



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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August 11, 2020

Rebecca L. Moon  
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456 West Olive Avenue  
Sunnyvale, CA 94088-3707

Re: Your Request for Advice  
**Our File No. A-20-092**

Dear Ms. Moon:

This letter responds to your request for advice on behalf of City of Sunnyvale Mayor Larry Klein and Councilmember Gustav Larsson, regarding the conflict of interest provisions of the Political Reform Act (the “Act”).<sup>1</sup> This letter is a follow-up request to advice recently provided in the *Moon* Advice Letter, No. A-19-236.

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

Following the City’s decision to amend the Downtown Specific Plan (“DSP”), may the City segment the development agreement decisions for two specific projects, “STC Venture in Block 18” and the “Kasik/Minkoff in Block 1,” so that Mayor Larry Klein or Councilmember Larsson, who each own a residence located near the DSP boundary, may participate in the decisions?

### CONCLUSION

No. Where the officials have a conflict of interest in the DSP amendment decisions, each official may only participate in specific project decisions to the extent that the official does not otherwise have a conflict of interest in the decision, the decision is properly segmented under

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<sup>1</sup> 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.

Regulation 18706, and the decision will not in effect reopen, determine, affirm, nullify, or alter the DSP amendment decisions. As the decision-making process is currently structured, the two Development Agreements identified are inextricably interrelated to the DSP decisions. The DSP allows the Development Agreements to reopen and alter the DSP amendment major policy decisions on height and density in the DSP Blocks.

### **FACTS AS PRESENTED BY REQUESTER**

Mayor Larry Klein and Councilmember Gustav Larsson each own a single-family home in the residential neighborhood immediately south of the City's Downtown Specific Plan ("DSP") area. Councilmember Larsson lives approximately 69 feet from the southeast corner of the DSP area. Mayor Klein's home is located approximately 640 feet south of the DSP boundary.

The City adopted and has amended the existing the DSP to guide planning and redevelopment in the downtown area over a 27-year period. Currently, due to six development project proposals for sites within the DSP, the City is considering amendments to the DSP that will allow for higher density, a shift from retail spaces to residential and office (mixed-use) spaces, and taller buildings in the Commercial Core District of the DSP, as well as additional policy and goal changes.<sup>2</sup> The DSP amendments will establish the base level of the development that can occur in the Downtown over the coming years. The City will then consider allowing developers to exceed these standards for a particular project in exchange for the developers providing community benefits under a Development Agreement for each project. Currently, the City has negotiated development agreements with two of the three owners/developers who have proposed projects in the DSP:

- Block 18: Project by STC Venture LLC and related entities, also known as "CityLine" including a combination of office and residential buildings, with associated commercial/retail space, parking garages, and a publicly accessible plaza.
- Block 1a/1: Project by the Kasik family (owners) and Minkoff Group (developer), also known as "100 Altair" including one office building with underground parking garage.

The City's Approval of each of the above projects will require three separate steps:

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<sup>2</sup> These DSP amendments are provided in detail in the *Moon* Advice Letter, No. A-19-236, which notes: All six of the proposed specific development projects are in the Commercial Core. Four of the proposed development project sites are in the Town Center (Block 18), formerly a large enclosed mall slated as early as 2007 for replacement by residential units, office space, a hotel, public plaza and retail. In 2016, the "CityLine" developer completed three 5-story mixed use apartment buildings within Block 18 and began constructing a 2-story retail building for Whole Foods and an AMC theater. CityLine removed some of the earlier abandoned partial construction and completed streetscape improvements.) Blocks 1 and 1a currently have a 1 story commercial building and a 3-story, 20-unit apartment building. The two sites are ringed by new development of 5- and 6-story office and mixed-use apartment buildings.

- (1) Approval of the amendments to the DSP. The DSP will establish a maximum level of development (height, square footage, number of units in residential buildings) that can be approved for each block. However, the DSP will authorize the City Council to approve additional height, square footage, or residential units through a Development Agreement in exchange for community benefits.
- (2) Approval of a Development Agreement with each applicant. The Development Agreement for each developer will specify the community benefits that the developer has agreed to provide (such as affordable housing, publicly accessible open space, etc.) and establish the maximum height, square footage, and/or residential units authorized by the City Council.
- (3) Approval of a Special Development Permit for each project. At future hearings, the Planning Commission or City Council will be asked to approve Special Development Permits (SDPs) for the specific development projects.

This request for advice involves Steps (2) and (3), approval of the Development Agreements and SDPs for the specific projects. Based on previous advice from the FPPC, the officials will recuse themselves from decisions related to the amendments to the DSP.

Although both officials are less than 1,000 feet from the DSP boundary, they are more than 1,000 feet from each of the specific projects. Mayor Klein is approximately 1,500 feet from the closest project on Block 18 (the “Building B” project) and more than 3,000 feet from the Kasik/Minkoff project. Councilmember Larsson is approximately 1,300 feet from the closest point on Block 18 (the Macy’s parking lot), and more than 2,700 feet from the Kasik/Minkoff project.

Unlike the development sites on Block 18, which are currently vacant or under-utilized, Block 1 is nearly built out with existing multi-story office and residential buildings. The effects of adding a 7-story office building to Block 1 seem unlikely to impact the residents of the neighborhood to the south of the DSP area, which is more than a half mile away. (See, e.g., FPPC Advice Letter A-15-049 (Quinn).)

## ANALYSIS

The Act’s conflict of interest provisions prohibit any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. (Section 87100.) A public official has a “financial interest” in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on one or more of the public official’s interests. (Section 87103; Regulation 18700(a).) Section 87103 defines a financial interest to include any real property in which the public official has a direct or indirect interest worth \$2,000 or more. Each of the officials has a real property interest in their respective residential homes located adjacent to the DSP.

The proposal to amend the existing DSP allows for major changes to make way for proposed development: creating a new district within the DSP, moving an area out of the Commercial Core and into the south of Iowa District, and changing the nature and density of the

residential, commercial and office allotments. These amendments address policies, goals and design guidelines to update the DSP. The amendments are also inherently connected to, and designed to allow for the six specific proposed development projects.

We have previously advised the officials that they may not participate in the DSP decisions due to their financial interests in their residences. In the *Moon* Advice Letter, No. A-19-236, we concluded that the scale and impact of the redevelopment in the DSP create a conflict of interest for the officials living less than 1,000 feet from the boundary of the DSP with respect to major policy decisions.<sup>3</sup> In regards to the anticipated specific development projects and decisions regarding the development agreements, we advised that, as a general matter, pursuant to the requirements of Regulation 18706, the officials may participate in decisions that will not in effect act to “re-open, determine, affirm, nullify, or alter” previous DSP decisions. Decisions involving “major policy decisions or decisions that may determine whether aspects of the DSP will move forward” we found are inextricably interrelated to the decisions in which the official has a conflict of interest and may not be segmented to allow participation.

Now that two of the development projects are more certain, you request advice on whether the Development Agreements for the Block 18 and the Block 1a projects may be segmented to allow for either of the officials’ participation.

To review, the Act’s segmentation rules allow that an official with a conflict of interest may participate in decisions that do not in effect reopen or affect the decision in which the official has a conflict of interest. Regulation 18706 allows for some large, complex decisions to be segmented into separate decisions so that even if an official has a disqualifying interest in one component of the series of decisions, he or she may still participate in other components in which there is no financial interest.

Regulation 18706 requires the following:

- (1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying financial interest;
- (2) The decision in which the official has a financial interest is segmented from the other decisions;
- (3) The decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official’s participation in any way; and

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<sup>3</sup> Additionally, we previously advised Councilmember Larsson that he has a reasonably foreseeable and material real property financial interest in decisions related to the DSP, the redevelopment of Block 18, and the Town Center Project (a mixed-use development plan within Block 18) due to the development’s anticipated impacts on his residence. (*Borger* Advice Letter, No. I-15-110, *Borger* Advice Letter, No. A-15-226, and *Nagel* Advice Letter, No. A-16-101.)

(4) Once the decision in which the official has a financial interest has been made, the disqualified public official's participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified."

Where a decision in which an official has a conflict of interest is "inextricably interrelated" (the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision), the official will be required to disqualify from both decisions. (Regulation 18706(b).)

We previously advised Councilmember Larsson that "implementation-type" decisions may be segmented from the DSP or development plan approvals in which he had a conflict of interest: decisions to approve a new developer for the Block 18 redevelopment plan (*Borger* Advice Letter, No. I-15-110), decisions regarding timing and phasing of construction of the Town Center Project (*Borger* Advice Letter, No. A-15-226) and ministerial decisions to modify the Town Center Project permit to reflect changes to the Building Code, as well as changes in the development.

However, we have also advised that decisions involving major policy decisions or decisions that may determine whether aspects of the DSP will move forward are inextricably interrelated to the original approvals of the DSP or the development plan for Block 18 and are not decisions that may be segmented. These include decisions regarding the construction financing, extension of time frames, and the ownership structure of housing units. (*Borger* Advice Letter, No. A-15-226), and decisions relating to how the Town Center Project would meet its Below Market Rate Housing obligations and the types of housing units to be included in the project. These were material provisions of the original approvals, and constitute major policy decisions that may reopen, determine, affirm, nullify, or alter the original approvals of the Town Center Project or the development plan for Block 18. (*Nagel* Advice Letter, No. A-16-101.)

We note that the decisions could be structured to comply with the requirements of Regulation 18706; however, as presented, the City's steps 1 and 2 are inextricably interrelated. The Development Agreements are not implementations of the DSP decisions; these are heavily negotiated continuations of the DSP major policy decisions. Rather than making a final decision in the DSP, the DSP approval authorizes the City to approve additional height, square footage and residential units in each project through a Development Agreement in exchange for community benefits. This is an authorization to reopen and alter the DSP decision at the Development Agreement level. The Development Agreements are inextricably interrelated to the original approvals of the DSP development plan for Block 18 and Block 1a, and will reopen and alter those decisions. This decision structure does not meet the requirements of Regulation 18706 and are not decisions that may be segmented to allow for the officials' participation.

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

Sincerely,

Dave Bainbridge  
General Counsel

*L. Karen Harrison*

By: L. Karen Harrison  
Senior Counsel, Legal Division

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