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MEMORANDUM OF LAW

DATE: November 18, 1997

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

FROM: City Attorney

SUBJECT: Potential Conflict of Interest of Glenna Schmidt, Member of the Barrio Logan Redevelopment Project Area Committee

QUESTION PRESENTED

You have asked the City Attorney to determine whether a conflict of interest exists with regard to Ms. Glenna Schmidt, a member of the Barrio Logan Redevelopment Project Area Committee ("PAC"), who is employed by a business located within 300 feet of two Barrio Logan Redevelopment Projects, the Mercado Trolley Station Project and the Mercado Commercial Project ("Projects"). If a conflict of interest exists, you want to know what action to take.

SHORT ANSWER

From the facts presented, it does not appear that Ms. Schmidt has a conflict of interest which would disqualify her from participating in the PAC's discussions and votes on the Projects. This conclusion is based on the fact that Ms. Schmidt does not appear to have an economic interest that will be materially affected by the PAC's decisions on the Projects. Additionally, the business that she works for does not appear to have a financial interest that will be materially affected by the Projects.

Under Council Policy 000-4, Ms. Schmidt may choose to abstain from PAC activity related to the Trolley Station Project, if she believes that her working relationship with her boss, who has submitted a proposal for that project, is incompatible with her PAC duties. However, she is not required by law to abstain from such activity. It is a matter for her discretion.

BACKGROUND FACTS

Pursuant to provisions of the California Community Redevelopment Law (California Health & Safety Code sections 33000-33855), the PAC is responsible for, among other things, reviewing and advising the San Diego Redevelopment Agency ("Agency") on development proposals for a project area. The PAC's Conflict of Interest Code requires that all PAC members file a Statement of Economic Interest ("SEI") and disclose, among other things, any involvement in a business entity within the relevant project area, and contracts entered into with The City of San Diego or the Agency concerning activities in a project area.

The following facts were provided by Byron Estes of your office, and by Ms. Schmidt: Ms. Schmidt has been a member of the Barrio Logan Redevelopment PAC since 1991. The PAC is currently involved in discussing and voting on the two Projects in the Barrio Logan Redevelopment Project Area. On May 1, 1997, the Agency released a Request For Qualifications ("RFQ") for the redevelopment of the Mercado Trolley Station Site. This project is a 40,000 square foot development site next to a trolley station. A variety of proposals have been submitted for this site, including an entertainment complex, senior citizen housing, and a small market. A recommendation regarding this project will be made by the Agency to the District 8 Council Office in the next few weeks.

The second project that the PAC is currently involved in is the Mercado Commercial Project. The Agency released a Request for Proposals ("RFP") for that project in October 1997, and the proposals will be due January 16, 1998. The Agency's recommendation regarding the proposals received will be made in early 1998. The Commercial Project is a 120,000 square foot site. It is anticipated that the responses to the RFP may include a retail center, a mixed-use retail and residential proposal, or a light industrial proposal.

Ms. Schmidt is a salaried employee of Mitchell Investments, a real estate management company that manages property belonging to the Felipe-Aronzo Corporation. Mitchell Investments is located at 1827 Main Street, which is within 300 feet of the Projects. The company owns two parcels of property in close proximity to the Projects, including a warehouse building, and an adjacent alley. Ms. Schmidt is a secretary/office manager, and her primary responsibilities are day-to-day management of the firm's properties, and receptionist duties. Ms. Schmidt has no ownership nor investment interest in the business, and does not participate in profit-sharing. There is no evidence that the decisions made regarding the Projects will have any effect on Ms. Schmidt's income from her employment. One of the owners of Mitchell Investments, Mr. Shapiro, submitted a response to the RFQ for the Trolley project. Mr. Shapiro's proposal was submitted in his individual capacity, and his proposal has no connection to

Mitchell Investments. To date, Ms. Schmidt has abstained from participating in discussions and votes pertaining to the Trolley project.

ANALYSIS

Potential conflicts of interest of the kind described in this memorandum must be evaluated under two distinct statutory schemes: the Political Reform Act (California Government Code sections 87100 - 91014) and California Government Code sections 1090 -1097. Additionally, potential conflicts of interest must be evaluated under Council Policy 000-4, the City's Code of Ethics.

I. Political Reform Act of 1974

The Act was adopted by the People of the State of California in 1974 and specifies in pertinent part as follows: "No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." Cal. Gov't Code section 87100. The Fair Political Practices Commission ("FPPC"), the state agency that interprets and administers the Political Reform Act, has specifically determined that PAC members such as Ms. Schmidt are "public officials" who are subject to the Act's disclosure and disqualification provisions. In re Rotman, 10 FPPC Ops. 1 (1987).

A public official has a "financial interest" in a decision if it is reasonably foreseeable that the decision will have a material financial effect on the public official or on one or more financial interests set forth in California Government Code section 87103. Here the relevant financial interests are: (1) Ms. Schmidt's own financial interests; (2) Mitchell Investments' financial interests as a "source of income" to Ms. Schmidt, pursuant to Government Code section 87103(c); and, (3) Mitchell Investment's financial interests as a "business entity in which the public official is a director, officer, partner, trustee, employee or holds any position of management."

1. Direct Effect On Ms. Schmidt's Economic Interests (California Government Code section 87103)

For there to be a material financial effect on Ms. Schmidt as a direct result of a decision, the decision must "result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing by at least $250 in any 12-month period." Cal. Code Regs. tit. 2, § 18702.1(a)(4). There is no evidence whatsoever that Ms. Schmidt's income, or any other direct financial interest of Ms. Schmidt or her immediate family, will be affected in any way by the PAC's decisions on the Projects. Therefore, Ms. Schmidt is not disqualified from

participating in the PAC's decisions on the Projects as a result of her own financial interests being affected.

2. Effect on Economic Interests of Mitchell Investments as a "Source of Income" to the Public Official (California Government Code section 87103(c))

Even when a PAC decision does not have a direct effect on a public official's financial interests, the official may have a conflict of interest if the decision has a financial effect on a business that is a "source of income" to the official. Cal. Gov't Code § 87103(c). In this case, the effect of the PAC's decisions on Mitchell Investments' financial interests must be examined because it is a "source of income" to Ms. Schmidt of $250 or more in the preceding twelve months. Cal. Code Regs., tit. 2, § 18702(a)(1).

A PAC decision meets the standard for having a material effect on Mitchell Investments as a source of income to Ms. Schmidt if the business is either "directly involved in a decision before the official's agency," or "there is a nexus . . . between the purpose for which the official receives income and the governmental decision." Cal. Code Regs, tit. 2, § 18702.1(a)(1). For purposes of this section, there is a nexus between the business purpose and the governmental decision if "the official receives income to achieve a goal or purpose which would be achieved, defeated, aided or hindered by the decision." Cal. Code Regs., tit. 2, § 18702.1(d). Because Mitchell investments is not directly involved in any decisions before the PAC, the remaining issue is whether there is a nexus between the business and its purpose and the PAC's decisions on the Projects.

Mr. James Davies, Project Manager for the Community and Economic Development Department, was asked to render an opinion on the issue of whether the PAC's decisions on the Projects will have a material economic effect on Mitchell Investments. Mr. Davies' expertise in this subject includes a Master of Arts degree in Urban Planning, and over twelve years of experience in real estate and redevelopment, including six years as a real estate economic consultant. Mr. Davies has opined that there would be no foreseeable material effect on the business as a result of the Projects. (See Mr. Davies' memorandum, which is attached as Exhibit A).

Mr. Davies' analysis was based on the following facts. Mitchell Investments owns two contiguous parcels in close proximity to the Projects. One property is a .9 acre parcel zoned for industrial uses which has an industrial warehouse building on the site, with an assessed value for the land and improvements of $474,211. The other property serves as an alley for the warehouse property and has an assessed value of $27,831. No plans have been identified to change the zoning or use of the parcels. The Mercado Commercial site is proposed to be developed with primarily retail uses. The estimated improvement value of that site ranges from $10.0 to $15.0

million. The Trolley site development proposals range from retail and entertainment uses to multi-family residential with ancillary commercial space. The Trolley site improvements have an estimated value of from $1.5 million to $7.5 million.

Although Mitchell Investments' property is located in close proximity to the development sites, Mr. Davies believes that there will be little impact on the business's revenues or on the value of the business's property, primarily because of the dissimilar zoning and uses of the Mitchell Investments properties and the development sites. According to Davies, the development of the Projects will have little effect on the replacement costs of the improvements on the Mitchell properties and resale value of the Mitchell properties, because these values would be based upon comparable industrial properties. Further, the development of the Projects will not significantly affect the income-producing potential of the Mitchell properties, because the nature of the business is not related to the proposed commercial/residential uses of the Projects.

Additionally, the fact that Ms. Schmidt's boss, Mr. Shapiro, has submitted a proposal for the Trolley development site does not create a nexus between the Projects and Mitchell Investments. Mr. Shapiro has submitted a proposal in his individual capacity, and his proposal has no known connection to Mitchell Investments, nor Ms. Schmidt's work for Mitchell Investments.

Because the Projects will have no significant effect on the replacement cost, resale value, and income-producing potential of Mitchell Investments' properties adjacent to the site, and because Mr. Shapiro's proposal for the Trolley site is unrelated to Mitchell Investments, we conclude that there is no nexus between the purpose of the business from which Ms. Schmidt receives her income, and the PAC's decisions on the Projects. Therefore, Ms. Schmidt is not disqualified from participating in the PAC's review of the Projects under section 87103(c) of the Act.

3. Effect on Mitchell Investments as a Business Entity for Which Ms. Schmidt is an Employee (California Government Code section 87103(d))

In addition to analyzing the effect of the PAC's decisions on Mitchell Investments as a source of Ms. Schmidt's income, under Government Code section 87103(d) there must also be an analysis of the effect of the PAC's decisions on Mitchell Investments as a business entity for which Ms. Schmidt is an employee. The standard for materiality of an economic effect on a business under section 87103(d) is contained in title 2, section 18201.2(g) of the California Code of Regulations, which provides that the effect of a decision is material if it results in: (1) "an increase or decrease in the gross revenues for a fiscal year of $10,000 or more"; or (2) "the business entity incurring or avoiding additional expenses or reducing or eliminating existing

expenses for a fiscal year in the amount of $2,500 or more"; or (3) an increase or decrease in the value of assets or liabilities of $10,000 or more."[1]

Mr. James Davies has determined, based on available information about the business and the Projects, that the Projects will not have a significant effect on the income-producing potential of Mitchell Investments, or the replacement cost of its improvements, or value of its property. He has specifically opined that the Projects will not have an economic effect of $10,000 or more on the revenues of the business or its property value, because of the differences in zoning and use of the Mitchell Investments property and the development sites. Because the PAC's decisions on the Projects will not have a material economic effect on Mitchell Investments, under section 87103(d) of the Act, Ms. Schmidt does not have a conflict of interest based upon an indirect economic effect of her employer.

II. Government Code Section 1090

Government Code section 1090 ("Section 1090") precludes a public officer or employee from participating in the making of a contract in which he or she is financially interested. Although the term "financial interest" is not specifically defined in the statute, an examination of the case law and the statutory exceptions to the basic prohibition indicates that the term is to be liberally construed. See Thompson v. Call, 38 Cal. 3d. 633, 645 (1985). Section 1090 has been held to apply to persons and advisory bodies who act in an advisory capacity to the contracting agency, such as PACs. See City Council v. McKinley, 80 Cal. App. 3d. 204, 278 (1978). Therefore, it is the opinion of this office that PAC members are subject to the prohibitions of section 1090.

As a member of the PAC, Ms. Schmidt "participates in the making of a contract" for purposes of Section 1090 because she is involved in preliminary discussions, negotiations, compromises, planning, and solicitation of bids for government contracts. Millbrae Ass'n for Residential Survival v. City of Millbrae, 262 Cal. App. 2d 222 (1968). However, she has no known financial interest in the contracts that will be awarded for the Barrio Logan projects. As discussed in relation to the Act above, there are no known facts that indicate Ms. Schmidt's income will increase or decrease as a result of any decision that is made regarding the Barrio

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[1] Section 18702.2(g) applies to businesses that are not listed on (or qualified for listing on) the New York Stock Exchange, American Stock Exchange, National Association of Securities Dealers Nation Market List, Pacific Stock Exchange, or California Department of Corporations Eligible Securities List. Based on the information available, this standard appears to be the appropriate standard for Mitchell Investments.

Logan project contracts. Further, the awarding of the contracts for these projects will not have a material financial effect on Ms. Schmidt's employer, Mitchell Investments, for the reasons outlined above. Ms. Schmidt does not stand to benefit financially from the potential award of one of the contracts to her boss, Mr. Shapiro, because the proposal that he submitted was submitted in his individual capacity, and it is not connected to Ms. Schmidt or Mitchell Investments. Therefore, under the facts presented, she has no apparent conflict under section 1090.

III. Council Policy 000-4

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

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

Under this policy, it is Ms. Schmidt's responsibility to determine whether her working relationship with Mr. Shapiro, who has submitted a proposal for the Trolley Project, is "incompatible with the proper discharge of her official duties" as a member of the PAC considering that project. If she determines that these roles are incompatible, she may choose to continue to abstain from participating in PAC discussions and votes on the Trolley Project. It should be emphasized, however, that this is a policy, not a law, and does not have the force and effect of law.

CONCLUSION

From the above analysis, it does not appear that Ms. Schmidt's participation in the PAC's activities related to the Trolley Project and Commercial Project presents a conflict of interest. If you have any further questions, please feel free to contact me.

CASEY GWINN, City Attorney

By
Lisa A. Foster
Deputy City Attorney

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