



## FAIR POLITICAL PRACTICES COMMISSION

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March 10, 2009

William A. Vaughn  
City Attorney  
City of Los Banos  
525 J Street, Suite A  
Los Banos, CA 93635

Re: Your Request for Advice  
**Our File No. A-09-034**

Dear Mr. Vaughn:

This letter responds to your request for advice on behalf of City of Los Banos Councilmember Elizabeth Stone regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> Nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions. In addition, this letter is based on the facts presented. The Fair Political Practices Commission ("the Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws such as common law conflict of interest or Government Code Section 1090.

### QUESTION

May Councilmember Stone make, participate in making, or influence a city council decision regarding the city's Regional Transportation Impact Fee (the "RTIF") despite the fact that a business in which her father has an investment interest owns property that may be affected by the decision?

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

## CONCLUSION

Based upon the facts presented, Councilmember Stone does not have an economic interest in her parents as either a source of income or a source of gifts. Accordingly, there is no indication that Councilmember Stone has an identifiable economic interest disqualifying her from the RTIF decision under the provisions of the Act.<sup>2</sup>

## FACTS

Councilmember Stone is a newly elected member of the Los Banos City Council and took office in December of 2008. Councilmember Stone graduated from Cal Poly San Luis Obispo in June of 2007 and has been residing with her parents in Los Banos since graduation. Currently, Councilmember Stone is receiving room and board from her parents free of charge while pursuing a master degree at the University of San Francisco. Councilmember Stone's parents are also paying for the costs of her graduate degree including tuition. Councilmember Stone's parents claimed her as a dependent on their 2007 Federal and State Income Tax Returns.

Councilmember Stone's father owns a 6% investment share in a limited liability company that owns undeveloped real property (the "property") outside the city limits but in the vicinity of the City of Los Banos. Mr. Stone invested \$100,000 in the limited liability company in 2006, is not the managing partner of the company, and has not received any income from the company.

The property is located in an unincorporated area of Merced County approximately 4.62 miles from the western edge of the City of Los Banos. The property consists of 180 acres of agriculture land, is zoned A-1 or general agriculture by Merced County, and is designated as agriculture in the Merced County general plan. The property is currently being used for pasture and grazing. There are no pending development applications on file with the County of Merced for development of the property, and the property is not within the jurisdiction of the City of Los Banos.

Currently, the Los Banos City Council is considering a proposed amendment to the RTIF administered by the Merced County Association of Governments. The proposed amendment will increase the RTIF assessed to non-residential developments within the city limits of the City of Los Banos. The City of Los Banos is located within the County of Merced.

In 2004, the Merced County Association of Governments (the "MCAG") developed the long range Regional Transportation Plan for Merced County (the "RTP"). The RTP identified highway and arterial improvements that would be necessary to

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<sup>2</sup> Note that this conclusion is limited to the provisions of the Act. Your participation in the decisions you have described may be prohibited by other provisions of law including common law conflict of interest laws and Government Code Section 1090.

maintain traffic at an acceptable level of service on the regional road system in Merced County based upon projected growth. In addition to identifying improvement projects, the RTP also recommended a strategy for funding the projects. One of the main goals of the RTP is to develop a regional fee for regional projects that serve multijurisdictional needs.

In 2005, all of the member jurisdictions, including the City of Atwater, the City of Dos Palos, the City of Gustine, the City of Livingston, the City of Los Banos, the City of Merced, and Merced County, adopted ordinances and/or resolutions establishing the RTIF and delegating administration of the program to the MCAG Governing Board. In January 2008, the MCAG Governing Board approved an updated RTIF Study. Subsequently, the City of Los Banos adopted an ordinance, in September 2008, which allowed for the residential RTIF to be raised to the amount as outlined in the updated RTIF Study. However, the non-residential RTIF was not raised at this time. Currently, all of the member jurisdictions, except the City of Los Banos and the City of Livingston, have adopted ordinances raising the RTIF for both residential and non-residential developments, in the incorporated and unincorporated areas of Merced County, in accordance with the updated RTIF Study.

The top project of the thirteen identified transportation projects on MCAG's priority list is the Los Banos/152 Bypass Project (the "Bypass") that would reroute Highway 152 around the City of Los Banos. The Bypass would run in a large curve around the north of the City of Los Banos replacing the current route through the city. The start of the bypass, the closest portion of the bypass to the property, is approximately 2.5 miles from the property. However, it is possible that there will be an increase in traffic on Henry Miller Road, which runs much closer to the property, during the first phase of construction.

The primary purpose of the Bypass is to allow through traffic to bypass the main streets of the city. One of the components of the funding for the Bypass includes the revenues received from the RTIF and imposed by the proposed ordinance.

### ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision.

**Step One: Is Councilmember Stone a “public official?”**

The Act’s conflict-of-interest provisions apply only to “public officials.” (Sections 87100, 87103; Regulation 18700(b)(1).) A “public official” is “every member, officer, employee or consultant of a state or local government agency . . . .” (Section 82048.) As a member of the Los Banos City Council, Councilmember Stone is a public official within the meaning of the Act.

**Step Two: Is Councilmember Stone making, participating in making, or influencing a governmental decision?**

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.) A public official “participates in a governmental decision” when, acting within the authority of his or her position and without significant intervening substantive review, the official negotiates, advises, or makes recommendations to the decisionmaker regarding the governmental decision. (Regulation 18702.2.) A public official is attempting to use his or her official position to influence a decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of his or her agency. (Regulation 18702.3.) Councilmember Stone will be making, participating in making, or influencing a governmental decision when considering the RTIF as a member of the Los Banos City Council.<sup>3</sup>

**Step Three: What are Councilmember Stone’s economic interests?**

Section 87103 provides that a public official has a “financial interest” in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family,<sup>4</sup> or on any of the official’s economic interests, described as follows:

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<sup>3</sup> If a public official’s office is listed in Section 87200 (“87200 filers” include members of a city council) and he or she has a conflict of interest in a decision noticed at a public meeting, then he or she must: (1) immediately prior to the discussion of the item, verbally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in Regulation 18702.5(b)(1)(B), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences and speaking as a member of the public regarding personal interests, special rules found in Regulation 18702.5, subdivisions (c) and (d) apply. (Section 87105.)

<sup>4</sup> “Immediate family” is limited to the official’s “spouse and dependent children” under Section 82029.

- An economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a); Regulation 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d); Regulation 18703.1(b).)
- An economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)
- An economic interest in a source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- An economic interest in a source of gifts to him or her if the gifts aggregate to \$420 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- An economic interest in his or her personal finances, including those of his or her immediate family. This is known as the “personal financial effects” rule. (Section 87103; Regulation 18703.5.)

Under the facts provided, the only question presented is whether Councilmember Stone has an economical interest in her parents as either a source of income or a source of gifts due to the fact that her parents provide her with free room and board and pay the costs including tuition for her to obtain her graduate degree.

Under the Act, “income” is defined as “a payment received, including but not limited to any salary, wage, advance, dividend, interest, rent, proceeds from any sale, gift, including any gift of food or beverage . . .” (Section 82030(a).)<sup>5</sup> The term “gift” is defined as “any payment that confers a personal benefit on the recipient, to the extent that consideration of equal or greater value is not received . . .” (Section 82028.)

The primary distinction between a gift and income is whether the recipient has provided equal consideration in exchange for the payment. If a payment is received and the recipient *does not provide consideration of equal or greater value to the source of the payment*, the payment will be considered a gift. Conversely, where the recipient can demonstrate that he or she in fact provided equal consideration for the payment, the payment will be treated as income. (See *Hensley* Advice Letter, No. A-07-045 and *Sodergren* Advice Letter, No. I-93-345.)

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<sup>5</sup> Section 82044 defines “payment” as “a payment, distribution, transfer, loan, advance, deposit, gift or other rendering of money, property, services or anything else of value, whether tangible or intangible.

Under the facts you have provided, Councilmember Stone does not have an economic interest in her parents as a source of income because she has not provided her parents with equal or greater consideration for the rent and board or costs relating to her graduate degree. Furthermore, Councilmember Stone does not have an economic interest in her parents as a source of gifts because the term "gift," as defined by the Act, does not include payments from "an individual's spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, aunt, uncle, or first cousin or the spouse of any such person . . ." (Section 82028(b)(3).)

Accordingly, you have not provided any facts indicating that Councilmember Stone has an identifiable economic interest that would disqualify her from the RTIF decision under the provisions of the Act.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Scott Hallabrin  
General Counsel



By: Brian G. Lau  
Counsel, Legal Division

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