

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-13-080

Dear Ms. Quinn:

This letter responds to your request for advice on behalf of Mountain View City Councilmember John McAlister 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 McAlister 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 leasing a 750 square foot portion of a 6,600 square foot parcel in the Precise Plan area at which he operates a Baskin Robbins ice cream franchise?

CONCLUSION

Because the councilmember has a long-term lease of property in the Precise Plan area on which he operates his business, it is presumed his lease will be materially affected by the decision. Thus, he cannot participate in the Precise Plan decisions.

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.

The governmental decision that Councilmember McAlister will be participating in is the adoption of a preferred plan alternative for the Precise Plan 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. The key issues for these locations are primarily traffic congestion and pedestrian movement.

In addition, you noted the following:

- Councilmember McAlister leases a 750 square foot portion of a 6,600 square foot parcel and operates a Baskin Robbins ice cream franchise at the property located at 1249 W. El Camino Real, which is located within the Precise Plan area. The business is located within a parcel with a total area of 6,600 square feet. The lease expires in June 2016, there is no option in the lease agreement to renew the lease, and any renewal of the lease has not been negotiated at this time. The rent is a percentage of gross sales but you stated that you believe it will not be affected positively or negatively by the governmental decision. The lease does not allow the lessee to sublease.
- 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 overall site within which the business is located is a small, multi-tenant commercial building with a small adjacent parking lot. The uses include other restaurants, retail, and personal service uses. It is one-story built in 1967 and is not historic. The building abuts the sidewalk and has no setback on the side or rear of the property. The building frontage is about 40 feet and the parcel frontage is approximately 100 feet.
- Within the Precise Plan area, 46 parcels have multiple addresses (and many more have multiple tenants and suites that are not tracked by the City). Sixty-six other buildings are built up to the sidewalk, and many others have zero-lot-line development. Almost all uses on El Camino Real are retail, personal and business services, restaurants, offices, and auto-oriented uses. On June 17, 2013, you also stated that there are at least five other ice cream/frozen-yogurt shops in the study area and within 500 feet (including another Baskin Robbins). Including local chains and coffee shops, there are at least 28 similar businesses in the study area and within 500 feet.
- The zoning changes will apply to new development in the area. Existing uses will not be affected (i.e., changed or prohibited) by these zoning changes because the use is already permitted. The General Plan allows retail in the location of the council member's business, and existing businesses are not required to procure any new zoning permits to continue operating.
- The Precise Plan boundaries only include a small proportion of Councilmember McAlister's retail catchment area. On June 17, 2013, you stated that there are approximately 12,750 residences within one mile of the Baskin Robbins and another 1,100 in Los Altos. This totals 13,850. Only about two percent of the residences are in the Precise Plan area, approximately 270 units.
- You stated on June 17, 2013, that over the past five years, gross revenue for the Baskin Robbins has ranged from approximately \$429,000-\$495,000, with an average gross revenue of approximately \$470,000.
- On June 20, 2013, you stated that Councilmember McAlister's rent is not fixed, but is variable at 6.5 percent of gross sales per month. The councilmember stated that the rent does not vary considerably month to month; it is generally not exactly the same due to slightly variable gross sales. The average yearly rent however, consistently comes close to \$35,000 per year.
- On June 24, 2013, you stated that there are approximately 822 business licenses in the Precise Plan area and within 500 feet of the area, approximately 20 percent of the businesses in the city.

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 determining whether an official has a disqualifying conflict of interest, which we apply to your facts. (Regulation 18700(b)(1)-(8).) Your facts indicate that Steps 1 and 2 of the standard analysis have been satisfied. You have confirmed that Councilmember McAlister, a public official under Sections 82048 and 87200, wishes to make and participate in the Precise Plan decision. (Regulation 18702 et seq.)

Step 3: What are the interests of Councilmember McAlister?

The interests that can give rise to conflicts of interest under the Act and that are pertinent to your request are the following:

- **Business Entity** -- A public official has an interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a); Regulation 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d); Regulation 18703.1(b)).
- **Real Property** -- A public official has an interest in real property in which he or she has a direct or indirect interest of \$ 2,000 or more (Section 87103(b); Regulation 18703.2). Under the Act, an “interest in real property” includes a leasehold interest in real property within the official’s jurisdiction. (Section 82033.) However, the terms “interest in real property” and “leasehold interest” as used in the Act do not include the interest of a tenant in a periodic tenancy of one month or less. (Regulation 18233.)
- **Sources of Income** -- A public official has an interest in any source of income, including promised income, aggregating \$500 or more within 12 months prior to the decision (Section 87103(c); Regulation 18703.3).
- **Personal Finances** -- A public official has an interest in his or her personal finances, including those of his or her immediate family -- this is the “personal financial effects” rule (Section 87103; Regulation 18703.5).

You have identified three potentially disqualifying interests:

(1) *Baskin Robbins Business*: The business is an interest as a business entity in which the councilmember has an investment of \$2,000 or more (Section 87103(a)), holds a position of management (Section 87103(d)), and also from which he receives income. (Section 87103(c).)

(2) *Real Property*: An interest in real property (in this case a leasehold interest) in which he has a direct or indirect interest of \$2,000 or more (Section 87103(b)). We will analyze each

interest separately below, focusing on steps four through six for each interest: direct involvement, materiality, and reasonable foreseeability.

(3) *Personal Finances*: A public official always has an interest in his or her personal finances and those of his or her immediate family. (Regulation 18703.5.) A governmental decision will have an effect on this interest if the decision will cause personal expenses, income, assets, or liabilities of the official or his or her immediate family to increase or decrease. (Ibid.) However, Regulation 18705.5 provides a limitation that avoids duplicative analysis of this interest, providing: “[N]either a financial effect on the value of real property... nor a financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which the official has a direct or indirect investment interest will be considered.” Because only those two interests are identified as possibly at issue in this letter, and there is no suggestion that the decisions in question would otherwise have a personal financial effect on the councilmember, we do not separately consider his interest in “personal finances.”

Step Four: Are the council member’s interests directly or indirectly involved in the decision?

In order to determine if a governmental decision’s reasonably foreseeable financial effect on a given interest is material, it is necessary to first determine if the official’s interest is “directly involved or indirectly involved” in the governmental decision. (Regulation 18704(a).)

Baskin Robbins Business: Pursuant to Regulation 18704.1:

“(a) A person, including business entities, sources of income, and sources of gifts, is directly involved in a decision before an official’s agency when that person, either directly or by an agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

“(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official’s agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.”

According to your facts, the Precise Plan has grown out of the General Plan. There are no applicants or named parties. Moreover, the decisions do not involve the issuance, renewal, approval, denial, or revocation of any license, permit, or other entitlement to, or contract with, the subject person. Therefore, the business is not “directly involved” in the decision and pursuant to Regulation 18704(a), the business is “indirectly” involved in the decision.

Real Property: For a governmental decision that affects real property interests, Regulation 18704.5(a)(1) provides that real property (including leaseholds) are directly involved in a decision when 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. Under your facts, the councilmember's property interest is in the Precise Plan area and therefore is directly involved in the decision.

Step 5: Materiality Standard

Once the degree of involvement is determined, Step 5 of the conflict of interest analysis addresses the applicable materiality standard and whether it is reasonably foreseeable that the materiality standard will be met.

Indirectly Involved Business Interests: Under Regulation 18705.1(c)(4), the financial effect of a governmental decision on a small business entity is considered material if it is reasonably foreseeable⁴ that:

“(A) The governmental decision will result in an increase or decrease in the value of the business entity's gross revenues for a fiscal year in the amount of \$20,000 or more; or,

“(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,

“(C) The governmental decision will result in an increase or decrease in the value of the business entity's assets or liabilities of \$20,000 or more.”

Real Property: Regulation 18705.2(a) states the materiality standard for directly involved real property interests:

“(2) Real property, leaseholds. The financial effect of a governmental decision on the real property in which an official holds a leasehold interest is presumed to be material. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any effect on any of the following:

“(A) The termination date of the lease;

⁴ 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 FPCC Ops. 198.)

“(B) The amount of rent paid by the lessee for the leased real property, either positively or negatively;

“(C) The value of the lessee’s right to sublease the real property, either positively or negatively;

“(D) The legally allowable use or the current use of the real property by the lessee; or

“(E) The use or enjoyment of the leased real property by the lessee.”

Step 6: Is it “reasonably foreseeable” that the governmental decisions will have a material financial effect on any of your identified interests?

Once a public official has determined the materiality standard applicable to each of his or her economic interests, the next step is determining whether it is “reasonably foreseeable” that the standard will be met. A material financial effect on an economic interest is “reasonably foreseeable” if it is substantially likely that one or more of the materiality standards will be met because of the governmental decision. (Regulation 18706(a).) For a material financial effect to be foreseeable on an official’s 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.)

Indirectly Involved Business Interests: With respect to whether it is reasonably foreseeable that the materiality standards will be met, you stated in pertinent part:

“[T]hese zoning changes will apply to new development in the area. Existing uses, such as Councilmember McAlister’s business entity interest, will not be affected (i.e., changed or prohibited) by these zoning changes because the use is already permitted, the General Plan allows retail in this location, and existing businesses are not required to procure any new zoning permits to continue operating.

“On a more practical note, it is very unlikely the zoning changes and anticipated gradual implementation of the Precise Plan would have the effect of greatly increasing sales of ice cream for example. In our view, land use policy changes would not have immediate impacts in terms of creating a larger or smaller customer base, or impact the operating expenses of a business located in a zoning change area.

“As to the specific economic materiality standards, the potential economic impacts of zoning changes on a business such as Councilmember McAlister’s include: (1) changes to local population; (2) changes to the number and type of competing and complementary businesses; and (3) changes to transportation

networks. These changes can occur very gradually, especially in a built-out city such as Mountain View. In addition, the adoption of the Precise Plan boundaries only includes a small proportion of Councilmember McAlister's retail catchment area.

“In light of the proposed adoption date for the Precise Plan of December 2014, and the duration of Councilmember McAlister's lease expiring in June 2016, we do not reasonably believe any of the specified levels of monetary impacts will occur on: (1) the business entity's gross revenues; (2) the business entity incurring or avoiding additional expenses; or (3) the value of the business entity's assets. Therefore, we believe the presumption of materiality has been rebutted.”

Your additional facts provided on June 17, 2013, further support this conclusion. You stated that the Precise Plan boundaries only include a small proportion of Councilmember McAlister's retail catchment area. On June 17, 2013, you stated that there are approximately 12,750 residences within 1 mile of the Baskin Robbins and an additional 1,100 in Los Altos. This comes out to 13,850. But only about two percent of the residences are in the Precise Plan area, approximately 270 units. It would appear very unlikely that the Precise Plan decision in itself would increase or decrease the council member's customer base such that his revenue is increased or decreased by \$20,000 in a fiscal year.

Based on the totality of facts you provided, we agree that it is not foreseeable that the Precise Plan will affect the council member's business to the thresholds set forth in Regulation 18705.1.

Real Property: With respect to the financial effect on the council member's real property, the financial effect of a governmental decision on the real property is presumed to be material. This presumption may be rebutted only by proof that it is not reasonably foreseeable that the governmental decision will have any effect on the factors listed in Regulation 18705.2(a)(2). You provided facts relevant to each materiality standard in Regulation 18705.2(a)(2). While, for the most part your facts support finding that that the presumption will be rebutted because the decision will not affect the termination date of the lease, the value of the lessee's right to sublease, or the legally allowable use or the current use of the real property by the lessee or use or enjoyment of the leased real property by the lessee, whether there will be an effect on the amount of rent paid by the council member is a more difficult question.

Under your facts, the rent paid by the council member is a percentage of gross sales. You stated in your June 20, 2013, communication that Councilmember McAlister pays 6.5 percent of gross sales per month. The councilmember stated that the rent does not vary considerably month-to-month, it is generally the same due to slightly variable gross sales. The average yearly rent however, consistently comes close to \$35,000 per year. You noted that you did not believe that the rental amounts currently paid would be affected positively or negatively by the adoption of the Precise Plan. While this is a factual question, we note that due to the strict materiality

threshold applied to the council member's lease within the Precise Plan area,⁵ any increase in the number of customers that purchase from the Baskin Robbins resulting from the adoption of the Precise Plan will impact the rent paid. Thus, we conclude that it will be foreseeable that the financial effect will be material (at least one penny).

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."

You noted 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 percent of the city's total property owners. This would constitute a significant segment and the exception would apply if that entire segment was affected in substantially the same manner.

The more difficult question is whether the financial effect on the council member's interest in real property (the "percentage" lease)⁶ will be substantially the same as the financial effect on all the other businesses and property owners in and around the Precise Plan area. It would appear that because the lease payments are directly tied to improvement or loss of his business, he will be affected in a much more direct manner than property owners and lessee's

⁵ The test is often referred to as a "one-penny" test. In other words, materiality is presumed unless there is not even one-penny financial effect on the interest. In contrast, with respect to the business entity itself which has a different definition of "directly" or indirectly involved in the decision, we concluded it was indirectly involved and for a financial effect to be material, it had to reach a regulatory thresholds (\$20,000 on revenue in a fiscal year, \$5,000 on expenses in a fiscal year, or \$20,000 on the value of assets or liabilities.)

⁶ "A common lease arrangement, especially in commercial properties, is to relate the lease payments directly to the amount of business done on the premises. *Percentage lease* arrangements have long been utilized by the oil companies and more recently have been used by the developers of shopping centers." (36 Ops. Cal. Atty. Gen. 258, 259-260, emphasis added.)

with rents that are based on a fixed amount. While there are a substantial number of business properties in the area, as well as properties leased for business purposes, it would not appear that the number of leased properties subject to a percentage lease will be significant and a much smaller number. While we do not have a precise figure, we assume it is less than a significant segment of the property interests in the city.

Step 8: Legally Required Participation

In certain rare circumstances, a public official may be called upon to take part in a decision despite the fact that the official may have a disqualifying conflict of interest under the “legally required participation” exception if a quorum cannot be achieved without the member’s participation. However, since we have no facts suggesting the city will be unable to achieve a quorum, we do not further analyze this exception.

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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