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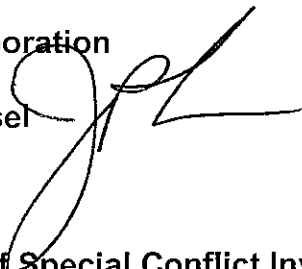
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STAFF REPORT
September 24, 2008 Board Meeting

TO: Board of Directors,
Centre City Development Corporation

FROM: James P. Lough, Special Counsel 

DATE: September 22, 2008

SUBJECT: Second Interim Status Report of Special Conflict Investigation
Counsel (Ballpark Village)

RECOMMENDED ACTION:

To receive report and take appropriate action as follows.

- Renegotiate the Implementation Agreement and related documents for final presentation to the CCDC Board of Directors.
- It is recommended by Special Counsel that several issues be renegotiated or be reconsidered by the Board and specific findings should be made to establish a factual and policy basis for variations to the terms of the 2005 Owner Participation Agreement. We specifically recommend a reconsideration of the removal of the office space requirement, the lowering of the retail office space requirement and reconsideration of the expansion of the Average Daily Trip (ADT) cap increase.
- As part of any future Implementation Agreement or other discretionary approval by the CCDC Board, it is recommended that as a condition of approval that Ballpark Village LLC and/or Lennar of California indemnify and hold CCDC, the San Diego Redevelopment Agency and their officers and employees harmless from any challenges to approval of these agreements and/or permits based on any conflict of interest claim.

- For elements such as office space, retail space and ADT analysis, Special Counsel recommends the retention of consultants for necessary independent review, but does not recommend that CCDC go outside its normal pool of consultants for these independent analyses.
- It is recommended that the Board consider alterations to these recommendations as further information comes forward.

BACKGROUND:

The law firm of McDougal, Love, Eckis, Smith, Boehmer & Foley was retained by the Corporation to review ethics and conflict of interest issues related to several projects. Originally, the office was retained to review the 7th & Market project. At the September 10, 2008 Special Board Meeting, the scope was expanded to other potential conflict issues. Specific direction was given to emphasize the review of the Ballpark Village Project.

The Ballpark Village Project ("Project") was originally approved as an Owner Participation Agreement ("OPA") on May 25, 2005 by the CCDC Board. The OPA was later adopted by the Agency Board. The document was executed on January 13, 2006.

Since that time, the CCDC staff has been negotiating an Implementation Agreement and related agreements, permits and entitlements. The Implementation Agreement was approaching final form and many aspects of the Project had been brought forward by the staff to the full Board and various Committees. The negotiation process was halted with the revelation that Ms. Graham received a \$125,000.00 payment from Ballpark Village partner, Lennar Homes, in June 2007. This payment arose out of a real estate transaction in Florida and is documented, under oath, by Ms. Graham in a Deposition taken in August 2007 (See: Attachment 1). Lennar Homes of California, Inc. is an affiliated business entity, for California conflict of interest purposes, with the parent corporation in Delaware and its affiliated business entities in Florida. Lennar Corporation's home state of Florida has a common corporate headquarters for the entities from which the conflict with Ms. Graham arises.

Under California conflict rules, Ms. Graham was required to disclose the conflict and refrain from participating in negotiations with any affiliated business entity in which she received financial compensation. The public records of CCDC clearly indicate that she participated in negotiations with Ballpark Village, LLC during the time period in which she had the conflicting interest.

DISCUSSION:

OWNER PARTICIPATION AGREEMENT

On May 25, 2005, the CCDC Board of Directors approved the OPA. At the time Ms. Graham was not employed by the Corporation. After approval by the Agency Board, the parties signed the agreement, with the last signature being added on January 13, 2006. While this final signature date was after Ms. Graham assumed office, the signing of the OPA was a ministerial act and did not involve Ms. Graham. (See: 2 California Code of Regulations (CCR) Sec. 18702.4(a)(1); Attachment "2," Fair Political Practices Commission (FPPC) Regulations 18702 – 18702.4.)

With the final execution of the OPA, Ballpark Village, LLC possessed all legal rights to implement the agreement pursuant to its terms. Ballpark Village, LLC is made up of two business entities, JMIR-Ballpark Village, LLC and Lennar Homes of California, Inc. Lennar Homes of California, Inc. is an affiliated business entity of Lennar Corporation, headquartered in Florida. The fact that Ms. Graham joined the Corporation and participated in later negotiations to implement the OPA does not taint the approval of the OPA in 2005.

This situation is different from the 7th & Market Project. In the 7th & Market Project, the disqualifying interest of Ms. Graham persisted throughout that project. Because of her participation in the RFQ/P, Exclusive Negotiating Agreement (ENA) and the Disposition and Development Agreement (DDA) negotiation process, the entire transaction was influenced by the conflict. The Board, using its independent authority to determine whether to proceed on the 7th & Market Project, terminated the process.

Here, Ballpark Village, LLC has contractual rights in the approval given by the CCDC Board and the Agency Board. The OPA is a completed contract that cannot be tainted by a *post hoc* conflict. However, Special Counsel has also reviewed the original OPA for other potential disqualifying interests.

On September 10, 2008, the CCDC Board accepted the resignation of its Corporate Counsel, Helen Holmes Peak. Ms. Peak served as Corporate Counsel as part of a law firm, Lounsbery Ferguson Altona & Peak. In correspondences to the Board Chair, Ms. Peak indicated that her firm had represented Lennar Corporation of California, Inc. in unrelated matters during the calendar year 2005. As a shareholder of the firm, she had a disqualifying interest that precluded her from participating in any part of the OPA process for the Ballpark Village OPA. At the same time that she informed the CCDC Board Chair, the former Corporate Counsel also informed the Agency General Counsel (City Attorney) and the San Diego Ethics Commission of her failure to disclose the conflicting interest on her Conflict of Interest (700) Forms. Once she learned of the conflict, she filed amended forms.

As part of the review of the 2005 OPA approval process, I reviewed CCDC records, interviewed witnesses (including the former Corporate Counsel) and reviewed other information relevant to the issue. The witnesses, including staff and consultants, uniformly stated that the former Corporate Counsel did not participate in negotiation of the OPA that was presented to the Board of Directors of CCDC. The written records verify that conclusion. Except for a brief reference to the former Corporate Counsel on an e-mail list from Ms. Graham that was copied to Ms. Peak after the OPA was approved, no record can be found of her sitting in on negotiations, advising the Board as to the contents of the transaction or otherwise participating in drafting of the OPA or any subsidiary documents.

The former Corporate Counsel's role in redevelopment negotiations, in this issue and others, was very limited. It was almost exclusively limited to general corporate and governmental matters, such as meeting procedure and Brown Act issues, for the Corporation. The preference during the applicable time period, 2005 to present, was to have Special Counsel negotiate OPAs, DDAs and other redevelopment agreements rather than the former Corporate Counsel. According to our review, the redevelopment legal issues were directed at outside Special Redevelopment Counsel or the City Attorney's Office, as Agency General Counsel. The former Corporate Counsel's role was limited to general corporate and government matters rather than participation in project-specific issues. Interviews and the review of records of this transaction and others are consistent on this point.

At the May 25, 2005 Board meeting where the Ballpark Village OPA was approved, Ms. Peak was present and did not announce a conflict of interest. She remained at the podium throughout the staff presentation, but did not speak to the item. There is no reference in the minutes of the meeting to any involvement by the former Corporate Counsel. Videotapes of the meeting indicate no involvement other than being present. Interviews and reviews of meeting minutes of individual negotiating sessions indicate that the former Corporate Counsel did not attend any negotiating sessions for the OPA or later negotiations over any matters related to the substance of the Project. The former Corporate Counsel did attend other Board and Committee meetings that the item was discussed, but did not participate in discussions of the matter. The former Corporate Counsel has stated that she was unaware of the conflict at the time of the approval of the OPA.

This office reviewed the issue of whether the mere presence at the dais when the item was discussed can legally be considered improper participation. If so, would mere presence without participation invalidate the approval the OPA. It is our conclusion that mere presence on the podium for an item by a staff member, in this instance, does not invalidate the OPA.

Here, the standard for a public official, under the FPPC Regulations, is whether they are "making, participating in making, or using or attempting to use official position to

influence a government decision". (2 CCR Sec. 18702(a).) As defined in Section 18702.1, the former Corporate Counsel did not vote, commit the Agency (CCDC) to enter into a contract on behalf of the agency or determine not to act on the Ballpark Village OPA.

Section 18702.2, regarding participation "in a governmental decision", is the regulatory section that usually is applicable to a staff member, as opposed to a voting Board member. This section defines participation as follows:

§ 18702.2 Determining When a Public Official is Participating in
Making a Governmental Decision.

A public official "participates in making a governmental decision," except as provided in Title 2, California Code of Regulations, section 18702.4, when, acting within the authority of his or her position, the official:

(a) Negotiates, without significant substantive review, with a governmental entity or private person regarding a governmental decision referenced in Title 2, California Code of Regulations, section 18701(a)(2)(A); or

(b) Advises or makes recommendations to the decision-maker either directly or indirectly without significant intervening substantive review, by:

(1) Conducting research or making any investigation which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision referenced in Title 2, California Code of Regulations, section 18701(a)(2)(A); or

(2) Preparing or presenting any report, analysis, or opinion, orally or in writing, which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision referenced in Title 2, California Code of Regulations, section 18701(a)(2)(A).

The former Corporate Counsel was not part of the negotiating team. (2 CCR Sec. 18702.2(a).) There is no indication that any of the Board members were advised or received a recommendation from Ms. Peak on the OPA or later actions. (2 CCR Sec. 18702.2(b).) No report was prepared or research conducted that was presented to the Board from the former Corporate Counsel. (*Id.*) This investigation could not find any actions taken by the former Corporate Counsel that could have been construed as a substantive recommendation on any aspect of the Ballpark Village Project.

Likewise, no improper influence could be found under the anti-lobbying section of the FPPC regulations. (2 CCR Sec. 18702.3.) We could find no indication of "attempts to influence" on behalf of a "business entity" by the former Corporate Counsel for the Ballpark Village Project. At the time, the former Corporate Counsel was not involved in the negotiations and there is no public record (minutes or notes) showing her discussing the matter with Board members.

Remaining on the dais does create a legal problem under the Political Reform Act and implementing regulations. Since June 10, 2003, a public official with a conflict must follow certain procedures when a disqualifying conflict of interest exists. (See: Attachment "3," 2 CCR Sec. 18702.5(b).) The type of conflict must be publicly identified and made part of the official record. The official must leave the room after the identification of the conflict. (2 CCR Sec. 18702.5(b)(3).) At the May 25, 2005 CCDC Board meeting, the former Corporate Counsel took none of these steps.

While the failure to leave the proceeding during the Ballpark Village OPA presentation may violate this requirement, it does not affect the legality of the transaction. There are several reasons for this conclusion. First, the disclosure and removal provision does not fall under the category of a "use of a public position to influence a government decision." (See: Attachment "2".) This recently created regulation is entitled: "Public Identification of a Conflict of Interest for Section 87200 Filers." The purpose of the section is to mandate an official who is required to file an Annual Conflict of Interest Form (700) to announce the conflict and leave the room with most types of conflicts. The failure to abide by the provisions of this section is not one of the indicators of undue influence under the "making, participating in making, or using or attempting to use official position to influence a government decision". (See: Attachment "2" Fair Political Practices Commission (FPPC) Regulations 18702 – 18702.4.) This section was added after the "influence" regulations were adopted and, while it is a prohibited act, it is not a type of issue, which is normally considered an "undue influence" violation.

The recommendation of the Special Ethics Counsel is that the Board does not need to take any curative action regarding the 2005 approval of the Ballpark Village Owner Participation Agreement with Ballpark Village, LLC. Later conflicts do not taint the previous transaction. The later involvement of the former President cannot impact the vested rights held under the OPA. The former Corporate Counsel's participation in the Board meeting when the matter was approved does not rise to the level of a prohibited conflict that would invalidate the transaction. Therefore, the Board of Directors should continue to proceed with potential implementation under the 2005 Owner Participation Agreement.

IMPLEMENTATION AGREEMENT AND SUBSEQUENT NEGOTIATIONS

Currently, there is a signed and active Owner Participation agreement between Ballpark Village LLP and the Agency. The fact that the Ballpark Village transaction has a pre-

existing agreement sets it apart from the 7th & Market situation. However, there are differences, in significant respects, between the formation of the Ballpark Village OPA and the current on-going process to an Implementation Agreement.

As opposed to the OPA process, Ms. Graham was part of the negotiations between Ballpark Village, LLC and CCDC to establish a framework for an implementation agreement. While the negotiations were mostly between CCDC and JMIR-Ballpark Village, LLC, Lennar Corporation of California, Inc. held a 50% stake in the transaction. There is no legal distinction between an active and passive partner in a transaction for conflict purposes in this situation.

The former chief operating officer and president received compensation from a Lennar Corporation related business entity during the negotiations. The payment of \$125,000 was made by this Lennar affiliate to Ms. Graham in June, 2007. This is confirmed by sworn testimony of Ms. Graham. (See Attachment 1.) This payment amounts to a disqualifying interest. Ms. Graham participated in the negotiation of a transaction with CCDC while having a prohibited interest in violation of California conflict of interest regulations (2 C.C.R. section 18702.2(a) & (b)(1).) Special counsel has found no evidence of a *quid pro quo* between the Florida/Lennar/Related transaction and either the Ballpark Village or the 7th & Market transactions. However, in both instances clear FPPC conflict of interest violations exist which have tainted negotiations.

REVIEW METHODOLOGY

The purpose of this review was to focus on determining the existence of undue influence. Since the OPA is still in place, this transaction, unlike 7th & Market, has a baseline that is untainted by the conflict that arose out of Florida.

In order to make recommendations in this matter, the Special Counsel interviewed witnesses, reviewed emails, meeting notes and other CCDC documents related to the OPA process and the negotiations intended to lead to an Implementation Agreement. He also reviewed official records regarding corporate relationships and interviewed outside witnesses regarding the conflict issues, CCDC procedures and general market conditions.

Specifically, the Special Counsel looked at Ms. Graham's involvement in the transaction. As with most busy executives, the former president did not spend an inordinate amount of time participating in detailed negotiations of this project or any of the others reviewed by this office. Typically, she attended portions of meetings and gave input on key points of interest and gave advice to staff and consultants on what direction to take on sticking points between the parties. Much of this is typical for current and past chief executives of CCDC and other similar organizations.

A second element of the review is whether a particular deal point is at variance with the terms and conditions of the original Owner Participation Agreement. While it is not unusual to vary from the original terms of an OPA when implemented, variations are an indicator of a potential undue influence issue. Market conditions often lead to changes when development moves from conceptual to the practical stages of development. Here, Special Counsel attempted to determine and make recommendations as to whether any deal points were influenced by potential bias as opposed to changing market conditions or normal negotiation factors.

Another element of review was the normal procedures, processes and methods used by CCDC. Variations from normal practices are another potential indicator of bias.

SPECIFIC IMPLEMENTATION AGREEMENT ISSUES

As with any negotiation of an Implementation Agreement, most of the elements are either carried over from the original Owner Participation Agreement/DDA or represent standard language required by either the Agency or other law. Implementation of the OPA in this situation came down to approximately 13 significant issues that took up most of the negotiating time. These are the key issues that the Board should review to consider whether they should be renegotiated.

First of all, on an overall basis, it is not recommended that the current draft of the Implementation Agreement be brought forward for approval to the CCDC Board in its current form. While most elements are typical and/or consistent with the pre-existing OPA, the mere existence of a conflict would make approval of any draft transaction with the former president's significant participation subject to suit and probable invalidation. Under Government Code section 91003, any person may bring an action to challenge the transaction since it was made with the participation of a person with a conflict of interest. Any variation from the original OPA would more than likely not withstand judicial scrutiny without an independent review by the Board of Directors and/or outside parties. Considering Lennar is still a party to the OPA, through the Ballpark Village LLC, this risk is even greater.

For these reasons, this office recommends the Board reconsider a new implementation agreement negotiated between the parties without Ms. Graham's participation. While most of the elements will likely remain the same because they are based on verified market conditions, the existing OPA and standardized CCDC practices and policies, renegotiation should not create a significant hurdle to this project. Considering the uncertain status of Marriot's participation in the transaction at this time, it is more than likely that the transaction will need renegotiation to address this issue as well.

1. Conveyance of Agency-Owned Property

As part of the implementation of the OPA, there are certain agency owned parcels that were to be assembled with the parcels owned by Ballpark Village, referenced in the OPA as Parcels "C" and "D." The parcels to be added to the project are remnants of street vacations.

At this point, no position has been reached by staff regarding the appraised value and/or methodology for determining the appraised value. Typically, appraised value is determined through independent appraisers. Therefore, no ratification of a validation or other curative steps need to be taken at this point. Staff would continue discussions with developer regarding appraised value and methodology for establishing appraised value. These factors could be approved through the normal process utilized by CCDC in these matters.

2. Minimum Office Space requirement

Under the OPA, the Developer must provide a minimum of 300,000 sq.ft. of office space distributed among Parcels C and D. The Developer had requested elimination of the office space requirement. Previously, the staff recommendation supported the developer's request based on market conditions for office space at the site's location. The ultimate recommendation was to eliminate the office space requirement.

It is recommended by Special Counsel that the office space requirement not be eliminated at this time. The conclusion regarding the elimination of the office space requirement by CCDC staff was based on interviews and other research that showed significant involvement by Ms. Graham at an early stage of the process on this issue. This was an important element of the OPA and was considered to be eliminated without, apparently serious negotiations on the matter.

Special Counsel recommends that, at this point, the minimum office space requirement of the OPA not be eliminated from the negotiations. If, during further negotiations, it can be shown by the demonstrated lack of need for office space within this area of the City, the Board could reconsider this matter. Evidence of office demand could be solicited from independent sources such as real estate professionals, appraisers, redevelopment consultants or other related professionals.

Also, the Board could also consider shifting the existing office requirement to Parcel C since the original OPA does not designate where the office space must be located.

3. Minimum Ground Floor Retail Space Requirement

Under the OPA, Developer must provide a minimum of 115,000 sq. ft. of ground floor retail space among Parcels C and D. The Developer requested a reduction in the minimum ground retail space requirement from 115,000 sq.ft. to 75,000 sq.ft. Staff had

not reached consensus in this item, and left the matter to the Board for a determination. If renegotiation results in the proposed project allocating only 7740 sq.ft. to Parcel D, one possibility is to allocate the balance of the minimum requirement to Parcel C.

Another possibility would be to continue the previous Board direction to reduce the minimum ground floor retail requirement to 75,000 sq. ft. Thereafter, each parcel would contain a minimum retail requirement in a recordable document as part of the future development plan approval.

4. At Maximum Daily Trips and Traffic Demand Management (TDM) Plan.

The OPA provided for a maximum of 16,000 cumulative Average Daily Trips ("ADT") among Parcels C and D. The Developer had requested an increase in the maximum ADT by 7,901 to a new total of 24,401.

The Developer proposed that if the District-wide ADT maximum was not increased or eliminated by 2011, then Developer would commission a trip generation analysis of the hotels third full year of operation. The hotel would be obligated to implement a TDM plan if more than 9 trips per room limited to the following three provisions:

- Private transit shuttle for hotel guests and employees connecting the hotel to the airport, Horton Plaza, Harbor Drive and Balboa Park;
- Employer-subsidized transit passes for its hotel employees; and
- Carpool parking spaces for its employees.

Upon implementation of the TDM Plan, Parcel D's assumed trip generation would be reduced by 15% or 2,645, thereby increasing Parcel C's maximum ADT by 2,645 to a new total of 9,415 trips.

Staff supported the requested increase in ADT provided certain conditions were met. If the District-wide ADT did not significantly increase or be eliminated, the Developer would then have to commission a trip generation analysis during the hotel's third full year of operation, or upon stabilization. If the trip generation exceeded 7.65 trips per room, then the Developer would immediately implement a TDM plan approved by the City's Traffic Engineer. Follow-up trip generation analyses would be conducted and additional TDM measures would be implemented until the 7.65 trips per room goal was met. A private transit shuttle would be provided at little or no cost to its riders, and employee transit passes would be subsidized at 100% of their cost.

If the City's Traffic Engineer accepted Developer's proposed TDM measures as sufficient to result in a 15% reduction in trip generation, no future studies would be required. All trips reduced from Parcel D due to the trip reduction measures would

increase the District's balance of unused ADT and would be available for future use within the District and not transferred to Parcel C.

The Board has two potential options in this issue. One would be to re-approve the previous Board direction in this matter. Ms. Graham, based on Special Counsel's review of meeting notes and interviews, took an aggressive position on the ADT issue against the Developer's position. The position of Ms. Graham and staff was influenced more by legal opinions received that counseled against a more aggressive position on the issue than was ultimately recommended by staff. Legal advice was sought from outside independent legal counsel, redevelopment Special Counsel, and the City Attorney's office on this issue.

The bottom line still required the ADT assumptions to be based upon trip generation that is based on a 9 trip per room formula. This is the standard formula used by the City, Agency, and CCDC. It is recommended that existing environmental consultants review this matter and/or traffic engineers used by CCDC to ensure that any changes made are based on typical data and assumptions used in the downtown redevelopment area.

5. Expiration of Transfer Density

The Development Permit must be issued within five years from the effective date of the OPA or additional density transferred from the Ballpark Village parcel would expire, effective January 13, 2011. The Developer had requested a five-year extension in the expiration date of additional density due to current market conditions. Even though market conditions were sluggish, staff recommended only a two-year extension to the expiration of the transferred density. The Board directed that a three-year extension of the expiration of density transfer be granted, to January 2014.

It is recommended that the Board reconsider this matter for several reasons. First, the involvement, or lack of involvement of Marriott at this point, would have an impact on the tentative Board position. Also, market forces drive the Board's consideration in this matter more than any perceived conflict. Special Counsel could find no specific bias issues or involvement by the former president on this matter.

6. Substitution of Ballpark Events Parking

The OPA provided that the Developer would preserve 267 parking stalls within Parcels C and D for Ballpark events. The Developer would be able to substitute the onsite parking with other parking, if that other parking were deemed to be acceptable by the Agency and met the requirements of the FEIR. The Developer proposed substitution of 300 parking stalls located in the MTS Garage for the onsite surface parking spaces. After review, staff and legal counsel recommended approval of this

request. The Board directed approval of the Developer's request for the 300 stalls in the MTS Garage, pursuant to a lease agreement.

Special legal counsel and interim Corporate Counsel for CCDC independently reviewed this matter. From our review, it appears that this issue is mainly handled by project staff legal counsel and not specifically Ms. Graham. Therefore, this is not an issue that needs revisiting for conflict reasons.

7. Offsite Traffic Mitigation Improvements.

The Developer proposed payment of the project's allocated share of the traffic mitigation improvements identified in the Traffic Report. Staff recommended approval of the Developer's planned contribution of the projects share of the required improvements.

This issue is still in process and final recommendation should be received from staff, and the Board should act as it deems appropriate in the matter.

8. Sustainable Design

Developer proposed to receive commissioning from the U.S. Green Building Council for a LEED-certified project. Staff recommended a Schedule of Performance which would require the Developer to receive LEED-certification within a reasonable period of time from building occupancy and which would encourage additional sustainable measures wherever possible. The Board required LEED-certification requirements pursuant to CBA be integrated into the Schedule of Performance. The LEED Design Submittal would be submitted to the USGBC within 120 days after construction commenced, and the LEED Construction Documentation Package would be submitted within 120 days after construction is completed.

This item does not involve significant input from the former president. It is recommended that negotiations proceed on this matter along the lines previously directed by the Board.

9. Sewer Capacity Upgrades

The Developer had requested the Agency pay the costs for the necessary sewer upgrades and obtain reimbursement for those property owners who would benefit from the improvements. However, staff had recommended that the Developer incur those costs, and enter into a Developer Reimbursement Agreement with the City to recover the costs from property owners. The Board's direction was for staff to work with the City to complete a capacity study, prepare costs estimates, and determine Developer's contribution to sewer usage. The findings would be presented to committee for further

direction, and the City would finance construction costs and establish a reimbursement mechanism.

These issues were essentially negotiated by staff in conjunction with City standards and policies. No significant involvement by Ms. Graham could be determined by Special Counsel on this issue.

10. Rescission of OPA Modifications

Staff recommended that, in the event the project was not constructed, all elements of the Implementation Agreement, with the exception of the conveyance of Agency parcels, be rescinded. If the Developer did not initiate utilization of the Development Permit within three years of approval of the Permit, the office space requirement of 300,000 sq.ft. would be reinstated to Parcel D, the ground floor retail space requirement would be reinstated to 51,000 sq. ft for Parcel D and 64,000 sq.ft. for Parcel C, and the ADT cap on Parcel D would be reduced from 17,631 to 8,770. The extension of the expiration date for transferred density and the substitution of Ballpark event parking would not be rescinded.

Upon renegotiation, Board should exercise its independent judgment as to the status of these items. This issue overlaps with many other elements, such as office space square footage.

11. Water Supply Assessment (WSA)

The Developer's compliance with water demand reduction measures is pending input from the City Water Department. Compliance with demand reduction measures would be a condition of building permit issuance.

This issue is essentially process-driven following state and local procedures. No variation is recommended by Special Counsel on this item.

12. Public Art Program

The Public Art Program is a requirement that must be submitted and approved prior to the Development Permit being issued. The Developer had requested that the submission and approval requirement be delayed until there had been further progress on the Project design. Recommendation from staff was to add milestones to the Schedule of Performance in the Implementation Agreement, in order to ensure timely submission and approval of the Public Art Program. The Board's recommendation was to require that a Conceptual Art Plan be submitted within 3 months of approval by the Agency of the Implementation Agreement, and that the Final Art Plan be submitted at or before the building permit is issued. The Artwork would be installed prior to building occupancy.

In reviewing this project and other projects reviewed by CCDC, it appears the Board of Directors has significant design and art input in all projects. Specific Board input appears to drive design and art issues. It is recommended that the Board exercise its independent judgment on this issue whether it makes changes or leaves this matter as it stands, based on its previous direction.

13. Padre Employee Parking

Developer had requested that approximately 100 parking stalls on the Tailgate Park South site be made available to Padres employees at no cost during the Project's construction period, until construction staging could be removed to Parcel C. It was staff's recommendation to first quantify fiscal considerations before consideration of this request, and present any fiscal impacts of the proposed parking to the Board.

This particular issue was unresolved, and therefore, the Board should allow staff to continue the process and return with a recommendation based on the fiscal impacts of the Developer's request.

CONCLUSION AND RECOMMENDATION

As stated above, this transaction differs from 7th & Market for one primary reason. The Ballpark Village development is already subject to an approved OPA that is untainted by the actual conflict as discussed above. Since the Implementation Agreement and related implementation measures were subject to negotiations overseen by former president, Nancy Graham, our office is recommending the following:

1. Re-negotiation of the Implementation Agreement and related documents for final presentation to the CCDC Board of Directors. As part of the re-negotiation, most of the elements of the transaction should not require substantial amendments or revision. Most elements can remain in place since they were not influenced and follow the general guidelines of the OPA, existing CCDC policies, Agency policies, and policies and procedures of the City of San Diego.
2. It is the recommendation of Special Counsel that several issues be renegotiated or reconsidered by the Board and specific findings should be made as to the propriety of the actual approved portions of the Implementation Agreement to demonstrate that the necessary independent review was undertaken. These elements would include a reconsideration of the removal of the office space requirement and reconsideration of the expansion of the Average Daily Trip (ADT) cap increase. We would also recommend that independent analysis be done of these issues in the case of commercial and retail space issues, by real estate consultants currently being used by CCDC to give the Board an independent analysis. As to the ADT analysis, an independent analysis should

be conducted to determine if the recommendations are consistent with San Diego and Agency policies regarding vehicle trips, procedures and the applicable Environmental Impact Report. We advise that the Special Counsel did not find bias on this issue by Ms. Graham influencing the staff recommendation. However, a determination by an environmental consultant on the reasonableness of the mitigation measures is recommended.

3. As part of any future Implementation Agreement or other discretionary approval by the CCDC Board, it is recommended that as a condition of approval that Ballpark Village, LLC and/or Lennar of California, Inc. indemnify and hold CCDC, the San Diego Redevelopment Agency and their officers and employees harmless from any challenges to approval of these agreements and/or permits based on any conflict of interest claim. This hold harmless requirement would allow CCDC and/or the Agency to defend itself using attorneys of its choice and to pass on reasonable attorneys fees and costs incurred in defending the actions to the Developers. This allows CCDC to pass costs related to this issue to the party who participated in the conflict, if litigation ensues.
4. For elements such as office space, retail space and ADT analysis, Special Counsel recommends the retention of consultants for necessary independent review but does not recommend that CCDC go outside of its normal pool of consultants for these independent analyses. There are two reasons for this recommendation. First, none of the consultants that CCDC normally uses has been alleged to have any conflict relating to this transaction or any other transactions at this point. Second, using normal consultants will speed up the process and cut costs in that consultants who have no prior experience working with CCDC will expend more time and expense in determining CCDC compliance with policies and procedures that are otherwise known to current consultants. Finally, one of the main reasons the analysis is recommended is to determine whether policies and procedures were circumvented in any of the recommendations made. Consultants currently being utilized by CCDC would be more knowledgeable about CCDC practices and procedures and could more quickly identify variations that could have resulted from divided loyalties.
5. It is recommended that the Board consider alterations to these recommendations as further information comes forward. There are investigations being conducted regarding these issues by the City Attorney's office and others. Participants in the transactions may be engaged in their own due diligence regarding these issues and new information should be considered when the CCDC Board determines how to proceed from this point forward.

Special Counsel is not recommending, at this time, that this transaction or any related transaction to the Ballpark Village OPA be validated through court proceedings. First, the Owner Participation Agreement, as discussed above, was not influenced by the Florida/Lennar/Nancy Graham transaction. Ms. Graham was not an officer or employee of the organization at that time. Second, the Implementation Agreement had not been

formally approved by the Board of Directors. Therefore, it would be difficult to ratify a transaction that had not taken place. The purpose of the Special Counsel's recommendations is to allow the Board to review the transactions and various deal points while making an independent judgment on which elements should be retained and which ones should be modified.

If you have any questions regarding any of the above-mentioned matters, Special Counsel will be available at the Board meeting to answer those questions.

ATTACHMENTS:

1. Partial Deposition Transcript of Nancy Graham (August 2007).
2. FPPC Regulations 18702 – 18703.4.
3. FPPC Regulation 18702.5.

JPL:kld

ATTACHMENT 1

1 A I only recall being furious at all of the boys.

2 Q All of them including Kevin?

3 A Yeah.

4 Q Why?

5 A Because I thought that they were all acting
6 ridiculous and that, you know, they were just being stubborn
7 and ego was getting in the way of a really good deal.

8 Q What was the issue that occurred between Kevin and
9 Ryan during that deal that then triggered all these buyout
10 offers and ultimately Ryan buying out Kevin?

11 A We had a meeting and I think that meeting was on a
12 Sunday night. I don't recall. What ultimately happened
13 because we were 50/50 we needed equal agreement to go
14 forward into how we were going to proceed and we couldn't
15 get it and we wanted today do one thing, Ryan wanted to do
16 something else, and basically both Rami and Ryan said we're
17 not going to agree to anything that you want to do which was
18 a problem. The issue was, one of the issues was of course
19 the exercise of the option but one of the bigger issues was
20 that Chris was kind of being a jerk in dancing us all around
21 and wanting more money and this, that and the other and the
22 lawsuits. There was an environmental issue on that site.

23 Q Right.

24 A And Ryan and them wanted to sue. And I remember
25 Ryan's words were that we would just sue and bring Chris to

1 her knees and get the property for half of what Chris was
2 asking for. And being a lawyer I disagree because I said
3 Ryan, that will never happen. Once Chris does what she's
4 supposed to do with the environmental, the Court is going to
5 rule we have to close. So he said his theory was to keep
6 her in court as long as he could, bring her to her knees and
7 get the property for half price. I said that's not going to
8 happen. The Court will never do that. That was my part of
9 it. There were meetings between Rami and Ryan and Kevin
10 that I was not party to but I did disagree with that
11 assessment because as a lawyer practicing in an area that I
12 knew that it would be very short order before she was --
13 already had an environmental consultant, they were already
14 doing part of it, and as quickly as it was done, the Court
15 is going to order us to close. So there was no way. And we
16 did not want to be, I did not want to be a party to a
17 lawsuit that I did not think was a legitimate lawsuit even
18 for tactical purposes. In other words, we people file
19 lawsuits for tactical. I know that.

20 Q Right.

21 A But I didn't want to in that particular one
22 because I did not think it was legitimate and because
23 frankly, I thought it would be very publicly embarrassing.
24 It would piss the Town of Boynton Beach off really bad
25 because this project was so important to them. And that if

1 we got in a lawsuit and just drug it out just to turn a
2 screw to Chris that it was really, I thought it was not
3 good. It would hurt our reputation as developers. It would
4 hurt my reputation, you know, because I've always had a very
5 straight forward reputation, excellent reputation with
6 regulatory agencies and cities and frankly I wasn't willing
7 to sacrifice that on a lawsuit that I felt was not a
8 legitimate lawsuit.

9 Q So based on the two issues that neither one of you
10 could agree how to develop the property and you have this
11 other issue do we tie her up in court or not, there was an
12 impasse do we hold her feet to this environmental claim half
13 price, there was an impasse between Ryan and Rami; is that
14 fair?

15 A Yeah. But I think by that time, there was kind of
16 the culmination of it. I think my relationship with
17 everybody was still fine but the relationship between Ryan
18 and Kevin had deteriorated and it was very hard. It just
19 came to the point where basically, you know, like that night
20 we were told we're not going to agree to anything you want
21 to do and kind of it left us all in an okay, they're not
22 going to agree to it, they're not going to do it. What the
23 hell do you do?

24 Q And N-K ultimately bought Ryan out on that
25 project?

1 A Ultimately.

2 Q Your husband said one night at City Place he had
3 dinner. You were not there?

4 A I was not there.

5 Q With Rami and Ryan. You didn't participate in
6 that dinner?

7 A I did not.

8 Q Did he tell you Rami had made the statement we
9 will never fund any of your projects and we never intended
10 to fund any of your projects?

11 A He did tell me that.

12 Q Did you continue to have any relationship with
13 Rami after that dinner or meeting between Kevin, Ryan and
14 Rami at City Place?

15 A Yes.

16 Q And did you ever say to Rami, you know, I can't
17 believe you said that or why did you make that statement to
18 Kevin or did it ever come up?

19 A It didn't really come up. The relationship I had
20 was unfortunately strained and not real often, but did I
21 ever talk to him after that? Yeah. Some. I considered
22 them again my friends.

23 Q Right. How much money has N-K been paid from the
24 Lennar/Related deal on Lantana to date?

25 A How much have they been paid to date?

1 Q Yes. Do you know?

2 A You know I don't know because -- I can give you a
3 guesstimate.

4 Q Okay.

5 A But since Kevin handled that and of course we were
6 pretty much -- we were physically split up and close to
7 legally split up before any of that money came in, we have
8 been paid something over 7 million.

9 Q Okay. Kevin at his depo which was in June said
10 that as of May 2007, his depo was right in the beginning of
11 June, he said that N-K was paid 7,250,000. And then there
12 was another, the back end 250 had also been paid.

13 A Oh, because the back end 250 had a preference.
14 That's right. So we knew -- I think that's correct. I
15 think that's probably a fairly accurate statement. There
16 was about two months ago, within the last couple of months
17 there was another distribution of \$125,000. Just one total
18 125,000 I think or am I wrong? I'm wrong. Maybe that was
19 the 250 preference.

20 Q Because you get 50 percent.

21 A You're correct.

22 Q That would have been in June.

23 A In June the 250 preference payment. The other 125
24 was just mine.

25 Q Your half: Has N-K been paid any other

1 distributions from the deposition date which was in June
2 through today's date?

3 A No.

4 Q Has the restaurant Pad been sold?

5 A Not to my knowledge.

6 Q Is it still on the market?

7 A Yes.

8 Q They put it back on the market?

9 A No. I could be wrong too. I have no idea. I
10 know at one time they took it off.

11 Q Right.

12 A Or they asked permission to reduce it but I have
13 not been in any -- and Kevin does not keep me -- I mean
14 other than if there's some money that comes that he's sent
15 me, I have no clue what's going on with it. I'm not
16 involved in it.

17 Q If or when the restaurant Pad is sold, N-K is
18 entitled to receive 20 percent of the profits as defined in
19 the participation profit agreement from the restaurant Pad,
20 correct?

21 A Correct.

22 Q And do you know what the market value is or the
23 asking price is on the restaurant Pad?

24 A No.

25 Q You heard anything like that?

1 A It was very high at one time but I think it's been
2 dramatically reduced because I think they were being
3 ridiculous.

4 Q 5 million at one time.

5 A Outrageous.

6 Q From the seven and a half million that we've sort
7 of now pinpointed as we know has been paid, did you receive
8 your 50 percent as 50 percent member of N-K?

9 A There were distributions made. Some of it went to
10 between N-K and Kevin there was some obligation to refund
11 working capital.

12 Q Okay.

13 A There was sizable amount of money that went to
14 taxes. Sizable. And then whatever was left after that,
15 those distributions, payment of bills, working capital that
16 went to N-K, taxes, whatever that was left, then that was
17 split 50/50 yes.

18 Q You did receive that whatever was left over that
19 50 percent?

20 A Yes, I have.

21 Q Do you know what the number you actually received
22 that total if we're talking about seven and a half million
23 minus taxes, minus expenses for N-K? Was it close to three
24 million? Was it under 3 million?

25 A Under three.

1 Q It was under 3 million?

2 A (No audible response.)

3 Q Was that money you received placed in trust?

4 A I think quite a bit under three but I don't know.

5 The taxes were big.

6 Q I'm sure. They always are. Was that money that
7 you received then placed into this Nancy C. Graham Trust?

8 A No.

9 Q There is a trust that you formed --

10 A Yes, there is. That's my general estate planning
11 purposes.

12 Q So the money didn't go into that trust.

13 A No.

14 Q It went to Nancy Graham individually?

15 A There was a designation that I sent a letter to
16 Kevin that basically directed him that was an estate
17 planning thing that if something happened to me before those
18 distributions were made that it was to go into that trust.
19 That was an estate planning document. That had nothing to
20 do with if I was still living what was to happen.

21 Q Got it. Let me just look at my notes real
22 quickly. I'll take a quick break with Ryan.

23 (Thereupon, a short break was taken.)

24 BY MS. CLAYTON:

25 Q Two questions. Out of N-K's profit participation

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1 from the Lantana deal, was Ryan Weisfisch paid any money
2 from N-K?

3 A Not to my knowledge.

4 Q And the global agreement that you talked about,
5 this global working relationship you'd have with Ryan and
6 Rami, if you did bring them another deal, another project,
7 were they going to get -- and they agreed to finance it and
8 they did the deal, would they then get a percentage of that
9 particular deal?

10 A Sure. It depends on what the terms would be.

11 Q If they did three deals with you they'd get a
12 percentage on those three deals that were basically
13 separately negotiated?

14 A Yes. Although we were trying to have an overall
15 deal so there was a certain amount of money that was capital
16 structure. We were never able to get that worked out so if
17 it was a million, 5 million, whatever the number was, it was
18 sitting in an account that we could go out and do deals with
19 and we were never able to get that put together.

20 Q It was we'll pay you a one shot time fee, Ryan and
21 Rami, but you're going to do these other deals.

22 A No.

23 Q They were to get paid on whatever was negotiated?

24 A Depends on what the deal would be. Depends on
25 whether you close the land or participate in another way.

1 You start out with a global and each one gets structured
2 however it would get structured. But there was certainly an
3 understanding there would be investors.

4 MS. CLAYTON: No more questions.

5 MR. WOODFIELD: I don't have any. We'll
6 waive.

7 (Thereupon, the deposition was concluded at
8 12:44 p.m.)

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1 STATE OF FLORIDA)

2 COUNTY OF PALM BEACH)

3

4 I, the undersigned authority, certify
5 that the aforementioned witness personally appeared
6 before me and was duly sworn.

7 Dated this 13th day of September,
8 2007.

9

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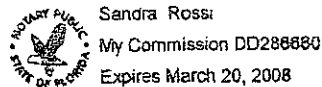
Sandra Rossi
Sandra Rossi
Notary Public-State of Florida
My Commission # DD286680
Expires 3/20/08

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BRÜMM, VEGA & ASSOCIATES, INC.
(305) 374-3340

C E R T I F I C A T E

STATE OF FLORIDA)
COUNTY OF PALM BEACH)

I, Sandra Rossi, Court Reporter, State of Florida at Large, do hereby certify that the aforementioned witness was by me first duly sworn to testify the whole truth; that I was authorized to and did report said deposition in stenotype; and that the foregoing pages are a true and correct transcription of my shorthand notes of said deposition.

I further certify that said deposition was taken at the time and place hereinabove set forth and that the taking of said deposition was commenced and completed as hereinabove set out.

I further certify that I am not attorney or counsel of any of the parties, nor am I a relative or employee of any attorney or counsel of party connected with the action, nor am I financially interested in the action.

The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/or direction of the certifying reporter.

Dated this 13th day of September, 2007.



SANDRA ROSSI
Notary Public - State of Florida
My Commission # DD 286680
My Commission Expires 3/20/08

BRUMM, VEGA & ASSOCIATES, INC.
(305) 374-3340

(Regulations of the Fair Political Practices Commission, Title 2, Division 6, California Code of Regulations.)

§ 18702. Making, Participating in Making, or Using or Attempting to Use Official Position to Influence a Government Decision, Defined.

(a) To determine if a public official is making, participating in making, or using or attempting to use his/her official position to influence a government decision, apply 2 Cal. Code Regs. sections 18702.1 through 18702.4, respectively.

(b) Notwithstanding subdivision (a) of this regulation, to determine if a public official who holds an office specified in Government Code section 87200 is making, participating in making, or using or attempting to use his or her official position to influence a governmental decision relating to an agenda item which is noticed for a meeting subject to the provisions of the Bagley-Keene Act (Government Code section 11120 et seq.) or the Brown Act (Government Code section 54950 et seq.) apply 2 Cal. Code Regs. sections 18702.1(a)(1)-(a)(4), 18702.2, 18702.3, 18702.4, and 18702.5.

Note: Authority cited: Section 83112, Government Code. Reference: Sections 81002, 81003, 87100, 87101, 87105 and 87200, Government Code.

HISTORY

1. New section filed 1-22-76; effective thirtieth day thereafter (Register 76, No. 4).
2. Amendment filed 3-19-76 as an emergency; effective upon filing. Certificate of Compliance included (Register 76, No. 12).
3. Amendment filed 12-20-78; effective thirtieth day thereafter (Register 78, No. 51).
4. Amendment of subsection (a) and (b) filed 7-5-79; effective thirtieth day thereafter (Register 79, No. 27).

5. Amendment of subsection (b) filed 4-28-82; effective thirtieth day thereafter (Register 82, No. 18).
6. Amendment filed 6-22-87; operative 7-22-87 (Register 87, No. 26).
7. Repealer and new section filed 10-17-88; operative 11-16-88 (Register 88, No. 43).
8. Amendment of subsection (c) filed 4-26-95; operative 4-26-95 pursuant to Government Code section 11343.4(d) (Register 95, No. 17).
9. Editorial correction of subsections (a) and (c) (Register 95, No. 50).
10. Amendment of section heading, section and Note filed 3-26-96; operative 3-26-96 pursuant to Government Code section 11343.4(d) (Register 96, No. 13).
11. Amendment of subsections (d)(2)-(3) filed 10-23-96; operative 10-23-96 pursuant to Government Code section 11343.4(d) (Register 96, No. 43).
12. Repealer and new section filed 11-23-98; operative 11-23-98 pursuant to the 1974 version of Government Code section 11380.2 and title 2, California Code of Regulations, section 18312(d) and (e) (Register 98, No. 48).
13. Change without regulatory effect amending section filed 3-26-99 pursuant to section 100, title 1, California Code of Regulations (Register 99, No. 13).
14. Editorial correction of 12 (Register 2000, No. 25).
15. Amendment of section and Note filed 6-10-2003; operative 6-10-2003 (Register 2003, No. 24).

(Regulations of the Fair Political Practices Commission, Title 2, Division 6, California Code of Regulations.)

§ 18702.1. Determining When a Public Official is Making a Governmental Decision.

(a) A public official "makes a governmental decision," except as provided in 2 Cal. Code Regs. section 18702.4, when the official, acting within the authority of his or her office or position:

(1) Votes on a matter;

(2) Appoints a person;

(3) Obligates or commits his or her agency to any course of action;

(4) Enters into any contractual agreement on behalf of his or her agency;

(5) Determines **not** to act, within the meaning of subdivisions (a)(1), (a)(2), (a)(3), or (a)(4), above, unless such determination is made because of his or her financial interest. When the determination not to act occurs because of the official's financial interest, the official's determination may be accompanied by an oral or written disclosure of the financial interest.

(b) When an official with a disqualifying conflict of interest abstains from making a governmental decision in an open session of the agency and the official remains on the dais or in his or her designated seat during deliberations of the governmental decision in which he or she is disqualified, his or her presence shall not be counted toward achieving a quorum.

(c) During a closed meeting of the agency, a disqualified official shall not be present when the decision is considered or knowingly obtain or review a recording or any other non-public information regarding the governmental decision.

(d) Notwithstanding subdivision (a) of this regulation, to determine if a public official who holds an office specified in Government Code section 87200 is making, participating in

making, or using or attempting to use his or her official position to influence a governmental decision relating to an agenda item which is noticed for a meeting subject to the provisions of the Bagley-Keene Act (Government Code section 11120 et seq.) or the Brown Act (Government Code section 54950 et seq.) apply 2 Cal. Code Regs. sections 18702.1(a)(1)-(a)(4), 18702.2, 18702.3, 18702.4, and 18702.5.

Comment: Nothing in this section authorizes or prohibits an agency by local rule or custom from requiring a disqualified member to step down from the dais and/or leave the chambers.

Note: Authority cited: Section 83112, Government Code. Reference: Sections 81002, 81003, 87100, 87101, 87105 and 87200, Government Code.

HISTORY

1. New section filed 9-5-85; effective thirtieth day thereafter (Register 85, No. 36).
2. Amendment filed 10-17-88; operative 11-16-88 (Register 88, No. 43).
3. Amendment of subsection (a)(1) filed 3-14-95; operative 3-14-95 pursuant to Government Code section 11343.4(d) (Register 95, No. 11).
4. Amendment of subsections (a)(2), (a)(3)(E), (a)(4) and (c)-(c)(2) filed 12-11-95; operative 12-11-95 pursuant to Government Code section 11343.4(d) (Register 95, No. 50).
5. Amendment of subsection (a)(1) and Note filed 6-13-97; operative 6-13-97. Submitted to OAL for printing only (Register 97, No. 24).
6. Repealer and new section filed 11-23-98; operative 11-23-98 pursuant to the 1974 version of Government Code section 11380.2 and title 2, California Code of Regulations, section 18312(d) and (e) (Register 98, No. 48).
7. Editorial correction of 6 (Register 2000, No. 25).

8. Amendment of section and Note filed 1-10-2001; operative 2-1-2001. Submitted to OAL for filing pursuant to *Fair Political Practices Commission v. Office of Administrative Law*, 3 Civil C010924, California Court of Appeal, Third Appellate District, nonpublished decision, April 27, 1992 (FPPC regulations only subject to 1974 Administrative Procedure Act rulemaking requirements) (Register 2001, No. 2).

9. Amendment of subsection (c) filed 1-16-2002; operative 2-15-2002 (Register 2002, No. 3).

10. Amendment of subsection (a) , new subsection (d) and amendment of Note filed 6-10-2003; operative 6-10-2003 (Register 2003, No. 24).

(Regulations of the Fair Political Practices Commission, Title 2, Division 6, California Code of Regulations.)

§ 18702.2. Determining When a Public Official is Participating in Making a Governmental Decision.

A public official "participates in making a governmental decision," except as provided in Title 2, California Code of Regulations, section 18702.4, when, acting within the authority of his or her position, the official:

(a) Negotiates, without significant substantive review, with a governmental entity or private person regarding a governmental decision referenced in Title 2, California Code of Regulations, section 18701(a)(2)(A); or

(b) Advises or makes recommendations to the decisionmaker either directly or without significant intervening substantive review, by:

(1) Conducting research or making any investigation which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision referenced in Title 2, California Code of Regulations, section 18701(a)(2)(A); or

(2) Preparing or presenting any report, analysis, or opinion, orally, or in writing, which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision referenced in Title 2, California Code of Regulations, section 18701(a)(2)(A).

Note: Authority cited: Section 83112, Government Code. Reference: Section 87100, Government Code.

HISTORY

1. New section filed 7-24-85; effective thirtieth day thereafter (Register 85, No. 30).

2. Repealer of subsection (h) filed 6-22-87; operative 7-22-87 (Register 87, No. 26).
3. Amendment filed 10-17-88; operative 11-16-88 (Register 88, No. 43).
4. Change without regulatory effect amending subsection (a)(2) filed 11-27-95 pursuant to section 100, title 1, California Code of Regulations (Register 95, No. 48).
5. Amendment of subsections (a)(1)-(3) and (d) filed 10-23-96; operative 10-23-96 pursuant to Government Code section 11343.4(d) (Register 96, No. 43).
6. Repealer and new section filed 11-23-98; operative 11-23-98 pursuant to the 1974 version of Government Code section 11380.2 and title 2, California Code of Regulations, section 18312(d) and (e) (Register 98, No. 48).
7. Editorial correction of 6 (Register 2000, No. 25).
8. Amendment of subsection (a) filed 10-26-2004; operative 11-25-2004 (Register 2004, No. 44).

(Regulations of the Fair Political Practices Commission, Title 2, Division 6, California Code of Regulations.)

§ 18702.3. Determining When a Public Official is Using or Attempting to Use His/Her Official Position to Influence a Governmental Decision.

(a) With regard to a governmental decision which is within or before an official's agency or an agency appointed by or subject to the budgetary control of his or her agency, the official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official contacts, or appears before, or otherwise attempts to influence, any member, officer, employee or consultant of the agency. Attempts to influence include, but are not limited to, appearances or contacts by the official on behalf of a business entity, client, or customer.

(b) With regard to a governmental decision which is within or before an agency not covered by subsection (a), the official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official acts or purports to act on behalf of, or as the representative of, his or her agency to any member, officer, employee or consultant of an agency. Such actions include, but are not limited to the use of official stationery.

Note: Authority cited: Section 83112, Government Code. Reference: Section 87100, Government Code.

HISTORY

1. New section filed 10-17-88; operative 11-16-88 (Register 88, No. 43).
2. Repealer and new section filed 11-23-98; operative 11-23-98 pursuant to the 1974 version of Government Code section 11380.2 and title 2, California Code of Regulations, section 18312(d)

and (e) (Register 98, No. 48).

3. Editorial correction of 2 (Register 2000, No. 25).

(Regulations of the Fair Political Practices Commission, Title 2, Division 6, California Code of Regulations.)

§ 18702.4. Exceptions.

(a) Making or participating in making a governmental decision shall not include:

(1) Actions of public officials which are solely ministerial, secretarial, manual, or clerical;

(2) Appearances by a public official as a member of the general public before an agency in the course of its prescribed governmental function to represent himself or herself on matters related solely to the official's personal interests as defined in Title 2, California Code of Regulations, section 18702.4(b)(1); or

(3) Actions by public officials relating to their compensation or the terms or conditions of their employment or contract. In the case of public officials who are "consultants," as defined in Title 2, California Code of Regulations, section 18701(a)(2), this includes actions by consultants relating to the terms or conditions of the contract pursuant to which they provide services to the agency, so long as they are acting in their private capacity.

(b) Notwithstanding Title 2, California Code of Regulations, section 18702.3(a), an official is not attempting to use his or her official position to influence a governmental decision of an agency covered by that subsection if the official:

(1) Appears in the same manner as any other member of the general public before an agency in the course of its prescribed governmental function solely to represent himself or herself on a matter which is related to his or her personal interests. An official's "personal interests" include, but are not limited to:

(A) An interest in real property which is wholly owned by the official or members of his

or her immediate family.

(B) A business entity wholly owned by the official or members of his or her immediate family.

(C) A business entity over which the official exercises sole direction and control, or over which the official and his or her spouse jointly exercise sole direction and control.

(2) Communicates with the general public or the press.

(3) Negotiates his or her compensation or the terms and conditions of his or her employment or contract.

(4) Prepares drawings or submissions of an architectural, engineering or similar nature to be used by a client in connection with a proceeding before any agency. However, this provision applies only if the official has no other direct oral or written contact with the agency with regard to the client's proceeding before the agency except for necessary contact with agency staff concerning the processing or evaluation of the drawings or submissions prepared by the official.

(5) Appears before a design or architectural review committee or similar body of which he or she is a member to present drawings or submissions of an architectural, engineering or similar nature which the official has prepared for a client if the following three criteria are met:

(A) The review committee's sole function is to review architectural or engineering plans or designs and to make recommendations in that instance concerning those plans or designs to a planning commission or other agency;

(B) The ordinance or other provision of law requires that the review committee include architects, engineers or persons in related professions, and the official was appointed to the body to fulfill this requirement; and (C) The official is a sole practitioner.

(c) Academic Decisions

(1) Except as provided in subsection (c)(2), neither disclosure of financial interests nor disqualification is required under Government Code sections 87100, 87302, or any Conflict of Interest Code, in connection with:

(A) Teaching decisions, including the selection by a teacher of books or other educational materials for use within his or her own school or institution, and other decisions incidental to teaching;

(B) Decisions made by a person who has teaching or research responsibilities at an institution of higher education to pursue personally a course of academic study or research, to apply for funds to finance such a project, to allocate financial and material resources for such academic study or research, and all decisions relating to the manner or methodology with which such study or research will be conducted. Provided, however, that the provisions of this subsection (c)(1)(B) shall not apply with respect to any decision made by the person in the exercise of institution- or campus-wide administrative responsibilities respecting the approval or review of any phase of academic research or study conducted at that institution or campus.

(2) Disclosure (consistent with 2 Cal. Code Regs. section 18755) shall be required under Government Code section 87302 or any Conflict of Interest Code in connection with a decision made by a person or persons at an institution of higher education with principal responsibility for a research project to undertake such research, if it is to be funded or supported, in whole or in part, by a contract or grant (or other funds earmarked by the donor for a specific research project or for a specific researcher) from a nongovernmental entity, but disqualification may not be required under Government Code sections 87100, 87302 or any Conflict of Interest Code in connection with any such decision if the decision is substantively reviewed by an independent committee established within the institution.

Note: Authority cited: Section 83112, Government Code. Reference: Section 87100,
Government Code.

HISTORY

1. New section filed 10-17-88; operative 11-16-88 (Register 88, No. 43).
2. Repealer and new section filed 11-23-98; operative 11-23-98 pursuant to the 1974 version of Government Code section 11380.2 and title 2, California Code of Regulations, section 18312(d) and (e) (Register 98, No. 48).
3. Editorial correction of 2 (Register 2000, No. 25).
4. Amendment of subsection (c)(2) filed 6-14-2005; operative 7-14-2005 (Register 2005, No. 24).

(Regulations of the Fair Political Practices Commission, Title 2, Division 6, California Code of Regulations.)

§ 18702.5. Public Identification of a Conflict of Interest for Section 87200 Filers.

(a) Government Code section 87105 and this regulation apply when a public official who holds an office specified in Government Code section 87200 has a financial interest in a decision within the meaning of Government Code section 87100, and the governmental decision relates to an agenda item which is noticed for a meeting subject to the provisions of the Bagley-Keene Act (Government Code section 11120 et seq.) or the Brown Act (Government Code section 54950 et seq.).

(b) Content & Timing of Identification: The public official shall, following the announcement of the agenda item to be discussed or voted upon but before either the discussion or vote commences, do all of the following:

(1) The public official shall publicly identify:

(A) Each type of economic interest held by the public official which is involved in the decision and gives rise to the conflict of interest (i.e. investment, business position, interest in real property, personal financial effect, or the receipt or promise of income or gifts), and

(B) The following details identifying the economic interest(s):

(i) if an investment, the name of the business entity in which each investment is held;

(ii) if a business position, a general description of the business activity in which the business entity is engaged as well as the name of the business entity;

(iii) if real property, the address or another indication of the location of the property, unless the property is the public official's principal or personal residence, in which case, identification that the property is a residence;

(iv) if income or gifts, then identification of the source; and
(v) if personal financial effect, then identification of the expense, liability, asset or income affected.

(2) Form of Identification: If the governmental decision is to be made during an open session of a public meeting, the public identification shall be made orally and shall be made part of the official public record.

(3) Recusal/Leaving the Room: The public official must recuse himself or herself and leave the room after the identification required by subdivisions (b)(1) and (b)(2) of this regulation is made. He or she shall not be counted toward achieving a quorum while the item is discussed.

(c) Special Rules for Closed Session: If the governmental decision is made during a closed session of a public meeting, the public identification may be made orally during the open session before the body goes into closed session and shall be limited to a declaration that his or her recusal is because of a conflict of interest under Government Code section 87100. The declaration shall be made part of the official public record. The public official shall not be present when the decision is considered in closed session or knowingly obtain or review a recording or any other non-public information regarding the governmental decision.

(d) Exceptions:

(1) Uncontested Matters: The exception from leaving the room granted in Government Code section 87105(a)(3) for a "matter [that] has been placed on the portion of the agenda reserved for uncontested matters" shall mean agenda items on the consent calendar. When the matter in which the public official has a financial interest is on the consent calendar, the public official must comply with subdivisions (b)(1) and (b)(2) of this regulation, and recuse himself or

herself from discussing or voting on that matter, but the public official is not required to leave the room during the consent calendar.

(2) Absence: If the public official is absent when the agenda item subject to subdivision (a) of this regulation is considered, then Government Code section 87105 and this regulation impose no public identification duties on the public official for that item at that meeting.

(3) Speaking as a Member of the Public Regarding an Applicable Personal Interest: When a personal interest found in 2 Cal. Code Regs. section 18702.4(b) is present, a public official may speak as a member of the general public if he or she complies with subdivisions (b)(1) and (b)(2) of this regulation, recuses himself or herself from voting on the matter and leaves the dais to speak from the same area as the members of the public. He or she may listen to the public discussion of the matter with the members of the public.

Comment: Nothing in the provisions of this regulation is intended to cause an agency or public official to make any disclosure that would reveal the confidences of a closed session or any other privileged information as contemplated by law including but not limited to the recognized privileges found in 2 Cal. Code Regs. section 18740.

Note: Authority cited: Section 83112, Government Code. Reference: Sections 87100, 87105 and 87200, Government Code.

HISTORY

1. New section filed 6-10-2003; operative 6-10-2003 (Register 2003, No. 24). For prior history, see Register 98, No. 48.
2. Amendment of subsection (b)(1)(A) filed 10-26-2004; operative 11-25-2004 (Register 2004, No. 44).