



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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MEMORANDUM

To: Chair Remke, Commissioners Audero, Casher, Wasserman, and Wynne

From: Hyla Wagner, General Counsel
John Wallace, Assistant General Counsel
Heather Rowan, Senior Commission Counsel

Subject: Legal Division's Monthly Report

Date: October 5, 2015

A. Pending Litigation

Board of Pilot Commissioners for the Bays of San Francisco, San Pablo & Suisun v. Fair Political Practices Commission

The Board of Pilot Commissioners filed a writ of mandate in Sacramento Superior Court on March 3, 2015, seeking relief from the Commission's decision and order in *Pacific Merchant Shipping Association v. Board of Pilot Commissioners for the Bays of San Francisco, San Pablo and Suisun*. Following an administrative hearing that the parties presented to the Commission at its July 2014 meeting, the Commission found that the Port Agent should be designated in the Board of Pilot Commissioners' conflict of interest code under Section 87300. The Board of Pilot Commissioners challenged the decision on both jurisdictional and statutory grounds. After a hearing on September 25, 2015, the superior court decided in favor of petitioner and ordered the Commission not to take action on the Board of Pilot Commissioners' conflict of interest code. There will be a closed session to discuss any further litigation on the matter. The Commission will hold a closed session to deliberate on the pending litigation. (Gov. Code, 11126(e)(1).)

Frank J. Burgess v. Fair Political Practices Commission

Frank J. Burgess filed a writ of mandate in Riverside Superior Court on September 4, 2015 seeking relief from the Commission's decision and order in *In re Frank J. Burgess*, Case No. 12/516. Following an administrative hearing in front of an administrative law judge, Mr. Burgess challenged that decision to the Commission. After oral argument before the Commission on March 19, 2015 and a thorough review of the record, the Commission rejected the ALJ's decision and decided the case based on the record, oral argument, and the parties' supplement briefing on the "governmental decision" element of the case. The Commission found that Mr. Burgess violated Section 87100 of the Act and imposed a \$5,000 fine July 7, 2015. Mr. Burgess challenges that decision as an excess of the Commission's jurisdiction, an abuse of discretion, and a denial of due process rights. The court has scheduled a status conference for November 3, 2015.

B. Outreach and Training

None to report.

C. Probable Cause Decisions

None to report.

D. Legal Advice

In September 2015, the Legal Division attorneys responded to the following requests for legal advice:

- *Email Requests for Advice:* Responded to more than 69 email and telephone requests.
- *Advice Letters:* Received 25 advice letter requests and issued 23 advice letters.
- *Section 1090 Letters:* Received four advice letter requests concerning Section 1090 and issued nine advice letters. This year to date we have received 43 requests regarding Section 1090 (not including conflict of interest letters that incidentally deal with Section 1090 issues).

E. Advice Letter Summaries

Campaign

Dave Ish

I-15-109

The use of a text messaging service to send communications supporting or opposing a candidate or ballot measure to interested individuals is not prohibited by the Act. Political speech is highly protected and the Act does not prohibit a candidate or ballot measure from communicating their message in any form, including text messaging. The Act does, however, have disclaimer requirements that apply to political communications.

Max D. Kanin

A-15-148

A member of the Assembly may use funds from her legal defense fund account to pay for legal fees and costs regarding complaints filed with the Commission, including travel costs to meet with investigators, where the costs were incurred prior to opening the account and prior to the Commission's 14-day notice as to how it intended to act on the complaints. The legal fees and costs were directly related to a political, legislative, or governmental purpose and, at the time of the travel, she reasonably concluded that the Commission had commenced an investigation in an administrative proceeding.

Conflict of Interest**Stephen P. Deitsch****I-15-107**

For decisions involving the city's contract with a golf course management company, a councilmember does not have a potentially disqualifying interest in either the general manager of the golf course or the management company resulting solely from his joint-ownership interest in a café with the general manager. Barring a reasonably foreseeable material financial effect on an interest as enumerated in Section 87103, the Act does not prohibit the councilmember from taking part in these decisions regardless of the potential effect on the general manager or the management company.

William B. Connors**I-15-113**

City councilmember, with a residence within 500 feet of railroad track, is not disqualified from decisions regarding the conversion of railroad gates to quad gates because it is unlikely that replacing existing gates will have a measurable financial impact on the councilmember's residence. Additionally, the councilmember is not disqualified from decisions regarding the electrification of the railway, the conversion of the railway to the High Speed Rail system, or the level of commuter services (including depot improvements) because, considering the limited geographical size of the town, the effect on the councilmember's residence is indistinguishable from the effect on the public generally.

Craig Geyer**A-15-132**

Commissioner has a disqualifying conflict of interest under the Act prohibiting him from participating in a LAFCO recommendation concerning the proposed formation of the Isla Vista Community Services District (CSD) based on his numerous real property interests within the boundaries of the proposed CSD. However, the public generally exception relating to Public Services and Utilities applies to allow his participation in the LAFCO decision concerning the appropriate rate of taxation for a utility user tax for the proposed CSD.

Jennifer M. Lyon**A-15-143**

A councilmember who owns a beachfront condominium may participate in city council decisions regarding a sand replenishment project that would enlarge the beach and protect beachfront structures from storm damage based on the exception to the materiality rules for a decision that solely concerns repairs, replacement or maintenance of existing streets, water, sewer, storm drainage or similar facilities.

Caroline L. Fowler**A-15-146**

A city councilmember may participate in decisions regarding a project (the construction of twenty apartment units on a vacant lot) where he owns real property 1,500 feet from the site and on the same street. It is not reasonably foreseeable that the project will materially impact his real property by changing its character or in such a way that a reasonably prudent person would believe that the value of the property will change.

Kenneth Dauber**A-15-151**

A school board member who received income from a federal government entity more than 12 months prior to a decision does not have a financial interest in a school board's decisions concerning that entity.

Quinn M. Barrow**A-15-155**

A councilmember may participate in decisions concerning a retail development site 1,000 feet from his residence because it is not reasonably foreseeable that the development will have a material effect on his residence such that it will influence the property's market value.

Rebecca L. Moon**A-15-160**

The Act does not prohibit a Sunnyvale City Councilmember from participating in and voting on the decisions on whether to approve the Environmental Impact Report for the Peery Park Specific Plan (PPSP) and whether to approve the PPSP itself despite the fact that the councilmember provided consulting engineering services to and received more than \$500 from a company located within the project area. According to the facts presented, the decisions would not directly affect the company or its productive use of the property. The PPSP may result in minimal incidental impacts on the company's actual use of the property, but these impacts were highly unlikely to affect the value of the company (estimated at more than \$23 million). Given the facts presented, there is no reasonably foreseeable material financial effect on the company as a result of the decisions in question, and the councilmember may participate and vote on these decisions.

Doug Karpa**A-15-161**

Section 83116.5 imposes liability on persons that purposely or negligently cause any other person to violate any provision of the Act, or who aid and abet any person in the violation of any provision of the Act. However, this section is only applicable to persons with filing duties under the Act.

Heather Phillips**A-15-164**

The planning commissioner does not have a conflict of interest in a decision regarding a new winery in Napa. The decision to approve a single new winery in Napa to be located among numerous existing wineries will not materially impact the value of the commissioner's business. Moreover, while the new winery may affect traffic in the area, Napa County has determined in a preliminary review that approval of the Winery Project would result in no significant impacts that cannot be mitigated. Therefore, it does not appear that the decisions will have a foreseeable and material financial effect on the commissioner's business or property.

Jay Freeman**I-15-169**

With respect to a leasehold interest in property, Regulation 18702.2(b) provides that the financial effect is material if the decision will: (1) change the termination date of the lease; (2) increase or decrease the potential rental value of the property; (3) increase or decrease the rental value of the property, and the official has a right to sublease the property; (4) change the official's actual or legally allowable use of the real property; or (5) impact the official's use and enjoyment of the real property." The LAFCO decision concerning Isla Vista will not affect the requestor's lease in the ways described above. With respect to a business, Regulation 18702.1(b) provides an effect 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 price of the business entity’s publicly traded stock, or the value of a privately-held business entity.” Since the business does not operate in Isla Vista and has no employees in Isla Vista, it is not foreseeable that the business will be materially financially affected.

Jeff Ginsburg**I-15-170**

The councilmember does not have a conflict of interest in a development project three-tenths of a mile from his office building. There are numerous intervening properties between his building and the Project. In addition, the Project will be on an existing commercial site and while the project will increase the current use of the property it will not be a brand new use. Finally, the councilmember’s office tenants are not likely to be affected by the changes in use that will result from the Project. The traffic flow appears to be removed from the street on which the councilmember’s office building is located. Thus, these facts support the conclusion that the development decision would not contribute to a change in the value of his privately-held business entity or affect his business tenants.

Michael Hansen**A-15-172**

An employee of the City of San Diego may represent his personal interests in his private capacity before city bodies, despite a conflict of interest. Under this exception, however, he must limit his comments to his personal interests and make clear that he is not acting in his official capacity and is not speaking in the interest of any other person or group. Within the confines of the exception, he may also hire or consult with experts outside of the public meeting in preparation of his comments.

J. Christine Dietrick**I-15-175**

The Act does not prohibit a San Luis Obispo City Councilmember from participating in the governmental decision to approve an update to the Downtown Conceptual Plan (Plan). According to the facts, there is no reasonably foreseeable material financial effect of the decision on the councilmember’s real property within the Plan area, or the trust in which he is a co-trustee and beneficiary, or the property he leases. City development projects and capital improvements need not be consistent with the Plan, the Plan is to be implemented “whenever feasible,” and implementation of any proposed improvements included in the update will require a further decision or decisions by the city council. Therefore, the councilmember does not have a conflict of interest under the Act.

John Waddell**A-15-176**

Based on Regulation 18950.1, the county may accept free travel and accommodations from Bentley Systems for attendance at an annual infrastructure development conference in London. The travel payments will be considered a gift to the county, not the employee that attends the conference.

Molly S. Stump**A-15-184**

The councilmember has an interest in Stanford as a source of income. However, once the decision is made to remove Stanford from the decision to establish an annual growth limit cap on new office and research and development space in the city, the councilmember may participate in the

subsequent decisions on the cap. Based on the facts, the decisions, after the exclusion of Stanford, will not have a material financial effect on Stanford.

Conflict of Interest Code

Kim Forrester

A-15-131

Since the county is the code reviewing body, whether a corporation that operates charter schools within the county must adopt a separate conflict of interest code for each charter school or a single code combining the schools is a decision that must be left to the county. Additionally, the county will remain the corporation's code reviewing body unless the corporation is granted a charter to operate a school in another county within the state.

Lobbying

Sonny Mojonier

A-15-142

The Act does not prohibit a lobbyist, whether she is a former legislator or not, from serving on a board of directors for a non-profit organization.

Section 1090

Adam U. Lindgren

A-15-059

Under the Act and under Section 1090, a councilmember may not make, participate in making, or influence city budget and funding decisions or contracts involving his wife's employer, a nonprofit entity. Because the councilmember has a "remote interest" under Section 1091(b), the city council may consider decisions regarding the spouse's employer so long as: (1) the councilmember discloses to the city council his financial interest in the contract; (2) the interest is noted in the city council's official records; and (3) the councilmember abstains from participating in making any contract with the nonprofit.

Gary W. Schons

A-15-114

A County Medi-Cal Managed Care Commission governs a Health Plan. The Plan is in the process of securing the services of a corporate firm to provide consulting services to the Plan to assist it in locating and retaining a Pharmacy Benefits Manager (PBM). The consulting firm would contract with the Plan to prepare a Request for Proposal (RFP) from PBM vendors, score the vendors' responses, provide a financial analysis of each vendor and report the results of this work to the Care Commission's board with a recommendation to aid the Care Commission in selecting and making a contract with a particular vendor. The preferred corporate consulting firm has a prior or pre-existing, and possibly on-going, business relationship with many of these PBM vendors and would therefore have a financial interest in any contract the Plan might enter into with such a consulting firm under Section 1090. Thus, the contract would be prohibited under Section 1090. Further, use of a blind selection system would not change the analysis and there would still be a prohibited conflict under Section 1090.

Bradley W. Sullivan**A-15-121**

The vice-mayor does not have a disqualifying interest in the local post of the Veterans of Foreign Wars under either the Act or Section 1090 because he is an uncompensated officer of the nonprofit, tax-exempt, organization. Accordingly, the city may enter into the lease agreement with the organization and the vice-mayor is not precluded from taking part in the decision so long as the fact that he is currently serving as an officer of the organization is noted in the official record.

Caroline L. Fowler**A-15-145**

Section 1090 does not prohibit the Santa Rosa City Council or Councilmember Carlstrom from approving contracts with Pacific Gas and Electric Company (PG&E) or third party vendors where there may be some resulting impact on PG&E. Based on Councilmember Carlstrom's employment with PG&E, there are no facts to suggest she has a financial interest in the contracts.

Scott Chadwick**A-15-147**

Corporations or individuals that contract with a public agency during the "design phase" and have considerable influence over the public agency in developing an RFP for the "build phase" of the same contract are prohibited under Section 1090 from contracting with the public agency on the build phase. While the inquiry is fact-specific, the prohibition applies here to two contractors for the design phase. Under the Act, the remaining contractors for the design phases are not precluded from bidding on the build phase of the project.

William D. McMinn**A-15-162**

The Act does not prohibit a commissioner from the Board of Port Commissioners of the San Diego Unified Port District from participating in the decision of whether to renew and extend the lease between the District and the Pacific Gateway, Ltd. (Pacific) for tidelands and water area in the City of San Diego. The commissioner's month-to-month boat slip rental agreement with Marriott International, Inc. (Marriott) for a boat slip in a marina is not considered an interest in real property that could give rise to a conflict of interest under the Act. Accordingly, the commissioner is permitted to participate in the decision on whether to renew and extend the lease between the District and Pacific under the Act. In addition, Section 1090 does not prohibit the commissioner from participating in or the Board of Port Commissioners from entering into a lease renewal and extension with Pacific as a result of the boat slip agreement with Marriot because the commissioner does not have a financial interest in the lease for purposes of Section 1090.

Thomas A. Willis**A-15-163**

Section 1090 does not prohibit a library from contracting with a public relations consultant that may subcontract with a firm that previously did polling for the library and whose employee previously participated in a library discussion and advisory group on a similar issue.

Hilda Cantu Montoy**A-15-165**

Under Section 1090, a city may not hire a city councilmember as its city manager after the councilmember has resigned from office to take the job. The councilmember is deemed to have participated in making, and has a financial interest in, the employment contract and the contract would be void.

Amy R. Webber**A-15-166**

Section 1090 prohibits the Mayor of the City of Long Beach from participating in City's Mills Act Tax Incentive Program. The Mills Act (Section 50280, et seq.) allows a local government to enter into a contract with the owner of a qualified historical property who agrees to rehabilitate, restore, preserve, and maintain the property in exchange for property tax reductions. The mayor owns a loft within a multi-family building that is a qualified historical property, and the building and the owners of units within, including the mayor, applied to participate in the City's Mills Act Program. Section 1090 prohibits the mayor from participating in the Program.

F. UPCOMING REGULATIONS

The proposed regulations schedule for the upcoming three months is set forth below, subject to modification.

November 19, 2015

- **Regulation 18360 Complaints; and Regulation 18362 - Access to Complaint Files.** - Revision to Regulation 18360 to reflect current and future procedures and include the Commission's press policy with respect to Enforcement matters. Revision to Regulation 18362 to reflect current procedures for making Enforcement records available to the public and the media.

December 17, 2015

- **Regulation 18313: Forms and Manuals.** Modify Regulation 18313's requirement for formal Commission approval of manuals so individual chapters of new manuals can be updated quickly to keep current with changes to the Act or regulations.
- **Regulation 18313.5: Online Posting.** Amend subdivision (c) to permit the FPPC to use the standard retention periods for forms posted on the website (including filed Form 700s, behested payments reports, and warning, advisory and closing letters) and not require Commission approval before each removal.
- **Regulation 18996: Scope of Audits and Investigations.** Last year Section 90002(c) was completely deleted to authorize the Commission to make preelection audits of specific transactions. Subsection (c) of Section 90002 stated what the audits will cover and what the audit period is be for candidate controlled, primarily-formed, and measure committees, as well as general purpose committees. Regulation 18996 still refers to Section 90002(c). In light of the repeal of Section 90002(c), amend Regulation 18996 to state clearly what the mandatory audits pursuant to 90001 will cover.

January 21, 2016 (tentative date)

- **Lobbying Regulations.** Require more detailed reporting of “other payments to influence” to show more specifically who these payments are made to and what they are used for. Exclude certain payments such as administrative overhead (rent) from other payments to influence because they unnecessarily inflate the “other payments to influence” amount.