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State of CA
Fair Political Practices Commission
1102 Q Street Suite 3000
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April 26, 2018

To: Chair Remke, Commissioners Audero, Cardenas, Hatch, and Hayward

Subject: Commission Authority to Set Aside a Closure Letter

Regarding Councilmember Eric Lucan: FPPC Case #16/284

Concerning: Request from Commissioner Audero to review the language of the Lucan closure letter and vote on whether or how to amend.

Dear Commissioners:

I am writing to request that you do not allow an amendment to the language of the closure letter, issued to Councilmember Eric Lucan, in November of 2017. Councilmember Lucan has already requested and been denied this action. This is the third opportunity he has been given to get a different result. It interferes with FPPC staff's attempt to find a fair and reasonable resolution to the complaints filed against Councilmember Lucan. It undermines public confidence in the FPPC process.

I believe the FPPC policy issues regarding closure letters can be resolved without giving Councilmember Lucan an unreasonable advantage. If the FPPC falls into the habit of allowing politicians with complaints lodged against them, to use changes in procedure as a means of overturning a prior decision, it's likely that many more will want to come back for another "drink at the well" in order to advance their careers without any hint of impropriety.

I believe Councilmember Lucan made an irresponsible decision, given his duty to the public, when he chose not to obtain a formal FPPC opinion before voting in January 2016 to build a 3rd SMART station at the city's expense. I believe Councilmember Lucan's vote to spend public funds on the 3rd SMART station provided him with a direct and foreseeable financial benefit due to the proximity of his rental property which is 4 minutes walking distance from the SMART station site.

Councilmember Lucan was extremely fortunate in November of 2017, to have FPPC staff provide an option that would allow him to do the right thing and request a formal opinion regarding any future votes on the downtown SMART station. What Councilmember Lucan sought in January of 2018 was exoneration. He did not want to take any personal responsibility for his decisions. Since the FPPC issued the closure letter

in 2017, allowing Councilmember Lucan to request a formal decision, I have asked that he follow through and request a formal opinion. Councilmember Lucan explained that the issue was resolved. It appears to me that Councilmember Lucan uses the expression “resolved” when it is convenient but continues to appeal to the FPPC to revisit their decision when he wants his closure letter overturned and rewritten.

Now the Downtown SMART station is increasing in cost by approximately \$2,105,000 dollars and Councilmember Lucan is recusing himself from these discussions because he knows he cannot take any action until he follows through and asks the FPPC if it is the correct action to take. This is exactly what Councilmember Lucan should have done in January 2016 - request a formal FPPC opinion with ample time for a response, prior to voting and again in April 2018, when the matter was listed on the proposed CIP budget for 2018/2019. I emailed Councilmember Lucan to ask him if he had reached out to the FPPC for a formal opinion on the current issue, but to date have received no response.

In January 2018, the FPPC Commissioner’s heard Councilmember Lucan’s request to revisit the wording of the closure letter that was issued in November 2017. After extensive discussion and debate his request was denied. As a member of the public who has only had one chance to file a complaint against Councilmember Lucan in this matter, I am very uncomfortable with this approach to resolving what are two separate issues – the complaint against Councilmember Lucan and the issue of how the FPPC wants to address closure letters on complex issues. I believe these two matters should be kept separate, because the closure letter issued in November of 2017, was reasonable, appropriate and provided a clear path to resolution and was a viable option in Councilmember Lucan’s case.

I was unable to attend the January 2018 hearing in person. I submitted my comments via email, supporting the compromise reached by FPPC Staff in their November 2017 closure letter. I believe it was the best possible outcome given the complexity of the issues and the need to balance facts on both sides. I was able to watch the entire video of the hearing and listen to Staff’s articulate and thoughtful explanation of what the process entailed. I understood that in decisions regarding financial conflict of interest concerning property, it is not enough to use an arbitrary distance to determine culpability and that there were equal arguments on both sides of the complaint, some supporting it and others not, which is why the FPPC staff issued a letter giving Councilmember Lucan the ability to ask for a formal opinion prior to making any future vote. I believe politicians need to take the time to make formal requests of the FPPC when they have reasonable concerns. I believe Councilmember Lucan’s actions suggest he had reasonable concerns but voted anyway.

If you review some of the recent legislation being discussed in Sacramento concerning High Density Transit Oriented Development in the Bay Area and throughout CA (SB827) some of our state legislators, such as Senator Scott Wiener, are suggesting that if property is within either ¼ or ½ mile radius of a SMART (train) Station or a Ferry, housing developers immediately receive an:

“increase in density and height zoning minimums. These include no density maximums, no parking minimums, and a minimum height limit of between 45 and 85 feet, depending on various factors, such as whether the parcel is on a larger commercial corridor and whether it is immediate adjacent to the station.”

Had SB827 passed, Councilmember Lucan's rental property and the SMART station would have qualified as would the rest of the downtown property within a ¼ to a ½ mile radius of the existing SMART station and the Hamilton station property. We are talking about developers being given "by right" zoning over development of prime TOD properties in the northern most city in Marin, with proximity to SF, the East Bay and Sonoma. SB827 lost in committee by one vote with a promise from Senator Wiener to return with another TOD bill. We cannot ignore the potential increase in financial value of properties identified based on their proximity to transit as an issue in cases of conflict of interest involving property. If FPPC staff were to revisit this case now, they might decide that the balance of facts are now against Councilmember Lucan. Staff already made their decision, the decision was a compromise. If you rewrite the letter you take away the public's right to due process.

I am asking the Commission to formally end all deliberations over Councilmember Lucan's November 2017 closure letter and to allow the letter to stand as it is. I hope you can appreciate my frustration as a member of the public seeking help from the FPPC when the politician in question keeps being granted new opportunities to revisit the decision and improve the outcome from his point of view, while members of the public are compelled to give up any hope of correcting the errors in judgement made by politicians like Councilmember Lucan.

As a reminder the issues that brought about the filing of the original complaint are as follows:

1. Councilmember Lucan did not provide sufficient time for the FPPC to respond to a request for an opinion regarding a potential financial conflict of interest between his ownership of rental property and his vote to build, at city expense, a 3rd SMART rail station, when SMART had already built and financed two fully operational Novato stations, and one of the two existing stations was only 1 mile away from the location of the proposed 3rd station;
2. The Novato City Manager, the Novato City Financial Director and the Novato City Finance Commission all issued reports advocating AGAINST the Novato City Council approving the development of a third station at the city's expense, because the city lacked the financial resources to afford the station, the station would never be able to run concurrent with the other two stations, the decision for scheduling would not belong to the city, and the engineering studies provided by SMART indicated that the cost of upgrading the entire line to a double track would be financially imprudent, if not impossible;
3. Councilmember Lucan had ample time to request a formal FPPC opinion prior to the January 2016 vote and was aware that the proximity of his rental to the site for the SMART station would have a direct and foreseeable financial benefit. At the time the 3rd station was being discussed by the council, the Novato Chamber and the Downtown Novato Business Owners Association both lobbied to build the 3rd station because they believed it would increase property values and rents in the vicinity of the station, as well as bringing new customers to the downtown area. SMART is an upscale Marin County train, that serves commuters and people traveling for recreation. Funding for SMART was achieved through a sales tax measure but the actual costs associated with SMART have been far greater than original estimates. The line is not yet complete because it is not fully financed. No other city on the SMART line has more than two stations. Novato lacks the downtown commercial/retail base to support adding a third station at the Novato taxpayers expense and the towns with larger, better developed downtowns, only have one or two stations.

4. Councilmember Lucan was aware of the opinions of Novato City Staff and Commissioners and had access to their written reports as well as the engineering studies done by SMART. He knew that this vote was controversial. Councilmember Lucan had just been re-elected, in November 2015. He came in third of three council seats. He knew that two of the council members were fiscally cautious and would be concerned about unfunded pension liabilities, increased CALPERS contributions and loss of city staff due to lower pay and underfunding of different departments. Councilmember Lucan had every reason to believe that by voting on the third SMART station, his would become the essential tie breaker vote.

I believe that Councilmember Lucan clearly understood the risks associated with voting without a formal FPPC opinion and he knew that if he recused himself, the vote to fund the station would fail. The November 2017 closure letter forces Councilmember Lucan to ask for a formal opinion on projects impacting his rental property in Old Town, including votes to increase the SMART Station's cost from \$6 million to \$8 million not including the renovation of the historic depot building.

If you give Councilmember Lucan a third attempt to rewrite the decision painstakingly arrived at by FPPC staff, you remove any reasonable consequence for his actions, reinforcing his belief that he doesn't need to ask the FPPC for formal opinions in matters like this. That choice would be a huge disservice to the public and would further embolden politicians in similar situations. It would also be disrespectful to FPPC staff's efforts to resolve complex issues in conflict of interest cases.

I also believe Councilmember Lucan should have submitted a request for a formal FPPC opinion in April 2018, based on the current discussions of the proposed \$2,105,000 cost increase to the Downtown SMART station project. I respectfully ask that you check to see if he has taken this step. He would not request a formal opinion when I asked him to in November of 2017. He specifically stated the matter was resolved.

I believe the Commission can still revisit the types of closure letters that are written in response to cases like this one and perhaps, give Staff credit for having created an alternative that doesn't punish a politician but educates them by providing an option that corrects the problem. In Councilmember Lucan's case I believe that he knew what he was doing when he voted without a formal opinion. I believe that he should have been held accountable for that decision which is why the compromise was the best possible outcome given Staff's explanation of the issues on both sides and the need to create a balanced response. I respectfully request that you do not remove an option for a type of closure letter, like the one written to Councilmember Lucan, that Staff can implement in cases like this, where it is the best and most appropriate resolution.

Sincerely,



Tina Gale McMillan