



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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April 15, 2019

Heather Minner
City Attorney's Office
10300 Torre Avenue
Cupertino, CA
95014-3255

Re: Your Request for Advice
Our File No. A-19-032

Dear Ms. Minner:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹ Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090. Also note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTION

Does the Act prohibit City of Cupertino Vice Mayor Chao from taking part in governmental decisions concerning either of the two proposed mixed-use development projects located 939 feet away from her residence?

CONCLUSION

No. Although Vice Mayor Chao has a conflict of interest in governmental decisions concerning both proposed projects located 939 feet away from her residence because it appears the decisions will have a foreseeable and material effect on her real property interest, the public generally exception applies to allow her to take part in the decisions.²

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² For convenience, we consolidated your Questions 1 through 5 as they all pertain to decisions concerning both proposed projects. With respect to Question 6 concerning the possibility that the City Council may be asked to consider a potential alternative Specific Plan proposal with similar or less impacts than the current Specific Plan proposal, we are unable to provide advice concerning this hypothetical situation. Should a different proposal be submitted for the City Council's consideration, you should request further advice at that time.

FACTS AS PRESENTED BY REQUESTER

You have submitted this request for advice on behalf of your client, the City of Cupertino, concerning future City decisions involving a proposed mixed-use development project located about 939 feet from real property owned by Vice Mayor Liang Chao.³

I. Proposed Development of the Vallco Shopping Mall

The Sand Hill Property Company and Vallco Property Owner, LLC (collectively, “Sand Hill”) are interested in developing a mixed-use project (the “Project”) in the City, most of which would be located on the site of the current Vallco Shopping Mall (the “Project site”), which is approximately 58 acres. The mall at the Project site was initially built in the 1970s, operating for years with many shops and restaurants, including anchor stores Macy’s, JC Penney and Sears.

According to the Draft Environmental Impact Report (“EIR”), by the mid-1980s, the Vallco Shopping Mall was unable to respond to the changing demands of consumers and markets, which led to the decline of the mall by the early 2000’s. (EIR at p. 8.) Sand Hill purchased the Project site in 2014, when occupancy of the mall tenants had reduced to the point where vacant storefronts outnumbered active storefronts (EIR at p. 9), and by 2016, all of the anchor stores had closed. (*Ibid.*) By 2018, the mall had an approximately 76% vacancy rate. (*Ibid.*) The current businesses include a fitness center, a bowling alley, an indoor ice rink, and a restaurant.

Sand Hill’s proposed development is one of the most significant developments in the City in recent years. It is currently pursuing two project proposals with the City: 1) a “streamlined” application process under California Senate Bill 35 (“SB 35 Project”), and 2) a more traditional land use approval process pursuant to a Specific Plan proposal (“Specific Plan Project”).

A. The Specific Plan Project

Sand Hill is seeking approval to develop the Vallco site through a Specific Plan Project, which would include a total of 2,923 housing units, with 2,668 of those units being located on the Project site. It would have 1,750,000 square feet of office space, 400,000 square feet of retail, and 191 hotel rooms.

Describing the purpose and intent of the Project, the Vallco Town Center Specific Plan states:

[The Project] is aimed at one overarching purpose: to transform the existing Vallco Shopping Mall site into a walkable, mixed-use district anchored by retail, entertainment and cultural uses, and supported by new neighborhoods, employment areas and public open spaces. This would provide a major new destination for Cupertino

³ The Cupertino City Attorney prepared the request for formal written advice as authorized by Vice Mayor Chao.

residents and visitors to socialize, work, and enjoy the shops, restaurants and streetscapes.

(Specific Plan at Chapter 1, p. 2; see also EIR at p. 33 [the City's objective for the Vallco site is to "create a distinct and memorable mixed-use Town Center that is a regional destination and is a focal point for the community..."].)

With respect to the buildings at the Project site, the maximum building height would range between 10 to 13 stories. (See EIR at p. 11; see also <https://www.cupertino.org/our-city/departments/community-development/planning/major-projects/vallco> [maximum building height limit west of N. Wolfe Road is 120 feet (10 stories) while maximum height limit East of N. Wolfe Road is 150 feet (13 stories)].)

The EIR states that the Project would cause increased traffic and congestion on major surrounding thoroughfares, including Stevens Creek Boulevard,⁴ which could result in "cut-through" traffic and parking intrusion in adjacent neighborhoods, including the Vice Mayor's neighborhood. (See EIR at p. 325.)

The EIR states the Project contains a condition of approval⁵ that requires monitoring of cut-through traffic and parking in surrounding neighborhoods and implementation, if necessary, of traffic calming improvements and a parking permit program to minimize neighborhood cut-through traffic and parking intrusion. (EIR at p. 326.) With this condition of approval, the EIR concludes that implementation of the Project "would not result in significant traffic or parking intrusion in the adjacent residential neighborhood[s]." (*Ibid.*)

According to the EIR, noise impacts resulting from construction depend upon noise generated by construction equipment, the timing and duration of noise-generating activities, and the distance between construction noise sources and noise-sensitive areas. (EIR at p. 227.) The cumulative noise impacts for the Project site and surrounding area is considered significant and unavoidable (*Id.* at p. 230), and it is estimated the Project will take 10 years to complete. (*Id.* at p. 227.) However, the Vice Mayor's property is outside the area that would experience significant noise impacts. (*Id.* at p. 212.)

In September 2018, the City Council approved the Specific Plan Project by adopting multiple Resolutions, including one certifying the Final EIR and one approving General Plan amendments required to implement the Specific Plan. In October 2018, the City Council approved and enacted the three ordinances in relation to the Specific Plan Project.

On October 2018, opponents of the Specific Plan Project filed four separate referendum petitions with the Cupertino City Clerk's Office challenging (1) the General Plan Resolution, (2) the Specific Plan Resolution, (3) the Rezoning Ordinance and (4) the Development Agreement Ordinance. On December 6, 2018, the County Registrar of Voters determined that each of the four referendum petitions contained a sufficient number of valid signatures to qualify for the ballot.

⁴ Your facts state the EIR concludes that there would be significant cumulative traffic impacts on 17 intersections throughout the area, 8 of which are in Cupertino.

⁵ This condition of approval applies only to the Specific Plan Project, not the SB 35 Project.

The qualification of the referenda for the ballot has put the Specific Plan Project on hold for the foreseeable future. However, the City Council must make a decision whether or not to repeal the legislative actions challenged by valid referendum petitions or submit them to the voters.

Vice Mayor Chao, who was not elected until November 6, 2018, did not participate in her official capacity in any of decisions related to the City's approval of the Specific Plan, the referendum petitions, and the Specific Plan litigation.

B. The SB 35 Project

SB 35 became effective on January 1, 2018, amending provisions of the California Government Code with the intent of addressing California's housing shortage. Specifically, it imposes a streamlined ministerial review and approval process for certain affordable housing projects on cities and counties that, according to the State, have not made sufficient progress toward meeting their affordable housing goals for above-moderate and lower income levels. The State has determined that the City is subject to SB 35 streamlining for very low and low-income housing projects.

Projects that qualify for SB 35 streamlining are exempt from environmental review under the California Environmental Quality Act ("CEQA"). Further, the SB 35 approval process does not allow public hearings; only design review or public oversight is allowed, which must be objective and strictly focused on assessing compliance with criteria required for streamlined projects as well as objective design review of the project.

Projects that elect to take advantage of this process must submit an SB 35 application to the appropriate city or county. If a particular project is eligible for the streamlining process, then SB 35 specifies the timeframes within which the municipality must make a final decision on the application.

On March 27, 2018, Sand Hill submitted an SB 35 application for a proposed project at the Vallco site that would include 2,402 housing units, 1.8 million square feet of office space and 400,000 square feet of retail. The application provides that 1,201 units would be affordable to very-low and low-income households.

You state that the EIR only analyzed the Specific Plan Project and not the SB 35 Project, which requires ministerial approval. Nevertheless, the analysis in the EIR approximates the impacts of the SB 35 project because the amount of development that is permitted under the SB 35 Project is similar to the amount of development in the approved Specific Plan Project. Under the SB 35 Project, however, the maximum building height limit is up to 240 feet (22 stories), and no environmental mitigations would be required.⁶

In June 2018, the City issued a letter to Sand Hill determining that the application met the eligibility criteria established under SB 35 and requested additional information to allow the City to continue processing the application. In September 2018, prior to the Vice Mayor's election

⁶ See <https://www.cupertino.org/our-city/departments/community-development/planning/major-projects/vallco>

to the Council, the City approved the application. Sand Hill has begun some preliminary general work not specific to either approach, such as the first phase of demolition.

A lawsuit has been filed challenging the City's approval of the application. Since elected, Vice Mayor Chao has abstained from participation in any decisions related to the litigation challenging the SB 35 application.

II. Vice Mayor Chao

Vice Mayor Chao was elected to the Cupertino City Council at the November 6, 2018 election. She assumed office on December 6, 2018, and was elected Vice Mayor on the same date.

Vice Mayor Chao owns her home, which is located 939 feet from the nearest edge of the Project site. Her residence is in a cul-de-sac in the North Blaney neighborhood and is separated from the Project site by about three blocks of residential homes. Her neighborhood has several hundred similar homes extending in all directions and is separated from the Project site by a concrete wall. The wall prevents access to the Project site from the west side of the Project. The North Blaney neighborhood is located to the west of the Project site and the area is predominantly defined by single-family residential homes and on the valley floor with minimal grade changes.

Vice Mayor Chao's residence is a two-story, single family home. The front faces southeast and the back faces northwest towards the Project site.

Stevens Creek Boulevard is the nearest major thoroughfare, a six to eight lane street with numerous businesses already located on both sides of the street, including those currently operating on the Project site.

III. Appraisal

You have also provided a copy of an appraisal report performed by California licensed certified general real estate appraiser who has over 30 years of appraisal experience and is a Member of the Appraisal Institute. You state the appraiser is a neutral party, with no relationship to the Vice Mayor or Sand Hill and no prior involvement with the Project.

ANALYSIS

The Act's conflict of interest provisions prohibit a public official from taking part in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the official's financial interests distinguishable from the decision's effect on the public generally. (Sections 87100 and 87103.) An official's interests that may give rise to a disqualifying conflict of interest under the Act are set forth in Section 87103. Of the interest identified under the Act, the only one implicated is Vice Mayor Chao's real property interest in here residence. Under Section 87103(b), an official has an interest in any property in which the official has a direct or indirect investment of \$2,000 or more.

Foreseeability and Materiality

Regulation 18701(a) provides that a decision's financial effect on an official's financial interest is presumed to be reasonably foreseeable if the official's interest is "explicitly involved" in the decision at issue, and an interest is explicitly involved if the official's interest is a named party in, or the subject of, the decision. Regulation 18701(b) sets forth the foreseeability standard applicable to an official's interest that is not explicitly involved in the decision, and provides that the decision's financial effect on an official's interest need not be likely to be considered reasonably foreseeable – generally, a financial effect is reasonably foreseeable if it "can be recognized as a realistic possibility and more than hypothetical or theoretical."

The Vice Mayor's interest in her residence is not explicitly involved in any of the decisions at issue. Therefore, with respect to this interest, the effect of each of those decisions is reasonably foreseeable if it can be recognized as a realistic possibility and more than hypothetical or theoretical.

Regulation 18702.2 provides the materiality standards applicable to a decision's reasonably foreseeable financial effect on an official's real property interest. The Commission adopted amendments to Regulation 18702.2 at its regular meeting on January 17, 2019, and the analysis below applies that regulation as amended.

Under Regulation 18702.2(a)(8), a decision's effect on an official's real property interest is material if the decision involves property located more than 500 but less than 1,000 feet from the property line of the official's parcel, and the decision would change the parcel's market value, development potential, income producing potential, highest and best use, or character by substantially altering traffic levels, intensity of use, parking, view, privacy, noise levels, or air quality.

The Appraisal Report

Reasonable reliance on an appraisal by a disinterested and otherwise qualified real estate professional, based on an accurate understanding of all pertinent facts and circumstances and proper application of pertinent Commission regulations, will generally be considered a good-faith effort by a public official to assess the financial effect of a decision on his or her real property. However, an appraisal is not determinative on conflict of interest issues. While the appraisal provided indicates that the analysis is consistent with Regulations 18702.2, we do not find that it sufficiently addresses the pertinent facts and circumstances or applicable Commission regulations.

*The Project*⁷

Both of the proposed plans constitute major projects of significant magnitude. The Specific Plan Project would include 2,668 new housing units on the site in addition to 1,750,000 square feet of office space, 400,000 square feet of retail, and 191 hotel rooms. The tallest buildings in the

⁷ As your facts indicate, the two proposed projects are similar in size and scope so our analysis reflects the impacts of both projects unless otherwise specified.

development would range in height from 10 to 13 stories. Similar in size, the SB 35 Project would include 2,402 housing units, 1.8 million square feet of office space, 400,000 square feet of retail and a 22-acre rooftop park. The housing units would be comprised of 7 towers that would be approximately 22 stories in height.

The Project is also significant to the City. As mentioned, the Project would be a mixed-use development located on approximately 58 acres of land that is the current location of the largely vacant Vallco Shopping Mall. The Specific Plan states the developers envision transforming this mostly unused area “into a walkable, mixed-use district anchored by retail, entertainment and cultural uses, and supported by new neighborhoods, employment areas and public open spaces. This would provide a major new destination for Cupertino residents and visitors to socialize, work, and enjoy the shops, restaurants and streetscapes.” It further describes the Project as a “regional destination” and “focal point for the community.”

Traffic Levels and Intensity of Use including Parking, View and Noise.

The EIR states the Project, which is estimated to take 10 years to complete, will result in increased traffic and congestion on major thoroughfares near the Vice Mayor’s home, such as Steven’s Creek Boulevard, which could result in “cut-through” traffic and parking intrusion in adjacent neighborhoods, including the Vice Mayor’s neighborhood. Even though implementation of neighborhood traffic calming and a parking permit program may ultimately minimize the problem within her neighborhood, there is a realistic possibility that the Project will substantially alter traffic levels and parking in areas near Vice Mayor’s home, such as Steven’s Creek Boulevard.

Furthermore, when completed, the Project will add thousands of new residents and office workers to the area, while transforming the mostly vacant 50-acre Project site into a vibrant destination for Cupertino residents and visitors. While the intensity of use of the Vice Mayor’s residence will likely remain the same, there is a realistic possibility that the intensity of use of property surrounding her residence will substantially increase. For instance, the EIR states the cumulative noise impacts for the project site and surrounding area is considered significant and unavoidable. Although a concrete wall separates the Vice Mayor’s neighborhood from the Project site and her residence lies outside the area that would experience significant noise impacts, there is a realistic possibility that the construction activities necessary for a project of this size and magnitude will substantially alter the noise levels in areas surrounding her property. Additionally, it also appears that views from her residence will be substantially changed as the appraisal concluded that both projects would change the view from the property resulting in a more urban feel.

Market Value and Income Producing Potential.

As mentioned, the Vice Mayor’s residence is located in a cul-de-sac, approximately 939 feet from the Project. There is a “realistic possibility” that a project of this magnitude, seeking to become the focal point for the community, will impact the market value of her residence.

In prior advice, we have concluded that projects much smaller in scale would impact the market value of homes located within distances of a project similar to the distance here. (See, e.g., *Chopra* Advice Letter, No. A-18-098 [reasonably foreseeable that construction of 118 new residential dwellings on land utilized as a public park located about 930 feet from residences of two

City of Mountain View councilmembers would have a material financial effect on the market value of their homes; *Wright* Advice Letter, No. A-17-201 [reasonably foreseeable that mixed-use development that includes 10.45 acres of commercial use, 98 condominiums, 22 single family detached homes on undeveloped land 700 feet from Mayor's Antioch residence would have a material financial effect on the market value of surrounding properties, even those 700 feet away].)

Just as it is reasonably foreseeable the Project will impact the market value of the Vice Mayor's residence, there is also a realistic possibility, and thus reasonably foreseeable, that the Project will impact the potential rental prices of the Vice Mayor's home as well as the other homes in the neighborhood.

Accordingly, based on the facts provided, all governmental decisions concerning either the Specific Plan Project or the SB 35 Project would have a reasonably foreseeable material financial effect on the Vice Mayor's interest in her residence.

Public Generally Exception

Commonly referred to as the "public generally exception," Regulation 18703(a) provides:

A governmental decision's financial effect on a public official's financial interest is indistinguishable from its effect on the public generally if the official establishes that a significant segment of the public is affected and the effect on his or her financial interest is not unique compared to the effect on the significant segment.

For purposes of the exception, 25-percent or more of the residential real property within an official's jurisdiction constitutes a "significant segment of the public." (Regulation 18703(b).)

Cupertino is a relatively small city with a population of approximately 58,300 based on results from a 2010 census. The Project site is in the eastern portion of Cupertino. On April 4, 2018, you provided a map prepared by the City showing approximately 25-percent of the residential units in the City are within 3,800 feet of the Project.

A large majority of the residences in that significant segment are generally located to the west and south of the Project site. The appraisal indicated that California freeway 85 (CA-85) to the west of the Project is the major breaking point of Cupertino City so residences further west of CA-85 would be removed both physically and psychologically from the Project. In addition, it stated Bollinger Road to the south would be another logical boundary. We note that all the residences identified as part of the significant segment are located well within those specified boundaries.

In the *Nerland* Advice Letter, No. A-18-192, the San Pablo City Council considered installation of safety measures that would allow for a reduction in train horn noise at up to five railroad crossings in the City. There, trains running on the Burlington Northern Railroad, which runs north-to-south along the City's western border, would sound their horns at each railroad crossing. Two councilmembers owned personal residences within 400 feet of the railroad tracks and within 700 feet of one of the crossings being considered.

With respect to the public generally exception, the *Nerland* letter noted that a large majority of the residences were located within 3,000 of the railroad tracks and that given the City's small size and high level of noise from the trains, reduction in train horn noise would affect more than 25-percent of the residences. It further found that there was no indication the reduction in noise would have a disproportionate effect on the councilmembers' real properties within 400 feet of the tracks as compared to other residential parcels within the significant segment as far as 3,000 feet from the tracks.

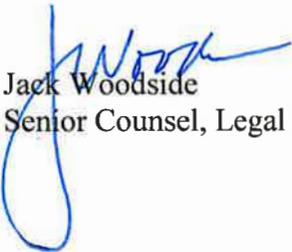
The present matter is similar. Given the massive size of this Project, which will add thousands of new housing units and jobs to the Project site that is expected to become a regional destination, it appears that the Project will affect all the residences identified in the significant segment within 3,800 feet of the Project. Furthermore, while some of the properties in closer proximity may be affected disproportionately, there is no indication that the foreseeable impacts, such as increased property value, increased traffic on several main thoroughfares, intensity of use or views, will have a unique or disproportionate effect on Vice Mayor Chao's residence, which is 929 feet from the Project, in comparison to the other properties within 3,800 feet of the project.

Accordingly, we conclude that the public generally exception applies, and Vice Mayor Chao may participate in decisions related to both proposed projects.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge
General Counsel

By: 
Jack Woodside
Senior Counsel, Legal Division

JW:aja