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

RE: Agenda Item 23: Regulation 18704 "Making a decision"

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.

Commission staff proposes several nonsubstantive revisions to the regulations describing when an official is "making, participating in the making of, or using their official position to influence a decision." In addition, staff proposes to merge existing regulations relating to disqualifications and recusal into a single regulation, and to renumber the regulation defining consultants and public officials who manage public investments. Our committee endorses the structural changes proposed by staff, and believes these changes will improve the regulations. Our committee did suggest a few minor edits that staff has incorporated into revised proposals.

In addition to these edits, the committee did have two comments and suggestions relating to proposed subdivision 18704(c)(1). The first comment relates to the language used. The primary goal of the regulation clarification project is to simplify the language used in the regulations so that the thousands of state and local officials (most of whom are not lawyers) subject to the regulations can read them and understand how to comply. Efforts have been made to remove jargon and terms of art and replace them with words of common understanding. Subdivision (c)(1) provides that an official is using their position to influence a governmental decision if they contact or "appear before" another agency official.

Our concern is with the use of the term "appear before." While lawyers know what an "appearance" means (a formal presentation before an official or tribunal), we are concerned that many non-lawyers might not. A layperson might reasonably interpret the term as not permitting an official from attending a hearing conducted by another agency official or tribunal, even if the official says nothing. (A member of our committee was

asked to answer this question.) To address this concern, we would suggest that the provision be revised to read as follows:

"Contacts or speaks before any official in his or her agency or in an agency subject to the authority or budgetary control of his or her agency for the purposes of affecting a decision;"

The second concern relates to the policy reflected in this regulation. Our committee's discussion of this provision led to a discussion of the different treatment it provides for officials when it comes to appearances before a body of which they are a member. By statute, a city council member who has a disqualifying financial interest in a decision to be made by the council must identify the nature of the interest and leave the council chambers while the matter is being deliberated. (See Government Code section 87105.) However, under 18704(c)(1), a council member with the same disqualifying interest would be allowed to sit in the front row at a planning commission meeting on an item that directly impacts the council member's interest. The statute reflects a policy that the mere presence of a member of a body might influence the other members of the body in their deliberations on a matter in which the member has a financial interest. We think this same policy concern exists when the decision is to be made by a subordinate body or official. After all, in most cities planning commissioners are appointed by the city council.

If the Commission agrees that the regulations should be revised to address this concern, the provision could be revised to read as follows:

"Attends the meeting of any official body of his or her agency or of an agency subject to the authority or budgetary control of his or her agency, or contacts any official in his or her agency or in an agency subject to the authority or budgetary control of his or her agency for the purpose of affecting a decision."

In closing, our committee supports staff's proposals to improve the regulations relating to when an official is "making, participating in the making of, or using their official position to influence" a governmental decision, and appreciates staff's efforts to seek our input on the proposals.

Thank you for your consideration of these comments.

Sincerely,

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