February 25, 2019

Board of Directors of the Truckee Tahoe Airport District
10356 Truckee Airport Road
Truckee, CA 96161
sent via email

Re: February 27, 2019 meeting of the Truckee Tahoe Airport District Board, Action Item 9, "Potential Policy on Campaign Contributions"

Dear Board Members:

In regard to item 9 of the February 27, 2019 Airport Board's meeting agenda, I am writing to encourage you to analyze and enact a rule capping the amount of campaign money that new and incumbent candidates for the Board can accept from Airport District contractors. A rule capping contractor contributions would help maintain the trust that the District's constituents have historically placed in the Board's decision-making. A cap would reduce distrust of a Board decision where a voting member received a large campaign contribution from a person who is affected by the decision.

The Board's counsel, Brent Collinson, refers to Government Code Section 84308 at page 4 of the staff report he prepared for agenda item 9. The Board's adoption of a rule based on Section 84308 would require a Board candidate to either return the portion of a contractor's campaign contribution that exceeds $250 or be disqualified from voting on matters affecting the contractor.

1. California Government Code Section 84308 Imposes a $250 Cap on Contractor Contributions

The following history and description of Section 84308 explains how it would work if the Board were to adopt this law as its own. According to a summary prepared by the California Fair Political Practices Commission, Section 84308 was adopted by the California Legislature "in 1982 in response to reports in the Los Angeles Times that several coastal commissioners had solicited and received large campaign contributions from persons who had applications pending before them." [1]

The operative provisions of Section 84308 are subdivisions (b) and (c). They give an incumbent or other individual running for public office two options when a person with a matter pending before the agency makes a campaign contribution. The electoral candidate can reject the portion of the contribution that exceeds $250 or be disqualified from participating in the agency's consideration of the pending matter.

Subdivision (b) sets forth the prohibition on accepting more than $250 from the party with a matter pending before the agency:

> (b) No officer of an agency shall accept, solicit, or direct a contribution of more than two hundred fifty dollars ($250) from any party, or his or her agent, or from any participant, or his or her agent, while a proceeding involving a license, permit, or other entitlement for use is pending before the agency and for three months following the date a final decision is rendered in the proceeding if the officer knows or has reason to know that the participant has a financial interest, as that term

[11] The FPPC summary of Section 84308 is separately attached to the email submittal of this letter.

> is used in Article 1 (commencing with Section 87100) of Chapter 7. This prohibition shall apply regardless of whether the officer accepts, solicits, or directs the contribution for himself or herself, or on behalf of any other officer, or on behalf of any candidate for office or on behalf of any committee.

Subdivision (c) sets forth the disqualification sanction that applies to a candidate who chooses to keep more than $250 in regard to a matter that has not yet been decided:

> (c) Prior to rendering any decision in a proceeding involving a license, permit or other entitlement for use pending before an agency, each officer of the agency who received a contribution within the preceding 12 months in an amount of more than two hundred fifty dollars ($250) from a party or from any participant shall disclose that fact on the record of the proceeding. No officer of an agency shall make, participate in making, or in any way attempt to use his or her official position to influence the decision in a proceeding involving a license, permit, or other entitlement for use pending before the agency if the officer has willfully or knowingly received a contribution in an amount of more than two hundred fifty dollars ($250) within the preceding 12 months from a party or his or her agent, or from any participant, or his or her agent if the officer knows or has reason to know that the participant has a financial interest in the decision, as that term is described with respect to public officials in Article 1 (commencing with Section 87100) of Chapter 7.

The final paragraph of subdivision (c) allows the recipient of the contribution a 30-day grace period to return the contribution and still be able to participate in the decision:

> If an officer receives a contribution which would otherwise require disqualification under this Section, returns the contribution within 30 days from the time he or she knows, or should have known, about the contribution and the proceeding involving a license, permit, or other entitlement for use, he or she shall be permitted to participate in the proceeding.

Section 84308 applies to individuals seeking election to most state agencies and locally appointed officials who run for public office. However, persons who run for local office and who are not serving as an appointee on a governmental body are not subject to Section 84308. For example, Section 84308 does not apply to the members of Truckee's town council who run for re-election or other public office, but it does apply to members of the town's planning commission running for election to the council or a local agency. Essentially, the California Legislature left to locally elected bodies the decision on the extent, if any, to which they would limit a candidate's acceptance of a campaign contribution from an entity conducting or seeking business with that body. Accordingly, the one substantive change the Airport Board would need to make, if it were to adopt Section 84308 as its own rule, would be to make it applicable to campaigns for seats on the Board.

2. "Pay To Play" Ethics Rules Are Well-established in California and Across the Country

California Government Code Section 84308 is not an isolated or unusual limitation on campaign contributions. Many other laws have been adopted to protect the integrity of public decision-making against campaign contributions by those who have business pending before public agencies. For example, federal campaigns are subject to 52 U.S.C. § 30119(a)(1), which makes it unlawful for any person "who enters into any contract with the United States . . . directly or indirectly to make any contribution . . . to any political party, committee, or candidate for public office or to any person for any political purpose." This prohibition applies "between the commencement of negotiations . . . and . . . the completion of performance" of the contract. This federal law, which is generally referred to as the federal "contractor contribution ban," has been on the books since 1940.

At least sixteen other states restrict contributions to candidates for public office by persons who have business pending before that office. Their laws are codified in Conn. Gen. Stat. § 9-612(f)(1)-(2); Haw. Rev. Stat. § 11-355; 30 Ill. Comp. Stat. 500/50-37; Ind. Code §§ 4-30-3-19.5 to -19.7; Ky. Rev. Stat. Ann. § 121.330; La. Rev. Stat. Ann. §§ 18:1505.2(L), 27:261(D); Mich. Comp. Laws § 432.207b; Neb. Rev. Stat. §§ 9-803, 49-1476.01; N.J. Stat.Ann. § 19:44A-20.13 to -20.14; N.M. Stat. Ann. § 13-1-191.1(E)-(F); Ohio Rev. Code Ann. § 3517.13(I)-(Z); 53 Pa.Con.Stat. § 895.704-A(a); S.C. Code Ann. § 8-13-1342; VT. Stat. Ann. tit. 32, § 109(b); VA. Code Ann. § 2.2-3104.01; W. VA. Code § 3-8-12(d).

In California, bans have been imposed on particular industries that repeatedly appear before certain state agencies. Board members of the Los Angeles County Transportation Authority, who have received campaign contributions in excess of $10 from contractors or prospective contractors within the previous four years, are prohibited from participating in contract decisions that involve those donors. In 2010, Assembly Bill 1743 (AB 1743) was passed by the state legislature as part of an effort to build on previously adopted transparency provisions. The bill effectively bans placement agents and external investment managers from making campaign contributions to an elected officer or candidate for the management boards of California's pension funds. In 2016, the California State Treasurer began requiring that municipal finance firms seeking California state business certify that they will no longer make contributions to local bond election campaigns.

In other situations special disclosure requirements have been imposed. For example, The California Public Employees Retirement System board is prohibited from considering any matter involving a government contractor in closed session unless the contractor has previously disclosed all "campaign contributions aggregating two hundred fifty dollars ($250) or more and any gifts aggregating fifty dollars ($50) or more in value" made to any board member or employee in the previous calendar year. Cal. Gov't Code § 20152.5. Similarly, the California Education Code provides that the State Teachers Retirement System Board may not consider any matter that involves a government contractor during an executive session absent a similar disclosure. Cal. Educ. Code § 22363. Failure to make these disclosures could result in disqualification. Id.; Cal. Gov't Code § 20152.5. California State Lottery contractors must *disclose all reportable campaign contributions "to any local, state, or federal political candidate or* political committee in [California] for the past five years." Cal. Gov't Code § 8880.57(b)(7).

Finally, the FPPC website identifies approximately 170 local jurisdictions in California that have adopted campaign finance limitations of one kind or another that go beyond what the FPPC itself requires. For example, section 1.126(b) of the San Francisco Campaign and Governmental Conduct Code prohibits a city contractor from making a contribution to an "individual holding a City elective office if the contract

must be approved by such individual, the board on which that individual serves, or . . . a candidate for the office held by such individual . . ." And a proposal to ban developers and other planning professionals from making donations to local politicians in Los Angeles cleared the city's ethics commission last week. It would apply to developers and "their principals" who have submitted project applications that require "discretionary decisions" by the city council and planning commission. In sum, this Board's adoption of a cap on contractor campaign contributions would be neither a unique nor novel step toward protecting the District against the ill effects of such contributions.

3. **Adoption of a Cap Would Promote Public Trust in the Board**

The public interest in capping contractor campaign contributions was succinctly explained in a 2014 decision by the United States Court of Appeals for the District of Columbia Circuit. In rejecting challenges, based on the First Amendment and other constitutional grounds, to a federal ban on contractor campaign contributions, the court's Chief Justice explained that the ban served two important public purposes: "(1) protection against *quid pro quo* corruption and its appearance, and (2) protection against interference with merit-based public administration." California's government code Section 84308 would advance those purposes.

Quid Pro Quo corruption typically involves the direct exchange of an official act for money. Renown perpetrators of this misconduct include Spiro Agnew, who resigned as Vice-President of the United States in 1973 in order to avoid prosecution for accepting campaign contributions in exchange for awarding infrastructure contracts while serving as governor of Maryland. Rod Blagoavich, former governor of Illinois, was convicted in 2011 of various forms of pay-to-play corruption, including attempting to extort campaign contributions in exchange for raising Medicaid reimbursement rates, as well as offenses in connection with his effort to sell a U.S. Senate seat. In these cases, bribery and extortion laws, as well as penal versions of ethical laws, came into play.

It is important to appreciate how a cap on contractor campaign contributions differs from punitive laws. Rather than being punitive, a contribution cap is preventative. By capping the amount a candidate can receive, a rule such as Section 84308 eliminates, or at least reduces, the risk of a *quid pro quo* contribution occurring. Consequently, the cap also reduces the risk of government prosecutors, in this case the Nevada County District Attorney, having to spend taxpayer money and devote precious resources to the detection, investigation and prosecution of *quid pro quo* contributions in local elections and government decisions.

A cap also helps eliminate the **appearance** of *quid pro quo* corruption. An example from the 2004 reelection campaign of California's then Governor Gray Davis involved a $25,000 campaign contribution by Oracle just days after the state signed a $95 million software contract with the company. The timing of the contribution, coming on the heels of the contract award, created the appearance of a *quid pro quo* contribution. A costly investigation, with attendant publicity, followed. While no-one was convicted of misconduct, the contribution was ultimately returned and the contract rescinded.

The difficulty in proving *quid pro quo* corruption is another reason for eliminating the mere appearance of a *quid pro quo* campaign contribution. The difficulty arises because it is hard to prove the *pro* in the *quid pro quo*. The agreement to exchange money for governmental action can be consummated with a pat on the back, making it virtually impossible for prosecutors to prove something more than a

coincidental timing in a pair of favors. That difficulty, in turn, invites unscrupulous behavior, which erodes the public's trust in governmental decision-making.

The appearance of corruption in electoral politics also occurs where there is a general practice among persons seeking government contracts to donate to campaigns and make other contributions to officials charged with voting on the contracts. Section 84308's contribution cap, where it applies, largely eliminates the appearance of a *quid pro quo* contribution by holding all of those contributions in check. That, in turn, helps restore public trust in the impartiality of government decisions.

A campaign contribution made by someone with business before a governmental agency is, by its very nature, different from contributions made by the general public. As the circuit court for the District of Columbia explained in affirming a complete ban on contract contributions in federal elections, "[u]nlike the corruption risk when a contribution is made by a member of the general public, in the case of contracting there is a very specific *quo* for which the contribution may serve as the *quid*: the grant or retention of the contract." Thus, "a contribution made while negotiating or performing a contract looks like a *quid pro quo*, whether or not it truly is." It is this appearance of corruption which a ban or cap on contractor contributions serves to eliminate.

Finally, a campaign contribution cap protects against "interference with merit-based public administration." In effect, the cap removes the incentive to award a contract based on the slight hope for, or anticipation of, an appreciative campaign contribution. In other words, the cap helps public officials stay focused on awarding contracts based on their merits and not be distracted by the possible personal benefit that an award of a contract might have on the funding of an electoral campaign.

4. **Now is the Appropriate Time for the Board to Investigate and Adopt a Contribution Cap**

Now, rather than in the heat of a campaign, is the time for the Board to consider the adoption of a rule limiting the acceptable amount of contractor campaign contributions. With the last election cycle recently concluded, the Board has time to build on the staff report prepared by its counsel and begin considering the form of a rule that best serves District constituents. Notably, the State's Fair Political Practices Commission has explicitly provided that local jurisdictions, such as the Airport District, are free to adopt ethical standards that are stricter than what the legislature and the FPPC have already established. The legislature and FPPC only establish the floor on ethical conduct, not the ceiling.

Notably, Section 84308, while applying to local officials who are appointed, does not apply to locally elected officials. This distinction represents legislative deference to locally elected bodies and indicates a determination that locally elected officials are in a better position than the state legislature to decide what form of restrictions should be placed on local contractor campaign contributions.

The Board should consider incorporating Section 84308 into its rules and regulations for several reasons. First, the state's adoption of Section 84308 reflects a general acceptance of this standard. Second, Section 84308 is familiar to the FPPC and to practitioners of legal ethics. Third, adoption of Section 84308 would provide consistency between state and local laws, making it easier to follow, explain and enforce. State application of Section 84308 would provide guidance on how the Board should apply it. Nonetheless, the variety of other bans and caps applied by other jurisdictions and to other electoral activities illustrates that there are many alternatives to Section 84308 that the Board can also consider.

Among the alternatives is a contribution cap that more closely tracks the existing cap on gifts to locally elected officials. Government Code Section 82028 defines a gift as "any payment (or benefit) that confers a personal benefit for which an official does not provide goods or services of equal or greater value." A campaign contribution is a close cousin to a "gift," because the contribution benefits the campaign of the person running for a public office. In addition, a cap on gifts serves the same purpose as a cap on campaign contributions, that is, to "prevent either the perception or the reality that gift giving influences public officials' actions." A gift of more than $50 in a year requires disclosure and Government Code Section 89503 bars a locally elected official from accepting a gift of more than $470 from a single source in a calendar year. Acceptance of more than $470 can disqualify a public official from participating in a governmental decision affecting the gift giver.

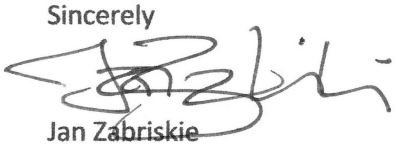
The state's gift rule currently make an exception for campaign contributions and leave their treatment to campaign finance laws. However, the Board has the discretion to eliminate the exception and treat campaign contributions the same as gifts. Since Board members are already familiar with the gift standards, the Board might choose to extend the gift standards to campaign contributions.

5. **Local Disclosure Requirements, While Helpful, Are Insufficient**

The staff report discusses increased disclosure requirement as a possible solution to the reality or perception of *quid pro quo* corruption in contractor campaign contributions. This form of transparency, however, would not solve the risks of actual or perceived corruption. Section 84308 illustrates the point. It requires disclosures, but it also imposes the contribution cap. The cap is needed because there is no mechanism to assure that heightened disclosures would occur in time for voters to act on them or that the disclosure would reach all of the District's constituents. Nor would a disclosure remove the solicitude that large contributions can buy or the taint of perceived corruption.

In addition, there is no assurance that voters fully appreciate the corrupting influence that contractor campaign contributions can have on the body politic. The corrupting effect of contractor contributions has been well documented over the course of American history and many jurisdictions have adopted laws to blunt its corrosive effect on the public's trust in government decision-making. But that does not mean that this District's voters are as well versed as the Board should be on how much contractor campaign contributions can undermine the public trust and the Board's ability to achieve "merit-based" decisions. Thus, the Board should methodically study and determine the appropriate standard for banning or capping contractor campaign contributions.

Sincerely



Jan Zabriskie
10295 Snowshoe Circle
Truckee, CA, 96161

cc: Kevin Smith, General Manager
Brent Collinson, Board counsel