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August 22, 2019

VIA EMAIL AND U.S. MAIL

Robert B. Hodil
Coblentz Patch Duffy & Bass LLP
1 Montgomery Street, Suite 3000
San Francisco, CA 94104
Email: rhodil@coblentzlaw.com

Re: Councilmember Candell's Unlawful Decision to "Unrecuse" Herself and to Participate in "All Matters Related to the Terraces Going Forward"

Dear Rob:

On behalf of our client, O'Brien Land Company, LLC ("**O'Brien**"), we write to address Councilmember Susan Candell's extraordinary recent political decision to "unrecuse" herself with respect to the 315-unit Terraces of Lafayette housing development project ("**Project**"). As you know, Councilmember Candell originally recused herself on February 25, 2019 as a result of having advocated against the Project for years, but "only after [her] own personal research, consultations with [you] and her own attorney and the FPPC." Although it took far too long for Councilmember Candell to finally take that step, it was the only valid legal and ethical step to take given the controlling legal standard based on her common law conflict of interest and the extensive record demonstrating her bias against the Project.

We thought the issue had finally been appropriately put to rest. But Councilmember Candell was apparently hard at work behind the scenes seeking advice from the Fair Political Practices Commission ("**FPPC**" or "**Commission**") (Attachment 1) about how she might be able to lawfully use campaign funds to pay potential future legal expenses for violating O'Brien's due process rights (Attachment 2) and finding a new personal attorney willing to provide the opinion she seeks based on a red herring—a faux financial conflict of interest that we have not alleged. Indeed, according to her public announcement at the August 12, 2019 regular City Council meeting (Attachment 3), she has apparently finally found such counsel.¹ According to her statement:

¹ Though we strongly suspect her new personal attorney was not likely fully apprised of all, or perhaps even many, of the relevant publicly known facts.

“On the matter of the Terraces, I have retained my own counsel to give me legal advice and I have been told that my earlier recusal was not necessary as a matter of law. I am, therefore, going to participate in all matters related to the Terraces going forward.

I retained this legal advice from Steve Churchwell, of Churchwell, White LLP in Sacramento. The reason I chose him, along with his many legal accomplishments including two 7-0 victories in the California Supreme Court, is that he was the General Counsel for the Fair Political Practices Commission, the FPPC, from 1993 to 2000. He therefore is an expert in ethics and conflicts of interest cases such as mine.”

Unlike you, however, her new personal attorney has a duty only to Ms. Candell, not to the City of Lafayette (“**City**”). Moreover, the controlling legal standard for common law conflicts of interest has not changed, and the facts have only gotten worse for Councilmember Candell, who twice admitted to the FPPC that she has a common law conflict and yet still desperately desires to “participate” in the City’s processing of the Project despite her known bias against the Project. This desire, of course, only confirms the bias and resulting conflict that requires her recusal.

Thus, besides willfully violating the oath of office she took last fall after we first raised this delicate issue and provided extensive evidence demonstrating her staunch publicly expressed opposition to the Project, the upshot of Ms. Candell’s unlawful, unethical, unwise, and unsupportable decision not to recuse is to:

- prove her actual bias;
- breach her fiduciary duties to the City and its residents;
- introduce a conflict of interest between herself and the City itself that will likely require the City to seek judicial intervention to resolve; and
- increase the City’s legal risks and expenses.

The only way for Councilmember Candell to comply with her oath and avoid violating the constitutional prohibition against common law conflicts of interest is for her to completely recuse herself and abstain from any official action and not make any attempt to influence City staff’s handling of the Project application and its required non-legislative permits as well as all City commission and City Council meetings, discussions, and votes concerning the Project.

No Public Official May Participate in an Adjudicative Land Use Matter if They Have “An Unacceptable Probability of Actual Bias”

Procedural due process requires that adjudicative land use hearings be conducted “before a reasonably impartial, noninvolved reviewer.” *See, e.g., Gai v. City of Selma*, 68 Cal.App.4th 213, 219 (1998). As we know you are well aware based on your prior

correspondence to us and to various Project opponents, the legal standard for determining whether a public official must recuse himself or herself from participating in an adjudicative land use permitting process due to a common law conflict of interest is whether there exists “an unacceptable probability of actual bias.” See, e.g., *Nasha v. City of Los Angeles*, 125 Cal.App.4th 470, 483 (2004); see also *Applebaum v. Board of Directors*, 104 Cal.App.3d 648, 657-58 (1980) (biased decision makers are constitutionally impermissible and even the probability of unfairness is to be avoided).

It is a long-standing principle of California law that government officials have a fiduciary duty to exercise the powers of their office for the benefit of the public and not for their own private interest. Public officers must not place themselves in positions in which personal interests may come into conflict with their duties to the public. This common law conflict of interest doctrine and the need to “strictly enforce” it was explained more nearly 100 years ago in *Noble v. City of Palo Alto*, 89 Cal.App. 47, 51 (1928):

“A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public . . . This doctrine is generally applicable to private agents and trustees, but to public officers it applies with greater force, and sound policy requires that there be no relaxation of its stringency in any case that comes within its reason.”

Under the common law doctrine, “[p]ublic officers are obligated . . . [by virtue of their office], to discharge their responsibilities with integrity and fidelity.” *Terry v. Bender*, 143 Cal.App.2d 198, 206 (1956).

According to The California Municipal Law Handbook (Cal CEB 2013) at § 2.168:

“A common law conflict usually can be avoided by the official’s complete abstention from any official action on the matter, or any attempt to influence it. [Citation]. Violation of the common law duty to avoid conflicts of interest can constitute official misconduct and result in a loss of office. [Citation].”

To prevail on a claim of bias violating fair hearing requirements, the applicant need not prove actual bias. Rather, he or she must simply establish:

“ ‘an unacceptable probability of actual bias on the part of those who have actual decisionmaking power over their claims.’ [Citation] A party seeking to show bias or prejudice on the part of an administrative decision maker is required to prove the same “with concrete facts: ‘[b]ias and prejudice are never implied and must be established by clear averments.’ ”

Nasha v. City of Los Angeles, *supra*, 125 Cal. App. 4th at 483 (quoting *BreakZone Billiards v. City of Torrance*, 81 Cal.App.4th 1205, 1236 (2000)).

In *Nasha*, the court held that a landowner/developer proved a planning commissioner’s unacceptable probability of actual bias based on the commissioner’s authorship of a newsletter attacking the project as a “threat to wildlife corridor.” The article was thus

not merely informational but rather clearly took a position against the developer's proposed project.

Councilmember Candell Has Demonstrated “An Unacceptable Probability of Actual Bias Against the Project” Through Years of Actively Opposing It

Because Councilmember Candell has been so dogged in her desire to participate in the City's handling of the Project despite her long and vocal opposition to it—which independently demonstrates both her actual bias as well as the severity of it—we have been forced to undertake substantial efforts to protect O'Brien's due process rights. In fact, we have written six letters to the City—dated November 30, 2018; December 5, 2018; January 14, 2019; January 22, 2019; February 13, 2019; and February 28, 2019—all of which are posted on the City's website for the Project.² In addition, because Councilmember Candell attempted to rely on inapposite legal principles addressing financial conflicts of interest to continue opposing the Project as if she had never been elected—when financial conflicts of interest are different than and subject to vastly different legal standards than common law conflicts—we also wrote to Ms. Candell on March 18, 2019 (Attachment 4) to make her and the undisclosed private attorney she was then working with aware of the clear legal distinctions between the two conflict doctrines.

Without citing many, much less all, of the concrete examples already in the record, the record unambiguously shows Councilmember Candell's disqualifying common law bias:

- Her campaign website (<https://www.susancandell.com/>) admits that the Project sparked her “intense civic involvement” leading to “Mama Bear's” campaign for office.
- In a September 19, 2018 Lamorinda Weekly article she is quoted as saying that “[t]he 315 Apartments at Deer Hill will cause irreparable harm to the environment and gridlock. Lafayette urgently needs to be proactive.”
- She signed two petitions against the Project.
- She wrote an August 7, 2013 letter to the City Council opposing the Project and asserting, among other things, that the potential of children living in the Project crossing Deer Hill Road “**is clearly a very new and HUGE safety issue. Deer Hill Road is blind. This is an accident waiting to happen.**” (Emphasis in her letter).

Despite the well-settled legal standard articulated in *Nasha*, and despite the many other examples documented in our letters detailing Councilmember Candell's deep opposition to the Project, she fought to avoid recusal and continues to do so today,

²² See “Terraces of Lafayette – 2018 – 2019 Recent Documents,” available at <https://www.lovelafayette.org/city-hall/quick-links/hot-topics/terraces-of-lafayette/terraces-2018-documents>.

clearly unconcerned with O'Brien's constitutionally protected due process rights or what anyone might justifiably think of her ethics.

Your own letter to us on February 26 concludes that she opposed the Project, and no one has ever publicly attempted to or validly could refute that fact, including Ms. Candell, who now reverses field and insists on participating in the City's processing of the Project even though she has admitted the common law conflict we already demonstrated. We can't help but note, by way of comparison, that if Councilmember Candell had such a direct conflict in connection with a City contract she would be forever barred from holding any office in California. See Gov't Code § 1097. O'Brien's constitutional due process rights are no less important than the public's statutory right for its officials to be free from personal financial interests in contracts they enter into in their official capacity on behalf of a city or county. See Gov't Code § 1090.

Councilmember Candell Continues to Conflate Financial Conflicts of Interest with Common Law Conflicts of Interest, But O'Brien Has Only Ever Alleged—and Proven Beyond Doubt—that She Has a Common Law Conflict of Interest

When Councilmember Candell recused herself on February 25, 2019, she explained as follows:

"With great disappointment and from an abundance of caution I have decided to recuse myself from review and consideration of the Terraces of Lafayette apartment complex project. I made this decision only after my own personal research, consultations with the City Attorney and her own attorney and the FPPC. It is clear I do not have a financial conflict with this project, so the only restriction is [to] determine under what I will refer to as common law conflict.

The developer's attorneys have written many letters and have threatened litigation and now I've decided to recuse myself. However, according to the FPPC, Councilmembers who have real financial conflicts with the project still have rights after recusal. The City Attorney recommends I follow all the rules as if I had a real financial conflict and I will do so. As a member of the public, I retain my rights to speak as a member of the public in front of the Council with certain narrow limits around the topics I will present and I may not use my official position to influence a governmental decision. However, these limitations do not include communications by a public official to the general public or media. In addition, I may attend the Councilmembers as a member of the public if I am speaking only to my personal interests and can discuss the project generally with friends, neighbors and members of the community."³

In addition, the March 6, 2019 edition of the Lamorinda Weekly (Attachment 5) reports that Councilmember Candell said she "worked hard to try to retain [her] rights to not recuse." Moreover, according to the Lamorinda Weekly, she said that:

³ See Minutes of February 25, 2019 Lafayette City Council Regular Meeting, agenda item #6, available at http://lafayette.granicus.com/DocumentViewer.php?file=lafayette_338db9411761a7ee34d27df1a972c95a.pdf&view=1.

"I believe my positions were and are based on legitimate principles and that I do not have an improper bias or motive towards the project. I also worked equally as hard to retain my rights to participate as a citizen, which they also tried to take away. According to the FPPC, I did retain my private citizen rights similar to those I would have if I had a financial conflict (which I do not have). I will work within these limitations. However, I will also retain my rights to consider and pursue all legal options."

As we explained in our March 18 letter to Councilmember Candell, we are unaware of any legal authority that would allow a recused elected official with a common law conflict of interest to potentially influence the non-recused decisionmakers by remaining "in the room" or to affirmatively participate in any part of an adjudicative land use permitting process as a project opponent.

In short, even if Councilmember Candell "only" had a financial conflict of interest, she has not followed any of the FPPC requirements that could possibly allow her to avoid the full consequences of her disqualification even in that limited but inapplicable context. There is thus no possible basis for Councilmember Candell to be "in the room" as the City considers the Project, as a recused elected official under the limited exceptions thereto in the world of financial conflicts of interest, much less to participate in the City's handling of the Project as if she had never revealed her impermissible bias against it.

Councilmember Candell Has Admitted She Has a Common Law Conflict of Interest

On approximately January 31, 2019, Councilmember Candell began corresponding with the FPPC regarding various conflict of interest issues. In broad strokes, Ms. Candell ultimately sought advice regarding how she might raise money for a potential legal defense because the City properly informed her that it would not represent her regarding her common law conflict of interest.⁴

⁴ The FPPC issued an advice letter to Councilmember Candell on April 12, 2019 (*Candell Advice Letter*, No. A-19-071), concluding that she may expend campaign funds for attorney's fees and related expenses in potential litigation allegedly threatened based on her common law conflict of interest. The Commission's advice letter is based on Government Code sections 89513 and 89514. Section 89513(b)(1) prohibits the use of campaign funds "to pay for or reimburse the cost of professional services unless the services are directly related to a political, legislative, or governmental purpose." Section 89514 explains that "[e]xpenditures of campaign funds for attorney's fees and other costs in connection with administrative, civil, or criminal litigation are not directly related to a political, legislative, or governmental purpose except where the litigation . . . arises directly out of a committee's activities or out of a candidate's or elected officer's activities, duties, or status as a candidate or elected officer"

The advice letter inaccurately describes Councilmember Candell's admitted common law conflict of interest as an "alleged conflict," and from that false premise it dubiously concludes that she may open a 2022 election account and use campaign funds from that account because "the litigation contemplated in [her] case is 'directly related to a political, legislative, or governmental purpose,' because the alleged conflict of interest arises directly out of [her] activities, duties, or status as an elected officer." While there is in fact no litigation contemplated and none has been threatened, Councilmember Candell has a proven and admitted common law conflict of interest that requires her recusal and already led to her recusal based on "[her] own personal research, consultations with the City Attorney and her own attorney and the FPPC." As a matter of logic and fact, any use of campaign funds to defend Councilmember Candell for violating O'Brien's constitutional due process rights would relate solely to her personal political objectives of placating the Project's opponents who expect her to work and vote against the Project. These private objectives are completely

Those communications reveal a great deal of interesting information, including that Councilmember Candell voluntarily admitted in an email and related letter dated January 31, 2019 that "I do not have a monetary conflict which is the typical conflicts [sic] of interest, **but rather a 'perceived bias' against the project.**" (Emphasis added) (Attachment 6). She admitted the same on March 20, 2019, volunteering that:

"Yes, I have recused myself in the matter of the Terraces of Lafayette, and did so with the City Attorney's recommendation to recuse myself as if I had a financial conflict, even though **I have a common law conflict.**" (Emphasis added).

Ms. Candell thus *freely admitted* her disqualifying common law conflict of interest twice. She also either waived her attorney-client privilege with you or, to the extent she did not because the City Council as a whole holds the privilege on behalf of the City, she breached her trust with her fellow City Councilmembers by disclosing your confidential advice on this issue, which has not been publicly shared in any other forum, including when she originally recused herself on February 25. And in so doing Councilmember Candell also violated the Brown Act's prohibition against disclosing information provided in a closed session. Gov't Code § 54963.

In addition, those communications with the FPPC show that Councilmember Candell is only concerned with her own political interests regardless of the consequences to others. For example, she alleged in her January 31 email and letter that:

"One of the complications in this issue are that 3 other sitting Councilmembers were campaigning FOR the Homes project, and were Co-Chair and campaign spokespeople for the campaign. They worked with the developer and their hired campaign manager, and were active in community and personal events promoting their support of the Homes project (Yes on Measure L)."

As the elected face of, and basically advocating for, Save Lafayette, Ms. Candell pointed fingers at her City Council colleagues and went on to state that:

"Save Lafayette submitted a letter arguing that under *Horn v. County of Ventura* [citation], that not only myself, but these other 3 council members have also presented at least the appearance of bias for both projects for this property."

And she then asked the FPPC to address the following question:

unrelated to any legislative or governmental purpose. See Gov't Code § 89512(a). Even if Councilmember Candell may somehow use campaign funds to pay attorney's fees with respect to any potential future conflict of interest litigation, the Political Reform Act expressly provides that "an expenditure for a fine, penalty, judgment, or settlement is not within the lawful execution of the trust imposed by Section 89510." *Id.* at § 89512(b).

3. Does the fact that the three other council members' efforts end up with the conclusion that was stated by Save Lafayette:

"The result, of course, is that four, and possibly five, of the Councilmembers have potential conflicts and a probability or appearance of bias on the grounds originally asserted by O'Brien. This results in the absence of a quorum or ability to conduct business and hearings on O'Brien and the Deer Hill property. This, in turn, invokes and leads to the so-called Rule of Necessity or Rule of Legally Required Participation, found in both California case law and the California Government Code."

While the FPPC ultimately advised her that it "does not provide third-party advice, so we cannot advise you regarding whether the other councilmembers may have a financial conflict of interest under the [Political Reform] Act," these public records show that Councilmember Candell is aligned with Save Lafayette and willing to throw her colleagues and City staff under the proverbial bus if it suits her personal purposes.

Should She Participate in Any Way, Councilmember Candell Would Taint The City's Handling of the Project

The applicable law regarding common law conflicts of interest is clear and well-settled, and the publicly known facts regarding Councilmember Candell's deep opposition to the Project are extensive. Although we suspect she will claim she made an unforced error in admitting to the FPPC that "I have a common law conflict," that admission must be held against her, particularly when the facts line up perfectly with it. There is no ambiguity in this case and it is not a close call: Councilmember Candell has a disqualifying common law conflict of interest and she must again recuse herself, completely, from participating in any part of the City's processing of the Project.

As in an interesting recent case from New York state, *Matter of Titan Concrete Inc. v. Town of Kent* (addressing the improper participation of a conflicted public official whose mere presence the court held could influence her fellow board members and raise the appearance of impropriety in the eyes of the public), Councilmember Candell's participation in any part of the Project would taint the entire process. To state the obvious, Councilmember Candell cannot lawfully participate in any public meeting or closed session regarding the Project, nor can she lawfully communicate about it with her fellow Councilmembers, with any City commissioner, or with City staff. As long as she remains an elected official, Councilmember Candell also may not be "in the room" at any time when the City considers the Project at any public meeting.

Although these circumstances are extraordinary if not unprecedented, we trust that the City will not allow Councilmember Candell to flagrantly violate O'Brien's constitutional due process rights given the well-known depths of her firmly held bias and the substantial risks she is blithely forcing on the City.

Councilmember Candell's Unlawful Decision to "Unrecuse" Both Revives Her Common Law Conflict of Interest With O'Brien and Creates a New Conflict of Interest Between Ms. Candell and the City Itself

Councilmember Candell has an irrefutable conflict of interest based on her long and vocal opposition to the Project—we have proven her bias with concrete facts, and she has already admitted it in writing to the FPPC—that can only be resolved through a complete recusal from participating in any part of the City's processing of the Project.

In light of your correct advice that Councilmember Candell recuse herself, which we are sure you will not change given the extensive publicly known facts under a settled legal standard, her decision to violate her oath and participate in the City's handling of the Project breaches her fiduciary responsibilities as an elected official and creates a new conflict with the City itself. Should Councilmember Candell refuse to recuse herself again it will be incumbent on the City to take all appropriate steps to protect its interests.

Sincerely,

MILLER STARR REGALIA



Bryan W. Wenter, AICP
BWW:kli

- Attachment 1: *Candell* Advice Letter, No. A-19-071.
- Attachment 2: Public records provided by the FPPC to Miller Starr Regalia on August 14, 2019.
- Attachment 3: Email from Save Lafayette re Alert: Candell to discuss Terraces development, dated August 14, 2019.
- Attachment 4: Miller Starr Regalia letter to Susan Candell, dated March 18, 2019.
- Attachment 5: Lamorinda Weekly article dated March 6, 2019.
- Attachment 6: Letter from Susan Candell to FPPC, dated January 31, 2019.

cc: Honorable Mayor Mike Anderson
City Councilmember Steve Bliss
City Councilmember Cameron Burks
City Councilmember Teresa Gerringer
Planning Commission
Niroop Srivatsa, City Manager
Greg Wolff, Acting Planning Director
Joanne Robbins, City Clerk
Dennis O'Brien
Caryn Kali
Dave Baker
Arthur F. Coon, Esq.
Allan Moore, Esq.

Attachment 1



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

April 12, 2019

Councilmember Susan Candell
3675 Mt. Diablo Blvd, #210
Lafayette, CA 94549

Re: Your Request for Advice
Our File No. A-19-071

Dear Ms. Candell:

This letter responds to your request for advice regarding the campaign fund expenditure provisions of the Political Reform Act (the "Act").¹

Please note that we are only providing advice under the campaign fund expenditure provisions of the Act and not regarding general conflict of interest prohibitions such as common law conflict of interest or Section 1090.

Also note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTION

As a Lafayette City Councilmember, may you expend campaign funds for attorney's fees and related expenses in contemplation of litigation based on an alleged common law conflict of interest?

CONCLUSION

Yes, because the contemplated litigation pertains to an alleged conflict of interest arising directly out of your activities, duties, or status as an elected officer, such expenditures are considered directly related to a political, legislative, or governmental purpose, and satisfy the requirements of Sections 89513 and 89514.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

FACTS AS PRESENTED BY REQUESTER

You are a member of the Lafayette City Council. On February 26, 2019, Counsel for the City of Lafayette sent a letter to the law firm Miller Starr Regalia (“Miller”), in response to four letters Miller had sent on behalf of O’Brien Land Company, LLC and Anna Maria Dettmer. Miller’s letters had requested that you recuse yourself from consideration of the “Terraces of Lafayette Project” (“Project”) due to an alleged common law conflict of interest.

In the letter sent to Miller, the Lafayette City Counsel explained that after considering the request, you ultimately decided to recuse yourself from taking part in the City Council’s decisions regarding the Project, due to your past opposition to the Project. The letter also explained that although you did not have a financial conflict of interest, you “agreed to abide by the Fair Political Practices Commission’s regulations governing the conduct of a public official who recuses himself or herself due to a financial conflict of interest.”

On March 18, 2019, Miller sent you another letter, stating, “[f]or the reasons expressed herein—even if only to avoid any perception that you might be improperly trying to influence your City Council colleagues to ultimately vote against the Project, not to mention a desire to act consistently with the City’s conflict avoidance policy you voluntarily signed on November 29, 2018 . . .—we hope you will reconsider further opposing the Project, as if you ‘only’ had a ‘*financial conflict of interest*,’ while you are an elected official sworn to uphold the law. We encourage you to seek the advice of your own qualified attorney on this delicate subject at your earliest opportunity.” Though Miller denied having “threatened litigation,” the letter expressed the firm was “deeply concerned by your apparent desire to continue opposing the Project—by ‘rallying’ future Project opposition, among other things—based on Fair Political Practices Commission (‘FPPC’) regulations and advice letters that address an entirely different species of legal conflict.”

In describing an alleged common law conflict of interest, the letter referenced a “constitutional line you have repeatedly and voluntarily crossed—‘an unacceptable probability of actual bias.’” Similarly, the letter alleged, “In what is now your public life as a duly-elected local official with various new legal obligations, in the eyes of the law you are, at a minimum, ‘unacceptably’ biased against the Project. Given the conflict of interest that led to—and required—your recusal now that you have been elected and taken the oath of office, the law does not contemplate a future role for your ongoing Project opposition.” Miller’s letter concluded, “we hereby inform you that, in our opinion, should you attempt to rally opposition to the Project or oppose the Project in any future public meeting or hearing in the face of the conflict of interest that led to your recusal, particularly if you are successful, such activities would unlawfully infringe our clients’ rights to procedural due process, in violation of various laws, including the Fourteenth Amendment to the U.S. Constitution, section 1983 of the Civil Rights Act of 1871, and Article I, Section 7 of the California Constitution.” Accordingly, Miller “encourage[d] you to reconsider any decision to oppose the Project, even by potential reference to the FPPC rules that provide limited exceptions to the general rule requiring disqualification of *financially conflicted* officials under circumstances not applicable here, now that you have recused yourself due to a *common law conflict* stemming from your many years opposing the Project before your election.”

Due to the letters and allegations by Miller, you are seeking formal written advice from the FPPC on whether you may spend campaign funds on attorney’s fees and other costs related with

hiring independent counsel "for legal defense." You also state, "it appears that the City Attorney (the one hired by the city for this project, not the normal City Attorney), has a conflict with representing [you] as part of . . . his firm."

ANALYSIS

As noted above, this letter does not provide conflict of interest advice with respect to common law conflicts of interest. Rather, this letter solely addresses whether you may use campaign funds to pay for attorney's fees and other related costs, given your circumstances, and pursuant to Section 89514.

Section 89513(b)(1) provides that "[c]ampaign funds shall not be used to pay for or reimburse the cost of professional services unless the services are directly related to a political, legislative, or governmental purpose." Section 89514 addresses when attorney's fees and related costs meet that standard, and provides:

Expenditures of campaign funds for attorney's fees and other costs in connection with administrative, civil, or criminal litigation are not directly related to a political, legislative, or governmental purpose except where the litigation . . . arises directly . . . out of a candidate's or elected officer's activities, duties, or status as a candidate or elected officer

We have previously advised that campaign funds may be used on legal expenses in contemplation of litigation based on an alleged conflict of interest under the Act. (See *Brown* Advice Letter, No I-91-048; see also *Lanning* Advice Letter, No. A-92-050.) Where litigation arises directly out of an elected officer's activities, duties, or status as an elected officer, "there are policy reasons for allowing an elected officer to obtain legal advice even prior to the commencement of formal proceedings against the officer, in order for the elected officer to perform his governmental duties more effectively." (*Kawagoe* Advice Letter, No. A-02-109.) With respect to the requirements of Section 89514, the litigation contemplated in your case is "directly related to a political, legislative, or governmental purpose," because the alleged conflict of interest arises directly out of your activities, duties, or status as an elected officer. Accordingly, campaign fund expenditures for attorney's fees and related expenses associated with the contemplated litigation are permissible uses of campaign funds.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge
General Counsel



By: Kevin Cornwall
Counsel, Legal Division

Attachment 2

Amanda Apostol

From: Kevin Cornwall
Sent: Friday, March 29, 2019 1:44 PM
To: Juanita Lira
Subject: FW: Advice and possible written statement - Lafayette City Councilmember AMR!

Hi Juanita,

If you could give this request for advice a number and assign it to me whenever you have a chance, I would greatly appreciate it. Thank you! And have a good weekend!

Kevin

From: Kevin Cornwall
Sent: Friday, March 29, 2019 1:40 PM
To: 'SUSAN CANDELL' <[REDACTED]>
Subject: RE: Advice and possible written statement - Lafayette City Councilmember

I can forward this email chain as a formal request for advice with respect to Section 89514. I will be sure to contact you if we need any additional information.

- Kevin

From: SUSAN CANDELL [REDACTED]
Sent: Friday, March 29, 2019 1:09 PM
To: Kevin Cornwall <kcornwall@fppc.ca.gov>
Subject: RE: Advice and possible written statement - Lafayette City Councilmember

Perfect. Yes, I would like to request formal advice, and hopefully it will agree with your assessment here.

How do I make the formal request?

Thank you!

-Susan Candell

On March 29, 2019 at 11:56 AM Kevin Cornwall <kcornwall@fppc.ca.gov> wrote:

Hi Susan,

Just to follow up on our previous phone call: I did some research on the issue and found that in the past we have advised that campaign funds may be used on legal expenses in contemplation of litigation based on an alleged conflict-of-interest. However, if you would like the FPPC to examine your specific

circumstances, we would need to proceed with a request for formal advice. I hope this provides some clarification, but please let me know if you have any additional questions.

Sincerely,

Kevin Cornwall

Commission Counsel

Fair Political Practices Commission

kcornwall@fppc.ca.gov

(916) 445-4812

Email Advice: *This email advice is not a final decision of the FPPC and does not constitute legal advice, alter any legal right or liability or provide immunity to the requestor under Government Code Section 83114. It is not a rule, regulation or statement binding on the agency. The Political Reform Act (Government Code Sections 81000 through 91014) and the FPPC regulations (Sections 18110 through 18997) are on the FPPC website. Formal written advice is available upon request.*

Confidentiality Notice: *This email message, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any review, use, disclosure, or distribution not authorized by the intended recipient(s) is prohibited. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message.*

From: SUSAN CANDELL [REDACTED]
Sent: Tuesday, March 26, 2019 5:20 PM
To: Kevin Cornwall <kcornwall@fppc.ca.gov>
Subject: RE: Advice and possible written statement - Lafayette City Councilmember

Yes, we can talk tomorrow. What times can you talk tomorrow? Thank you!

I intend to open up my campaign for 2022, since I just closed down my campaign for 2018. I am familiar with the reporting requirements as well as the bank account rules, etc.

-Susan Candell

On March 26, 2019 at 4:56 PM Kevin Cornwall <kcornwall@fppc.ca.gov> wrote:

Hi Susan,

Okay, thank you for letting me know. I am not sure which FPPC representative you spoke with last Friday, but it appears she provided you with correct information.

The money raised for legal expenses would presumably qualify as contributions under the Act. (See Section 82015; Regulation 18215.) Accordingly, you would need to file a statement of intent to run for office before soliciting or accepting campaign contributions. (See Section 85200.) You would also need to establish a campaign bank account before spending any contributions. (See Section 85201.) You would also be subject to the Act's recordkeeping and reporting requirements. You can review campaign rules, including a "candidate toolkit," and when and where to file campaign statements by clicking [here](#).

Under the Act, "[c]ampaign funds shall not be used to pay for or reimburse the cost of professional services unless the services are directly related to a political, legislative, or governmental purpose." (Section 89513(b)(1).) With specific regard to campaign expenditures on attorney's fees, Section 89514 provides, in relevant part, "[e]xpenditures of campaign funds for attorney's fees and other costs in connection with administrative, civil, or criminal litigation are not directly related to a political, legislative, or governmental purpose *except* where the litigation . . . arises directly out of . . . a candidate's or elected officer's activities, duties, or status as a candidate or elected officer . . ." (emphasis added.)

I hope this clarifies things for you, but if you have any additional questions, including those pertaining to reporting requirements, please let us know.

Sincerely,

Kevin Cornwall

Commission Counsel

Fair Political Practices Commission

kcornwall@fppc.ca.gov

(916) 445-4812

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From: SUSAN CANDELL [REDACTED]
Sent: Tuesday, March 26, 2019 11:55 AM
To: Kevin Cornwall <kcornwall@fppc.ca.gov>
Subject: RE: Advice and possible written statement - Lafayette City Councilmember

Hello! No, Lafayette does not have any additional local ordinances establishing contribution limits for Lafayette elections.

On March 25, 2019 at 4:31 PM Kevin Cornwall
<kcornwall@fppc.ca.gov> wrote:

Hi Susan,

In order to better answer your question, it would be helpful to know if the City of Lafayette has any local ordinance establishing contribution limitations for local elections. Could you please confirm whether Lafayette has any such ordinance?

Thanks,

Kevin

From: SUSAN CANDELL [REDACTED]
Sent: Friday, March 22, 2019 8:05 PM
To: Advice <Advice@fppc.ca.gov>; Kevin Cornwall
<kcornwall@fppc.ca.gov>
Subject: RE: Advice and possible written statement - Lafayette City Councilmember

Hello! I spoke with a representative on Friday, and she was advising me to get a written statement from you helping me to figure out how to raise money for legal defense. Her advice is to open up a 2022 campaign, and track the money like normal donations during a campaign, but targeted to legal fees.

Can I get a written response? I just want to make sure that I do this correctly.

Thank you!

-Susan Candell

City of Lafayette City Councilmember

On March 20, 2019 at 2:04 PM SUSAN CANDELL
[REDACTED] wrote:

Hello! We emailed a few times last month, and now I have some more questions. Please defer me to someone else, but it seems like you were the last one I dealt with, so might want to continue.

Yes, I have recused myself in the matter of the Terraces of Lafayette, and did so with the City Attorney's recommendation to recuse myself as if I had a financial conflict, even though I have a common law conflict. The applicants attorney have since written two letters challenging my level of involvement as a member of the public, even though I am allowed this even if I had a financial conflict, referring to our correspondences.

My question today mainly is around how I can go about raising money in order to get independent legal representation, as it appears that the City Attorney (the one hired by the city for this project, not the normal City Attorney), has a conflict with representing me as part of Coblenz, his firm.

If I did a 'Go Fund Me' or equivalent, how do I report this income, since I'm still a Councilmember? I did close down my Campaign account from Nov 2018, so can I just reopen all of that? Or should I create a new campaign fund for 2022? Or what are the options you would recommend for me to raise money for legal defense, since my city has said they won't represent me.

Attached are the letters from the applicant's attorney both when I recused myself, and then yesterday.

On February 5, 2019 at 2:32 PM
Advice <Advice@fppc.ca.gov>
wrote:

The attached statute and regulation state when and to what extent an official may recuse himself and participate as a member of the general public. There are limited exceptions that allow a public official to participate as a member of the public and speak to the press that are narrowly interpreted. In general, a disqualified official who may participate as a member of the general public may only address how the matter at issue affects his own interests. Items 1-5 on your list appear to be appropriate activities outside a meeting, and the activities during a meeting are properly narrowed in scope. For item 6, we have not advised that a letter is appropriate. However, if presented to the Council at the time the official speaks at the meeting as a member of the public, then a letter discussing only the official's interests would be allowed.

If the foregoing does not sufficiently answer your questions, then this matter is too complex for informal advice. If you would like to request formal advice, the process is set forth here: <http://www.fppc.ca.gov/advice/formal-advice.html>. The formal request must be in writing, provide specific information about the requestor, and contain sufficient information for the FPPC's staff attorneys to conduct a complete legal analysis.

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From: The Candells

[REDACTED]]

Sent: Tuesday, February 05, 2019 8:01 AM

To: Advice <Advice@fppc.ca.gov>

Subject: RE: Advice and possible written statement - Lafayette City Councilmember

Hello! I do have follow-up questions, and it does relate to the 2014 FPPC file A-14-022, to *Cary S. Reisman and City Attorney of Las Alamos*. In this case, Councilmember Troy Edgar has a financial interest in a property that is near his property, so he rightfully recused himself. However, just to be very clear, his participation as a member of the public was not prohibited.

I would like to state every action that he was allowed to do in this matter, and please confirm these to be true.

Questions:

Councilmember Troy Edgar, after recusal, can as a member of the general public in the course of its prescribed governmental function in order to represent himself or herself on matters related solely to his or her 'personal interests', and this includes (from that File):

1. Attend the council meeting as a member of the public and listen to presentations, public comment, council deliberations, and optional vote;
2. Discuss the project generally with friends, neighbors, and other members of the community;
3. Rally opposition to the project;
4. Join with opposition group that is not affiliated with the city in any way;
5. Appear before Council and discuss the property, as long as he is not attempting to use his official position as a city

councilmember to influence their decision, and representing himself or herself on matters solely to his or her personal interests.

Would you also believe that these rights would extend to cover:

6. Write letters to the Council discussing his interests

Thank you!

-Susan Candell

From: Advice
[<mailto:Advice@fppc.ca.gov>]
Sent: Thursday, January 31, 2019 3:51 PM
To: SUSAN CANDELL
Subject: RE: Advice and possible written statement - Lafayette City Councilmember

1. Based on the information you have provided, which does not appear to involve any financial conflict (or any accusation of a potential financial conflict), and therefore neither the Political Reform Act or Section 1090 are applicable. An alleged conflict-of-interest based on “perceived bias” does not fall under either the Act or Section 1090.
2. Could you please clarify what you are requesting?

Kevin Cornwall

Commission Counsel

Fair Political Practices Commission

kcornwall@fppc.ca.gov

(916) 445-4812

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From: SUSAN CANDELL

[REDACTED]

Sent: Thursday, January 31, 2019 3:31

PM

To: Advice <Advice@fppc.ca.gov>

Subject: RE: Advice and possible written statement - Lafayette City Councilmember

Thank you!

I want to make sure:

1. None of the FPPC rulings either as part of the Act or Government Code Section 1090 involve my current situation.
2. Is there any way that you could make a written statement for my case?

-Susan Candell

On January 31, 2019
at 2:51 PM Advice
<Advice@fppc.ca.gov
> wrote:

Good afternoon,
Councilmember
Candell,

The Fair Political Practices Commission responds to requests for advice regarding the conflict of interest provisions of the Political Reform Act ("the Act") and Government Code Section 1090, and not under other general conflict of interest prohibitions such as common law conflict of

interest. Both the Act and Section 1090 pertain to conflicts of interests involving *financial* conflicts of interest.

Section 87100 of the Act provides: “No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.” The Act also explains that “a public official has a financial interest . . . if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family,” or on particular economic interests, such as investments above \$2,000 in a business entity or real property, or an interest in a source-of-income. (See Section 87103.)

The facts you have included in your emails do not appear to involve, or express a concern regarding, a potential financial

conflict of interest. As you noted in your email, it does not appear that the developer's attorney believes you have a financial conflict of interest, but rather, that you have "perceived bias." However, "perceived bias" is not covered under the conflict of interest provisions of the Political Reform Act and, accordingly, we cannot provide you with advice regarding that area of the law or the potential merit of such arguments.

Further, the FPPC does not provide third-party advice, so we also cannot advise you regarding whether the other councilmembers may have a financial conflict of interest under the Act. However, if you feel a violation has occurred, you may contact our [Enforcement Division](#).

With regard to the legal issues that we cannot provide advice on, you may want to further consult with your City Attorney or a private attorney. If you have any additional questions, or you believe I have

misunderstood one of
your questions,
please feel free to
contact me and let
me know.

Sincerely,

Kevin Cornwall

Commission Counsel

Fair Political
Practices Commission

[kcornwall@fppc.ca.g
ov](mailto:kcornwall@fppc.ca.gov)

(916) 445-4812

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*Formal written advice
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From: SUSAN CANDELL



Sent: Thursday, January
31, 2019 11:20 AM

To: Advice
<Advice@fppc.ca.gov>

Subject: Advice and
possible written
statement - Lafayette
City Councilmember

I apologize for the 3
previous emails,
and here is the
summary email
regarding my
request for advice,
and possibly a
statement letter
depending on your
advice.

Thank you!

-Susan Candell

City of Lafayette
City
Councilmember

Attachment 3

Subject:

FW: Alert: Candell to discuss Terraces development

From: "SaveLafayette" <contact@savelafayette.org>

Date: August 14, 2019 at 5:00:58 PM PDT

To: dave@bakerthorn.com

Subject: Alert: Candell to discuss Terraces development

Reply-To: Contact@savelafayette.org

Statement to Council attached

We are pleased to announce that Vice Mayor Susan Council publicly proclaimed to the City Council that she has withdrawn her recusal and will now fully participate in all discussions regarding the Terraces project (315 apartment units at the corner of Pleasant Hill Road and Deer Hill Road). Here is the Vice Mayor's statement:

August 12, 2019

On the matter of the Terraces, I have retained my own counsel to give me legal advice and I have been told that my earlier recusal was not necessary as a matter of law. I am, therefore, going to participate in all matters related to the Terraces going forward.

I retained this legal advice from Steve Churchwell, of Churchwell, White LLP in Sacramento. The reason I chose him, along with his many legal accomplishments including two 7-0 victories in the California Supreme Court, is that he was the General Counsel for the Fair Political Practices Commission, the FPPC, from 1993 to 2000. He therefore is an expert in ethics and conflicts of interest cases such as mine.

Susan Candell, Vice Mayor, City of Lafayette

SaveLafayette

3220 Ronino Way, Lafayette, CA 94549

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Attachment 4



**MILLER STARR
REGALIA**

1331 N. California Blvd.
Fifth Floor
Walnut Creek, CA 94596

T 925 935 9400
F 925 933 4126
www.msrlgal.com

Bryan W. Wenter, AICP
Direct Dial: 925 941 3268
bryan.wenter@msrlgal.com

March 18, 2019

VIA EMAIL AND U.S. MAIL

Susan E. Candell
c/o City of Lafayette
3675 Mount Diablo Blvd., #210
Lafayette, CA 94549
Email: scandell@lovelafayette.org

Re: Your Recusal Based on a Common Law Conflict of Interest in Connection with the Terraces of Lafayette Apartments

Dear Ms. Candell:

We send this letter to you using your City contact information in light of the fact the City cannot provide you with legal counsel outside your role as a City official, we do not have and have not been able to obtain the name of your personal attorney, and we understand you requested we provide this letter to you personally in this manner.

Accordingly, on behalf of our client, O'Brien Land Company, we write to address the potential future role you articulated for yourself when you "reported out" after the closed session at the Lafayette City Council's February 25, 2019 regular meeting¹ for the above-referenced 315-unit apartment project ("Project") notwithstanding your recusal as a result of a "*common law conflict of interest*."² For the reasons expressed herein—even if only to avoid any perception that you might be improperly trying to influence your City Council colleagues to ultimately vote against the Project, not to mention a desire to act consistently with the City's conflict avoidance policy you voluntarily signed on November 29, 2018 (Attachment 1)—we hope you will reconsider further opposing the Project, as if you "only" had a "*financial conflict of interest*," while you are an elected official sworn to uphold the law. We encourage you to seek the advice of your own qualified attorney on this delicate subject at your earliest opportunity.

¹ Although the closed session was placed on the agenda under Government Code section 54956.9(d)(2) regarding "significant exposure to litigation," you asserted that we had "threatened litigation." If we had threatened litigation, and we have not, the closed session would have been agendized under other sections of the Brown Act dealing with such threats. See, e.g., Gov't Code sections 54956.9(d)(4) and (5).

² See http://lafayette.granicus.com/MediaPlayer.php?view_id=3&clip_id=4283.

We are deeply concerned by your apparent desire to continue opposing the Project—by “rallying” future Project opposition, among other things—based on Fair Political Practices Commission (“FPPC”) regulations and advice letters that address an entirely different species of legal conflict. But given your announced plans to continue opposing the Project, as you did as a private citizen, only now in your role as a disqualified elected official representing publicly that you are not unconstitutionally biased—contrary to all objective evidence that is already known and in the public record—we must again assert our clients’ rights. Indeed, at the February 25 City Council meeting you explained that you “will present” certain topics and may (1) attend public meetings regarding the Project as a member of the public and speak regarding your personal interests, (2) discuss the Project generally with friends, neighbors, and members of the community, (3) rally opposition the Project, and (4) join opposition groups not affiliated with the City. Contrary to your public statement, however, which can only be read as potential future Project opposition, and contrary to the prior Project opposition that required your recusal, you asserted, “I believe that I can review this project in a neutral and impartial manner.”

Moreover, the March 6, 2019 edition of the *Lamorinda Weekly* ([Attachment 2](#))³ reports that you said you “worked hard to try to retain [your] rights to not recuse.” Moreover, according to the *Lamorinda Weekly*, you said that:

“I believe my positions were and are based on legitimate principles and that I do not have an improper bias or motive towards the project. I also worked equally as hard to retain my rights to participate as a citizen, which they also tried to take away. According to the FPPC, I did retain my private citizen rights similar to those I would have if I had a financial conflict (which I do not have). I will work within these limitations. However, I will also retain my rights to consider and pursue all legal options.”⁴

The activities you described when reporting out and your statements quoted in the *Lamorinda Weekly* validate our reluctant decision to raise this issue and provide yet another example of the constitutional line you have repeatedly and voluntarily crossed—“an unacceptable probability of actual bias.” See, e.g., *Woody’s Group, Inc.*

³ See *Candell to recuse from Deer Hill project, three others reject call to recuse*, *Lamorinda Weekly*, March 6, 2019 available at <http://www.lamorindaweekly.com/archive/issue1301/pdf/Candell-to-recuse-from-Deer-Hill-project-three-others-reject-call-to-recuse.pdf>. In contrast to Mayor Burks’ wise and ethical decision to not comment on the City Council closed session outside of the authorized reporting out period at the February 25 regular meeting, it is unclear whether your comments to the *Lamorinda Weekly* were compliant with the Brown Act, which deems all closed session information to be confidential and prohibits the disclosure of such information to a person not entitled to receive it. Gov’t Code § 54963(a). Violations of the Brown Act’s rule prohibiting unauthorized disclosures of confidential closed session information may be addressed by various remedies including injunctive relief, disciplinary action, and referral of a member of a legislative body who has willfully disclosed confidential information in violation of the Brown Act to the grand jury. *Id.* at § 54963(c).

⁴ Moreover, the *Lamorinda Weekly* quotes you as follows: “I believe my positions were and are based on legitimate principles and that I do not have an improper bias or motive towards the project.” Even if your positions were based on legitimate “principles,” and they were not, your unconstitutional bias results from the fact that you took “positions” opposing the Project before voting on it, which due process requirements do not allow. The problem is thus undeniable: you took a position against the Project. And having taken a position against the Project, whether or not you believe the position is based on legitimate or illegitimate principles, you have a conflict of interest requiring recusal.

v. City of Newport Beach, 233 Cal.App.4th 1012, 1021-22 (2015) (holding that a council member's public pre-hearing opposition to a commercial use permit disqualified him from later voting on the issue when it was before the city council); *Nasha v. City of Los Angeles*, 125 Cal.App.4th 470, 483 (2004) (holding that the prehearing bias of one planning commission member sufficed, by itself, to invalidate a planning commission decision that had overruled a city planning director's approval of a project). Indeed, the collective weight of the evidence on this subject proves that you are, in fact, actually biased against the Project.

But as you surely know, your recusal stems from the fact that you have long opposed the Project, even though you did not actually admit that fact during your statement reporting out from closed session or even acknowledge that you do have a common law conflict of interest because of that opposition, and you have now been quoted *denying* you have "an improper bias or motive towards the project." The objective facts do not support that statement, however. In what is now your public life as a duly-elected local official with various new legal obligations, in the eyes of the law you are, at a minimum, "unacceptably" biased against the Project. Given the conflict of interest that led to—and required—your recusal now that you have been elected and taken the oath of office, the law does not contemplate a future role for your ongoing Project opposition.

In our prior correspondence on the issue of your common law conflict of interest we explained that your recusal must be total and include open meetings and closed sessions, formal and informal meetings, or conversations with other City officials and staff, and otherwise, and it must include a public statement that you have recused. We also explained that, once recused, you cannot even resume your role as a private citizen Project opponent. We stand by these conclusions.

Unfortunately, however, in finally announcing your recusal publicly, you did not simply close this unfortunate chapter and avoid any possibility anyone could reasonably think you might want to improperly influence your City Council colleagues. Instead, you doubled down by articulating a continuing role you believe you can play opposing the Project in your private capacity as if you "merely" had a *financial conflict of interest*, notwithstanding the constitutional bar against your doing so as a City official with a *common law conflict of interest*. But these are not analogous conflict of interest doctrines.

As you may know, the Political Reform Act ("PRA") (Gov't Code § 87100 *et seq.*) and FPPC regulations (2 Cal. Code Regs. § 18110 *et seq.*) generally prohibit officials from making, participating in making, or using his or her position to influence a governmental decision in which the official has a "financial interest." The PRA and FPPC regulations also provide certain exceptions that under certain circumstances allow *financially conflicted* officials to engage in certain prescribed activities notwithstanding the otherwise disqualifying conflict. Those exceptions are interpreted narrowly, however, and there is nothing we are aware of in the Political Reform Act, FPPC regulations, or FPPC advice letters that allows or purports to allow an official with a disqualifying

common law conflict to nevertheless undertake certain activities as a private citizen once he or she has recused.⁵

Contrary to the *statutory* and *regulatory* requirements regarding *financial conflicts* of interest—which we will address in detail in a separate letter if necessary—the *Constitution* does not allow biased officials with *common law conflicts* to participate in the land use permitting process in either their public or private capacities, and most certainly not before the very agency from which the law mandates their recusal. Indeed, we can find no case where an official in your position, who is disqualified based on impermissible bias, whether probable or actual, has nevertheless been allowed to act privately to oppose a project seeking discretionary, adjudicative land use entitlements. See *Beck Development Co. v. Southern Pacific Transportation Co.*, 44 Cal.App.4th 1160, 1188 (1996) (“In considering the applicability of due process principles, we must distinguish between actions that are legislative in character and actions that are adjudicatory . . . Quasi-legislative acts are not subject to procedural due process requirements while those requirements apply to quasi-judicial acts regardless of the guise they may take.”). The notion is antithetical to our clients’ constitutional rights to procedural due process, outside the scope of the indemnities established in the Government Claims Act (see, e.g., Gov’t Code § 825), and we are unaware of any legal authority that provides a “safe harbor” for any Project opposition you may elect to undertake privately now that you have recused yourself due to a common law conflict of interest resulting from prior opposition to and resulting pre-judgment of a project seeking adjudicative land use approvals. The likely reason for this absence of authority is that few recused governmental officials in such circumstances would take such chances.

For the foregoing reasons, we hereby inform you that, in our opinion, should you attempt to rally opposition to the Project or oppose the Project in any future public meeting or hearing in the face of the conflict of interest that led to your recusal, particularly if you are successful, such activities would unlawfully infringe our clients’ rights to procedural due process, in violation of various laws, including the Fourteenth Amendment to the U.S. Constitution, section 1983 of the Civil Rights Act of 1871, and Article I, Section 7 of the California Constitution. We thus encourage you to reconsider any decision to oppose the Project, even by potential reference to the FPPC rules that provide limited exceptions to the general rule requiring disqualification of *financially conflicted* officials under circumstances not applicable here, now that you have recused yourself due to a *common law conflict* stemming from your many years opposing the Project before your election. If you are aware of any on-point, controlling authority creating any exception to the common law conflict of interest recusal requirement,

⁵ In fact, we note that there is a far more relevant body of law in cases such as *Morongo Band of Mission Indians v. State Water Resources Control Bd.*, 45 Cal.4th 731, 739–740 (2009), which address a party’s due process right to a fair and impartial decision maker in a quasi-judicial administrative proceeding, hold that an agency’s staff may not act so as to create either the unacceptable risk of, or actual, bias by such a decision maker, and require separation of prosecutorial functions from advisory functions during such proceedings. Those cases provide extensive analysis of the due process rights afforded to party’s in such proceedings and do not provide any exceptions to the “separation of functions” requirement. Similarly, we are aware of no exception to the recusal requirement that applies when a common law conflict of interest creates the appearance of bias in quasi-judicial land use proceedings.

Susan E. Candell
March 18, 2019
Page 5

particularly from the United States Supreme Court, the Court of Appeals for the Ninth Circuit, the California Supreme Court, or any California Court of Appeal, we invite you to share it with us.

Sincerely,

MILLER STARR REGALIA

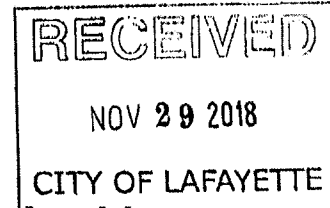


Bryan W. Wenter, AICP

BWW:kli

cc: Robert B. Hodil, Esq.
Honorable Mayor Cameron Burks and City Councilmembers
Niroop Srivatsa, Interim City Manager
Greg Wolff, Acting Planning Director
Dennis O'Brien
Caryn Kali
Dave Baker
Allan Moore, Esq.
Arthur F. Coon, Esq.

Susan Candell



City of Lafayette Code of Ethics/Conflict Avoidance for City Council Members

Preamble

The proper operation of democratic government requires that decision-makers be independent, impartial and accountable to the people they serve. The purpose of this Code of Ethics/Conflict Avoidance is to promote and maintain the highest standards of personal and professional conduct in the City's government. Because we seek public confidence in the City's services and public trust of its decision-makers, the City Council adopts and pledges to follow this Value-Based Code:

Fairness

As a representative of the City of Lafayette, I am fair and impartial.

In practice:

- I support the public's right to know and promote meaningful public involvement.
- I treat all persons, claims and transactions in a fair and equitable manner.
- I make decisions based on the merits of the issue and in compliance with applicable laws and regulations.
- I am transparent regarding the public contacts I have and any prior opinions I may have regarding an issue facing the City.

Honesty and Integrity

As a representative of the City of Lafayette, I act with honesty and integrity.

In practice:

- I am prepared to make unpopular decisions when my sense of the public's best interest and/or controlling law requires it.
- I take responsibility for my actions, even when it is uncomfortable to do so.
- I give credit to others for their contributions to moving our community's interests forward.
- I adhere to standards of conduct and the avoidance of conflict of interest, and the appearance of conflict. I ask my fellow officials, staff and commissioners to follow these standards.
- I honor my commitments to the public.
- I comply with the spirit and letter of all applicable laws and City policies involving my service and campaigns.

Responsibility

As a representative of the City of Lafayette, I act in a responsible manner.

In practice:

- I do not use public resources, such as agency staff time, equipment, supplies or facilities, for private gain or personal purposes.
- I make decisions after prudent consideration of their financial impact, taking into account the long-term financial needs and stability of the City.
- I come to meetings prepared.
- I make myself available equally to meet with people having different opinions from one another.
- I recognize that at times I am acting in a legislative manner, such as when the Council is considering an ordinance, and at other times in a quasi-judicial manner, such as when Council is reviewing a land use application. I will use an analytical and decision-making approach appropriate for different occasions. For example, I may sponsor and/or express a position either for or against an ordinance while also taking into account new information that may be offered. When reviewing a land use application, I will wait until all information is presented before determining whether I can or cannot make the findings required to approve the application or announcing my preferences regarding the application.

Vision

As a representative of the City of Lafayette, I look to the future when making decisions.

In practice:

- I promote intelligent and thoughtful innovation to achieve the City's mission and policies.
- I consider the broader regional and statewide implications of the City's decisions and issues.
- I try to influence federal, state, and regional policies so they are consistent with the City's.
- I understand change can be part of the innovative process.

Respect

As a representative of the City of Lafayette, I respect my fellow officials, staff and the public.

In practice:

- I treat my fellow officials, staff and the public with patience, courtesy and civility, even when we disagree.

- I focus on the merits in discussions of issues; not personalities, character or motivations.
- I solicit and listen to the views of my fellow officials, staff and the public before making a decision.

I have read, understand and will adhere to this code of ethics/conflict avoidance when acting as a candidate for City Council or as a Council member.

Susan E. Candell

Signature

Susan Candell

Name (print, please)

11/29/18

Date



Print this page

Published March 6th, 2019

Candell to recuse from Deer Hill project, three others reject call to recuse

By Pippa Fisher

The Feb. 25 city council meeting got off to a somewhat scripted start with four of the five city council members reading statements - one recusing herself and three others stating their intention not to recuse - as advised by legal counsel on any future discussion or decisions on the Terraces project.

The Terraces, the controversial 315-unit apartment project on a 22-acre parcel on Deer Hill Road, is expected to come before the city for approval this spring.

The development was first proposed in March 2011 but its application was suspended in 2014 in favor of alternative plans for a scaled back development of 44 single-family homes, a dog park, a playing field, a playground and tot lot. Local preservationist group Save Lafayette sued the city resulting in a referendum last June on the future of the revised project. With the defeat of Measure L, the developer O'Brien Homes resumed the original application for the apartments.

The council members' statements were read during the report from the closed session meeting and came following a barrage of letters from the developer's attorney Bryan Wenter of Miller Starr Regalia calling for Council Member Susan Candell to recuse herself from all matters concerning the Terraces, citing as a conflict her "long history actively opposing our clients' proposed 315-unit affordable apartment project in Lafayette and even expressing personal hostility to our clients," in a letter to the city's attorney Robert Hodil of Coblenz, Patch, Duffy and Bass dated Dec. 5, 2018.

Candell, whose springboard to running for office was her involvement opposing first the apartments and then the homes, expressed great disappointment as she announced her recusal on the advice of her private attorney but noted that she retained the right to speak as a member of the public.

Candell pointed out after the meeting, "I was the number one vote getter, but yet, I'm now in the position that I am advised that I cannot represent Lafayette residents in a very important land use decision. I cannot express my disappointment enough."

Candell said that she worked hard to try to retain her rights to not recuse. "I believe my positions were and are based on legitimate principles and that I do not have an improper bias or motive towards the project. I also worked equally as hard to retain my rights to participate as a citizen, which they also tried to take away. According to the FPPC, I did retain my private citizen rights similar to those I would have if I had a financial conflict (which I do not have). I will work within these limitations. However, I will also retain my rights to consider and pursue all legal options."

Following Candell's announcement, Vice Mayor Mike Anderson, Council Member Teresa Geringer and Mayor Cam Burks all read identical statements that during the closed session they gave consideration to claims (made by a letter from Save Lafayette) that they should also recuse themselves and said that after consultation with the city's attorney they do not believe there is any reason to do so.

Save Lafayette contends that, based on the logic given that Candell should recuse, Burks' involvement as chair of the 'Yes on Measure L' campaign and Geringer's and Anderson's endorsement and support of the campaign should by the same token require their recusals.

In fact, says Candell, "The letter from Save Lafayette argues that this entire process is biased because the three other council members were not also forced to recuse, even though they worked very closely for a long time with the developer on Measure L.

'Letters were written describing residents' dissatisfaction with council in this matter, which has done absolutely nothing to help support their fellow council member, me, during this process," says Candell.

In a follow-up letter from Wenter to Hodil dated Feb. 28 in which the attorneys address what they describe as Candell's 'material animosity' to the developer citing specific posts from social media, the developer's attorney expresses deep concern that Candell intends to retain her right to speak as a private citizen and requests the name of her personal attorney.

The letter states, "We are deeply concerned about the role Council Member Candell apparently believes she can play opposing the project even as a private citizen, notwithstanding her acknowledged conflict of interest affecting our clients' due process rights, and will address that critical issue separately."

Burks said that it would not be appropriate for him to comment on anything related to city council closed session.

Reach the reporter at: pippa@lamorindaweekly.com

[back](#)

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Attachment 5

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... continued on Page A9

Council to keep talking gas safety; plans second meeting with PG&E, community and CPUC



Photo Pippa Fisher

Bollards remain in place where PG&E has been working to bury exposed pipeline along the Lafayette-Moraga Trail.

By Pippa Fisher

The Lafayette City Council spent a short time at their Feb. 25 meeting discussing next steps in the formation of a safety task force and what exactly that might look like. The subject will be on the March 11 meeting agenda.

Gina Dawson, co-founder with her husband Michael Dawson of Save Lafayette Trees, was disappointed that the item was included in the February meeting only as a continuation on the consent calendar.

SLT, a local organization which formed in 2017 in an attempt to stop Pacific Gas and Electric Company's planned tree removal program, which the utility wants to do as part of their Pipeline Safety Initiative since it claims the roots damage underground high transmission pipes and hinder emergency access, has been pushing for the formation of a safety task force with the idea that it would work with the city, the utility and the California Public Utilities Commission. Initially SLT involvement centered around planned tree removal, but it led the Dawsons to be increasingly concerned about a wider scope of pipeline safety issues. SLT is currently suing the city and the utility.

But should the city form a task force headed by the people who are currently suing them? What would such a task force

look like?

City attorney Mala Subramanian advised against having members of SLT on such a task force. And Mayor Cam Burks advised caution regarding the city taking it upon themselves to set up any type of regulatory body.

"The Dawson's have done a lot for the community in this space, and I am grateful for their efforts," Burks said later, but added, "We need to be careful as a city to not represent ourselves – or even give the appearance of representing ourselves – as an oversight or regulatory body when it comes to pipeline safety as we don't have the subject matter expertise to do so, and we certainly don't have a state mandate or authorities as a regulatory body in this space."

Gina Dawson is frustrated. "The city's consistent kicking of the pipeline safety can down the road is frustrating," she said. "The news ... from the city attorney that Save Lafayette Trees members could not be appointed to the task force because of pending litigation was surprising as this item has been on the agenda for many past council meetings. We sent initial purpose and proposal to the city a month ago and we've been discussing draft charters for the task force in good faith with Vice Mayor Mike Anderson since last summer – we're appreciative of his efforts."

... continued on Page A10



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Lamorinda Home Price Comparison Between 2017 & 2018

	ORINDA		LAFAYETTE		MORAGA	
	2017	2018	2017	2018	2017	2018
TOTAL HOMES SOLD	243	281	313	300	165	131
LOWEST PRICE SOLD	\$650,000	\$706,000	\$740,000	\$675,000	\$745,000	\$800,000
HIGHEST PRICE SOLD	\$3,900,000	\$12,250,000	\$6,500,000	\$7,800,000	\$2,750,000	\$3,500,000
AVERAGE SALES PRICE	\$1,617,000	\$1,730,000	\$1,625,000	\$1,737,000	\$1,391,000	\$1,489,000

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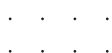
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Downtown Orinda



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Lamorinda Catholic churches not immune from sexual predator clergy

By Nick Marnell

Three Roman Catholic priests who served as associate pastors at Lamorinda parishes appeared on a list of clergy “credibly accused of sexual abuse of minors,” released Feb. 17 by the Diocese of Oakland. Two of the priests worked at the Church of Santa Maria in Orinda and one had been assigned to St. Monica Church in Moraga. Allegations of sexual abuse of minors had been charged against at least one other priest who served in a Lamorinda parish, but though named in the Oakland report as credibly accused, he was not listed as having worked in Lamorinda.

According to information provided by the diocese, Robert Freitas served at St. Monica

from June of 1988 until March 1990, Gary Lagasse worked at Santa Maria in 1972 and Gary Tollner was assigned there in 1971-72. All three had been credibly accused of sexual abuse of minors.

“My first reaction in seeing the list of names of priests who have abused, is one of deep shame. These are monstrous crimes, committed by priests who are supposed to model virtue and grace, not sin and harm. By publishing this list, I am making an ‘Act of Contrition’ on behalf of my Church,” Bishop Michael Barber said in a statement.

Robert Ribeiro appeared in the diocese report but it made no mention of his 1971-80 tenure at St. Perpetua Church in Lafayette, where he was listed as having served in a 2018 report

on clergy sexual abuse in the Bay Area. The report was compiled by the Minneapolis law firm Jeff Anderson and Associates, which represents clergy abuse victims.

Three of the accused Lamorinda priests have died and in 2008 Lagasse was excommunicated, the most severe penalty administered by the Catholic Church. A fifth priest, who worked three assignments in the 1980s at Saint Mary’s College in Moraga and had been accused of fondling an altar boy, had the charges dismissed in 2017, according to the Catholic Sentinel.

“There has been no credible incident of abuse of a minor by a priest or deacon of the Diocese of Oakland since 1988. I can assure that today, no priest or deacon who is in active ministry in the Diocese of Oakland has a

credible allegation of abuse of a minor,” Barber said.

Officials of the Survivors Network of those Abused by Priests called the publication of the list a good first step, but said that the diocese still lacked transparency. “What the diocese should provide are not only all of the names of all who lived or worked in the diocese who are accused, but also their specific work histories, when the diocese first learned of the abusive behavior, and their actions towards that priest to limit the damage he caused then and could cause in the future,” Northern California SNAP representative Dan McNevin said.

The organization explained that, according to government

and law enforcement statistics, the average clergy abuse victim does not come forward until 30 or more years have passed. “If no one has come forward yet in the Lamorinda area, that does not mean that no children were molested there,” SNAP Northwest Leader Joey Piscitelli said. “I’ve talked to numerous clergy sex abuse victims that waited much longer than 30 years to come forward, and I urge anyone in the Lamorinda area who is ready to come forward to contact police.”

None of the priests named in this article had been accused of sexual abuse of minors while serving in the Lamorinda parishes.

Letters to the editor

A matter of education

In the February newsletter the MSD superintendent Bruce Burns cites the need to pay for teacher pensions as the primary reason the district must limit other spending. He thanks the Moraga Education Foundation for supporting, art, music and PE programs and he gives as an example of cost control a reduction in special education.

So in Moraga climbing walls, and trombones are more important than the disabled students, who after all really don’t use them and probably won’t have important lives anyway. Is that how it is Mr. Burns? Cut the funds for those who have no options so that you can fund the latest educational fad or not take heat from the sports fans?

How mean spirited, how selfish to put the these things above giving help, kindness and the best opportunity possible to a group of our chil-

dren who need our care and protection. How we treat, how we care for, those less fortunate is the mark of our humanity. A donation for a climbing wall or a computer for your already well off children is just plain selfish when even one of our children carries a lifetime burden that we could ease in anyway.

David Gow
Moraga

Understanding destructive California fires – more than ignition sources

In the editorial, “Camp Fire revelation is last straw; PG&E must be replaced” (March 1), the Bay Area News Group again demonstrates it’s extreme bias against PG&E and its limited understanding of the complex issues surrounding the destructive California wildfires. It is overly simplistic and disingenuous to blame the utility for the terri-

ble California fires even if ignition sources are substantiated.

Ignition sources are part of the equation. There are many other reasons why the California fires caused loss of life and were so destructive, besides ignition sources. Prolonged severe droughts, spontaneity, extremely high intensity of the fires, climate engineering, and other anthropogenic causes were major contributors. These other factors need to be analyzed and understood. Most, if not all of these other factors, are not within the purview of PG&E.

Claiming that the utility “... cannot continue to exist in its current form” presupposes that the editors have the knowledge, experience and “knowhow” to address these complex issues. Clearly, they do not.

Chris Knief
Orinda

Opinions in Letters to the Editor are the express views of the writer and not necessarily those of the Lamorinda Weekly. All published letters will include the writer’s name and city/town of residence – we will only accept letters from those who live in, or own a business in, the communities comprising Lamorinda (please give us your phone number for verification purposes only). Letters must be factually accurate and be 350 words or less; letters of up to 500 words will be accepted on a space-available basis. Visit www.lamorindaweekly.com for submission guidelines. Email: letters@lamorindaweekly.com; Regular mail: Lamorinda Weekly, P.O.Box 6133, Moraga, CA 94570

Candell to recuse from Deer Hill project, three others reject call to recuse

... continued from Page A3

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Burks said that it would not be appropriate for him to comment on anything related to city council closed session.

Lafayette BART-owned land

... continued from Page A2

In response to a question from Council Member Steven Bliss, Thorne-Lyman said that the bill requires rezoning all BART-owned land even if they have no plans to develop.

Burks considers this very good news for Lafayette, explaining that in his meeting, “I

once again reiterated to the BART general manager that Lafayette is not anti-development – that we are for smart, controlled growth in our downtown core area that involves high-density units, including affordable housing, near our public transportation – and that we have a strong, proven track record to

show we have been successful in this space. I indicated that we are against Sacramento stripping our local control in the land use and development space – as AB 2923 does – because we do indeed know how to grow in an appropriate way; a way that addresses and does our part vis-à-vis the Bay Area housing crisis.”

Moraga Library HVAC woes continue

... continued from Page A4

Woehleke recommended that, in the future, the library purchases a system with less bells and whistles to fix.

Korpus will ask her husband, an electrical engineer, to take a look at the boiler and possibly provide some diagnostic answers.

During the public com-

ment portion, Friends of the Library Board Member Jane Low cited additional existing maintenance issues. “The library is an old building. It’s not at the top of everybody’s list for maintenance. My concern is unless you make a lot of complaints, nobody really pays a lot of attention to it. I urge you to pay more attention to the library.”

The town council unanimously gave the town manager authorization to use funds in the Minor Capital Improvement Program not to exceed \$40,000 toward the Moraga Library HVAC repairs.

The library will remain open during the repair process, which is expected to be completed by mid-April.

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Attachment 6

Susan Candell
City of Lafayette City Councilmember



January 31, 2019

Dear FPPC Representative,

I'm Susan Candell, a first-time elected City of Lafayette City Councilmember. We have many development projects ongoing in our city, and there is one that the developer's attorney has submitted letters requesting that I recuse myself from further involvement with this project.

The brief history of the project:

2010-2013: Proposed 'Terraces' project, 315 apartments protected under the Housing Accountability Act

2013-2018: Proposed 'Homes at Deer Hill' project, 44 single family homes, sports field, tot lot, dog park. This project was created and presented as a joint effort between the developer and the City of Lafayette. Referendum from 'Save Lafayette' to allow residents to vote on the Homes project went to trial and was supported by the Appeals Court in January 2018. The City put Measure L on the June 2018 ballot, and Lafayette residents voted against the Homes project in June 2018.

June 2018 – today: A 'Tolling Agreement' signed between the developer and City dating back to 2013 to allow the original 'Terraces' project to re-start, and is now being processed by the City.

I have been working with a newly hired Attorney Rob Hodil for the City of Lafayette and his recommendation appears to be that I should recuse myself. Many of the allegations made in their multiple letters he admits can be dismissed as they were only regarding the 'Homes' project which is no longer an issue, but he still recommends recusal. But that is not my question – **please read on.**

My history with this project is that I'm a nuclear engineer by education and profession, and have been reading many of the EIR's for projects around the city, and I have done my best to ensure that our residents are protected from adverse health and safety impacts from *any* sources. The residents have rights, even under the HAA, and now under the recent Supreme Court decision in the *Fresno vs. Sierra Club* in terms of the methods for mitigating impacts involves 'proving' mitigation methods. I did make my position clear during the Measure L (Homes) campaign that I supported the Housing (44 single family homes), but the sports field and tot lot locations were validated by the Bay Area Air Quality Management District (BAAQMD) as unsafe as they are right next to Highway 24 and Pleasant Hill Road, a regional route of significance. Like my history shows, I have been doing my best to ensure residents are protected from adverse health and safety impacts, and therefore could not support the Homes project when it included the sports field and tot lot.

One of the complications in this issue are that 3 other sitting Councilmembers were campaigning FOR the Homes project, and were Co-Chair and campaign spokespeople for the campaign. They worked with the developer and their hired campaign manager, and were active in community and personal events promoting their support of the Homes project (Yes on Measure L).

Save Lafayette submitted a letter arguing that under *Horn v. County of Ventura*¹, that not only myself, but these other 3 council members have also presented at least the appearance of bias for both projects and the developer for this property.

So my questions for you are below:

1. The developer's attorney Miller Starr Regalia argue that I have a 'conflicts of interest', but I do not have a monetary conflict which is the typical conflicts of interest, but rather a 'perceived bias' against the project. If I do recuse myself, do I have the rights to return as a 'resident of Lafayette' to participate under my First Amendment rights as a US Citizen or other rights as a resident in front of Council on this manner?

2. Our sitting council members participated WITH the developer on Measure L, stating their rights as residents to participate. Why is different to my rights as a resident both before my campaign and during my campaign in terms of bias either for or against this project and/or the developer?

3. Does the fact that the three other council members efforts result with the conclusion that was stated by Save Lafayette:

"The result, of course, is that four, and possibly five, of the Councilmembers have potential conflicts and a probability or appearance of bias on the grounds originally asserted by O'Brien. This results in the absence of a quorum or ability to conduct business and hearings on O'Brien and the Deer Hill property. This, in turn, invokes and leads to the so-called Rule of Necessity or Rule of Legally Required Participation, found in both California case law and the California Government Code."

Please read the attached letters regarding previous FPPC statements on similar topics. The letter regarding the Las Alamitos Councilmember's participation (14022) as a resident after recusal seems to address the issue raised in question #1. The other letter (16049) is a more recent letter regarding the Rule of Necessity.

Thank you for reading this letter, and I truly would appreciate your prompt response regarding whether or not any of these questions can be pursued. And if they can be pursued, can you

¹ The California Supreme Court has made abundantly clear that administrative due process protects other landowners and citizens whose property rights can be affected, including the right to an impartial hearing. *American Tower v. City of San Diego* (9th Cir. 2014), citing *Horn v. County of Ventura* (1979) 24 Ca1.3d 605,612,617. The City has a due process obligation to other landowners and citizens, including "a duty to hear their views, and a duty to consider the proposed development with respect to its effect on *all* neighboring property owners." *Scott v. City of Indian Wells* (1972) 6 Ca1.3d 541, 549 (emphasis in original).

please let me know if you need more information and/or what steps can be taken to get a written statement from you regarding any or all of the questions above?

Thank you so much, and thank you again for your service!

Signed,

Susan Candell

City of Lafayette City Councilmember, elected Nov 6, 2018