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June 7, 2023

VIA EMAIL ONLY: CommAsst@fppc.ca.gov

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

RE: June 8, 2023 FPPC Commission Meeting - Discussion of Levine Act
Regulations

Dear Chair Miadich and Commissioners Baker, Wilson, and Wood:

The Sutton Law Firm would like to thank the Fair Political Practices Commission's (FPPC) staff for their work in preparing the proposed regulations to California Government Code section 84308 in connection with the passage of SB 1439. While we agree with much of what staff is proposing, we have a concern regarding the regulations possible application to contributions made to elected City Attorneys.

Based on our understanding of the Legislature's intent in drafting SB 1439, it appears that the purpose of the revisions to the Levine Act was to broaden its scope to apply to City Councilmembers and Boards of Supervisors. However, we believe the broad definition of "officer of an agency" under proposed regulation 18438.1 will ensnare elected officials that the Legislature did not intend to cover.

California Government Code section 84308(c) begins by stating that, “[p]rior to rendering any decision in a proceeding involving a license, permit, or other entitlement for use pending before an agency, each officer of the agency . . .” (Emphasis added.) City Attorneys do not “render” decisions. They advise the City about what the law allows and does not allow in the land use process, and they prepare certain documents on behalf of the City, but other City offices and City Councils “render” decisions regarding such matters.

The definition of officer of an agency in proposed regulation 18438.1 seems to apply to a broader set of officials than the law intended. For instance, a City Councilmember or County Supervisor does have decision-making authority to the extent that they are tasked with approving permits, licences, development agreements or otherwise giving project approvals. However, a City Attorney has no such decision-making authority. While a City Attorney may advise a City Council or County Board of Supervisors regarding the applicability of various zoning and other land use laws to a proposed project, that City Attorney does not have actual decision-making authority over the project itself. Despite this difference, proposed regulation 18438.1 would subsume City Attorneys under the definition of officer of an agency because they “use their official position to influence a decision” even though based on the text of California Government Code section 84308 itself, they do not render any decisions but are merely situated in an advisory role (e.g., the City Attorney advises a City Council regarding

whether a zoning change or continuing use permit is legal and the advice is not binding on a City Council in any way).

The consequences of applying this law to elected City Attorneys are extreme. City Attorneys' offices work on real estate project approvals for months and sometimes years before they are presented to an elected body for a vote. If the FPPC says the law does apply to City Attorneys, it would leave dozens of unanswered questions. If an elected City Attorney receives a contribution from a participant during the middle of a project, how would recusal work? Would the City Attorney have to recuse themselves only or would the entire office need to recuse itself? What happens to the work that the City Attorney and staff have already completed to date? Does the party need to start the process over entirely? Could a project opponent with a financial interest in the project disqualify an entire City Attorney's office by making a contribution? Not having a City Attorney and their office to advise a City Council regarding a real estate project would leave a city in a terrible position the Legislature did not intend. It is one thing for this law to prevent an elected official who receives a contribution from a party or participant from taking an official vote on a project because a vote is a single action taken at a single point in time. But a City Attorney's work on a real estate project is a collection of countless actions performed by several people in the office over months and even years. It makes no sense for the law to apply to City Attorneys given the role of a City

Attorney in these types of proceedings.

Further, in the February 6, 2023 memorandum from David Bainbridge and Kevin Cornwall regarding “Prenotice Discussion of Regulations Implementing SB 1439,” there is a note-worthy example used regarding District Attorneys and County Sheriffs. The memorandum states on page 3 that, “a District Attorney or County Sheriff may be in a position to receive a contribution and approve or deny an entitlement for use, but the District Attorney and Sheriff do not serve on a board or commission and, because they serve under the County Board of Directors, neither is the head of an agency and therefore under the current regulations, Section 84308 would not apply to them.” The memorandum goes on to say that, “staff recommends defining ‘officer of an agency’ to include, at a minimum, all officials elected, or otherwise appointed to an elected position, and all candidates for elected positions that are also serving in a decision-making capacity.”

While a District Attorney or County Sheriff may be in a position to approve or deny an entitlement for use, a City Attorney is not. While City Attorneys do frequently advise City Councils and Boards of Supervisors regarding the applicability of various zoning and other land use laws to a project, they do not render any decisions as that phrase is used in California Government Code section 84308(b) & (c). Thus, we do not believe that City Attorneys were

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intended to be covered by SB 1439 and contributions to them should not require disqualification or otherwise trigger this law.

We thank the Commission and its staff for their hard work in drafting these new regulations, and for their consideration of our concern. We are happy to engage further on this matter if the issue we are raising is unclear.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew Alvarez", with a long horizontal flourish extending to the right.

Matthew C. Alvarez

EBL/slf
#1000.01