

April 3, 2013

Arnold M. Alvarez-Glasman  
City Attorney  
City of West Covina  
13181 Crossroads Parkway North  
Suite 400- West Tower  
City of Industry, CA 91746

Re: Your Request for Advice  
**Our File No. A-13-038**

Dear Mr. Alvarez-Glasman:

This letter responds to your request for advice on behalf of West Covina City Councilmembers Steve Herfert, Rob Sotelo, and Andrew McIntyre regarding their duties under the conflict-of-interest provisions of the Political Reform Act (the “Act”).<sup>1</sup> This letter is based on the facts presented; the Fair Political Practices Commission (the “Commission”) does not act as the finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Also, please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws such as common law conflict of interest or Government Code Section 1090.

### QUESTION

May West Covina City Councilmembers Herfert, Sotelo, and McIntyre make and participate in a vote on an ordinance establishing a moratorium on development of 74 vacant lots in the city, despite owning property near the vacant lots?

### CONCLUSION

Because the councilmembers all own real property that is located beyond 500 feet of the nearest of the 74 vacant lots, the effect of the moratorium decision is presumed not to have a material financial effect on the properties owned by the councilmembers. Nothing in the facts

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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.

provided suggest that this presumption is rebutted. Therefore, the councilmembers do not have a conflict of interest in the moratorium decision.

### FACTS

The West Covina City Council is considering a moratorium on the development of 74 vacant lots in the city. The lots are located within a larger subdivision that was subdivided over twenty years ago. The moratorium would allow time for the city staff to study conditions and development standards for the development project. You stated that “the City is concerned of the potential impacts unfettered development of the Subject Lots within the residential hillside areas and city as a whole because the current City Municipal Code does not set forth updated development standards for the construction of residential properties within the hillside area.” Specifically, you identified the following concerns:

- *Parking*: Currently, residences could be built with only two enclosed spaces, even if the residence is greater than 4,000 square feet and contains a large number of bedrooms.
- *Potential Erosion*: Since the lots are on a hillside, drainage issues must be addressed in order to prevent erosion.
- *Building Specifications*: There are also issues involving the building heights and whether they would obstruct the views and privacy of existing residences.
- *Open Space*: The city municipal code does not address adequate open space around the proposed structures, and whether there would be any review process for elevated structures, such as decks.
- *“Mansionization”*: There is a concern that without the moratorium, the lots would be subject to “mansionization” because the current Municipal Code only takes into account the size of the structure relative to the lot size but not to the pad size.

The adoption of the moratorium would allow the city to study and enact development standards that address these concerns.

Three councilmembers live in residences in proximity to the 74 vacant lots. All three Councilmembers own their residences, and each residence has a market value of \$2,000 or greater. You also noted that none of the councilmembers’ residences would receive new or improved municipal services because of the passage or defeat of the moratorium. The councilmember’s respective real property interests are:

- Councilmember Herfert resides in a home approximately 1,400 feet from the closest lot.
- Councilmember Sotelo resides in a home located approximately 2,150 feet from the closest lot.

- Councilmember McIntyre resides in a home approximately 2,800 feet from the closest lot.

You stated that you did not foresee any effects on the councilmembers' properties resulting from the decision.

*Traffic Impacts:* You stated that the 74 lots are not located on the same block or on the same street as any of the Councilmembers' residences. Moreover, while access to the Councilmembers' residences and the 74 lots in question originate from Azusa Avenue, a major north-south artery through the entire city, access to the Councilmembers' residences and the roads to access the lots are by means of two different roads that extend from Azusa Avenue. Thus, you do not believe the Councilmembers' residences would be materially affected by the moratorium decision.

*Privacy Impacts:* The councilmembers' residences range from 1,400 to 2,800 feet from the lots subject to the moratorium. You stated that at that distance, the privacy of the councilmembers' residences would not be affected by the development of the lots because the lots are not adjacent to the Councilmembers' residences. You also stated that any views from the councilmembers' residences would not be affected because the 74 lots are not close enough to the councilmembers' residences.

*Character of the Neighborhood:* You stated that the character of the neighborhoods in which the Councilmembers' residences are located would not be affected by the moratorium decision. The Councilmembers' residences are not located within the same subdivisions or neighborhood as the 74 lots. The Councilmembers' neighborhoods are far enough away that development of the lots would not affect the character of neighborhoods. You also stated that the moratorium decision would not materially affect the noise or air pollution of the neighborhoods where the Councilmembers' residences are located because the only structures that could have been located on the 74 lots are single-family residences. As a result, you conclude, the moratorium decision will not materially affect the value (increase or decrease) of the Councilmembers' residences.

*Other Pertinent Facts:* While access to the Councilmembers' residences and access to the lots both originate from Azusa Avenue, Azusa Avenue is a major north-south artery that runs through the entire city and provides major entrance and exit points to the city from both the San Bernardino and Pomona Freeways. Any decrease or increase in traffic on the road will be shared equally by a large segment of city residents. However, you stated that the moratorium decision itself would not affect ten percent or more of the population of the city, 5,000 residents of the city, or 5,000 property owners within the city.

You also noted that the city council consists of five members, three of whom are required for a quorum.

## ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) The Commission has adopted an eight-step standard analysis to decide whether an official has a disqualifying conflict of interest. (Regulation 18700(b)(1)-(8).) You letter eliminates the need to discuss the first four steps. You have acknowledged that the individuals in question, as councilmembers, are public officials who wish to make and participate in the moratorium decision. Moreover, you note that each has a financial interest in the decision by virtue of their respective home ownership in proximity to the project.

### **Step Four: Are the councilmembers' economic interests directly or indirectly involved in the decision?**

In order to determine if a governmental decision's reasonably foreseeable financial effect on a given economic interest is material, it is necessary to first determine if the official's economic interest is "directly involved or indirectly involved" in the governmental decision. (Regulation 18704(a).) For a governmental decision that affects real property interests, Regulation 18704.2 applies. Real property in which a public official has an economic interest is directly involved in a governmental decision when (among other circumstances)<sup>2</sup> the real property in which the official has an interest, or any part of that real property, is located within 500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the governmental decision. Each council member owns property beyond 500 feet of the nearest lot subject to the decision. Consequently, the properties are indirectly involved in the decision.<sup>3</sup>

### **Steps Five and Six: What is the applicable materiality standard and is it reasonably foreseeable that the standard will be met?**

Regulation 18705.2 provides the materiality standards applicable to real property indirectly involved in a governmental decision. Regulation 18705.2(b)(1) provides:

"The financial effect of a governmental decision on real property which is indirectly involved in the governmental decision is presumed not to be material. This presumption may be rebutted by proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real property in which the public official has an economic interest, which make it

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<sup>2</sup> You also noted that Regulation 18704.2(a)(6) would not apply as to make the councilmembers' properties directly involved. For purposes of this letter we conclude that subdivisions (a)(2) - (5) also do not apply to the facts.

<sup>3</sup> If a public official's economic interest is not "directly involved" in a governmental decision, it is deemed to be "indirectly involved." (Regulation 18704(a).)

reasonably foreseeable<sup>[4]</sup> that the decision will have a material financial effect on the real property in which the public official has an interest. Examples of specific circumstances that will be considered include, but are not limited to, circumstances where the decision affects:

“(A) The development potential or income producing potential of the real property in which the official has an economic interest;

“(B) The use of the real property in which the official has an economic interest;

“(C) The character of the neighborhood including, but not limited to, substantial effects on: traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood.”

You stated that none of the factors that might rebut the presumption exists in this case. You stated that the 74 lots are not located on the same block or on the same street as any of the Councilmembers’ residences. Moreover, access to the Councilmembers’ residences and the roads used to access the lots are different. Similarly, the privacy afforded and view from the councilmembers’ properties will not be affected due to the distance and intervening streets and property. We agree that the presumption of no material financial effect is not rebutted under your facts. Therefore, the councilmembers do not have a conflict of interest in the decision.

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

Sincerely,

Zackery P. Morazzini  
General Counsel

By: John W. Wallace  
Assistant Chief Counsel,  
Legal Division

JWW:jgl

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<sup>4</sup> For a material financial effect to be foreseeable on an official’s economic interest, it need not be certain or even substantially likely that it will happen. However, the financial effect must be more than a mere possibility. (Regulation 18706(a); *In re Thorner* (1975) 1 FPPC Ops. 198.)