March 6, 2003

VIA FACSIMILE

Karen Getman, Chair
Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, CA 95814

Re: Agenda Item No. 6 – Adoption of Regulation 18702.5
Public Identification of a Conflict of Interest for Section 87200 Filers

Dear Chair Getman:

This correspondence is submitted on behalf of the League of California Cities, City Attorneys Division, FPPC Committee. We have reviewed the staff report and proposed regulation for Agenda Item No. 6 on your March 7th agenda. Notwithstanding the recollections of our efforts in this regard two years ago, AB 1797 which is now Government Code Section 87105, legislates "active" disqualification. Due to the uncertainty created by the wording of the statute, a regulation is vitally needed. While the regulation is lengthy, we were quite pleased to see the clarity with which it addresses each and every issue. The staff report was even more helpful in that regard. We would, however, ask for one consideration to be included in the formal adoption.

Clarification (or change) is requested relative to subsection **(d)(3) Exceptions: Speaking as a Member of the Public**. We agree with staff's proposed language with the exception of interpreting the statute to require the public official who remains in the room <u>to speak</u> on a matter regarding his or her personal interest as a condition of remaining in the room. Staff points out on page 14 that the literal language seems to require same and there does not seem to be any room in the language to read it otherwise. The language of the statute in question reads as follows:

> "(4) Notwithstanding paragraph (3), a public official described in subdivision (a) may speak on the issue during the time that the general public speaks on the issue."

The Commission may recall that when this legislation was originally drafted, this exception did not appear. I sent a letter dated March 20, 2002, to Amy Brown, Legislative Representative of the League of California Cities (copy attached) so that she could work with the author on the several points noted in the letter. Point #4 of my letter suggests that such an exception should be included and, I believe, as a follow-up, I may have supplied (very specific) language to the authors of the bill through the League in that same regard. You will note that my letter specifically references 18702.4(a)(2).

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It is our view that if we can interpret the rather broad language in the new legislation to only apply to situations considered by Regulation 18702.4 (as opposed to public officials being treated as a member of the public on <u>any</u> item or on an item that relates to a conflict created by a business entity interest or gift) we should not struggle to make a very logical interpretation that the councilmember, when appearing as a member of the public under 18702.4, can act as a member of the public in that very limited circumstance even though they hold their tongue.

Perhaps even more to the point is that "speak on the issue during the time that the general public speaks on the issue" is perhaps broader than the literal words would suggest. Consider the following:

1. members of the public show up in vast numbers on issues of importance to them and believe they are "speaking" to the council by merely sitting in the audience, catcalling or raising their hands to show support;

2. to manage meetings efficiently, the legislative body often asks large groups to appoint one of its members as spokesperson and then allows that person ten minutes to speak (versus the typical three minutes or five minutes) to save time, provided the other members do not speak;

3. an interpretation of the wording as proposed may place a public official in peril if they sit in the audience waiting to speak and are never given the opportunity to speak either because the public testimony is limited; the matter is tabled; or the issue they wish to speak on (e.g., a particular facet of a proposed development) is changed during the public hearing by the applicant, staff or council and is therefore no longer an issue.

In conclusion, while I respect the adherence to the literal words of the statute, I think that the literal words would allow a public official to remain in the room as long as they were willing to speak as a member of the general public irrespective of the economic interest which gave rise to the conflict. Clearly we do not believe that was intended because the change to the statute was as a result of input from the League of California Cities and perhaps the FPPC in that regard. The author chose a shortened version of text to accomplish this exception no doubt recognizing that Regulation 18702.4 existed.

Thank you for your consideration of this item.

Sincerely,

Michael D. Martello
City Attorney

cc: FPPC Committee, Craig Labadie

March 20, 2002

Amy Brown, Legislative Representative
League of California Cities
1400 K Street
Sacramento, CA 95814

Re: AB 1797 (Harman)
Comments of LCC City Attorney's FPPC Committee

Dear Ms. Brown:

Pursuant to our telephone conversation, the following will provide you with the League's FPPC Committee's comments on Assembly Bill 1797 (Harman).

We note that this issue was extensively studied as part of the Fair Political Practices Commission's (FPPC) two year project to revise the conflict of interest regulations (1999 – 2000). That process was completed and the initial substantive changes to the regulations took effect February 1, 2001. One of the items studied but not adopted was language similar to the approach of AB 1797. For the reasons noted in this letter, the Commission decided not to pursue a regulation requiring mandatory steps when disqualification is required.

At that time, significant input was received from the regulated community, in particular city attorneys, which favored some disclosure requirement, however, after experiencing the pitfalls of trying to craft regulatory language around the multiple and varied situations which are presented in the parliamentary process, I believe both the Commission and city attorneys agreed to study this issue further over the next several years (and after the regulation, which does not require disclosure, took effect).

COMMENTS AS TO PROPOSED REGULATION

1. The first paragraph of proposed Government Code §87105 provides **"that a public official <u>and a person</u> who holds an office specified in §87200..."**

- If this is meant to apply only to §87200 filers, the words <u>and a person</u> are surplusage and confusing. The word "and" is conjunctive, and thus that first phrase could be read to apply to 87200 filers <u>as well as anyone else subject to the Political Reform Act</u> such as 87302 filers and non-filers. Section 87302 filers typically are not sitting at the dais, or in the room when a conflict is identified. The phrase: "a public official who holds an office specified in §87200" would be sufficient if the conjunctive was not intended.

2. That same first paragraph requires the public official **"immediately prior to the consideration of the matter,"...** to perform a series of stated requirements.

- The problem with this requirement is that it presumes that the public official is seated at the dais when the matter is being considered. As a practical matter, the section is worded broadly enough that this could apply to a conversation between the public official and the city manager, a staff member or when the item is being considered at a committee meeting.

Faced with a conflict, a public official may not discuss the matter with the city manager, a staff member and may not even be in attendance at the committee meeting to perform the required actions "immediately prior to the consideration of the matter."

If the goal of AB 1797 is to have public officials who are seated at a council meeting or other board meeting make a public announcement at the public meeting and then step down, the language of the introductory paragraph of AB 1797 could be reworded to more narrowly focus it to that circumstance, for example,

> "A public official who holds an office specified in §87200 who has a financial interest in a decision within the meaning of §87100, shall upon identifying a conflict or potential conflict of interest and immediately prior to the consideration of the matter, do all of the following:"

3. In proposed §87105(a), the requirement is to **"publicly state the specific nature of the conflict of interest in detail sufficient to be understood by the public."** For the first twenty-odd years of the Political Reform Act, advice letters from the FPPC merely required the public official to state that they had a conflict or potential conflict of interest and not participate in the decision.

More recently, and prior to the adoption of the new regulations which made disclosure permissive, the advice letters required a level specificity of the disclosure similar to that proposed in this subsection (a).

As part of the Interested Persons meetings held by the FPPC in 2000 on revising the regulations, it was clear that it was next to impossible to meet a "detailed specificity" standard. It is therefore our recommendation that since the **chief goal** is to have the official acknowledge the conflict and step down, that the required statement be fairly simple and perhaps focus only on the "financial interests involved."

An example of a statement would be: "I'm stepping down from consideration in this matter because I have a conflict or potential conflict created by my ownership of a piece of real property within 500 feet of the property which is the subject of our decision this evening."

That disclosure states the "financial interest" which gives rise to the conflict or potential conflict, thus providing the public with the opportunity to review the public official's Form 700 to gain more information in that regard. Examples of possible revised language include:

> (a) Publicly identify the financial interest that gives rise to the conflict of interest or potential conflict of interest;
>
> or
>
> (b) Publicly state that they are stepping down from consideration of the matter due to a conflict of interest or potential conflict of interest.

If the current proposed language is retained, it is in our view impractical to expect a public official to describe the nature of the conflict in sufficient detail. This is particularly true if the conflict arises under a trust ownership; the ownership of a pro rata share of a business entity; or a stock ownership since those conflicts require detailed analysis. A simple disclosure "in detail sufficient to be understood by the public," is probably not available.

4. Exceptions – The bill as proposed should include an exception to the requirement of subsection (c) consistent with exceptions found within the Political Reform Act and its implementing regulations.

Regulation 18702.4(a)(2) permits public officials, who otherwise must "step down," to appear before the agency in the same manner as the general public under certain circumstances that are spelled out in that regulation (i.e., representing his/her interests as a property owner).

CONCLUSION

On behalf of the League's committee, we find the aim of the proposed legislation to be sound, however, we recommend that the effort might be better approached by regulations promulgated by the Fair Political Practices Commission after further study. An alternative would be to draft legislation that would simply require the FPPC (or local agencies) within a two year period, to promulgate regulations addressing this issue.

It is also important to note that AB 1797 would not apply to a variety of conflict situations which can arise at the dais, including conflicts of interest under Govt. Code §1090 and conflicts for non-87200 public officials.

On behalf of the League's City Attorneys FPPC Committee, we remain ready and willing to assist your efforts or the efforts of Assemblyman Harman's office in this regard.

Sincerely,

Michael D. Martello
City Attorney

cc: FPPC Committee
JoAnne Speers
Fair Political Practices Commission (S. Burrett)