

June 13, 2012

Michael R. W. Houston, Esq.
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Re: Your Request for Advice
Our File No. A-12-075

Dear Mr. Houston:

This letter responds to your request for advice on behalf of the Anaheim Transportation Network regarding the conflict-of-interest code provisions of the Political Reform Act (the “Act”).¹ This letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Please note that the Commission does not provide advice on bodies of law outside the confines of the Act.

QUESTION

Is the Anaheim Transportation Network a local government agency subject to the provisions of the Act and, therefore, required to adopt a conflict-of-interest code under which board members and employees must file statements of economic interests?

CONCLUSION

Based upon the information you have provided, it does not appear that the Anaheim Transportation Network is a government agency under the Act. Thus, the Anaheim Transportation is not required to adopt a conflict-of-interest code and board members and employees are not required to file statements of economic interests.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

FACTS

You represent the Anaheim Transportation Network (the “ATN”) and are requesting the reconsideration of the *Haubert* Advice Letter, No. A-04-253, in which it was determined that the ATN was a local governmental agency required to adopt a conflict-of-interest code and that members of the ATN’s Board of Directors are required to file statements of economic interest (Commission Form 700) under the ATN’s adopted code. At this time, you state that the ATN’s present organization, funding, and operation differ from the facts previously considered.

Prior to ATN’s formation, hotels in the area surrounding the Disney Resort (Disneyland, Disney’s California Adventure, Downtown Disney, and related Disney hotels and retail areas) often provided private shuttle services to transport visitors and patrons to the resort and event centers. Other than the ATN, the City of Anaheim (the “City”) did not and does not operate a public transportation system. Public transportation within the City was and currently is provided by the Orange County Transportation Authority (the “OCTA”). The OCTA was founded in 1991 and operates a public transportation system throughout Orange County consisting primarily of bus and special purpose shuttles (e.g. senior shuttles). Currently, a member of the Anaheim City Council serves on the OCTA Board of Directors, but the City is not entitled to a dedicated OCTA board position.

In 1994 the City adopted a series of resolutions amending the City’s General Plan, Zoning Code, and maps to alter the land uses and development standards for an area of the City known as the Anaheim Resort Area, which generally encompasses the area surrounding the Disney Resort. These resolutions are generally known as the Anaheim Resort Specific Plan. To mitigate traffic and air quality impacts that could result from private development under the plan, as required under the California Environmental Quality Act, the City also adopted a mitigation monitoring and reporting program under City Ordinance No. 5454.

Pursuant to Ordinance No. 5454 property owners/developers within the Anaheim Resort Area are “responsible for compliance with all applicable conditions of approval and mitigation measures included in Mitigation Monitoring Program No. 0085.” Under Mitigation Monitoring Program No. 0085, Mitigation Measures 3.3 and 3.4 require owners and developers to “join and financially participate in a clean fuel shuttle program, if established; and shall participate in the Anaheim Transportation Network/Transportation Management Association.” Joining and participating in the ATM is triggered by the development of the property, and the condition must be satisfied prior to “final building and zoning inspection.”

The ATN did not exist at the time Ordinance No. 5454 was adopted. As anticipated by the City, the ATN would subsequently be formed and managed by the private owners and developers. The City did however participate substantially in forming the ATN. In fact, the City Attorney’s office prepared and filed the organizational documents establishing the ATN. Additionally, the City devoted staff resources and oversaw day-to-day operations, entered into and approved contracts with third-party vendors to assist in the ATN’s formation, contributed capital resources to the ATN including ten buses and the leasing of an additional eight buses for

\$1/year, and assisted the ATN in obtaining federal funding. Ultimately, the ATN was established as a nonprofit public benefit corporation on September 28, 1995.

As established in the Articles of Incorporation, the membership of the ATN “shall consist of the municipal government of the City of Anaheim and other public agencies, and employers and event centers within the [Anaheim Resort Area] and the [Stadium Business Center] area of the City of Anaheim.” Notwithstanding the City’s membership in the ATN, the City was not an original voting member of the ATN under the Articles of Incorporation filed by the City. Moreover, the power to amend the articles was granted exclusively to the ATN’s voting members and board of directors. Pursuant to the ATN’s Bylaws, membership dues and assessments are determined by a two-thirds vote of the ATN’s Board of Directors.

In 2006, the ATN’s voting members and board of directors voted to amend the Articles of Incorporation to provide a single vote to the City. This amendment permits the City’s member to run for a seat on the ATN’s board of directors, which is elected by the voting members, under the ATN’s Bylaws. Currently, the City is just one of 104 voting members. Of the 104 voting members only 46 are mandatory members as required by Ordinance No. 5454. The remaining voting members are voluntary members of the ATN.

Services provided by the ATN consists of a shuttle system providing transportation along specified routes predominately for the benefit of the visitors, patrons, and employees of private tourism, resort, and event/convention businesses in the Anaheim Resort Area, other specified areas of the City (including Angels’ Stadium, the Platinum Triangle, and the Honda Center), the City of Orange (the Outlets at Orange shopping center), the City of Buena Park (the resort area surrounding Knott’s Berry Farm), and the City of Santa Ana (the Westfield Mainplace shopping center and the Santa Ana Discovery Science Center).

The ATN currently has 19 routes providing service to 61 lodging establishments and nine event center locations. 24 of the 56 total bus stops are located on the private property of the businesses the routes serve. Ridership is open to the general public. However, the “ATN estimates that the vast majority of users are tourism- and event- related users.” Services are provided based upon the operating hours of the private businesses and event centers served by the shuttles, as opposed to the needs of the general public. The ATN no longer provides age-restricted rider service for seniors.

Based upon figures from the 2011-2012 fiscal year, ATN’s funding is primarily derived from the assessments on the businesses it serves (\$5,840,000) and ticket sales (\$4,700,000). Additional funding is derived from membership dues (\$50,000), advertising (\$500,000), and federal grants (including an annually occurring grant of \$500,000 and a one-time grant \$3,800,000). Notwithstanding the assessments and dues collected under the authority of Ordinance No. 5454, including the City’s actual membership dues, no additional funds are derived from the City.

The ATN leases property from the City’s former Redevelopment Agency for the purposes of housing its administrative offices, vehicle storage, maintenance, and other uses. You

state the terms of the lease are “consistent with a negotiated contract between unrelated parties” and that the ATN pays a “possessory interest tax,” which is comparable to a property tax when public property is used by private parties. Currently, the ATN has 60 buses. 20 of these buses were funded by federal grants, while 35 are leased from the OCTA for \$36,175 per month with additional costs for maintenance. The remaining buses consist of five buses from the original 10 buses given to the ATN by the City when the ATN was first formed. These five buses are not currently used for public transportation and are in the process of being donated to the Santa Barbara Metropolitan Transit District.

The ATN and the City entered into a franchise agreement granting the ATN a “non-exclusive right to operate ‘resort shuttle transportation’ for ‘guests of the Anaheim Resort’ and ‘other guest-oriented areas of the City’ on City streets.” This franchise agreement was amended in 2011 and does not expire until 2025. While the ATN’s franchise application provides information regarding the ATN’s rate structure, the rates are not reviewed or approved by the City but by the ATN.

As an additional note, the ATN’s bylaws specify that meetings of the ATN’s Board of Directors shall comply with the Brown Act. However, you have stated that the ATN is not subject to the Brown Act but complies on a voluntary basis. The ATN chooses not to comply with the Brown Act for meetings of its membership. Moreover, employees of the ATN do not participate in public pension programs, the ATN is not provided governmental immunity from lawsuits, and persons bringing actions against the ATN are not required to comply with the Governmental Claims Act.

ANALYSIS

A public official is prohibited under the Act from making, participating in making, or using his or her position to influence a governmental decision in which the official knows or has reason to know he or she has a financial interest. (Section 87100.) For purposes of the Act, a “public official” is defined as “every member, officer, employee or consultant of a state or local government agency.” (Section 82048.) Moreover, the Act requires every agency to adopt and promulgate a conflict-of-interest code designating positions within the agency that involve the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest. (Sections 87300 and 87302.) Agency members, officers, employees and consultants who are in these positions are required to file Statements of Economic Interests (FPPC Form 700), disclosing financial interests relevant to their positions, as determined by their agency. An “agency” is broadly defined to include any state or local agency, while a “local government agency” is defined as “a county, city or district of any kind including school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency of the foregoing.” (Sections 82003 and 82041.)

Because the Act’s conflict-of-interest provisions only apply to public officials and governmental agencies, we must distinguish governmental from non-governmental entities. As explained in the *Haubert* Advice Letter, *supra*, in which we previously concluded that the ATN was a governmental entity, the Commission adopted a four-part factual test to determine whether

an entity is a governmental or non-governmental entity in its opinion *In re Siegel* (1977) 3 FPPC Ops. 62. Under the *Siegel* test, the Commission has employed the following four criteria:

(1) Whether the impetus for formation of the entity originated with a government agency;

(2) Whether the entity is substantially funded by, or its primary source of funds is, a government agency;

(3) Whether one of the principal purposes for which the entity was formed is to provide services or undertake obligations which public agencies are legally authorized to perform and which, in fact, they traditionally have performed; and

(4) Whether the entity is treated as a public entity by other statutory provisions.

(1) *Did the impetus for the formation of the entity originate with a government agency?*

Participation in the ATN by businesses and developers in the areas was mandated under City Ordinance No. 5454. While established as a mitigation measure to address traffic and air quality concerns, the authority under which the ATN assesses and collects fees derives entirely from the City's adoption of the ordinance. To implement the ordinance, the City participated substantially in the initial formation of the ATN and ultimately authored the Articles of Incorporation establishing the ATN and the City's membership in the ATN. Additionally, the City devoted staff resources and oversaw day-to-day operations, entered into and approved contracts with third-party vendors to assist in the ATN's formation, and contributed capital resources to the ATN.

As previously stated in the *Haubert* Advice Letter, *supra*, the first criteria of the *Siegel* test is generally met where an entity is created by statute, ordinance, or by some official action of another government agency. (See *Moser* Advice Letter, No. A-97-400.) Considering that the ATN's authority derives entirely from the City's adoption of Ordinance No. 5454 and the City's initial actions to implement the ordinance, it is inescapable that the impetus of the ATN's formation originated with the City.

Nonetheless, despite the City's initial role, the Articles of Incorporation removed the City from the day-to-day operations of the ATN and granted control of the ATN to the very businesses that the ATN serves. Any additional amendments to the Articles of Incorporation are under the sole authority of the ATN's Board of Directors and voting members. Additionally, the ATN's Board of Directors, which determines membership dues and assessments, is determined by the ATN's voting members, of which the City is just one of the 104 current members. At this time, 17 years after the formation of the ATN, the City's initial role in establishing the ATN is less relevant to the determination of whether the ATN is a government agency.

(2) *Is the entity substantially funded by, or is its primary source of funds, a government agency?*

Based upon the figures you have provided for the 2011-2012 fiscal year, the majority of the ATN's funding is derived from the assessments on the businesses it serves. Ticket sales and federal grants come in a close second and third, while membership fees and advertising make up the remainder of the ATN's funding. While you contend that no additional funds are derived from the City apart from the small membership dues paid by the City, the assessments (at least for obligatory members) are collected under the authority of City Ordinance No. 5454. Thus, the assessments are akin to a local tax that passes to the ATN through the City itself. Conversely, the assessments are derived from the very businesses that have been granted the power through the formation of the ATN to control the funds. Accordingly, there is a question whether the City or the obligatory members are the source of assessments paid under the authority of City Ordinance No. 5454.

Additionally, it is unclear whether the federal grants should be considered in determining whether the ATN is a government agency. For instance, we have previously advised that federal grants are public funds, and that an entity that receives most of its monies from a federal grant meets the second *Siegel* criteria. (See *Brammer* Advice Letter, No. A-08-205a.) However, we have not been consistent in providing this advice and have also advised, albeit contradictorily, that obtaining funding from the federal government "argues against [the entity] being considered a California state agency." (*Donavan* Advice Letter, No. A-99-269.)

Even assuming that assessments from obligatory members and federal grants should be considered in determining whether the primary source of the ATN's funds is a government agency, we note that the ATN receives significant funding from its daily operations and voluntary business members.

(3) *Is one of the principal purposes for which the entity was formed to provide services or undertake obligations which public agencies are legally authorized to perform and which, in fact, they traditionally have performed?*

While the oversight and operation of public transportation systems is undoubtedly a function that is typically performed by governmental entities (See *Knox* Advice letter, A-90-038 and *Keene* Advice Letter, No. I-89-613), this does not conclusively establish that transportation provided as a shuttle service for patrons of private businesses is a service typically performed by governmental entities. To this extent, we disagree with the statement in the *Haubert* Advice Letter, *supra*, that "the fact that ATN engages in activities traditionally (though not exclusively) performed by the government, demonstrates that the governmental function factor of the *Siegel* analysis is *conclusively* met." (Emphasis added.)

For comparison, in the Commission's opinion *In re Leach* (1978) 4 FPPC Ops. 48, the Commission considered whether the Bakersfield Downtown Business Association was a government agency in light of the association's contract with the city to provide administrative services for a business promotion district, which was funded by a local tax on the business located in the district including approximately one-quarter of the association's members.

Despite the fact that the tax was enacted for the public purpose of promoting public events in the district and the general business climate, the Commission found that the services rendered were less public in nature in that they specifically benefited the downtown businesses including retail stores, restaurants, and hotels.

Based upon the facts you have provided, the ATN is primarily operated for the benefit of the private businesses it serves. For example, routes and schedules are determined based upon the needs of the businesses and not the general public, and you have stated that the ATN estimates that the “vast-majority” of riders are patrons of the businesses served. At the same time, the ATN is open to the general public and by its very design acts to supplement public transportation within the City. For this reason, we can determine only that the ATN serves both public and private functions, but that shuttle services catering to the patrons of the private businesses served by the ATN are less public in nature.

(4) Is the entity treated as a public entity by other statutory provisions?

As determined in the *Haubert* Advice Letter, *supra*, it does not appear that the ATN is currently treated as a public agency by other statutory provisions.

In summary, the ATN does not squarely fall under any of the four criteria established by the *Siegel* opinion. Moreover, the facts presented are comparable to those analyzed in the *Leach* opinion. In both instances, we find particular significance in that the entity in question was composed of the very businesses affected by the assessments, control of the entity was exercised independently from the city imposing the assessments, and the entity had only the limited authority to use the assessments to fund services that specifically benefited the businesses. Accordingly, it does not appear from the facts you have provided that the ATN is currently a government agency under the provisions of the Act.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Brian G. Lau
Counsel, Legal Division

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