



CITY OF ORANGE

CITY ATTORNEY—(714) 744-5580

FAX (714) 538-7157

February 29, 2012

Fair Political Practices Commission
Zachery P. Morazzini, General Counsel
428 J Street, Suite 620
Sacramento, CA 95814-2329

Re: *Resolution Supporting Petition to Amend Title 2*

Dear Mr. Morazzini:

Enclosed please find a Resolution of the City Council of the City of Orange in support of the Petition to amend title 2 and a letter from city Attorney David DeBerry supporting the Petition filed by Rutan and Tucker.

Very truly yours,

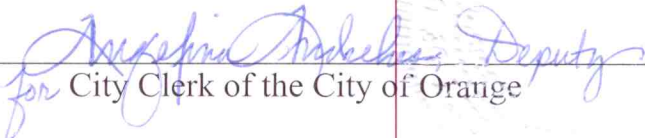
David DeBerry
City Attorney

Enclosures

STATE OF CALIFORNIA)
COUNTY OF ORANGE) SS.
CITY OF ORANGE)

I, MARY E. MURPHY, City Clerk of the City of Orange, California, DO HEREBY CERTIFY that the attached Resolution No. 10634, adopted February 28, 2012, is a true and correct copy of the original as it appears on file in this office.

WITNESS my hand and Seal this 29th day of February, 2012.


for City Clerk of the City of Orange

RESOLUTION NO. 10634

**A RESOLUTION OF THE CITY COUNCIL OF THE
CITY OF ORANGE SUPPORTING THE PETITION
TO AMEND TITLE 2, CALIFORNIA CODE OF
REGULATIONS SECTION 18705.5.**

WHEREAS, Government Code Section 87100 of the Political Reform Act of 1974 (Government Code Sections 81000 through 91014) prohibits a public official from making or participating in the making of a decision which could have a reasonably foreseeable financial effect on the public official's "financial interest"; and

WHEREAS, Government Code Section 87102.5(b)(2) states that a "financial interest" means "an interest defined in Section 87103;" and

WHEREAS, Government Code Section 87103 provides that a public official generally has a financial interest in a decision within the meaning of Government Code Section 87100 if it is reasonably foreseeable that it will have a material financial effect on: (1) the public official, which includes income to the public official; (2) on business entities or real property in which the public official has a financial interests; or (3) on any of the public official's sources of gifts and sources of income; and

WHEREAS, Government Code Section 82030 defines "income" as "a payment received, including but not limited to "any salary, wage, advance, dividend, interest...reimbursement for expenses, per diem," etc.; and

WHEREAS, notwithstanding the above, Government Code Section 82030(b) provides that "income" does not include "salary or reimbursement for expenses or per diem...or other similar benefit payments received from a state, local or federal government agency...;"

WHEREAS, pursuant to state law the City Council is required to appoint, from among the members of the City Council, one of its members to sit on various regional boards of public agencies in Orange County, such as the Vector Control District, Orange County Sanitation District, Transportation Corridor Agency and others; and

WHEREAS, council members who are appointed to these boards typically receive a per diem for each meeting of the board that they attend and thus, are receiving a "per diem" or "salary" from a local government agency, which pursuant to Government Code Section 82030 is not considered "income" and thus, not a "financial interest"; and

WHEREAS, the amount that council members receive for serving on these public agency boards is governed by state law and within state law parameters is determined by the boards of these public agencies, not by the City Council; and

WHEREAS, the Fair Political Practices Commission (“FPPC”) is authorized pursuant to Government Code Section 83112 to adopt, amend and rescind rules and regulations to carry out the purposes of the Political Reform Act on the condition that such rules and regulations **are consistent** with the Political Reform Act; and

WHEREAS, the FPPC has adopted a regulation, Title II, California Code of Regulations, Section 18705.5 (the “Regulation”), which it has interpreted to preclude a council member from voting on his or her appointment to a local agency board if it is reasonably foreseeable that a council member could receive \$250 or more during a 12-month period from that appointment; and

WHEREAS, in adopting the Regulation, the FPPC has, notwithstanding Government Code Section’s express language to the contrary, made the receipt of salary and per diem from a local government agency a financial interest and thus, voting on appointments to a local government agency that provides a salary or per diem, a violation of the Political Reform Act; and

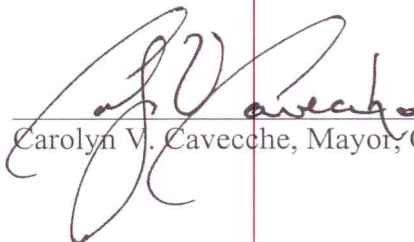
WHEREAS, the FPPC’s apparently contradictory Regulation has resulted in the entrapment of large numbers of even the most conscientious public officials; and

WHEREAS, the Regulation does nothing to further the primary purposes of the Political Reform Act which are to insure a better informed electorate or to prevent corruption of the political process, the two primary goals of the Political Reform Act.

NOW, THEREFORE, BE IT RESOLVED the City Council of the City of Orange hereby resolves as follows:


1. That the City Council supports the Petition filed by Ash Pirayou of the law firm of Rutan & Tucker on behalf of the cities of Anaheim, Dana Point, Irvine, La Palma, Newport Beach, San Clemente, Villa Park, and Yorba Linda.
2. That a certified copy of this Resolution be forward to the Fair Political Practices Commission, along with the formal letter of support executed by the City Attorney, a copy of which is attached hereto as **Exhibit “A”**, and incorporated herein by this reference.

ADOPTED this 28th day of February, 2012.



Carolyn V. Cavecche, Mayor, City of Orange


ATTEST:



Mary E. Murphy, City Clerk, City of Orange

I, MARY E. MURPHY, City Clerk of the City of Orange, California, do hereby certify that the foregoing Resolution was duly and regularly adopted by the City Council of the City of Orange at a regular meeting thereof held on the 28th day of February, 2012, by the following vote:

AYES: COUNCILMEMBERS: Smith, Cavecche, Bilodeau, Dumitru
NOES: COUNCILMEMBERS: None
ABSENT: COUNCILMEMBERS: Whitaker
ABSTAIN: COUNCILMEMBERS: None



Mary E. Murphy, City Clerk, City of Orange



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February 28, 2012

Fair Political Practices Commission
Zachery P. Morazzini, General Counsel
428 J Street, Suite 620
Sacramento, CA 95814-2329

Re: *Petition to Amend Regulation 18705.5*

Dear Mr. Morazzini:

I am the City Attorney for the City of Orange and am drafting this letter in support of the petition filed by Ash Pirayou of Rutan & Tucker on behalf of several cities and appreciate the opportunity to provide input. I will try not to be unnecessarily repetitive of positions previously laid out by Mr. Pirayou or by others, including my own letter to Gary Winuk of November 14, 2011, with respect to Regulation 18705.5 (the "Regulation"). This letter assumes in all of its hypotheticals that the appointment would potentially result in the \$250 threshold being reached and all section references herein are to provisions of the Government Code.

1. The Regulation is impractical, unnecessary and would have the practical effect of excluding the mayor in a city which directly elects its mayor from sitting on any boards of a local government agency which pays a stipend.

Under the Regulation, city council members have a financial interest in a decision to appoint themselves to a board of another public agency if it is reasonably foreseeable that the council member would receive more than \$250 during a 12-month period from such appointment. Regulation 18702.2 and 18702.3 contain broad definitions of when a public official is "participating in making a governmental decision." A public official participates in a governmental decision if he or she "makes recommendations to the decision maker...directly" or "use[s] his or her official position to influence the decision, if for purposes of influencing the decision, the official contacts....any member, officer, employee or consultant of the agency."

In cities with directly-elected mayors, such as Orange, "the mayor, with the approval of the city council, shall make all appointments to boards, commissions and committees unless otherwise specifically provided by statute." Section 40605. Any

EXHIBIT "A"

council member who advised the mayor that he or she is interested in being appointed to a board would, necessarily, have participated in making the decision to appoint because he or she would have made a recommendation to the decision maker directly and in making such a recommendation, would also have been using his or her official position, since membership on these boards is limited to council members. Thus, the Regulation precludes council members from informing the mayor that they are interested in the appointment and thus, results in the mayor having to make the appointments in a vacuum, i.e., without any information as to whether a particular council member was even interested.

The mayor in Orange could never sit on such a board and receive a stipend or any reimbursement for an expense. Since the mayor makes all appointments and the Regulation makes it a conflict for her to participate in any decision on such appointments, the net result is that a directly-elected mayor could not sit on a board. The mayor could not let the other council members know that he or she was interested in serving on a board because that would, as noted above, violate the Regulation as well. The mayor could not even place the appointment on the agenda, even if the mayor then abstained from the decision, because in placing the matter on the agenda the mayor would violate the Regulation.

Recognizing that travelling to and from meetings of local government agencies and performing other duties related thereto comes at some financial expense, the state legislature has statutorily established modest compensation levels for appointed board members of such local government agencies. If there is a concern that compensation for serving on such boards is so extraordinary that it taints a council member's decision to serve, the City respectfully submits that that issue should be addressed by the state legislature and not the FPPC. The Regulation has left council members with the Hobson's choice of not participating in their appointment, even if simply limited to expressing an interest therein or in the alternative, to perform such services out of their own pocket book, no matter what the council members' financial means. The Regulation's ultimate effect is to discourage participation in these local agencies by council members of limited financial means.

2. If the legislature had intended to prohibit council members from voting on such appointments, it would have clearly stated as much. The Regulation creates ambiguity which otherwise does not exist within the Political Reform Act itself.

The Political Reform Act and in particular Section 82030 is clear and unambiguous—salary, per diem and reimbursement for expenses do not constitute a financial interest giving rise to a conflict. There is nothing in the Political Reform Act that would lead a council member to believe that voting on an appointment to another public agency board would ever constitute a disqualifying conflict of interest. Indeed, the unambiguous language of the Political Reform Act would lead a council member to

exactly the opposite conclusion. While a council member would certainly understand that a decision affecting his or her own personal finances would, under Government Code Section 87100, generally preclude him or her from participating in the decision, read in conjunction with Section 82030, it would also be clear that this does not apply when the decision may affect salary, per diem or reimbursement for expenses received from any local government agency. The FPPC's interpretation of these statutes, expressed in the Regulation, nearly eviscerates Section 82030, leaving it essentially only to apply to salary, per diem or reimbursement received by a council member from his or her elected city council position.

If the state legislature intended to limit Section 82030's application only to salary, per diem and reimbursement received from the local government agency to which the council member was elected, it could have and past history tells us, would have expressly so provided. One need look no further than the Political Reform Act itself and in particular the Levine Act, for a model of such expression. As you know campaign contributions of any size are not considered "income" (Section 82030) or a "gift" (Section 82028) under the Political Reform Act and thus, do not constitute a financial interest or a conflict of interest—except in one situation expressly noted within the Political Reform Act. That situation, clearly expressed in Section 84308, is when a campaign contribution of more than \$250 is received from a person who is seeking a license, permit or other entitlement before a local government agency to which a council member was appointed.

In the context of campaign contributions, Section 84308 applies to council members sitting on the very same boards at issue in this matter. Thus, when the legislature intended to make an exception to the Political Reform Act's definition of financial interest with respect to campaign contributions, it expressly provided as much. By analogy, it would follow that if the legislature had intended to make an exception to the definition of financial interest with respect to "salary, per diem and reimbursement for expenses" received by council members from local government agencies to which they were appointed, it would have expressly so provided. It did not.

And as has been pointed out by others, the FPPC's own regulations are inconsistent. The Regulation directly contradicts Regulation 18702.4 which provides that public officials are not participating in a governmental decision when they are making decisions "relating to their compensation..." There is no comment or cross-reference to the Regulation. It also contradicts Regulation 18232 which expressly exempts from the definition of income "salary", "per diem" and "reimbursement for expenses" received from a state, local or federal government agency. While the "Comment" portion of Regulation 18232 cross-references Government Code sections 82030 and 82048, it does not cross-reference the Regulation. Regulation 18703.5 which defines "Economic Interest...Personal Finances" suffers the same problem. In the "Comment" section it states that for the definition of "income, see Government Code section 82030 and

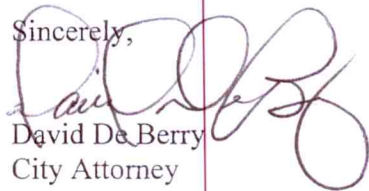
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California Code of Regulations, Title 2, section 18232, both of which exclude salary, per diem and reimbursement for expenses received from a local agency from the definition of "income" and thus, from the definition of an economic interest related to personal finances. No cross-reference is made to the Regulation.

Ambiguities in penal statutes must be construed in favor of the alleged offender. See *In re Jeanice D.* (1980) 28 Cal.3d 210, 217; *People v. Poole* (1985) 168 Cal.App.3d 516, 527. Although the statute, i.e., the Political Reform Act, is in and of itself not ambiguous, the FPPC's regulations create an ambiguity, one which carries possibly criminal penalties. It is bad public policy to draft potential criminal penalties which cannot be discerned by even the most wary and diligent of public officials and the attorneys that advise them. For the reasons noted above, the City requests that the FPPC reconsider the Regulation and adopt the amendment proposed by Mr. Pirayou.

If you have any questions or comments, please do not hesitate to contact me at 714-744-5580 or by e-mail at ddeberry@cityoforange.org.

Sincerely,


David De Berry
City Attorney