CHARTER COMMITTEE AGENDA REPORT

MEETING DATE: FEBRUARY 12, 2014 **ITEM NUMBER: 8-B**

SUBJECT: PROPOSED CHARTER LANGUAGE RE: FORM OF GOVERNMENT

DATE: FEBRUARY 7, 2014

FROM: SPECIAL COUNSEL'S OFFICE

PRESENTATION BY: YOLANDA M. SUMMERHILL

FOR FURTHER INFORMATION CONTACT: BRENDA GREEN @ 714-754-5221

BACKGROUND

At the previous meeting, a number of questions arose regarding city council member conflicts of interest. Thus, the following provides a summary of conflict of interest rules that apply to public officials, including those in charter cities, as well as an analysis of language related to conflicts of interest proposed by charter committee members.

DISCUSSION

I. CONFLICT OF INTEREST RULES

There are two different sets of statutes which address conflicts of interest. The first is the Political Reform Act, and the other is Government Code section 1090, et seq. Each of these will be discussed in turn.

1. THE POLITICAL REFORM ACT

The first, and the most commonly applicable statute is the Political Reform Act (the "PRA"), which is found at California Government Code section 81000, et seq. The PRA addresses conflicts of interests of public officials by requiring the officials to disclose their financial interests, and also by prohibiting them from participating in any decision in which the official knows (or has reason to know) he or she has a financial interest. Exactly what constitutes a financial interest which would preclude involvement by an official shall be discussed in greater detail below.

The PRA is administered and enforced by the Fair Political Practices Commission (the "FPPC"). If there is ever any question as to whether or not a particular situation requires an official to disqualify himself or herself, the FPPC can be consulted for an opinion. You may also contact our office.

A. General Rule

Under the PRA, the general rule is that ***public officials are prohibited from making, participating in, or in any way attempting to use their position to influence, a governmental decision in which they know (or have reason to know) they have a financial interest.*** This includes not only financial interests held by the officials

themselves, but also financial interests held by their spouse or dependant family members.

B. What Constitutes a Prohibited Financial Interest

The PRA states that a public official will be deemed to have a financial interest if it is reasonably foreseeable that the decision will have a material financial effect on 1) the official, 2) a member of his or her immediate family, or 3) on any of the following:

1) Any business entity in which the official has a direct or indirect investment of $2,000.00 or more;

2) Any business entity in which the officer is a director, officer, partner, trustee, employee or holds a management position;

3) Any real property in which the officer has a direct or indirect investment of $2,000.00 or more;

4) Any source of income (for the officer) which amounts overall to $500.00 or more within the 12 months prior to the decision.

(Note: Campaign contributions typically do not count as income under the PRA. There is, however, a separate conflict of interest rule under Government Code section 84308 dealing with campaign contributions that you will need to be aware of. That section is discussed in greater detail at the end of this memorandum. There is also a special Costa Mesa ordinance which provides that campaign contributions can establish conflicts. See CMMC 2-68.).

5) Any source of gifts to the officer, if the overall gifts amount to $440.00 or more within 12 months prior to the decision. (Note: this limit is effective as of January 1, 2013, and is increased by CPI every 2 years.)

6) Personal financial effect of $250 or more. Generally triggered when a decision will impact the personal expenses, income, assets or liabilities of an official or his/her immediate family members' in an amount of $250 or more. Immediate family includes spouses, registered domestic partners, and dependent children.

500 Foot Rule: Real Property

Real property conflicts of interest are subject to property line differentials. If the property that is the subject of the City=s decision is **within 500 feet** of the property line of the official=s property, there is strong presumption that it is directly involved in the decision, and a conflict of interest would be created. If, however, the official=s property is more than 500 feet from the property that is the subject of the decision, it is presumed not to be directly involved. In such case there will be no conflict, unless there are other facts which demonstrate a conflict exists.

Every situation under the PRA is extremely dependent upon the facts involved. Therefore, if you have any questions as to whether a conflict exists in a specific situation, you may want to consult directly with the FPPC or contact our office.

In any situation where it is determined that a public official has a conflict of interest, the official must do each of the following:

a) publicly disclose the conflict;

b) not participate in the decision; and
c) leave the dais or room so that the official cannot influence the decision with body language, expressions, or other intangible means.

C. Two Exceptions from the General Rule

Even if there is a conflict of interest, there are two situations where a public official can still participate in the decision. These are as follows:

1) **Public Generally Exception**. The official will not be disqualified, if the decision will affect the financial interests of the general public in the same manner it will affect the official=s financial interests. This is known as the Public Generally Exception. The exception does not require that the entire general public be affected. All that is required is that it must affect a A*significant segment*@ of the population in the same manner as the public official. What constitutes a Asignificant segment@ of the population must be determined on a case by case basis. See Cal. Govt. Code '87103.

2) **Legally Required Participation Exception**. An official will not be disqualified if his participation in the decision is Alegally required@ for the action or decision to be made. The fact that an official=s vote is needed to break a tie, however, does not make the vote Alegally required.@ See Cal. Govt. Code '87101.

II. SECTION 1090

In addition to the prohibition set forth in the PRA, there is also a separate and distinct prohibition in Government Code section 1090 (ASection 1090"). The general rule under Section 1090 is that city officers and employees are prohibited from having a financial interest in **contracts** made by them, or by any board or body of which they are members. Section 1090 codified the common law prohibition against self-dealing that existed prior to the enactment of the PRA. Therefore, public officials must be sure that, in every situation, they are in compliance with both the PRA and section 1090.

The main distinction between section 1090 and the PRA, is that under the PRA whenever there is any financial interest the public official can avoid a violation of the PRA by simply abstaining from the decision. Abstention, however, will not eliminate a violation of Section 1090. Under Section 1090 if an official is a member of a board or other body that actually approves or executes the contract, and he or she is financially interested (either directly or indirectly) in that contract, then Section 1090 prohibits the City from entering into the contract altogether. This is true, regardless of whether or not the interested officer participates in or abstains from the decision. The City is absolutely barred from entering into the contract.

There are a certain statutory Aremote interests@ and Anon-interests@ exceptions to Section 1090, but they are narrowly defined. See Gov=t Code '' 1091, 1091.5. Relatively minor and/or indirect financial interests in a contract could result in a violation of Section 1090. Therefore each situation must be examined on a case by case basis with the city attorney=s office to determine if a violation is present.

Several serious penalties may be imposed upon a public official for violating Section 1090. The **maximum penalty for a willful violation is a felony conviction** with a maximum fine of $1,000 or imprisonment in the state prison, and the official is Aforever disqualified from holding any office" in this state.

III. BIAS

The due process clauses in the federal and state constitutions require that in a quasi judicial proceeding the decision maker must be fair and impartial. When a public official has a personal interest

or involvement in the outcome of a matter or with any of the participants he or she must disqualify themselves from the proceedings. Fairfield v. Superior Court, 14 Cal. 3d 768 (1975). This rule does not preclude holding opinions, philosophies or strong feelings about issues or specific projects; it also does not prevent the public official from being able to express views about matters of importance in the community, particularly during an election campaign. However, *it would preclude participation by a decision maker who has been demonstrated to have a completely closed mind, and has a preconceived and unalterable view of the outcome of a particular adjudicatory proceeding before he has even heard the evidence*. Cohan v. City of Thousand Oaks, 30 Cal. App. 4th 547 (1994).

In Nasha v. Los Angeles, 125 Cal. App. 4th 470 (2004), the court overturned a decision to deny a land use project, because prior to the public hearing one of the planning commissioners had authored a newsletter article opposed to the project. The court held that publishing the article prior to the hearing gave rise to an unacceptable probability of actual bias, and was sufficient to preclude him from serving as a Areasonably impartial, non-involved reviewer.@

4. **GIFTS, HONORARIA AND CAMPAIGN CONTRIBUTIONS**

A. Gifts.

Local elected office holders, candidates for local elected office, and designated employees of a local agency, are ***prohibited from accepting any gift*** from any single source, ***valued at more than $440, during any calendar year***. Cal. Govt. Code '89503; See also Cal. Code of Regs. 18940.2. (This limit is effective as of January 1, 2013, and will go up every odd numbered year based upon CPI. The next increase will take place on January 1, 2015.) Gifts of $50 or more are reportable on an official's annual Form 700.

There are a few exemptions, where a gift is not subject to the annual limit and is also not reportable on form 700. The following are some examples: 1) Gifts you return to the donor or which are given to a nonprofit 501(c)(3) entity within 30 days of receipt without claiming a deduction; 2) gifts from close family members; 3) gifts exchanged during holidays, if both gifts are of approximately equal value; 4) campaign contributions; 5) plaques or trophies of minor value; 6) free admission and food at an event where you give a speech or otherwise participate.

B. Honoraria.

No local elected office holder, candidate, or designated employee, may accept any honorarium. Cal. Govt. Code '89501(a). AHonorarium@ means *payment in consideration for any speech given, article published, or attendance at any public or private conference, meeting or other similar gathering.* It does not include income earned for personal services which are customarily provided in connection with the practice of a bona fide business or profession, unless the predominate activity of the business is making speeches. Cal. Govt. Code '89502.

There are a few exceptions to the honorarium ban, which are similar to the exceptions for gifts above. If you have any questions consult with the City Attorney=s office.

C. Campaign Contribution Restrictions (Generally Only Applies to Appointed Public Officials)

There are two prohibitions that officials must be aware of related to the receipt of campaign contributions. These prohibitions apply to any officer appointed to a city board or commission (e.g. planning commission, etc.). City Council members are specifically exempted from these rules, except in situations where the official is serving as a voting member of another board or commission. Cal. Govt. Code '84308. However, note that Costa Mesa's code treats campaign contributions as potentially creating a conflict of interest.

Campaign contributions generally do not constitute income under the PRA for elected officials. Therefore, for elected officials, it generally cannot serve as a basis for disqualification under the PRA. However, other officials need to keep the following two prohibitions in mind :

1) Can't Solicit or Receive Contributions Related to Current Proceedings. Public officials are prohibited from receiving or soliciting campaign contributions of more than $250, from parties or from persons financially interested in a proceeding. The prohibition lasts for the duration of the proceeding and for three months thereafter.

2) Disqualification

Public officials must disqualify themselves from participating in a proceeding, if they have received contributions of more than $250 during the previous 12 months from a person who is financial interested in the proceeding currently before the official.

III. CITY'S CONFLICT CODE

In addition to the above, the City has adopted its own Conflict of Interest Code. The code sets forth those positions in the City that are required to file the Statement of Economic Interest (Form 700). It also incorporates many of the provisions of state law on conflicts already discussed above.

IV. AB 1234 – REQUIREMENTS

A state law, known as AB 1234 (AB 1234), took effect on January 1, 2006. AB 1234 applies to any member of a local legislative body who receives any type of compensation, or who receives any type of reimbursement for expenses incurred in the performance of his duties. There are two sections of AB 1234 that public officials need to be aware of:

AB 1234 states that public officials are *required to receive at least two hours of training in general ethics principles and laws every two years. New members are required to receive their first two hours of training within* ***one year*** of the day they first begin service for the City.

Recommended Additional Outsourcing Clause

> Any outside company wishing to bid for and be considered as the supplier for a city task, job or responsibility under outsourcing shall not have in the prior two years, or in the future, within 10 years from contracting, make a direct contribution to a city council candidates or members election funds or a contributor to a PAC contributing directly to a city candidate or member's election funds. This restriction applies to the company itself or any of its officers or directors. Additionally, no contributions from any individuals related by blood or marriage to these officers are allowed to make contributions to these city council candidates or members in excess of $100. Lastly, no employees of these companies may make contributions to these city council candidates or members unless the employee is also a resident of the City of the Costa Mesa.
>
> No member of the City Council, department head or other officer of the City, shall be financially interested in any contract, sale, or transaction made by them in their official City capacity. No member of any board, commission, or committee shall participate in any decision when the member has a financial interest in any contract, sale, or transaction to which the City is a party and which comes before the board, commission, or committee of which such person is a member for approval or other official action.

The above prohibits the City Council from awarding a contract (whether or not it involves outsourcing city services) to council campaign contributors or family members of campaign contributors. The first paragraph contains some provisions which could be considered to violate the First Amendment. Also, the 10 year post-contracting restriction is substantially in excess of that currently provided in state law. The second paragraph is essentially a restatement of Government Code Section 1090.

Disclosure Requirement

The PRA contains regulations governing campaign contributions. Specifically, the PRA requires the candidate to disclose the donor identity and amount of any campaign contribution in excess of $100. Those disclosures are reported to the Fair Political Practices Commission and available on the City's website and/or the City Clerk's office.

Under the Costa Mesa Municipal Code, city council members that receive campaign contributions in excess of $250.00 may not decide on an item that is before them from a campaign contributor within the previous twelve months.[1] CMMC Sec. 2-68.

[1] Government Code Section 84038 governing campaign contributions does not apply to city council members but does apply to planning commissioners and other appointees.

A charter city cannot exempt itself from the PRA, meaning that the aforementioned disclosure requirements are applicable to the City whether it is a charter city or general law city. CMMC section 2-68 was enacted by a vote of the people, so cannot be repealed except by a vote of the people.

Any outright prohibition against certain campaign contributions triggers evaluation under the First Amendment since it infringes on the contributor's ability to engage in free communication and association. Buckley v. Valeo (1976) 424 U.S. 1. The U.S. Supreme Court recognizes that the state has an interest in eliminating impropriety and corruption, however, any restrictions on contributions require the state to show a sufficiently important interest and employ means "closely drawn" to avoid unnecessary abridgement of associated freedoms. Buckley v. Valeo, 424 U.S. at 29. An example of the First Amendment protections afforded campaign contributions, the United States Supreme Court held that the First Amendment prohibits the government from restricting political independent expenditures by corporations, associations or labor unions. Citizens United v. Federal Election Commission, (2010) 558 U.S. 310. Similarly, the United States Supreme Court struck a government ban on corporate or other organizations' contributions to a committee organized to defeat a ballot measure. First National Bank of Boston v. Bellotti (1978) 435 U.S. 765.

In Thalheimer v. City of San Diego, 645 F.3d 1109 (2011) the Ninth Circuit Court of Appeals upheld in part a San Diego ordinance (ECCO) that imposed a ban on contributions to candidates outside of a 12 month pre-election window, prohibited contributions by any non-individual entities and that imposed a $500 limit for contributions to candidates and committees supporting or opposing a candidate. In effect, the ECCO prohibited a city council candidate from soliciting funds more than one year prior to his election, prohibited donations from non-individuals, and from sole proprietors that commingled personal and business funds. However, the decision does make clear that individual contributions cannot be limited absent a compelling interest and that restrictions on independent contributions and spending could not be upheld. Although you can place limitations on corporate contributions, that ban cannot be placed on individuals. The Thalheimer case upheld the prohibition on campaign contributions from non-individuals. The court upheld the ban on corporate, union, committee and other organization contributions to candidates was intended to prevent the circumvention of individual contribution limits. The court supported the city's attempt to avoid corruption. This decision may not support the proposed language here under the rationale of Citizen's United, which treated corporations the same as individuals in terms of contributions and spending for campaigns. See also, Cal Med Assoc. v. Federal Elect. Comm'n, (1981) 453 U.S. 182, which upheld a contribution limit by an association to multicandidate PACs; Long Beach Area Chamber of Commerce v. City of Long Beach, (2010) 603 F.3d 684 (striking down expenditure limits on independent committees).

In this case, the above language proposes also to limit individual's campaign contributions. This provision would likely be unconstitutional. However, a ban on corporate contractors who are contractors for the City might be upheld. In Yamada v. Weaver, (2012) 872 F. Supp. 2nd 1023, a ban on government contractors making campaign contributions was upheld. The text of that law follows:

> (a) It shall be unlawful for any person who enters into any contract with the State, any of the counties, or any department or agency thereof either for the rendition of personal services, the buying of property, or furnishing of any material, supplies, or equipment to the State, any of the counties, any department or agency thereof, or for selling any land or building to the State, any of the counties, or any department or agency thereof, if payment for the performance of the contract or payment for material, supplies, equipment, land, property, or building is to be made in whole or in part from funds appropriated by the legislative body, at any time between the execution of the contract through the completion of the contract, to:
>
> (1) Directly or indirectly make any contribution, or promise expressly or impliedly to make any contribution to any candidate committee or noncandidate committee, or to any candidate or to any person for any political purpose or use; or
> (2) Knowingly solicit any contribution from any person for any purpose during any period.
> (b) Except as provided in subsection (a), this section does not prohibit or make unlawful the establishment or administration of, or the solicitation of contributions to, any noncandidate committee by any person other than the

> state or county contractor for the purpose of influencing the nomination for election, or the election of any person to office. (c) For purposes of this section, "completion of the contract" means that the parties to the government contract have either terminated the contract prior to completion of performance or fully performed the duties and obligations under the contract, no disputes relating to the performance and payment remain under the contract, and all disputed claims have been adjudicated and are final.

HRS § 11-355.

As to the proposed 10 year period, the Court will likely find that this restriction it is not narrowly tailored, and would strike it down.