



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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September 21, 2015

Molly S. Stump  
City Attorney  
City of Palo Alto  
250 Hamilton Avenue, 8<sup>th</sup> Floor  
Palo Alto, CA 94301

Re: Your Request for Advice  
**Our File No. A-15-184**

Dear Ms. Stump:

This letter responds to your request for follow-up advice on behalf of Councilmember Tom DuBois, regarding his duties under the conflict of interest provisions of the Political Reform Act (the “Act”).<sup>1</sup> You have asked specifically for follow up advice to the *Stump* Advice Letter, Nos. A-15-060, 15-066 and 15-153. Please note, we are also not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate.

### FACTS

The facts of the initial request, as pertinent to your follow up request, were as follows:

“The City Council has engaged in a number of preliminary discussions regarding the potential establishment of a City-wide annual growth limit or ‘Cap’ on new office and research and development space . . .

“This request focuses on the potential conflicts of interest that may arise in the context of the interim Cap. While an interim Cap could take several different forms, including a Cap on new development for a period of time until firm limits are developed in the general plan, the City Council has expressed an interest in focusing the interim Cap on three areas of the City which are experiencing rapid change: Downtown, the California Avenue Area, and the El Camino Corridor (the

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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.

CD zone). Depending on the demand for development and the size of any limit that is eventually adopted, it is possible that the Cap could slow development in these three areas, reducing increases in development impacts that might otherwise occur (traffic, parking, noise, etc.) and maintaining status quo conditions. On April 24, 2015, you clarified that all parcels within the three areas of the city theoretically are potentially affected by the Cap. For example, even if a particular parcel is a residential use (currently permitted only as part of a mixed use project) the Cap would affect future development opportunity.

“In addition, if this kind of Cap is adopted, it would effectively exempt the Stanford Research Park and commercial areas in the East Meadow/Bayshore area and the South San Antonio Road area. Because opportunities for office development in Palo Alto are limited, any restriction or exemption in one or more of these non-residential areas could impact the attractiveness of property in other areas.

“The primary landowner in the Stanford Research Park is Stanford University, a non-profit institution with gross revenues approximately equivalent to that of a Fortune 500 company....

“Councilmember Tom DuBois’s spouse is employed by Stanford University. Accordingly, [Councilmember] Dubois has an interest in Stanford University as a source of income. Stanford is a major commercial land owner in the City, with interests in both the Stanford Research Park and Stanford Shopping Center areas.”

In connection with your request for follow-up advice, you provided the following additional facts:

“The Palo Alto City Council is scheduled to further consider an Interim Annual Office/R&D Growth Limit at its evening meeting on Monday, September 21<sup>st</sup>...

“The FPPC previously advised Council Member Tom Dubois to recuse himself due to a financial interest in Stanford University, where Member Dubois’ wife is employed. Stanford is a major commercial landowner in Palo Alto.... Member Dubois recused himself from participation in discussions regarding a Growth Limit as directed by the FPPC.

“In the time since the FPPC’s prior advice, the policy proposal has been further developed through staff analysis and public meetings of the City’s Planning and Transportation Commission....

“The proposal that is before the City Council on Monday is an interim regulation that would last for two years or until the City’s general plan update (Palo Alto uses the term ‘Comprehensive Plan’) is complete, whichever is shorter.

At that time, there could be an extension of the regulation or a different regulation, either through the general plan or as a separate ordinance, but a new action would be required.

“All of Stanford’s land is proposed to be excluded from the interim regulation. Moreover, due to the short duration of the regulation and based on a comparison with historical development data, the Palo Alto’s professional planning staff has stated that: ‘while a longer-term annual limit might have the effect of directing office development to other areas of the City . . . , these market shifts are unlikely to occur within the two year time frame’ during which the interim ordinance will be effective.<sup>2</sup> (Staff Report, pp. 10-11.)

“Based on the current facts and assuming the Council confirms that Stanford property is outside the boundaries of the proposed regulation, it is our view that Member Dubois should be able to participate in the remaining policy determinations and the adoption of the ordinance. While there has not been a proposal to revise the proposed ordinance to include Stanford lands (and any such proposal, if made, would require putting over the item to allow notice to the public and stakeholders), we propose in an abundance of caution that the Council take an initial vote confirming the outer boundaries of the regulated area, from which Member Dubois would recuse himself. If the Council determines to exclude Stanford lands, we propose that Member Dubois be permitted to return to the Council to participate in the remaining policy discussions and adoption of the ordinance.”

On September 18, 2015, you provided additional information:

“After the City Council confirms the boundary of the area to be regulated, the Council will consider and determine a series of policy matters concerning the regulation. These policy matters are described in the staff report. They include:

- Factors for prioritizing projects if applications exceed the growth limit.
- When applications will be considered.
- Whether the regulation will apply to projects currently in the ‘pipeline.’
- Whether to provide for exceptions for certain land uses or sub-areas within the regulated area.”

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<sup>2</sup> You note that the staff report includes discussion of one policy area on which direction has not previously been given: the inclusion or exclusion of “coordinated area plans,” such as the SOFA I or II areas. However, you noted that the coordinated area plans that are at issue are all outside Stanford land. You stated that their inclusion or exclusion has no bearing on the staff’s statement that the interim ordinance is unlikely to impact Stanford during its two year effective time frame.

## ANALYSIS

### Conflicts of Interest

*Financial Interests:* As we discussed in our prior letter, Councilmember DuBois has an interest in Stanford University as a source of income since his spouse is employed by the University. Note that the financial interest under Section 87103(c) is the source of the income, not the salary that the official or the official's spouse receives.<sup>3</sup> The rationale is that an official may be beholden to a person who pays his salary. Consequently, under Section 87103(c), the effect of the decision on the amount that the official or his spouse receives is not relevant. Rather the analysis is on the foreseeable and material effect on the finances of the source of the income. (*Howard* Advice Letter, No. A-07-182.) Thus, the appropriate inquiry in Section 87103 is whether the decision in question will have a foreseeable and material financial effect on Stanford.

*Foreseeability and Materiality:* The determination of foreseeability and materiality are fact questions, dependent on the parameters of the particular decision. You discuss two different decisions in your request for additional advice. However, you ask us to assume that the councilmember will not vote on the decision to confirm that Stanford property will be outside the boundaries of the proposed Cap. Rather, your question is limited to decisions made after the City Council determines to exclude Stanford lands.<sup>4</sup> You ask whether under those circumstances, he can participate in the remaining policy discussions and adoption of the ordinance (since Stanford has been excluded).<sup>5</sup>

Based on the parameters of the question you pose, the test for foreseeability is: "A financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable." (Regulation 18701(b).)

As relevant to your facts, the financial effect on a nonprofit (Stanford) is material if:<sup>6</sup>

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<sup>3</sup> A public official always has an interest in his or her personal finances, however, this is analyzed as a separate and independent financial interest. (Section 87103.) A governmental decision will have an effect on personal finances if the decision will result in the personal expenses, income, assets, or liabilities of the official or his or her immediate family increasing or decreasing. Your facts do not implicate the personal finances of the councilmember.

<sup>4</sup> Obviously this decision presupposes that the prior decision to exclude Stanford property (the decision in which the councilmember will not participate) will occur as described. If this preliminary decision is modified substantially, the advice in this letter may not be applicable.

<sup>5</sup> See also Segmentation discussion below.

<sup>6</sup> In our prior letter, based on the possibility that Stanford would be directly impacted by the rule, additional materiality standards also applied. However, the decision you pose in this request is narrower and triggered far fewer materiality standards.

- The nonprofit will receive a measurable financial benefit or loss by virtue of the decision,
- The official knows or has reason to know that the nonprofit has an interest in real property and the decision would change the income producing potential of the real property.

It is possible that if opportunities for office development in Palo Alto are limited in some areas, that the attractiveness of office property offered by Stanford would be enhanced. However, you stated that the Planning Department has concluded as follows:

“Adoption of an ordinance implementing a short term (two year) limit on the amount of office space that can be entitled in a subsection of the City will have the effect of perpetuating the status quo if it discourages new applications for development or slows down the processing of pending applications. Also, while a longer-term annual limit might have the effect of directing City of Palo Alto office development to other areas of the City or stimulating alternative development (such as housing), these market shifts are unlikely to occur within the two year time frame. For these reasons, it can be seen with certainty that the proposed temporary annual limit would not have the potential to cause a significant effect on the environment and no review pursuant to the California Environmental Quality Act (CEQA) is required pursuant to CEQA Guidelines Section 15061(b)(3).” (Staff Report, pp. 10-11.)

We agree that the short duration of the interim rule would reduce the likelihood of any impact on Stanford’s income from their property. We are also mindful of the cautionary statement in Regulation 18702 which states: “the financial effect of a governmental decision is not material if it is nominal, inconsequential, or insignificant.” Thus, in light of the limited term of the interim rule and the financial size of Stanford, we conclude that the decisions regarding other office properties will not have a foreseeable and material financial effect on Stanford.

### *Segmentation*

We also note the analysis above reflects the segmentation rule in Regulation 18706. The segmentation rule recognizes that the conflict of interest rules of the Act are applied on a decision-by-decision basis. For example, even related decisions can be analyzed separately under limited circumstances such that where an official has a conflict of interest with one of the related decisions, he or she may participate in other decisions so long as they are not inextricably interrelated. For purposes of this regulation, decisions are “inextricably interrelated” when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision.

Regulation 18706 provides the method for segmentation of a governmental decision:

“(a) An agency may segment a decision in which a public official has a financial interest, to allow participation by the official, provided all of the following conditions apply:

“(1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying financial interest;

“(2) The decision in which the official has a financial interest is segmented from the other decisions;

“(3) The decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official’s participation in any way; and

“(4) Once the decision in which the official has a financial interest has been made, the disqualified public official’s participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified.

Thus, so long as you comply with Regulation 18706, the councilmember may participate in the decisions you describe, so long as the decisions (1) will not result in a reopening of, or otherwise financially affect, the initial decision to exclude Stanford property and (2) he does not have an independent financial interest in these decisions.

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

Sincerely,

Hyla Wagner  
General Counsel

/s/

By: John W. Wallace  
Assistant General Counsel

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