June 16, 2014

VIA ELECTRONIC MAIL

Mayor Elizabeth Patterson
Benicia, CA

RE: Your Request for a Legal Opinion

Dear Mayor Patterson:

You are the Mayor of the City of Benicia. As Mayor, you regularly communicate with City residents on a wide variety of issues. In particular, you do regular e-alerts to individuals who have requested to be on your 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. You also meet with citizen groups on occasion and are otherwise very involved in the community.

You have a long history of supporting increased public education and involvement in City issues. You also bring your expertise and experience in environmental review and issues as a resource to the community. City residents often bring questions and concerns to your attention, and you assist in addressing the question or forwarding them to the appropriate agency or officials.

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. You have requested our guidance on the laws which apply to you as a public official in California with respect to this matter and similar matters which may come before the City in the future. Our firm has many years of experience and expertise with respect to conflict of interest issues for public officials in California.

Additional Background Information

With respect to the Valero matter in particular, there is substantial community interest and concern regarding the expansion of train deliveries to the Valero refinery, and there is increasing interest from other communities which are also affected by the deliveries. Other agencies, the State and the federal government also have policies and regulatory roles which relate to the operation of the refinery. As Mayor, you have taken a leadership role on providing information to the City residents, and speaking out on the health and

safety issues raised by the proposal to increase the train deliveries. These activities have included an op-ed piece you authored for the San Francisco Chronicle concerning the rail safety issues, the sending out of several email alerts with information on the City process for reviewing the Valero application as well as other information concerning the issues raised by the increase in rail traffic in the City, meetings with various state and federal officials, and similar activities. We have reviewed these email alerts which include the following statement:

This site is my responsibility and my discretion including recipients and material. Requests for posting are honored and I encourage readers to share information. An informed society is essential. Material on this site is my personal domain and does not reflect official city policy. Posting material on this site does not indicate bias for future decision making. Use of words and terminology, notice about events, forums and public concerns is not dicta nor determinative for future decisions. The more sunshine on issues, events, happenings and concerns, the better the public is aware of choices so that government is open and accessible to all and not just the few. Public discourse is the path to fair and informed decisions.

We understand that you have acted in accordance with this statement, and we have not reviewed any email alerts or other communications which suggest otherwise.

During this time, you have also sent out many other email alerts relating to many other issues, and you continue to be involved in numerous other public policy issues and pending decisions. You have also continued to provide on-going information to City residents on local events and issues.

With respect to process and timing for the Valero project, we understand that the draft Environmental Impact Report will be issued this week, and then there will be an organized public process for the City's review of the EIR and permit application. It is anticipated that the City Council will review the matter at some point in the future although the timing is still to be determined.

Summary of Advice

In summary, based on our review of the facts, it is our opinion that you do not have a disqualifying conflict of interest in the Valero matter based on the Political Reform Act (Gov. Code section 81000, et seq.) which is the primary set of statutes governing public official conflicts of interest and which covers financial conflicts of interest. In addition, since the matter does not involve a contract with the City, Government Code section 1090 does not apply.

With respect to the application of the common law doctrine of conflict of interest, it is our view, based on the information you have provided including the email alerts and other communications we have reviewed, that there is no evidence that you have a personal bias based on either a substantial pecuniary or personal interest in the outcome of the matter. As a public official, you certainly not only have "a right but an obligation to discuss issues of vital concern" to your constituents and to state your "views on matters of public importance." Fairfield v. Superior Court of Solano County, 14 Cal.3d 768, 780 (1975).

We do note that, as a public official, you have the duty of determining whether you have a disqualifying conflict of interest either under the statutes cited above or the common law doctrine, and if you did determine that you had a conflict of interest, you are then required to refrain from all participation in the City decisions. Reliance on legal counsel and advice is not a defense to an action brought by the FPPC, the district attorney or the Attorney to enforce the Political Reform Act or section 1090 although it is evidence of good faith. With respect to the common law doctrine, the ultimate arbiter of the issue would be a court.

Discussion

Political Reform Act

Since 1975, the principal laws governing conflicts of interest by state and local public officials in California are those found in the Political Reform Act of 1974, as amended, and as interpreted and enforced by the Fair Political Practices Commission (FPPC). The general prohibition in the Political Reform Act reads as follows:

> No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest. (Gov. Code section 87100).

The law further defines the term "financial interest" as follows:

> A public official has a financial interest in a decision within the meaning of Section 87100 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, or on any of the following:
> (a) Any business entity in which the public official has a direct or indirect investment worth two thousand dollars ($2,000) or more.
> (b) Any real property in which the public official has a direct or indirect interest worth two thousand dollars ($2,000) or more.
> (c) Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating five hundred dollars ($500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.
> (d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.
> (e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating two hundred fifty dollars ($250) or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made. The amount of the value of gifts specified by this subdivision shall be adjusted biennially by

> the Commission to equal the same amount determined by the Commission pursuant to subdivision (f) of Section 89503.
> For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater. (Gov. Code section 87103)

We have reviewed these requirements with you, and we understand that you do not have any investments, interests in real property, nor sources of income, loans or gifts which would form the basis of a potential conflict of interest under these statutes with respect to the pending decisions on the Valero matter. Accordingly, these laws would not preclude your participation in these decisions.

Government Code section 1090

Government Code section 1090 et seq. is another set of statutes relating to conflicts of interest by public officials. The basic prohibition in the law reads as follows:

> Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity. As used in this article, "district" means any agency of the state formed pursuant to general law or special act, for the local performance of governmental for proprietary functions within limited boundaries.

As stated clearly in the law, this prohibition and accompanying requirements apply only to financial conflicts of interest by officials in government contracts.

Since the Valero matter involves a land use permit, it would not come within the definition of a "contract" and would therefore not be covered by section 1090. Even if the matter did involve a contract (and contract is broadly defined for purposes of this prohibition), the statute would not apply unless you had a direct or indirect financial interest in the matter. Again we are not aware of any facts which would establish any type of financial interest.

Common Law Conflict of Interest Doctrine

In addition to the statutory requirements discussed above, there is a common law doctrine of conflicts of interest which has been developed through court opinions over many years. Although its on-going existence and viability given the enactment of the statutory provisions has been questioned, there is case law which substantiates its on-going application under specific

circumstances most notably where an official has a substantial personal interest in the parties to or the outcome of a matter. Since non-financial personal interests are not covered by either the Political Reform Act or Government Code section 1090, the common law doctrine continues to be invoked when these types of interests are involved. *Clark v. City of Hermosa Beach*, 48 Cal.App. 4th 1152, 1171, fn. 18 (1996).

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The common law doctrine proscribes that public officers must exercise their powers with "disinterested skill, zeal, and diligence and primarily for the benefit of the public." *Noble v. City of Palo Alto* (1928) 89 Cal.App. 47, 51.) Actual injury is not required; rather, fidelity to the public interest is the primary purpose of conflict of interest laws. (Noble, *supra*, 89 Cal.App. at 51.) Indeed, public officers are obliged to fulfill their responsibilities with both honesty and loyalty. (*Terry v. Bender* (1956) 143 Cal.App.2d 198, 206.) If they are influenced by any "base and improper considerations" of personal advantage, they violate their oaths of office. (*Ibid.*; *see also* 81 Ops.Cal.Atty.Gen. 274, 279 (1998) [county supervisor "must not act officially when to do so would be to his *personal gain*"] [emphasis in original].)

A public officer ordinarily cannot vote on a matter in which that officer is interested – otherwise, the action taken by the body of which he or she is a member may be subject to invalidation by a court. (*Clark, supra*, 48 Cal.App.4th at 1171 [citing 4 McQuillin, The Law of Municipal Corporations (3d ed. rev. 1992) § 13.35, pp. 840-84)].) If a common law conflict of interest arises, the interested official is required to abstain in the matter, neither voting on it nor attempting to influence the vote of the other members of the board. (*See* 81 Ops.Cal.Atty.Gen., *supra*, at 279.)

The issues of common law conflict of interest or bias typically arise as part of court challenges to adjudicatory decisions made by public officers or body where the law requires that a hearing in the matter. Depending on the type of matter, this may be part of the constitutional guarantee to due process (for example, in professional license revocation proceedings), or as part of a statutory requirement for specific administrative decisions for a hearing.

In order to challenge a decision on the ground that the decisionmaker did not act in an impartial manner, a party must prove either actual bias or an "unacceptable probability of actual bias." (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal. 4th 197, 219; *Thornbrough, supra*, 223 Cal.App.4th at 188; *Mennig, supra*, 86 Cal.App.3d at 350.) The test is an objective one. (*Today's Fresh Start, supra*, 57 Cal. 4th at 219.)

Actual bias may be shown by evidence of a direct or indirect financial interest in the outcome of the matter by a decisionmaker, or by evidence that the decisionmaker has personal relationships with parties to the matter. For example, in a 2009 opinion, the Attorney General concluded that it was improper for a city redevelopment agency board member to participate in any official action or negotiations concerning a proposed commercial property improvement loan from the agency to the board member's adult, non-dependent son who also resided with the board member in the same rented apartment. (92 Ops.Cal.Atty.Gen. 19 (2009).) Because the

board member likely has "a private or personal interest in whether her son's business transactions succeed," the Attorney General concluded that the appearance of impropriety or conflict would arise from the member's participation in an agreement that might benefit her son financially. (*Ibid.* at 23-24.) As such, to avoid a conflict between her official and personal interests, the board member should recuse herself. (*Ibid.* at 24.)

In addition, bias has been found where a decision-maker is personally embroiled in the dispute and therefore cannot act in an impartial manner in the proceeding. For example, in Mennig, supra, which involved the discharge of the plaintiff as the city's police chief, one councilman believed that the plaintiff had sought to have the councilman transferred in his regular job. Another councilman had been a subordinate to the plaintiff prior to his election and had continuing disagreements with him, and had also been a unsuccessful candidate for the police chief position when the plaintiff was appointed to the position; this councilman had also sought to conduct a personal field investigation of the plaintiff to try to establish that he had been neglecting his duties. These types of activities apparently escalated, and the court ultimately found that the members of the city council were thoroughly embroiled in a personal dispute with the plaintiff which amounted to actual bias and thus precluded their participation in any City decisions regarding his employment. See also Clark, supra, where a councilmember's conflict of interest in voting on a development application arose from both the impact of the proposed development on the view from his residence and his long-time personal animosity to the applicants.

These types of personal biases based on pecuniary or personal considerations can be contrasted with and distinguished from the views or opinions held by public officials on policy and community issues. In the seminal case of *Fairfield v. Superior Court of Solano County* (1975) 14 Cal.3d 768, a challenge was made to the denial of a planned unit development permit for a shopping center development on the grounds that two of the councilmembers had made pre-election campaign statements opposing the development. Subsequently both councilmembers voted against the permit. The State Supreme Court held that the pre-hearing statements by the councilmembers would not disqualify them from later voting on the permit. 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.

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."

> "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 pollu8tion 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 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.]" The *Fairfield* decision has not been overturned or revised by the Court and remains the law applicable in similar circumstances.

The Supreme Court's decision in *City of Fairfield, supra,* was cited and then distinguished from the circumstances in *Clark, supra,* where the court concluded that the councilmember had a conflict of interest in voting on a development project as follows:

> "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*.] 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."

Other courts have also stated more generally, citing *City of Fairfield*, that public involvement or advocacy on an issue does not disqualify a member from voting on the issue in a quasi-judicial administrative proceeding. (*Independent Roofing Contractors v. California Apprenticeship Council* (2003) 114 Cal.App.4th 1330, 1340.) Indeed, "a councilperson has a right to state views or concerns on matters of community policy without having his vote impeached. (*Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 558.)

By way of contrast, we did locate a 2004 Court of Appeal decision where the Court found an unacceptable probability of actual bias when a planning commissioner apparently wrote an

article for the local residents association of which he was president and which the court found was critical of a project while the project was pending before the Planning Commission. *Nasha v. City of Los Angeles*, (2004) 125 Cal. App. 4th 470. In the unsigned article, the commissioner advocated against the project, categorized the project as a "threat" to an "absolutely crucial habitat corridor" and urged the residents to support the appeal of the project to the Planning Commission. The planning commission also introduced the resident appealing the project at the association's monthly meeting, and apparently the resident proceeded to speak against the project. The court found that the article was not *merely informational as claimed*, and also found that the intent was "to rally residents to support the appeal to the Planning Commission." (*Id.* at 477.) Moreover, the planning commissioner did not disclose that he had authored the article and also incorrectly claimed that he had not any direct contant with of the appellants. Based on these circumstances, the court found that the commissioner could not be an impartial reviewer on the project and issued an order vacating the Planning Commission's decision.

Certainly we see some important distinctions between the facts in the *Fairfield* and *Nasha* cases. The *Fairfield* case involved elected councilmembers who had expressed their views on extremely significant public policies involved in a pending project as candidates and councilmembers in various public statements. As elected officials, they had both a right and a duty to do so as the Supreme Court found. The *Nash*a case involved an appointed planning commissioner who had very limited duties and who certainly did not have the same rights as an elected councilmember to express views on important public issues. In addition, the planning commissioner had actively involved himself in the appeal of the project and then attempted to hide or cover up his involvement.

Given these distinctions, we do not think that the decision in *Nasha* is directly applicable to you and your activities in the present matter and that the controlling legal standard is the one articulated by the Supreme Court in the *Fairfield* case. However, in any event, your current course as spelled out in the statement included on your email alerts and as described in this letter is certainly consistent with both decisions and prudent under all of the circumstances. Accordingly, we would advise you to stay your current course of engaging in the exchange of information and discussion of the issues and supporting the process for public education and engagement on the issues while avoiding any specific statements of opposition to the pending permit decision and keeping an even-handed approach to your interactions with the public and all others involved in the matter.

Very truly yours,

OLSON HAGEL & FISHBURN LLP

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