

# *City of Brisbane*

## *Agenda Report*

**TO:** Honorable Mayor and City Council

**FROM:** Sheri Marie Spediacci, City Clerk  
John Swiecki, Community Development Director

**DATE:** City Council Meeting of January 14, 2013

**SUBJECT:** Citizens Committee on Baylands Draft Environmental Impact Report (DEIR)

### **RECOMMENDATION**

Receive update on Committee status and provide direction to staff as necessary.

### **BACKGROUND**

At the City Council Meeting of December 17, 2012 the Council reviewed the list of citizens who had indicated interest in serving on the committee. As part of that discussion, a concern was raised with members of that committee having a financial conflict of interest with either Universal Paragon, or other land owners in the Brisbane Baylands and whether a disclosure form should be submitted by each member and if they should be able to serve if they disclosed a potential conflict.

### **ANALYSIS**

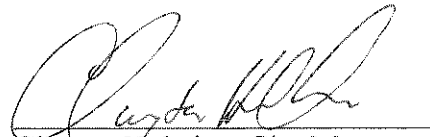
In the City Attorney's absence, staff contacted Sohagi Law Group, outside legal counsel working with City staff and the City Attorney on the Baylands EIR process, and requested a legal opinion on the above-noted conflict of interest issue. That opinion is attached for your review.

In summary, there is no legal conflict of interest because the Committee members are not public officials as defined in state law. Since there is no potential legal conflict of interest, there is no legal requirement for disclosure. While there are no legal conflict of interest concerns, the committee is a creation of the City Council. As such, it is up to the discretion of the City Council if it wishes to require disclosure forms, or if the Council wants to establish committee eligibility requirements. Once the City Council provides guidance on these matters, staff will contact the committee volunteers and advise them accordingly.

Staff is also proposing Monday, January 28<sup>th</sup> at 6:30 p.m. as a Committee preliminary organizational meeting date. A current list of interested citizens is attached.

## ATTACHMENTS

Sohagi Law Group Legal Opinion  
Committee Volunteer List

  
\_\_\_\_\_  
Sheri Marie Spediacci, City Clerk  
\_\_\_\_\_  
John Swiecki, Community Development Director  
\_\_\_\_\_  
Clayton Holstine, City Manager

# MEMORANDUM

## THE SOHAGI LAW GROUP, PLC

---

**TO:** John Swiecki, Community Development Director  
*City of Brisbane*

**FROM:** Margaret M. Sohagi, Esq. and Alison L. Krumbein, Esq.  
*The Sohagi Law Group, PLC*

**SUBJECT:** Conflict of Interest Advice Regarding Membership on Baylands  
Draft EIR Citizens Committee

**DATE:** January 10, 2013

---

### **I. ISSUE PRESENTED**

You asked us whether a conflict of interest would exist if an employee of Universal Paragon Corporation (“UPC”), the applicant for the Brisbane Baylands Project, were to serve on the City Council-created Citizens Committee on the Baylands Draft Environmental Impact Report (“Draft EIR”).

### **II. SHORT ANSWER**

While service on a Baylands Project-related advisory body by a UPC employee may carry the appearance of a conflict, because members of the Citizens Committee are not public officials, there is no legal conflict of interest.

### **III. BACKGROUND**

We understand that the City Council has formed an ad-hoc committee of citizens to review and comment upon the Baylands Draft EIR (“Citizens Committee” or “Committee”). The Committee is an advisory body with no authority to amend the Draft EIR and no role in its ultimate approval. Therefore, while the Council may consider the Committee’s comments on the Draft EIR in its deliberation on the document, it is not bound by these comments nor by any recommendations which may accompany them. We further understand that one of the individuals who wishes to serve on the Citizens Committee is employed by UPC, the applicant for the Baylands Project.

**THE SOHAGI LAW GROUP, PLC**

John Swiecki, Community Development Director

*City of Brisbane*

January 10, 2013

Page 2

**IV. UNDER STATE LAW A CONFLICT OF INTEREST EXISTS ONLY WHEN A PUBLIC OFFICIAL HAS A FINANCIAL INTEREST IN A GOVERNMENTAL DECISION**

Conflicts of interest in California are largely governed by the Political Reform Act of 1974 (the “Act”). (Gov. Code § 87100 *et seq.*)<sup>1</sup> Chapter 7 of the Act (Gov. Code §§ 87100-87500) deals exclusively with conflict of interest situations, as does Chapter 7 of the Fair Political Practices Commission’s (“FPPC’s”) regulations. (Cal. Code Regs. tit. 2, § 18700 *et seq.*) The FPPC is the agency primarily charged with the responsibility of advising officials regarding conflicts of interest, informing the public, and enforcing the Act.

Under the Act, public officials are only disqualified from participating in government decisions in which they have a financial interest. (Gov. Code § 87100.) Conflicts arising out of matters other than a financial interest, such as friendship, family or general sympathy for a particular viewpoint, are outside the purview of the Act.

**A. Conflict of Interest Laws Only Apply to Public Officials**

The Act’s conflict of interest provisions apply to “public officials” only. As that term is used in the Act, it encompasses not only elected and appointed officials in the ordinary sense of the word, but also any “member, officer, employee or consultant of a state or local government agency,” including “other public officials who manage public investments.” (Gov. Code § 82048; FPPC Regulations § 18701(b)(1).)

The terms “officer” and “employee” have their ordinary meaning under state law, but the FPPC has specifically defined the terms “member” and consultant.”

---

<sup>1</sup> Other provisions of California conflict of interest law prohibit elected public officials from voting on contracts in which they have a personal interest. Government Code § 1090 provides in relevant part “Members of the Legislature, state, county, district, judicial district, and City officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.”

## **THE SOHAGI LAW GROUP, PLC**

John Swiecki, Community Development Director

*City of Brisbane*

January 10, 2013

Page 3

### **B. There Can Be No Conflict of Interest in the Absence of Decision-Making Authority**

The FPPC has interpreted the Act to apply to the members of all boards or commissions *with decision-making authority*. (FPPC Regulations § 18701(a)(1).) It makes no difference whether such members are salaried or unsalaried, so long as they possess the requisite decision-making authority. A board or commission possesses decision-making authority whenever any of the following circumstances are present:

- It may make a final governmental decision. (FPPC Regulations § 18701(a)(1)(A)(i).) A body that solely prepares a report or recommendation for submission to another governmental body that has final decision-making authority has not itself made a final decision. (FPPC Regulations § 18701(a)(1)(A)(i).)
- It may compel or prevent the making of a governmental decision by its action or inaction. (FPPC Regulations § 18701(a)(1)(A)(ii).)
- Its recommendations are regularly approved without significant modification. (FPPC Regulations § 18701(a)(1)(A)(iii).) This third prong covers some bodies that are technically advisory, but they are covered because their recommendations are regularly followed by the decision maker. This standard involves a determination of whether the board or commission in question has established a track record of having its recommendations regularly approved.

While the members of the Citizens Committee have been tasked by the City Council to review and comment on the Draft EIR, they are an advisory body with no decision-making authority and, therefore, are not public officials for purposes of the Act. If an individual is not a public official, no further inquiry is necessary, as the question of whether an individual has a financial interest leading to a conflict only arises for public officials. Recall also, that conflicts arising out of matters other than a financial interest, such as general sympathy for a particular viewpoint, are outside the purview of the Act.

### **V. THE COMMON LAW DOCTRINE AGAINST CONFLICTS OF INTEREST APPLIES WHEN A PUBLIC OFFICIAL'S PRIVATE INTERESTS MAY CONFLICT WITH HIS OR HER OFFICIAL DUTIES**

Under the common law doctrine against conflicts of interest, public officials have a fiduciary duty to exercise the powers of their office for the benefit of the public, and are

## **THE SOHAGI LAW GROUP, PLC**

John Swiecki, Community Development Director

*City of Brisbane*

January 10, 2013

Page 4

not permitted to use their powers to benefit a private interest. (*Nussbaum v. Weeks* (1989) 214 Cal.App.3d 1589, 1597.) The common law doctrine is the judicial expression of the public policy against public officers using their official positions for private benefits. (*Terry v. Bender* (1956) 143 Cal.App.2d 198, 206). A public officer must “exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public.” (*Noble v. City of Palo Alto* (1928) 89 Cal.App. 47, 51 [citations omitted].)

While the Act focuses on financial conflicts of interest, the common law extends to non-economic conflicts as well. (*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1172 [(Councilmember’s vote against a residential project was a conflict of interest because the project directly impacted the ocean view from his personal residence); 92 Ops.Cal.Atty. Gen 19 (2009) (board member advised to disqualify herself from any participation in the negotiations and decision surrounding an application made by her adult child for a loan, as any agreement, if executed, would presumably result in a financial benefit for her son).]

Though the types of conflicts covered by the common law are broader than the financial interests covered by the Act, the common law doctrine, like the Act, applies to public officers, i.e., those who exercise public power. Therefore, while service by a UPC employee on the Citizens Committee may appear on its face to be a conflict, because the Committee members are not public officials, there is no legal conflict.

## **VI. CONCLUSION**

Only public officials are covered by the common law and statutory prohibitions against conflicts of interest. Therefore, there is no legal conflict of interest which prohibits service by a UPC employee on the Citizens Committee.

Citizens Committee to review Baylands DEIR

Cy Bologoff, 202 Glen Park Way  
Pamala Sayasane, 27 Huckleberry Court  
Greg Anderson, 349 San Bruno Avenue  
Louise Schiller, 333 Sierra Point Road  
Tom Lambert, 1035 Humboldt Road  
Jessica Aloft, 236 Klamath Street  
Elisa Primm, 460 San Bruno Avenue  
Robert Maynard, 200 Monterey, #6  
Lori Liu, 77 Golden Aster Court  
Anja Miller, 224 Sierra Point Road  
Esther Ong, 524 Sierra Point Road  
Coleen Mackin, 161 San Bruno Avenue  
Alison Wilson, 480 Monterey Street  
Bill Dettmer, 160 Tulare Street  
Mark Cianci, 100 San Bruno Avenue  
Dana Dillworth, 41 Humboldt Road  
Paul Bouscal, 523 Alvarado Street  
Marco Gagliardi, 419 San Francisco Street  
Anjana Richards, 259 Sierra Point Road  
Dolores Gomez, 433 Monterey Street  
Linda Dettmer, 160 Tulare Street  
David Needham, 215 Klamath Street  
Michael Schumann, 764 Humboldt Road