


May 24, 2010

TO: JAY PETREK, Principal Planner

FROM: JENNIFER K. MCCAIN, Assistant City Attorney 

SUBJECT: Conflict of Interest and the General Plan Citizen Committee

The issue of whether conflict of interest laws apply to the General Plan Citizen Committee ("Citizen Committee") has been referred to me for review and response. Specifically, you have asked whether the members of the Citizen Committee are subject to the conflict of interest laws and if members who have conflicts of interest must abstain from participation.¹ Based on my review of the Political Reform Act ("Act")² and Fair Political Practices Commission ("FPPC") Regulations and Advice Letters, it appears that the Citizen Committee is advisory and its members are not subject to the disclosure and disqualification requirements of the Act. Notwithstanding this fact, if any particular member of the Citizen Committee feels that they cannot be fair and impartial, they may voluntarily abstain from any particular discussions. This office can also assist any member in making direct contact with the FPPC for informal or formal advice if needed in the future.

Facts

On August 19, 2009, the City Council established an ad hoc Citizen Committee for input on General Plan Update issues. Each Council member appointed three members to serve on the Citizen Committee. The appointed members of the Citizen Committee are: Linda Bailey, Maria Bowman, Elmer Cameron, Dave Ferguson, Thora Guthrie, Jon Hudson, Terry Jackson, Steve Kildoo, John Masson, Rick Paul, Lisa Prazeau, Lucas Ross, Pam Stahl, Afred Velasco, and Joyce Wells. Staff was directed by the City Council to schedule two to four Citizen Committee meetings to obtain input on the proposed goals, objectives and project description that will guide the General Plan Update process.

¹ Please be aware that an individual Citizen Committee member has no attorney/client relationship with the City Attorney and would be unable to rely on advice from this office to provide immunity from FPPC enforcement or prosecution arising out of their conduct in this matter.

² The Political Reform Act is codified as Government Code §§ 81000 through 91015.

The 15 member ad hoc committee met six times between October 22, 2009 and January 21, 2010. The Citizen Committee's work to date has been available to the public as well as all information, reports, and presentations have been posted on the General Plan website. Additionally, all reports, updates and agendas continue to be transmitted to an email list of approximately 150 people.

Staff presented the Citizen Committee's recommendations to the City Council on February 24, 2010. On February 24, 2010, the City Council directed staff to proceed with amendments to the General Plan consistent with the recommendations of the Citizen Committee. The Citizen Committee's work on the goals, objectives, and project description has been fulfilled. The City Council has now asked the Citizen Committee to convene on the General Plan land use alternatives to discuss specific properties and possible amendments.

The General Plan Update time line last presented to the City Council on January 27, 2010, is as follows:

- Completion of the text amendments, development of alternative Land Use Scenarios, and commencement of public review by the end of April, 2010;
- Complete workshops on the draft General Plan document by July, 2010;
- City Council selection of preferred and/or range of General Plan alternatives by August 2010;
- Execute final consultant contracts by September 2010;
- Complete the screencheck EIR by March 2011;
- Commence the 45 day public review process of the draft EIR by June 2011;
- Complete the final EIR by September 2011;
- Complete Planning Commission meetings by January 2012;
- Complete City Council hearings by March 2012; and
- Transmit all information to the County Clerk as necessary to place the General Plan on the November 2012 General Election by August 2012.

Analysis

Government Code § 87100 prohibits a public official from making, participating in making, or otherwise attempting to influence a governmental decision in which that official knows or has reason to know that he has a financial interest. The Act's provisions are only applicable to public officials who make governmental decisions.

The term "public official" is broadly defined under the Act to include every member, officer, employee or consultant of state or local government agency. (Government Code § 82048). California Code of Regulation 18701(a) further defines the term "public official" to include salaried and unsalaried members of boards or commissions with decisionmaking authority. Therefore, whether or not members of the Citizen Committee would be public officials subject to the provisions of the Act depends on whether or not the Citizen Committee has decisionmaking authority.

Under Regulation 18701(a) a committee, board or commission possesses decisionmaking authority whenever:

- (A) It may make a final governmental decision;
- (B) It may compel a governmental decision; or it may prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto that may not be overridden; or
- (C) It makes substantive recommendations which are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency.

Based on a review of staff reports, summaries of Citizen Committee meetings and minutes of City Council meetings, it is clear that the Citizen Committee has no power to make final governmental decisions and does not have any veto power which may not be overridden. The sole purpose of the Citizen Committee is to make recommendations to the City Council regarding the scope of the General Plan Update. This newly formed committee has and will continue to make recommendations to the City Council on an as needed basis regarding the General Plan Update. The timeline indicates that the Citizen Committee's input will ultimately be presented to the Planning Commission who in turn will provide their own input to the City Council. Escondido is also subject to a unique initiative measure which makes many changes to the General Plan subject to a vote of the electorate. It appears that a bulk of the Citizen Committee's work is not only subject to approval by the Planning Commission and the City Council but also by the electorate itself.

The FPPC has previously advised that when a board or commission is newly formed and has no history of its recommendations being regularly approved over an extended period of time, such a board or commission is not yet a decisionmaking entity under the Act. See *Wilson* Advice Letter, No. I-94-307, *Michelon* Advice Letter, No. I-94-224. Further in *Cader-Thompson* Advice Letter, No. A-97-393, the FPPC advised that a member of a Specific Plan Committee was not a public official subject to the disclosure and disqualification provisions of the Act solely by virtue of his membership on the committee because the Specific Plan Committee was advisory in nature. In concluding as such, the FPPC relied on the fact that the Committee was newly formed and would make recommendations regarding the specific plan to the Planning Commission, which in turn will make its own recommendations to the City Council, which is the final decisionmaker regarding the specific plan.

Similarly, here, the Citizen Committee was formed to provide citizen input regarding the General Plan to the City Council and the Planning Commission. The City Council will make the final decision regarding the General Plan amendments to be placed on the ballot for the November 2012 General Election. The electorate will make the final decision regarding any amendments to the General Plan. To the extent that the electorate is the final decisionmaker, the Citizen Committee's role is clearly advisory in nature.

Therefore, based on the information presented, it appears that the Citizen Committee is an advisory body, and its members are not "public officials" subject to the disclosure and disqualification provisions of the Act. Notwithstanding this fact, if any individual member of the Citizen Committee feels that they cannot be fair and impartial regarding any particular issue discussed by the Citizen Committee, they may voluntarily abstain from any particular discussion. This office can also assist any member in making direct contact with the FPPC for informal or formal advice if needed in the future.