

MEMORANDUM OF LAW

DATE: September 15, 1999

TO: Tina Christiansen, Deputy Executive Director
Redevelopment Agency of The City of San Diego

FROM: City Attorney

SUBJECT: Potential Conflict of Interest of Members of the Barrio Logan Redevelopment Project Area Committee in Relation to the Mercado Commercial Project pursuant to California Government Code Section 1090 and the Political Reform Act

QUESTION PRESENTED

Based on the facts presented, do any of the newly elected or appointed members of the Barrio Logan Redevelopment Project Area Committee [PAC] have a conflict of interest that would disqualify them from participating in discussions or votes on the Mercado Commercial Project [Project]?

SHORT ANSWER

From the facts presented, none of the newly elected or appointed members has a legal conflict of interest which disqualifies him or her from participating in the PAC's discussions or votes on the Mercado Commercial Project. However, Panfilio Sanchez, an ongoing member of the PAC, whose situation was not previously analyzed, has a legal conflict of interest which disqualifies him from participating in PAC discussions or votes on the Mercado Commercial Project.

BACKGROUND

On May 12, 1998, this Office issued a Memorandum of Law discussing the potential conflicts of interest of each member of the Barrio Logan PAC, with the exception of Panfilio Sanchez, in relation to the Mercado Trolley Station and Mercado Commercial Project (Attachment A to this Memorandum of Law). On March 17, 1999, three new members were elected to the PAC. These new members and their categories are: Ericka Nava, Residential Tenant; Estela Hurtado, Residential Tenant; and Beatriz Velarde, Residential Tenant. In addition, Antonio Castillo replaced Luis Villegas on the PAC in the category of Community Organization Representative. Armando Lozano, Steve Zapoticzny, and Rosa Maria Gallegos have left the

PAC.

On May 12, 1998, this Office was told that Panfilio Sanchez was no longer a member of the PAC, and, therefore, his potential conflicts of interest were not analyzed. Apparently, this information was in error and Mr. Sanchez is still a member of the PAC. This Memorandum of Law will address only the potential conflicts of interest of the new members of the PAC and Panfilio Sanchez.

The PAC is currently involved in discussing and voting on the Mercado Commercial Project, which is more fully described in the May 12, 1998, Memorandum of Law. The PAC is no longer considering the Mercado Trolley Station Project. The Mercado Commercial Project will be discussed at the PAC meeting on September 15, 1999.

ANALYSIS

Potential conflicts of interest of the kind described in this memorandum must be evaluated under two distinct statutory schemes: the Political Reform Act [Act] (Cal. Gov't Code 87100- 91015) and California Government Code sections 1090-1097. These statutory schemes only recognize effects on *financial interests* as disqualifying conflicts of interest. Other types of interests, such as political interests, do not disqualify public officials from participating in decisions under these statutes.

I. Political Reform Act

The Act was adopted by the People of the State of California in 1974 and specifies in pertinent part that "[n]o 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. A public official has a conflict of interest if the decision will have a reasonably foreseeable material financial effect on one or more of his or her economic interests, unless that effect is indistinguishable from the effect on the public generally. A conflict of interest requires an official to disqualify himself or herself from participating or voting on matters that come before them if the public official's participation is not legally required. Cal. Code Regs. tit. 2, 18700(a).

In order to determine whether an individual has a disqualifying conflict of interest under the Act, the following questions must be answered: (1) Is the individual a public official within the meaning of the Act? (2) Is the public official making, participating in making, or using or attempting to use his or her official position to influence a governmental decision? (3) Does the public official have an economic interest, such as an interest in a business entity, real property or source of income, identified in title 2, section 18703 of the California Code of Regulations? (4) Is the public official's economic interest directly or indirectly involved in the governmental decision? (5) Is the public official's economic interest considered material? (6) Is it reasonably foreseeable that the governmental decision will have a material financial effect on the public official's economic interest? (7) Is the reasonably foreseeable financial effect distinguishable from the effect on the public generally? and (8) Is the public official's participation legally required despite the conflict of interest?

The Fair Political Practices Commission [FPPC], the state agency that interprets and administers the Act, has specifically determined that PAC members are “public officials” who are subject to the Act’s disclosure and disqualification provisions. *In re Rotman*, 10 FPPC Ops. 1 (1987). Pursuant to title 2, section 18702.2(b)(2) of the California Code of Regulations, an official “participates in making a governmental decision” when, acting within the authority of his or her position, the official advises or makes recommendations to the decision maker by presenting an opinion which requires the exercise of judgment on the part of the official in order to influence a governmental decision. Therefore, because PAC members advise the Agency on the matters before them, they participate in making governmental decisions. The rest of the questions referred to above will be answered in regard to the individual PAC members.

II. Government Code Section 1090

California Government Code section 1090 [Section 1090] precludes a public officer or employee from participating in the making of 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 the case law and the statutory exceptions to the basic prohibition indicates that the term is to be liberally construed. *Thomson v. Call*, 38 Cal. 3d. 633, 645 (1985). Section 1090 has been held to apply to persons and advisory bodies who act in an advisory capacity to the contracting agency, such as PACs. *City Council v. McKinley*, 80 Cal. App. 3d. 204, 212 (1978). PAC members participate in the making of a contract for purposes of Section 1090 because they are involved in preliminary discussions, negotiations, compromises, planning, and solicitation of bids for government contracts. *Millbrae Ass’n for Residential Survival v. City of Millbrae*, 262 Cal. App. 2d 222, 237 (1968).

A contract made in violation of Section 1090 is void and cannot be enforced. A public officer cannot escape liability for a Section 1090 violation merely by abstaining from voting or participating in discussions or negotiations. *Thomson*, 38 Cal. 3d at 649. Mere membership on the board or council establishes the presumption that the officer participated in the forbidden transaction or influenced other members of the council. *Id.* Additionally, an official who violates Section 1090 may be subject to criminal, civil, and administrative penalties.

III. Discussion: Applying Section 1090 and the Political Reform Act to Ericka Nava, Estela Hurtado, Beatriz Velarde, and Antonio Castillo

The facts used in this analysis were provided by Ingrid Johnson and Marco Camacho of the Redevelopment Agency of The City of San Diego [the Agency], as well as by the PAC members themselves, who filled out a questionnaire. Mr. Castillo was interviewed by City Attorney Investigator Sue Sabbagh. Additionally, the determinations of the foreseeable financial effect of the Mercado Commercial Project on the properties owned by Antonio Castillo and Panfilio Sanchez are based upon the expert opinion of James Davies, a Redevelopment/Revitalization Project Manager for the Economic Development and Community Services Department. Mr. Davies’ expertise includes a master of arts degree in urban planning, with course work in real estate development, real estate investment, development finance, and real estate appraisal. Mr. Davies has over fourteen years of experience in real estate and redevelopment, including six years as a real estate economic consultant.

A. Section 1090 Analysis

There are no facts indicating that Ericka Nava, Estela Hurtado, Beatriz Velarde, or Antonio Castillo have a financial interest pursuant to Section 1090 in the Mercado Commercial Project that would preclude them from participating in discussions or votes on the Project.

B. Political Reform Act Analysis

1. Ericka Nava, Estela Hurtado, and Beatriz Velarde.

These PAC members are all month-to-month tenants. A month-to-month tenancy is not treated as a financial interest for purposes of the Political Reform Act. Cal. Code Regs. tit. 2, 18233.

However, the analysis of potential conflicts of interest cannot stop there. The official may have a conflict of interest if the decision has a financial effect on an individual who is a source of income to the official if the decision will affect the individual's income, investments, or other tangible or intangible assets or liabilities (other than real property) by \$1,000 or more, or the decision will affect the individual's real property interest in a manner considered material under title 2, sections 18705.2(b) or 18705.2(c) of the California Code of Regulations. Cal. Code Regs. tit. 2, 18705.3(3)(A)(B). A decision has a material effect on an individual who is a source of income to the official if the official receives or is promised the income to achieve a goal or purpose which would be achieved, defeated, aided, or hindered by the decision. Cal. Code Regs. tit. 2, section 18705.3(c).

In the case of Ericka Nava, Estela Hurtado, and Beatriz Velarde, none of these PAC members has a conflict of interest based on his or her sources of income. Ericka Nava receives income from an individual who works for a graphics firm outside the Barrio Logan Redevelopment Project area. Estela Hurtado receives income from an individual who works in a knife shop in El Cajon. Beatriz Velarde receives income from an individual who works for a major hotel in the downtown area. It does not appear that a decision on the Mercado Commercial Project will affect the income, investments, real property interests, or other tangible or intangible assets or liabilities of any of the newly elected PAC members' individual sources of income. These newly elected PAC members do not have an economic interest under the Act. Therefore, these members are not disqualified from participating in the PAC discussions and votes on the Mercado Commercial Project.

2. Antonio Castillo.

Mr. Castillo is one of the representatives for the Community Organization category. He owns two residential properties. The first property is located beyond 2,500 feet (approximately 2.1 miles) from the Mercado Commercial Center site and has an assessed value of over \$100,000. The other property, a five-unit complex, is located just inside the 2,500-foot boundary (approximately 1.5 miles) from the Mercado Commercial Project site. Mr. Castillo is employed by the Longshoreman's Union in downtown San Diego. According to Tim Chavis, Secretary/Treasurer for the local Longshoreman's Union, the Longshoreman's Union is a non-profit entity. The gross annual receipts for the Union are approximately \$87,000.

Mr. Castillo has an economic interest in the real property he owns because he has a direct interest worth \$1,000 or more in fair market value. Cal. Code Regs. tit. 2, 18703.2. His interest

is indirectly involved in the governmental decision at hand. Cal. Code Regs. tit. 2, 18704.2.

The reasonably foreseeable effect of a decision on the Mercado Commercial Project is *not* considered material as to Mr. Castillo's first piece of real property (that property located entirely beyond a 2,500-foot radius of the boundaries or proposed boundaries of the Mercado Commercial Project) unless there are specific circumstances regarding the decision, its effect, and the nature of Mr. Castillo's real property which make it reasonably foreseeable that the fair market value of his real property will be affected by \$10,000 or more or the rental value of his property will be affected by \$1,000 or more per 12-month period, and either the effect will be different from the effect upon at least 25 percent of all the properties which are within a 2,500-foot radius of the boundaries of Mr. Castillo's property or there are not at least ten properties under separate ownership within a 2,500-foot radius of his property. Cal. Code Regs. tit. 2, 18705.2(b)(2).

A decision on the Mercado Commercial Project is considered material as to Mr. Castillo's second piece of real property (that property located outside a radius of 300 feet but within 2,500 feet of the boundaries or proposed boundaries of the Mercado Commercial Project) if it will have a reasonably foreseeable financial effect of \$10,000 or more on the fair market value of the property or will affect the rental value of the property by \$1,000 or more per 12-month period. Cal. Code Regs. tit. 2, 18705.2(b)(1)(C).

According to Mr. Davies, Mr. Castillo's properties will not experience the above- listed material financial effects as a result of the PAC's decision on the Project. His properties are too far away from the Mercado Commercial Project and both properties are separated from the proposed Mercado Commercial Project by Interstate 5. Therefore, Mr. Castillo does not have an economic interest in real property that would disqualify him from participating in discussions and votes on the Mercado Commercial Project.

The Longshoreman's Union is a source of income for Mr. Castillo. This is an economic interest under the Act. Mr. Castillo's interest in this source of income is classified as an indirect interest pursuant to title 2, section 18704.1(b) of the California Code of Regulations and is analyzed under section 18705.3(b)(2). The effect of a decision is material as to a nonprofit entity which is a source of income to the official if the following facts apply:

- a. the decision will result in an increase or decrease of the entity's gross annual receipts for a fiscal year in the amount of \$10,000 or more; or
- b. the decision will cause the entity to incur or avoid additional expenses or to reduce or eliminate existing expenses for a fiscal year in the amount of \$2,500 or more; or
- c. the decision will result in an increase or decrease in the value of the entity's assets or liabilities in the amount of \$10,000 or more.

It does not appear likely that a decision on the Mercado Commercial Project will affect the gross annual receipts, expenses, assets, or liabilities of the Longshoreman's Union. Mr. Castillo's indirect economic interest in his source of income is not considered material under the Act. Cal. Code Regs. tit. 2, 18705.3(b)(2)(F). Therefore, he is not disqualified from participating in the PAC discussions and votes on the Mercado Commercial Project.

IV. Discussion: Applying Section 1090 and the Act to Panfilio Sanchez

Mr. Sanchez is the owner/occupant of a single family residence which is located approximately 385 feet from the boundary of the Mercado Commercial Project site.

A. Section 1090 Analysis

Mr. Sanchez's ownership of this property must be evaluated under Section 1090. As discussed earlier, Section 1090 prohibits a PAC member from participating in a contract in which he has a financial interest. The issue here is whether the potential rise in the value of Mr. Sanchez's property when the Mercado Commercial Project is completed is a financial interest under Section 1090.

The California Supreme Court outlined the purpose of Section 1090 in *Thomson v. Call*, 38 Cal. 3d 633 (1985). The origin of the statute is in the general principle that "no man can faithfully serve two masters whose interests are or may be in conflict." *Id.* at 647. "The instant statutes [sections 1090-1097] are concerned with *any* interest, other than perhaps a remote or minimal interest, which would prevent the officials from exercising absolute loyalty and undivided allegiance to the best interests of the city." *Id.* at 648. The "object of these enactments is to remove or limit the *possibility* of any personal influence, either directly or indirectly which might bear on an official's decision, as well as to void contracts which are actually obtained through fraud or dishonest conduct." *Id.* at 649.

Section 1090 prohibits any direct interest, such as a contract between the official and the body of which he is a member. In addition, case law has also consistently held that contracts where the public official had an indirect interest are subject to Section 1090. *Thomson*, 38 Cal. 3d at 645.

As discussed above, the term "financial interest" is not defined in the statute. However, Section 1091 lists certain categories that the Legislature has determined are "remote interests." The term "remote" has special statutory meaning in the context of Sections 1090-1097. It should not be confused with "remote" or "speculative" used in other contexts. A few examples of the "remote interests" that Section 1091 deals with are those of officers or employees of a nonprofit corporation, parents, landlords, or tenants of a contracting party, and the attorney of the contracting party. The ownership of real property is not listed as a "remote interest."

Further, Section 1091.5 delineates situations that might technically create conflicts of interests under Section 1090, but that the legislature has decided as a matter of policy are exempt from its operation. A sample of non-interests under Section 1091.5 are corporate ownership of less than 3 percent of the shares of the corporation where the official's total annual income from dividends or stock dividends amounts to less than 5 percent of his or her income and any other income from the corporation also amounts to less than 5 percent; an official's reimbursement for actual expenses; and a public housing tenant's interest regarding that housing if he or she is serving as a member of the board of commissioners overseeing it. Again, ownership of real property is not among the situations determined to be a "non-interest" under Section 1091.5.

The determination whether a "financial interest" under Section 1090 exists in a particular case is primarily a question of fact. *People v. Darby*, 114 Cal. App. 2d 412, 431-432 (1952). In one case, the State Superintendent of Public Instruction and his wife started a nonprofit corporation that paid the

wife's salary and paid rent for office space in their home. The court found a violation of Section 1090 where the official's staff at his direction arranged contracts with the State Department of Education to fund staff positions in the nonprofit corporation. *People v. Honig*, 48 Cal. App. 4th 289 (1996). In *People v. Vallerga*, 67 Cal. App. 3d 847 (1977), a county employee's private consulting contract that was contingent upon the execution of the county's contract with the city was found to violate Section 1090. The court also found that a harbor commissioner whose company loaned money to a corporation that subsequently attempted to negotiate a lease with the commission violated Section 1090 when the harbor commissioner voted to approve the proposed lease while the loan was still outstanding. *People v. Watson*, 15 Cal. App. 3d 28 (1971).

The common thread in these cases is a relationship between the official and the contracting party, however indirect. Here, Mr. Sanchez has no relationship whatsoever with the potential developers of the Mercado Commercial Project. The fact that the development of a shopping center might increase Mr. Sanchez's property value and he might benefit from the financial gain, does not make his interest a "financial interest" within the meaning of Section 1090.

Further, California Health and Safety Code section 33385(c) mandates that the PAC shall include residential owner occupants, along with representatives from other categories. The duties of a PAC include advising the Agency on policy matters that affect the residents of the project area. Cal. Health & Safety Code 33386. The legislature has sanctioned a process where financially interested property owners advise the Agency. However, pursuant to Section 1090, a PAC potentially could not advise the Agency which was going to enter into a contract because these same financially interested property owners are members of the PAC. To apply the sanctions of Section 1090 to residential owner occupants would render meaningless the statutory scheme under which PACs are formed and function.

The California Supreme Court stated, "[w]e do not presume that the Legislature performs idle acts, nor do we construe statutory provisions so as to render them superfluous." *Shoemaker v. Myers*, 52 Cal. 3d 1, 22 (1990). In the construction of a statute, when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it. Cal. Civ. Proc. Code 1859. In this situation, the specific provisions of the Health and Safety Code sections creating PACs and defining their function must prevail over the general proscription of Section 1090. Therefore, Mr. Sanchez and the Barrio Logan PAC are not precluded from discussing and voting on the Mercado Commercial Project under Section 1090. Support for this conclusion is found in 99 Op. Cal. Att'y Gen. 304 (1999).

B. Political Reform Act Analysis

Although this Office has determined that Mr. Sanchez does not have a conflict of interest under Section 1090, he should not participate in any activities concerning the Mercado Commercial Project because his financial interest in the real property gives rise to a potential conflict under the Act.

California Government Code section 81013 states:

Nothing in this title prevents the Legislature or any other state or local agency from imposing additional requirements on any person if the requirements do not prevent the person from complying with this title. If any act of the Legislature conflicts with the provisions of this title, this title shall prevail.

The Political Reform Act will control over Sections 1090-1097 where the Act would prohibit a contract otherwise allowable under Sections 1090-1097. 59 Op. Cal. Att’y Gen. 604, 617 (1976).

Because Mr. Sanchez has a direct or indirect interest worth \$1,000 or more in fair market value in his home, he has an economic interest under the Political Reform Act. Cal. Code Regs. tit. 2, 18703.2(a). Mr. Sanchez’s interest in real property is indirectly involved in the governmental decision. Cal. Code Regs. tit. 2, 18704.2. As discussed earlier, the effect of a decision on property located outside a radius of 300 feet and within a radius of 2,500 feet of the boundaries (or proposed boundaries) of a project is material if the decision will have a reasonably foreseeable financial effect of \$10,000 or more on the fair market value of the real property or will affect the rental value of the property by \$1,000 or more per 12-month period.

An effect is considered reasonably foreseeable at the time a governmental decision is made if there is a substantial likelihood that the effect will occur. Cal. Code Regs. tit. 2, 18706. Certainty is not required. Only if an effect is a mere possibility, is it not reasonably foreseeable. *Downey Cares v. Downey Community Development Com.*, 196 Cal. App. 3d 983, 989-991 (1987).

According to Mr. Davies, whose expertise is being used to determine the foreseeable financial effect of a decision on the Mercado Commercial Project on property, the development of the Mercado Commercial Project will be complementary to Mr. Sanchez’s property. It will provide needed services to the neighborhood and make it a more attractive and desirable community to live in. Mr. Davies has determined that it is reasonably foreseeable that the close proximity of Mr. Sanchez’s property to the Mercado Commercial Project combined with the complementary nature between retail centers and residential uses will have a financial effect of \$10,000 or more on the fair market value of the property. Therefore, Mr. Sanchez has a conflict of interest that prevents him from participating in discussions or votes on the Mercado Commercial Project.

Even so, Mr. Sanchez may still participate and vote if the financial effect on his property is the same as the effect on the “public generally.” For the “public generally” exception to apply to a decision, the decision must affect the official’s interest in substantially the same manner as it would a significant segment of the public. Cal. Code Regs. tit. 2, 18707(b)(1). In this case, the governmental decision will affect a “significant segment” of the public generally if it affects 10 percent or more of the population in the jurisdiction of the official’s agency, or 10 percent or more of all property owners, all home owners, or all households in the jurisdiction of the official’s agency or the district the official represents. Cal. Code Regs. tit. 2, 18707(b)(1)(A)(i)(ii). In other words, the decision would have to affect 10 percent or more of the population or 10 percent or more of all property owners in the Barrio Logan Redevelopment Project Area in substantially the same manner as it affects Mr. Sanchez’s economic interest in his house. Mr. Davies has determined that, because Mr. Sanchez lives so close to the Mercado Commercial Project, the financial effect of the Project would affect his property differently than properties in the Barrio Logan Redevelopment Project area that are further away. Therefore, the “public generally” exception does not apply in this case.

Finally, it must be determined whether Mr. Sanchez is legally required to participate in discussions or votes on the Mercado Commercial Project. A public official is not legally required to make or to participate in the making of a governmental decision unless there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision. There are fifteen members of the Barrio Logan PAC. The PAC can reach a decision even if Mr. Sanchez refrains from discussion or voting. Mr. Sanchez’s participation is not legally required for a decision on the

Mercado Commercial Project.

V. Council Policy 000-4

San Diego City Council Policy 000-4 states in pertinent part:

No elected official, officer, appointee, or employee of The City of San Diego shall engage in any business or transaction or shall have a financial or other personal interest, direct or indirect, which is incompatible with the proper discharge of his official duties or would tend to impair his independence or judgment or action in the performance of such duties.

Under this policy, it is each PAC member's responsibility to determine whether he or she has any interest, financial or not, which is "incompatible with the proper discharge of official duties" as a member of the PAC considering the Mercado Commercial Project. If a PAC member determines that he or she cannot be objective about the Mercado Commercial Project because of a financial or personal interest, the member may choose to abstain from participating in the discussions or votes on the Mercado Commercial Project. It should be emphasized, however, that this is a policy, not a law, and it does not have the force and effect of law.

CONCLUSION

Based on the information presented, Panfilio Sanchez is disqualified from participating in PAC activities related to the Mercado Commercial Project. None of the newly elected or appointed members of the PAC are disqualified.

CASEY GWINN, City Attorney

By
Elisa A. Cusato

Deputy City AttorneyEAC:lc:048x612.9(x043.2)
Attachment
ML-99-13