



## FPPC Update

Thursday, May 9, 2019    General Session; 1:30 – 3:15 p.m.

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**FAIR POLITICAL PRACTICES COMMISSION (“FPPC”)  
UPDATE**

**League of California Cities  
2019 City Attorneys’ Spring Conference**

**May 9, 2019**

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This update covers the time period between August 17, 2018 and April 17, 2019. I would like to thank the members of the FPPC Committee of the City Attorneys' Department for their help in preparing this update.

## **A. USE OF PUBLIC FUNDS FOR CAMPAIGN ACTIVITY**

### **1. Background**

One major focus of the Fair Political Practices Commission ("FPPC") has been the use of public funds for campaign activity and the FPPC's regulations related to campaign expenditures. This has led to increased enforcement activity and litigation in this area. The FPPC is also advocating for legislation amending the Political Reform Act ("Act") to authorize the Commission to bring administrative and civil actions against public agencies and public officials for impermissibly spending public funds on campaign activities.

This raises important questions related to the distinction between the legal standards that apply to campaign finance reporting under the Act and the constitutional limitations that apply to the expenditure of public funds to support or defeat a ballot measure. It also raises the question of whether there is, or should be, a blanket prohibition on use of public funds for television, radio, and electronic communications that inform residents about ballot measures.

#### **a. Constitutional Limitations**

In *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, the California Supreme Court reaffirmed its holding in *Stanson v. Mott* (1976) 17 Cal.3d 206, which established that, absent clear and unambiguous statutory authority, cities may not spend public funds to assist in the passage or defeat of an initiative or other ballot measure. Nevertheless, cities may spend public money for informational purposes, to provide the public with a "fair presentation" of relevant information relating to an initiative or other ballot measure.

These cases point out that some activities "unquestionably constitute improper campaign activity" such as ". . . the use of public funds to purchase such items as bumper stickers, posters, advertising 'floats,' or television and radio 'spots.'" (*Stanson v. Mott*, supra, 17 Cal.3d at p. 221; *Vargas v. City of Salinas*, supra, 46 Cal.4th at p. 32.) In other cases, ". . . 'the style, tenor and timing' of a communication must be considered in determining whether the communication is properly treated as campaign activity." (*Vargas*, at p. 33 (citing to *Stanson*, at p. 222).)

## **b. Campaign Finance Reporting**

The Act requires political candidates and campaign committees to file written reports of election expenditures made and contributions received once certain thresholds are reached. (Government Code, §§ 84204.5, 82013.)<sup>1</sup>

In *Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, the court made clear that the definition of an “expenditure” under the Act must be “. . . limited in accordance with the First Amendment mandate ‘that a state may regulate a political advertisement only if the advertisement advocates *in express terms* the election or defeat of a candidate.’ [Citation omitted.]” (*Id.* at p. 470.)

Taking into account this limitation, the definition of “independent expenditure” contained in section 82031 was amended in 2009 to now provide that:

“Independent expenditure” means an expenditure made by any person, including a payment of public moneys by a state or local governmental agency, in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee.

In 2009, the Commission amended Regulation 18420.1<sup>2</sup> to clarify when a payment of public moneys by a state or local governmental agency constitutes an “independent expenditure” for the purposes of section 82031. In doing so, the Commission incorporated both the “express advocacy” standard set forth in section 82031 and the standards set forth in the *Vargas* and *Stanson* cases. Regulation 18420.1 now reads in relevant part that:

(a) A payment of public moneys by a state or local governmental agency, or by an agent of the agency, made in connection with a communication to the public that expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage, or defeat of a clearly identified measure, as defined in Section 82025(c)(1), or that taken as a whole and in context, unambiguously urges a particular result in an election is one of the following:

(1) A contribution under Section 82015 if made at the behest of the affected candidate or committee.

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<sup>1</sup> All references to sections are to the Government Code unless otherwise noted.

<sup>2</sup> All references to Regulations are to Title 2 of the California Code of Regulations unless otherwise noted.

(2) An independent expenditure under Section 82031.

(b) For the purposes of subdivision (a), a communication paid for with public moneys by a state or local governmental agency unambiguously urges a particular result in an election if the communication meets either one of the following criteria:

(1) It is clearly campaign material or campaign activity such as bumper stickers, billboards, door-to-door canvassing, *or other mass media advertising including, but not limited to, television, electronic media or radio spots.*

(2) When considering the style, tenor, and timing of the communication, it can be reasonably characterized as campaign material and is not a fair presentation of facts serving only an informational purpose.

(Emphasis added.)

## **2. Administrative Enforcement Actions**

### **a. In the Matter of San Francisco Bay Area Rapid Transit District (“BART”)**

The FPPC and the San Francisco Bay Area Rapid Transit District (“BART”) entered into a stipulation whereby BART agreed to the Commission imposing an administrative penalty against BART in the amount of \$7,500. The FPPC alleged that BART used YouTube videos, social media posts, and text messages to promote Measure RR, which authorized BART to issue \$3.5 billion in general obligation bonds, causing it to qualify as an independent expenditure committee. The FPPC also alleged that BART: (a) failed to timely file two late independent expenditure reports; (b) failed to timely file a semi-annual campaign statement; and (c) failed to include a proper disclosure statement in its electronic media advertisements.

### **b. In the Matter of County of Los Angeles, et al.**

The FPPC is considering whether Los Angeles County failed to properly disclose payments made for communications that were allegedly covered by Regulation 18420.1 (described above). The communications at issue included television spots the County made to inform its residents about a March 2017 ballot measure (Measure H), a sales tax measure to fund homeless services and prevention. Measure H passed with approximately 69% of the voters approving. This matter is also now the subject of litigation (*Howard Jarvis Taxpayers Association v. County of Los Angeles* (Los Angeles County Superior Court Case No. BC714579) filed on July 17, 2018 (see below)).

### **3. Litigation**

#### **a. *Howard Jarvis Taxpayers Association v. County of Los Angeles* (Los Angeles County Superior Court Case No. BC714579)**

In this case, the Howard Jarvis Taxpayers Association alleges that the County of Los Angeles' use of public funds for communications it made to inform its residents about a March 2017 ballot measure (Measure H), a sales tax measure to fund homeless services and prevention, violated the California Constitution and various statutory provisions. Specifically, the case alleges that the County: (a) expended public funds for "campaign" activity in violation of the California Constitution; (b) violated Government Code section 54964, which prohibits an officer, employee, or consultant of a local agency from using public funds to support or oppose a ballot measure; (c) violated the "mass mailing" provisions of the Political Reform Act; (d) failed to report such expenditures as "independent expenditures" as required by the Political Reform Act; and (e) failed to include a disclosure statement identifying the "name of the committee making the independent expenditure" as required by the Political Reform Act. This case has been stayed pending the outcome of the administrative enforcement action referenced above.

#### **b. *California State Association of Counties v. FPPC* (Los Angeles County Superior Court Case No. BS174653)**

In this case, the California State Association of Counties and the California School Boards Association are alleging that the FPPC has exceeded its rulemaking authority by adopting Regulations 18420.1 and 18901.1<sup>3</sup> that purport to incorporate the restrictions on modes of communications set forth in the *Stanson* and *Vargas* cases (described above). The plaintiffs argue it is for the courts, not the FPPC, to interpret and apply the standards set forth in the *Stanson* and *Vargas* cases. Additionally, they argue that the dictum in those cases, which has been incorporated into Regulations 18420.1 and 18901.1, which prohibits the use of public funds for television, radio, and electronic communications does not reflect modern times and should not be used by the courts or the FPPC. The FPPC filed a Motion for Judgment on the Pleadings. On March 29, 2019, the court granted the Motion for Judgment on the Pleadings as to standing and ripeness with regards to regulation 18901.1 and gave 30 days leave to amend.

### **4. Legislation**

At its meeting on February 11, 2019, the FPPC directed that letters be sent to the leadership of the Assembly and Senate requesting that they consider legislation amending the Act to authorize the Commission to bring administrative and civil actions against public agencies and public officials for spending public funds on campaign activities.

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<sup>3</sup> Regulation 18901.1 provides guidance on the restrictions contained within the Act related to mass mailings sent at public expense under Government Code sections 89001 - 89003.



Assembly Bill No. 1306 (2019–2020 Regular Session) proposes to add section 85300.5 to prohibit any elected state or local officer, including any state or local appointee, employee, or consultant, from using or permitting others to use public resources for campaign activity. The bill would authorize the FPPC to impose an administrative or civil penalty against a person for the misuse of public resources for campaign activity, not to exceed \$1,000 for each day on which a violation occurs, plus three times the value of the unlawful use of public resources.

## **B. ADVICE LETTERS**

The following are select advice letters issued by the Commission. Monthly, as part of the FPPC's regular agenda, FPPC staff issues an Advice Letter Report which contains a summary of all advice letters issued by the staff. Full copies of FPPC Advice Letters, including those listed below, are available at: <http://www.fppc.ca.gov/the-law/opinions-and-advice-letters/law-advice-search.html>.<sup>4</sup>

### **1. Interests in Real Property**

Regulation 18702.2 (Materiality Standard for Property Interests) now provides different standards depending on whether an official's property is located within one of three distances to property that is the subject of a governmental decision: (1) 500 feet; (2) more than 500 feet but less than 1,000 feet; or (3) more than 1,000 feet.<sup>5</sup>

- Pio Roda Advice Letter No. A-19-012  
Councilmember who owns a home located 1,438 feet from project site may take part in decisions related to the project because there is no clear and convincing evidence that decisions related to the project would have a substantial effect on her property.
- Ghizzoni Advice Letter No. A-19-001  
Supervisor who has an interest in property located 4,000 to 6,000 feet from project site may take part in decisions related to the project because there is no clear and convincing evidence that decisions related to the project would have a substantial effect on his property.
- Nebb Advice Letter No. A-19-002  
Mayor who owns property 300 feet from theater may not take part in decisions relating to the potential provision of financial assistance for the reconstruction of the theater because there is no clear and convincing evidence that such decisions will not have a measurable impact on his property. However, he may take part in decisions involving a potential rail

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<sup>4</sup> Link current as of April 17, 2019.

<sup>5</sup> Regulation 18702.2 was recently amended (see section C below). The advice letters referenced here only include those applying Regulation 18702.2 as recently amended.

station project located 837 feet from his property because it is unlikely to alter his property's views, privacy, noise levels, or air quality.

- Brewer Advice Letter No. A-19-019  
Councilmember who has a real property interest located within 500 feet from lagoon preservation project may participate in decisions related to the project because, given the geographic separation of the property from the lagoon and the type of lagoon enhancement involved, there is clear and convincing evidence that the decisions will not have any measurable impact on her property.
- Fajardo Advice Letter No. A-19-015  
Mayor who owns property within 500 feet of specific plan area may participate in decisions related to commercial cannabis ordinance because: (a) the ordinance does not pertain to the specific plan area as a whole and is limited to certain districts within the area; (b) although it would impact property located within 615 feet from his property, there is no indication that the ordinance would impact his residence or residential neighborhood differently than the existing permitted types of business uses; and (c) although it would impact property located over 1,000 feet from his property, there is no indication that the decisions will have any effect on his property.
- Fenstermacher Advice Letter No. A-19-020  
Deputy Mayor and two Councilmembers may participate in decisions to supplement two landscape maintenance districts where: (a) one Councilmember lives within 500 feet from the closest potential landscape change; (b) another Councilmember lives more than 500 feet but less than 1,000 feet from the closest potential landscape change; and (c) the Deputy Mayor lives more than 1,000 feet from the closest potential landscape change.
- Eckmeyer Advice Letter No. A-19-018  
Councilmembers who own properties located in, and within 500 feet of, districts that would be affected by a potential general plan amendment may not participate in decisions related to the general plan amendment.

## **2. Interests in Business Entities (Advice Letters Related to the Cannabis Industry)**

Regulation 18702.1 sets forth the materiality standards applicable to an interest in a business entity not explicitly involved in a decision, including a source of income. Regulation 18702(b) provides that a decision's effect on an official's business interest is material "if a prudent person with sufficient information would find it is reasonably foreseeable that the decision's financial effect would contribute to a change in the . . . value of a privately-held business entity." There have been a number of recent advice letters applying this regulation to the cannabis industry.

- Watson Advice Letter No. A-18-150  
Planning Commissioner who is an attorney that provided legal services to a former client in connection with a cannabis distribution business located in another city may participate in considering proposed amendments to the City's zoning ordinance regarding locational and development application requirements for medical cannabis non-storefront (delivery only) retailers in the City.
- Schons Advice Letter No. A-18-260  
Councilmember who is an independent contractor with a firm that provides governmental affairs, land use consulting, lobbying, and public relations serves to clients, including clients engaged in the cannabis industry, may take part in decisions related to ordinances affecting the City's cannabis industry.
- Stroud Advice Letter No. A- 18-259  
Councilmember who owns the only medical cannabis dispensary permitted to operate in the City may not take part in decisions relating to a proposed cannabis ordinance.
- Mollica Advice Letter No. I-18-270  
Planning Commissioner who has an ownership interest in a cannabis retail business may not take part in Planning Commission's consideration of cannabis manufacturing licenses.

### **3. Government Code Section 1090**

#### **a. Consultants**

The California Supreme Court recently affirmed that "[i]ndependent contractors come within the scope of section 1090 when they have duties to engage in or advise on public contracting that they are expected to carry out on the government's behalf." (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, 245.) This has resulted in a number of advice letters relating to the applicability of section 1090 to design services professionals.<sup>6</sup> It has also led to proposed legislation to create an exception in section 1090 for design services professionals.<sup>7</sup>

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<sup>6</sup> For a more comprehensive discussion of this area, see: Conneran, "Sorting Out the Conflicts: Consultants and Alternate Methods of Project Delivery," League of California Cities Annual Conference, September 13, 2018; and Harrison and Prinzing, "Navigating Pitfalls Under Government Code Section 1090 When Contracting Consultants," City Attorneys' Department Spring Conference, May 2, 2018.

<sup>7</sup> Assembly Bill No. 626 (2019–2020 Regular Session) proposes to amend section 1091.5 to create a "non-interest" exception for interests "... of an engineer, geologist, architect, land surveyor, or planner in performing preliminary design services, preconstruction services, or assisting with plans, specifications, or project planning services on any portion or phase of a project when proposing to perform services on any subsequent portion or phase of the project."

- Kiernan Advice Letter No. A-18-100  
Design consultant who performed work of a limited, technical nature as a subcontractor to consultant who prepared feasibility study may contract to complete plans, specifications, and related architectural services through construction for the project.
- Stroud Advice Letter No. A-18-185  
City may enter into a design services contract with company for a pool facility where the company had a prior contract with the City to perform a needs assessment study for the same facility.
- Stryker Advice Letter No. A-18-179  
City may contract with engineering company for the design of a road/bridge widening project where the company previously provided information and data associated with the development of environmental reports in connection with the project.
- Stroud Advice Letter No. A-19-004  
City may enter into a contract for engineering design services with consultant who provided preliminary design services for the project under a previous contract with the City. Consultant did not have extensive involvement in the preliminary design phase, or any other phase of the project to provide it with an unfair advantage over other potential contractors in the final design phase and there was no indication that consultant's performance of the initial contract would allow it to accelerate or eliminate steps in its performance of the subsequent contract.
- Stroud Advice Letter No. A-18-276  
City may enter into a contract for engineering design services with consultant who performed the preliminary design services where the engineering design services will simply be a continuation of the design services it already performed.

#### **b. Nonprofit Corporations and Entities**

There are three exceptions contained in section 1090 related to nonprofit corporations and entities: (a) a "remote interest" exception for officers or employees of a nonprofit corporation, or an Internal Revenue Code sections 501(c)(3) or 501(c)(5) entity (section 1091(b)(1)); (b) a "non-interest" exception for nonsalaried members of a nonprofit corporation (section 1091.5(a)(7)); and (c) a "non-interest" exception for noncompensated officers of a nonprofit, tax-exempt corporation, which, as one of its primary purposes, supports the functions of the body or board or to which the body or board has a legal obligation to give particular consideration (section 1091.5(a)(8)).

- Walter Advice Letter No. A-18-15  
Mayor who is board member of local Boys & Girls Club may participate in City Council decisions related to the lease of City-owned property to the Club under section 1991.5(a)(8) because the Club “supports the functions of the City by promoting a variety of programs for the City’s youth population.”
- Schroeter Advice Letter No. A-18-196  
Councilmembers who are members of a nonprofit organization may participate in the decision to create a grant program. However, if a Councilmember becomes an officer of the organization, and the Council considers a grant to the organization, the Councilmember would have to follow the disclosure and recusal requirements of section 1091.
- Avila Advice Letter No. A-18-218  
School Board Member who is a paid President and CEO of a nonprofit corporation may not participate in District’s approval of a contract with the nonprofit.
- Nerland Advice Letter No. A-19-014  
Independent contractor for a nonprofit is considered an employee for the purpose of applying the remote interest exception contained in section 1091(b)(1) for officers or employees of a nonprofit corporation or entity.

#### **c. Rule of Necessity**

In limited circumstances, the “rule of necessity” allows a contract otherwise violating section 1090 to ensure that essential government functions are performed. (69 Ops.Cal.Atty.Gen. 102, 109 (1986.)

- Schroeter Advice Letter No. A-19-006  
Councilmember who operates a business on municipal airport land owned by City would be financially interested in a grant from the Federal Aviation Administration and may not take part in decisions regarding the grant. However, the “rule of necessity” would allow the City to take part in the contracting process in order to ensure that the airport continues to operate safely.

#### **4. Mass Mailing**

Sections 89001 – 89003 prohibit certain newsletters and other mass mailing from being sent out using public funds. With some exceptions, these sections prohibit the individual distribution of more than 200 copies of substantially similar items in a calendar month if the items include the name, office, photograph, or other reference of an elected official.

- Moon Advice Letter No. A-18-173  
City staff may prepare and distribute over 200 copies of a newsletter, which includes a list of candidates for City Council.
- Giba Advice Letter No. A-18-201  
Intra-agency distribution of letter sent to over 200 City staff members was exempt from the mass mailing provisions.
- See Also - Enforcement Actions:
  - In the Matter of Peralta Community College District (\$2,000 penalty)  
(Printed and distributed over 200 copies of a holiday postcard at public expense, featuring a photograph of its elected officials.)
  - In the Matter of Camarillo Health Care District (\$2,000 penalty)  
(Designed, produced, printed and mailed over 200 copies of four different issues of a quarterly magazine that featured photographs and names of several elected officers affiliated with the District.)
  - In the Matter of Madera Unified School District (\$2,000 penalty)  
(Prepared and distributed over 200 copies of an issue of its official newspaper featuring photographs and a message from District's Board.)

## **5. Public Generally**

Section 87103 prohibits an official from taking part in a decision only if the effect of the decision on the official's interest is distinguishable from the effect on the public generally. Regulation 18703 establishes the criteria use to determine if the effect of the decision on the official's interest is distinguishable from the effect on the public generally.

- Nerland Advice Letter No. A-18-192  
Vice Mayor and Councilmember who own homes 100 feet and 400 feet, respectively, from railroad tracks may take part in decisions related to the creation of "quite zones" at up to five railroad crossings because the reduction in train horn noise would affect a large majority, and well more than 25 percent, of the residential parcels within the City.
- Gallagher Advice Letter No. A-18-252  
Councilmembers who own single-family homes and rent rooms in their homes to long-term tenants may take part in decisions related to Price Gouging Ordinance and Anti-Discrimination Ordinance because the ordinances will apply to all rental units in the city, which comprise approximately 47.7 percent of the total residential units within the City.

- Martyn Advice Letter Nos. A-18-167 and A-18-216  
Airport District Director may take part in decisions relating to fuel prices and airport facility rental rates where he rents District facilities on a month-to-month basis if the decisions adjust the rates/prices equally, proportionally, or by the same percentage for all renters and fuel purchasers.
- Loomis Advice Letter No. A-18-210  
Water Commissioner who has ownership interests in apartment building and commercial property may take part in decisions to consider and approve water rate increases for multi-family and commercial properties so long as the rate adjustments are applied equally, proportionally, or by the same percentage to all multi-family and commercial properties subject to the rate.
- Berger Advice Letter No. A-18-247  
Utility District Board Members who have disqualifying financial interest may nevertheless participate in a Proposition 218 public hearing concerning a potential increase to water and wastewater rates because the decision concerns the establishment of taxes or “rates for water, utility, or other broadly provided public services” that will be applied proportionally to all properties.
- Brady Advice Letter No. A-19-017  
“Tenant commissioners” of City’s Housing Authority may take part in decisions related to a project to improve and operate City-owned affordable housing properties even though they live in two affordable housing units because the financial effects of the project would be felt by all tenants of the Housing Authority.
- Storton Advice Letter No. A-19-011  
Councilmember who has a financial interest in a downtown business may take part in decisions relating to a downtown festival because the festival will likely affect sales for at least 25 percent of the City’s businesses and there is no unique effect on the Councilmember’s business.
- Moore Advice Letter No. I-19-044  
Councilmember who owns commercial property within a proposed sewer/assessment district may take part in decisions pertaining to the selection, formation, and governance of the district because the district would cover 90 percent of the commercial property in the Town.
- Coleson Advice Letter No. A-19-016  
Mayor who owns property within a planned unit development district may not take part in decisions related to the district because the district comprises only approximately 9 percent of the Town’s parcels.

- Webber Advice Letter No. A-19-010

Councilmember who works for an apartment association and owns rental property in the City may not participate in decisions relating to a tenant protection ordinance because the decisions would extend certain restrictions to all or a segment of the City's rental market and would therefore have a unique effect on the income of the apartment association. However, the public generally exception would apply to her interest in her rental properties.

## 6. Appointment

Regulation 18702.5(a) states that the financial effect on an official's personal finances, or those of his or her immediate family, is material if the official or immediate family member will receive a measurable financial benefit or loss from the decision. Regulation 18702.5(b) sets forth a number of exceptions to this rule including: decisions to fill a position on the body of which the official is a member (e.g., vice mayor or mayor); and stipends received for attendance at meetings of any group or body created by law or formed by the official's agency for a special purpose (e.g., a joint powers agency or authority).

- Collins Advice Letter No. A-18-248

Councilmember who loses an election may not participate in a vote to appoint himself to a vacant seat on the same City Council prior to the end of his tenure.

## C. REGULATIONS

### 1. Amendment to Regulation 18702.2 – Materiality Standard for Property Interests

Since 2014, Regulation 18702.2 provided that:

- where an official's property is located *within 500 feet* of property that is the subject of a governmental decision, the official may not participate in the decision unless they have received written advice from the FPCC that the decision will have no measureable impact on the value of the official's property; and
- where an official's property is located *more than 500 feet* of property that is the subject of a governmental decision, the official must consider whether the decision:

. . . would cause a reasonably prudent person, using due care and consideration under the circumstances, to believe that the governmental decision was of such a nature that its reasonably foreseeable effect would influence the market value of the official's property.



Effective March 22, 2019, Regulation 18702.2 (a copy of which is attached) now provides that:

- where an official's property is located *within 500 feet* of property that is the subject of a governmental decision, the official may not participate in the decision unless there is clear and convincing evidence that the decision will not have any measurable impact on the official's property;
- where an official's property is located *more than 500 feet but less than 1,000 feet* of property that is the subject of a governmental decision, the official may not participate in the decision if the decision would change the property's: (a) development potential; (b) income producing potential; (c) highest and best use; (d) character by substantially altering traffic levels, intensity of use, parking, view, privacy, noise levels, or air quality; of (e) market value; and
- where an official's property is located *more than 1,000 feet* of property that is the subject of a governmental decision the financial effect of the decision is presumed not to be material (unless rebutted with clear and convincing evidence the decision would have a substantial effect on the official's property).

## **2. Amendment to Regulation 18944.1 - Agency Ticket Distribution Policies**

The FPPC will soon be considering repealing and readopting Regulation 18944.1 relating to agency provided tickets and passes.

Regulation 18944.1 sets up a procedure for agencies that provide tickets to their officials that, if utilized, will result in the tickets not qualifying as gifts under the Act, where the official may accept the ticket if there is a public purpose achieved through that official's use of the ticket. In particular:

- The use of the ticket must further a governmental or public purpose;
- The agency must adopt a ticket distribution policy that contains provisions set forth in the Regulation;
- The agency must complete a form for each distribution that must be maintained as a public record and subject to inspection and copying; and
- The form for each ticket distribution must be forwarded to the FPPC for posting.

Tickets distributed under the policy, including tickets distributed at the behest of a public official, must be identified on a Form 802 and posted on the agency's website to comply with this regulation. The form must be completed within 45 days of distribution of a ticket or pass.

Where the distribution is made pursuant to the public purpose exception, that purpose must also be described on the form. An agency is free to make its own choice whether or not to adopt a policy conforming to the regulation or to treat the tickets as income or gifts to the official and not apply the regulation.

The FPPC is considering making several structural and substantive changes to Regulation 18944.1 (a copy of the proposed changes is attached). The two most significant substantive changes are as follows:

- The proposed amendments attempt to limit the potential for abuse by requiring that an agency's ticket distribution policy include a provision prohibiting the disproportionate use of tickets or passes by the governing body, the chief administrative officer, or department heads.
- The proposed amendments make clear that, where the public purpose cited for the use of tickets involves the oversight or inspection of facilities, the official must document the public purpose by submitting a written inspection report of findings and recommendations to the official's agency.

### **3. Adoption of New Regulations 18360.1 and 18360.2 - Streamline Settlement Program**

The FPPC's Streamline Settlement Program was established for the Enforcement Division's prosecution of violations with limited public harm. A large percentage of cases before the FPPC are resolved through the existing program. The Enforcement Division has discretion to include or exclude any case from the program based upon mitigating and aggravating circumstances. If mitigating circumstances exist, a case will result in a warning letter rather than a fine. If aggravating circumstances exist, the case is handled through the standard administrative process (i.e., mainline). Penalties in streamline cases start at \$100 - \$200 and can increase based on the amount of activity not properly reported in the case, and the efforts required to gain compliance and resolve a case. The FPPC adopted two new regulations intended to codify this Program.

New Regulation 18360.1 lists the types of violations eligible for the Program and sets forth general and specific eligibility requirements for the Program.

New Regulation 18360.2 sets forth the penalties in streamline cases under the Program.

### **4. Possible Future Amendments**

The following possible future amendments have been identified in the FPPC's adopted regulation projects and schedule for 2019:

- Advice letter process (Regulation 18329) – revise process for advice letter requests.

- Business interest materiality standard (Regulation 18702.1) – revise the existing regulation for improved clarity and to address interpretation and application issues.
- Source of income materiality standard (Regulation 18702.3) - revise the existing regulation for improved clarity and to address interpretation and application issues.
- Personal financial effect materiality standard (Regulation 18702.5) - revise the existing regulation for improved clarity and to address interpretation and application issues.

## **D. TIPS ON WRITING ADVICE REQUEST LETTERS TO THE FPPC**

### **1. The Basics**

The FPPC's website<sup>8</sup> and Regulations 18329 and 18329.5<sup>9</sup> provide guidance on requesting formal advice letters, including the following:

- You may request formal advice by submitting your inquiry in writing to [Advice@fppc.ca.gov](mailto:Advice@fppc.ca.gov) or by sending your request to:

Fair Political Practices Commission  
1102 Q Street, Suite 3000  
Sacramento, CA 95811

- The request must:
  - Be in writing;
  - Provide specific information about the requestor; and
  - Contain sufficient information for the FPPC's staff attorneys to conduct a complete legal analysis.
- A request for advice under section 1090 must be submitted in writing from the contracting public agency. The request must be signed by the public official, agency head or manager, or agency's counsel.

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<sup>8</sup> See: <http://www.fppc.ca.gov/advice/formal-advice.html> (Link current as of April 17, 2019).

<sup>9</sup> Regulation 18329 provides guidance on formal written advice and informal assistance and Regulation 18329.5 provides guidance on the Commission's advice procedure regarding the interpretation of an agency's conflict of interest code.

- In a request for section 1090 advice involving a public agency and a private contractor, the public agency must be provided notice of the request, concur with the facts presented, and agree to the request for advice. The request must come from the public agency or the agency's counsel, and contain an agreed upon set of facts.
- The request should set out the question to be answered as clearly as possible, along with enough description of the background and context of the question to allow a precise legal analysis to be prepared.
- The following requests will be declined:
  - Requests that relate directly or indirectly to past conduct or that may be under review of any enforcement agency. This includes Section 1090 requests where the contract in question has already been made, or where decisions have occurred that (directly or indirectly) affect, even remotely, the contract in question.
  - Requests that do not include complete and accurate facts or in which the facts are in dispute. The FPPC is not a finder or adjudicator of facts when rendering advice (In re Oglesby (1975) 1 FPPC Ops. 71), and any advice the FPPC provides assumes the facts are complete and accurate.
  - In a request for advice involving a public agency and a private contractor, the request will be declined if the public agency did not make the request or has not concurred with the facts.
  - Requests for policy determinations.
  - Requests to interpret other areas of law, including local ordinances, rules, and statutes.
  - Requests for advice posed on behalf of others, or on questions unrelated to the office.
  - The FPPC declines advice requests involving legal issues that are pending in a judicial or administrative proceeding. Issuing an advice letter on a question that is at issue in litigation might be perceived as an inappropriate attempt to influence litigation. When the FPPC becomes aware that a request is the subject of litigation, the preparation of an advice letter will cease and no advice will be provided.

A sample request letter is attached.

## **2. What FPPC Staff Looks for in Advice Request Letters**

The following are practice tips from the FPPC's Legal Division:

- Citations to legal authorities are helpful but a statement of facts that addresses the material issues is more helpful than providing a legal analysis. Review the relevant statutes and regulations to create a relevant statement of facts. For example, if a business interest or real property interest is at issue, provide information indicating whether the official's investment/ interest is worth \$2,000 or more.
- Provide website links and/or attach copies of the relevant project/grant program/decision information. When there are relevant staff reports, environmental review documents (including CEQA documents), or other staff or contractor work documents that would provide information relevant to the questions presented, provide those reports and documents or direction on where to access them.
- For issues involving a real property financial interest, provide a map showing the location of the official's property and its distance to the project/decision item if the official's property is not the subject of the decision. Google Maps works well for this. Note any factors relevant to impacts on the parcel under Regulation 18702.2.
- Contact information should include the email of the requestor or authorized representative for ease in contacting for additional information. Timely responses to requests for additional information make for more timely responses on our end.
- Only issues that involve a specific future decision or an intended course of conduct are able to be addressed in formal advice. General questions do not present facts necessary for a formal advice letter. These general questions can be answered by consulting our web site's general guides, Fact Sheets and Manuals. More specific questions about these materials and a general issue can be addressed through our informal assistance by phone or email. If dealing with a novel issue, consider pursuing informal advice prior to pursuing formal written advice, as this may enable better issue spotting and provide insights into the Act's previous application in similar circumstances.
- Requests regarding travel for a public purpose paid for by a 501(c)(3) or foreign government are addressed by a specific Fact Sheet that can be found on the FPPC website, and will only be appropriate for a formal advice letter if the facts raise a specific issue not addressed by the Fact Sheet.
- Influencing a decision and participating in a decision are prohibited when the official has a conflict of interest. Make certain that the official has not been involved in earlier actions prior to "making the decision." We cannot advise where the official has had a role

in the process leading up to the formal decision. When appropriate, include a statement in the request about whether there has been any past conduct by the official at issue relating to the decisions at issue.

- Indicate if there is a pending enforcement case involving the official or agency since it may preclude advice if it involves the same or similar circumstances.
- Provide all relevant informal and formal advice previously sought from us that relates to the latest advice request.

It should be noted that the purpose of the advice function is to inform people on how they can comply with the Act. Beyond providing immunity in certain circumstances, it's not intended as a legal authority in the nature of an Attorney General opinion or a Commission opinion. As such, advice given is often conservative in nature to ensure compliance with the law.

Finally, the Commission will be considering proposed amendments to the advice regulation (Regulation 18329) at its May and June 2019, meetings. As part of that process, FPPC staff intends to add to the information and guidance on the FPPC's website concerning the advice process.

1 Amend 2 Cal. Code Regs., Section 18702.2 to read:

2 **§ 18702.2. Materiality Standard: Financial Interest in Real Property.**

3 (a) ~~Except as provided in subdivision (c) below, the~~ The reasonably foreseeable financial  
4 effect of a governmental decision ~~(listed below in (a)(1) through (a)(12))~~ on a parcel of real  
5 property in which an official has a financial interest, other than a leasehold interest, is material  
6 whenever the governmental decision:

7 (1) Involves the adoption of or amendment to a development plan or criteria applying to  
8 ~~general (except as provided below) or specific plan, and the parcel is located within the proposed~~  
9 ~~boundaries of the plan;~~

10 (2) Determines the parcel's zoning or rezoning, ~~(other than a zoning decision applicable~~  
11 ~~to all properties designated in that category);~~ annexation or de-annexation, ~~or;~~ inclusion in or  
12 exclusion from any city, county, district, or ~~other~~ local government subdivision, or other  
13 boundaries, other than elective district boundaries ~~as determined by the California Citizen's~~  
14 ~~Redistricting Commission or any other agency where the governmental decision is to determine~~  
15 ~~boundaries for elective purposes;~~

16 (3) Would impose, repeal, or modify any taxes, fees, or assessments that apply to the  
17 parcel;

18 (4) Authorizes the sale, purchase, or lease of the parcel;

19 (5) Involves the issuance, denial or revocation of a license, permit or other land use  
20 entitlement authorizing a specific use of or improvement to the parcel or any variance that  
21 changes the permitted use of, or restrictions placed on, ~~that real~~ the property. ~~For purposes of this~~  
22 ~~paragraph, any financial effect resulting from a governmental decision regarding permits or~~  
23 ~~licenses issued to the official's business entity when operating on the official's real property shall~~

1 ~~be conclusively analyzed under Regulation 18702.1, rather than this paragraph, without any~~  
2 ~~separate consideration for any material financial effects on the official's real property as a result~~  
3 ~~of the decision;~~

4 (6) Involves construction of, or improvements to, streets, water, sewer, storm drainage or  
5 similar facilities, and the parcel in which the official has an interest will receive new or improved  
6 services that provide a benefit or detriment disproportionate to other properties receiving the  
7 services are distinguishable from improvements and services that are provided to or received by  
8 other similarly situated properties in the official's jurisdiction or where the official will otherwise  
9 receive a disproportionate benefit or detriment by the decision;

10 (7) Involves property located 500 feet or less from the property line of the parcel unless  
11 there is clear and convincing evidence that the decision will not have any measurable impact on  
12 the official's property; or

13 (8) Involves property located more than 500 feet but less than 1,000 feet from the  
14 property line of the parcel, and the decision would change the parcel's:

15 (7) (A) ~~Would change the development~~ Development potential of the parcel of real  
16 property;

17 (8) (B) ~~Would change the income~~ Income producing potential of the parcel of real  
18 property. However, if the real property contains a business entity, including rental property, and  
19 the nature of the business entity remains unchanged, the materiality standards under Regulation  
20 18702.1 applicable to business entities would apply instead;

21 (9) (C) ~~Would change the highest~~ Highest and best use of the parcel of real property in  
22 ~~which the official has a financial interest;~~



1       ~~(10) (D) Would change the character~~ Character of the parcel of real property by  
2 substantially altering traffic levels, ~~or intensity of use, including parking, of property surrounding~~  
3 ~~the official's real property parcel, the view, privacy, noise levels, or air quality, including odors,~~  
4 ~~or any other factors that would affect the market value of the real property parcel in which the~~  
5 ~~official has a financial interest; or~~

6       ~~(11) Would consider any decision affecting real property value located within 500 feet of~~  
7 ~~the property line of the official's real property, other than commercial property containing a~~  
8 ~~business entity where the materiality standards are analyzed under Regulation 18702.1.~~

9 ~~Notwithstanding this prohibition, the Commission may provide written advice allowing an~~  
10 ~~official to participate under these circumstances if the Commission determines that there are~~  
11 ~~sufficient facts to indicate that there will be no reasonably foreseeable measurable impact on the~~  
12 ~~official's property; or~~

13       ~~(12) (E) Would cause a reasonably prudent person, using due care and consideration~~  
14 ~~under the circumstances, to believe that the governmental decision was of such a nature that its~~  
15 ~~reasonably foreseeable effect would influence the market~~ Market ~~value of the official's property.~~

16       (b) The financial effect of a governmental decision on a parcel of real property in which  
17 an official has a financial interest involving property 1,000 feet or more from the property line of  
18 the official's property is presumed not to be material. This presumption may be rebutted with  
19 clear and convincing evidence the governmental decision would have a substantial effect on the  
20 official's property.

21       ~~(b) (c) Leasehold Interests. Except as provided in subdivision (c) below, the~~ The  
22 reasonably foreseeable financial effects of a governmental decision on any real property in which

1 a governmental official has a leasehold interest as the lessee of the property is material only if  
2 the ~~whenever~~ governmental decision will:

3 (1) Change the termination date of the lease;

4 (2) Increase or decrease the potential rental value of the property;

5 ~~(3) Increase or decrease the rental value of the property, and the official has a right to~~  
6 ~~sublease the property;~~

7 ~~(4) (3) Change the official's actual or legally allowable use of the real property; or~~

8 ~~(5) (4) Impact the official's use and enjoyment of the real property.~~

9 ~~(e) (d) Exceptions. The financial effect of a governmental decision on a parcel of real~~  
10 ~~property in which an official has a financial interest is not material if: Exceptions:~~

11 (1) The decision solely concerns repairs, replacement or maintenance of existing streets,  
12 water, sewer, storm drainage or similar facilities.

13 (2) The decision solely concerns the adoption or amendment of a general plan and all of  
14 the following apply:

15 (A) The decision only identifies planning objectives or is otherwise exclusively one of  
16 policy. A decision will not qualify under this subdivision if the decision is initiated by the public  
17 official, by a person that is a financial interest to the public official, or by a person representing  
18 either the public official or a financial interest to the public official.

19 (B) The decision requires a further decision or decisions by the public official's agency  
20 before implementing the planning or policy objectives, such as permitting, licensing, rezoning, or  
21 the approval of or change to a zoning variance, land use ordinance, or specific plan or its  
22 equivalent.

1 (C) The decision does not concern an identifiable parcel or parcels or development  
2 project. A decision does not “concern an identifiable parcel or parcels” solely because, in the  
3 proceeding before the agency in which the decision is made, the parcel or parcels are merely  
4 included in an area depicted on a map or diagram offered in connection with the decision,  
5 provided that the map or diagram depicts all parcels located within the agency's jurisdiction and  
6 economic interests of the official are not singled out.

7 (D) The decision does not concern the agency's prior, concurrent, or subsequent approval  
8 of, or change to, a permit, license, zoning designation, zoning variance, land use ordinance, or  
9 specific plan or its equivalent.

10 ~~(d)~~ (e) Definitions. The definitions below apply to this regulation:

11 (1) A decision “solely concerns the adoption or amendment of a general plan” when the  
12 decision, in the manner described in Sections 65301 and 65301.5, grants approval of, substitutes  
13 for, or modifies any component of, a general plan, including elements, a statement of  
14 development policies, maps, diagrams, and texts, or any other component setting forth  
15 objectives, principles, standards, and plan proposals, as described in Sections 65302 and 65303.

16 (2) “General plan” means “general plan” as used in Sections 65300, et seq.

17 (3) “Specific plan” or its equivalent means a plan adopted by the jurisdiction to meet the  
18 purposes described in Sections 65450, et seq.

19 (4) Real property in which an official has a financial interest does not include any  
20 common area as part of the official's ownership interest in a common interest development as  
21 defined in the Davis-Stirling Common Interest Development Act (Civil Code Sections 4000  
22 et seq.) .

- 1 Note: Authority cited: Section 83112, Government Code. Reference: Sections 87100, 87102.5,
- 2 87102.6, 87102.8 and 87103, Government Code.

1 Adopt 2 Cal. Code Regs., Section 18944.1 to read:

2 § 18944.1. Gifts: Agency Provided Tickets or Passes.

3 (a) Gift Exemption. A ticket or pass provided to an official by his or her agency and  
4 distributed and used in accordance with a policy adopted by the agency is not a gift under the  
5 Political Reform Act if all of the following criteria are met:

6 (1) The distribution of the ticket or pass by the agency is made in accordance with a  
7 policy adopted by the agency that incorporates all of the provisions of subdivision (b) and is  
8 maintained as a public record as required in subdivision (c).

9 (2) The distribution of the ticket or pass is reported pursuant to subdivision (d).

10 (3) The ticket or pass is not earmarked by an outside source for use by a specific agency  
11 official. (4) The agency determines, in its sole discretion, who uses the ticket or pass.

12 (b) Agency Ticket/Pass Distribution Policy. Any distribution of a ticket or pass under this  
13 regulation to, or at the behest of, an agency official must be made pursuant to a written agency  
14 ticket distribution policy, duly adopted by the legislative or governing body of the agency or, if  
15 none, the agency head that contains, at a minimum, all of the following:

16 (1) A provision setting forth the public purposes of the agency for which tickets or passes  
17 may be distributed.

18 (2) A provision requiring that the distribution of any ticket or pass to, or at the behest of,  
19 an agency official accomplishes a stated public purpose of the agency.

20 (3) A provision prohibiting the transfer of any ticket received by an agency official  
21 pursuant to the distribution policy except to members of the official's immediate family or no  
22 more than one guest solely for their attendance at the event.

1 (4) A provision prohibiting the disproportionate use of tickets or passes by a member of  
2 the governing body, chief administrative officer of the agency, political appointee, or department  
3 head.

4 (c) Public Record. The policy must be maintained as a public record and is subject to  
5 inspection and copying under Section 81008. The agency must post the policy on its website  
6 within 30 days of adoption or amendment and send to the Commission by e-mail the agency's  
7 website link that displays the policy so that the Commission may post the link.

8 (d) Reporting. Within 45 days of distribution of a ticket or pass, the distribution must be  
9 reported on a form provided by the Commission.

10 (1) Except as provided in subdivision (d)(2), the information must include the following:

11 (A) The name of the official receiving the ticket or pass;

12 (B) A description of the event;

13 (C) The date of the event;

14 (D) The fair value of the ticket or pass as that term is defined in Regulation 18946,  
15 subdivision (d)(1);

16 (E) The number of tickets or passes provided to each person;

17 (F) If the ticket or pass is behested, the name of the official who behested the ticket;

18 (G) If the ticket was transferred to a person meeting the requirements of paragraph (b)(3),  
19 the relationship of the transferee;

20 (H) A description of the public purpose under which the distribution was made; and

21 (I) A written inspection report of findings and recommendations by the official receiving  
22 the ticket or pass if received for the oversight or inspection of facilities.

1       (2) If the ticket or pass is distributed to a department or other unit of the agency, and not  
2       used by a member of the governing body, the chief administrative officer of the agency, political  
3       appointee, or department head, the agency may report the name of the department or other unit of  
4       the agency receiving the ticket or pass and the number of tickets or passes provided to the  
5       department or unit in lieu of reporting the name of the individual employee as otherwise required  
6       in subdivision(d)(1).

7       (3) The forms must be maintained as public records and are subject to inspection and  
8       copying under Section 81008(a). The agency must post the form, or a summary of the  
9       information on the form, on its website and send to the Commission by e-mail the agency's  
10      website link that displays the form so that the Commission may post the website link.

11      (e) Public Purpose. For purposes of subdivision (b)(2), the agency determines whether the  
12      distribution of tickets or passes serves a legitimate public purpose of the agency, consistent with  
13      state law. However, a ticket or pass distributed to an official for his or her personal use, other  
14      than a member of the governing body, the chief administrative officer of the agency, political  
15      appointee, or department head, to support general employee morale, retention, or to reward  
16      public service is deemed to serve a public purpose. For purposes of this paragraph, "personal  
17      use" is limited to the official, and his or her family, or no more than one guest.

18      (f) Application. This regulation applies solely to a ticket or pass, as those terms are  
19      defined in Regulation 18946, to an event or function provided by an agency to an official of the  
20      agency, or at the behest of an official of that agency. The provisions of this regulation apply only  
21      to the benefits the official receives from the ticket or pass that are provided to all members of the  
22      public with the same class of ticket or pass. This regulation does not apply to the following:

1       (1) An admission provided to a school, college, or university district official, coach,  
2       athletic director, or employee to attend an amateur event performed by students.

3       (2) An admission identified in Regulation 18942(a)(13) relating to an official performing  
4       a ceremonial role.

5       (g) Ticket or Pass Received as Income. A ticket or pass is not subject to the provisions of  
6       this regulation, and not a gift for purposes of the Act, if it is taxable income to the official.

7       (h) Reimbursement. A ticket or pass is not subject to the provisions of this regulation, and  
8       not a gift for purposes of the Act, if the official reimburses the agency for the ticket within 30  
9       days of receipt.

10      Note: Authority cited: Section 83112, Government Code. Reference: Section 82028,  
11      Government Code.





# CITY OF SUNNYVALE

## OFFICE OF THE CITY ATTORNEY

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Paralegal  
Nelia López  
Legal Secretary

April 7, 2016

**VIA E-MAIL**

Mr. Matt Christy  
Commission Counsel  
Fair Political Practices Commission  
P.O. Box 807, 428 J Street, Suite 620  
Sacramento, CA 95812-0807

RE: Conflict of Interest Advice Sought for Planning Commission Members  
[REDACTED] and [REDACTED] Regarding the Butcher's Corner Project

Dear Mr. Christy:

We are writing on behalf of City of Sunnyvale Planning Commission Members [REDACTED]  
and [REDACTED]<sup>1</sup> to request formal conflict of interest advice pursuant to Gov. Code §83114.

**QUESTION:**

May Mr. [REDACTED] and Ms. [REDACTED], who are members of the Sunnyvale Planning Commission, participate in and vote on governmental decisions relating to the development of the Butcher's Corner Project at 871 East Fremont Avenue in Sunnyvale?

**BACKGROUND INFORMATION:**

The Project applicant proposes to construct a mixed-use development on a currently undeveloped 5.1 acre site located at 871 East Fremont Avenue in Sunnyvale, known as "Butcher's Corner". A total of 153 residential units are proposed, including 114 apartment units within two multi-story buildings and 39 two-story townhome units. The Project also includes 6,936 square feet of non-residential (office or retail) use within the first floor of the apartment building fronting El Camino Real.

The Project site is an undeveloped parcel of land at the intersection of El Camino Real and Wolfe Road, two of the City's major thoroughfares. The surrounding area is generally characterized by wide streets with high traffic volumes, multifamily residential, commercial retail and medical offices. Nearby land uses include gas stations, small strip malls, and a miniature golf course. The Project site is immediately adjacent to a two-story medical office building and two- and three-story multifamily housing developments. Lower density single-family residential neighborhoods are located west and southeast of the Project site.

<sup>1</sup> Commissioners [REDACTED] and [REDACTED] are currently [REDACTED], respectively of the City of Sunnyvale Planning Commission.

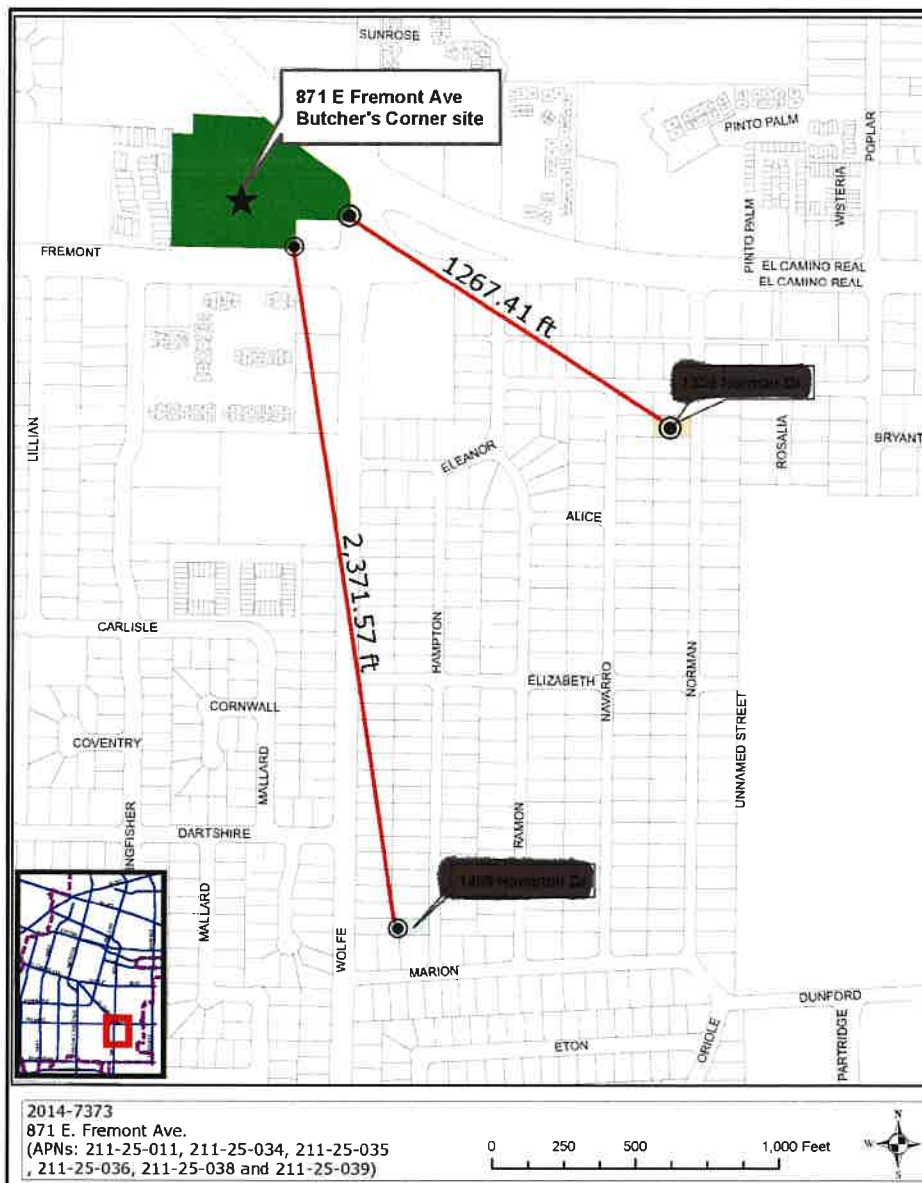
**Re: Conflict of Interest Advice Sought for Butcher's Corner**

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**Commissioner [REDACTED]**. Commissioner [REDACTED] is the owner of a single-family residence at [REDACTED], approximately 2,372 feet south of the Project. Commissioner [REDACTED]'s residence is separated from the Project site by three residential blocks and is one block east of Wolfe Road.

**Commissioner [REDACTED]**. Commissioner [REDACTED] is the owner of a single-family residence at [REDACTED], approximately 1,267 feet southeast of the Project. Her residence is separated from the Project site by approximately two residential blocks.



**Re: Conflict of Interest Advice Sought for Butcher's Corner**

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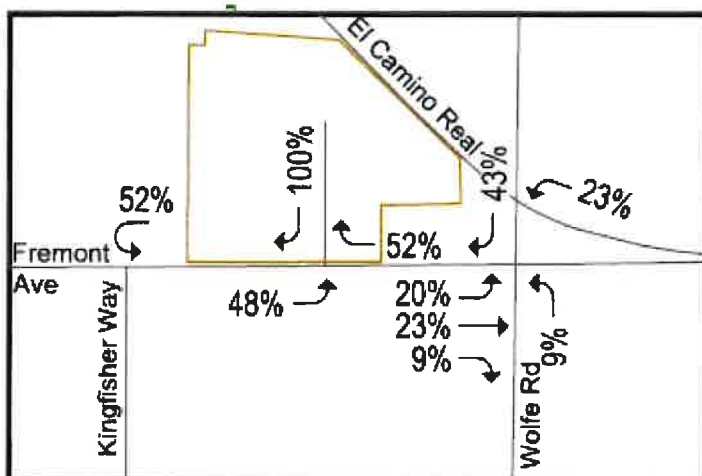
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**Project Impacts.** The following information comes from the Draft Environmental Impact Report (DEIR) for the Butcher's Corner Project, released on April 8, 2016. A copy of the DEIR can be provided if requested. The DEIR is also available for download on the City's website at <http://sunnyvale.ca.gov/Departments/CommunityDevelopment/CurrentProjectsandStudies/ButchersCorner.aspx>. For convenience, the Executive Summary table and the Traffic and Transportation chapter are included with this letter.

The DEIR identifies significant impacts in the following areas: air quality, biological resources (tree removal and disturbance of nesting birds and bats), cultural resources, and noise. These impacts can be reduced to a less than significant level with appropriate mitigation measures. (DEIR, Executive Summary).

The DEIR identifies a significant and unavoidable traffic impact at the unsignalized intersection of East Fremont Avenue and Kingfisher Way. The average delays at this intersection, which is currently operating at an "F" level during both the morning and evening peak hours, will increase from between 60.3 seconds (morning) and 67.9 seconds (evening) to 92.9 seconds (morning) and 93.7 (evening). (DEIR, page 4.11-14.) The mitigation for this impact would be to add a traffic signal to the intersection. However, a traffic signal could affect through movement of traffic on East Fremont Avenue and cause additional congestion, and is not recommended. (DEIR, page 4.11-21.)

The DEIR's traffic analysis estimates that the Project will generate 1,182 net new trips on a typical weekday. Of the external trips, 79 net trips will occur during the weekday morning peak hour and 108 trips during the evening peak hour. An estimated 48% of the new trips will be on Fremont Avenue, 23% on El Camino Real, and 9% on Wolfe Road south of El Camino Real. (DEIR, page 4.11-15, Figure 4.11-3 "Project Trip Distribution Pattern".



**Project Trip Distribution Pattern (Detail)**

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The Project will slightly worsen traffic operations at certain times at the intersections of El Camino Real, Wolfe Road, and Fremont Avenue, where traffic volumes are already heavy during peak hours. Congestion in the area is expected to worsen due to "background" projects, including the new Apple campus currently under construction on Wolfe Road approximately one mile south of El Camino Real. However, the additional vehicle trips generated by the Project are not expected to substantially increase vehicle queues or delay, and intersections other than Kingfisher and Fremont Ave. will continue to operate at acceptable levels.

**DISCUSSION**

Section 87100 prohibits a public official from making, participate in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. Under Section 87103, a public official has a financial interest in real property in which he or she has a direct or indirect interest of \$2,000 or more. Because Commissioners [REDACTED] and [REDACTED] own their homes, they have a financial interest in real property under the Act.

***Is the public official making, participating in making or influencing a governmental decision? (2 Cal. Code Regs. § 18704 et seq.)***

Commissioners [REDACTED] and [REDACTED] are members of the Planning Commission and are therefore public officials who will be making decisions regarding the Butcher's Corner Project.

***Is it reasonably foreseeable that the governmental decision will have a material financial effect on the public official's financial interests in real property? (2 Cal. Code Regs. §§ 18701 and 18702.2)***

Regulation 18701 provides that in cases where an official's interest is not explicitly involved in a decision, a financial effect is foreseeable if it is a realistic possibility and more than hypothetical or theoretical. Regulation 18702.2(a) provides a list of circumstances under which the reasonably foreseeable financial effect on real property is material. Relevant here, the financial effect will be material if the decision:

(10) Would change the character of the parcel of real property by substantially altering traffic levels or intensity of use, including parking, of property surrounding the official's real property parcel, the view, privacy, noise levels, or air quality, including odors, or any other factors that would affect the market value of the real property parcel in which the official has a financial interest;

(12) Would cause a reasonably prudent person, using due care and consideration under the circumstances, to believe that the governmental decision was of such a nature that its reasonably foreseeable effect would influence the market value of the official's property.

Both Commissioner [REDACTED] (2,372 feet south of the Project) and Commissioner [REDACTED] (1,267 feet southeast of the Project) are separated from the Project by 2-3 blocks of existing residential

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neighborhoods. It does not appear that the Project will have any impact on their parking, views, privacy, noise levels or air quality. Although the Project will add to traffic congestion in the general area, the DEIR finds that this impact is less than significant except for one intersection (Kingfisher and Fremont Ave.) which is on the west side of the Project site, further removed from both Commissioners' residences. Although the Project will generate 1,182 net new trips on a typical weekday, there is no evidence that the Commissioners' streets will be affected by additional traffic, although nearby arterial streets (El Camino Real, Fremont and Wolfe) will experience a slight increase. Traffic volumes in the area are already heavy at certain times of day and are expected to worsen due to other projects in the area. The Butcher's Corner project, however, is not expected to significantly add to the congestion according to the DEIR traffic analysis.

Although the Butcher's Corner site is currently undeveloped, the Project will not substantially change the intensity of use in the surrounding area, which is already highly developed and includes single family and multifamily residential neighborhoods as well as the busy commercial and retail corridor on El Camino Real. The eventual development of the Butcher's Corner site is anticipated as part of the City's General Plan.

The following FPPC Advice Letters appear to be helpful to the analysis in this case:

**Pleasanton (Lowell, A-15-202):** proposal to construct 50 new homes on 195 acres approximately 3,400 feet from the councilmember's residence. The development would result in increased traffic and noise and decreased air quality in the nearby areas, including a 9% traffic increase on the street in close proximity to the councilmember's residence. However, the impacts were not significant enough to cause a reasonably foreseeable effect on the property's market value.

<http://www.fppc.ca.gov/content/dam/fppc/documents/advice-letters/1995-2015/2015/15202.pdf>

**Redondo Beach (Ginsburg, A-15-170):** large mixed-used development located 1,500 feet and across the Pacific Coast Hwy from an office building partly owned by the councilmember. The traffic impacts seemed to concern other streets and the councilmember's building was separated from the project by numerous intervening properties.

<http://www.fppc.ca.gov/content/dam/fppc/documents/advice-letters/1995-2015/2015/15170.pdf>

**Pleasanton (Seto, A-15-177):** proposal to expand an existing private school from 120 to 298 students and to build 27 single family homes on a former church site approximately 1,900 feet from the councilmember's residence. The FPPC found no conflict because the traffic impacts on intersections near the councilmember's residence would be limited to the beginning and end of the school day.

<http://www.fppc.ca.gov/content/dam/fppc/documents/advice-letters/1995-2015/2015/15177.pdf>

**Mountain View (Quinn, A-15-049):** proposed hotel project approximately 1,600 feet from councilmember's residence. It was unlikely that hotel traffic would use this street. Councilmember's residence was separated from the hotel project by 3 large city blocks. The project would not change the intensity of use in the use in the area, which was already highly developed. There were no impacts on the councilmember's residence related to parking, views, privacy, noise, or air quality.

<http://www.fppc.ca.gov/content/dam/fppc/documents/advice-letters/1995-2015/2015/15049.pdf>

**Re: Conflict of Interest Advice Sought for Butcher's Corner**

April 7, 2016

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Thank you for your time and attention to this matter. If you need further information, or if I can be of assistance in any way, please do not hesitate to contact me at (408) 730-2705.

Very truly yours,

Rebecca L. Moon  
Sr. Assistant City Attorney

cc: Commissioner [REDACTED]  
Commissioner [REDACTED]