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Date: April 19, 2017

To: Members of the Ethics Commission

From: Kyle Kundert, Senior Policy Analyst

Re: **AGENDA ITEM 4: Staff Memorandum Regarding Commissioner Keane's Campaign Finance and Ethics Proposal, Introduced at the March 27, 2017 Ethics Commission Meeting.**

Summary: This memorandum discusses Staff's research and identified policy considerations to date regarding the restoration of "Prop J," as submitted to the Ethics Commission on March 27, 2017.

Action Requested: No action is required at this time by the Commission, but Staff seeks the Commission's further policy guidance on issues highlighted in this memo and on its proposed plan for public engagement on potential Prop J and additional campaign finance reform recommendations.

I. Introduction

During the Commission's March 27, 2017, regular meeting, Commission Chair Peter Keane introduced proposed revisions to San Francisco's Campaign Finance Reform Ordinance ("CFRO") designed to restore the November 2000 voter initiative commonly referred to as Proposition J ("Prop J"). Prop J, then-known as the "Oaks Initiative"[1] or "Oaks Ordinance"[2], sought to eliminate corruption by city officials (appointed and elected) by prohibiting those officials from accepting personal or campaign advantages from persons that had or were about to receive a public benefit from an official. In 2015, at the request of then-Chair Paul Renne, Commissioner Keane was tasked with exploring whether provisions of Prop. J that had been approved by local voters, and later superseded by another ballot measure, could be restored in City law. In March, Chair Keane announced that he worked with the Friends of Ethics and former Ethics Commission staffer Oliver Luby to expand the provisions of Prop. J by the end of 2017 through a new series of proposals, which this Memorandum will refer to as "Revised Prop. J.".

After hearing a presentation by Mr. Luby, the Commission voted unanimously in favor of exploring adoption of Revised Prop. J, a project aimed at further limiting the opportunities and circumstances which enable corruption and its appearance to occur. Commission members

[1] *City of Santa Monica v. Stewart*, 24 Cal. Rptr. 3d 72, 126 Cal. App. 4th 43 (Ct. App. 2005).
[2] See: 11/15/2005 letter from Robert Stern, then President of the Center for Governmental Studies.

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expressed strong approval of the goals of the Revised Prop J and their belief that the proposal would advance those goals, with the aim of prohibiting and preventing undue influence in government decision making before it can occur. As introduced, the Revised Prop. J seeks to limit those circumstances by prohibiting any public official from receiving, fundraising, or gaining other personal or campaign advantage from an individual or entity which has appeared before or received some public benefit from the official. The Revised Prop. J would have the Commission or other agency create an electronic database of public benefit recipients to track and audit compliance with the law.

The Commission, at its March 27 meeting, asked staff to review and make recommendations on the restoration of a Revised Prop J. This memorandum will first outline the background of Prop J in San Francisco, highlighting the larger Oaks Project in California and a brief exploration of the proposed restoration project. The memorandum will next turn to an exploration of current legal and policy contexts, including an analysis of constitutional considerations and existing regulatory framework. The memorandum will conclude with a framework of new and existing provisions addressing conflicts of interest and next steps for implementation of a revised law consistent with the intent of the Oaks Initiative and the voters of San Francisco in "reducing the corrupting influence of emoluments, gifts and prospective campaign contributions on the decisions of public officials in the management of public assets and franchises, and in the disposition of public funds."[3]

II. Background

Prop J in San Francisco

Prop J was originally contemplated and sponsored by the Oaks Project of the Foundation for Taxpayer and Consumer Rights ("FTCR"). The Initiative and ultimately Prop J were premised on a conviction that public benefits are frequently awarded based on personal or campaign advantages, and not on merit or for the public good.[4] In general terms, the Initiative prohibits city officials from receiving campaign contributions, employment for compensation, gifts, or honoraria for a specified time after the end of their term of office from any person or entity who or which benefited financially from the officials' discretionary decisions made while in office.[5]

The voters of San Francisco passed the Initiative as Prop J, "Taxpayer Protection Amendment", in November 2000 in substantially similar form as the sponsored language of FTCR's Oaks Initiative. Prop J was formally codified as S.F. Campaign and Governmental Conduct Code § 3.700 et seq. The Proposition contained four basic requirements:

1. City officials who exercised their discretion to approve a "public benefit" cannot receive certain specified "personal or campaign advantages" from the recipient of such a benefit.
2. City officials must "practice due diligence to ascertain whether a benefit ... has been conferred, and to monitor personal or campaign advantages ... so that any such qualifying advantage received is returned".

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[3] *Stewart* at 78.
[4] Id.
[5] Id.

3. City officials "must provide, upon inquiry by any person, the names of all entities and persons known to them who respectively qualify as public benefit recipients....".
4. The City must provide written notice of the provisions of the Proposition and its limitations to any person or entity "applying or competing for any benefit enumerated".

After its adoption by San Francisco voters in November 2000, Prop J went into effect on July 13, 2001, after several regulations were considered and adopted by the Commission, including a determination that exempting variances and permits from the definition of "public benefits" was necessary to be legally enforceable[6]. The Commission also added sections on monitoring, due diligence, and safe harbor provisions to protect innocent or non-willful violations of the law.[7] The monitoring and due diligence sections required candidates and public officials to review their contributions and contributors for potential public benefit recipients that would preclude the candidate or official from accepting the contribution. The safe harbor provision precluded a candidate or official who had received advice from the Commission or other enforcement officer from being punished based on incorrect or erroneous advice.

In 2003, the Ethics Commission proposed repealing Prop J at its April 2003 meeting as part of its effort to recodify conflict of interest laws out of the Charter, amending some of them and making non-voter amendments possible in the future—the effort that became Proposition E on the 2003 ballot.[8] Prop J was subsequently superseded by Proposition E, which included the contractor contribution ban currently found in CFRO section 1.126.

The Prop J Experience in Other California Cities: Santa Monica and Pasadena

The Oaks Initiative qualified for the ballot in five California cities in 2000 and 2001. Public reports noted controversy about the constitutionality of some of the Initiative's provisions, The City of Vista, for example, filed suit to keep it off the ballot citing constitutional concerns.[9] Officials in other cities expressed displeasure with the Initiative's approval and had campaigned against its the passage but didn't challenge the law until after the voters approved the Initiative.[10] Eventually, the measure passed in some form in all five cities, although both Vista and San Francisco would later replace their provisions with other 'conflict of interest' laws. The sections below briefly outline the experiences in Santa Monica and Pasadena who ultimately deployed the law but only after protracted legal battles.

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[6] See: 04/07/2003 Letter from Ginny Vida, Executive Director or the San Francisco Ethics Commission.

[7] See: 07/12/2001 Letter from Ginny Vida, Executive Director or the San Francisco Ethics Commission.

[8] See Ethics Commission meeting minutes 4/14/2003:

> (Staff) explained that Prop J, which places limits on gifts, future employment and campaign contributions, and which is currently part of the C&GCC, is now redundant because the goals of Prop J are either (a) already addressed in the proposed conflict of interest amendments, or (b) scheduled to be addressed by proposed amendments to be considered in Item VIII at tonight's meeting.

[9] See: *City of Vista v. Drake* discussion available at: https://www.surfsantamonica.com/ssm_site/the_lookout/news/News-2000/Dec-2000/12_05_2000_City_Suit_Corruption_Initiative.htm

[10] *Stewart* at 79, 81.

Santa Monica

In May 2001, the Santa Monica City Attorney circulated a memorandum to the Santa Monica Mayor and City Council describing the background and purpose of the Initiative, her concerns about its constitutional validity.[11] The City Attorney reiterated her belief that the Initiative was unconstitutional and noted she had advised the City Clerk not to implement the Initiative until its constitutionality was resolved.[12]

In March 2002, a trial court issued an order dismissing an action on the constitutionality, among other issues, as a non-justiciable controversy. In January 2005, the Court of Appeals for the 2nd Appellate District agreed with the trial courts finding, never reaching the constitutional questions raised by the City.

Pasadena

After the initiative's passage in Pasadena, for over a year, that city refused to perform the ministerial duties required to authenticate, certify, and file copies of their Initiative with the Secretary of State.[13]

On March 15, 2002, a Pasadena resident filed a petition seeking to require Pasadena to authenticate the Initiative and file it with the Secretary of State. Pasadena answered the complaint and insisted it had no duty to comply with the statute due to its belief the Initiative was unconstitutional.[14]

At a hearing on May 31, 2002, the petition was granted on the ground Pasadena was required to comply, regardless of its position as to the constitutionality of the Initiative.[15] The Mayor and City Clerk were ordered to certify the Initiative, and file it with the Secretary of State.[16]

Prop J Restoration

The Commission, at its March 27, 2017 meeting, received public comment on a legislative proposal by Commission Chair Keane to restore certain contribution-related restrictions contained in Prop J. Commission Chair Keane provided the Commission with a comparative chart for Prop J restoration which highlighted the changes and additions that the Revised Prop J would add. That chart has been reproduced in the attached materials.[17] The proposed restoration language of Prop J contains some important distinctions and expansions of the language contained in the original proposition passed by San Francisco voters in 2000. Those distinctions are discussed in the *Current Legal Context and Considerations* section that follows.

Staff has begun the review and development of strategies for the implementation of a proposal that would advance the stated goals of reducing the corrupting influence of emoluments, gifts, and

[11] *Stewart* at 80.
[12] Id.
[13] Id. at 81.
[14] Id.
[15] Id. at 82.
[16] Id.
[17] See: Commission Chair Keane Comparative Chart.

prospective campaign contributions on the decisions of public officials in the management of public assets and franchises, and in the disposition of public funds.

III. Current Legal Context and Considerations

As explained above, Prop J was initially enacted in 2000. In the seventeen years that followed, the Supreme Court of the United States acquired five new justices, whose First Amendment jurisprudence significantly altered the landscape of permissible campaign finance restrictions. Before enacting this new, broader Prop J, those decisions merit contextual review.

First Amendment - Corruption Narrowed

The revised Prop J's stated purpose is to limit the "appearance or reality of conflicts of interest".[18] The revised Proposition attempts to achieve this goal by banning "personal or campaign advantages", including but not limited to the receipt of contributions.[19] The Supreme Court has generally distinguished restrictions on expenditures for political speech (*i.e.,* expenditures made independently of a candidate's campaign) from restrictions on campaign contributions, reasoning that the former place a relatively heavier burden on First Amendments rights.[20] Restrictions on campaign contributions are subject to a form of intermediate scrutiny, which the Supreme Court has described as a "lesser but `still rigorous standard of review.[21] Under this intermediate standard, a restriction on contributions may be upheld only if the government demonstrates that the restriction promotes a "sufficiently important interest" and is "closely drawn to avoid unnecessary abridgment of associational freedoms."[22]

The Supreme Court has recognized only one government interest that is sufficiently important to justify restrictions on campaign contributions: the interest in preventing *quid pro quo* corruption or its appearance.[23] The Supreme Court held its in landmark decision in *Buckley v. Valeo*[24], that the Government's asserted interest in preventing "corruption and the appearance of corruption, provided sufficient justification for the contribution limitations imposed [. . .]".[25] By 2003's *McConnell v. FEC* decision however, the Supreme Court had embraced an even broader definition of corruption, ultimately concluding that Congress could regulate not only to "prevent simple cash-for-votes corruption" but also the "sale of access" and the use of campaign funds to obtain "undue influence" with officeholders.[26] For at least the last decade, the tides of corruption have returned to the original holding in *Buckley* with the new majority again limiting corruption to quid pro quo corruption or its appearance.[27]

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[18] See: Luby Proposition Restoration – Final Draft
[19] Id. at 14.
[20] *Federal Election Com'n v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652, 551 U.S. 449, (2007), (quoting *Buckley*, 424 U.S. at 19-21).
[21] *McCutcheon v. Federal Election Com'n*, 134 S. Ct. 1434, 572 U.S., 188 L. Ed. 2d 468 (2014).
[22] Id at 1444.
[23] *McCutcheon* at 1445-46.
[24] *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).
[25] Id. at 26.
[26] *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003).
[27] *McCutcheon*, 134 S. Ct. at 1444 (quoting *Buckley*, 424 U.S. at 29)

Since the decision in *Citizens United,*[28] the Court has taken an even sharper turn away from its jurisprudence on corruption.[29] Instead of viewing access and influence as even potentially corrupting factors, the Supreme Court under Justice Roberts shrank the definition of corruption down to the explicit exchange of money for votes.[30] Justice Kennedy, now famously, remarked that:

> "Favoritism and influence are not . . . avoidable in representative politics."[31]

In *McCutcheon*, a challenge to the federal aggregate contribution limits, the Roberts Court continued to narrow the definition of corruption, reiterating that only quid pro quo exchanges are to be considered corruption.[32] With this conception of corruption as the backdrop, the Court concluded that the aggregate limits were not justified by any important governmental interest and consequently are prohibited by the First Amendment.[33]

The confirmation of Justice Gorsuch could give the Court occasion to further reconsider its definition of corruption and ultimately whether other restrictions on campaign finance activity are constitutional, including fundraising and contribution limits at any level.[34] [35] In fact, the Court has already found one occasion to call general contribution limits unconstitutional. In *Randal v. Sorrell*[36], the court (in narrow holding) found Vermont's limits on contributions to be so restrictive as to violate the First Amendment.

Staff and the proponents of the Revised Prop J believe the stated findings of the Proposition are laudable and worthy of reconsideration. Given the current constitutional framework, due diligence on the part of Staff and interested stakeholders will be required to effectively draft the strongest and most enforceable provisions to prohibit corruption that ensure they pass constitutional muster. This is particularly true given a record of several City Attorneys and a least one Judge having found the narrower original Prop J to be unconstitutional based on First Amendment considerations.[37]

Intra-Candidate Transfer Bans and the First Amendment

Intra-candidate transfers occur when a candidate transfers campaign funds from one campaign committee to a different campaign committee controlled by the same candidate. The California

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[28] *Citizens United v. Federal Election Com'n*, 130 S. Ct. 876, 558 U.S. 310, 175 L. Ed. 2d 753 (2010).

[29] See: Trevor Potter comments from "*"Ending Institutional Corruption"* Conference at the Edmond J. Safra Center for Ethics at Harvard University, 2015, *available at* http://www.campaignlegalcenter.org/news/blog/court-s-changing-conception-corruption

[30] Id.

[31] *McConnell* at 297

[32] *Ending Institutional Corruption*.

[33] Id.

[34] See: *Riddle v. Hickenlooper*, 742 F. 3d 922 (2014), for a discussion of Justice Gorsuch's campaign finance jurisprudence, *available at* https://www.brennancenter.org/blog/neil-gorsuch-understands-campaign-finance-%E2%80%93-and-that%E2%80%99s-problem

[35] See: discussion on fundraising limits in *Williams-Yulee v. The Florida Bar* distinguishing between fundraising limits in judicial and "political" elections.

[36] *Randall v. Sorrell*, 547 U.S., 126 S. Ct. 2479, 165 L. Ed. 2d 482 (2006).

[37] See: *Putting Political Reform to the Test*: October 23, 2002, *available at* http://www.strumwooch.com/S-W-Press/2002/October/Putting-Political-Reform-to-the-Test.aspx. See also: http://articles.latimes.com/2002/jul/20/local/me-pasadena20

Supreme Court struck down intra-candidate committee transfer bans as unconstitutional in *SEIU v. Fair Political Practices.*[38] In the SEIU case, the court found that the intra-candidate provision was an unconstitutional expenditure limitation. Additionally, the Attorney General of California further noted in a 2002 opinion that intra-candidate transfer [bans] operate as an expenditure limitation because they limit the purposes for which money raised by a candidate may be spent.[39] Expenditure limitations are subject to strict scrutiny and will be upheld only if they are "narrowly tailored to serve a compelling state interest."[40]

The Commission, along with interested parties, must determine whether the intra-candidate ban can be resurrected in a form that is consistent with constitutional standards or whether it can be resolved from another policy perspective.

Due Process - Entitlements

Unlike developments in First Amendment case law noted above, the law surrounding whether and how governments can restrict "entitlements" has remained steadfast since 1970 when the Supreme Court decided that the government must provide Due Process—notice and opportunity to be heard—before it can restrict or deny access to certain government entitlement programs, such as Social Security, Medicaid, Temporary Assistance for Needy Families ("TANF"), or Women Infant and Children ("WIC").[41]

Some of those programs are administered to San Francisco families through the county-based Health Services Agency. According to new section 1.126(a)(10)(C), the proposed expanded definition of public benefit includes "other entitlements for use where discretion is exercised in the granting of the permit or license." If this provision goes into effect, individuals who apply for welfare benefits from the Health Services Agency could be restricted from conveying a personal or campaign advantage (which includes making a campaign contribution) on any individual holding City elective office for twelve months without notice and opportunity to be heard.[42] After verifying with co-author Oliver Luby, Staff believes the word "entitlement" is overly broad and would need special consideration to meet the Commission's goal of ending the corrupting influence of money in the government decision-making process.

Due Process - Debarment

New section 1.126(g) gives the Ethics Commission authority to debar contractors who have "violated" or "aided or abetted a violation of" section 1.126. "Debarment" and its precursor "suspension" are sanctions that exclude an individual or entity from doing business with the government. These sanctions are imposed upon persons who have engaged in wrongful conduct or who have violated the requirements of a public contract or program. A debarment excludes a person from doing business with the government for a defined period, usually some number of years. A suspension is a temporary exclusion which is imposed upon a suspected wrongdoer pending the outcome of an investigation and

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[38] *Service Employees v. Fair Political Practices*, 747 F. Supp. 580 (E.D. Cal. 1990).
[39] See: Attorney General Opinion 01-313 (2002), *available at* http://caselaw.lexroll.com/2016/10/31/opinion-no-01-313-2002/
[40] Id.
[41] *Goldberg v. Kelly*, 397 U.S. 254 (1970).
[42] See: new section 1.126(b) in Revised Prop J Draft.

any ensuing judicial or administrative proceedings. Like welfare recipients, the California Supreme Court has determined that government contractors enjoy at least some Due Process protections, including notice of the charges, an opportunity to rebut the charges, and a fair hearing in a meaningful time and manner.[43]

Government entities meet these requirements through the adoption of debarment procedures. San Francisco has done so via the San Francisco Administrative Debarment Procedure, found at Chapter 28 of the Administrative Code. Section 28.2 gives any charging official authority to issue Orders of Debarment against any contractor for willful misconduct with respect to any City bid, request for qualifications, request for proposals, purchase order and/or contract. Charging officials include any City department head or the president of any board or commission authorized to award or execute a contract, the Mayor, the Controller, the City Administrator, the Director of Administrative Services, or the City Attorney.[44]

Staff has asked the City Attorney's Office to analyze whether the Ethics Commission has jurisdiction as a debarring authority for City contractors separate from the existing ordinance or alternatively whether we should request the addition of the Commission to the list of charging authorities under the existing ordinance. If the latter, Staff will propose revisions to new section 1.126(g) that account for Due Process considerations noted above, including suspension as a precursor to debarment as well as notice and opportunity to be heard.

Eighth Amendment - Civil Penalties

As currently drafted, Revised Prop J section 1.168 proposes giving successful citizen plaintiffs a right to personally recover 50 percent of a civil penalty award directly from the defendant in certain circumstances to determine whether direct access to civil penalty recovery is constitutional and necessary in an administrative ordinance.

Generally, civil penalties are remedies afforded to the government, and private citizens are not entitled to civil penalties but instead may recover actual damages in litigation. Unlike damage awards, civil penalty assessment is subject to due process guarantees that exercises of police power be "procedurally fair and reasonably related to a proper legislative goal . . .".[45] The government has police power to impose penalties to ensure prompt obedience to its regulatory requirements, but penalty assessment must not be arbitrary or unduly strict.[46] The government must assess factors, such as the sophistication of the plaintiff, willfulness of the violation, and the defendant's financials strength if called into question before it can assess a reasonable penalty under the constitutions.[47]

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[43] See: *Southern Cal. Underground Contractors, Inc. v. City of San Diego,* 108 Cal. Appl. 4th 533, 542-543 (2003) (citing Cal. Const. Art. I, §§ 7, 15; *Golden Day Schools, Inc. v. State Dept. of Education,* 83 Cal. App. 4th 695, 711 (2000)).

[44] See: Admin. Debarment Proc. § 28.1(B).

[45] *Hale v. Morgan*, 22 Cal. 3d 388, 398 (Cal. 1978) (citing U.S. Const., Amend. VIII).

[46] Id.

[47] Id; See: *City and County of San Francisco v. Sainez*, 77 Cal. App. 4th 1302 (Cal. App. 1st Dist. 2000), for a local case concerning civil penalty assessment.

This rule is not absolute. For example, California's Private Attorney General Act[48] ("PAGA") gives citizen plaintiffs the right to recover civil penalties from employers who violate Labor Code sections 2698-2699.5, but the citizen plaintiff must meet several procedural requirements before they can recover civil penalties directly from their employer, including filing a notice with the employer and giving the employer an opportunity to cure her violations. Citizen plaintiffs who prevail are entitled to 25 percent of the penalty.[49] The Labor and Workforce Development Agency is entitled to 75 percent of the penalty. The employer must pay the penalty monies directly to the citizen plaintiff. In addition to California's PAGA, under the federal False Claims Act,[50] a whistleblower may recover at least 15 percent but not more than 25 percent of the proceeds of an action or settlement of an action if the government intervened in the whistleblower's lawsuit AND the whistleblower aided in the prosecution of the lawsuit.[51] Because the amount recovered is from "proceeds" obtained by the government, the government must make the payment to the whistleblower after determining what the penalty should be and whether to negotiate settlement.

Staff is evaluating the new section 1.168 and whether it is appropriate to limit civil penalty recovery to the narrow instances defined in the new section 1.168 or if broad access currently afforded to citizen plaintiffs under CFRO should extend to civil penalty recovery as well.

IV. Harmonizing New and Existing Approaches and Provisions

On April 28, 2000, San Francisco adopted what is commonly referred to as the Campaign Finance Reform Ordinance ("CFRO") in its current form, at Section 1.100, et seq. of the San Francisco Campaign & Governmental Conduct Code (hereinafter CFRO). At its core, San Franciscans hoped CFRO would, among other goals[52]:

1. Place realistic and enforceable limits on the amount individuals may contribute to political campaigns in municipal elections, on the amount individuals may contribute to political campaigns in municipal elections, and to full and fair enforcement of all the provisions in this Chapter;
2. Ensure that all individuals and interest groups in our city have a fair opportunity to participate in elective and governmental processes;
3. Limit contributions to candidates and committees, including committees that make independent expenditures, to eliminate or reduce the appearance or reality that large contributors may exert undue influence over elected officials;
4. Assist voters in making informed electoral decisions and ensure compliance with campaign contribution limits through the required filing of campaign statements detailing the sources of campaign contributions and how those contributions have been expended;
5. Make it easier for the public, the media and election officials to efficiently review and compare campaign statements by requiring committees that meet certain financial thresholds to file copies of their campaign statements on designated electronic media; and

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[48] Private Attorney General Act.
[49] Cal. Labor Code § 2699(i).
[50] False Claims Act.
[51] 31 U.S.C. § 3730(d).
[52] See: CFRO § 1.101(b).

6. Help restore public trust in governmental and electoral institutions.

The Prop J Restoration provisions introduced in March would amend existing CFRO provisions. To maximize the strength, clarity, and effectiveness of the City's regulatory framework, Staff also analyzed other potential revisions to CFRO not introduced at the March 27, 2017, Commission meeting with an eye toward harmonizing all existing and proposed provisions.

Per Revised Prop J section 1.101(a), proposed amendments aim to end the widespread practice of "trading . . . special favors or advances in the management or disposal of public assets" in exchange for broadly defined "public benefits." Staff shares the Proponent's stated goal, and believes a clear assessment of how existing the provisions of a restored Prop J would mesh with other existing provisions is necessary to maximize its impact.

Revised Prop J section 1.126, for example, broadens CFRO's current contractor fundraiser/contribution ban to prohibit persons seeking any public benefit from participating in many common forms of political activity in the City.[53] Public benefit is broadly defined to include a contract; "a land use matter;" a "business, professional, and trade licenses and permit or other entitlement for use;" underwriting services; a tax, penalty, or fee exception, abatement, reduction or waiver; tax savings from existing law; any franchise award; cash or any other specific thing of value.[54]

Existing law addresses actual or perceived corruption stemming from financial relationships with the City in several ways. First, enacted in 2003, current CFRO section 1.126 bans persons contracting with the City from making campaign contributions to candidates for or persons holding City elective office.[55] Current CFRO section 1.126 also bans candidates for or persons holding City elective office from soliciting contributions from persons seeking to contract with the City.[56]

Next, the San Francisco Campaign & Governmental Conduct Code at section 3.200, *et seq*. broadly prohibits any City officer or employee from making, participating in making, or seeking to influence a government decision in which the officer or employee has a financial interest within the meaning of the Political Reform Act, Cal Govt. Code § 1090, et seq.[57] To the extent this broad prohibition is more narrowly construed than the Commission would like, the Commission may change certain definitions in its own Regulations to more closely comport with the prohibition contained in the ordinance. For example, Ethics Commission Regulation 3.214-4 limits the definition of financial interest to an investment interest of $2,000 or more, the receipt of income of $500 or more, or holding the position of officeholder in a business. The Ethics Commission could change this definition to include different types of financial interests, such as reputational interest, financial interests of spouses or agents of the officeholders, etc. City law further prohibits any person from making a gift with intent to influence a government official to perform an official act, imposes gift limits on all City officers and employees, restricts all gifts from persons doing business with or seeking to do business with the City, and requires

[53] See: New CFRO section 1.126(a)(9) (banning contributions, payments to slate mailer organizations, gifts, behested payments, contracts for employment, contract options, offers to purchase stock, emoluments, bundling of contributions, etc.); See also, New section 1.104, "*Prohibited Fundraising*."
[54] New section 1.126(a)(a)(10).
[55] CFRO § 1.126(b).
[56] CFRO § 1.126(c).
[57] See: SF Ethics Ord § 3.206(a).

disclosure of gifts of travel.[58] Like the financial interest regulations, the Commission could change its own regulations to close any loopholes involving gift restrictions.

Finally, the Political Reform Act, which is incorporated by reference into CFRO at section 1.106, prohibits an officer of an agency from accepting, soliciting, or directing a contribution of more than $250 from any party or their agent, or from any participant or their agent, while a proceeding involving a license, permit, or other entitlement for use is pending before the agency where the officer works and for three months following the date a final decision is rendered.[59] "In addition, PRA section 84308(c) requires each officer of an agency who received a contribution of $250 or more within the preceding 12 months to disclose that fact on the record and recuse themselves prior to rendering any decision in a proceeding involving a license, permit, or other entitlement for use pending before an agency. PRA section 84308(d) further requires a party to a proceeding before an agency involving a license, permit, or other entitlement to disclose contributions made to any an officer or their agent during the twelve-month period before the proceeding and prohibits a party from making a contribution of $250 or more to any officer of the agency during the three-month period following the agency's final decision.

Along with these concrete prohibitions and disclosure requirements, the City's public financing program encourages public participation and transparency in City elections by decreasing candidate reliance on special interest groups and compelling participants to engage the public in meaningful ways. As part of the Commission's Annual Policy Plan, a review of the City's public financing program is also planned for this Spring to harmonize its structure with recent legal developments and to ensure the program operates as effectively as possible. Incorporating that review and analysis as part of this process to identify needed changes to City campaign finance law would ensure the most robust, expansive program improvements to support the important goal articulated by the Commission to reduce actual or perceived corruption. When candidates rely on public funding, they have reduced incentive to participate in the type of quid pro quo fundraising Prop J hoped to curtail. Identifying how the public financing program can be better leveraged to expand participation, and therefore expand the program's impact on city governance, could also serve the goals of Prop J's restoration.

V. Other Implementation Considerations

In addition to legal considerations, Staff also preliminarily researched and identified some technological and cost considerations that may be associated with implementation of the proposed revisions to Prop J. These considerations will also need to be considered to ensure any new provisions adopted are strong and workable once implemented.

For example, the Commission currently uses an outside vendor, Netfile, to manage its online campaign reporting and disclosure database. Currently, Netfile's system does not track or communicate with the

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[58] See SF Ethics Ord § 3.216.

[59] Cal. Govt. Code § 84308(b) (where Officer" means any elected or appointed officer of an agency; "license, permit, or other entitlement for use," means all "business, professional, trade and land use licenses and permits and all other entitlements for use, including all entitlements for land use, all contracts . . . and all franchises." "Participant" means any person who is not a party but who actively supports or opposes a decision in a proceeding involving a license, permit, or other entitlement for use and who has a financial interest in the decision. *Id.* at (2)).

Office of Controller's contractor database. The Commission is in preliminary discussions for a long-range plan to integrate the two systems, but neither department has had the opportunity to assess what costs could be associated with such a large technological undertaking. Staff fully supports integration, and funding would be necessary to ensure this goal is met effectively and in a timely manner.

Notably, Prop J goes further than contracts by requiring the Commission to maintain a database of all persons in the City seeking or adjudicating public benefits, as broadly defined in proposed section 1.126(a). In a 2006 report produced by the City of Pasadena's Task Force on Good Government the City of Pasadena projected annual administration costs of $194,000 to ensure the City met the requirements of the Taxpayer Protection Act, or Pasadena's Prop J.[60] The $194,000 annual figure accounted for staff time only. Staff has not yet been able to assess expected or potential costs associated with building a tracking database, but based on past contracts with Netfile, Staff estimates costs for development of a comprehensive, integrated system could be several hundred thousand dollars. Ensuring a new legislative package that identifies sufficient funding to implement its provisions in practice is critical to ensuring the effectiveness of the new law. Absent a database for logging city contracts and a corresponding legal provision requiring City and county contracts to be warehoused in one location, the administrative and enforcement duties required of the Commission may be obstructed by organizational infeasibility. That is, if Staff can't accurately evaluate and audit a database of city contracts for violators, the proposed provisions may ring hollow at the implementation stage.

VI. Proposed Next Steps

Staff is excited to begin the stakeholder engagement process over the next month, including Friends of Ethics, Represent Us, interested members of the Board of Supervisors, public citizens, and other interested persons. Staff has scheduled two interested persons' meetings, scheduled to take place at 25 Van Ness, Rm 610 on May 9 at 5:30 p.m. and 25 Van Ness, Rm 70 May 11 at 12:00 p.m. to give people an opportunity to attend when their schedule allows. For these meetings, Staff plans to publish the Commission's proposed revisions to Prop J, along with a list of specific calls for public comment on Thursday, April 27. Based on the Commission's discussion at its April meeting, Staff will prepare materials to seek input on specific questions Commissioners would like interested persons to answer. For example, Staff will seek assistance from stakeholders to build a thorough factual record in support of any revisions to the Campaign Finance Reform Ordinance under consideration, and also seek input about ways to ensure the City's campaign ordinance and public financing program can also be strengthened to support the goals of the Prop J Restoration project.

As is the case with our Interested Persons process generally, public comment may be provided verbally or in writing at one of the Interested Persons' meetings, or submitted in writing to (ethics.commission@sfgov.org) on or before May 12, 2017, by 5:00 p.m.

Staff will then analyze all comments in advance of the May 22, 2017, regular Commission meeting, and present a complete set of public comments with associated Staff recommendations to the Commission and public at that meeting. After further hearing the Commission's May meeting and any additional

[60] See: Report of the City of Pasadena Task Force on Good Government, p. 7 (2006) *available at* http://ww2.cityofpasadena.net/councilagendas/ 2006%20agendas/Feb_27_06/7C1.pdf (Robert Stern, consultant, Center for Governmental Stuides).

policy guidance, Staff will integrate any further changes and bring final revisions to the Commission in June. The Commission may then send proposed changes on to the Board of Supervisors for its consideration or send the revisions back to Staff for additional review and re-drafting. As the Commission knows, the Board of Supervisors recesses in August, so it is likely that the Board's consideration of the Commission's proposals would take place this Fall.

We look forward to the Commission's further discussion and public input at the April 24th meeting, and to answering any questions you might have about this report at that time.

Mabel Ng/ETHICS/SFGOV
11/15/2005 12:19 PM

To "Robert Stern" <rstern@cgs.org>
cc
bcc John St.Croix/ETHICS/SFGOV@SFGOV
Subject Re: Question on Oaks Measure

Bob:
As stated in the Sutton advice letter, the Commission made a determination that it could not legally enforce Proposition J if the term "public benefit" included variances and permits.
Mabel

Mabel Ng
Deputy Executive Director
San Francisco Ethics Commission
415/581-2300
"Robert Stern" <rstern@cgs.org>

"Robert Stern"
<rstern@cgs.org>
11/10/2005 02:57 PM

To "Mabel Ng" <Mabel_Ng@ci.sf.ca.us>
cc
Subject Question on Oaks Measure

Mabel

Do you know why the Commission exempted variances and permits from the Oaks Ordinance the San Francisco passed in 2000 and then was repealed? I thought the ordinance explicitly included these and so I wonder why variances and permits were deleted.

Bob

Robert M. Stern
President
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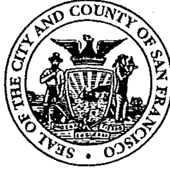

Ethics Commission
City and County of San Francisco

Advice Letter – April 7, 2003 – James R. Sutton, Esq. – Proposition J (application to non-profit organizations)

April 7, 2003

James R. Sutton, Esq.

Nielsen, Merksamer, Parrinello, Mueller & Naylor, LLP

591 Redwood Highway #4000

Mill Valley, California 94941-3039

Dear Mr. Sutton:

You requested the Ethics Commission's advice regarding various provisions of the Taxpayer Protection Amendment, Proposition J in the November 2000 election, S.F. Campaign and Governmental Conduct Code sections 3.700-3.740.

The Ethics Commission provides two kinds of advice: written formal opinions or informal advice. S.F. Charter § C3.699-12. Written formal opinions are available to individuals who request advice about their responsibilities under local laws. Formal opinions provide the requester immunity from subsequent enforcement action if the material facts are as stated in the request for advice, and if the District Attorney and City Attorney concur in the advice. Id. Informal advice does not provide similar protection. Id.

Because your letter seeks general advice and does not pertain to particular persons or events, the Commission is treating your letter as a request for informal advice.

Discussion

The General Prohibition under Proposition J

Under Proposition J, a City and County public official who "has exercised discretion to approve and who has approved or voted to approve a public benefit" may not receive a personal or campaign advantage1 from the public benefit recipient for a specified period of time ranging from two to six years from the date the official approves or votes to approve the public benefit. S.F. C&GC Code § 3.715(a). The prohibition does not

apply when the public official's approval of the public benefit is a ministerial function, or when the public official does not participate in, influence or attempt to influence the approval of the public benefit. Ethics Commission Regulation 3.715(a)-1.

1. Do volunteer members of the boards of directors of a nonprofit organization which received a grant from the City valued over $10,000, or a City contract valued over $50,000, qualify as "public benefit recipients"?

You ask whether Proposition J applies to nonprofit organizations that receive City grants that are valued over $10,000 or contracts that are valued over $50,000. You further ask whether the law also applies to volunteer members of the boards of directors of these nonprofit organizations such that the directors ar

prohibited from contributing to any candidate for City elective office who voted to approve the grants or contracts. You ask whether the Commission's response would differ "if the contribution is not in any way connected to the City's grant, and even if the volunteer board member does not in any way personally benefit from the grant."

The fundamental task of statutory construction is to determine the legislative intent in order to effectuate the law's purpose. SeeWhite v. Ultramar, Inc. (1999) 21 Cal.4th 563, 572. "If the plain language of [an ordinance] is unambiguous, no court need, or should, go beyond that pure expression of legislative intent." Id., citations omitted. The plain language of Proposition J is clear with respect to whether volunteer members of boards of directors of nonprofit organizations that receive City grants or contracts are public benefit recipients. Therefore, we need not look beyond the words of the Ordinance.

S.F. C&GC Code section 3.710(b) states the following:

Those persons or entities receiving public benefits as defined in Section 3.710(a)(1)-(7) shall include the individual, corporation, firm, partnership, association, or other person or entity so benefiting, and any individual or person who, during a period where such benefit is received or accrues: (1) Has more than a ten percent (10%) equity, participation, or revenue interest in that entity; or (2) Who is a trustee, director, partner, or officer of that entity.

The plain language of the Ordinance provides that any entity that receives public benefits is a public benefit recipient. The plain language of the Ordinance also provides that the directors of any entity that receives public benefits are also public benefit recipients. No distinction is made between for-profit and nonprofit entities that receive public benefits, nor is a distinction made between volunteer and paid directors. The usual and ordinary meaning of the Ordinance's words leads the Commission to conclude that nonprofit organizations that receive public benefits are public benefit recipients covered by Proposition J. For similar reasons, the Commission concludes that the directors of these nonprofit organizations are public benefit recipients.2

Although we believe that the Ordinance is clear, the language in Proposition J's preamble supports the Commission's conclusions. In adopting the initiative, the people of San Francisco sought to ensure that the use or disposition of public assets is not tainted by conflicts of interest among City officials who are entrusted with their management and control, and that decisions that confer private benefits are "arranged strictly on the merits for the benefit of the public, and irrespective of the separate personal or financial interests of involved public officials." S.F. C&GC Code § 3.705(a). The voters stated:

The people find that public decisions to sell or lease property, to confer cable, trash hauling and other franchises, to award public construction or service contracts, or to utilize or dispose of other public assets, and to grant special land use or taxation exceptions have often been made with the expectation of, and subsequent receipt of, private benefits from those so assisted to involved public 'decision makers.'

The people declare that there is a compelling state interest in reducing the corruptive influence of emoluments, gifts, and prospective campaign contributions on the decisions of public officials in the management of public assets and franchises, and in the disposition of public funds. The people, who compensate public officials, expect and declare that as a condition of such public office, no gifts, promised employment, or campaign contributions shall be received from any substantial beneficiary of such a public decision for a reasonable period.

Id., § 3.705(b) and (c).

In deciding that they did not want decisions to award City contracts and grants to be based on whether the decision-makers received or would receive gifts or contributions from the public benefit recipients, the voters did not limit their concern to organizations that exist only for profit or to directors who serve only for pay. Instead, they used the term "any substantial beneficiary." Nonprofit corporations are substantial beneficiaries of public benefits and nothing in the legislative history suggests that they were to be excluded from the Ordinance's reach.

2. Does Proposition J prohibit PACs sponsored by public employee unions from contributing to City candidates?

You note that Proposition J specifically excludes public employment from the term "public benefit." See

You note that Proposition J specifically excludes public employment from the term "public benefit." See S.F. C&GC Code § 3.710(a). You ask whether this exemption allows only individuals who work for the City to make contributions to candidates for City elective office, or whether the exemption also allows the various public employee unions that negotiate large City contracts on behalf of their members (memoranda of understanding or MOUs) to make such contributions. You indicate that several of these public employee unions sponsor political action committees (PACs) that often contribute to City candidates.

Proposition J provides that "the term public benefit does not include public employment in the normal course of business for services rendered." Id. § 3.710(a). It is unclear from the plain language of the Ordinance whether this exception applies only to public employees or whether it extends to the unions that represent public employees and are parties to MOUs. Accordingly, we must rely on the tools of statutory construction to determine the meaning of the phrase "public employment in the normal course of business for services rendered."

If the plain language of an ordinance is ambiguous or uncertain, we must look to the legislative history for assistance in interpreting the meaning of a law. See Halbert's Lumber, Inc. v. Lucky Stores, Inc. (1992) 6 Cal.App.4th 1233, 1239. When the voters change a law, ballot arguments should be used as the legislative history. See Hodges v. Superior Court (1999) 21 Cal.4th 109, 113-115. If the legislative history does not provide an answer, we must apply common sense to the language and, if possible, interpret the words in a manner that makes them reasonable, in accord with common sense, and avoids an absurd result. See id. When interpreting the statutory language in a manner that makes the words reasonable, in accord with common sense, and avoids an absurd result, the language must be read not in isolation but in light of the overall statutory scheme. See Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal.3d 1379, 1386-1387.

None of the paid arguments in support of or in opposition to Proposition J sheds light on the meaning of this phrase. See Voter Information Pamphlet and Sample Ballot, November 7, 2000 Consolidated Presidential General Election Ballot, at pp. P-128-132. Accordingly, we must interpret this phrase in a manner that makes its words reasonable, in accord with common sense, and avoids an absurd result.

To supply a reasonable interpretation of this phrase in a manner that is in accord with common sense and avoids an absurd result, we must examine the overall statutory scheme of Proposition J. As discussed above, the overall statutory scheme of Proposition J sets forth the goal of ensuring that the use or disposition of public assets is not tainted by conflicts of interest among City officials arising from the receipt of campaign contributions, gifts or promises of future employment. Specifically, the preamble to Proposition J identifies the "trading of special favors or advantage in the management or disposal of public assets and in the making of major public purchases" that "compromises the political process, undermines confidence in democratic institutions, deprives meritorious prospective private buyers, lessees, and sellers of fair opportunity, and deprives the public of its rightful enjoyment and effective use of public assets" as its core concerns. Accordingly, we must determine whether approval of MOUs by public officials who receive campaign contributions, gifts or future employment from unions implicates these concerns.

In order to make this determination, it is important to understand the role a union plays in negotiating an MOU on behalf of its members. Collective bargaining between the City and its employees is controlled by the Meyers-Milias-Brown Act. Cal. Gov't Code § 3500 et seq. Under the Act, employee collective bargaining units have the authority to represent their employees in "all matters related to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment." San Bernardino Public Employees Association v. City of Fontana (1998) 67 Cal.App.4th 1215, 1220 (citations omitted). The Act requires the City to negotiate exclusively with the collective bargaining units. Id. Under state and local law, both the City and the bargaining units are mutually obligated to negotiate in good faith. Cal. Gov't Code § 3505; S.F. Charter § A8-409-3. Once an MOU has been negotiated and approved by the governing body of the public entity and the membership of the bargaining unit, it is binding on both parties for its duration. San Bernardino, supra, 67 Cal.App.4th at 1220. The Act does not permit individual employees to negotiate the terms of their employment, and ". . . a member of an employee bargaining unit is bound by the terms of a valid collective bargaining agreement, though he is not formally a party to it and may not even belong to the union which negotiated it." Id. at 1220-1221, citations omitted.

Thus, it is only through the collective bargaining units that individual employees may voice their concerns. In addition, individual employees are bound by the MOU, and they may not negotiate the terms of their own employment. Finally, the law prescribes that the City must negotiate exclusively with collective bargaining units that have been chosen to represent the City's employees. These conditions lead the Commission to conclude that an MOU is not a special favor that deprives any person or entity of fair opportunity or that deprives the public of its right to the effective use and enjoyment of public assets.

Accordingly, to interpret the phrase "public employment in the normal course of business for services rendered" in a reasonable manner that is in accord with common sense and avoids an absurd result, the Commission determines that the exemption includes collective bargaining units that are designated by law to negotiate MOUs with the City on behalf of City employees.3 Public officials who approve MOUs may receive campaign contributions from PACs set up by these public employee unions. However, the Commission cautions that should such public employee unions receive grants or contracts or other public benefits from the City for purposes not related to the negotiations for the MOUs for City employees, such public benefits may be covered by Proposition J. In such a case, public officials who participated in the approval of the public benefit might be prohibited from receiving campaign contributions, gifts or employment from the unions for the specified time periods under the law.

3. Do the prohibitions in Proposition J apply to a supervisor who approves a public benefit during the budget process?

You state that several individuals and entities receive funding from the City through the annual budget process rather than through separate action by the Board of Supervisors. You explain that although Board members may debate certain line items in the budget during committee meetings or other public hearings, they generally vote on the budget as a whole rather than on individual line items in the budget. You ask whether a supervisor who approves the budget would be prohibited from accepting a contribution from the individual entity listed in a line item, assuming that the line item constitutes a public benefit (for example, a cash grant over $10,000). You state that although Board members technically "exercise discretion to approve" the line items, they do not really have the opportunity to vote against most line items, unless they choose to vote against the entire budget. Thus, you appear to contend that Board members do not exercise discretion to approve the line item contracts and grants. The Commission disagrees.

In considering the budget, the Board members necessarily exercise legislative judgment to determine how to prioritize key functions and responsibilities of City government and whether or not to fund certain benefits and services for local residents. As you indicate, supervisors often debate line items at committee meetings and other hearings. Even though line items may not be considered separately in the vote to approve the budget, their inclusion in the budget reflects both a determination by the supervisors that the items are not inconsistent with the policy choices being made and a decision by the supervisors to award a grant or contract to certain recipients. Indeed, members of the Board may propose amendments to the budget to add or delete these line items. In doing so, they exercise discretion.

In adopting Proposition J, the voters specifically sought to limit the trading of special favors or advantages in the management and disposal of public assets. To exclude contracts and grants that are awarded via a line item in the budget on the basis that supervisors do not exercise discretion to approve them would undermine the purpose of the Ordinance. Because the Commission finds that supervisors actually do exercise discretion when they vote on a budget that includes line items and are not engaged in a ministerial function, the Commission cannot agree that the supervisors "do not really have the opportunity to vote against most line items." As a result, the Commission concludes that Proposition J prohibits members of the Board of Supervisors from accepting personal or campaign advantages from public benefit recipients who are granted public benefits during the budget process.

4. Does a payment received from the City to settle a lawsuit constitute a "public benefit"?

You indicate that the City must defend itself against a wide range of lawsuits brought by individuals and entities, that the City Attorney often concludes that it is in the City's best interest to settle these lawsuits rather than spending resources on trial, and that the Board of Supervisors typically has to approve these cash settlements. You ask if these settlements constitute a public benefit under Proposition J.

The fundamental task in statutory construction is to determine the legislative intent in order to effectuate

the law's purpose. See White, supra, 21 Cal.4th at 572. As discussed above, if the plain language of the ordinance is clear, there is no need for statutory construction. See id. But the literal meaning of a law must be in accord with its purpose. See Delaney v. Superior Court (1990) 50 Cal.3d 785, 798.

The plain language of the Ordinance states that the term public benefit includes a contract, benefit, or arrangement between the City and County and any person or entity "to receive cash or specie of a net value to the recipient in excess of $10,000 in any 12-month period." S.F. C&GC Code § 3.710(a)(7). Generally, the settlement of a lawsuit includes a monetary payment. Accordingly, it appears when examining the plain language of Proposition J that the settlement of a lawsuit constitutes a public benefit if the net value of the settlement to the recipient includes a monetary payment that is in excess of $10,000 in any 12-month period.

But this literal meaning may not be in accord with the Ordinance's purpose. The voters adopted Proposition J to prevent the trading of favors "in the management or disposal of public assets" in a way that deprives meritorious persons of a fair opportunity to obtain public benefits and deprives the public of its effective use and enjoyment of public assets. See S.F. C&GC Code

§ 3.705(a) and (b). Because a final judgment in a lawsuit might otherwise cause the City to have a legal obligation to make a payment, it is unclear that including a settlement of a lawsuit before final judgment within the meaning of the term "public benefit" is in accord with the purpose of Proposition J.

Generally speaking, when a decision to settle a lawsuit is reached, the City has decided either that the City will make a monetary payment because it has exposure to a liability that may exceed the settlement amount, or that the costs of going forward with a trial exceed the possible return on the lawsuit or the settlement amount. Thus, settlement payments are compromises reached after negotiations by both the City and the affected parties. They do not appear to provide special favors to the recipients, nor do they deprive some other meritorious person or entity of fair opportunity for a public benefit or undermine the public's effective use of public assets. Instead, they appear to ensure that public assets are used efficiently. Thus, settlement payments do not implicate the types of arrangements that were at the core of the concerns that Proposition J sought to address. Accordingly, the Commission does not believe that payments made to settle lawsuits constitute public benefits. The Commission cautions, however, that Proposition J authorizes civil actions by private citizens to enforce its provisions, and a court may reach a different conclusion.

5. Do City contracts for health care, telephone or other "services" constitute "selling or furnishing any material, supplies or equipment" to the City?

You state that the definition of public benefit includes certain but not all City contracts, namely, those contracts that exceed $50,00 for "personal services" or for "material, supplies or equipment." You indicate that the quoted terms are not defined in the ordinance or regulations, and you add that a January 21, 1997 memorandum from the City Attorney appears to define those terms narrowly in the context of Campaign and Governmental Conduct Code section 1.126. Thus, you ask whether, if the terms are narrowly defined for the Ordinance, board members of a nonprofit organization that has a contract with the City to provide health care services to low-income residents could contribute to a supervisor who voted to approve the contract. You also ask whether a company that provides long-distance telephone service to City offices and employees is covered under the law, as well as a law firm retained by the City Attorney to represent the City in a lawsuit. You further inquire how a candidate can distinguish between contracts that come under Proposition J and contracts that do not.

The Commission does not find that the terms "personal services" or "materials, supplies or equipment" are ambiguous with respect to the types of grants or contracts you referenced and does not believe that the January 21, 1997 memorandum from the City Attorney would cause the Commission to reach a different conclusion. The plain and ordinary meaning of the terms covers the grant or contract to provide health care services, long-distance telephone services or legal services, as long as the grant or contract otherwise meets the financial thresholds for coverage. Inasmuch as Proposition J covers such contracts, Proposition J forbids public officials who approved such contracts from receiving gifts or campaign contributions for periods of time ranging from two to six years from the date the contracts were awarded. If you have additional questions as to whether a specific contract is considered a public benefit, please do not hesitate to contact the Ethics Commission for further advice.

6. Are individuals and entities which receive "variances" or "permits" from the City exempt from all enforcement under Prop J?

You correctly state that the Commission has exempted variances and permits from the definition of public benefits. EC Reg. 3.710(a)-1. You also note that Proposition J sets forth three ways to enforce its provisions: through an enforcement action by the Ethics Commission, an action by the City authorities, or a civil lawsuit by a City resident. You ask whether the Commission's regulation estops a civil lawsuit brought by the City or a City resident.

In adopting Regulation 3.710(a)-1, the Commission made a determination that it could not legally enforce Proposition J if the term "public benefit" included variances and permits. While a court may give weight to the Commission's determination, a court may adopt another interpretation of the term. Thus, the Commission's interpretation does not preclude or estop a lawsuit from either the City's other enforcement authorities or private residents.

7. Does the "Public Benefit Recipient Report – By Supervisor" satisfy the "due diligence" requirement of Regulation 3.720(a)-1(a)?

You state that the Clerk of the Board of Supervisors distributes a document entitled "Public Benefit Recipients Report – By Supervisor" which "purportedly lists all actions approved by the Board which qualify as public benefits." In providing a copy of the document, you ask whether a supervisor who relies on the document in order to determine whether he or she may accept a contribution, has satisfied the due diligence requirements of Regulation 3.720(1)-1(a).

Under Regulation 3.720(a)-1, a public official satisfies the due diligence and monitoring requirements of the law if

(1) the public official's board, commission or department establishes a record of public benefits conferred (a "departmental record");

(2) the departmental record identifies the public officials who exercised discretion to approve and approved or voted to approve the public benefits;

(3) the departmental record identifies the public benefit recipients; and

(4) the public official relies in good faith on the departmental record.

In examining the document you provided, it appears to identify the public officials who approved the public benefits. In some circumstances, the document lists the public benefit recipients; in other circumstances, it is not clear that it lists all the recipients. For example, for the contract approved on July 15, 2002, the public benefit recipient listed is "SF Institute for Criminal Justice Board of Directors." Under the law, the individuals who are the directors – and trustees, partners or officers, if applicable – are considered public benefit recipients and therefore their names should be listed. While the regulation provides that there is a rebuttable presumption that a public official relied in good faith on the departmental record, good faith cannot be premised on a record that contains insufficient information. Entries that contain all the required information satisfy the due diligence requirements, but entries with insufficient information do not.

I hope you find this letter responsive to your inquiry. Please do not hesitate to contact Deputy Executive Director Mabel Ng at (415) 581-2300 if you have questions.

Sincerely,

Ginny Vida

Executive Director

By: Mabel Ng

Deputy Executive Director

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1 A personal or campaign advantage includes a campaign contribution, a gift or honoraria worth more than $50, and any employment for compensation. S.F. C&GC Code § 3.710(c) and EC Reg. 3.710(c)-1.

2 The Ethics Commission clarified that an individual or entity is deemed to be the recipient of a public benefit if the individual is a trustee, director, partner or officer of a party to the contract "at the time the public benefit is awarded." Ethics Com. Reg. 3.710(b)-1.

3 In light of the Commission's conclusion, it need not reach the question of whether Proposition J's prohibitions extend to a PAC established by a union given tha

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"Robert Stern" <rstern@cgs.org>
11/10/2005 02:57 PM

To "Mabel Ng" <Mabel_Ng@ci.sf.ca.us>
cc
bcc
Subject Question on Oaks Measure

Mabel

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Bob

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ETHICS COMMISSION
CITY AND COUNTY OF SAN FRANCISCO

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COMMISSIONER

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COMMISSIONER

VIRGINIA E. VIDA
EXECUTIVE DIRECTOR

DATE: July 12, 2001

TO: All Members of City Boards and Commissions
All Department Heads

FROM: Ginny Vida G.V.
Executive Director

RE: Implementation of Proposition J

On **Friday, July 13, 2001**, Proposition J, which the voters of San Francisco adopted on November 7, 2000, will go into effect. Proposition J imposes new rules affecting gifts, payments and campaign contributions to public officials.

Proposition J, codified as S.F. Campaign and Governmental Conduct Code § 3.700 et seq., prohibits public officials who approve certain contracts or other "public benefits" from accepting personal or campaign advantages from a recipient of the public benefit or contract. The prohibition begins on the date the public official approves or votes to approve the public benefit and ends no later than:

(1) two years after the expiration of the term of office that the public official is serving at the time the official actually approves the public benefit;
(2) two years after the public official's departure from office, regardless of whether there is a pre-established term of office; or
(3) six years form the date the public official actually approves the public benefit, whichever is first.

Public officials are required to practice due diligence to determine whether a public benefit has been conferred and to monitor receipt of personal and campaign advantages from public benefit recipients. The regulations provide information on due diligence, monitoring and safe harbors. You may wish to review Regulations 3.720(a)-1 and 3.730-1 for more information on due diligence, monitoring and safe harbors and establish these procedures as soon as possible.

The text of Proposition J and the regulations are available from the Ethics Commission office and from its website at www.sfgov.org/ethics/pertin.htm. For further information, please contact the Commission at (415) 581-2300.

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E-Mail Address: ethics_commission@ci.sf.ca.us Web site: http://www.ci.sf.ca.us/ethics/