

FAIR POLITICAL PRACTICES COMMISSION ("FPPC") UPDATE

**League of California Cities
2019 City Attorneys' Spring Conference
May 9, 2019**

**Daniel G. Sodergren
City Attorney
City of Pleasanton**



OUTLINE

- **Use of Public Funds for Campaign Activity**
- **Regulations**
- **Advice Letters**
- **Tips on Writing Advice Request Letters to the FPFC**

Expenditure of Public Funds – Constitutional Limitations

Vargas v. City of Salinas (2009)

- Cities may not spend public funds to assist in the passage or defeat of an initiative or other ballot measure.
- However, 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.

Expenditure of Public Funds – Constitutional Limitations

Vargas v. City of Salinas (2009)

- Activities that “unquestionably constitute improper campaign activity” include “. . . the use of public funds to purchase such items as bumper stickers, posters, advertising ‘floats,’ *or television and radio ‘spots.’*”
- 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.”

(Emphasis added.)

Regulation 18420.1

- A communication paid for with public money is considered an “independent expenditure” if 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;*” or
 - is not a fair presentation of the facts serving only an informational purpose based on “. . . *the style, tenor, and timing of the communication.*”

(Emphasis added.)

Administrative Enforcement Actions

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

- Stipulated administrative penalty of \$7,500 for using videos and social media to promote a ballot measure.



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



- Involves communications, including television spots, the County made to inform its residents about a ballot measure.

Litigation

- *Howard Jarvis Taxpayers Association v. County of Los Angeles*
 - Alleges illegal use of public funds for communications related to ballot measure.
- *California State Association of Counties v. FPPC*
 - Challenge to Regulations 18420.1 (independent expenditure) and 18901.1 (mass mailing).

Legislation

- Assembly Bill No. 1306 (2019–2020 Regular Session)
 - Proposes to prohibit public officials and employees from using or permitting others to use public resources for campaign activity.
 - Authorizes the FPPC to impose administrative or civil penalties.

Regulations



Amendment to Regulation 18702.2

Materiality Standard for Property Interests



A Short History of the Materiality Standard for Property Interests

1988



1999



2014



2019



Mmm-donuts
Is there anything they can't do?



Regulation 18702.2

- Regulation 18702.2 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:
 - 500 feet;
 - more than 500 feet but less than 1,000 feet; or
 - more than 1,000 feet.

Regulation 18702.2

- *Within 500 feet* - 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.

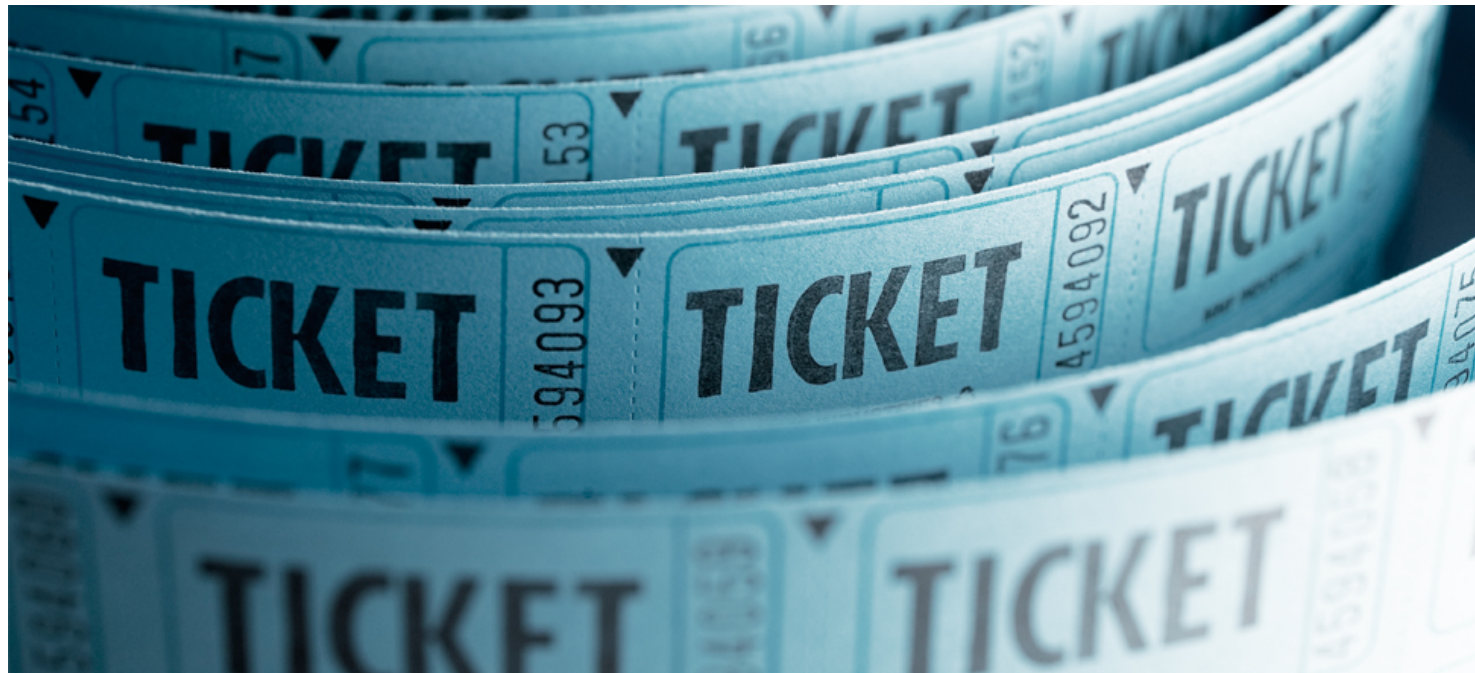
Regulation 18702.2

- *More than 500 feet but less than 1,000 feet* - 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; or
 - (e) market value.

Regulation 18702.2

- *More than 1,000 feet* - presumed not to be material (unless rebutted with clear and convincing evidence the decision would have a substantial effect on the official's property).

Amendment to Regulation 18944.1 Agency Ticket Distribution Policies



Amendment to Regulation 18944.1

- Requires 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.
- 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.

Select Advice Letters (August 17 – April 17)

 **STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION**
468 J Street • Suite 600 • Sacramento, CA 95804-8209
(916) 322-5556 • Fax (916) 322-0880

September 13, 2005

Kenneth Dasher
739 Paul Avenue
Palo Alto, CA 94301

Re: Your Request for Advice
Our File No. A-15-051

Dear Mr. Dasher:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹

Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest provisions such as common law conflict of interest or Section 1096. Additionally, you may wish to consult with your school district's statement of nonexemptable activities, if any.

QUESTION

As a member of the Palo Alto Unified School District Board, does the Act prohibit you from participating in decisions relating to how the Board will respond to civil rights complaints involving the Federal Department of Education's Office for Civil Rights?

CONCLUSION

No. The Act seeks to prevent financial conflicts of interest in decision making. The Office for Civil Rights has not been a source of income to you since 2001, and therefore, because such a state, local or federal governmental agency is not included within the Act's definition of income, your facts do not show other financial interests in the decisions you described that are coming before the Board and therefore the Act does not restrict your participation in these decisions.

FACTS

You are a member of the Governing Board of the Palo Alto Unified School District. Over the past several years, the School District has been investigated by the United States Department of Education Office for Civil Rights ("OCR") in response to parent complaints. One complaint resulted in a finding that the School District had violated federal civil rights laws. Other complaints

¹ The Political Reform Act is contained in Government Code Sections 81800 through 81914. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18100 through 18907 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Sections 6 of the California Code of Regulations, unless otherwise indicated.

Interests in Real Property

- **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 there is clear and convincing evidence that the decisions will not have any measurable impact on her property.



Interests in Real Property

- **Fenstermacher Advice Letter No. A-19-020**

Deputy Mayor and two Councilmembers may participate in decisions to supplement landscape maintenance districts where they live various distances from the closest potential landscape changes.



Interests in Business Entities



- **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.

Government Code Section 1090 - Consultants

- Trend is to find that independent contractors are not subject to section 1090 where:
 - they play a limited technical role and do not have extensive involvement in the initial design and development of the project; and
 - the nature of the contractor's involvement does not give the contractor an unfair advantage in the subsequent award of the contract.
- Assembly Bill No. 626 (2019–2020 Regular Session) proposes to amend section 1091.5 to create a “non-interest” exception for design professionals.

Government Code Section 1090 - Nonprofits

- **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.



Government Code Section 1090 - Nonprofits

- Government Code section 1091.5(a)(8) provides 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.

Government Code Section 1090 - Nonprofits

- Trend is to broadly find that nonprofits, *that generally support some segment of the city's population*, qualify for the section 1091.5(a)(8) “non-interest” exception.
 - Walter Advice Letter No. A-18-155 (Boys & Girls Club) and Sodergren Advice Letter No. A-19-025 (National Alliance on Mental Illness)
 - However, proceed with caution – Schroeter Advice Letter No. A-18-196 (Knights of Columbus)

Mass Mailing

- **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. The City Council is not involved in the review, production or distribution of the newsletter.





ON BEHALF OF OUR PERALTA EMPLOYEES AND STUDENTS,
WE WISH YOU THE VERY BEST THIS SEASON AND VALUE YOUR SUPPORT.

PICTURED ABOVE (L TO R)

*William 'Bill' Riley, Vice President, Area 5 - Karen Weinstien, Area 6
Nicky Gonzales-Yuen, Area 4 - Meridith Brown, President, Area 7
Chancellor Jewel E. Laguerre, Ph.D. - Juliana Bonilla, Area 2
Linda Handy, Area 3 - Bill Withrow, Area 1*

NOT PICTURED

Nesi More, Student Trustee - Corey Hollis, Student Trustee

LOOMING ETHICS PENALTY

Happy holidays! Here's a \$2K fine in your stocking

Holiday cards sent by Peralta Community College District Board in 2017 might have violated state law for using public money

By David DeBolt
ddebolt@bayareanewsgroup.com

Even holiday cards aren't exempt from state government code, if the card is designed, printed, and sent Monday. Chancellor Laguerre did not immediately respond to a request for comment. Sending the holiday cards violated a section of state law prohibiting the use of more than \$50 in public money to pay for 200 College history instructor and critic of Peralta administration, said the FPPC fine is part of a pattern of a misuse of district spending. "Our largest collection of fully functional fire alarms," he said. "We find

Appointment

- **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.



Advice Request Letters to the FPPC



Advice Request Letters to the FPPC

- Regulation 18329 provides guidance on formal written advice and informal assistance.
- Regulation 18329.5 provides guidance on the Commission's advice procedure regarding the interpretation of an agency's conflict of interest code.
- See: <http://www.fppc.ca.gov/advice/formal-advice.html> (Link current as of April 17, 2019)

Advice Request Letters to the FPPC

- 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.
 - Provide website links and/or attach copies of the relevant project/grant program/decision information.

Advice Request Letters to the FPPC

- Tips from the FPPC's Legal Division:
 - 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.
 - Contact information should include the email of the requestor or authorized representative.
 - Only issues that involve a specific future decision or an intended course of conduct are able to be addressed in formal advice.

Advice Request Letters to the FPPC

- Tips from the FPPC's Legal Division:
 - Make certain that the official has not been involved in earlier actions prior to “making the decision.”
 - 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.