

VIA ELECTRONIC MAIL

Heather McLaughlin
City Attorney
City of Benicia

Benicia, CA

RE: Mayor Elizabeth Patterson

Dear Ms. McLaughlin:

As you know, we represent Mayor Elizabeth Patterson. We understand from Mayor Patterson that your office has recently advised her not to be involved in any way with any City decisions relating to the pending Valero permit decision. We also understand that you have asked her to refrain from sending out e-alerts relating to the project and related issues and engaging in other public discussion of the matters. Since she does not have any financial interest in the decision under the Political Reform Act or any other applicable statute, it appears that the advice is based on the common law conflict of interest doctrine.

We have reviewed the matter with our client, and it is our opinion based on the Supreme Court's decision in *City of Fairfield v. Superior Court of Solano County* (1975) 14 Cal.3d 768 that she does not have a common law conflict of interest in this matter, and that she not only has First Amendment rights as a citizen and public official, but she also has the right and duty as an elected official to participate in the public and City discussions regarding this important matter. Equally importantly, she has First amendment rights to communicate freely with her constituents and the public in general on any and all issues of public policy and concern, and any attempt by the City or city officials to curb those rights would be an unlawful restraint of her speech under the U.S. and state Constitutions.

As background, we note that the Mayor regularly communicates with City residents on a wide variety of issues. In particular, she sends periodic e-alerts to individuals who have requested to be on her mailing list. These emails cover a broad range of topics including upcoming community and cultural events as well as a range of public policy and City issues. She also meets with citizen groups and other interested individuals and entities and is otherwise very involved in the community.

She also has a long history of supporting increased public education and involvement in City issues. She brings her expertise and experience in environmental review and issues as a resource to the community. City residents often bring questions and concerns to her attention, and she assists in addressing the questions or forwarding them to the appropriate agency or officials for response.

In the last few months, these communications and related activities have included information regarding the City's review of the pending land use application filed by Valero as well as discussions of the many public policy issues raised by the proposed increase in train traffic which also cross over to matters of state and federal jurisdiction.

The law fully supports the Mayor's complete participation in both the public community discussions and her activities in her role as Mayor as well as in any decisions which may come before the Council on the project. (See *City of Fairfield v. Superior Court of Solano County*, *supra*, 14 Cal.3d. (hereafter *City of Fairfield*)).) With respect to elected officials in particular and the discussion of issues of broad public interest and importance, the Supreme Court held that the pre-hearing statements of two councilmembers opposing a development application did not serve to disqualify either one of them from participating in the City decision on the application. In its decision, the Court made several very important pronouncements on the importance of the exchange of views between officials and their constituents on important public issues.

First, the Court found that "the proceedings did not turn upon the adjudication of disputed facts or the application of specific standards to the facts found; the few factual controversies were submerged in the overriding issue of whether construction of the shopping center would serve the public interest." (*City of Fairfield, supra*, 14 Cal.3d at 779-780.)

In a city of Fairfield's size, the council's decision on the location and construction of a shopping center could significantly influence the nature and direction of future economic growth. The construction of that center will increase both the city's revenue and its expenditures; will affect the value not only of neighboring property, but of alternative shopping center sites and of existing business, will give employment but may also aggravate traffic and pollution problems. These topics are matters of concern to the civic-minded people of the community, who will naturally exchange views and opinions concerning the desirability of the shopping center with each other and with their elected representatives.

A councilman has not only a right but an obligation to discuss issues of vital concern with his constituents and to state his views of public importance.

(*Id.*, at 780.)

The Supreme Court also quoted from *Wollen v. Fort Lee* (1958) 27 N.J. 408, where the New Jersey Supreme Court addressed similar circumstances and declared that “it would be contrary to the basic principles of a free society to disqualify from service in the popular assembly those who had made pre-election commitments of policy on issues involved in the performance of their sworn ... duties. Such is not the bias or prejudice upon which the law looks askance... The contrary rule of action would frustrate freedom of expression for the enlightenment of the electorate that is of the very essence of our democratic society. [Citations omitted.]” (*City of Fairfield, supra*, 14 Cal.3d. at 781.)¹

Accordingly, we respectfully disagree with your advice to the Mayor that she has a potential conflict of interest based on the common law conflict of interest doctrine and would ask you to retract it with respect to her involvement in the City decisionmaking process on the permit. As you also know, our client has taken a prudent approach and has not made public statements or indicated a specific position on the pending permit. She has provided information through her email alerts and in other public fora on the City’s process for the review of the matter and information on the related issues, and the information comes from all sides of the issues. Accordingly, her actions have been consistent with her role as Mayor and leader in the community and her desire to see that the public is provided with complete information and encouraged to be part of the review process as well as with her official role in the pending City decisions. However, even if she had expressed views on the pending Valero permit, it is clear based on *City of Fairfield* and related authorities that this would not disqualify her from participating in the on-going proceedings and in future City Council decisions in the matter.

We also reiterate that any further efforts on the part of the City to discourage Mayor Patterson from continuing her public communications and discussions regarding

¹ See also 78 Ops. Cal. Atty. Gen. 77 (1995). The decision in *City of Fairfield, supra*, was distinguished from the circumstances in *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152 by the court of appeal which concluded that a councilmember had a conflict of interest in voting on a development project: “Because Benz [the councilmember] lived one block inland of the Clarks, he stood to benefit personally by voting against the Clarks’ project....an interest in preserving his ocean view was of such importance to him that it could have influenced his judgment. Of course, a public official may express opinions on subject of community concern (e.g., the height of new construction) without tainting his vote on such matters should they come before him. [Citing to *City of Fairfield, supra*, 14 Cal.3d.] Here, Benz’s conflict of interest arose, not because of his general opposition to 35-foot buildings, but because the specific project before the Council, if approved, would have had a direct impact on the quality of his own residence. In addition, Benz’s personal animosity toward the Clarks contributed to his conflict of interest; he was not a disinterested, unbiased decisionmaker.”

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June 26, 2014

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the important public policy issues raised by the proposed increase train deliveries of crude and otherwise publicly expressing her opinion on these issues would likely be found by a court to be a prior restraint of her speech rights under the 1st and 14th Amendments and the State Constitution.

We are certainly available to discuss this further with you at your request.

Very truly yours,

OLSON HAGEL & FISHBURN LLP

DIANE M. FISHBURN

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cc: Mayor Elizabeth Patterson

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