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August 11, 2015

Celia Brewer, City Attorney  
City of Carlsbad  
1200 Carlsbad Village Drive  
Carlsbad, CA 92008

RE: Proposed Land Use Initiative (Agua Hedionda 85/15 Plan): Conflict and Legislative Discretion Issues

Dear Ms. Brewer:

By telephone today, you have asked this office to give an opinion on two questions related to claims of conflict of interest and the standards for legislative discretion during City Council deliberations on a land use initiative that has been submitted and is currently undergoing signature verification. The questions are as follows:

1. Does a Council Member have a conflict of interest for the proposed land use measure if supporters or opponents of the measure assisted the Council members as campaign consultants or contributed to their city council campaigns?
2. Are City Council Members subject to “impartiality” standards applicable to quasi-judicial hearings on land use matters when considering how to act on a qualified land use initiative measure?

**No. 1: Does a Council Member have a conflict of interest for the proposed land use measure if supporters or opponents of the measure assisted the Council members as campaign consultants or contributed to their city council campaigns? No.**

Under the Political Reform Act of 1974 (“Act”) and implementing regulations, a public official cannot participate in a decision that affects their financial interests in a material manner. (California Government Code § 87100, et seq.)<sup>1</sup> The question that you have asked is whether former consultants to council members on past political campaigns who are working either for or

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<sup>1</sup> All statutory references are to the California Government Code unless otherwise indicated.

against the land use initiative measure known as the “Agua Hedionda 85/15 Plan”, automatically disqualifies the Council Member from participating in legislative consideration of the Agua Hedionda 85/15 Plan initiative measure. A related question is whether campaign contributions for past elections made to council members requires disqualification. As discussed below, the Council Members are not barred from consideration of legislative matters related to the Agua Hedionda 85/15 Plan just because they worked with former consultants or received campaign contributions from persons who now support or oppose the measure. This is true whether the consultants are compensated or not. Like any other person or entity, unless they are a current source of a gift or income, there is no conflict.

The Political Reform Act (“Act”) regulates conflict of interest issues for participation in governmental decisions such as consideration of an initiative measure. The Act addresses several kinds of economic interests: (1) investments in or positions with business entities, (2) interests in real property, (3) sources of income, (4) sources of gifts and their agents or intermediaries, and (5) the personal finances of the official and the official’s immediate family. (§ 87103, subds. (a)-(e).) The most likely issues in your scenario would be sources of income and sources of gifts within the last twelve months to the City Council Member.

Income generally includes earned income such as salary or wages; gifts; reimbursements of expenses; proceeds from sales, regardless of whether a profit was made; certain loans; and monetary or nonmonetary benefits, whether tangible or intangible. (§ 82030, subd. (a).) Common exclusions from the definition of income include: campaign contributions and certain types of payments from nonprofit organizations. (§ 82030, subd. (b).) Although gifts are included in the definition of income, there is also a separate disqualification provision for gifts. (§ 87103, subd. (e).) A public official has a financial interest in the donor of gifts aggregating \$460 or more in the 12 months prior to the decision in question.

The exclusion of campaign contributions to the Council members would eliminate conflict issues from any individuals who donated to their campaigns. As such, there is no conflict of interest related to any campaign contribution given to sitting council members by sponsors or primary opponents of the measure. Additionally, for consultants who were paid to work on city council campaigns, they would not be sources of income since they were paid by the campaign and not the other way round.

Unless a person who is a source of income or gift to the Council Member over the established thresholds within the last twelve months, there is no conflict of interest issue related to the consideration of the land use measure. Support or opposition to the measure is not a measuring factor. There must be some financial benefit to demonstrate a conflict. The standard applied to determine whether a decision will have a material financial effect on the public official’s interest depends upon whether the interest is directly or indirectly involved. If the interests are directly involved, materiality is generally presumed and the public official usually will have to disqualify himself or herself from the decision. If the interests are only indirectly involved, generally a graduated set of monetary thresholds will be applied to determine the material financial effect. (Fair Political Practices Commission Regulation, § 18704.1, subd. (b).)

Even assuming persons or entities are directly or indirectly involved in the initiative consideration, previous income or gifts prior to the preceding twelve month period are not considered. Support or opposition by a citizen or business of the measure is also not a disqualifying factor. The normal conflict of interest rules apply to consideration of a circulated land use initiative measure related to gifts or sources of income within the last twelve months by a person or entity that is directly or indirectly involved. A prior association, political support or prior employment does not give rise to a conflict without meeting the same thresholds as any other person or entity. A former consultant for a Council Member can be involved in the matter and, under the factors discussed above, the involvement would not cause a conflict of interest.

**No. 2: Are City Council Members subject to “impartiality” standards applicable to quasi-judicial hearings on land use matters when considering how to act on a qualified land use initiative measure? No, the consideration of a land use initiative ordinance is a legislative act and the election official is not subject to the standards that apply to a quasi-judicial hearing.**

The item to be considered by the City Council is a citizen-initiated land use measure. The City Council will consider the measure in their legislative capacity. The power of initiative only extends to legislative acts. (*DeVita v. County of Napa* (1995) 9 Cal.4<sup>th</sup> 763.) Zoning and General Plan measures are legislative acts and subject to the power of initiative. (*Arnel Dev. Co. v. City of Costa Mesa* (1980) 23 Cal.3d 511; *Nelson v. Carson* (1993) 17 Cal.App.4<sup>th</sup> 732; *Wiltshire v. Superior Court* (1985) 172 Cal. App.3d 296.)

When a City Council acts in its legislative capacity, it is subject to different judicial review standards than if it acts in a quasi-judicial role. (*BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4<sup>th</sup> 1205.) In a quasi-judicial capacity, a hearing body hears evidence and applies those facts to the legal standards. Due process requires that a hearing body provide neutral hearing procedures to the parties. This includes a degree of impartiality. (*Clark v. Hermosa Beach* (1996) 48 Cal.App.4<sup>th</sup> 1152.)

When a City Council is acting in its legislative capacity, it is subject to different standards than when the Council is holding a quasi-judicial hearing. Matters that are deemed legislative in nature do not require quasi-judicial procedures and are presumed valid. (*Associated Homebuilders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 607.) The decision of the City Council on a legislative matter is evaluated based on whether the legislative body has the discretion to take the action. No inquiry is made into the underlying motive or thought process of the decision makers. (*City of Fairfield v. Superior Court* (1976) 14 Cal.3d 768,777; *Oxnard Harbor Dist. V. Local Agency Formation Comm’n* (1993) 16 Cal.App.4<sup>th</sup> 259, 271.) Because of the legislative deliberative privilege, discovery involving the thought process of an elected official in an action challenging a legislative matter is prohibited. (*San Joaquin County Local Agency Formation Comm’n v. Superior Court* (2008) 162 Cal.App.4<sup>th</sup> 159, 170.)

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The reasoning behind the distinction in standards is based on the difference between the quasi-judicial and legislative process. In the quasi-judicial process, the hearing body weighs evidence and applies that evidence to applicable law to come up with a decision. Bias could affect the manner in which a hearing body weighs the evidence.

During the legislative process, there is no strict standard where evidence is weighed and compared to legal requirements. The legislative body is allowed to use their pre-existing knowledge and experience to guide their decision. City Council Members are elected based on their views on relevant issues. Barring council members who have made their own investigations into legislative issues and take stands on items of local interest would thwart the democratic process. As long as legislators operate within their legal discretion, Courts will not second guess the reasoning behind their decisions. The “deliberative privilege” was established to prevent inquiry into the motives of a Council Member that acts within established rules. Requiring a quasi-judicial bias standard to apply to elected officials when making legislative decisions has no precedent and would run contrary to law.

If you have any questions, please feel free to contact me.

Sincerely,

LOUNSBERY FERGUSON ALTONA & PEAK, LLP

James P. Lough