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OPINION NUMBER 2010-5

DATE: September 29, 2010

SUBJECT: Conflict of Interest Analysis Involving a Contract Amendment by City Officials to Allow the San Diego Housing Commission (SDHC) to Lease SDHC-Owned Properties to Tenants Receiving Federal Funds Administered by the SDHC

REQUESTED BY: Honorable Mayor and Members of the City Council

PREPARED BY: City Attorney

INTRODUCTION

You have asked this Office to prepare an opinion analyzing a potential conflict of interest involving a contract amendment by city officials to allow the San Diego Housing Commission (SDHC) to lease SDHC-owned properties to tenants receiving the benefit of federal funds administered by the SDHC.

On September 14, 2009, the City of San Diego, as the grantee, entered into an agreement with the San Diego Housing Commission (SDHC), as the sub-grantee, to administer Homelessness Prevention and Rapid Re-Housing Program (HPRP) funding awarded to the City by the U.S. Department of Housing and Urban Development (HUD). One of the purposes of HPRP is to provide financial assistance to eligible individuals and families on the brink of or already experiencing homelessness by providing direct payments to landlords.

HPRP funds cannot be used to subsidize the rent of any property owned by the grantee or sub-grantee of such funds. SDHC is currently seeking a waiver from this prohibition to allow SDHC to use HPRP funds to subsidize the rent for tenants in SDHC-owned rental units. In order to consider a waiver request, HUD requires an opinion from this Office, as the grantee's attorney, that granting an exception in this instance would not violate state or local conflict of interest law. This opinion focuses solely on conflict issues involving the City and City officials. It does not opine on any issues involving the SDHC which are raised or analyzed in the SDHC Opinion Letter. SDHC has separately sought and obtained a legal opinion from its legal counsel on this

issue as it pertains to any conflicts of interest involving SDHC which it has submitted directly to HUD in the form of an opinion letter dated July 30, 2010 (SDHC Opinion Letter).

QUESTION PRESENTED

Is there a conflict of interest for the City in violation of state or local law if the SDHC is allowed to make SDHC-owned rental units available to tenants receiving HPRP funding assistance?

SHORT ANSWER

No. The City would not violate any state or local law if SDHC is allowed to make SDHC-owned rental units available to tenants receiving HPRP funding assistance so long as the SDHC-owned property at 2381-2389 Grove Avenue, San Diego, is specifically excluded from eligibility for HPRP funds in any contract amendment involving the City.

BACKGROUND

On August 27, 2009, the City was awarded HPRP funding from HUD. The purpose of HPRP is to provide financial assistance and services to prevent individuals and families from becoming homeless and to help those who are experiencing homelessness to be quickly re-housed and stabilized.

On September 14, 2009, the City entered into an agreement with SDHC to administer HPRP funds in the amount of \$5,760,000 on behalf of the City (HPRP Agreement). As part of the HPRP Agreement, SDHC is responsible for allocating HPRP funds to prevent approximately 350 cases of homelessness over a three-year period. There are three categories of eligible activities for these HPRP funds. SDHC is to provide up to \$3,823,188 for short-term (3 months) and medium-term (4-18 months) rental assistance to be paid directly to landlords; up to \$1,736,511 for case management related to housing needs and stability of program participants; and up to \$200,000 for SDHC expenses associated with the administration of HPRP. With regard to the rental assistance funds in the amount of \$3,823,188, the HPRP Agreement contains a provision that prohibits HPRP funds from going toward the rent of properties owned by the City or SDHC. This provision in the HPRP Agreement mirrors the requirement under the HPRP program.

At this time, SDHC is seeking a waiver to the provision which prohibits any HPRP funds from going toward off-setting the rent of any real property owned by SDHC, as sub-grantee of HPRP funds. Based on SDHC's letter dated June 17, 2010, to HUD Director William Vasquez, SDHC seeks this waiver from HUD in order to increase the availability of affordable units in San Diego to those who are homeless or on the brink of homelessness. In a letter dated June 22, 2010 to HUD Director William Vasquez, City CDBG Program Administrator Angela Nazareno supported SDHC's request for a waiver to this HPRP program requirement. Pursuant to the Department of Housing and Urban Development [Docket No. FR-5307-N-01], Notice of Allocations, Application Procedures and Requirements for Homelessness Prevention and Rapid

Re-Housing Program Grantees under the American Recovery and Reinvestment Act of 2009, section VII A, Other Federal Requirements, Conflicts of Interest, HUD may grant an exception to conflicts of interest restrictions involving this HPRP program requirement “on a case-by-case basis when it determines that the exception will serve to further the purposes of the HPRP program and promote the efficient use of HPRP funds” if the grantee provides an opinion of the grantee’s attorney that the interest for which the exception is sought would not violate state or local law.

The City’s CDBG Program Unit oversees the HPRP Agreement by ensuring that SDHC follows all HPRP guidelines and complies with all federal reporting and other requirements including compliance with all federal, state and local laws. Pursuant to the HPRP Agreement, SDHC obtains reimbursement from the City for the services it provides in the management of HPRP funds by submitting invoices and other documentation verifying the provision of such services. All of this documentation is reviewed and analyzed by the City’s CDBG Program Unit which is responsible for, among other things, authorizing or denying SDHC reimbursement requests pertaining to its administration of HPRP.

The City’s CDBG Program Unit consists of City employees who administer federal grant awards from HUD including but not limited to CDBG, CDBG-R, HOME Partnership Program, HOPWA, and of course, HPRP. The employees within the City’s CDBG Program Unit who administer to or who would have any decision-making authority related to HPRP are Vickie White, Joan Talbert, Angela Nazareno, Beth Murray, and William Anderson. In addition, Mayor Jerry Sanders, the City’s Chief Operating Officer Jay Goldstone, the City’s Assistant Executive Chief Operating Officer (Asst. COO) Walter Hill, and the City’s Director of Purchasing and Contracting may also be involved with decision-making authority with regard to execution of such contracts or in the resolution of any significant issues that may arise as a result of contract administration.

Vickie White is the Stimulus Program Specialist. She is responsible for administering the stimulus grant contracts which specifically includes HPRP. Among other things, Ms. White maintains oversight of HPRP by monitoring stimulus program progress and meeting of program deadlines through regular reports from HPRP. She also reviews SDHC’s requests for reimbursements to ensure that the documentation is complete and that the services performed are in compliance with the contract scope, budget, eligibility of costs. She acts as the liaison to SDHC involving HPRP matters and resolves issues and questions involving SDHC’s administration of HPRP.

Joan Talbert is the CDBG Program Unit’s Fiscal Manager. Ms. Talbert is responsible for essentially all fiscal issues related to funding of HUD-related programs including HPRP. She is responsible for setting up the proper accounting within the City’s OneSD system and HUD’s IDIS system. She is also responsible for responding to any audits and processing

reimbursements by, among other things, ensuring that draw downs of funds are accurate and accounted for.

Angela Nazareno is the CDBG Program Administrator. She is the direct supervisor of Ms. White and manages the day-to-day operations of HUD-funded grant programs including HPRP. As it relates to HPRP, Ms. Nazareno is the department liaison with the Mayor's Office and City Council responsible for updating them on the ongoing process of funded projects. In the event that Ms. White is unable to resolve any issues involving SDHC's administration of HPRP, Ms. Nazareno would provide her expertise to make or to assist in making any such decisions.

Beth Murray is the Deputy Director of Community Planning and Community Investment (CPCI). The CDBG Program Unit is a sub-unit of CPCI. As such, Ms. Murray has supervisory responsibilities over Ms. White, Ms. Talbert, and Ms. Nazareno. Ms. Murray is responsible for making policy decisions related to the City's administration of all HUD grant programs which are overseen by CPCI, including but not limited to HPRP.

William Anderson is the Director of CPCI. Among other things, Mr. Anderson is Ms. Murray's supervisor and oversees the entire CPCI department, which includes the City's CDBG Program Unit. Although Ms. Murray is largely responsible for the day-to-day operation of the CPCI department, from time-to-time, Mr. Anderson may be asked to weigh in on policy decisions related to the City's administration of HUD grant programs including HPRP.

Hildred Pepper is the Director of the Purchasing and Contracting Department. The vast majority of City contracts including ones involving HPRP route to the Purchasing and Contracting Department for review and execution. As one of the Mayor's designees, Mr. Pepper has the authority to execute any contract or amendment thereto subject to any required Council approval. *See* San Diego Charter §§ 28, 260(b) and 265(a). Mr. Pepper was one of two City officials who executed the HPRP Agreement on behalf of the City.

Walter Hill is the City's Assistant Chief Operating Officer and is officially part of the Mayor's Office. Mr. Hill acts as the liaison between the CDBG Program Unit and the Mayor's Office on issues related to the City's administration of HUD grant awards including HPRP. As one of the Mayor's designees, Mr. Hill has signature authority for all HPRP contracts subject to any required Council approval. *See* San Diego Charter §§ 28, 260(b) and 265(a).

Jay Goldstone is the City's Chief Operating Officer. Mr. Goldstone is Mr. Hill's direct supervisor. Like Mr. Hill, Mr. Goldstone is also with the Mayor's Office and also has signature authority for HPRP contracts as one of the Mayor's designees, subject to any required Council approval. *See* San Diego Charter §§ 28, 260(b) and 265(a). Mr. Goldstone was one of two City officials who executed the HPRP Agreement on behalf of the City.

In an email dated August 3, 2010, SDHC Senior Program Analyst Kathi Houck provided a comprehensive list of SDHC-owned properties which is attached hereto as Exhibit A. In an

email dated August 12, 2010, Ms. Houck represents that the properties on this list are owned solely by the SDHC.

This opinion is based on facts presented in the most recently filed Statements of Economic Interest (SEI) forms filed by COO Goldstone, Assistant COO Hill, Director Anderson, and Deputy Director Murray. CDBG Coordinator Nazareno, Fiscal Manager Talbert, and Stimulus Program Specialist White were not required to file SEI forms. However, they represent that they have no economic interests other than principal residences owned by Ms. Talbert and Ms. Nazareno, which would not be required to be reported in the SEI form.

This opinion is rendered based on certain facts set forth within this opinion. Any change in any of these facts may change the conclusion of the opinion.

ANALYSIS

Conflict of interest statutes exist to prevent or limit the possibility of personal influence regarding decisions made by public officials. *See* Cal. Gov't Code § 81001; *see also*, *Thorpe v. Long Beach Community College Dist.*, 83 Cal. App. 4th 655, 659 (2000). The statutes prohibiting such activity are the Political Reform Act of 1974 (California Government Code sections 81000 through 91014) and California Government Code section 1090. The Political Reform Act of 1974 (Act) disqualifies public officials from participating in government decisions in which they have a financial interest. *See* Government Code § 81000. California Government Code section 1090 governs conflict of interest issues regarding public officials entering into contracts for services or other matters.

A. Political Reform Act.

California Government Code section 87100 states: "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 a reason to know he has a financial interest." A public official includes any "member, officer, employee or consultant of a state or local government agency." Cal. Gov't Code § 82048. Local government agency is defined as "a county, city or district of any kind...or any department, division, bureau, office, board, commission or other agency of the foregoing Cal. Gov't Code § 82041." Therefore, the Mayor and City employees are public officials.

Generally, a public official makes a governmental decision when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. Cal. Code Regs. title 2, § 18702.1. A public official participates in making a governmental decision when he or she acts within the authority of his or her position to: (1) negotiate, without significant substantive review, with a governmental entity regarding a

governmental decision; or, (2) advise or make recommendations to the decision maker directly or without significant intervening substantive review. Cal. Code Regs. title 2, § 18702.2.

The governmental decision that could potentially create a conflict of interest for City officers and employees is the City's decision to amend the HPRP Agreement to allow SDHC to lease SDHC-owned units (set forth on the attached Exhibit A) to tenants receiving HPRP funding assistance if HUD grants the waiver to its HPRP program requirements (Decision).

In this instance, COO Goldstone and Purchasing Director Pepper actually executed the HPRP Agreement with SDHC on behalf of the City. Any amendment to the HPRP Agreement would likely be executed by them as well. Therefore, they are making governmental decisions within the context of the Act.

In their role as employees within the City's CPCI department, all of the other individuals analyzed in this opinion provide advice or make recommendations to the Mayor's Office directly or indirectly with regard to the execution of any contractual amendment involving the HPRP Agreement. Typically, both Ms. White in her role as Stimulus Program Specialist and Ms. Talbert as the Fiscal Manager would do so indirectly through research and analysis conducted by them on the feasibility of executing such a contractual amendment based on the program requirements and the current performance of the SDHC as it relates to the existing HPRP Agreement. They would report this information to their direct supervisor, CDBG Coordinator Angela Nazareno, who would also weigh in by exercising her judgment based on her expertise with such HUD programs. All of this information would be provided to Deputy Director Beth Murray or Director Bill Anderson, or both, for their review and approval to be relayed to the ultimate signatories in the Mayor's Office on any proposed contract amendment.

Based on the foregoing, Ms. White and Ms. Talbert would not participate in making the Decision because in the performance of their duties, there is significant intervening substantive review by their supervisors, CDBG Coordinator Angela Nazareno and Deputy Director Beth Murray. However, CDBG Coordinator Angela Nazareno, Deputy Director Beth Murray, Director Bill Anderson, and Assistant COO Hill would participate in the making of the Decision because they advise or make recommendations to the decision-maker directly or without significant intervening substantial review. COO Goldstone and Purchasing Director Pepper would make the Decision by executing the proposed amendment to the HPRP Agreement.

Once it is determined that a public official is involved in making a government decision, we must next examine whether or not the official has a statutorily defined economic interest. Pursuant to California Government Code section 87103, a public official has a 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, a member of his or her immediate family, or on any of the following: (1) investments of \$2,000 or more in a business entity; (2) interest in real property worth \$2,000 or more; (3) a source of income that totals \$500

or more within the 12 months prior to the decision in question; (4) a business entity in which he or she is an officer, director, employee, or holds any business position, irrespective of whether he or she has an investment in or receives income from the entity; or (5) gifts from a single donor aggregating \$420 or more in the 12 months prior to the decision in question. *See* Cal. Code Regs. Title 2, §§ 18703.1-18703.5.

Based on their most recent SEI forms filed with the City, the only City official or employee making or participating in the making of the Decision with a qualifying economic interest is Deputy Director Murray. Ms. Murray has an investment of over \$2,000 in a business entity. Deputy Director Murray also has interests in real property including one at 1394 Oro Vista Road, San Diego, amounting to more than \$2,000. None of the other City officials and employees has an economic interest as defined in California Government Code section 87103.

The next step in the analysis is to determine whether the economic interest of Deputy Director Murray is directly or indirectly involved in the Decision. Cal. Code Regs. Title 2, § 18704. A public official's economic interest is indirectly involved when it is not directly involved in the governmental decision. Cal. Code Regs. title 2, § 18704(a). Business entities are considered to be directly involved in a government decision when: (1) they directly or through an agent initiate the proceeding in which the decision will be made; or, (2) they are otherwise a named party in, or the subject of the proceeding concerning the decision before the official or the official's agency. Cal. Code Regs. title 2, § 18704.1(a). Real property interests are considered to be directly involved in a government decision when the real property is located within 500 feet of the real property which is the subject of the government decision. Cal. Code Regs. title 2, § 18704.2(a)(1). The determination of whether economic interests are directly or indirectly involved is essential to the determination of whether the economic interest is material. Cal. Code Regs. Title 2, § 18705. The materiality of each qualified economic interest is subject to its own unique standard under the Act. *Id.*

In this case, the SDHC, not Deputy Director Murray's business entity, is initiating the action to amend the HPRP Agreement. Also, the business entity in which Deputy Director Murray has an interest is not the subject of the action to amend the HPRP Agreement. Consequently, Deputy Director Murray's interest in the business entity is indirectly involved in the Decision.

The business entity in which Deputy Director Murray has a qualified economic interest is not publicly listed on any stock exchanges. *See* Cal. Code Regs. Title 2, § 18705.1(c)(2) and (c)(3). It is also not listed within the Fortune 500 nor does it have revenues that are within the range of Fortune 500 companies. *See* Cal. Code Regs. Title 2, § 18705.1(c)(1). As such, her business interest is material only if it is reasonably foreseeable that any one of the following occur: (1) the governmental decision will result in an increase or decrease in the business entity's gross revenues for a fiscal year in the amount of \$20,000 or more; or (2) the governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or, (3) the

governmental decision will result in an increase or decrease in the value of the business entity's assets or liabilities of \$20,000 or more. Cal. Code Regs. Title 2, § 18705.1(c)(4). Given that the business entity in which Deputy Director Murray has an interest lacks any affiliation or relationship to the SDHC or any of the properties listed in Exhibit A, it is not reasonably foreseeable that the Decision would have a financial effect on her business entity interest.

Additionally, Deputy Director Murray's real property interest is within 500 feet of an SDHC-owned property located at 2381-2389 Grove Avenue, San Diego, as noted on Exhibit A. As a result, her real property interest is considered to be directly involved in the decision to amend the HPRP Agreement.

With regard to Deputy Director Murray's directly involved real property interest, the Act presumes the financial effect to be material unless there is proof that it is not reasonably foreseeable that the governmental decision will have any financial effect on the real property. Cal. Code Regs. Title 2, § 18705.2(b)(1). To date, this Office has not been presented with an economic analysis or any other proof to rebut the presumption that the Decision would have a financial effect on Deputy Director Murray's real property interest. Therefore, to avoid any conflict of interest, any amendment to the HPRP Agreement should exclude the SDHC-owned property at 2381-2389 Grove Avenue, San Diego, from being eligible to receive HPRP funds.

As it pertains to whether there is a conflict of interest, the issue is whether it is reasonably foreseeable that there will be a material financial effect as a result of the Decision. Cal. Code Regs. Title 2, § 18706. Assuming that the SDHC-owned property at 2381-2389 Grove Avenue, San Diego, is excluded from the Decision, the Decision would not have a financial effect on Deputy Director Murray's real property interests and there would be no conflict of interest for any of these City officials and employees pertaining to the Decision.

B. California Government Code Section 1090.

California Government Code section 1090 prohibits government officials from "self dealing" as it relates to the making of contracts. Government Code section 1090 states, in pertinent part, that "[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members." The California Supreme Court stated that the purpose of section 1090 is to make certain that "every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity." *Thomson v. Call*, 38 Cal. 3d 633, 650 (1985). Like the Act, virtually all board members, officers, and employees including City employees are public officials within the meaning of California Government Code section 1090. *See Stigall v. City of Taft*, 58 Cal. 2d 565, 568 (1962).

California courts have defined the making of a contract to include preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. *Millbrae Ass'n for Residential Survival v. City of Millbrae*, 262 Cal. App. 2d 222, 237 (1968); *See also Stigall*, 58 Cal. 2d at 569 and 571. Therefore, COO Goldstone, Assistant COO Hill, Director Anderson, Deputy Director Murray, and CDBG Coordinator Nazareno are involved in the potential amendment of the HPRP Agreement to allow SDHC to make available SDHC-owned units to tenants receiving HPRP funds. *See City of Imperial Beach v. Bailey*, 103 Cal. App. 3d 191, 194 (1980); *See also* 81 Ops. Cal. Atty. Gen. 134 (1998).

So long as any proposed amendment of the HPRP Agreement excludes the SDHC-owned property at 2381-2389 Grove Avenue, San Diego, from the list of eligible housing for HPRP funds, Deputy Director Murray would have no financial interest in the Decision. None of the other City officials and employees stand to gain any monetary or proprietary benefit from the Decision. As a result, there is no violation of section 1090.

C. Local Conflict of Interest Laws

With regard to applicable local laws, the City's Ethics Ordinance mirrors California Government Code section 1090 insofar as making it unlawful for a City official to be financially interested in any contract made by him or her in his or her official capacity. San Diego Municipal Code section 27.3560(a).

Likewise, the City's Ethics Ordinance, San Diego Municipal Code section 27.3561 essentially parallels the Act by making it unlawful for a City official to knowingly influence a municipal decision if it is reasonably foreseeable that the municipal decision will have a material financial effect on the City official or his or her immediate family or any of the following:

- (1) any business entity in which any of them has invested \$2,000 or more;
- (2) any business entity in which any of them is a director, officer, partner, trustee, employee, or hold any position of management;
- (3) any real property in which any of them has invested \$2,000 or more;
- (4) any person from whom any of them has received or been promised \$500 or more in income within the twelve months prior to the municipal decision;
- (5) any person from whom any of them has received gifts which total \$320 or more within twelve months prior to the municipal decision; or,
- (6) the personal expenses, income, assets, or liabilities of any of them.

Honorable Mayor and
Members of the City Council

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As long as the SDHC-owned property at 2381-2389 Grove Avenue, San Diego, is excluded from the Decision, there is no violation of the Ethics Ordinance.

CONCLUSION

Based on the facts set forth in this opinion, the City would not violate any state or local conflict of interest laws if SDHC is allowed to make SDHC-owned rental units available to tenants receiving HPRP funds so long as the SDHC-owned property at 2381-2389 Grove Avenue, San Diego, is specifically excluded from HPRP funding eligibility.

JAN I. GOLDSMITH, City Attorney

By _____

Kenneth So
Deputy City Attorney

KS:mm
Attachment
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