



FAIR POLITICAL PRACTICES COMMISSION

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April 22, 2010

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Re: Your Request for Advice
Our File No. A-10-015

Dear Mr. McNeill and Ms. Spivak:

This letter responds to your requests for advice regarding statement of economic interest disclosure under the Political Reform Act (the "Act")¹. The advice of the Fair Political Practices Commission (the "Commission") is limited to matters arising under the Act. (Regulation 18329(b)(8)(d).)

You have each requested advice in separate letters regarding San Diego's Community Parking District Advisory Boards that have been in existence since 2005 (the "Advisory Boards.") We are responding to your requests in one advice letter and have reformulated some of your questions because your questions overlap and we believe that clarity is best served by a comprehensive analysis of the issues. We understand that Ms. Spivak is requesting advice on behalf of the city council of the City of San Diego, which is the reviewing body of the Conflict of Interest Codes of Community Parking District Advisory Boards, and that Mr. McNeill has previously requested advice from the city on these issues as they relate to Pacific Beach.

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.

QUESTIONS

1. Are members of the Advisory Boards, including the Pacific Beach Community Parking District Advisory Board (the "PB Advisory Board"), required to file Statements of Economic Interests ("SEI's")?
2. What are the boundaries of the Pacific Beach Community Parking District (the "PB District") for reporting purposes?
3. Are Advisory Board members who lease space in the parking district required to report income on their SEIs?
4. Do the income reporting requirements apply to a PB Advisory Board member who owns a business located in Pacific Beach and the business either owns or leases commercial real property in Pacific Beach?
5. Do the income reporting requirements apply to a PB Advisory Board member who is employed by a business located in Pacific Beach?

CONCLUSIONS

1. Yes. Members of the Advisory Boards must file SEIs because they have decisionmaking authority within the meaning of Section 82019 and Regulation 18701(a)(1). The boards have authority to enter into contracts, hire consultants, disburse public funds and hire personnel. Prior to the adoption of a conflict-of-interest code, board members must file SEIs pursuant to Section 87302.6. Once a conflict-of-interest code is adopted, they must file SEIs in accordance with the provisions of the agency's conflict-of-interest code.
2. It is our understanding that the boundaries of the PB District have been defined by the city council. We ask the city attorney's office to answer this question.
3. Yes, if the member receives annual *income* of \$500 or more from a single source located or doing business within the boundaries of a parking district, regardless of whether the member owns or leases real property in the district. (If a member leases or owns real property in the district, the leasehold or ownership interest is reportable as an *interest in real property* if its value is \$2,000 or more.)
4. Yes. Annual *income* of \$500 or more from a business located or doing business in the PB District is reportable. In addition, a \$2,000 or more interest in the commercial property is reportable as an *interest in real property*.
5. Yes. Annual income of \$500 or more received from the employer located or doing business in the PB District is reportable.

FACTS²

Ms. Spivak states that “since 1997, the city council adopted resolutions creating community parking districts, each with a designated advisory board to oversee parking policy within the communities.” Council Policy 100-18 (the “Policy”) provides that “the City Council may designate as the District Advisory Board the existing board of a business improvement district, a redevelopment corporation, a community development corporation, or other nonprofit corporation approved by the City Council.” Under the Policy, Advisory Boards have been given responsibility for managing 45 percent of revenues generated by parking meters in their respective local parking districts.

The PB District was created by the city council on June 27, 2005 pursuant to the Policy. Once such a district is formed, the city council designates a legal entity as the community parking district advisory board. On July 18, 2006, the city entered into a contract (the “2006 Contract”) with Discover Pacific Beach³ designating Discover Pacific Beach as the PB Advisory Board. Discover Pacific Beach is a non-profit organization that represents the interests of businesses located in the Pacific Beach area to promote business in Pacific Beach. Discover Pacific Beach is funded by a city business tax. Mr. McNeill is a board member of Discover Pacific Beach.

The scope of services under the 2006 Contract is as follows:

- Work with the city to develop changes to parking requirements for development projects in Pacific Beach;
- Coordinate with other community groups and agencies who participate in activities related to transportation and parking in Pacific Beach;
- Utilize existing neighborhood communication tools to promote existing public and private parking reservoirs;
- Survey existing parking reservoirs and resources and establish contacts in the community to build partnerships;
- Develop a parking brand/logo and research options relating to parking signage campaign;
- Participate in citywide parking meetings, especially as they relate to Pacific, such as the proposed oversized vehicle ordinance and the changes to parking requirements for new developments and condo conversions;
- Develop long term parking initiatives:
 - ❖ Work with partners, develop funding sources to fund feasibility study for neighborhood parking structures;

² For purposes of addressing your questions, we have relied on documents, in addition to those you have provided, submitted to us in April 2008 in connection with a request for advice from Michael Calabrese, Chief Deputy City Attorney for the city of San Diego. (*Calabrese* Advice Letter, No. I-08-067.)

³ The official name of Discover Pacific Beach is “Pacific Beach Community Development Corporation.”

- ❖ Establish a comprehensive five-year action plan for parking solutions in Pacific Beach.

In accordance with requirements of the Policy, the city council approved a \$15,000 budget for the PB District for Fiscal Year (FY) 2007. The budget included personnel expenses for an executive director and an administrative assistant. It also designated sums for the payment of rent and marketing.

As stated above, the Policy provides that 45 percent of any parking meter revenues generated within each community parking district is allocated to that district. Pacific Beach generates no meter or other parking related revenue. Each Advisory Board is to submit annually a recommended improvement or implementation plan and proposed budget for consideration by the city council. However, subsequent to the FY 2007 budget, no additional plans or budgets were submitted by the PB Advisory Board, nor has the city council approved any budgets. Mr. McNeill states that the PB District has received no city funds, relying entirely on services provided by Discover Pacific Beach staff at no cost.

At some point, the Pacific Beach Cooperative Parking Committee (the "Committee") was formed to represent the interests of the community relating to the PB District. The Committee consists of thirteen delegates, including three from Discover Pacific Beach, three from the Pacific Beach Town Council, three from the Pacific Beach Planning Committee, and four at-large delegates from the "four quarters of the community." The Committee has not been formally recognized by the city council.

In March 2007, Discover Pacific Beach entered into a consulting contract with Walker Parking Consultants pursuant to which Walker was to assist in developing a parking management plan for Pacific Beach. Mr. McNeill states that the Committee hired the consulting firm and that funding came from a county grant specifically earmarked for a parking study for Pacific Beach. The PB Advisory Board submitted the resulting consultant's report to the city council without making any recommendations. The city council took no action on the report.

According to Mr. McNeill, the PB Advisory Board has taken no actions with respect to parking and that it is the Committee, not the PB Advisory Board, that holds community meetings and handles parking concerns of individual members of the community. He states that since its inception in 2005, the PB Advisory Board has made no recommendations to the city council.

There appears to be some confusion regarding the various groups responsible for the PB District. Mr. McNeill appears to believe that Discover Pacific Beach and its board members have delegated their responsibilities to the Committee. This view is supported by the "scope of services" exhibit to the 2006 Contract. It states: "The Community Parking Advisory Board (a Business Improvement District Parking Sub Committee) is a joint committee comprised of members from the Pacific Beach Planning Committee, Pacific Beach Town Council and Discover Pacific Beach BID." However, despite Mr. McNeill's assertion that the Committee hired the consultant, the parties to the consulting contract are Discover Pacific Beach and the

consultant. Also, nothing in the Policy suggests that an Advisory Board has the authority to delegate its duties to a committee. Also, the 2006 Contract expressly designates Discover Pacific Beach as the PB Advisory Board. Based on our review of the Policy, the 2006 Contract, the FY 2007 Budget, and the contract between Discover Pacific Beach and Walker Parking Consultants, we conclude that Discover Pacific Beach, and not the Committee, is the PB Advisory Board and is responsible for the PB District.

Mr. McNeill states that on the advice of the city attorney's office, the Committee has not met in over eighteen months because it had no conflict-of-interest code. The COI Code was adopted on January 4, 2010. He also states that the board of directors of Discover Pacific Beach does not discuss parking at its meetings.

Mr. McNeill describes the functioning of the PB Advisory Board as strictly advisory, stating that it has no decisionmaking authority. However, in our prior advice to Mr. Calabrese of the city attorney's office, (*Calabrese* Advice Letter, No.I-08-067), we determined that San Diego's community parking districts have some decisionmaking authority, and, therefore, are required to adopt a conflict-of-interest code.⁴

ANALYSIS

1. Question 1: Are members of the Advisory Boards, including the PB Advisory Board, required to file SEIs?

Consistent with our analysis in the *Calabrese* advice letter, the Advisory Boards, including the PB Advisory Board, are local government agencies and are required to adopt and promulgate a conflict-of-interest code.⁵

Public officials, including members of boards or commissions of a local government agency, disclose their financial interests in accordance with the conflict-of-interest code developed by their respective agencies. (See Sections 87300-87313; *Simon* Advice Letter, No. I-04-013, citing to *Weaver* Advice Letter, No. A-03-225.) Persons designated in a conflict-of-interest code include any "officer, employee, member, or consultant" of an agency whose position involves making or participating in making decisions that may have a foreseeable and material effect on any financial interest. (Section 82019(c).) Members of a board or commission

⁴ In *Calabrese*, we concluded, on two independent bases, that members of the advisory boards must file SEIs. First, the advisory boards had decisionmaking authority. Second, the advisory boards made substantive recommendations that were, over a period of time, regularly approved by the city council, a practice commonly referred to as "rubber-stamping." Based on information provided by Ms. Spivak that is more specific than that which was provided by Mr. Calabrese regarding the conduct of the various advisory boards, we omit any discussion of rubber-stamping, as it does not appear to be applicable to the PB Advisory Board.

⁵ Section 87300 provides that every "agency" shall adopt and promulgate a conflict-of-interest code. Section 82003 defines "agency" as any state agency or local government agency. "Local government agency" is defined in Section 82041 to include "a district of any kind" or any "department, division, bureau, office, board, commission, or other agency" of a district. Also, see *Carlisle* Advice Letter, No. I-05-246.

who serve in a solely advisory function are not required to be designated in a conflict-of-interest code. (Section 82019; *Simon and Weaver Advice Letters, supra.*)

For purposes of determining disclosure requirements of designated employees under Section 82019,⁶ Regulation 18701(a)(1) 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.”

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”
- (Regulation 18702.1(a).)

In the *Calabrese* advice letter, we concluded that the Advisory Boards have decisionmaking authority by applying the following factors:

- Authority to adopt rules, rates and regulations for the administration and management of a city’s central parking district (*Petzold Advice Letter, No. A-89-591*).
- Authority to hire or fire personnel, appoint an executive director, purchase supplies, or enter into contracts. (*Petzold and Weaver Advice Letters, supra.*)
- Entering into contracts with entities to provide services (*Glacken Advice Letter, No. I-92-265a*).
- Authority to hire outside consultants (*Ewing Advice Letter No. 89-480; Amen Advice Letter No. A-88-304*).

⁶ This regulation also applies to determine if individuals are “public officials” for purposes of the disqualification rules of the Act. (Sections 82048 and 87103.)

The following factors were considered determinative in finding that an advisory body had no decisionmaking authority:

- No authority to hire a consultant without first being directed by the city council to do so (*Calonne* Advice Letter, No. A-90-292).
- Authority to hire a consultant but only subject to selection of the consultant by city staff (*Calonne* Advice Letter, *supra*).
- Mere assistance to agency staff (*Woodbury* Advice Letter, No. A-90-665; *Busterud* Advice Letter, No. A-92-542).
- No authority to implement its own recommendations (*Milne* Advice Letter, No. A-87-250).
- No authority to do anything (*Dickerson* Advice Letter, No. I-90-729).

Applying these factors to Discover Pacific Beach, we conclude that it has decisionmaking authority. Discover Pacific Beach entered into a consulting contract. (*Petzold, Weaver, Glacken, Ewing, and Amen* Advice Letters, *supra*.) The FY 2007 budget provided for the hiring of an executive director and administrative assistant. (*Petzold* and *Weaver* Advice Letters, *supra*.) Finally, under the Policy, Discover Pacific Beach has authority to disburse public funds generated by parking meter revenues, whether or not that authority has been exercised. It was also given authority to disburse public funds when the city council approved the FY 2007 budget. In the *Calabrese* letter, we stated:

“The authority to disburse public funds, we believe, comes as close to authority to make a governmental decision as is the authority to purchase supplies [referring to *Petzold*]. While a budget may authorize the expenditure of a total amount in a fiscal year for certain purposes, budgets typically do not designate each vendor or recipient of each expenditure. Presumably, decisions regarding the specific recipients of the funds and the amounts that would be disbursed are made by the Advisory Board. If that is the case, the Advisory Boards are disbursing public funds and their members are obligating the Community Parking District to a course of action. (Regulation 18702.1(a)(3).) Moreover, expenditure of funds often involves entering into contractual agreements on behalf of an agency (Regulation 18702.1(a)(4).”

Consistent with our decision in *Calabrese*, Discover Pacific Beach, which is the Advisory Board for Pacific Beach, has decisionmaking authority under Regulation 18702.1 because it has authority to enter into contracts, hire consultants, disburse public funds and hire personnel.

Accordingly, its board members are required to file SEIs in accordance with the provisions of the board's conflict-of-interest code.

The Act also requires board members to file SEIs prior to the adoption of a conflict-of-interest code. Section 87302.6 governs a board member's reporting obligations between the time he or she becomes a board member and the time a conflict-of-interest code is adopted. Regulation 18754 implements the provisions of Section 87302.6 and provides that a member of a board of a newly created agency shall file a statement of economic interests at the same time and in the same manner as individuals filing under Section 87200. The PB Advisory Board is a "newly created agency," as defined in Regulation 18754.⁷ Hence, members of the PB Advisory Board were required to file an initial statement of economic interests not more than 30 days after assuming office and annual statements thereafter, even though their positions were not designated in a conflict-of-interest code during that period. (See Regulations 87200 and 87202.) As stated in *Calabrese*, we find no exceptions to the filing requirements of Section 87302.6. Board members who have not already done so, should file SEIs for that period even though the "retroactive" filings will be late.⁸

Question 2: What are the boundaries of the PB District for reporting purposes?

It is our understanding that the boundaries of the PB District have been defined by the city council. In the "Recitals" section of the 2006 Contract, reference is made to a designated "specific geographic area" called the "1995 Pacific Beach Community plan area." We ask the city attorney's office to answer this question.

Question 3: Are Advisory Board members who lease space in the parking district required to report income on their SEIs?

Yes, if the member receives annual *income* of \$500 or more from a single source located or doing business within the boundaries of a parking district, regardless of whether the member owns or leases real property in the district. (If a member leases or owns real property in the district, the leasehold or ownership interest is reportable as an *interest in real property* if its value is \$2,000 or more).

⁷ For purposes of Section 87302.6, "newly created agency" is defined to include a local government agency which came into existence on or after January 1, 2003. (Regulation 18754(a)(2).) The PB Advisory Board was created on June 27, 2005.

⁸ We confirm our prior statement that the Commission will not take enforcement action against Advisory Board members for failure to timely file these SEIs, so long as they are filed within a reasonable time after this advice letter has been mailed.

Question 4: Do the income reporting requirements apply to a PB Advisory Board member who owns a business located in Pacific Beach and the business either owns or leases commercial real property in Pacific Beach?

Yes. Annual *income* of \$500 or more from the business, which is located and doing business in the PB District, is reportable. In addition, an interest in the commercial property is reportable as an *interest in real property* if its value is \$2,000 or more.

Question 5: Do the income reporting requirements apply to a PB Advisory Board member who is employed by a business located in Pacific Beach?

Yes. Annual income of \$500 or more received from the employer located or doing business in the PB District is reportable.

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

Sincerely,

Scott Hallabrin
General Counsel



By: Valentina Joyce
Counsel, Legal Division

VJ:jgl