VIA EMAIL: CommAsst@fppc.ca.gov

Chair Richard C. Miadich
Commissioner Frank Cardenas
Commissioner Brian Hatch
Commissioner Allison Hayward
Fair Political Practices Commission
102 Q Street, Suite 3000
Sacramento, CA, 95811

Re: May 2019 Agenda Item 21 – Request for Review and Withdrawal or Modification of *Minner* Advice Letter, A-19-032

Chair Miadich and Commissioners Cardenas, Hatch and Hayward:

We are writing to respectfully request that the Commission exercise its oversight authority to review and either withdraw or modify the *Minner* Advice Letter, A-19-032, which was issued on April 15, 2019, and is included with the materials for Item 21 ("Advice Letter Report and Commission Review") on the Commission's Agenda for May 16, 2019. (See Staff Advice Letter Report, dated May 6, 2019.) If not promptly corrected or rescinded, a legal defect in the *Minner* Advice Letter—as the FPPC's first advice letter under newly amended Regulation 18702.2 pertaining to the materiality standards for interests in real property—will essentially nullify and render un-administrable the conflict of interest safeguards in this area of the Political Reform Act.

At its regular meeting on January 17, 2019, the Commission adopted amendments to Regulation 18702.2 in order to "establish a bright-line materiality standard for property interests more than a set distance from property that is the subject of a governmental decision." (Staff Report, dated January 7, 2019, re Amendments to Regulation 18702.2.) Specifically, amended Regulation 18702.2 adopts a "bright-line" rule covering real property interests by establishing *three* categories of real property:

(1) property *within* 500 feet of the property subject to the governmental decision, for which a material financial effect is presumed, absent clear and convincing evidence to the contrary;

(2) property *more than* 1,000 feet from the property subject to the governmental decision, for which there is a presumption of no material financial effect, absent clear and convincing evidence to the contrary; and

(3) property that is *between* 500 and 1,000 feet from the property subject to the governmental decision, which requires a comprehensive review of the various materiality factors set forth in the regulation.

(See Regulation 18702.2.) Staff explained that, as requested by the Commission at earlier meetings, these amendments "would provide what the current regulation does not: an objective bright-line rule establishing when an official may participate in a governmental decision." (Staff Report, dated January 7, 2019, re Amendments to Regulation 18702.2.) This is a commendable goal and a positive improvement in the regulation.

The *Minner* Advice Letter, however, undermines these important recent amendments by introducing what appear to be inadvertent, but nonetheless serious, legal errors into the analysis.

Minner pertains to a city councilmember's financial interest in residential real property located approximately 939 feet from a 58-acre property subject to various governmental decisions that relate to a sizable mixed-use development project in a Bay Area city. (*Minner* at pp. 2-5.) The *Minner* letter correctly concludes that the city councilmember has a disqualifying financial interest in governmental decisions concerning the project "because it appears the decisions will have a foreseeable and material effect on her interest in real property" as a result of "'cut-through' traffic and parking intrusion" in the councilmember's neighborhood, "noise impacts for the project site and surrounding area," the project's impact on "views from her residence," as well as the project's impact on the market and rental value of the councilmember's property. (*Id*. at pp. 7-8.)

The *Minner* letter, however, then relies entirely on the seldom used "public generally exception" to conclude—in the absence of facts and directly contrary to amended Regulation 18702.2—that the councilmember may participate in decisions related to the project.[1] (*Id*. at pp. 8-9.) Although we

[1] Regulation 18703(a), commonly referred to as the "public generally exception," provides:

presume this was due to oversight, the analysis and conclusion represents clear legal error.

The *Minner* letter states that, on April 4, several weeks after the initial request for advice, the city attorney "provided a map prepared by the City showing approximately 25-percent of the residential units in the City are within 3,800 feet of the Project." (Emphasis added.) A true and correct copy of the map submitted by the city is attached hereto as Attachment A. Remarking only on the large scale of the project, the *Minner* letter relies entirely on this map to conclude:

> [W]hile some of the properties in closer proximity may be affected disproportionately, there is no indication that the foreseeable impacts, such as increased property value, increased traffic on several main thoroughfares, intensity of use or views, will have a unique or disproportionate effect on [the councilmember's] residence, which is 929 feet from the Project, in comparison to the other properties within 3,800 feet of the project.

(*Id*. at p. 9.) Thus, despite the clear legal requirement to rely only on specific, identified facts when providing conflict of interest advice *and* the burden being squarely on the public official to establish the proper application of the public generally exception, the *Minner* letter issues a definitive legal conclusion in the complete and total absence of factual or other evidentiary support. (See Regulation 18329 [FPPC is to decline to provide advice where "material facts provided in the request may be inaccurate, incomplete, or in dispute"]; see also Regulation 18703(a).) Tellingly, the conclusion is even worded in the negative ("there is no indication"), rather than a *positive* statement of what the factual record actually supports (because there is no such support).

This plain error is even more problematic here—including for others who will look to this letter for guidance in the future—given that amended Regulation 18702.2 expressly provides that when a public official's property is beyond

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> A governmental decision's financial effect on a public official's financial interest is indistinguishable from its effect on the public generally if the official establishes that a significant segment of the public is affected and the effect on his or her financial interest is not unique compared to the effect on the significant segment.

(Emphasis added.) For purposes of this exception, a "significant segment of the public" requires at least 25-percent or more of the residential real property within a jurisdiction. (Regulation 18703(b).)

1,000 feet from the property subject to the governmental decision there is a presumption of no material financial effect, which may be rebutted only with "clear and convincing evidence the governmental decision would have a substantial effect on the official's property." (Regulation 18702.2(b) [emphasis added].) In other words, given the newly amended regulation expressly provides that properties beyond 1,000 from the project site are presumed to have no material financial effect unless there is "clear and convincing evidence" to the contrary, then how can the *Minner* letter—*in the complete and total absence of any evidence whatsoever*—conclude that properties up to 3,800 feet away will have the very same impacts as a councilmember's property located just 939 feet way from the project? In short, the "bright-line" rules of amended Regulation 18702.2 have been completely ignored, turning what should be a straight-forward analysis into an un-administrable guessing game.

Indeed, the analysis used in the *Minner* letter is completely backwards. It is clear legal error to determine—at the very outset of the analysis—what constitutes 25% of the residences in the jurisdiction (i.e., 3,800 feet from the project site in this case) because such logic presumes exactly what it is trying to prove. To the contrary, under amended Regulation 18702.2, the proper analysis requires a determination of the number of residences in the jurisdiction within 1,000 feet of the project site, as those properties—and those properties alone absent "clear and convincing evidence" to the contrary—are the only ones similarly situated to the councilmember's property at 939 feet.

Here, there was absolutely no evidence, let alone "clear and convincing evidence," that the impacts on properties up to three-quarters of a mile away from the project site are the same as the impacts on property that is approximately three blocks away. Without question, those who live closest in proximity to a project site, regardless of its size, will be uniquely impacted by the development, including by the very same types of impacts identified by FPPC staff here. (See, e.g., *Coleson* Advice Letter, A-16-134.) Those closest to the project location, including those within 1,000 feet, will hear the construction noise at full or near-full volume, experience significant view impacts, and encounter local neighborhood parking intrusion in ways that those considerably farther away will not. (*Minner* Advice Letter at pp. 2-5, 9 [recognizing that "some of the properties in closer proximity may be affected disproportionately"]; see also Attachment B hereto [showing the project's readily apparent view impacts at approximately 939 feet from the project site versus the lack of view impacts at approximately 3,100 feet, including from multiple directions].)

Thus, it simply defies logic to conclude that a city councilmember who owns real property approximately *three blocks* from a project site will have the same or even remotely similar impacts as residents who live almost *three-quarters of a mile* away from the site. Yet that is exactly what the *Minner* letter concludes here, in direct conflict with amended Regulation 18702.2.

The use of an arbitrary distance from the project site rather than the bright-line distance set forth in the amended regulation also happens to be inconsistent with prior FPPC advice in this area. For example, the *Ziegler* Advice Letter, A-16-025, found that the exception applied to allow Councilmembers of the City of Citrus Heights to vote on a project that would make improvements to sidewalks throughout the jurisdiction. The FPPC found that since a significant segment of the population would be <u>located within 500 feet</u> of a proposed sidewalk improvement, councilmembers <u>located within 500 feet</u> of a proposed improvement would not be disproportionately or uniquely impacted by the project. (See also *Peake* Advice Letter, A-15-227 [applying public generally exception to determine the number of properties within *500 feet* of the subject action where official owns property within *500 feet*].) Conversely, in the *Rozell* Advice Letter, A-16-198, the FPPC found that a councilmember was disqualified from participating in a decision involving short term rentals because potential short term rentals were clustered in the area where the councilmember owned real property; given that, unlike the councilmember, the majority of the city was not located within close proximity to the potential short term rentals, the public generally exception did not apply. (See also *Coleson* Advice Letter, A-16-134 [even if project could impact 25% of the town in some way, the councilmember has a unique interest due to "her property's close *proximity* to the project site and the magnitude of the proposed development"].)

The error in ignoring amended Regulation 18702.2 and past FPPC advice is meaningful here. When the public generally analysis is conducted as required under the amended regulation, it reveals that only 1.7% of the city's residences are within approximately 1,000 feet of the project site, which is far from the 25% minimum required for the exception to apply. Pursuant to data available from Experian, there are a total of 16,515 households in Cupertino, but only 284 of those households are located approximately 1,000 feet or less from the project site.

Moreover, although the results-oriented 3,800 foot radius map provided by the city is ultimately irrelevant, it is worth noting that it does not even appear to capture 25% of the city's residences. (See Regulation 18329 [FPPC should decline to provide advice where material facts may be incorrect or in dispute].)

First, because the project site is located near a city boundary, the 3,800 foot radius circle covers substantial parts of two neighboring cities (i.e., significant parts of the circle are not even in the city). Second, per Experian, only 2,988 of the city's households are located within 3,800 feet of the project site, which amounts to only 18% of the total number of households in the city – considerably less than the 25% required. Thus, even setting aside the improper application of the regulatory framework, the *Minner* letter is legally flawed and must be addressed.

For the foregoing reasons, we respectfully request that the Commission exercise its authority to review and either withdraw or modify the *Minner* Advice Letter, A-19-032. The recent amendment of Regulation 18702.2 to re-introduce bright-line standards for real property interests so they can be more effectively navigated by public officials and enforced by the FPPC was a much needed step. However, unless the *Minner* Advice letter is withdrawn or, at the very least, corrected, the amended regulation will be effectively nullified and rendered un-administrable.

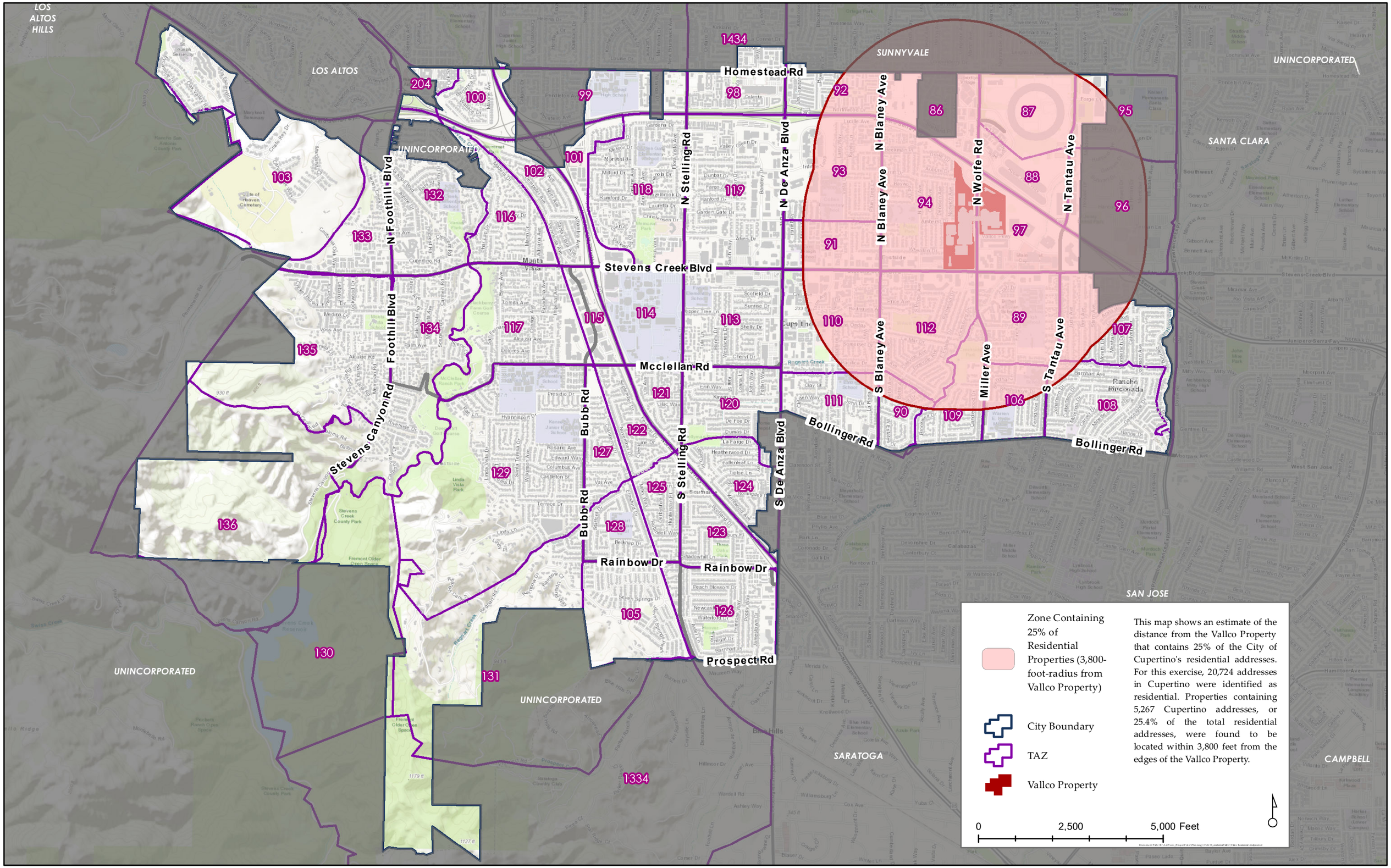
Thank you in advance for your prompt attention to this important matter.

Sincerely,

Sean P. Welch

Encl. (2)

Attachment A



Attachment B

1 WHEATON & MCLAREN

939 FEET

Wheaton & McLaren
939 Feet

WEST VIEW

3,111 Feet

3,111 FEET

2 WEST VIEW

3,116 Feet

EAST VIEW

3,116 FEET

3 EAST VIEW


1 WHEATON & MCLAREN - 939 Feet
Mc Laren Pl
Wheaton Dr
NO PARKING
Google Earth
© 2019 Google

2 WEST VIEW - 3,111 Feet

3 EAST VIEW - 3,116 Feet

EAST