

August 29, 2014

Anne M. Russell
Interim Assistant City Attorney
990 Palm Street
San Luis Obispo, CA 93401-3249

Re: Your Request for Advice
Our File No. A-14-116

Dear Ms. Russell:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”)¹ and is based 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.) 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 Government Code section 1090.

We note that the initial request dealt with other officials as well, however, in order to refine the voluminous facts provided and to provide your officials individualized advice without unnecessary delay, we are splitting the response into multiple parts.

QUESTION²

May Councilmember Kathy Smith participate in city council decisions regarding the creation of an Airport Overlay Zone as part of an amendment to the city’s Land Use and Circulation Element of the General Plan where she owns real property located in the proposed Airport Overlay Zone?

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.

² Please note that in order to provide timely advice, we have broken down the individual questions contained in your request and limit our advice in this letter to the question of whether Councilmember Smith may participate in decisions regarding the city’s proposed Airport Overlay Zone.

CONCLUSION

Yes. The decisions will not have a reasonably foreseeable material financial effect on Councilmember Smith's real property.

FACTS

The City is in the process of updating the Land Use and Circulation Element of the General Plan which will include policy changes and updated ordinances (the "Update"). The changes will focus primarily on residential infill and opportunity sites versus wholesale expansion of the city limits or sphere of influence.

According to your facts, a portion of the Update addresses property in the vicinity of the San Luis Obispo County Regional Airport (the "Airport".) At many locations, the Airport is located outside of, but adjacent to, city limits. The Update covers some of these properties that are outside city limits. Land use in the vicinity of the airport is regulated in part by the Airport Land Use Commission (the "ALUC"), a non-city agency created under Public Utilities Code Section 21675. The ALUC has adopted the Airport Land Use Plan (the "ALUP") for the Airport. The Update proposes new development in areas currently covered by the ALUP.

The Update proposes the creation of an Airport Overlay Zone with six subzones designed to match the boundaries and basic compatibility policies of the six airport safety zones contained in the state's "California Airport Land Use Planning Handbook." The ALUP covers more property than the proposed Airport Overlay Zone. In addition, the ALUP's standards may be different from the densities and types of development proposed in the Update for the Airport Overlay Zone. The Update will be reviewed by the ALUC which will then make a determination as to whether it is compatible with the ALUP. The determination will then go to the Planning Commission and the City Council. The City Council can choose to override the ALUC's determination by a two-thirds vote under Public Utilities Code Section 21676.

Councilwoman Smith owns and resides in a mobile home in the Chumash Village Mobile Home Park ("Chumash MHP"). She owns the lot on which her mobile home is located and an undivided interest in the common areas of Chumash MHP with the other 234 owners. Chumash MHP is the only mobile home park in the City owned by the residents. Chumash MHP property is currently zoned medium-low density (R-2) and will remain R-2.

You stated that Councilmember Smith's residence appears to be either within the S-2 safety zone or possibly on the boundary between the more restrictive safety zone SI-C and safety zone S-2 of the ALUP. The Update proposes to include this area in the Airport Overlay zone A06. Safety zone SI-C limits new development other than infill or replacement dwellings to one unit per five acres. However, if Councilmember Smith's residence is determined to be in safety zone SI-C, since the residence is in a developed area, new development or replacement dwellings would be allowed at the existing densities under safety zone SI-C. There is no impact on this by the creation of the Airport Overlay Zone. Under the existing ALUP, density in safety zone S-2 is limited to 12 units/acre while under the proposed A06 overlay zone, the underlying

zoning (i.e., R-1, R-2, etc.) defines the allowed density and no additional density limitations are applied. The basic compatibility policies of the ALUP zone S-2 and the Airport Overlay Zone A06 are similar but not identical.

The underlying zoning for Councilmember Smith's residence, R-2, is limited to 12 units/acre, the same as ALUP safety zone S-2. The property site is fully developed and no additional density is allowed under existing zoning including subzone A06 and does not change the underlying residential zoning, density or uses of the residence.

The Airport Overlay Zoning does, however, in addition to imposing the overlay zoning, describes residential uses in the A06 zone as "Noise Sensitive Land Use" and requires compliance with proposed Municipal Code section 17.57.070, which requires new residential development to demonstrate consistency with noise standards and to make certain disclosures, including disclosures in the deed transferring the property. The Airport Overlay Zone also prohibits all activities that may be a hazard to flight operations, similar to the existing Airport Land Use Plan.

Mobile home construction standards are regulated by the California Housing and Community Development Department, not the city, so it is questionable whether the noise standards would apply if Councilmember Smith's residence were to be replaced.

In addition to requiring consistency with noise standards, another proposed zoning ordinance requires owners of property in the Airport Overlay Zone, prior to sale or lease of the property, to disclose a "Notice of Airport in Vicinity" in the deed, in specified language, regarding aircraft overflights. By comparison, Civil Code Section 1102.17 already requires a seller of residential property (if he or she has actual knowledge) to disclose in writing, prior to transfer, that the property is adjacent to, or in a zone allowing an airport. Real estate transactions also typically include Airport Influence Area disclosures in addition to the six mandatory disclosures of hazards under the California Civil Code Section 1103 (Natural Hazards Disclosure Act.). The City's proposed ordinance would expand this requirement to owners of all zones of property in the Airport Overlay Zone. Since Councilmember Smith's residence is residentially zoned, a disclosure is already required, although the specified wording contained in the proposed ordinance and the requirement to put the Notice in the deed are new.

The imposition of the overlay does not change the underlying zoning, development potential or use of the Councilmember's residence and applies to all properties in the zone. The only changes are the imposition of the two requirements described above, new development complying with noise standards, specific disclosures in the deed, and a prohibition of activities hazardous to flight operations.

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.³ Councilmember Smith is a public official for purposes of the Act under Sections 82048 and 87200 and when considering and voting on city council decisions regarding the Airport Overlay Zone and the General Plan Update, she will be making, participating in making and using her official position to influence governmental decisions. (Regulation 18702.2.) A public official has a “financial interest” in a decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official’s interests. (Section 87103; Regulation 18700(a).)

What are Councilmember Smith’s Financial Interests?

Section 87103 and Regulations 18703 - 18703.5 set forth the potential financial interests a public official may have. As relevant here, the only financial interest Councilmember Smith has is her real property interest in the lot she owns on which her mobile home is located. (Section 87103(b); Regulation 18703.2.)

Is it reasonably foreseeable that the decision to create the Airport Overlay Zone will have a material financial effect on Councilmember Smith’s 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 one or more of the public official’s interests. Regulation 18706(b) sets forth the applicable rule when the public official’s financial interest is not explicitly involved in the decision, as the case is here. That rule states:

“A financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official’s control, it is not reasonably foreseeable.”

Regulation 18706(b) also sets forth various factors to consider in conducting the analysis. The following factors lead us to the conclusion that the decisions at issue will not foreseeably have a material financial effect on Councilmember Smith’s interest in real property:

- The overlay does not change the underlying zoning of her property;
- The overlay does not change the use of her property;

³ When a public official who holds an office specified in section 87200 has a conflict of interest in a decision noticed at a public meeting, then he or she must: (1) immediately prior to the discussion of the item, orally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in regulation 18702.5(b), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences and speaking as a member of the public regarding personal interests, special rules found in regulation 18702.5(c) and 18702.5(d) apply.

- The overlay does not change the development potential of her property;
- New noise standards imposed on properties in the Airport Overlay Zone apply only to new construction and the area surrounding Councilmember Smith's property is built out. Even if her home were to be destroyed, it is not clear that the new standards would apply to re-construction because construction of a mobile home is governed by the California Housing and Community Development Department.
- The overlay imposes new disclosure requirements on sellers of property located within the Airport Overlay Zone that includes language that must appear in the deed. However, property owners in the Airport Overlay Zone are already subject to state disclosure laws advising buyers that the property is adjacent to or in a zone allowing an airport. The disclosures are similar but not identical.
- The overlay contains a prohibition on activities that may be a hazard to flight operations, but these rules are very similar to existing prohibitions contained in the ALUP.

In Councilmember Smith's case, based on the facts, we have determined that the Airport Overlay Zone decisions will have no measurable effect on Councilmember Smith's property and, therefore, she is not prohibited from participating in these decisions. In addition, you have provided no facts to suggest that any part of the Update, other than the Airport Overlay Zone will affect the councilmember's property. Therefore, the councilmember does not have a conflict in either decision.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Valentina Joyce
Counsel, Legal Division

VJ:jgl