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January 15, 2019

VIA E-MAIL

Ms. Rocio Fierro
Acting City Attorney
20410 Town Center Lane, Suite 210
Cupertino, CA 95014-3230

Re: **Additional Conflict of Interest of Liang Chao with Respect to All
Governmental Decisions Relating to Vallco Project; California Political Reform Act**

Dear Ms. Fierro:

Our letters of December 6 and 12, 2018 raised the issue of Councilmember Liang Chao's indisputable personal bias, which disqualifies her from participating in any governmental decisions or processes related to the Vallco revitalization project. It has recently come to our attention that Councilmember Chao has an entirely separate—and equally disqualifying—conflict of interest resulting from her financial interest in real property located approximately 950 feet from the Vallco Town Center project site. Given Councilmember Chao's multiple—and disqualifying—conflicts of interest with respect to the Vallco project, there is no question that she may not, in any way, lawfully participate in any City decisions related to the Vallco revitalization project, including but not limited to any project related applications, the pending litigation filed by Better Cupertino, or the referenda filed against the Vallco project approvals.

The California Political Reform Act, Government Code § 87100, prohibits local public officials from making, participating in making, or using their official position to influence a governmental decision in which the official has a financial interest. A public official has a financial interest in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's interests, including but not limited to an interest in real property. (Gov. Code § 87103(b).) A financial effect need not be likely to be reasonably foreseeable, but rather a realistic *possibility*. (2 Cal. Code Regs § 18701(b).) If a public official owns real property that is located more than 500 feet from a project, the financial effect on the official's interest will be material if any of the several factors outlined in Regulation 18702.2(a) are met. Relevant here, the financial effect will be material if the project:

- “Would change the character of the parcel of real property by substantially altering traffic levels or intensity of use, including parking, of property surrounding the official's real property parcel, the view, privacy, noise levels, or air quality, including odors, or any other factors that would affect the market value of the real

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property parcel in which the official has a financial interest.” (2 Cal. Code Regs § 18702.2(a)(10).)

- “Would cause a reasonably prudent person, using due care and consideration under the circumstances, to believe that the governmental decision was of such a nature that its reasonably foreseeable effect would influence the market value of the official’s property.” (2 Cal. Code Regs § 18702.2(a)(12).)

Here, there can be no dispute that Councilmember Chao has a material financial interest in the real property she owns and lives in, *which is just 950 feet from Vallco*. It is equally clear that it is “reasonably foreseeable” that decisions involving Vallco Town Center will have a material financial effect on this interest and, as such, Councilmember Chao is prohibited from participating in any and all decisions related in any way to the Vallco project.

Indeed, when presented with similar—and even far less egregious—fact patterns, the California Fair Political Practices Commission (“FPPC”) has definitively determined that the official in question has a disqualifying conflict of interest. For example, in the *Ihrke* Advice Letter, A-16-092, the FPPC considered whether City of La Quinta Mayor Pro Tem Pena could participate in decisions regarding a project known as the Villas at Old Town, despite owning property located about 750 feet from the project site. In determining that Mr. Pena had a disqualifying conflict of interest, and as such could not participate in any decisions related to the project, the FPPC determined that the “magnitude of the development that is the subject of the governmental decision in relation to that property’s current use” to be determinative. The La Quinta project involved a proposed mixed-use development that was far smaller than the Vallco project. It consisted of 24,000 square feet of retail space, only 72 multi-family residential units, parking lots, and a 60-unit multi-family residential building. (*Ihrke* Advice Letter, A-16-092.) Mr. Pena, however, owned a single-family home, which was his personal residence, about 750 feet from the outermost point of the project site. (*Id.*) The FPPC determined that “[t]his significant change [in]the character of the parcel could substantially alter traffic levels and could affect the market value of the real property in the area ... Alternatively, the conversion of the vacant lot to additional retail and residences could enhance the marketability of homes in the area.” (*Id.*) As such, there was a reasonably foreseeable, material impact—positive or negative—on Mayor Pro Tem Pena’s interest in his property and he was flatly prohibited from having any involvement in any governmental decisions relating to the development project. (*Id.*)

Similarly, in the *Chopra* Advice Letter, A-17-127, the FPPC determined that a City of Mountain View councilmember was prohibited from taking part in decisions relating to a proposed hotel development project located within 669 feet (or a total of four street blocks) of her residence, because the project would “lead to a significant intensification of use in the immediate area surrounding it.” The project proposed to convert two parcels of property—which

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at the time were being used as a public park and a commercial bike shop—into a 160-room boutique lifestyle hotel. (*Id.*) The FPPC began its analysis by noting that the City’s entire downtown area was “already very densely developed, and residents . . . are accustomed to living nearby popular commercial businesses that attract vehicles and pedestrians.” The FPPC nonetheless found that the intensification of uses, which would cause increased traffic, more cars parked on residential streets in the blocks surrounding the project, additional noise, increased air pollution caused by the increase in traffic levels, and a “general increase in the intensity of use of the immediate area.” (*Id.*) As such, the reasonably foreseeable impact on the councilmember’s property was found to be material.

These advice letters are not outliers. Indeed, the FPPC has consistently found that where a public official owns real property in close proximity to a major development project, the official has a disqualifying conflict of interest. (See, e.g., *Kokotaylo* Advice Letter, A-17-234 [disqualifying conflict of interest found where Planning Commissioner had a financial interest in real property located 1,460 feet from the site of a proposed rezoning and development of existing commercial property]; *Chopra* Advice Letter II, A-18-098 [councilmembers who owned real property within 1,000 feet of the site of proposed workforce and market rate housing had disqualifying conflicts of interest in decisions involving the project]; *Sodergren* Advice Letter, A-17-104 [councilmember disqualified from taking part in decisions relating to a road improvement project because those decisions would have a reasonably foreseeable material financial effect on his real-property interest in his residence located 925 feet from the site of the planned improvements].)

The very same analysis applies here. The Vallco Town Center project will, without question, substantially alter not only the character of the 50-acre Vallco property, but also the adjacent neighborhood where Ms. Chao lives. The project entails demolishing the existing, almost entirely vacant mall (approximately 1,200,000 square feet of retail buildings) and replacing it with an approximately seven million square feet mixed use development that would include 2,402 units (50% of which will be affordable), 1,981,447 square feet of office space and 430,939 square feet of retail space. The project will also transform the site to provide the City with a true gathering place with two public plazas, an active retail and entertainment district, and a 30-acre rooftop park. This signature project will transform not only the neighborhood, but the City itself.

Due to project’s scale and the significant changes being proposed, the Vallco Specific Plan Environmental Impact Report (EIR) concluded that project would have several significant impacts, particularly to the most proximate neighborhoods and streets, such as noise impacts from construction and operation and traffic impacts on residential streets. The EIR specifically discusses potential significant impacts to the neighborhoods directly west of the project (where Councilmember Chao resides), including parking intrusion and cut through traffic on residential

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streets, and greater traffic and congestion on nearby streets. Councilmember Chao herself has publicly complained about the project's potential lack of parking and traffic. Vallco promises to be a transformative project and the immediate neighbors, such as Ms. Chao, will feel both the benefits of living close to this new vibrant gathering place, as well as some of the impacts such as increased traffic. The FPPC has repeatedly ruled in similar circumstances that the decision-maker cannot participate.

The City should be aware that the FPPC is in the process of amending Regulation 18702.2 to clarify and further strengthen the rules with respect to real property interests. Under the proposed regulation, there will be three categories of materiality depending on how far the official's property is located from the property subject to the decision: (1) 500 feet or less; (2) 500 to 1000 feet; and (3) more than 1,000 feet. The first category of 500 feet or less will impose a presumption that there will be a material financial effect on the public official's real property interest unless there is clear and convincing evidence otherwise. The second category of 500 to 1,000 feet will trigger a suspicion of materiality and invite heightened scrutiny, requiring a comprehensive review of the various factors listed in the current regulation (see the analysis and conclusions in the FPPC advisory opinions, above). Finally, the third category of more than 1,000 feet will impose a rebuttable presumption that the effect on the official's real property interest will not be material unless there is clear and convincing evidence otherwise. (See FPPC Memorandum, Request to Adopt Amendments to Regulation 18702.2, January 7, 2019, attached hereto.) In other words, whether analyzed under the current version of Regulation 18702.2, as interpreted by the FPPC in the advice letters discussed above, or the proposed amendment of Regulation 18702.2, Councilmember Chao has a clear disqualifying conflict of interest with respect to her primary residence and any and all governmental decisions relating to the Vallco project.

As such, for the foregoing reasons—which are in addition to the entirely separate reasons involving impermissible bias that Councilmembers Chao, Willey, and Scharff are disqualified from participating in Vallco-related matters—Ms. Chao may not in any way participate in any matter involving or relating in any way to the Vallco project. She is unquestionably conflicted out under the California Political Reform Act and its regulations. Please confirm that Ms. Chao will not be participating in any Vallco related items. If the City does not confirm that Ms. Chao will not participate, then please be advised that we intend to seek a formal advice letter from the Fair Political Practices Commission.

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Thank you for your prompt attention to this matter. Please do not hesitate to contact us if we can provide any further information.

Very truly yours,

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