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REPORT TO THE COMMITTEE
ON LAND USE AND HOUSING

AIRPORTS ADVISORY COMMITTEE CONFLICTS OF INTEREST

INTRODUCTION

At the November 16, 2005 Public Safety and Neighborhood Services Committee meeting, two questions were raised by the Committee[1]:

(1) Should Airports Advisory Committee [AAC] members disclose financial interests by filing Statement of Economic of Interest [SEI] forms?

(2) Do these conflicts require AAC members to avoid voting on matters in which they have potential conflicts of interest?

Presently, AAC members are not required to file SEI forms. However, based on a review of the AAC's activities, we recommend that the City Council adopt a conflict of interest code for the AAC and require that members file an annual SEI disclosure form. In addition, these members also must avoid voting on matters in which they have potential conflicts of interest.

DISCUSSION

Established in 1987, the AAC exists in order to "provide advocacy for San Diego General Aviation as an integral part of the total aviation system. The AAC is charged with the responsibility of studying major aviation issues"[2] involving the City's two municipal airports, Montgomery Field and Brown Field. The AAC is currently comprised of twelve members. Of these twelve members, five have businesses located at Montgomery Field or Brown Field, four rent hangars located at either airport, two are involved with local community planning groups, and one is a non-voting member affiliated with the FAA Air Traffic Control Tower. These

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[1] Oversight of the Airports Division transferred to the Land Use and Housing Committee in January 2006. This item was first docketed for hearing on May 31, 2006.

[2] This information is from the AAC website http://www.sandiego.gov/airports/aac/description.shtml

numbers indicate that nine of the twelve AAC members may have direct financial interests in the decisions made at the City's airports.

Statement of Economic Interest Forms

The Political Reform Act of 1974 [Act] requires many state and local government employees and public officials to disclose personal financial interests. In particular, individuals considered "public officials" are covered under the Act. The Fair Political Practices Committee [FPPC] has established regulations that define whether a person is a "public official" under the Act. California Code of Regulations Title 2 § 18701 states in pertinent part:

> For purposes of Government Code section 82048, which defines "public official," and Government Code section 82019, which defines "designated employee," the following definitions apply:
>
> (1) "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.[3]

AAC members do not make final governmental decisions, nor do they compel or prevent governmental decisions. The question remains whether AAC members make the "substantive recommendations" that are "regularly approved." A search of the last ten years of the AAC minutes has provided some clarification on this issue. The following chart provides a summary of past AAC recommendations and the actions taken by the City.

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[3] Section (B) further states "A committee, board, or commission does not possess decisionmaking authority under subsection (a)(1)(A)(i) of this regulation if it is formed for the sole purpose of researching a topic and preparing a report or recommendation for submission to another governmental body that has final decisionmaking authority."

AAC Recommendations and Resulting City Action

Date	Matter	Advice Given	Result	Advice Followed?
1/22/97	Relocation of San Diego Flight Museum [SDFM]	City should find a temporary leasehold for SDFM	SDFM is subleasing from Lancair	No
5/13/97	FBO Proposals award to Brown Field Aviation Ventures [BFAV]	City should award leasehold to BFAV	Real Estate Advisory concurred, BFAV awarded leasehold	Yes
9/14/99	Tie Down Fees	Keep tie down fees – AAC "actively involved in the negotiations" according to reso.	Tie down fees kept	Yes
2/8/00	tie down area administration	City should continue administration of tie down areas	City still administers tie downs	Yes
8/8/00	BFAP project	Approval of project	Council halted any action 10/1/01	No
6/12/01	Perimeter Fencing Project	Support for project	Finished Phase I	Yes
6/12/01	EAA long term lease	City should enter into long term lease with EAA	Finalizing negotiations	Yes
12/11/01	Aircraft Anti-theft devices	Letter recommending anti-theft devices	1/8/02 security lock implemented	Yes
12/11/01	Shier Helicopters	City should continue negotiations with Shier	City in negotiations with Shier	Yes
5/6/03	Perimeter Fence Upgrade	Recommended upgrade of perimeter fencing	2nd phase of perimeter fence project 45% complete by 2/14/06	Yes
5/6/03	MYF operations weekend hours	Motion to expand hours to weekend	No weekend hours	No
5/20/03	Tie down fee increases	Motion to oppose tie down fee increases	Fee increased, appeal denied	No

Date	Matter	Advice Given	Result	Advice Followed?
5/20/03	Future proposals for fee increases	Motion to request future fee increases be submitted to AAC at least sixty days before effective date	Fees have not been increased since, but staff would provide requested notice now	TBD[4]
10/07/03	Perimeter Fence	Motion approved to request design of perimeter fence to accommodate jogging trail	Request denied by Deputy Director	No
10/07/03	Parking Area	Motion approved to request parking area for sport aircraft trailers	Request denied by Deputy Director	No
3/15/05	Gibbs lease	Recommendation to extend lease one year	Agreed Gibbs could operate leasehold for minimum of one year	Yes
5/10/05	Square One Development	Recommend Square One as winner of RFP	City chose to enter into negotiations with Square One	Yes
7/12/05	12 acre parcel for aviation uses at Brown Field	Motion approved to support leasing parcel for aviation uses	City is in support for aviation use of parcel	Yes
11/08/05	EAA Lease	Motion approved to support lease	City near finalizing lease terms with EAA	Yes

The chart above provides examples where AAC recommendations were both followed and rejected. There are a total of nineteen recommendations, twelve of which were followed by City staff and/or Council, six were rejected, and one is yet to be determined.[5] These numbers indicate a high percentage of AAC recommendations have been followed by the City. Several of the AAC recommendations followed by the City – the BFAV lease, the EAA lease, and the Gibbs lease - involve significant development plans and long-term leaseholds at the Brown and

[4] This has yet to be determined because a fee increase has not been proposed at either airport since this item.

[5] This list may not be exhaustive of all AAC recommendations made during its history. However, the information was compiled using the AAC minutes and through interviews with Airports Division staff.

Montgomery Fields. The decision to follow the AAC recommendations in these important matters indicate AAC recommendations carry significant weight with the City's decisionmakers.[6]

In addition to the record of City action, anecdotal evidence exists that suggests the AAC's recommendations carry significant weight. In the October 10, 2000 AAC minutes, a member of the public, Steve Adams asked then AAC Chairman, Buzz Fink "[H]ow successful the AAC has been in getting it's recommendations acted upon." Fink "responded that the Committee's track record was good." More recently, City staff has reassured AAC members that they will play an important role in advising the City on issues. In particular, the City's attempt in 2005 to remove Buzz Gibbs from Montgomery Field generated significant controversy. The AAC stepped in and made clear their opposition to this action and recommended that Gibbs' lease be extended at least one year. On May 10, 2005, Jack Farris, then Deputy Director of the Real Estate Assets Department, agreed that Gibbs should continue to operate on the leasehold for at least one year and that the AAC would be involved in the RFP process. On August 9, 2005, Christian Anderson, Property Agent for Montgomery Field, reassured the AAC that an RFP for Gibbs' leasehold would not commence without AAC input.

Given the fact that the majority of AAC recommendations are followed by the City and that City staff make considerable effort to include the AAC input on significant matters, it appears that AAC members do make "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." These factors indicate that AAC members should be required to fill out SEI forms.

Potential Conflicts of Interest

After AAC members fully disclose their financial interests, it will be possible to determine whether these interests create potential conflicts of interest. Under the FPPC regulations, in order to determine whether an individual has a conflict on interest, an eight-step analysis must take place. The following outlines that 8-step analysis.

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[6] After interviewing Airports Division staff, it became apparent that some of the AAC recommendations that were rejected were attributable primarily to the personality of then Deputy Director Tracy Means. Both the City and AAC members have indicated that the departure of Means has created a new atmosphere of cooperation and communication concerning Brown and Montgomery Fields. It is likely that several of these recommendations that were rejected would be approved by Airports Division staff today. This would lead to an even higher likelihood that AAC recommendations would be approved by City decisionmakers.

(1) Is the individual a "public official" within the meaning of the Act?

This is the same question that has been answered above. AAC members are "public officials" within the meaning of FPPC regulations because they make "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."

(2) Will the public official be making, participating in making, or using or attempting to use his or her official position to influence a government decision?

According to California Code of Regulations Title 2, Division 6, § 18702, a public official "participates in making a governmental decision" when that person:

> Advises or makes recommendations to the decisionmaker either directly or without significant intervening substantive review, by:
>
> 1. Conducting research or making any investigation which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision . . . or
>
> 2. Preparing or presenting any report, analysis, or opinion, orally, or in writing, which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision.

The AAC makes recommendations to the decisionmakers in the City on a regular basis. These recommendations are often in the form of a "report, analysis, or opinion, orally, or in writing." At the monthly AAC meetings, City staff are always present to listen to any AAC recommendations and comment on these items at that time or report back on the items later. In addition, these recommendations from the AAC are intended to "influence a governmental decision." The recent AAC advice to the City to negotiate with EAA, the Shiers, and other aviation-related users is meant to influence the City in its actions.

In some situations, the actual subject of the AAC recommendation, such as the advice to the City in 2001 to continue negotiations with Shier Aviation, involves an AAC member. At that time, Ivor Shier, who was then an AAC member, chose to abstain from voting on that matter because he recognized that a vote on such a matter affected his economic interests.

(3) What are the AAC member's economic interests?

The Act applies to economic interests. The relevant interests for our discussion involve the "business investment" and "personal financial effect' categories. This "business investment" category applies to businesses with $2,000 or more in investment. CCR Title 2. Div. 6 § 18703.1.

As mentioned above, five AAC members own businesses at Brown or Montgomery Fields. Given the millions of dollars involved in hangar construction, use, and planes involves, these AAC members have undoubtedly invested $2,000 or more into their businesses.

Regarding "personal financial effect," the economic interest must involve personal expenses, income, assets, or liabilities totaling $250 or more. CCR Title 2. Div. 6 § 18705.5. Four AAC members have hangar leases at the two airports. An airports policy that affects lease rates, fuel flowage fees, tie down fees or other costs could affect the financial interests of these individuals. If these City actions involved at least $250 in financial effects, then these AAC members would be covered under this category.

(4) Are the economic interests directly or indirectly involved in the governmental decision?

When the economic interests involve business investment, the direct or indirect involvement hinges on whether (1) the proceeding on that issue is initiated by the affected person or (2) if that person is a named party or the subject of the proceeding. CCR Title 2. Div. 6 § 18704.1. For example, if an AAC member's hangar rental business was the subject of an AAC recommendation to the City to negotiate a lease extension with that business, then that AAC member would have a direct economic interest.

Regarding personal financial effects, the code states "a public official or his or her immediate family is deemed to be directly involved in a governmental decision which has any financial effect on his or her personal finances or those of his or her immediate family." CCR Title 2. Div. 6 § 18704.5. An example of this situation would involve the lessees of hangar space noted above. Any increases in certain fees or lease rates could have a direct affect of $250 or more annually.

(5) Is the economic interest affected material?

If the AAC member's economic interest directly involves a business investment, then it is presumed that the materiality standard applies.[7] CCR Title 2. Div. 6 § 18705.1(b)(1). If the economic interest involves an indirect effect on a business entity in which the AAC member has an economic interest, then several different questions arise. These questions involve whether the effect will result in an effect of $5,000-$20,000 or more impact, depending on the situation.[8]

The materiality test does not provide much clarity for those with personal financial effects. Several exclusions apply for effects which include the effect on the value or real property or financial effect on a business. However, in most cases, the personal economic interests AAC of would be presumed material.

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[7] An exception exists for individuals with investment in business entities less than $25,000. CCR Title 2. Div. 6 § 18705.1(b)(2). In these cases, a different materiality test applies.

[8] This assumes that the business entity is not a Fortune 500 , NYSE, NASDAQ, or AMEX listed company.

(6) Is it reasonably foreseeable that the governmental decision will have a material financial effect on the AAC member's economic interest?

The material financial effect on an AAC member would be reasonably foreseeable if "it is substantially likely that one or more of the materiality standards applicable to that economic interest will be met as a result of the governmental decision." CCR Title 2. Div. 6 § 18706. Several factors determine whether the effect would be reasonably foreseeable, which include the extent of the engagement in the business activity, the market share held in the affected business, the extent of the competition for business, the scope of the governmental decision in question, and the "extent to which the occurrence of the material financial effect is contingent upon intervening events." CCR Title 2. Div. 6 § 18706(b)(1)-(5). This analysis will occur on a case by case basis. However, if the action involves an event such as the development agreement at Montgomery Field with an AAC member's business, then it would be reasonably foreseeable that the AAC's recommendation on that issue would have a material financial effect on that member's economic interest.

(7) If the AAC member has a conflict of interest, does the "public generally" exception apply?

The "public generally" exception applies to business entities "in which a public official has an economic interest [and] the decision also affects 2,000 or twenty-five percent of all business entities in the jurisdiction . . . so long as the effect is on persons composed of more than a single industry, trade, or profession." CCR Title 2. Div. 6 § 18707.1(b)(1)(C). This exception would not apply to AAC members given that their decisions affect substantially less than 2,000 businesses or twenty-five percent of businesses in the jurisdiction. Further, the effect of the AAC's actions generally affect only the aviation industry, rather than multiple trades and professions.

The "public generally" exception applies to an individual's economic interest when a "significant segment" of the jurisdiction – ten percent or 5,000 individuals – would be affected in the same manner. This exception generally would not apply to AAC members given that their decisions affect less people than required by statue.

(8) Even if an AAC member has a disqualifying conflict of interest, is the participation of the AAC member legally required?

The "legally required" exception applies in the narrow circumstances where a public official must make a "governmental decision . . . legally required for the action or decision to be made." Cal. Gov't. Code § 87101. AAC recommendations are not required before the City takes action that affect the airports. Therefore, this exception does not apply to AAC members.

CONCLUSION

The City Council should adopt a conflict of interest code[9] that requires AAC members to file SEI forms because their recommendations have led to approval by the City the majority of the time. In addition, the AAC carries significant weight with the City when City staff and Council has made decisions affecting the airports. Further, AAC members have economic interests at the airports and must refrain from voting on certain matters when conflicts of interest arise.

Respectfully submitted,

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MP:nda
Attachments
RC-2006-22

[9] We recommend modeling the AAC conflict of interest code after the "Qualcomm Stadium Advisory Board Conflict of Interest Code" attached to this report.

Resolution #R-299972
Adopted 12/7/04

QUALCOMM STADIUM ADVISORY BOARD
CONFLICT OF INTEREST CODE

APPENDIX A
DESIGNATED POSITIONS, DUTIES AND CATEGORIES

Position	Duties	Category
Member of the QUALCOMM Stadium Advisory Board	Serve as a member of an advisory board to the Mayor, the City Council, and the City Manager on matters relating to the operations of QUALCOMM Stadium.	1
Consultants	Duties vary with each agreement.	2

APPENDIX B
DISCLOSURE CATEGORIES

CATEGORY	DESCRIPTION
1*	All reportable investments and business positions in any person, firm or entity of the type which supplies goods or services to the QUALCOMM Stadium Advisory Board or to the City of San Diego for specific use at, or operation of, QUALCOMM Stadium. All investments and business positions in any person, firm or entity of the type which has been granted, or applied for, authority to use any of the facilities of QUALCOMM Stadium. All gifts and income from any person, firm or entity of the type which supplies goods or services to the QUALCOMM Advisory Board or to the City of San Diego for specific use at, or operation of, QUALCOMM Stadium. All interests in real property owned within a two mile radius of QUALCOMM Stadium.
2	Consultants shall disclose all interests in Category 1, unless the Chair deter-mines that a particular consultant, although a "designated position," is hired to perform a range of duties that is limited in scope and thus will be required to disclose economic interests in fewer categories. The Chair's written determination shall include a description of the consultant's duties and, based upon the description, a statement of the extent of the consultant's disclosure requirements. The Chair's determination is a public record and shall be retained for public inspection in the same manner and location as the conflict of interest code.

* Interests in real property apply only to property within the City's jurisdiction or within two miles outside the City's jurisdiction.