PAUL J. PFINGST, ESQ. (Bar No. 112967)
pfingst@higgslaw.com
KRISTOPHER S. YOUNG, ESQ. (Bar No. 220013)
youngk@higgslaw.com
HIGGS, FLETCHER & MACK LLP
401 West "A" Street, Suite 2600
San Diego, CA 92101-7913
619.236.1551 FAX: 619.696.1410

Attorneys for Respondent
NANCY GRAHAM

BEFORE THE CITY OF SAN DIEGO

ETHICS COMMISSION

THE CITY OF SAN DIEGO ETHICS COMMISSION, Petitioner, v. NANCY GRAHAM, Respondent.	CASE NO. 2008-54 **RESPONDENT NANCY GRAHAM'S REPLY BRIEF** DATE: May 20-21, 2010 TIME: 9:00 a.m. LOCATION: 1200 Third Avenue #300 San Diego, CA 92101

COMES NOW RESPONDENT NANCY GRAHAM and submits the following in support of her motion to dismiss the administrative complaint or merge the alleged acts:

I.
THE CITY ORDINANCE DOES NOT COVER AFFILIATED ENTITIES

The drafters of the City's ethics ordinance made a decision to replace State law "source of income" language with the City's own language. The ordinance directed City employees to use the ordinance definitions and not the definitions found in State law if a word was italicized. The word "person" was italicized and defined as "Any individual, business entity, trust, corporation, association, committee, or any other organization or group of persons acting in concert."

The City's definition of "person" obviously does not include "source of income" or make reference to affiliated entities. Nonetheless Petitioner argues that the State's "source of income" and affiliated entities rules are inherently a part of the City ordinance. Petitioners argument is that since

the "source of income" regulations are in State law they must be, ought to be, were intended to be, or are required to be in the City ordinance. Petitioner repeatedly ignores the indisputable fact that the language is not there.

It is claimed that Ms. Graham's statutory interpretation of the City code is simply "hyper technical." Typically, accusations of "hyper technical" statutory interpretation involve a misplaced comma or some confusion about pronouns. Here, the essential words of the State statute were eliminated and the City replaced them with new words and new definitions. The City directed employees to use the new definition. This is hardly a "hyper technicality."

Petitioner also contends that the definition of "person" contained in § 27.3503 was not intended to be different than the words "source of income" as it is used in Government Code § 87103. Petitioner does not explain why anyone reading the ordinance should be charged with that knowledge. Ms. Graham is accused of violating the language of the ordinance, not the individual intent of a deputy city attorney who drafted the ordinance.

Petitioner claims that when the drafter of the ordinance decided to eliminate the State language and replace it with the language found in § 27.3561(b)(4), he did it for no particular reason. That is a peculiar argument because people and courts reasonably expect that significant changes in the wording of a statute are made for a purpose.

Petitioner has submitted the declaration of Richard Duvernay, a former low-level Deputy City Attorney. Respondent believes the declaration is inappropriately raised in a brief. We also believe Mr. Duvernay's position with the City is not high enough to speak for the City. However, even Mr. Duvernay does not explain why the State's "source of income" language was changed. Paragraph 8 of his declaration reads:

> SDMC § 27.3561 was drafted with the intent of incorporating the State's disqualification prohibitions to achieve the goal of uniformity without copying over voluminous pages from the PRA and FPPC regulations. Even though the particular wording may differ in some places, SDMC § 27.3561 was not drafted with the intent of imposing disqualification rules that were in any manner different from those that exist in State law.

That explanation is logically flawed. The City drafters would have saved time and effort by simply using the same "source of income" wording as the PRA. There was no need to include "voluminous pages of FPPC regulations" in the City ordinance because the introductory language of

the ordinance instructs that if a word is not italicized the State definition is used.

Compare, for example, how Mr. Duvernay handled the definition of "material financial effect" a few lines down in paragraph (c) of the very same section. The term "material financial effect" was not defined in the ordinance and it was not italicized. However Mr. Duvernay drafted language stating that "material financial effect" as used in the ordinance had the "same meaning" as in the California Code of Regulations.

Mr. Duvernay's declaration states that he included a reference to FPPC regulations in paragraph (c) and not in paragraph (b) to accomplish the following:

> a. To explain the meaning of "material financial effect," an important term not used in everyday parlance, and not otherwise defined or explained in the Ethics Ordinance or in the Definitions section of the PRA or FPPC regulations:
>
> ...
>
> c. To take a "belts and suspenders" approach in emphasizing that a "financial effect" found to be "material" under a state law analysis would likewise be considered "material" under a local law analysis.

The term "source of income" is no more or less used in everyday parlance than "material effect. If the complete definition of "person" was to be found in the Code of Regulations then it should have been stated in the same way "material financial effect" was treated. The "belt and suspenders" explanation has the hallmarks of an after-the-fact rationalization for changing the State law, which had unanticipated effects.

The unusual facts of this case were apparently not foreseen when Mr. Duvernay changed the State language. That may be understandable. Government Code section 82030, which defines income, covered almost all of the same ground as the "source of income" regulations. The exception is that the Government Code expressly excluded out of state income from the types of income requiring disqualification.

The City's "pre-emption" argument is also misguided. The argument is that the City can change State law to make an ordinance more strict, but not less strict. The argument continues that because Ms. Graham's analysis would result in a less strict ethics law, she must be held to the State law.

We do not see the need to argue the merits of whether the ordinance was required to contain a

"source of income" provision. If the City inartfully or unintentionally enacted a flawed ordinance, the City should change the ordinance. But the City may not prosecute and fine employees who followed a law that it drafted. If the PRA was violated, then the FPPC can take appropriate action to prosecute the case.

II.
PENAL CODE SECTION 654 CONTROLS THE MULTIPLE ACTS ANALYSIS

Petitioner has directed the Commission's attention to *Ralphs Grocery Company v. California Dept. of Food and Agriculture*, 110 Cal. App. 4th 694 (2003). In *Ralphs*, seafoods were improperly short-weighted and offered for sale. The court was required to interpret a Business & Professions Code statute having to do with weights and measures.

Although *Ralphs* was an administrative case, the court held that in any case that results in fines, a multiple acts issue must be analyzed in accordance with Penal Code § 654. The court stated:

> Penal Code section 654 is broadly written to apply to any form of punishment under any provision of law. A fine clearly constitutes "punishment" (see Pen. Code, § 15) and sections 12023 and 12024 are clearly "provisions of law." Although we can find no cases applying Penal Code section 654 in the administrative context, we see no relevant distinction between a criminal court and an administrative agency. Punishment is punishment regardless of who imposes it. (Emphasis added.)

Petitioner's extended discussion of public policy is therefore irrelevant to an analysis of the multiple acts issue. It is unclear why Petitioner has referred to various stipulated settlements of the FPPC. There is no precedent value in those cases. Parties frequently settle accusations by stipulation to avoid the costs of litigation. Penal Code § 654 does not prohibit stipulated settlements.

Petitioner has ignored the case authorities we submitted and misinterpreted how the ultimate decision in *Ralphs* fits into a Penal Code § 654 analysis. The court in *Ralphs* stated:

> Turning to the substance of Ralphs' arguments, Ralphs first contends that Penal Code section 654 prohibits the imposition of two section 12023 fines for the two gross weight packages of seafood medley because there was really only one act or omission; namely, failing to include the weight of the tare, or packaging, when preparing the labels. We disagree with that characterization. Section 12023 does not prohibit the preparation of inaccurate labels, it prohibits selling inaccurately labeled items. Thus, each inaccurately labeled package of seafood medley offered for sale constituted a separate and distinct violation.

The particular statute in *Ralphs* authorized fines for each separate package offered for sale,

not for each step along the manufacturing process. The importance of *Ralphs* is that each of the defendant's acts of packaging and labeling could not have been separately punished.

Petitioner relies on the "plain language of SDMC section 27.3561" to support its position that every letter, e-mail, phone call or meeting constituted a separate violation here. That portion of the ordinance simply lists the types of conduct that influence a municipal decision. There is nothing in that section that bears one way or another on a PC 654 multiple acts analysis.

We suggest Petitioner has lost its way in discussing public policy. Like many governmental agencies, it clings to the belief that the more power it has to punish, the better off the public will be. We respectfully disagree and contend that the power to threaten financial ruin is inherently coercive and invites abuse. However our opinion matters no more than Petitioner's.

Ultimately, as the *Ralphs'* court stated, "punishment is punishment," therefore the multiple acts issue is governed by Penal Code § 654.

III.
DIRECT vs. INDIRECT

Ms. Graham contends that the Ballpark Village LLC., and not Lennar, was directly involved with CCDC. We claim Lennar was indirectly involved with CCDC through it's partial ownership of Ballpark Village LLC.

Petitioners legal analysis of the issue leads to the conclusion that Lantana Boatyards Ltd., was also "directly" involved with CCDC because it is an affiliated entity of Lennar and Lennar is an affiliated entity of Ballpark Village.

The claim that an inactive Florida corporation, formed for the single purpose of developing a condo project in Florida years ago, was directly involved with CCDC in a downtown redevelopment project six years later, is contrary to a reasonable interpretation of the word "direct". Petitioner's analysis, if accurate, would mean that there were hundreds of directly involved entities in the redevelopment. That clearly was not the case here – no was it the intent of the City's ethics code.

Petitioner warns that an alternative analysis would permit cheaters to create sham entities to circumvent the law. But courts have uniformly held that people who create an entity for a fraudulent purpose will not enjoy the legal protections from its liabilities. In this case there were no sham entities created to cheat the system or circumvent the law. Instead, Respondent simply complied with

the City code as written.

IV.
CONCLUSION

For the reasons stated above, the alleged ethics violations by Ms. Graham should be dismissed or merged into one violation.

DATED: May 7, 2010

HIGGS, FLETCHER & MACK LLP

By: [redacted]
PAUL J. PFINGST, ESQ.
KRISTOPHER S. YOUNG, ESQ.
Attorneys for Respondent
NANCY GRAHAM