OFFICE OF THE CITY ATTORNEY

330 West 20th Avenue
San Mateo, California 94403-1388
Telephone (650) 522-7020
FAX: (650) 522-7021

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Members of the Commission
Fair Political Practices Commission
428 J Street, Suite 800
Sacramento, CA 95814

RE: Agenda Item 8: Regulation 18703 "Public Generally"

Dear Chair Remke and Commissioners:

On behalf of the League of California Cities City Attorneys FPPC Committee, I submit this letter for comment on the above-referenced agenda item.

A public official may participate in a government decision that would affect their financial interests, if the effects the official would experience are indistinguishable from the financial effects that would be experienced by the "public generally." Making the determination about whether the effects on the official's interests are indistinguishable from those on the public generally is the third step in the 4-step process for answering conflict of interest questions. Staff is proposing substantial modifications to the regulations on the "public generally" step. Our committee has reviewed staff's proposal, and, with a few minor editorial suggestions, endorses staff's recommendation.

The Existing Approach

The existing regulatory approach requires the official to consider two questions:

(1) will the decision affect a significant segment of the public within the official's jurisdiction; and

(2) will the impact on the official's interests be substantially the same as the impact on the other members of this segment of the public.

While the answer to the first question can be tricky at times, this part of the analysis is relatively straightforward. On the other hand, answering the second question can be very challenging. It requires the quantification of the effects of the decision on the official's interest, *and* the quantification of the effects of the decision on the other members of the significant segment of the public. Evaluating the effects of a decision on a segment of

the public can be very challenging. For example, the value of real property is impacted by a wide range of factors, and it is very difficult to isolate the impact of a particular governmental decision on individual parcels. Moreover, even if one is able to identify a common financial effect to the members of the significant segment, the official is then required to demonstrate that the impact on the official's interest is essentially the same as all other members of that segment. We agree with your staff's assessment that this standard is overly restrictive.

Staff's Proposed Modified Approach

Staff proposes to modify the existing standard to replace the "substantially the same manner" term with a "unique effect" approach. Under this formulation, the official is not required to ascertain some common level of effect that would be experienced by the members of the segment on the public, but instead, would only need to determine whether there are circumstances present that would suggest that the official's interest would experience a "unique effect." The regulation goes on to list a series of factors to be considered in making this determination. To balance the concern that this approach might make it too easy to qualify for the "public generally" exception, staff proposes to raise the bar for establishing that a "significant segment" of the public will be affected by the decision. Our committee agrees with staff that the proposed approach strikes a better balance.

The Committee's Suggested Edits/Questions

Counting Real Property within the Jurisdiction

Subdivision (b)(2) defines a significant segment of the public as "at least 25% of...all real property, commercial real property, or residential real property within the official's jurisdiction." As our committee discussed this standard a question was raised as to how condominiums would be counted. Condominiums technically consist of one parcel of land, and separate interests in three dimensional air space units described on a condominium plan. Our assumption would be that in calculating the total number of properties in the segment, one would count each separate interest (i.e. individual condominium units) as a unit of real property. If this is correct, we would suggest the addition of language making this clear. For example, a sentence could be added as follows: "In calculating the number of properties required to make up 25%, separately owned units in a condominium shall each be considered a separate property."

Establishing the Number of Individuals in the Jurisdiction

The proposed regulation provides that 25 percent of the individuals in the jurisdiction make up a significant segment of the public. A member of our committee asked what source of population data should be used in making this calculation. The federal census is conducted once every 10 years, while the California Department of Finance publishes population estimates on a more frequent basis. If the Commission deems appropriate the addition of the following language might be helpful: "The official may use the most

recent population data published by any state or federal government agency to make this calculation."

Subdivision (c): Factors to Consider to Determine "Disproportionate Effect"

The second part of the proposed test is to determine whether the decision will cause a "unique effect" on the official's interest. Proposed subdivision (c) is intended to provide guidance on making this determination. It lists a set of factors to be considered to determine if the decision will have a "disproportionate impact" on the official's interest. While the staff report states "this list is not inclusive, but provides examples of how the test will be applied," the text of the regulation does not make this clear. We would suggest the following revision:

"(c) In determining whether the decision may have a unique effect on a public official's financial interest, the factors to consider include, but are not limited to, whether the decision will have a disproportionate effect on:".

Subdivision (c) goes on to list 6 factors to consider in making the determination of disproportionate effect. Subdivision (c)(5) provides that one should consider "[a] person's income, investments, assets or liabilities, or real property if the person is a source of income or gifts to the official." We would suggest the addition of the words, "or entity's," after the word, "person's," in this subdivision. This would address situations where the source of income or gifts is a business or nonprofit entity.

Subdivision (e)(1) Public Services and Utilities

Subdivision (e) codifies a number of circumstances that have been found over time to constitute legitimate public generally exceptions, even when the circumstances do not fit within the general rule. Subdivision (e)(1) provides an exception where the "decision establishes or adjusts assessments, taxes, fees, or rates for *water, utility, or other similar public services...*" (Emphasis added.) It is unclear how narrowly or broadly the italicized language will be interpreted. For example, in San Mateo the city established an assessment district to raise funds to construct levee improvements along the bayfront. The effect of this action was to remove over 8,000 single family residences from a FEMA flood map, and to eliminate the requirement for those homeowners to obtain costly flood insurance. It is not clear that an assessment to fund levee improvements would be considered a public service *similar* to water or utility services, yet the rationale for including assessment districts as a public generally exception would appear to apply equally to a district formed to fund those improvements. The removal of the word, "similar," would remove this ambiguity.

Subdivision (e)(5) Required Representative Interest

Subdivision (e)(5) provides an exception for decisions made by bodies that by law are to be composed of persons with "a representative interest in a particular industry, trade, or profession or other identified interest." The term "or other identified interest" is

inadvertently omitted from the list of interests in the remaining text of the proposed regulation. The term should be added after word "profession" on lines 13 and 14.

In conclusion, as your staff explains, the current "public generally" regulations are difficult to apply in a common sense way, and at times frustrate the purpose of including the term in the statute. We believe staff's proposed modifications greatly improve the situation and support its adoption.

Thank you for your consideration of these comments.

Sincerely,

Shawn M. Mason
City Attorney of San Mateo
Chair, League of Cities FPPC Committee