

**CITY OF DANA POINT
AGENDA REPORT**

Reviewed By:	
DH	<u>X</u>
CM	<u>X</u>
CA	<u>X</u>

DATE: SEPTEMBER 14, 2005

TO: CITY MANAGER/CITY COUNCIL

**FROM: A. PATRICK MUNOZ, CITY ATTORNEY
 MICHAEL R.W. HOUSTON, ESQ.**

SUBJECT: AMENDMENT OF CITY'S CONFLICT OF INTEREST CODE

RECOMMENDED ACTION:

That the City Council approve the proposed Resolution amending the City's Conflict of Interest Code. (Action Document A).

ISSUES:

Should the City Council amend the City's Conflict of Interest Code to clarify that members of advisory committees are required to file with the City conflict of interest statements but are not subject to the disqualification provisions of the Political Reform Act?

BACKGROUND:

On April 11, 1989, the City approved Resolution No. 89-63. Resolution No. 89-63 amended the City's Conflict of Interest Code to require members of each City commission, board and committee to file Conflict of Interest Statements. The staff report in support of the action stated, "Because members of local commissions, boards and committees are responsible for making recommendations to the City Council, and often do much of the investigation on various issues, the Council may wish to require that the members of these bodies file Conflict of Interest Statements." It appears that the intent of the amendment was to require subcommittee members to file Conflict of Interest Statements for *disclosure* purposes, but not necessarily require that all subcommittee members *disqualify* themselves under the requirements of the Political Reform Act. However, pursuant to the current language of the City's Conflict of Interest Code, it is arguable that subcommittee members would be required to both file Conflict of Interest Statements *and* disqualify themselves from any decisions if they had a conflict under the Political Reform Act.

The City Council has recently created a number of subcommittees in order to facilitate community involvement and participation on various City issues. The intent of the City Council was to create advisory subcommittees with final decision making authority remaining with the City Council.

DISCUSSION:

Generally speaking, the Political Reform Act (the "PRA") prohibits a "public official" from participating in "governmental decisions" in which the public official has a conflict of interest. An individual is a public official under the PRA and hence subject to the PRA's conflict of interest rules when the individual is a member of a governmental committee that has "with decision making authority." (2 Cal. Code Regs. § 18701(a).) A committee, board or commission possess "decision making 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 that are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency. (2 Cal. Code Regs. § 18701(a)(1).)

The standard outlined in Section 18701(a)(1)(C) refers to bodies which "make substantive recommendations" and are technically advisory in nature, but which the FPPC views as decision making, since their "advice" is generally followed by the recipient body. This standard involves the determination of whether the board or commission in question has established a track record of having its recommendations regularly approved. (See *Commission on Cal. State Gov. Org. & Econ. v. Fair Political Practices Comm.* (1977) 75 Cal.App.3d 716; *In re Rotman* (1987) 10 FPPC Ops. 1.)

Therefore, members of boards or commissions that are solely advisory in nature, without the specified decision making authority, do not meet the requirements of Section 18701(a)(1). Members of those boards or commissions would not come within the definition of "public official" and would therefore not be subject to the disqualification provisions of the PRA merely by virtue of membership on that committee.¹ (*Allen Advice Letter*, FPPC No. I-90-063 ["If the Clearlake Redevelopment Advisory Commission is not a decision-making board or commission, its members are not 'public officials' as defined by the Act. Consequently, the members are not subject to the disclosure and disqualification requirements of the Act. . . . if the advisory committee is in fact solely advisory, the committee's members are not public officials under the Act and are not subject to the disclosure and disqualification requirements of the Act."].)

In the current case, the subcommittees formed by the City do not meet the requirements of Section 18701(a)(1)(A) or (B) because they do not have final decision making authority and do not have the power to prevent or compel a government decision. As to

¹ A member of a subcommittee could still be deemed a public official due to the member being a City Council member or a planning commissioner (and hence subject to the PRA's conflict of interest provisions); however, this factor alone would not make the committee a decision making body. For instance several City subcommittees have a requirement that one or more City Council members serve on the subcommittee. Obviously, these members are "public officials" under the PRA.

Section 18701(a)(1)(C), because all of the subcommittees at issue in the current situation have been recently created by the City, there is no "track record" to examine as to whether subcommittee recommendations are regularly approved by the City Council. Because there is no such track record of the City Council routinely following subcommittee recommendations, it is *probable* that at this point in time the subcommittees would not be found to have decision-making authority subjecting subcommittee members to the disqualification provisions. (See *Simon Advice Letter*, FPPC No. I-04-013 (Apr. 15, 2004).

In *Simon*, Mono County determined that members of a newly formed and purportedly advisory "fisheries commission" did not have decision making authority and were not required to file conflict of interest statements. In its opinion, the FPPC deferred to the County's determination and stated, "Since the individuals are not public officials at this time, they do not have a conflict of interest within the meaning of the Act." However, the FPPC went on to state, "We have in the past advised new advisory bodies that they are in fact solely advisory until a history of recommendations has been established. (Cit. omitted.) Once there is a history of a particular advisory body's recommendations being routinely accepted without amendment or modification, the body converts from a solely advisory function to one of making, or participating in the making of a governmental decision and must be incorporated into a conflict of interest code. (Cit. omitted.) Since we have no track record concerning the commission, we are not able to determine if its members should be included in the commission's conflict of interest code."

However, the FPPC in *Simon* also stated that the City's Conflict of Interest Code is *generally dispositive* in determining whether a local agency committee member is a public official. (See *Simon Advice Letter*, FPPC No. I-04-013 (Apr. 15, 2004) [The City Council determines whether any particular board of commission has decision-making authority as defined in the PRA].) Currently, the City's Conflict of Interest Code specifically provides that "Members of all City Commissions, Boards, and Committees" are "involved in the making or participation in the making of decisions that have a material effect on financial interests." (City Resolution No. 04-09-08-02, Att. B (emphasis supplied).) Thus, under the City's code as currently drafted, members of the subcommittees are likely to be considered public officials subject to the disqualification provisions of the PRA.

Therefore, the City's Conflict of Interest Code, as presently drafted, creates the presumption that subcommittee members are subject to the disqualification provisions of the PRA merely by their membership on the subcommittee. This result contrasts with the result if one just analyzed the situation under the relevant PRA regulations listed above and the City Council resolutions authorizing the establishment of the various subcommittees. As discussed above, under the PRA it does not appear that the City is required to list subcommittee members as "Designated Employees" under the City's Conflict of Interest Code.

In order to clarify that members of City subcommittees are not subject to the disqualification provisions of the Political Reform Act (merely based on their status as subcommittee members), the City should amend Attachment B of its Conflict of Interest Code and remove from the list of "Designated Employees" those "Members of all City

Commissions, Boards, and Committees not otherwise required to file Conflict of Interest Statements". However, in order to facilitate the goals of disclosure and "open government," the revised Attachment B to the City's Conflict of Interest Code will still require members of advisory subcommittees to file Conflict of Interest Statements disclosing financial interests.

As with all legal advice regarding the PRA, the City Attorney's Office can only render advisory legal advice on this matter. If the City Council wanted a more definitive answer to the question of whether the change to the City's Conflict of Interest Code would successfully result in the clarification that the City's subcommittees are advisory in nature, the City should request a written opinion from the FPPC on this matter.

CONCLUSION:

The City Council should adopt Resolution No. 05-09-14-XX.

NOTIFICATION AND FOLLOW-UP:

Notification was provided in accordance with the Brown Act.

FISCAL IMPACT:

No negative fiscal impacts are anticipated.

ACTION DOCUMENTS

PAGE

A. <u>Draft Resolution #05-09-14-XX (A Resolution Of The City Council Of The City Of Dana Point, California Amending The City's Conflict Of Interest Code)</u>	5
B. <u>Attachment B – Revised Attachment B for City's Conflict of Interest Code</u>	7

ACTION DOCUMENT A**RESOLUTION NO. 05-09-14-xx****A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF
DANA POINT, CALIFORNIA, AMENDING THE CITY'S
CONFLICT OF INTEREST CODE**

WHEREAS, the Political Reform Act, Government Code Section 81000 *et seq.*, requires the City to adopt a Conflict of Interest Code; and

WHEREAS, the City previously included "Members of all City Commissions, Boards, and Committees not otherwise required to file Conflict of Interest Statements" as Designated Employees in the City's Conflict of Interest Code in order that such individuals be subject to the disclosure provisions of the City's Conflict of Interest Code;

WHEREAS, the City has recently established various advisory subcommittees in order to provide more opportunity for public participation and comment on various City issues; and

WHEREAS, the subcommittees created by the City are intended to be advisory bodies with no final decision making authority; and

WHEREAS, the City desires to amend the City's Conflict of Interest Code to clarify that advisory subcommittee members are not subject to the disqualification provisions of the Political Reform Act based on their membership on the subcommittee.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Dana Point as follows:

Section 1. That the above recitals are true and correct.

Section 2. The City's Conflict of Interest Code is hereby amended. Attachment B of Resolution No. 04-09-08-02 is hereby modified to read as indicated in the new Attachment B attached to this resolution.

Section 3. The City Clerk shall certify to the adoption of this Resolution.

PASSED, APPROVED, AND ADOPTED this 14th day of September, 2005.

WAYNE RAYFIELD, MAYOR

ATTEST:

ELIZABETH EHRING
CITY CLERK

STATE OF CALIFORNIA)
COUNTY OF ORANGE) ss.
CITY OF DANA POINT)

I, Elizabeth Ehring, City Clerk of the City of Dana Point, do hereby certify that the foregoing Resolution No. 05-09-14-_____ was duly adopted and passed at a regular meeting of the City Council on the 14th day of September, 2005, by the following roll-call vote, to wit:

AYES:

NOES:

ABSENT:

ABSTAIN:

ELIZABETH EHRING
CITY CLERK

ATTACHMENT B

Designated Employees and Disclosure Categories

The following position classifications are held by individuals involved in the making or participation in the making of decisions that may have a material effect on financial interests:

<u>Designated Position</u>	<u>Disclosure Categories</u>
Accounting Manager	1
Building Official	1
Chief of Police	1
City Architect/Planning Manager	1
City Clerk	1
City Engineer.....	1
Consultant*	1
Deputy City Engineer	1
Director of Community Development	1
Director of Public Works and Engineering Services	1
Exempt Officials**	0
Facilities Manager.....	1
Fire Chief	1
Park Manager	1
Public Works Administrative Manager	1
Recreation Manager	1
Recreation Coordinator	1
Senior Planner	1

* See Attachment C for explanation of Consultant filing.

** The Mayor, City Council Members, Members of the Planning Commission, City Manager, City Attorney, City Treasurer, and officials who manage public investments are all required to file disclosure statements (Form 700) pursuant to State law and thus are not included herein. It has been determined that the positions listed below manage public investments and will file a Statement of Economic Interests pursuant to Government Code §87200:

Director of Administrative Services

Note: For the purposes of disclosure only (not disqualification), members of all advisory City Commissions, Boards, and Committees not otherwise listed above shall still be required to file Conflict of Interest Statements per Disclosure Category 1.