

NOTICE: This letter SUPERSEDES the *Harmon* Advice Letter, No. I-92-84, to the extent that it is inconsistent with the assistance provided herein.

February 8, 2013

Paul J. Mehnert
Senior Deputy Counsel
County Administration Center
1600 Pacific Highway, Room 355
San Diego, CA 92101-2469

Re: Your Request for Informal Assistance
Our file No. I-12-102

Dear Mr. Mehnert:

This letter responds to your request for informal assistance regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ You have asked whether members of San Diego County Planning Groups are “public officials” under the Act. Because you seek general guidance, we are providing informal assistance, rather than advice. Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

FACTS

Between September 2009 and March 2010, the Commission’s Technical Assistance Division communicated with your office on the issue of whether members of San Diego County Planning Groups (“Planning Groups”) are public officials, and, therefore, must be included in a conflict-of-interest code. Your office indicated that the Planning Groups do not have decision-making authority, but, rather, provide “general input into the planning process for their specific communities.” (Letter from David Smith dated December 18, 2009). Relying on informal assistance issued to your office in 1992 (*Harmon* Advice Letter, No. I-92-84), we said in our letter of February 22, 2010 that “. . . our office requires that the Group members be treated as

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.

public officials subject to the disclosure and disqualification provisions of the Act.” On March 23, 2010 the Board of Supervisors adopted a Conflict-of-Interest Code for each Planning Group.

In May 2012 we responded to a request for advice from Michael Cassinelli, a member of the Jamdul/Dulzura Community Planning Group by saying that members of that planning group are not public officials. After receiving your request, we rescinded that letter in order to provide more comprehensive assistance. You have asked us to clarify our advice on the question of whether members of the Planning Groups are public officials.

ANALYSIS

Code Reviewing Bodies:

The Act requires specified public officials of state and local government agencies to periodically file Statements of Economic Interests (FPPC Form 700) disclosing defined financial interests. These officials fall into two categories: (1) Officials holding positions specified in Section 87200, who are required to disclose the broadest range of financial interests (Sections 87200 - 87210); and (2) Officials holding agency positions that involve participation in government decisions that have financial impacts. These positions are designated in the agency's conflict-of-interest code and disclosure for each position is tailored to the scope of the official's job duties. (Sections 87300 - 87313.)

It is the Act's stated policy that conflict-of-interest codes are formulated at the most decentralized level possible. (Section 87301.) The code reviewing body is the government agency charged with reviewing and approving an agency's conflict-of-interest code. No code is effective unless approved by the code reviewing body. (Section 87303.) Section 82011 details which agencies are code reviewing bodies.

As is pertinent to your questions, the following are the code reviewing bodies for local government agencies: (1) The Fair Political Practices Commission (the "Commission") for any local government agency with jurisdiction in more than one county (Section 82011(a)); (2) The county board of supervisors for any county agency and any other local government agency with jurisdiction wholly within the county, other than the board itself, an agency of the judicial branch or a city agency (Section 82011(b)); and (3), the city council for any city agency except for the council itself (Section 82011(c)).

Finally, Section 87312 provides that “The Commission shall, upon request, provide technical assistance to agencies in the preparation of Conflict of Interest Codes. Such assistance may include the preparation of model provisions for various types of agencies. Nothing in this section shall relieve each agency of the responsibility for adopting a Conflict of Interest Code appropriate to its individual circumstances.”

Advisory and Decisionmaking Boards:

Section 82048 defines “public official,” in pertinent part, as a “member, officer, employee or consultant of a state or local government agency.” Regulation 18701(a)(1) further defines a “member” as follows:

“Member” shall include, but not be limited to, salaried or unsalaried members of committees, boards or commissions with decisionmaking authority. (A) A committee, board or commission possesses decisionmaking authority whenever: (i) It may make a final governmental decision; (ii) 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 (iii) 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.”

Making a final governmental decision

Under the Act, a public official makes a governmental decision 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” (Regulations (a)(1)(A)(i) and 18702.1(a).)

In prior advice, we have enumerated the kinds of authority that suggest that a nominal advisory body makes governmental decisions: the authority to (a) adopt rules, rates and regulations for the administration and management of an agency; (b) enter into contracts with other entities; (c) hire or fire personnel or consultants; or (d) purchase supplies. (*Calabrese* Advice Letter No. I-08-067; *Petzold* Advice Letter No. A-89-591; *Ewing* Advice Letter No. A-89-480; *Amen* Advice Letter No. A-88-304; *Glacken* Advice Letter No. I-92-265).

We have also advised that a committee did *not* have decision-making authority where the enabling authority (such as a charter, ordinance or policy) stated that the committee (a) could not contract for the services of a consultant unless directed to do so by city staff and the consultant had to be selected by staff (*Calonne* Advice Letter, No. A-90-292); (b) only had authority to assist the various decision-makers (*Woodbury* Advice Letter, No. A-90-665; *Busterud* Advice Letter, No. A-92-543); or (c) had no power to implement its own recommendations (*Milne* Advice Letter, No. A-87-250).

Nothing in the facts or materials we have been provided indicates that the Planning Groups have the authority to adopt rules, rates or regulations, enter into contracts, hire or fire personnel or consultants or make purchases without prior approval by staff or a decision-making body.

Compelling or preventing a governmental decision:

Even if the Advisory Boards lack authority to make final governmental decisions, if they may compel a governmental decision or 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, this authority would render members subject to the Act's disclosure and conflict-of-interest provisions. (Regulation 18701(a)(1)(A)(ii).) The Planning Groups' enabling authority (Policy I-1) clearly indicates that the Planning Groups lack authority to compel or prevent governmental decisions. For example, the power to initiate decisions resides with the Board of Supervisors, the Planning Commission and staff. Thus, the Planning Groups do not have an exclusive power to initiate decisions. Also, there is no indication that the Planning Groups have the power to veto a governmental decision. The fact that disagreements between staff and a Planning Group are resolved by presenting both the staff proposal and the Planning Group proposal to the Board of Supervisors suggests that the Planning Groups lack veto power.

On a related note, in a prior letter concerning these bodies, (*Harmon, supra*), we provided informal assistance on the question of whether members of the Planning Groups were public officials under this test. We said that it was "likely" that the advisory groups met the test for compelling, preventing or rubberstamping governmental decisions. A significant fact relied upon in reaching this result is inconsistent with the facts and materials you have provided: when staff and a planning group disagree, the planning groups can supersede staff proposals.

However, the written policy you have provided indicates the opposite: when staff and a planning group disagree, both staff's and the Planning Group's recommendations are submitted to the Board of Supervisors. Accordingly, to the extent that the Harmon letter suggests that all Planning Group members are public officials because they can compel or prevent a governmental decision or their recommendations have been regularly approved without significant amendment or modification over an extended period of time, the Harmon letter is hereby superseded.

Making 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:

The language of Regulation 18701(a)(1)(A)(iii) requires an assessment of the extent to which a Planning Group's recommendations have been followed in the past. We have advised that if there is a history or track record of the decision-maker "rubber stamping" an advisory body's recommendations, the advisory body will be considered to have decision-making authority. (*Baird* Advice Letter, No. A-94-299; *Czach* Advice Letter, No. A-91-503; *Woodbury*

Advice Letter, No. A-90-665; *Ball* Advice Letter, No. I-89-671.) This test, even more than the others, is fact dependent. We must leave this ultimate decision on whether this test applies to you as code reviewing body based on the facts you have before you. However, we can offer some general guidance:

Determining whether a planning group's recommendations have been regularly approved without significant amendment or modification over an extended period of time requires examining a planning group's history. Each planning group has its own history, and, therefore, a determination must be made for each individual planning group. This necessarily requires reviewing the minutes of meetings of both the planning group and the board of supervisors. As the code reviewing body, the board of supervisors is tasked with determining whether individual positions should be included in a conflict-of-interest code. This includes a factual determination of whether planning group recommendations are regularly approved without significant amendment or modification.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Valentina Joyce
Counsel, Legal Division

VJ:jgl