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December 21, 2018

Cupertino City Council
City Hall
10300 Torre Ave.
Cupertino, CA 95014

Re: Conflict of interest allegation directed against city council members.

Dear Council Members:

I am writing on behalf of my client, the Better Cupertino Action Committee (“Better Cupertino AC”) in response to letters sent to the City by attorneys representing Vallco Property Owner LLC and related entities¹, (collectively, “Vallco”). The letters allege that several City Council members have conflicts of interest in regard to the Vallco Shopping District site in Cupertino. The allegations concern litigation against the city by Friends of Better Cupertino and others, and several referendum petitions supported by the Better Cupertino AC that have been certified as sufficient by the County Registrar of Voters and are being brought before the City Council for action pursuant to Elections Code § 9237. Both of these matters concern approvals given by the city prior to the November elections.

Vallco’s allegations have the obvious aim of keeping the City Council majority created by the November election from undoing the approvals the city gave prior to the election. Sand Hill obviously also wants to prevent the new Council majority from settling the litigation challenging the prior approvals, despite evidence indicating that the litigation is well-founded, and that, if it is successful, the city would pay dearly in attorneys’ fees.

To summarize the gist of this letter, Vallco’s allegations are unfounded. As will be explained in more detail below, none of the current City Council members have a conflict of interest or conflict of position requiring them to recuse themselves from participating in the discussion or voting on any of the matters addressed in Vallco’s letters. Nor does any conflict of interest or position require that any current Council members refrain from participating in Council closed sessions on any of the litigation matters involving Sand Hill.

THE BASICS OF CONFLICT OF INTEREST/POSITION

Conflict of interest and conflict of position are two closely related concepts involving when public officials can participate in and vote on matters pending before a public agency. The basic concept is that public officials owe their primary allegiance to

¹ Those entities include Sand Hill Property Company, which is shown on a Fictitious Business Name statement filed with Santa Clara County as being, in reality, Mr. Peter Pau of Atherton, CA. (A copy of that statement is attached to this letter.) Mr. Pau is also identified on official public documents as a partner or manager of Vallco Property Owner LLC and other related entities.

the public entity they serve and its constituents. If some other interest, financial, personal, or otherwise, would pull them in a different direction, they must disclose that interest and, if it might affect their decision, recuse themselves from participating as a public official. Similarly, if an official occupies a position in an organization, public or private, whose purposes or positions might regularly conflict with his/her duty as a public official, he/she must choose which organization is more important to him/her and resign from the other, conflicting, position.

However, it is important to distinguish between a public official's actions in *administrative* (or "*quasi-judicial*") versus *legislative* matters. Conflict of interest standards are very different for the two types of proceedings.

In administrative matters, when the official is making decisions based on an existing policy framework, the official's position is analogous to that of a judge. He/she is evaluating evidence as an unbiased, neutral, arbiter and then making a decision, measuring that evidence against the applicable policy standards.

Because *administrative* decisions require an unbiased evaluation of evidence, conflict of interest/position standards are stringent. If a public official has an interest, be it financial, personal, or otherwise, or occupies a position (e.g., as an officer of an organization, public or private) that would tend to pull the official away from being a neutral arbiter, conflict of interest laws and regulations can require that the official recuse him or herself from participating as a public official.

In legislative matters, by contrast, the official is making policy to guide current and future officials in their decision-making. In that role, the official is more like a legislator than a judge, and the official need not, and often will not, be neutral. Indeed, policy-making, by its very nature, requires officials to use their best judgment in choosing policies that will be most beneficial for the agency and its constituents. The choices involved are often subjective and can involve a variety of public policy as well as political factors.

Because *legislative* matters involve making, rather than implementing, policy, conflict of interest/position standards are much more limited. A public official cannot participate in a legislative decision if that decision could result in a significant direct financial benefit to the official that is significantly different from the corresponding benefit to the general public.

For example, an official must recuse him/herself from the agency's consideration of a zoning amendment affecting a specific area if he/she owns property within the area whose value would be affected by the zoning change. Similarly, an official cannot be involved in a zoning decision if he/she is an owner or officer of a *business entity* that would be *financially* affected by the zoning change. Under FPPC regulations, a financial interest is also presumed if the official owns property within *500 feet* of the area involved.

For a *conflict of position*, the positions in the two entities would need to predictably create a conflict in the official's policy choices. For example, an official could not, *at the same time*, be an officer of an organization that was dedicated to promoting more industrial development in the city and also sit on the city council or planning commission, which must make decisions affecting the locations and intensity of industrial development within the city.²

² While a person may continue to support an organization's policies after leaving its governing board, that person would no longer have *duty of loyalty* to the organization or its policies. Hence there would no longer be any conflict of position.

APPLICATION TO THE CURRENT SITUATION

Referendum Petitions: The city council has currently pending before it several city referendum petitions that have been certified by the county registrar of voters as being qualified for placement on the ballot. The council has to address several issues for these petitions. The major choice before the council, under Elections Code Sections 9237 and 9241, is to either vote to repeal the legislative actions involved, or to place them on the ballot for a vote of the people of Cupertino.

Secondarily, Vallco has asserted that some of the referendum petitions are defective because they do not substantially comply with the Elections Code's requirements. The Council must decide whether it agrees with Vallco's assertions. If the Council agreed, it would, *after* placing the measures on the ballot, file suit in Superior Court seeking to have the court remove the measures from the ballot. (See, *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924.)³ If the Council did not agree, it would be up to Vallco, or some other party, to bring a court challenge.

Both of these decisions involve legislative, as opposed to administrative, matters. Consequently, only narrow conflict of interest/position provisions apply. Council members would need to recuse themselves if they had a direct financial interest in the subjects of the referenda. Thus, for example, any council members who had a financial interest in Vallco, or in a property within 500 feet of the area involved in any of the referended actions, would need to recuse themselves. Based on the information in the Statements of Financial Interests filed by the current council members, it does not appear that any council members have such an interest.

There would be a conflict of position if any council members were a *current* officer or decision maker in an organization involved with either Sand Hill or a group sponsoring the referenda. While some current council members have, in the past, been involved with either Better Cupertino AC, Friends of Better Cupertino, or Better Cupertino itself, none of the current city council members is now a board member or decision maker in any of those organizations. Thus, contrary to the representations of Vallco's attorneys, none of the current council members need to recuse themselves from any decision involving the referenda.

Current litigation against the city: Two lawsuits are currently pending against the city involving city approvals for Vallco's projects. Both lawsuits were brought by Friends of Better Cupertino and certain individual citizens. Vallco's attorneys have asserted that, because some current council members were active in opposing Vallco's projects, they have a conflict of interest that precludes them from attending closed sessions on the lawsuits or participating in council decisions involving the lawsuits. These assertions are baseless.

Litigation defense is neither a legislative nor a quasi-judicial activity. What it involves is the legal defense of the best interests of the city and its citizens. As such, the crucial question is whether there is a conflict of interest that would adversely affect a council member's duty to defend the city's interests. Impartiality is not an issue.

There are certain narrow categories of interests and positions where a council member would need to recuse themselves from involvement in the city's litigation decisions. First, a council member may not be an officer or decision maker in an

³ In *California Cannabis Coalition*, the California Supreme Court explicitly disapproved of a City Council or city official attempting to unilaterally refuse to place a measure on an election ballot.

adverse party in the litigation. The only applicable adverse party is Friends of Better Cupertino. As already stated, no current council member is an officer or decision maker in that organization. The other category of excluded interest is having a direct financial interest in the subject of the litigation. Since the litigation involves the city approvals given to Vallco's projects, the prohibited financial interests would be an interest in Vallco Property Owner LLC, the property owner. As already noted, no current council member has such a financial interest. Consequently, no council member is required to recuse themselves from closed sessions on the litigation or council decisions involving that litigation.

CONCLUSION

Contrary to the arguments made by Vallco's attorneys, there are no legal impediments to any of the city's current Council members fully involving themselves in the Council's discussions and determinations involving the approvals related to Vallco's projects.

Most sincerely



Stuart M. Flashman

cc: (via e-mail)

Acting City Attorney
Interim City Manager
City Clerk

SEE BACK SIDE FOR INSTRUCTIONS

Fictitious Business Name (FBN) Statement (includes registration of 1 business name, 1 or 2 registrants and 1 certified copy)..... \$40.00
Each additional business name and/or registrant (must have the same business address and registrant) on the same statement \$7.00

Filed in County Clerk's Office
Regina Alcomendras
Santa Clara County - Clerk-Recorder
FBN631951
07/13/2017
FBN
Pages: 1
Fee: \$40.00
Exp: 07/13/2022
By tsantos, Deputy

FICTITIOUS BUSINESS NAME

FILED WITH THE COUNTY CLERK-RECORDER OF SANTA CLARA COUNTY ON THE DATE IDENTIFIED ON THE FILING LABEL

The following person (persons) is (are) doing business as: (Use the ADDENDUM page to list additional fictitious business names.)

1. FICTITIOUS BUSINESS NAME
SAND HILL PROPERTY COMPANY

2. at: (DO NOT USE P.O. BOX, PRIVATE MAIL BOX ADDRESSES)
STREET ADDRESS OF PRINCIPAL PLACE OF BUSINESS CITY STATE ZIP COUNTY
965 PAGE MILL ROAD PALO ALTO CA 94304 SANTA CLARA

If the principal place of business identified in #2 above is not in Santa Clara County, a current fictitious business name statement for the fictitious business name(s) identified in #1 above shall be on file at the above-identified County that is the principal place of business. If applicable, please complete #3 below:

3. THE PRINCIPAL PLACE OF BUSINESS IS IN COUNTY AND A CURRENT FICTITIOUS BUSINESS NAME STATEMENT IS ON FILE AT THE COUNTY CLERK-RECORDER'S OFFICE OF SAID COUNTY.

This business is owned by: (An asterisk (*) item requires proof of registration with the California Secretary of State's Office)

4. AN INDIVIDUAL AN UNINCORPORATED ASSOCIATION OTHER THAN A PARTNERSHIP MARRIED COUPLE A GENERAL PARTNERSHIP JOINT VENTURE STATE OR LOCAL REGISTERED DOMESTIC PARTNERS A LIMITED LIABILITY COMPANY A TRUST * LIMITED LIABILITY PARTNERSHIP A CORPORATION COPARTNERS

The name and residence address of the registrant(s) is (are): (DO NOT USE P.O. BOX, PRIVATE MAIL BOX ADDRESSES)
NOTE: General Partnerships, Copartnership, Joint Venture, Limited Liability Partnership, Unincorporated Association, and Limited Partnership - Insert name and residence address of each General Partner, Trusts - Insert the full name and resident address of each trustee; Limited Liability Company and Corporation - Insert full name and address of Limited Liability Company or Corporation as registered with the California Secretary of State's Office; State or local registered Domestic Partners - Insert full name and residence address of each Domestic Partner.
USE THE ADDENDUM PAGE TO LIST ADDITIONAL NAMES AND ADDRESSES

5. NAME ADDRESS CITY STATE ZIP
PETER PAU 267 ATHERTON AVENUE ATHERTON CA 94027

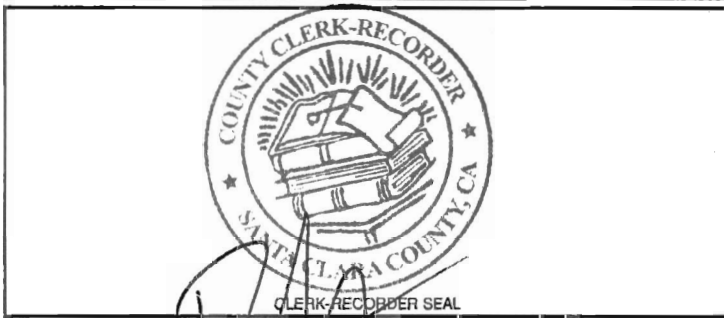
NAME ADDRESS CITY STATE ZIP

Registrant began transacting business under the fictitious business name(s) listed above on:

6. DATE: MARCH 1, 2017 NOT APPLICABLE

This filing is a:

7. First Filing (Publication Required)
Refile of previous file # (check appropriate box, below)
Refiled prior to expiration or within 40 days past expiration, with NO CHANGES
With changes (Publication Required)
After 40 days of expiration date (Publication Required)
Due to publication requirement not met on previous filing (Publication Required)



I hereby certify that this copy is a correct copy of the original Fictitious Business Name Statement on file in my office.
Regina Alcomendras, Santa Clara County Clerk-Recorder
By VEE REED, Deputy
Dated: OCT 30 2018

8. I declare that all information in this statement is true and correct. (A registrant who declares as true information which he or she knows to be false is guilty of a crime.)
SIGNED X PRINTED NAME PETER PAU
If a CORPORATION, LIMITED LIABILITY COMPANY, LIMITED PARTNERSHIP or LIMITED LIABILITY PARTNERSHIP, the following must be completed:
ENTITY NAME TITLE / CAPACITY OF SIGNER
ARTICLE / REG # (from CA Sec of State's Office) ABOVE ENTITY WAS FORMED IN THE STATE OF

NOTICE - IN ACCORDANCE WITH SUBDIVISION (a) OF SECTION 17920, A FICTITIOUS BUSINESS NAME STATEMENT GENERALLY EXPIRES AT THE END OF FIVE YEARS FROM THE DATE ON WHICH IT WAS FILED IN THE OFFICE OF THE COUNTY CLERK, EXCEPT, AS PROVIDED IN SUBDIVISION (b) OF SECTION 17920, WHERE IT EXPIRES 40 DAYS AFTER ANY CHANGE IN THE FACTS SET FORTH IN THE STATEMENT PURSUANT TO SECTION 17913 OTHER THAN A CHANGE IN THE RESIDENCE ADDRESS OF A REGISTERED OWNER. A NEW FICTITIOUS BUSINESS NAME STATEMENT MUST BE FILED BEFORE THE EXPIRATION. THE FILING OF THIS STATEMENT DOES NOT OF ITSELF AUTHORIZE THE USE IN THIS STATE OF A FICTITIOUS BUSINESS NAME IN VIOLATION OF THE RIGHTS OF ANOTHER UNDER FEDERAL, STATE, OR COMMON LAW (SEE SECTION 14417 ET SEQ., BUSINESS AND PROFESSIONS CODE).