City of Oakland
Public Ethics Commission
Executive Director, Daniel Purnell

Re: Consolidated Complaints
No. 09-08 Oakland Convention and Visitors Bureau (Convention Bureau)
No. 09-09 Oakland Museum of California (Museum)
No. 09-10 Chabot Space and Science Center (Chabot)
No. 09-11 East Bay Zoological Society (Zoo)

The following is respectively submitted in response to the December 7, 2009 Public Ethics Commission Report regarding the above captioned complaints.

Charitable Non Profit Foundations

The general contention expressed by the Foundations is that, "as a non-profit organization, (501(c)(3)) we are allowed to contribute to campaigns that support issues, so long as the contributions do not represent a significant portion of our annual operating budget." (emphasis added) (Joel Parrott, DVM, Executive Director, Zoological Society, July 28, 2009).

Nothing could be further from the truth. A Public Charity designated as a 501(c) (3) is not arbitrarily permitted, by that particular Federal Internal Revenue Code, or any other elected tax-exempt status of the IRC to make campaign contributions. The Code merely allows a non-profit corporation to be exempt from federal taxation, provided it complies with the requirements and limits expressed in the IRC. The Federal Tax Code is neither permissive nor prohibitive in its nature - non compliance would simply result in a reclassification or revocation of the tax exempt status.

Whether or not any type of non-profit foundation can make campaign contributions is not controlled by or determined by the IRS and goes far beyond Federal Tax Regulations. The issue at hand, is the *use* of "public money", not whether or not a particular organization is a 501(c)(3) or of any other tax exempt status. In other words, the IRS, or being a 501(c) (3) has absolutely nothing to do with the use of or the expenditure of "PUBLIC FUNDS".

Public Money

The key is whether or not the funds in question, the moneys used for the campaign contributions, are **"public funds".** The Executive Director, in the commission report, makes the same erroneous claim as do the Foundations, in that: *"Such corporations are not prohibited from using **their financial resources** to influence legislative or ballot measures..."* However, he qualifies his comment it in saying - "as a general rule".

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Again, the key is the ownership of the money. In the above, the reference is made to "**their**" financial resources. No question, if it is "their" money, (not public money) as a private organization they may do whatever they please with their money and their own financial resources .

There are but two questions.

1) Is the entity in question a, "public agency" and,

2) Are the funds in question, "public money".

Regarding the first question, I can't imagine a situation where a public entity would have any involvement with any type of money that was not public money. Therefore, any and all money handled by a public agency, by definition, is "public money". If an entity is determined to be a "public agency" then any and all funds handled by that entity are of course, "public".

Note!

Concerning the use of public money for political purposes, (campaigns and ballot measures) it has been a long held position of the courts which have addressed this issue that, *the use of public funds for partisan campaign purposes is improper, either on the ground that such use was not explicitly authorized or on the broader ground that such expenditures are never appropriate*. See Stanson v. Mott (1976) 17Cal. 3d 206 and Mines v. De Valle (1927) 201 Cal. 273. Also, for an overview of several cases see People v. Groat (1993) 19 Cal. App. 4th 1232.

Regarding the second question, a private entity may (and very often does) handle public money. Those funds, by their very nature, are held in "trust" by the private party for the benefit of the public entity. See People v. Evans (1967) 249 Cal.2d 254, where a hotel keeper in Bakersfield, (Mr. Evans) collected a 4% transient tax from lodgers but failed to remit those funds to the municipal tax collector. Also, see People v. Foss (1936) 7 Cal. 2d 669, defining "Agent" and the definition given in Section 2295 of the Civil Code as, "one who represents another, called the principal, in dealing with third persons."

In Evans, the court found that, monies became public monies immediately upon collection; thus, held in trust by Mr. Evans and his duty to deliver them to the city was operative. Certainly Mr. Evans had no authority to keep these funds for himself or to use them for his own purpose. (page 257). On the following page the court continued in saying, "The monies thus collected by Mr. Evans are obviously trust monies. They are the property of the city and of no one else, and the duty on the part of Mr. Evans, under the law, is clear; he must account for them and pay them over to the tax collector of the city…" (emphasis added).

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Agent of the City

In Foss. The term "agent" is clearly defined as it is in the California Civil Code, Section 2295 as, "one who represents another, called the principal, in dealing with third persons." (emphasis added). In Foss and as noted in People v. Holtzendorff (1960) 177 Cal. App. 2d 788, at page 799, the court noted, "Whether or not an officer, the defendant was undoubtedly an "agent" of the Authority" within the purview of section 504, Penal Code…" in citing the Supreme Court's finding in Foss as noted above (emphasis added).

Clearly, one who represents the city (city institutions, etc.) or acts in or on behalf of the city, is an "agent" of the city. It is no different than Douglass Parking who operates parking facilities for the city or numerous other private entities where the city contracts out public services. It is no different than the hundreds of businesses who collect (as in Evans) fees and taxes on behalf of the city. They are all *agents* of the city and when those monies are received or collected on behalf of the public entity, they immediately become property of the city and by definition, "public funds".

It makes no difference whatsoever whether the operator (private contractor or foundation) of a public facility or one who merely solicits donations or contributions for a public entity, is a private business or a non-profit foundation, they are nevertheless "agents" of the public facility, of the city, and all monies collected or received are public funds. A professional fund raising firm who contracts with an organization to raise money acts as an agent for that party. Clearly, they may not take and keep those funds for themselves in claiming, by some tax exempt status, that they are entitled to slice off a few bucks from the top. As protected by Constitutional Law - a Contract is a Contract.

Penal Code - Section 424

Penal Code, Section 424 makes it a felony for any state or city officer and "**every other person**" charged with the receipt, safekeeping, transfer or disbursement of public moneys who, essentially, misuses those moneys. People v. Little (1940) 41 Cal. App. 2d 797 and People v. West (1953) 3 Cal. App. 2d 568. Both cases (and many others) hold that a non public officer may be charged under Penal Code 424 for embezzlement. (See also, section 504)

The contention that the non profit corporations in question are private and legally separate and distinct from the public entities they serve is of little or no significance. As noted above, anyone, ("*every other person*") who is charged with the proper handling of public money is liable under the law for any neglect of that charge.

The Public Entities and the Foundations

The Oakland Museum, Oakland Zoo and Knowland Park , Chabot Space and

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Science Center, and the Oakland Convention and Visitors Bureau are all publicly owned and thus, *public* entities. The individual Public Benefit Corporations (501(c)(3), Foundations) which are associated with each public entity, although technically private, while serving, acting as an agent thereof, under contract, or performing services under any other binding legal agreement, (Joint Powers agreement, Bylaws, etc.) and including mutual "verbal" agreements, while in service of the public entity, are nevertheless subject to the same laws and regulations governing the public entity. While in the "public" arena one must abide by the "public rules" that govern. Simply put and applying the old adage, "when in Rome, do as the Romans do". Except in this instance it is not a choice or an option , it is legally required.

"Applicable Law"- Misconstrued

The Foundation's and Executive Director's contention (although softened in him saying - "*as a general rule*") that "non-profit "public benefit" corporations are legally entitled to receive, possess, encumber or transfer money and property consistent with their expressed public purposes and pursuant to powers granted to them under the state law." is patently false.

Additionally, at page 5, in speaking to the Zoological Society, the Executive Director makes reference to the phrase, "applicable law" as found in the "Political Prohibition" clause in the Zoo Contract. It is noted that the identical phrase is also found in the Museum agreement and the Visitors Bureau agreement. He *hints* that this clause may apply in allowing the Zoological Society to make campaign contributions.

He further claims that it is "**unknown**" whether this clause was intended to permit the Zoo to make ballot measure contributions. What a crock! Firstly, I would assume that everything is subject to applicable law unless it is noted otherwise. Secondly, it has been long held that a straight forward reading of the particular language is required - the words say what they mean. There are no hidden meanings or interpretations. If the makers of the language intended for the Zoological Society, the Museum, the Visitors Bureau , (or the dozens of other contracts containing that phrase) to be exempt from its own Political Prohibition Clause - they would have said so.

Moreover, the Director's reading of the phrase would indeed, completely nullify the entire "prohibition" clause. What sense, what logic could possibly be employed to create a self-canceling regulation. Whatever the reading, the intent is perfectly clear - a total and complete prohibition on any and all political activity.

Furthermore, it is not "unknown". That statement couldn't be further from the truth. I was there - along with dozens of other Oakland citizens who were there, not only during the City Council's approval of the Zoo contract but the Museum contract as well and concerned that the same illegal contributions that were made to Measure "G" by these same Foundations, (excepting the Visitor Center) didn't reoccur. The Zoo and Museum operating agreement (contract) negotiation records clearly attest to the purpose and intent

of the "Political Prohibition Clause". Regarding intent, the Executive Director is being either, disingenuous or simply too "lawyerly".

More to the point, he is simply wrong on both counts - the laws he references (but fails to cite) are simply, "*not applicable*". Those laws may of course govern other non-profit foundations such as the Red Cross, United Way, Salvation Army, and many others who have no direct association or financial involvement with a particular public entity. However, while involved with a public entity other laws governing public funds take precedence. See Irwin Memorial v. American National Red Cross, (1981) 640 F.2d 1051, where the court ruled that the Red Cross was not an "agency" for purposes of the Freedom of Information Act. It was found that substantial federal control was lacking in order to consider the entity as "*federal*" under the Act.

The Foundations in the instant case are quite a different matter - see below.

Delegation of Authority

A public body may delegate the performance of administrative functions to a private entity if it retains ultimate control over administration so that it may safeguard the public interest. County of Los Angeles v. Nesvig 231 Cal. App. 2d at p. 616; See also, Irwin v. City of Manhattan Beach (1966) 65 Cal. 2d 13, 23; . Hagerty v. City of Oakland (1958) 161 Cal. App. 2d 407, 415-417; and Egan v. San Francisco (1913) 165 Cal. 576, 583-584, where the contract to build an opera house on public land was invalidated because the city did not retain sufficient control over the operation of the opera house.

In Epstein v. Hollywood Entertainment District (2001) 87 Cal. App. 4th 862 the court elaborated in saying: " a nonprofit corporation to which such administrative functions are delegated must comply with the same laws and regulations as the public entity that is delegating its authority." (emphasis added).

In New York Edison v. City of New York (1935) 282 N.Y.S. at page 940, the court so held that: " In the absence of a clear legislative expression to the contrary, the city may not do through an agency or authority what it may not legally do itself directly." (emphasis added).

And, is 81 Ops. Cal. Atty. Gen. 281 (1998), "when a community redevelopment agency used a nonprofit corporation to administer its housing activities, the nonprofit corporation was required to comply with the same laws applicable to the redevelopment agency, such as open meeting laws and public bidding and prevailing wage statutes."

It is exceedingly clear, whatever the status of the "operator" of the facility, whether it be in part or in whole, whether it be a non profit foundation, a 501(c)(3), a volunteer group, a contract manager, or whatever, its status takes a back seat to the prevailing laws governing the city owned public entity and the use of "public funds". When an "agent" (anyone other than the city) operates a public facility it is bound by the

same laws, regulations, and restrictions as the city would be if the city operated it.

The Contracts

The Foundations have contracted with the City of Oakland to operate a public facility and provide specific services. The Zoological Society and the Museum Foundation both have valid and existing working agreements. The Museum Women's Board, the Chabot Space and Science Center Foundation, and the Oakland Convention and Visitors Bureau do not have written agreements in place at the present time. However, they all have verbal agreements with the City (which are as valid as a written agreement) and work closely with the City facilities they represent.

They function as agents of the particular public facility they represent, either by specific contract provisions, in practice and or by verbal agreement. All revenue they receive or collect, whether it be from operations, grants, donations, bequests, etc., belong to the public entity. The law is clear, any time monies are solicited or collected for, or in the name of a particular party or organization, those funds lawfully become the property of the named beneficiary - the party or organization they were collected for.

Just as political campaign funds are collected for a particular campaign, they are not allowed to be used for another purpose. Money collected for the Zoo must go to the Zoo, money collected for the Museum, must go to the Museum, money collected for the Science Center, must go to the Center, etc. It is basic contract Law.

Moreover, the public entity financially supports the foundations in their efforts to solicit or raise funds for the public entity. The public entity is the sole and only financial support to the foundations, they have no outside offices, equipment, or any other means of support. Clearly, the public entity, in financing the solicitation operation necessarily and unquestionably makes the public entity the exclusive owner of all funds procured.

If I employ you to solicit funds for me, by written contract or by verbal agreement and further, cover all the cost, provide the financing and all other related expenses and equipment for said solicitation and collection, then all funds, by law, belong to me.

The Chabot Science Center Foundation and Center Operation

Contrary to the statement in the Commission Report, (page 6) the Chabot Foundation is not recognized under the Joint Powers Agency (JPA) agreement. Under the JPA agreement, (Section 1.06 and 1.07) the Executive Director is charged with fund raising, seeking grants and donations, etc. However, the JPA Bylaws, at Section 5.01, does recognize the Foundation as a typical nonprofit public benefit corporation. In addition, the bylaws note that the nonprofit corporation (Foundation) is a distinct entity and was "organized by the Center" in order to raise funds for the Center.

Although the bylaws stipulate that the Foundation "shall have neither the authority

nor responsibility for operating the Center,…" the bylaws note that the Executive Director and other employees may be (and are) one in the same - the same persons. Inasmuch as the Science Center created the Foundation and operates the Foundation with the identical personnel and officers and by use of the Center's facilities (premises, offices space, equipment, etc.) as the Center, in practice, there is no separate entity.

Under the Foundation's Articles of Incorporation, (Article II, (D), the Foundation is permitted to, "receive grants, donations or other funds on behalf of or for the benefit of the Chabot Observatory and Science Center,…" . It is important to note that Article (D) concludes with, "**to be expended as directed by the Chabot Observatory and Science Center".**

Additionally, at Section 4.06, page 24, of the Joint Powers Agreement, the language provides: "**The Center is strictly accountable for all funds received and distributed by it…".** Further, under Section 4.08, "**Funds donated to the Center shall be held in accounts maintained by the Center treasure."** And, "**Funds donated for a specific purpose shall be deposited in a fund identified for that purpose,…"**

The same mantra is repeated in the Foundation Bylaws, at page 2, Article III, Section 3.01(D) in that as a purpose of the Foundation: "**To receive grants, donations or other funds on behalf of or for the benefit of the Chabot Observatory and Science Center, to be expended as directed by the Chabot Observatory and Science Center."**

There is no ambiguity. Although there is no contract with the Science Center Foundation, the controlling language in the JPA agreement, the Articles of Incorporation, and both sets of bylaws is nevertheless exceedingly clear - all funds collected become the property of the Science Center (JPA) and the expenditure of all funds lies exclusively with the Science Center (JPA). It then necessarily follows - the Science Center (JPA) is a public entity and is therefore prohibited from making campaign or ballot measure contributions. (See Stanson v. Mott and DeValle).

Further, and as noted above there is no actual separation between the "Center" and the "Foundation" and in practice they are one in the same. There is but one group of people who, (on paper only) function as two separate organizations. The campaign contributions came from an account of the Foundation but which is controlled by the Center. The finance director, Jill Knowland, who is Chief Financial Officer of the Center is also Finance Director of the Foundation, approved and signed for the Cashier Checks representing the campaign contributions. The checks came from the Center, from an account completely controlled by the Center.

<u>The Zoological Society and Operating Agreement</u>

All of the Zoological Society (Zoo) activities are strictly controlled by its operating agreement (contract) with the City of Oakland (City). In his Report, (page 4)

the Executive Director cites a portion of that agreement, in that: "The Zoological Society is authorizes to collect and use "all revenues collected at the zoo and park" and to "raise funds in any other lawful manner."

Unfortunately, he does not cite the language in its entirety, which specifically requires: those funds (all revenues) are to be used for, or expended for, *the benefit of the Zoo*. In that, the Society may accumulate funds received from its operation of the Zoo and Park, to be used however, specifically and exclusively for: (1) Regular operations and maintenance, and (2) improvements and animal acquisition.

It is abundantly clear, all funds received pursuant to the agreement, whether they be from the operation of the facility or from contributions or donations made directly to the Zoological Society, *are*, by the language of the agreement, property of the Zoo. By the stipulations in the contract the Society is permitted and actually required to raise funds (from public and private concerns alike) for the support of and in the name of the Zoo.

There can be no argument or confusion. The Zoological Society is *contracted* with the City of Oakland to run the Oakland Zoo, not to solicit private funds for various ballot measures. If that were true the Society could solicit and collect funds in support of a variety of measures, "*consistent with their expressed public purposes*". According to Mr. Parrott, he could collect funds in the name of the Oakland Zoo and then give those funds to the San Diego Zoo, the Bronx Zoo, a New York City ballot measure supporting zoos, or any other organization as long as it was, "consistent with their (Zoological Society) expressed public purposes".

Needless to say, if Mr. Parrott actually did what he professes he is legally allowed to do, he would soon be relived of his position as Director of the Zoo and probably charged with embezzlement .

The Museum Foundation Contract and Museum Operation

As with the Zoological Society the Museum Foundation contract (as noted above) has a "Political Prohibition" clause (Section 22) identical to that of the Zoological Society. Those same arguments of course are set forth regarding the Museum as are made above concerning the Zoo.

Additionally, like the Zoo Contract and Science Center governing documents, the Museum Contract (Sections 6 through 12 and others) is specific in that all revenues are to be used for "the benefit of the Museum". There is absolutely nothing found in the Contract that would permit the Foundation to use funds (grants, contributions, donations, bequests, etc.) solicited, received or collected for the Museum to be used or expended for any purpose other than the benefit of the Museum.

Not unlike the Science Center, there exists a convoluted and confusing arrangement between the Museum Foundation and the City of Oakland Museum as an

Agency of the City. The Museum Executive Director (Lori Fogarty) and others, wear two hats in that she and others are employees of the City and also paid employees or officers of the Foundation. Additionally, Director Fogarty, as a public employee and as with the Science Center is believed to have signed and approved the campaign contribution check.

Further, the Museum Board is controlled by City Hall (the public entity) through the appointment of it members and other restrictions and controls, not ignoring the fact that the City of Oakland actually created the Foundation. As with the Science Center, the control of the Foundation unarguably lies with the City. (See Museum Foundation Bylaws and other controlling documents, ordinances, etc.).

Political Prohibition

More importantly however is the "POLITICAL PROBITION" clause, found not only in the Zoo contract but the Museum and Visitors Center contracts as well - it is controlling. As discussed above, the clause is simple and straight forward in that it prohibits any and all political activity. It is basic "contract law". A party, whether a foundation, private operator, or whatever, may not do what is expressly prohibited by the contract. It matters little how those funds were received, they may not be expended or used for political purposes. The Foundations, although technically private (even though they were created by the public entity, the City of Oakland) are CONTRACTED with the City to operate the facility and raise funds for that specific purpose. As in Evans above, the moment those funds are collected, they immediately become "PUBLIC".

Taxes

As a TAX issue, a private concern (individuals or businesses) either gives money to support the Zoo, Museum Science Center or Visitor's Bureau directly or through the foundation which is tax deductible, or to a political campaign, which is non-tax deductible. To give it to the Foundation and claim a tax deduction as a charitable contribution, with the knowledge and or expectation that the Foundation will turn around and give it to the ballot measure campaign, is money laundering - it is a criminal act.

City Support

In conclusion, these Foundations are supported by the City of Oakland. In essence, the City pays them (provides the financial means and infrastructure) to conduct the fund raising for the respective entities. Unlike other "independent" Foundations (not connected with a public entity) Oakland's Foundations have no offices, (they all utilize the City facilities) they have no office equipment, desks, chairs, file cabinets, computers, phones, copy machines, fax machines, stationary, etc., they all use the City property. They have no meeting rooms or facilities for their Board meetings, they use the City's. They have no rest rooms, no lunch rooms nor do the pay their own utilities - they use and depend solely

on the City for their very existence.

Unlike independent Foundations, they would simply not exists without the Public entity and are no more than an extension and or agent of the City. As all funds and money are solicited and collected in the name of the City and for the benefit of the City (a Public entity) they are "Public" and those funds may not be used for political purposes.

Conclusion

There are three controlling factors

1) Political Prohibition:

As noted above the contracts prohibit any type of political campaign activity.

2) The Contracts

Even without the "political prohibition clause", the contracts and the JPA agreement expressly require that all funds be used solely and exclusively for the support of the public facility.

3) Delegation of Authority

Under the delegation of authority doctrine (and case law) the City may not delegate administrative functions to a private entity unless it retains ultimate control so that it may safeguard the public interest. Without sufficient control - the contracts are not valid.

The contracts and agreements in question, may not, and do not, (by design) permit the Foundations to make political campaign contributions. To interpret them in that way would be to invalidate them.

Respectfully submitted,

David E. Mix

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how the POA was "created." City itself, in the Management District Plan for BID II, explicitly recognized that the POA "was formed in 1996 to govern Phase I," that the POA also would govern "Phase II," and that BID II was just an "extension" of BID I.

Under these circumstances, we would improperly elevate form over substance if we were to treat the POA as a "pre-existing" private entity with which City just "happened" to decide to do business when it turned governance of BID II over to the POA. To turn a blind eye to such a subterfuge would allow City (and, potentially, other elected legislative bodies in the future) to circumvent the requirements of the Brown Act, a statutory scheme designed to protect the public's interest in open government. This we will not do. (*Plumbing, etc., Employers Council v. Quillin* (1976) 64 Cal.App.3d 215, 220 [134 Cal.Rptr. 332] [court will not place form above substance if doing so defeats the objective of a statute]; *People v. Jackson* (1937) 24 Cal.App.2d 182, 192 [74 P.2d 1085], disapproved on another ground, *People v. Ashley* (1954) 42 Cal.2d 246, 262 [267 P.2d 271] ["It should be and is an established principle of the law that the substance and not the mere form of transactions constitutes the proper test for determining their real character. If this were not true it would be comparatively simple to circumvent by sham the provisions of statutes framed for the protection of the public. This the law does not permit."]; see also Civ. Code, § 3528 ["The law respects form less than substance."]; *People v. Reese* (1934) 136 Cal.App. 657, 672 [29 P.2d 450], disapproved on another ground, *People v. Ashley, supra*, 42 Cal.2d 246, 262 ["The evidence tends to prove, and the jury had the right to find, that the real intention of the defendants was to place upon the market and sell shares of stock in a corporation, and that the form of the certificates issued by them was a subterfuge adopted in order to defeat the purposes of the Corporate Securities Act. The operation of the law may not thus be circumvented."].)

In order to avoid the conclusion that the Brown Act applies, defendants characterize our treatment of the POA as a legislative body within the meaning of the Brown Act as being "contrary to the evidence produced in the trial court and unfair to the businessmen trying to improve their local community." They contend that there is no evidence that City ever "handled" the administrative functions of any BID, and that, to the contrary, the BID's and the POA were structured by the local property owners themselves from the outset to be administered by a nonprofit organization formed by the owners themselves.

This contention, however, misses the point. The fact that local property owners who wanted City to create a BID were involved in the structuring of

the BID, and structuring of the POA to run the BID, does not mean that City did not "play a role in bringing" the POA "into existence." A BID cannot be created by private individuals. Private individuals do not have the power to authorize tax assessments, or to create tax liens. Thus, a public entity must be involved in the creation of any BID, no matter how, when, or by whom the idea and future structuring of the BID-to-be was initiated and pursued. Here, as already noted, the POA was formed for the purpose of administering the BID. Thus, by giving the BID the necessary legal standing as a BID, and by providing that the BID would, in fact, be administered by a POA yet to be formed, City clearly was involved in bringing into existence the POA. An operative BID was the *raison d'être* for the POA; by giving the BID the legal breath of life, the City breathed life into the POA as well.

2. *City Retained the Authority to Overturn the POA's Actions*

Furthermore, just as in *International Longshoremen's, supra*, 69 Cal.App.4th at page 296, City, the elected legislative body with ultimate accountability to the voters, retained plenary decisionmaking authority over the BID's activities. (Sts. & Hy. Code, § 36642.) Street and Highways Code section 36642 provides, in relevant part, that a city council "may modify the improvements and activities to be funded with the revenue derived from the levy of the assessments by adopting a resolution determining to make the modifications after holding a public hearing on the proposed modifications." This retention of power over the POA is not only provided for by section 36642, but it is required by well-established law, which provides that a public body may only delegate the performance of its administrative functions to a private entity if it retains ultimate control over administration so that it may safeguard the public interest. (*International Longshoremen's, supra*, 69 Cal.App.4th at pp. 297-298 and cases cited there.) And a nonprofit corporation to which such administrative functions are delegated *must comply with the same laws and regulations as the public entity that is delegating its authority*. (*International Longshoremen's, supra*, 69 Cal.App.4th at p. 300; 81 Ops.Cal.Atty.Gen. 281 (1998) [when a community redevelopment agency used a nonprofit corporation to administer its housing activities, the nonprofit corporation was required to comply with the same laws applicable to the redevelopment agency itself, such as open meeting laws and public bidding and prevailing wage statutes].)

b. *There Is No Legal Reason to Exempt the POA from the Operation of the Brown Act*

1. *The "Unfairness" and "Interference with Business" Argument*

As noted above, City and the BID contend that our decision that the POA must comply with the same laws as would City, for example, the Brown Act,

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Jurisdiction & Authority

As of late, a lot has been made of the term "jurisdiction" and how it is applied to various complaints lodged with the commission and the commission's authority to deal with those complaints.

In all due respect to anyone with an opposing viewpoint, I don't see it as a complex or terribly difficult issue. The City's Public Ethics Commission is a creature of the City of Oakland Charter, as provided for by the State Constitution. Section 202(a) of the Charter establishes the Commission and clearly spells out its charge, in that:

> *The Commission "shall be responsible for responding to issues with regard to compliance by the City of Oakland, its elected officials, officers, employees, boards and commissions with regard to compliance with City regulations and policies intended to assure fairness, openness, honesty and integrity in City government including,…"* (Charter Section 202(a))

Without question, the commission's jurisdiction is Oakland's City Government, not San Leandro's, not Berkeley's, or any other jurisdiction. Neither is it the School District, Peralta College District, or East Bay Regional Parks. Its jurisdiction extends to all of Oakland's City Government, inclusively.

The "charge", under the Charter "includes", (interpreted as not limited thereto) Oakland's Finance Reform Ordinance, Conflict of Interest Code, (Council) Code of Ethics, and any ordinance intended to supplement the Brown Act, and others.

The Section above is purposely broad and all encompassing in order to meet and fulfill its objective as described by the language therein and additionally, as reiterated in the Preamble to the Commission's By Laws where the phrase, "Those regulations and policies include, but are not limited to", is again expressed.

The Commission's charge, purpose and objective, regarding those *regulations* and *policies* is direct and straightforward. It is, *"intended to assure fairness, openness, honesty and integrity in City government."*

Likewise, "*authority*" is also provided and conveyed by the City Charter. Whereby the Commission may meet and confer, make determinations and recommendations regarding any subject matter within its charge. It may also defer to any other higher authority in any instance that it so chooses.

The Executive Director claims, in his report (p. 8) that, *"The Commission has no jurisdiction or authority to determine alleged violations of state law or alleged breach of a City contract*. However, neither does anyone else, for that matter.

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Understandably, the Commission is not a Court of Law thus, it may not impose fines, issue indictments, or imprison offenders, no more than the City Attorney or the County District Attorney may. Under our system of jurisprudence that authority is expressly reserved and delegated to the Courts.

Additionally, as a legal, practical, and perhaps, moral issue the Commissioners, (individually or as a body) as Officers of the City as provided for by the Charter, (Article IV, Section 400) and under the State of California Constitution, have an inherent duty and legal obligation to report to the proper authority any knowledge or awareness of any wrongdoing or of a perceived crime.

More to the point, the Commission is not being asked to make a legal determination, binding or otherwise, regarding state codes or statutes or violations thereof, again, that authority to make such a "determination" belongs exclusively to the Courts. The commission is merely being asked to forward the complaint to the proper authority if it concludes that it so warrants. However, it remains my contention that in the alternative the commission (as a body) is permitted and certainly may, pursue a resolution through or by a civil action as provided for by law

Moreover, it is a matter of "standing". Who may file a charge or initiate an action. Naturally the City Attorney has standing, I as a resident of the municipality have standing, and you as a commission and as individuals (citizens of Oakland) have standing to bring civil action. The County District Attorney and State Attorney General have discretionary prosecutorial authority regarding criminal charges, but once again, the authority to determine whether a state code (criminal or otherwise) has been violated, lies with the Court.

Ironically, the Director asks that the complaint be referred to the City Attorney for a determination whether any of the parties (Foundations) violated their respective contracts (operating agreements) with the City. However, just like the Commissioners, the City Attorney may *not* make that determination - he may *contend* that they did, and file a civil action or seek criminal action by the District Attorney or the State Attorney General, but he lacks the authority to determine whether or not they violated the law - once again, that authority lies exclusively with the Courts.

More importantly though - Why! Why would you refer this complaint to the City Attorney, that is the last place in the world where it should go. The City Attorney, by Law, by the City Charter, (Section 401) is the City's lawyer, he "shall act as counsel in behalf of the City or any of its officers, boards, commissions, or other agencies in litigation involving any of them in their official capacity." (emphasis added).

Clearly, the City Attorney may not represent individuals or residents of the City. He may not (and does not) give advise or confer in any manner with any of Oakland's organizations or civic groups or businesses that provide service or contract with the City.

Despite language to the contrary, he may not, and does not, represent the Public Ethics Commission.

Understanding that in most instances a citizen's complaint lodged with the Commission is duly lodged against the City, an officer, or an employee thereof. The City Attorney is legally mandated to represent and *defend* the City against that complaint. To contend, suggest or imply that he may then advise (under the cloak or guise of evaluation) or otherwise provide assistance or render an opinion that may jeopardize his client (the City) is no less than, insidious. Further, to sit on the Commission's Board during the conduct of meetings and periodically offer input or legal advise on points or conclusions, is unquestionably a serious conflict of interest, it is untenable. To use an old but very appropriate adage, it is akin to the Fox guarding the Henhouse.

By Charter language, although the City Attorney may provide a written opinion, his opinion in simply that, an opinion, no more. In the real world the only opinions (holdings and findings) that matter are those issued by the Courts - Appellate Division and the Supreme Court. And, as expressed above, any opinion drafted by the City Attorney (or by another city by a reciprocal agreement) is fully expected to "favor" the City's position - Why would you expect anything else.

As a practical matter, considering the political aspects of the Foundations involvement with these particular entities, why would the City Attorney so much as even hint of a wrong doing. Further, be there no mistake about it, (as repeatedly expressed above) **he is legally required to defend his client (the City of Oakland) even if he believes it acted illegally.**

The Ethics Commission, unlike *all* other City Commissions, is extraordinarily unique in its charge to sit in judgment of the City, its actions, and its officers. The City Attorney's oversight, and or participation in any aspect of that process, is self defeating and unacceptable.

Regarding the complaints at hand, there is no question that the Foundations and parties involved illegally used "public funds" to make political campaign contributions which is strictly forbidden under the law. Further, as expressed above, the Commission has full authority to hear the complaint and arrive at whatever conclusions it so chooses, as charged and provided by the City Charter.

Respectfully submitted for your consideration.

David E. Mix

ATTACHMENT 3

Purnell, Daniel

From: darlinemix@sbcglobal.net
Sent: Tuesday, December 01, 2009 1:39 PM
To: Purnell, Daniel
Subject: Commission Report - December 7, 2009

Dan:

Another question, if I may. Jill Knowland's declaration (Science Center) states that: "The contributions to the Economic Stimulus Committee came from funds raised specifically for this purpose from individuals as well as other unrestricted funds raised by the Foundation and held within this account." (emphasis added).

From her statement it appears that there were two separate origins of the campaign funds:

A) Funds raised specifically for the ballot measure, (by parties unknown) and

C) Funds withdrawn from the Foundation's unrestricted savings account.

This raises several questions:

1) Since the Chabot Foundation raised funds "specifically" for the ESC (as attested to by Knowland) are they then not a "recipient committee" and required to file a "statement of organization" and also required to file the appropriate form reporting and listing the contributions they received.

2) Are not the "unrestricted " funds which Knowland references, (also used for a contribution to ESC) required to be reported by ESC as a contribution, separate and distinct from reporting the funds from the recipient committee.

3) For **what purpose** were the funds in the Foundation's unrestricted account originally solicited or collected. Also, to whom were the checks (or other types of contributions) made payable.

4) To whom were the checks (funds raised) as claimed by Knowland, specifically for the ESC campaign, made payable to: (I.) A recipient committee; (II.) The Chabot Foundation, or (III.) The Chabot Space and Science Center (JPA).

5) By whom were the campaign funds solicited and collected. Who received and or endorsed the checks. What employees or staff was employed in facilitating the process. What facility (Science Center or other) was used in procuring the contributions.

6) What and who's equipment (office machines, computers, mailing, faxes, letters, etc.) was used in the solicitation and collection of the campaign funds.

7) As a recipient committee, is not the Foundation (or whoever) required to file the appropriate form indicating and listing all their expenses and expenditures it encountered in procuring the funds in question.

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Purnell, Daniel

From: darlinemix@sbcglobal.net
Sent: Monday, December 07, 2009 1:37 PM
To: Purnell, Daniel
Subject: Commission Report - December 7, 2009

Dear Dan:

Regarding the Commission Report, as captioned above, I have concerns in four separate areas .

I

Firstly, in the footnote at page 5 you disclosed that *"the spouse of the Commission's Executive Director* (your wife) *"provided market research consulting services to the Zoological Society on a pro bono basis during 2008 through approximately March, 2009."* Additionally, you disclosed that, *"the Executive Director,* (you) *attended an Oakland Zoo fundraiser in June 2009, on passes provided to his spouse* (your wife) *by his spouse's* (wife's) *employer, the Clorox Company."*

I have serious concerns regarding your and your wife's involvement in Zoo activities and particular fund raising events as to how it may or may not relate to or have affected your investigation, analysis, and conclusions concerning my complaint of misuse of public funds and the use of monies procured through "fund raisers".

In particular, your treatment and analysis of the political prohibition clause and your contention that the intent of the clause was "unknown" when as I recall you and I discussed it at the time as it related to my previous complaints involving like campaign contributions made by the same three foundations (including the Zoological Society) to Measure G. In fact, at the time you were the one who alerted me as to the renewal of that particular (Zoo) contract. It is very clear that the funds are indeed, "public" and the intent of the prohibition clause and that you are, perhaps due to, too close of a relationship with this entity and the others, straddling the fence, failing to take a position and merely throwing out nonsensical contentions in hopes that someone will bite.

I believe it is imperative that a much more detailed report and further disclosure be provided concerning your and your wife's activities (market research) with the Zoo and the Clorox Company relationship with the Zoo. To include of course, any information regarding donations or contributions supposedly made to the Zoological Society and then possibly redirected to the Measure C Campaign.

II

Secondly, due to the complexity of the four Foundation cases and my complaint of the misuse of public funds, I ask that they be moved to a later date. I make this request for several reasons.

1) For starters, it is extremely important to understand the gravity of these

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particular complaints, the seriousness of the charges and the consequences in the misuse of public funds. That these violations are criminal acts in the application of Penal Code 424 and Fraud and Embezzlement under Penal Code 504, are felonies and punishable by incarceration in state prison.

2) In consideration of the above the Commission Report is sorely lacking in detail and depth. No documents or other reference material has been provided nor have any statutes, codes, or laws been referenced, nor has any case law been cited, backing the contention that a Foundation, employed (contracted) by a public entity, may divert funds solicited for or in the name of the public entity, to a political ballot measure campaign. Inasmuch as the analysis and conclusions in the Commission Report are drawn on particular documents (as listed below) it would seem proper and necessary that they be part of the report:

A) The individual contracts encompassing the three foundations.

B) Their Articles of Incorporating.

C) The JPA Agreement representing the Science Center.

D) The Foundation Bylaws governing the Foundations.

E) Proper identification of the campaign checks - the accounts they were draw on and the governing regulations of those accounts.

F) Identification of the parties who signed the checks - Foundation employees or City Employees.

G) The meeting minutes where the campaign contributions were approved and by whom.

H) The Campaign contributions have not been properly reported (see my Dec. 1, 09 e-mail).

I) The Convention Bureau records, how are the funds accounted for, who controls the Bureau, with the passage of Measure C - where is the contract, where are the Bylaws, where did the claimed "private funds" come from, etc.

J) Where are the documents regarding Zachary Wasserman representing the Bureau and also treasurer of the ESO (measure C campaign) and by whose authority. What type of organization is it public, private or nonprofit and who controls what. How was it created and by whom?

Considering the magnitude of these complaints, including the Commission jurisdictional issue, and in order to assure that all parties and all sides are properly represented, it would appear absolutely necessary to continue all four complaints to a time when the additional material may be obtained, examined and presented in a proper fashion.

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III

Third - Complaint No. 08-13, Supplemental, Fire District Assessments. Allow me to make a couple of corrections or clarifications regarding the report:

(1) I never met with Pat Sierra and she never gave a satisfactory explanation as to how assessments were received by the City or accounted for.

(2) We spoke on the phone on two occasions and she then became frustrated and stopped returning my calls.

(3) The first spreadsheets she provided were admittedly inaccurate and the second set of spreadsheets were incomplete and also inaccurate.

(4) I never represented to the Commission that I had received the records requested.

The Public Records requested by letter to Mr. Griffin dated September 2, 2008, despite claims to the contrary, have not been provided. The bills, *only* (invoices) representing the four fiscal years, 2004/05, 2005/06, 2006/07 and 2007/08 *were* provided. (See Leroy Griffin letter , January 21, 2009) My request for the latest fiscal year, 2008/09 was never acknowledged nor were those records provided. Also, my request to identify the account (No. 49212) which the City claims to have deposited or credited the City of Oakland assessments has not be satisfied. The account where all the other assessments, from the other public entities, are credited is, No. 41520 (see spread Sheets)

It would have been helpful to the Commission Members if the material the City claims is representative of the records was provided to them. (See the spreadsheets).
It would also be helpful if Pat Sierra and Donna Hom would appear before the commission and explain their reasons for not providing the records requested. I also question why the Commission Staff has not taken this matter to the City Administrator or the City Attorney. Additionally, where is the response from Michele Abney concerning her efforts to obtain the records?

The December 7, 2009, Commission Report indicates that the Fire Department claims it is able to keep track of the payments other than by retaining a copy of the check itself. It further claims that it provided those records - **Not So! Those records have not been provided.** It is also claimed in the Report, (by Pat Sierra) that the next round of annual assessments will include any delinquent assessments from prior years. From that claim alone, it would appear that they *do* have the precise records which I have requested. It should then be a simple matter of providing those records. However, just exactly what is meant by their *"next round of annual assessments"* The key question here is, WHEN?

It is a simple summation, that if they intend to bill for delinquencies, then they do in fact have those records and have been purposely withholding them.

Lastly, number 3(a), (b), and (c) of my Sept. 02, 2009 records request have never been responded to.

I request that this complaint "not" be dismissed until those records have been provided.

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Respectfully submitted,

IV

The fourth issue is regarding the Foundations' "political campaign contributions". Oakland's Municipal Law has been overlooked and completely ignored. The City of Oakland Charter, Section 1203, is controlling. This Charter Section provides that Gifts, Donations, and Trusts made or offered to the City are controlled by and specifically under the power and authority of the City Council. The Council has the sole authority to accept, and to dispose of and administer those funds.

However, by Ordinance No. 8144 (June 9, 1970) that authority was conveyed, (in part) to the City Manager, the Museum Director, the Director of the Parks and Recreation Department, and to the Library Director. With that delegation of authority, the Ordinance expressly requires that those funds "be for the use of the City of Oakland or... by a designated department or facility of the City..." (emphasis added).

Section 3 of the Ordinance requires that: "All gifts and donations of money shall be deposited in the appropriate fund of the City." (emphasis added). It is important to note that the funds are expressly required to be deposited with the City - Not a Foundation or any other private party but, "the City".

This requirement is of course consistent with the "delegation of authority" doctrine whereby the public entity is required to retain ultimate control over the administration of the public facility. (Epstein v. Hollywood Entertainment Business Improvement District (2001) 87 Cal.App. 4th 862). It would also suggest that any type of contract or working agreement entered into by the parties that is interpreted to provide or hold otherwise, is on its face , null and void. (Egan v. San Francisco (1913) 165 Cal 576 and Hagerty v. City of Oakland (1958) i61 Cal, App. 2d 407, 415-417).

Respectfully submitted for your consideration,

David E. Mix

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Purnell, Daniel

From: darlinemix@sbcglobal.net
Sent: Wednesday, December 09, 2009 3:46 PM
To: Purnell, Daniel
Subject: Fw: Commission Report - December 7, 2009

Dan:

I am forwarding the attached e-mail of Dec.1, 09. I didn't hear from you on this so I wasn't clear as to whether you got it or thought it was a repeat of my Nov. 28th e-mail. My primary concern is stated under # 1 - is the JPA Foundation itself a "recipient committee" and required to file the forms as is noted in that question. I realize you covered a recipient committee in your report as it applies to the ESC, but no mention of the Foundation.

Also, I was puzzled by chairman Wiener's apparent concern whether this issue (proper reporting) was part of the original complaint where he asked you to cover it as an addendum. I certainly don't see this as a separate issue, the identification of the particular funds, where they came from and how they are reported, that were used for the political contribution are an integral part of the complained in that, are they or are they not "public moneys". It all goes to the characterization and identity of those funds.

I had hoped that it could be determined who signed the Museum check (two signatures) but I am unable to read them. Previously, as I recall with the measure G complained their internal regulations required that at least one of the signatures (or two) has to be a City Official. Also, as you may recall, the Museum Director and I believe two other City employees were and still are, in addition to being employees ("Officers") of the City, are also "paid" Officers of the Foundation. I believe this goes to, "retaining ultimate control" in the delegation of authority as is required by law. With this, I think they are hard pressed to claim it is "private" money while the City has full authority in controlling the account and endorsing the checks.

Do you know who signed the check - if not can you find out.

I am not ignoring your comment and question regarding the Commission's *authority* to determine the character of the funds (public or private) along with the Commission's jurisdiction (as Mr. Wiener posed at the meeting) which evidently has now become a leading and key issue. I can't help but feel that a hurdle is now being create in order to avoid responsibility and due process. I certainly intent to draft an argument challenging any such ill-conceived or invalid notion, just haven't gotten around to it yet.

On another note! Whatever happened to that mysterious e-mail about the LLAD to Joe Francisco from Combs seeking clarification on the vote counting requirements. The last we heard, Russo was to determine if it fell under attorney/client privilege.

Thanks again for all your help,

Dave

----- Original Message -----

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