply with the disclosure requirements in this section. Such written determination shall include a description of the consultant's duties and, based upon that description, a statement of the extent of disclosure requirements. That determination is a public record and shall be retained for public inspection in the same manner and location as this Conflict of Interest Code.F

I note that this portion of Appendix B in the Manager's Conflict of Interest Code is standard language recommend FPPC for determining when consultants should file disclo

In light of this language, I recommend that the Manager determine which, if any, of the officers or employees of EDC are consultants within the meaning of the law cited on page 3 of this memorandum, and if any are found to be consultants, to determine what their scope of disclosure will be.

#### CONCLUSION

EDC is not a "local government agency" within the meaning of the Political Reform Act, and therefore EDC is under no requirement to adopt a conflict of interest code for it. Whether EDC is a "consultant" within the meaning of the Political Reform Act and FPPC regulations should be determined by the City Manager in light of the scope of services to be provided by EDC under EDC's contract with the City. If the Manager finds that EDC is a "consultant," the Manager should determine the scope of disclosure by appropriate EDC officers or employees in accordance with the Manager's recently revised and adopted Conflict of

Interest Code.

Respectfully submitted,

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