

July 11, 2013

Jannie L. Quinn
City Attorney
City of Mountain View
500 Castro Street
P.O. Box 7540
Mountain View, CA 94039-7540

Re: Your Request for Advice
Our File No. A-13-079

Dear Ms. Quinn:

This letter responds to your request for advice on behalf of Mountain View City Councilmember Chris Clark regarding his duties under the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ The Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Please note there are other bodies of law, separate and apart from the Act's conflict-of-interest provisions that may apply to your situation. We offer no opinion on the applicability of other conflict-of-interest laws.

QUESTION

May Councilmember Clark participate in and vote on governmental decisions relating to the creation and adoption of a precise plan known as the El Camino Real Precise Plan (the "Precise Plan") despite owning property within 500 feet of the Precise Plan area?

CONCLUSION

Councilmember Clark may participate in and vote on the creation and adoption of the Precise Plan because his interest in real property will be affected by the governmental decision in substantially the same manner as the public generally, as discussed below.

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.

FACTS

As part of the 2030 General Plan update adopted by the city in 2012, various precise plans in the city are being updated in order to fulfill the vision, and implement the goals and policies set forth in the General Plan. The General Plan identifies the Precise Plan area as a key change areas in the city.² Generally, the Precise Plan will include strategies and standards to guide development and help foster revitalization along El Camino Real while implementing major General Plan policy directions. The city's website indicates that the city currently has 32 Precise Plan areas.

El Camino Real is a major east-west thoroughfare that traverses the entire width of the city. El Camino Real extends in both directions through other neighboring cities, but the portion located in the city is 3.87 miles long. The Precise Plan area, which runs along El Camino Real, encompasses 230 acres. If property within 500 feet of the Precise Plan area is included, the total area is 690 acres. The entire city encompasses 7,800 acres, excluding federally owned lands and open water.

El Camino Real is the city's primary commercial corridor, home to roughly 20% of the city's retail and service commercial building area and over 70% of the motel rooms. Commercial uses line El Camino Real, with residential uses located directly behind the commercial uses in this area. Many of the restaurant establishments on El Camino Real are chains, including Baskin Robbins, Chevy's, Subway, McDonald's, Burger King, Starbuck's, Jack-in-the-Box, Taco Bell and many others.³ The residential neighborhoods are composed of a mix of multi-family and single family structures.

The Precise Plan will include zoning level topics such as: allowed land uses; development intensities; development standards such as setbacks; parking ratios; building heights; urban design policies and standards to facilitate walkability, bikeability, transit access and street presence. It will also consider strategies such as promoting community health and wellness; preserving surrounding residential character; and how increased development intensities may be permitted in return for highly sustainable project components and/ or public benefits.

The city has hired a consultant to lead the Precise Plan process under direction from city staff. The consultant's key deliverables include conducting public outreach meetings, managing subconsultants for economics, urban design, California Environmental Quality Act (CEQA) compliance, transportation and infrastructure, and preparing and implementing the Precise Plan.

² In your correspondence of June 11, 2013, you noted that the Precise Plan process (also know as a "specific plan") is based on Government Code sections 65450 - 65457, and also in the city's Zoning Ordinance, sections A36.70.010 - A36.70.060.

³ You note that El Camino Real is not similar to downtown Mountain View, for example, where there are a large number of locally owned restaurants.

You noted in your correspondence of June 11, 2013 that the overall process goes through several phases:

1. Development of Precise Plan rules and regulations through work with the consultant and public and stakeholder outreach;
2. Preliminary review of the proposed Precise Plan by the city's Environmental Planning Commission, who then makes a recommendation on the Precise Plan to the city council;
3. Adoption of the Precise Plan by the city council;
4. Thereafter, development applications for projects within the boundaries of the Precise Plan are subject to its rules and regulations, and are processed accordingly through the city's planning approval process, with ultimate approval authority resting with the city council.⁴

The governmental decision which Councilmember Clark will be participating in is the adoption of a preferred plan alternative for the Precise Plan, and the certification of the accompanying Environmental Impact Report as required by CEQA, and ultimately adoption of the Precise Plan.

The Precise Plan is scheduled to be adopted by December, 2014. Following adoption, implementation of programs and improvements related to the Precise Plan will occur over a multi-year period. Implementation actions would include things such as analyses for new development impact fees, engineering and construction of public improvements. The priority in which these implementation actions will be undertaken will be informed in part by the key issues certain locations, primarily major intersections of El Camino Real and several streets, along the El Camino Real Corridor. The key issues for these locations are primarily traffic congestion and pedestrian movement. The condominium is not located near a major intersection, but is approximately equidistant between two major intersections: Castro Street and Grant Road.

In addition, you noted the following:

- Councilmember Clark owns a condominium⁵ that is within 500 feet of the Precise Plan boundaries. The councilmember has an ownership interest in his condominium worth more than \$2,000.
- Councilmember Clark's property is not unusually large, rather it is somewhat smaller than, but similar than most other properties within the Precise Plan area or within 500 feet of its boundaries. Only about 100 properties in the plan area and within 500 feet of the

⁴ As noted below, future development applications for projects within the boundaries of the Precise Plan may still create a conflict of interest depending on the surrounding circumstances.

⁵ You stated that the council member also owns 1/22 of the "air space" over the approximately 3/4 acre parcel, and the rights to use common areas of the complex on which the condominium project is located. We consider these all to be the aspects of the same real property interest and do not separately analyze them.

plan area are the same size or smaller than Councilmember Clark's condominium. The average property size within that segment is 11,927 square feet. There are also 603 condominiums with an average square footage of 1,140 square feet within the Precise Plan area or within 500 feet of its boundaries. No significant improvements have been made to the condominium.

- Councilmember Clark's condominium complex is zoned multifamily. The land use designation applicable to his property and allowed use will not change with the adoption of the Precise Plan. You also stated that it is already being used at its highest use. The adoption of the Precise Plan would have no effect on the development potential of the condominium or income producing potential of the condominium.
- There are 19,130 property owners in the city. You stated that within the Precise Plan area and within 500 feet of the Precise Plan boundaries there were 2,463 property owners or 12.9% of the city's total property owners.
- The councilmember's condominiums is located deep within the lot, so changes to surrounding area will not have a direct effect as might be the case if his condominium were immediately adjacent to the plan area.
- You concluded that because Councilmember Clark's ownership interest is small and the potential effects of the adoption of the Precise Plan minimal, the financial effect on Councilmember Clark will likely be similar to, and no greater than, the effects on other properties contained in the significant segment.
- There is nothing particularly noteworthy about the location of the condominium in terms of its location. It is not located near any of the seven major intersections along the 3.87-mile long El Camino Real corridor. The location also has not been identified as a "key location" which would be targeted for higher intensity of uses with the adoption of the Precise Plan. Councilmember Clark's condominium complex is located 130 feet from the Precise Plan boundaries. His condominium is located roughly "in the middle" of the significant segment in terms of its proximity to the Precise Plan area, so it is similarly situated to many properties located within the 500 foot ring around Precise Plan area.
- Councilmember Clark only owns one condominium in the significant segment. The vast majority of other property owners in the significant segment are similarly situated, meaning the vast majority of residential and commercial property owners own only one property within the significant segment.
- The condominium is not historical and is very typical of other residential housing structures in the significant segment. It was constructed in 1961, and most buildings in the significant segment were built between the 1950's and 1980's. The building in which it is located has typical physical characteristics of multifamily housing building constructed during this era. The condominium is a wood framed, two-story building. The unit was originally constructed as a rental unit in 1961, but in the 1980's was

converted to condominium use. Within the Precise Plan area or within 500 feet of its boundaries, 1,173 properties in the significant segment are designated multifamily housing, the same land use as Councilmember Clark's property.

- The neighborhood is very typical of the mixed neighborhoods along the EL Camino Real corridor, which consist of a mixture of residential (single family, multi-family, and duplexes) and commercial uses. The General Plan establishes the same land use designation for the entire Precise Plan area (mixed-use corridor). Individual neighborhoods adjacent to the Precise Plan area, such as Councilmember Clark's neighborhood, would not be affected in any special way. The Precise Plan will necessarily result in some impacts (traffic, view, privacy, intensity of use, noise levels, and air emissions) on the entire El Camino Corridor, including the significant segment. These impacts would likely be more intense at key areas along the El Camino real Corridor, such as the seven major intersections. The condominium is not located near any of these key areas. Therefore, the potential impacts on Councilmember Clark's neighborhood would be less than those near key locations, and similar to those in similar neighborhoods.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. 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 on the public official or any interest describe in Section 87103. The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision.

We need not consider the initial six steps of the eight-step standard analysis, since you agree these have been met. To briefly summarize these steps:

Steps 1 and 2: You have confirmed that Councilmember Clark, a public official under Sections 82048 and 87200, wishes to make and participate in the Precise Plan decision. (Regulation 18702 et seq.)

Step 3: Further, you have identified his economic interest in question as an interest worth more than \$2,000 in a condominium.

Step 4: Finally, you noted that the condominium unit is directly involved in the decision by virtue of the fact that it is within 500 feet of the nearest boundary of the precise plan.

Steps 5 and 6: For directly involved real property, the financial effect of a governmental decision is presumed to be material. This presumption may be rebutted by proof that it is not

reasonably foreseeable⁶ that the governmental decision will have any financial effect on the real property. You stated that under that “one-penny test,” it is reasonably foreseeable that Councilmember Clark’s property value would increase and meet the one-penny threshold due to the beneficial effects on the El Camino Corridor because of the adoption of the Precise Plan.

Step 7: The Public Generally Exception

Even if a public official determines that a decision will have reasonably foreseeable material financial effect on his real property interest, the official may still participate under the “public generally” exception if the financial effect of the decision on the property is indistinguishable from its effect on the public generally. (Section 87103; Regulation 18707.) The analysis to determine if the “public generally” exception applies to a given decision involves the determination of whether a significant segment of the jurisdiction is affected by the governmental decision in “substantially the same manner” as the official. Regulation 18707.1(b)(1)(B) provides (for real property) that a significant segment is:

“(i) Ten percent or more of all property owners or all residential property owners in the jurisdiction of the official’s agency or the district the official represents; or

“(ii) 5,000 property owners or residential property owners in the jurisdiction of the official’s agency.”

We start with analyzing the financial effects of the decision on the council member’s which is outside the Precise Plan area. You stated that the foreseeable financial effects on properties outside of the Precise Plan area would be limited and uniform. Individual neighborhoods adjacent to the Precise Plan area, such as Councilmember Clark’s neighborhood, will not be affected in any special way. The Precise Plan will necessarily result in some impacts (traffic, view, privacy, intensity of use, noise levels, and air emissions) on the entire EL Camino Real Corridor, including the significant segment. These impacts would likely be more intense at key areas along the El Camino Real Corridor, such as the seven major intersections. The condominium is not located near any of these key areas. Therefore, the potential impacts on Councilmember Clark’s neighborhood would be less than those near key locations, and similar to those in similar neighborhoods. You further stated:

- There is nothing unique about the condominium in relation to the other properties around the Precise Plan area. The condominium is not historical and is very typical of other residential housing structures in the significant segment.
- There is nothing particularly noteworthy about the location of the condominium in terms of its location. The condominium is not located near any key areas along the El Camino

⁶ For a material financial effect on an official’s property to be foreseeable, 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.)

corridor. The condominium is also located deep within the lot, so changes to any surrounding properties will not have as direct an effect on the condominium.

- The zoning designation and allowed use will not change with the adoption of the Precise Plan. The condominium, being used as a condominium, is already the highest use. The adoption of the Precise Plan would have no effect on the development potential of the condominium, so there would be no effect on the development or income producing potential of the condominium.
- The condominium is located roughly “in the middle” of the 500 foot ring around Precise Plan area. It is not located near any of the seven major intersections along the 3.87-mile long El Camino Real corridor. The location also has not been identified as a “key location” which would be targeted for higher intensity of uses with the adoption of the Precise Plan.
- The neighborhood is very typical of the mixed neighborhoods along the EL Camino Real corridor, which consist of a mixture of residential (single family, multi-family, and duplexes) and commercial uses.

You stated that, based on these facts, that you believe that the decision will not affect the area (in the Precise Plan area and near it). Moreover, since the property owners in the Precise Plan area (plus those within 500 feet of the Precise Plan boundaries) number 2,463 property owners (12.9% of the properties in the city) the significant segment standard is met. Based on these facts we conclude the public generally exception applies.

Please note however, that development applications for projects within the boundaries of the Precise Plan may still create a conflict of interest depending on the surrounding circumstances. You should seek additional advice at this time. Moreover, the Commission is currently considering revisions to the conflict of interest rules that may affect the advice in this letter.

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 General Counsel
Legal Division

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