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MEMORANDUM OF LAW

DATE: August 15, 1997

TO: Patricia K. Hightman, Deputy Executive Director
Redevelopment Agency of The City of San Diego

FROM: City Attorney

SUBJECT: Potential Conflicts of Interest Pertaining to the Chair and a Member of the Barrio Logan Redevelopment Project Area Committee's Response to a Request for Qualifications for the Mercado Trolley Station Site located within the Barrio Logan Redevelopment Project Area

QUESTION PRESENTED

By memorandum dated July 14, 1997, you ask the City Attorney to determine whether there is a conflict of interest associated with Robert Shapiro, Chair of the Barrio Logan Project Area Committee ("PAC"), and Ms. Glenna Schmidt, also a member of the PAC and an employee of a business owned by Mr. Shapiro. Mr. Shapiro submitted a response to a Request for Qualifications ("RFQ") for development of the Mercado Trolley Station Site ("Development Project") located in the Barrio Logan Redevelopment Project Area ("Project Area"). If a conflict of interest does exist, you want to know what action to take.

SHORT ANSWER

From the facts presented, it appears that Mr. Shapiro has a conflict of interest under the Political Reform Act of 1974, as amended (Cal. Gov't Code 87100 - 91015), and under California Government Code section 1090. According to the terms of the Political Reform Act of 1974 ("Act"), a public official is required to disclose the conflict and then disqualify him or herself from taking part in any action on the particular matter. Moreover, because Mr. Shapiro had a conflict of interest when he participated in discussions concerning the contract, upon the awarding of the contract there would be a violation of Government Code section 1090. Therefore, we recommend the following actions. First, the RFQ should be re-issued to avoid any taint to the solicitation process. Second, if Mr. Shapiro wants to remain on the PAC, he should not respond to the re-issued RFQ. He should not participate in any discussions regarding the

Mercado Trolley Station Site, until it can be determined whether he has any further conflict of interest under the Act, given the location and nature of his business. If he does want to respond to the RFQ, he should immediately resign from the PAC before the re-issuance of the RFQ.

As for Ms. Schmidt, it does not appear that she has a conflict under either the Act or Government Code section 1090.

BACKGROUND FACTS

All issues involving conflicts of interest are unique to the specific facts of the situation. For that reason, it is important that those facts be set forth before analyzing whether there is a conflict of interest. The facts surrounding the present situation were described to me by Byron Estes of your office, and are as follows:

Pursuant to provisions of the California Community Redevelopment Law (Cal. Health & Safety Code 33000 et seq.), the PAC is responsible for, among other things, reviewing and advising the San Diego Redevelopment Agency ("Agency") on development proposals for the Project Area. The PAC's Conflict of Interest Code (attached hereto as Exhibit A) requires that all PAC members file a Statement of Economic Interest ("SEI") and disclose, among other things, any involvement in a business entity within the Project Area, and contracts entered into with The City of San Diego or the Agency concerning activities in the Project Area. Mr. Shapiro has been a member of the PAC since its creation in 1989 and its Chair for the past three years. Ms. Schmidt has been a member of the PAC since 1991.

Mr. Shapiro works for, and owns an interest in, Mitchell Investments, a land development company. I was not apprised of the exact nature of Mr. Shapiro's business interests or location of the business in relation to the site of the Development Project. His proposal in response to the RFQ was submitted by him as an individual, and not by Mitchell Investments.

Ms. Schmidt is a salaried employee of Mitchell Investments. Her primary responsibilities are day-to-day management of the firm's properties, and receptionist duties. She is not an employee of Mr. Shapiro individually, and is not a party to Mr. Shapiro's proposal.

On May 1, 1997, the Agency released an RFQ for the redevelopment of the Mercado Trolley Station Site. Responses to the RFQ were due by June 13, 1997. PAC members were not involved in the drafting of the RFQ and did not review it before it was released. The PAC was first briefed about the RFQ at its May 1997 meeting. While the Agency would ultimately make the decision which proposal (if any) would be chosen, Agency staff expected that the PAC would recommend to the Agency which proposal it believed would be the most advantageous to the community.

Four responses were received, including the one from Mr. Shapiro. Agency staff short-listed the proposals down to three, and on July 9 interviewed the developers who submitted the proposals. Mr. Shapiro was one of the three developers. At various times after the responses were received, Agency staff requested that Mr. Shapiro and Ms. Schmidt resign from the PAC before the July 16, 1997, PAC meeting, which was the date the three responses were scheduled

to be discussed. Mr. Shapiro and Ms. Schmidt chose not to resign unless and until our office advised that they must do so. Our office was contacted on July 14, 1997, and asked to provide a written opinion on this issue. The PAC's review of the proposals has been continued pending receipt of this memorandum.

ANALYSIS

Potential conflicts of interest of this nature must be evaluated under two distinct statutory schemes: the Political Reform Act (Cal. Gov't Code 87100 et seq.) and California Government Code section 1090 et seq.

I. Political Reform Act of 1974

The Act was adopted by the People of the State of California in 1974 and specifies in pertinent part as follows: "No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." Cal. Gov't Code 87100.

PAC Members are "Public Officials" Under the Act

The Fair Political Practices Commission ("FPPC") has, in keeping with the broad scope of the Act, interpreted the Act to apply to the members of all boards, commissions, or committees with decision making authority. Cal. Code Regs. tit. 2, 18700(a)(1). It makes no difference whether such board members are salaried or unsalaried. Commission on Cal. State Gov't Org. & Econ. v. Fair Political Practices Com., 75 Cal. App. 3d 716 (1977). For example, the "public members" on boards and commissions are subject to the provisions of the Act. FPPC Index Letter 75-58 . The FPPC has determined that a board, commission, or committee possesses decision-making authority in the following circumstances:

1. It may make a final governmental decision. Cal. Code Regs. tit. 2, 18700(a)(1)(A);
2. It may compel or prevent the making of a governmental decision by its action or inaction. Cal. Code Regs. tit. 2, 18700(a)(1)(B); or
3. Its recommendations are routinely and regularly followed. Cal. Code Regs. tit. 2, 18700(a)(1)(C).

In recent years, in both the areas of conflict of interest laws and open meeting laws, the trend has been to take an expansive view of the role played by those who consult and advise public policymakers. For instance, Government Code section 54952 expressly recognizes both permanent and temporary advisory committees as legislative bodies subject to the Brown Act.

The key opinion in this particular area is 10 FPPC Ops.1 (1987) which specifically recognizes PAC members as "public officials" for purposes of the Act. It states in its

Conclusion:

Members of redevelopment project area committees are “public officials” who are subject to the Act’s disclosure and disqualification provisions. With regard to disqualification, members of project area committees must disqualify themselves from participation in decisions of the project area committee only if the decisions will have a reasonably foreseeable material financial effect on the member’s economic interest which is distinguishable from the effect on members of the public within the redevelopment project area. (Emphasis in original.)

Therefore, Mr. Shapiro and Ms. Schmidt are both public officials under the Act.

Elements in the Act that Trigger Disqualification

There are five necessary elements which must be present to trigger the disqualification of a public officer under the Act: (1) a governmental decision at hand; (2) the public official must have an identifiable economic interest that might be affected by the governmental decision; (3) it must be reasonably foreseeable that the governmental decision will have a financial effect on one or more of those economic interests; (4) the financial effect must be a material financial effect; and (5) the material financial effect must be one that is distinguishable from the effect on the public generally.

Clearly the award of a government contract is a governmental decision. Thus, in analyzing any contract situation for a conflict of interest, the first issue to consider will always be whether the public official has an "economic interest" in the contract. Government Code section 87103(d) states that an official has such an economic interest when the decision has a material effect on “[a]ny business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.” In the case of a business entity, the effect on the official’s financial interest is deemed material if the decision will result in his personal income, expenses, assets, or liabilities increasing or decreasing by at least \$250. Cal. Code Regs. tit. 2, 18702.1(a)(4). The term "business entity" as used in the Act is defined in Government Code section 82005 and refers to "any organization operated for profit, including but not limited to a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation or association."

Mr. Shapiro _____

Mr. Shapiro has submitted a proposal to redevelop the Mercado Trolley Station Site in his capacity as a sole proprietor and developer. As stated above, the Act provides that a public official has an economic interest in any business entity in which he or she is an officer, director, employee, or holds any management position, irrespective of whether he or she has an investment or receives income from the entity. Thus, Mr. Shapiro obviously has an economic interest in the Development Project. Next it must be determined whether a decision by the Agency to contract, *or not contract*, with Mr. Shapiro for the redevelopment of the Mercado Trolley Station Site would have a material financial effect upon his economic interest.

Under the Act, the financial effect of a decision by the Agency to contract with Mr. Shapiro is material. Mr. Shapiro submitted his proposal as a sole proprietor, and any contract awarded to him would have a direct impact on his personal income which would certainly exceed the \$250 threshold. Finally, the material financial effect to Mr. Shapiro of being awarded a contract would be distinguishable from the effect of that contract on the public generally.

Ms. Schmidt

Under the facts presented to me, the situation with Ms. Schmidt is quite different. First and foremost is the fact that Ms. Schmidt is neither a party to Mr. Shapiro's proposal, nor is she an employee of Mr. Shapiro individually. She is a salaried employee of Mitchell Investments, a firm where Mr. Shapiro works. But she is not connected to his proposal to develop the Mercado Trolley Station Site. She does not appear to have an identifiable economic interest that would be affected by the awarding of a contract to Mr. Shapiro. Given this, Ms. Schmidt does not have a conflict under the Act and is not required to disqualify herself from PAC review of the proposals for the Development Project.

II. Government Code Section 1090

Government Code section 1090 ("Section 1090") precludes a public officer or employee from participating in the making a contract in which he or she is financially interested. Although the term "financial interest" is not specifically defined in the statute, an examination of case law and the statutory exceptions to the basic prohibition indicates that the term is to be liberally construed. See Thompson v. Call, 38 Cal. 3d 633, 645 (1985). Furthermore, case law indicates that any contract made in violation of Section 1090 is not merely voidable, but void. People ex rel. State of Cal. v. Drinkhouse, 4 Cal. App. 3d 931 (1970). This is an important distinction from a conflict of interest analysis under the Act. Therefore, a contract is rendered void even when the contracting body enters into the agreement without the participation of the official who had the conflict of interest. If the official resigns before the final decision is made, that does not cure the conflict. The official involved may be subject to felony prosecution.

Government Code Section 1090 Applies to PAC Members

Generally speaking, for the purposes of determining whether a conflict exists under Section 1090, "participating in the making of a contract" includes preliminary discussions, negotiations, compromises, planning, and solicitation of bids. Millbrae Ass'n for Residential Survival v. City of Millbrae, 262 Cal. App. 2d 222 (1968). Courts have ruled that it applies to all boards, officers, employees, and consultants of a public entity. Thompson v. Call, 38 Cal. 3d 633, 649 (1985). While the courts have not ruled on the applicability of Section 1090 to PACs, it has been held to apply to persons and advisory bodies who act in an *advisory* capacity to the contracting agency, such as PACs. See City Council v. McKinley, 80 Cal. App. 3d 204, 278 (1978).

California Health and Safety Code section 33386 sets out the role of a PAC in the redevelopment process:

The redevelopment agency through its staff, consultants, and agency members *shall* upon the direction of and approval of the legislative body consult with, and obtain the advice of the project area committee concerning those policy matters which deal with the planning and provision of residential facilities or replacement housing for those to be displaced by project activities. They *shall* also consult with the committee on other policy matters which affect the residents of the project area. (Emphasis added.)

Given these mandatory duties of PACs and the fact that members of PACs are considered public officials under the Act, it is the opinion of this office that PAC members are subject to the prohibitions of Section 1090.

Mr. Shapiro

The participation of Mr. Shapiro in submitting a proposal for the Development Project presents a conflict under Section 1090, because he has a direct financial interest in the possible award of the contract to him. Thus, if the PAC were to vote on the three proposals that have been short-listed by staff, that decision would render the whole process void. Even if Mr. Shapiro were to now resign from the PAC, the fact that he submitted his proposal would be considered participation “in the making of a contract” while he was a public official.

The most prudent course of action would be to re-issue the RFQ for development of the Mercado Trolley Station Site. The conflict cannot be cured, even if Mr. Shapiro were to resign from the PAC immediately. If Mr. Shapiro wants to remain on the PAC, he should not submit a new proposal. I also suggest that if he wants to participate in any future decisions regarding the Development Project, he work with this office to determine whether in any given case he should disqualify himself from participation under the Act because of a material financial interest in the proposal due to the location of and nature of his business interests in the area. In the event Mr. Shapiro still wants to submit a proposal, he should immediately resign from the PAC prior to any actions being taken on the re-issuance of the RFQ.

Ms. Schmidt

For the reasons discussed above in the analysis of the facts under the Act, Ms. Schmidt does not have a conflict under Section 1090. She did not participate in a contract in which she is financially interested.

CONCLUSION

It appears that Mr. Shapiro does have a conflict of interest under the Political Reform Act of 1974 and Government Code section 1090. The Redevelopment Agency should reject all proposals submitted under the original RFQ for development of the Mercado Trolley Station Site and re-issue a new one. If Mr. Shapiro wants to respond to the RFQ, he should immediately resign from the PAC. If he chooses to stay on the PAC, he should not respond to the re-issued RFQ. We also recommend that he consult with this office regarding any other conflicts he may have concerning this particular Development Project. It does not appear that Ms. Schmidt has a

conflict of interest.

If you want to discuss any of these matters further, or have additional questions, please do not hesitate to contact me.

CASEY GWINN, City Attorney

By

Allisyn L. Thomas
Deputy City Attorney

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Attachment

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