

March 26, 2014

Gregory W. Stepanicich
General Counsel
San Francisquito Creek
Joint Powers Authority
44 Montgomery Street, Suite 3800
San Francisco, CA 94104-4811

Re: Your Request for Advice
Our File No. A-14-053

Dear Mr. Stepanicich:

This letter responds to your request for advice on behalf of San Francisquito Creek Joint Powers Authority Board Member Kirsten Keith regarding her duties under the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ We base this letter on the facts presented. 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.) Additionally, our advice is based solely on the provisions of the Act. We offer no opinion on the applicability, if any, of other conflict of interest laws.

QUESTIONS

1. Would the San Francisquito Creek Flood Protection, Ecosystem Restoration, and Recreation Project (“Project”) meet the requirements for the exception in Regulation 18704.2(b)(2) for “repairs, replacement or maintenance of existing streets, water, sewer, storm drainage or similar facilities” so as to make Board Member Keith’s real property interest indirectly involved in the decisions regarding the Project?

2. If Board Member Keith has a conflict of interest, would the “public generally” exception apply to allow the Board Member to participate in these discussions and 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.

3. Can Board Member Keith participate in the Board's consideration of the contents of the Draft Environmental Impact Report (draft "EIR") and its decision to certify the Final EIR?

4. Can Board Member Keith participate in the Board's consideration of the elements and features of the Project that will be approved and implemented?

CONCLUSIONS

1. The San Francisquito Creek Flood Protection, Ecosystem Restoration, and Recreation Project decisions you describe meet the requirements for the exception in Regulation 18704.2(b)(2). Thus, with respect to the Board Member's real property, it is indirectly involved in the governmental decision and the financial effect is presumed to be not material.

2. We have not responded to this second question since we concluded that the Board Member's property is indirectly involved in the decision and therefore she would most likely not have a conflict of interest. If you determine the Board Member has a conflict of interest, contact us for further advice regarding the public generally exception.

3. Based on the conclusion in Question 1, Board Member Keith may participate in the Board's consideration of the contents of the draft EIR and its decision to certify the Final EIR.

4. We cannot answer this question. Conflict of interest rules are applied on a decision-by-decision basis. Future decisions will need to be analyzed in light of the specific facts of the decision.

FACTS

The San Francisquito Creek Joint Powers Authority (the "Authority"): The Authority was formed in 1999 by the Cities of Palo Alto, Menlo Park and East Palo Alto, and the San Mateo County Flood Control District and the Santa Clara Valley Water District in response to serious flooding that occurred in 1998 that damaged over 1,700 properties. In the past, various flood control improvements were made to the San Francisquito Creek (the "Creek") in an uncoordinated manner that were not effective in providing satisfactory flood control protection within the jurisdiction of the members of the Authority. These existing improvements include floodwalls and creek banks reinforced with concrete sacks.

The Authority was formed to provide a coordinated, effective multi-jurisdictional approach to designing and constructing flood control measures along the Creek that also achieves ecological and recreational objectives. It was recognized by public officials and residents in the affected area that any measures taken at one segment of the Creek impacts the flow of water at other segments and that all improvements need to be designed in an interrelated manner. According to the Joint Powers Agreement, the Authority was established for the following purposes:

- a. To facilitate and perform bank stabilization channel clearing and other Creek maintenance.
- b. To plan flood control measures for the Creek watershed.
- c. To take actions necessary to preserve and enhance environmental values and in stream uses of the Creek.
- d. To coordinate emergency mitigation and response activities relating to the Creek.
- e. To make recommendations to Member Entities for funding and alternatives for long-term flood control for Member Entity consideration.

The Joint Powers Agreement provides that the Authority, through its Board of Directors, is authorized to do all acts necessary to fulfill the purposes of the Joint Powers Agreement.

The Creek represents the boundary between Santa Clara and San Mateo counties. The Creek' watershed, or drainage basin, includes portions of the three cities, as well as portions of unincorporated county areas. The FEMA-Designated 100-year Creek Floodplain includes land in the watershed area, but also includes land outside of the watershed area, where flooding would occur in the event of a 100-year flood. Thus, the watershed and the floodplain are not co-extensive. The combined watershed and floodplain, however, include territory in which the Authority exercises its powers covering over 50 square miles running from the Santa Cruz Mountains to the San Francisco Bay. The Creek floodplain consists of over 5,700 parcels of real property.

The Project: In the coming months, the Authority Board will be considering flood control measures along the portion of the Creek between Highway 101 and El Camino Real. The primary purpose of the Project is “to protect people and property from creek flows within the floodplain between Highway 101 and El Camino Reel and to enhance the ecosystem and recreational connectivity.” You stated that there are approximately 1,350 residences within 500 feet of the segment of the Creek between Highway 101 and El Camino Real, which constitutes over 20 percent of all properties in the floodplain.

The Authority recently issued a Notice of Preparation (the “Notice”) for a draft EIR for the Project. The Notice identifies the following specific objectives for the Project:

- Protect properties and infrastructure between Highway 101 and El Camino Real from floodwaters exiting the Creek during a 100-year flood event;
- Enhance habitat along the Project reach, particularly habitat for threatened and endangered species;
- Enhance recreational uses and connectivity; and
- Minimize operational and maintenance requirements.

The draft EIR for the Project will consider a variety of flood control measures, including floodwalls, bridge alterations, channel widening, diversion channels, and upstream detention basins in the upper area of the watershed. The Notice includes four specific alternatives that will be evaluated in the draft EIR.

(1) Alternative One would provide baseline flood protection in the event of a Creek flow similar to the 1998 flood of record by modifying bridges and widening the Creek channel bottlenecks.

(2) Alternative Two would consist of Alternative One plus additional protection against a 100-year flood through the construction of floodwalls.

(3) Alternative Three would consist of Alternative One plus additional protection against a 100-year flood through the construction of an underground bypass culvert.

(4) Alternative Four would consist of Alternative One plus additional protection against a 100-year flood through the construction of detention basins upstream.

The baseline project is intended to provide flood protection to properties in the floodplain in the event of a flooding event similar to the 1998 flood of record. Alternatives Two, Three, and Four provide increased protection to the level of a 100-year flooding event. It is possible that the final project approved by the Board will consist of elements or features from two or more of the Alternatives studied by the draft EIR.

The floodwalls being studied are approximately 9,000 linear feet in length, which is about 45 percent of the Creek frontage on the San Mateo Comity side from Highway 101 to El Camino Real. The floodwalls may have a height of up to seven feet. Part of this proposed floodwall is located within 500 feet of Board Member Keith's home, but the proposed floodwalls will not be visible from her home. The construction of floodwalls at this location would be included in the Project only if selected by the Board from a range of alternative features and subsequently funded by a vote of the community.

You also stated that the proposed flood control measures that will be considered by the Authority seek to obtain a reasonable and acceptable level of service - i.e., protection against a flood similar to the 1998 flood of record or a 100-year flood. The Authority's objective in undertaking these flood control measures is to protect all affected properties from these types of events. The level of service employed by the Authority is a nationally accepted standard of flood protection formulated to protect life and property. For this reason, you believe that the flood control measures to be considered by the Authority to bring this waterway up to this national standard should be considered "repairs" and "maintenance."

The Authority Board and Board Member Keith: The Authority Board is comprised of one director from each member entity. The current Chair of the Authority Board is Kirsten Keith who was appointed to the Authority Board to represent the City of Menlo Park and who

lives in the City of Menlo Park within 500 feet of the Creek that is the subject of the Project. Despite the proximity of her property to the Creek, her property *is not* located within the floodplain, nor is it located within the watershed. Given that Board Member Keith does not live within the floodplain, she is not required to purchase flood insurance nor is a 100-year flood event expected to reach her property. You stated that Board Member Keith is not receiving a greater level of protection than the approximately 1,350 parcels of property located within 500 feet of the segment of the Creek covered by the Project. Finally, you noted that the Board Member's access to and from arterial streets potentially would be impaired during a major flood event, which the project would remedy. During the 1998 flood of record, the street that serves Board Member Keith's property was closed because of flooding.

ANALYSIS

As you noted, under Regulation 18704.2(a), there are several factual situations when we conclude that an official's property is directly involved in a governmental decision.

- 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.
- The governmental decision involves the zoning or rezoning, annexation or deannexation, sale, purchase, or lease, or inclusion in or exclusion from any city, county, district, or other local governmental subdivision, of the real property in which the official has an interest or a similar decision affecting the real property. For purposes of this subdivision, the terms "zoning" and "rezoning" shall refer to the act of establishing or changing the zoning or land use designation on the real property in which the official has an interest.
- The governmental decision involves the issuance, denial, or revocation of a license, permit, or other land use entitlement authorizing a specific use or uses of the real property in which the official has an interest.
- The governmental decision involves the imposition, repeal, or modification of any taxes or fees assessed or imposed on the real property in which the official has an interest.
- The decision involves construction of, or improvements to, streets, water, sewer, storm drainage, or similar facilities, and the real property in which the official has an interest will receive new or improved services.

However, Regulation 18704.2(b) provides several exceptions whereby the official's property is presumed to be indirectly involved, including where a decision solely concerns repairs, replacement, or maintenance of existing streets, water, sewer, storm drainage, or similar facilities.

As you noted in your letter, our prior letters dealing with flood control projects have generally found that these projects fall within the exception.²

- **Stovall Advice Letter, No. A-08-112:** “In two prior letters to you concerning the dredging of 14-Mile Slough, we concluded that the slough is a storm drainage or similar facility and that the dredging of the silted-up slough is a ‘repair or maintenance’ activity by the District. (*Stovall* Advice Letters, No. A-04-141 and No. A-06124.) Because the governmental decision to fund the dredging of the slough falls within the exception of Regulation 18704.2(b)(2) as solely concerning repair or maintenance, Trustee Tholborn’s real property is considered indirectly involved in the decision.”
- **Murphy Advice Letter, No. A-07-134:** “Flood control work presents a unique question of interpretation. By design, flood control work is performed to increase protection from flooding. However, the majority of flood control work for a city protected by a system of levees could just as easily be classified as ‘repairs’ or ‘maintenance’ as opposed to an ‘improvement,’ despite the fact that the work will in some way increase the city’s flood protection. (See *Cauble* Advice Letter, 1-06-179.)

“Under the facts provided, the City is currently in the process of evaluating the 45 miles of levees protecting the City and will soon be addressing the financing of engineer studies, the hiring of consulting firms to review both facility and environmental concerns, and the engineering solutions and facilities necessary for each portion of the levees. The reports from these firms will identify necessary repairs or improvements for the levees. Addressing your questions related to the City Council’s decisions to finance engineering studies or to hire consulting firms to review facility and environmental concerns for the approximately 45 miles of levees protecting the City, we conclude that these decisions are decisions solely concerning the ‘repair’ or ‘maintenance’ of the levee system. Thus, Councilmember Johannessen’s real property interest is only indirectly involved in these decisions.

- **Cauble Advice Letter, No. I-06-179:** “As you have described it, the Project will consist of repairing, replacing, or maintaining the storm drainage capacity of the Alviso Slough as it once existed. The Alviso Slough’s capacity to control flooding was reduced when decisions were made during the past twenty years to raise levees rather than excavate sediment. This is the cause for the growth of vegetation that has reduced the extent of open water. By removing vegetation and restoring the Alviso Slough to its pre-1983 condition, its flood reducing capacity will be increased. Based on this information, and on advice we have provided in similar situations, it appears that the primary purpose of the project is to clear the slough of choking roots and vegetation, and that this is a “repair

² One of the letters also provides a caveat that a proposed flood solution or facility providing protection for an official’s property interest beyond the level of protection provided for the remainder of the City would not fall within the exception. (*Murphy* Advice Letter, No. A-07-134.) You stated that Board member Keith is not receiving a greater level of protection than the approximately 1,350 parcels of property located within 500 feet of the segment of the Creek covered by the Project

or maintenance” activity by the District, notwithstanding the community’s secondary desire to use the widened, open channel for boating and other recreational activities. Accordingly, for purposes of section 87103 and regulation 18703.1(a) the Partnership’s property that is within 500 feet of the Alviso Slough is indirectly involved in decisions to restore it to its former width.”

You stated that the proposed flood control measures that will be considered by the Authority seek to obtain a reasonable and acceptable level of service and protection against a flood similar to the 1998 flood of record or a 100-year flood. The Authority’s objective in undertaking these flood control measures is to protect all affected properties from these types of events. The level of service employed by the Authority is a nationally accepted standard of flood protection formulated to protect life and property. For this reason, you believe that the flood control measures to be considered by the Authority to bring this waterway up to this national standard should be considered “repairs” and “maintenance.”

We agree that the facts meet the exception and the Board Member’s property is considered indirectly involved in the decisions. With respect to the real property, the financial effect of a governmental decision on real property that 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 reasonably foreseeable that the decision will have a material financial effect on the real property.

You noted that despite the proximity of her property to the Creek, her property is not located within the floodplain or watershed and she is not required to purchase flood insurance. Moreover, you stated that the floodwalls may have a height of up to seven feet, but the proposed floodwalls will not be visible from her home. Thus, it does not appear from these facts that the presumption of no material financial effect would be rebutted.

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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