



## FAIR POLITICAL PRACTICES COMMISSION

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April 27, 2005

A. Patrick Muñoz, City Attorney  
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P.O. Box 1950  
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**Re: Your Request for Advice**  
**Our File No. A-05-032**

Dear Mr. Muñoz:

This letter is in response to your request on behalf of Councilmember Diane Harkey, for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup>

### QUESTIONS

- (1) May Dana Point City Councilmember Diane Harkey participate in and vote on the creation and adoption of a specific plan area known as the Dana Point Town Center?
- (2) When measuring the distance between a public official's real property and a specific plan area for the purpose of determining if a public official's property is within 500 feet, is the measurement from the boundary of the specific plan area or from each portion affected within the area?

### CONCLUSIONS

- (1) No. Unless it is not reasonably foreseeable that the governmental decision will have *any* financial effect on Councilmember Harkey's real property, Councilmember Harkey has a conflict of interest under the Act and may not participate in or vote on governmental decisions relating to the creation and adoption of a specific plan area known as the Dana Point Town Center.

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<sup>1</sup> Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

(2) The general rule is that the distance is measured from the edge of the entire subject property, although there have been some exceptions, as discussed below.

### FACTS

Dana Point City Councilmember Diane Harkey is considering the creation and adoption of a specific plan for an area presently designated, for planning purposes, as the Dana Point Town Center (the "Planning Area"). These governmental decisions will include determinations regarding: whether to adopt the specific plan; whether to initiate public improvements or other changes to the public rights of way; the design, development and use restrictions for the specific plan area; what the mix of zoning between residential and commercial should be; whether to increase set back requirements and, if so, by how much; setting intensified development standards (such as new requirements for landscaping, street lighting, public dedications, and architectural improvements) to encourage a village atmosphere and pedestrian-friendly uses (such as outdoor cafes); and whether to provide development incentives. The city also may provide development incentives as part of new zoning requirements in order to achieve the atmosphere it seeks to create.

The city council has identified the proposed conceptual boundary of the planning area within which the specific plan would be adopted (either coterminous with the planning area or comprising only a part of it). The area contained within the boundary consists primarily of public rights of way and the private properties, primarily commercial, that front along the public rights of way within the planning area. You stated in our April 11, 2005, telephone conversation that these are tentative boundaries that could change.

The city council has hired a consultant to propose a development plan for the planning area, which, if approved by council, would be embodied in a specific plan. At this time, there have been no specific discussions about the type of design, development and use restrictions that may be applied. The council has given general direction to the consultant to provide a pedestrian-friendly, village atmosphere, in which mixed commercial and residential uses would exist with traffic calming measures. The planning area is not currently subject to any specific plan. It is presently zoned Community Commercial/Pedestrian Commercial. Residential uses are not presently permitted in most of the proposed planning area.

Councilmember Harkey has a financial interest exceeding \$2,000 in each of four multi-family residential properties in the city, none of which are within the proposed boundaries of the planning area. Two of the properties are within 500 feet of the proposed boundaries of the planning area. These two properties are a duplex and a six-plex.

## ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials will "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).) The general rule is that a conflict of interest exists whenever a public official makes a governmental decision that has a reasonably foreseeable material financial effect on one or more of his or her financial interests.

### **STEPS 1 & 2: IS COUNCILMEMBER HARKEY A PUBLIC OFFICIAL MAKING, PARTICIPATING IN MAKING, OR INFLUENCING A GOVERNMENTAL DECISION?**

As a member of the Dana Point City Council, Councilmember Harkey is a public official under the Act. (Section 82048.) Councilmember Harkey will be called upon to consider whether the city should approve or disapprove the creation and adoption of the specific plan, including zoning, design, use, and development restrictions and other related decisions. Therefore, she will be making, participating in making, or otherwise using her official position to influence a governmental decision.<sup>2</sup>

### **STEP 3: DOES COUNCILMEMBER HARKEY HAVE A POTENTIALLY DISQUALIFYING ECONOMIC INTEREST?**

A public official has a financial interest in a decision within the meaning of section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any one of five enumerated economic interests, including:

- An economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (section 87103(a); regulation 18703.1(a)); or in which

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<sup>2</sup> If a public official's office is listed in section 87200 ("87200 filers" include city council members and members of planning commissions) and he or she has a conflict of interest in a decision noticed at a public meeting, then he or she must: (1) immediately prior to the discussion of the item, verbally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in regulation 18702.5(b)(1)(B), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences and speaking as a member of the public regarding personal interests, special rules found in regulation 18702.5, subdivisions (c) and (d) apply. (Section 87105.) Since Councilmember Harkey is a city councilmember these requirements are applicable to her if she determines that she has a conflict of interest in a governmental decision.

he or she is a director, officer, partner, trustee, employee, or holds any position of management (section 87103(d); regulation 18703.1(b));

- An economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more (section 87103(b); regulation 18703.2);
- An economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (section 87103(c); regulation 18703.3);
- An economic interest in any source of gifts to him or her if the gifts aggregate to \$360 or more within 12 months prior to the decision (section 87103(e); regulation 18703.4);
- An economic interest in his or her personal finances, including those of his or her immediate family -- this is the "personal financial effects" rule (section 87103; regulation 18703.5).

Under the facts you have presented, Councilmember Harkey has an economic interest in real property equal to or exceeding \$2,000 through her ownership of four multi-family residential properties in the city. You have not provided us with information to analyze any other economic interests, so we have limited our analysis exclusively to her real property interests. However, Councilmember Harkey should consider all of her economic interests when determining if she can participate in a governmental decision.

**STEP 4: ARE COUNCILMEMBER HARKEY'S ECONOMIC INTERESTS DIRECTLY OR INDIRECTLY INVOLVED IN THE GOVERNMENTAL DECISION?**

"In order to determine if a governmental decision's reasonably foreseeable financial effect on a given economic interest is material, it must first be determined if the official's economic interest is directly or indirectly involved in the governmental decision." (Regulation 18704(a).) For governmental decisions that affect real property interests, the standards set forth in regulation 18704.2 apply (regulation 18704(a)(2)).

Regulation 18704.2(a) states, in pertinent part:

"(a) Real property in which a public official has an economic interest is directly involved in a governmental decision if any of the following apply:

"(1) The real property in which the official has an interest, or any part of that real property, is located within 500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the governmental decision. For purposes of subdivision (a)(5), real property is located "within 500 feet of the boundaries (or proposed boundaries) of

the real property which is the subject of the governmental decision” if any part of the real property is within 500 feet of the boundaries (or proposed boundaries) of the redevelopment project area.”

None of Councilmember Harkey’s properties are within the proposed boundaries of the planning area; however, two of the properties are within 500 feet of the proposed boundaries.

As discussed in our March 18, 2005, advice letter to you, (*Munoz Advice Letter*, No. A-05-019), subdivision (b) provides a number of exceptions to the provisions of subdivision (a). These exceptions are a list of specific decisions that, when they are presented exclusive of other decisions before the governmental body, are of such a type that the public official’s real property interest is deemed to be indirectly involved in the decision regardless of the findings of subdivision (a). You ask if subdivision (b)(1) is applicable to make Councilmember Harkey’s real property indirectly involved. Regulation 18704.2(b)(1) states:

“The decision solely concerns the amendment of an existing zoning ordinance or other land use regulation (such as changes in the uses permitted, or development standards applicable, within a particular zoning category) which is applicable to all other properties designated in that category, which shall be analyzed under 2 Cal. Code Regs. Section 18705.2(b).”

“It is fundamental cannon of statutory construction that exceptions are to be construed strictly and narrowly.” (*Ascarate Advice Letter*, No. A-04-012; citing *Deitsch Advice Letter*, No. A-02-129 quoting *Ticket Track California, Inc. v. Department of Motor Vehicles* (2002) 97 Cal.App. 4<sup>th</sup> 1251; 119 Cal. Rptr. 2d 176.) As stated in our advice to you regarding Councilmember Chilton in the *Munoz Advice Letter*, *supra*, the exceptions set forth in subdivision (b)(1) do not apply to sweeping areas plans that do not, by their nature, *solely* concern the amendment of a *single* existing zoning ordinance or other land use regulation. The exception provided in subdivision (b)(1) is expressly singular (“an ordinance,” etc.) and would therefore not cover the multitude of factors addressed in a specific plan. In addition, the zoning and land use decisions you presented in as part of the adoption of the specific plan do not appear to be “applicable to all other properties designated in that category,” but instead, are only applicable to the properties with that zoning designation within the specific plan area.

You also ask if the measurement applicable for Councilmember Harkey’s properties can be made from the streets within the specific plan area for the decision involving the specific plan which only involves street improvements. The general rule is that the distance is measured from the edge of the entire subject property, although there have been some exceptions. Where the governmental decision only affects a clearly defined, specific and isolated site, such as a specific building on a large tract of land, we have interpreted the regulation to allow the distance to be measured from that clearly

defined and specifically affected portion. However, when the decision *or series of decisions* affects the entire property or where the decisions affecting the isolated site are inextricably linked to the entire property, the distance is measured from the boundary of the entire property. (*Ball* Advice Letter, No. A-01-279; *Nord* Advice Letter, No. A-82-038.)

Whether the distance is measured to the boundaries of the entire parcel or to the boundaries of only a smaller parcel of property within the area depends heavily on the type of decision before the official. However, this appears to be a moot point since your facts indicate that one of Councilmember Harkey's properties is within 500 feet of Golden Lantern Street, which is a street within the specific plan area and is a street affected by the decision. So, even if the distance is measured from the streets themselves and not the entire planning area, her property is still directly involved in the decision. Therefore, Councilmember Harkey's real property would be directly involved in the governmental decision under regulation 18704.2(a), as the property in which she has an interest is located within 500 feet of the boundaries of the specific plan.

#### **STEP 5: MATERIALITY STANDARD**

Once the degree of involvement is determined, Step 5 of the conflict of interest analysis addresses the applicable materiality standard. Regulation 18705.2 sets forth the materiality standards for real property economic interests. The financial effect of a governmental decision on real property that is directly involved in the decision is presumed to be material. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect on the real property. (Regulation 18705.2(a)(1).)

#### **STEP 6: REASONABLY FORESEEABLE**

An effect upon economic interests is considered "reasonably foreseeable" if there is a substantial likelihood that it will occur. (Regulation 18706(a).) Whether the financial consequences of a governmental decision are substantially likely at the time the decision is made depends on the facts surrounding the decision. A financial effect need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.) As for the presumption that there will be a material financial effect on the real property, foreseeability is met.

#### **STEPS 7 & 8: PUBLIC GENERALLY & LEGALLY REQUIRED PARTICIPATION**

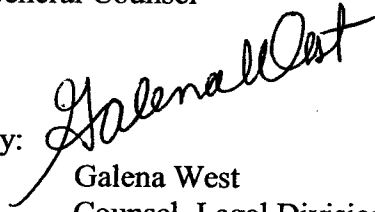
The last two steps of the Commission's standard eight-step conflict-of-interest analysis concern exceptions which may be applied when a public official has a conflict of interest with respect to a governmental decision before his or her agency. (Regulations 18707.1 and 18708.) Your facts do not indicate that either of these exceptions is applicable.

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

Sincerely,

Luisa Menchaca  
General Counsel

By:

A handwritten signature in black ink that reads "Galena West". The signature is written in a cursive style and is positioned over the printed name and title.

Galena West  
Counsel, Legal Division

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