

October 3, 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-14-116a**

Dear Ms. Russell:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”)<sup>1</sup> 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.

As explained in our previous letter (*Russell* Advice Letter, No. A-14-116), we have broken down the individual questions contained in your request and limit our advice in this letter to the following questions:

### QUESTIONS

1. May Deputy Community Development Director Kim Murry participate in government 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 (the “LUCE”) where she owns real property located in the proposed Airport Overlay Zone? May she participate in other decisions regarding the LUCE?

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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.

2. May Planning Commissioner John Fowler participate in government decisions regarding the creation of an Airport Overlay Zone, where he owns real property located in the Airport Overlay Zone? May he participate in other decisions regarding the LUCE?

3. May Planning Commissioner Michael Drazz participate in government decisions regarding the creation of an Airport Overlay Zone where he owns real property that is not located in the Airport Overlay Zone, but holds a deed of trust on property located in the Airport Overlay Zone? May he participate in other decisions regarding the LUCE?

### **CONCLUSIONS**

1. Yes. The specified decisions will not have a reasonably foreseeable material financial effect on Ms. Murry's real property.
2. Yes. The specified decisions will not have a reasonably foreseeable material financial effect on Commissioner Fowler's real property.
3. Yes. The specified decisions will not have a reasonably foreseeable material financial effect on the property for which Commissioner Drazz holds a deed of trust or the property he owns.

### **FACTS**

The City is in the process of updating the LUCE, which will include policy changes and updated ordinances. The changes will focus primarily on residential infill and opportunity sites rather than a wholesale expansion of the city limits or sphere of influence. The update proposes new development in areas identified in the Airport Overlay Zone. Although the Airport Overlay Zone does not itself change land use designations, it identifies properties that will be designated for such changes in the LUCE.

A portion of the LUCE addresses property in the vicinity of the San Luis Obispo County Regional Airport. 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 is charged with preparing and adopting an airport land use compatibility plan to encourage cities to designate land uses that are compatible with the safe operation of an airport. The ALUC reviews local government general and specific plans for consistency with the ALUC plan. The ALUC has adopted the Airport Land Use Plan (the "ALUP"), which establishes land use measures, including land use, height restrictions and building standards, within the "airport influence area." The LUCE contemplates new development of properties located within this area.

Also, as part of the planning process, cities are encouraged to adopt an airport compatibility overlay zone for the purpose of setting development standards in the airport influence area. The city council is considering the creation of such 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 California Airport Land Use Planning Handbook. The current ALUP covers more property than the proposed Airport Overlay Zone. The ALUP's standards may be different from the densities and types of development in the proposed Airport Overlay Zone. The LUCE 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.

### **Ms. Murry**

Ms. Murry owns and lives on property zoned low density residential (R-1). R-1 designation restricts development to seven units per acre. Ms. Murry's property appears to be primarily within the ALUP safety zone S-2, with a small portion in the more restrictive S1-C safety zone. Density in safety zone S-2 is limited to 12 units per acre.

The LUCE includes Ms. Murry's property in the Airport Overlay Zone A06. The underlying zoning (R-1) defines the allowed density so that density limitations and uses of her property will not change. In addition, the Airport Overlay Zone A06 has basic compatibility policies similar but not identical to those of ALUP safety zone S-2. Ms. Murry's property site is fully developed and, therefore, no additional density is allowed under either the existing R-1 zoning or the proposed A06 designation.

The Airport Overlay Zone does, however, include new noise standards. New residential development located in safety zone A06 will be subject to "Noise Sensitive Land Use" requirements set forth in proposed Municipal Code section 17.57.070.

The Airport Overlay Zone will also prohibit all activities that may be a hazard to flight operations, similar to requirements in the existing ALUP.

In addition, the Airport Overlay Zone will require owners of property within 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 ordinance to be enacted in connection with the Airport Overlay Zone would expand this requirement to owners of property in all zones. Because Ms. Murry's property 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 Ms. Murry's residence and applies to all properties in the zone. The only

changes are the imposition of new noise standards applicable to new development, additional disclosures in the deed and the prohibition of activities hazardous to flight operations.

There are two areas located in the Airport Overlay Zone and the current ALUP, the development of which may, by virtue of their proximity to Ms. Murry's property, affect the value of her property.

#### *The Avila Ranch Area*

The land use designation for the Avila Ranch Area, located nearly one-half mile from Ms. Murry's property, will change from "business park" to "dwellings and commercial." Ms. Murry's residence is separated from the Avila Ranch Area by South Higuera Street, which is a four-lane street classified as an arterial road and that you describe as a major thoroughfare. Ms. Murry's property is located on the north side of South Higuera Street, which is currently residential and will not be affected by the proposed changes in use. The changes in use are limited to property located south of South Higuera Street. Ms. Murry's property appears to be further buffered from any influences of the proposed land use changes in the Avila Ranch Area by existing development south of South Higuera Street that includes services and manufacturing. You state that under the proposed changes, no additional traffic will be directed through Ms. Murry's neighborhood.

#### *The LOVR Creekside Area*

The designation for property in the LOVR Creekside Area, located within 500 feet of Ms. Murry's property, will change from "interim open space" to "agricultural and residential" with roughly the northern half to be designated "medium density residential" and the southern half "low density residential." Property located between Ms. Murry's property and the nearest boundary of the LOVR Creekside Area that is adjacent to the northern and eastern boundaries of the LOVR Creekside Area is designated "low density residential." Property adjacent to the western boundary will remain open space. Development within the LOVR Creekside Area will add 159 residential units.<sup>2</sup> You state that under the proposed changes, no additional traffic will be directed through Ms. Murry's neighborhood. In addition, there are environmental constraints to development of much of the LOVR Creekside Area.

#### **Commissioner Fowler**

Planning Commissioner Fowler owns and resides in a single family home zoned low density residential, which permits 7 units per acre, and will be located in the Airport Overlay Zone. The property is also within the ALUP under which permitted density is 12 units per acre. Under the proposed Airport Overlay Zone, the underlying zoning will not change. His property is located approximately 1½ miles from the nearest area to be developed under the LUCE.

#### **Commissioner Draz**

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<sup>2</sup> All references to the number of residential units and square footage are based on the "SLO 2035 Land Use & Circulation Update – Draft Program EIR," page ES-3.

*Currently Owned Property*

Commissioner Draze owns and resides in a single family home zoned low density residential that is in the ALUP and is about 0.6 miles from the Airport Overlay Zone. The boundary of the current ALUP area runs through Commissioner Draze's residence. The property is located nearly one mile from the nearest area to be developed under the LUCE.

*Sold Property – Source of Income*

Planning Commissioner Draze and his wife have sold a commercial condominium consisting of two units which the owner uses for his business, one unit as a warehouse and the other as an office. Planning Commissioner Draze and his wife hold a deed of trust on this property. The property is located about three-quarters of a mile from two areas proposed for development under the LUCE, the San Luis Ranch Area to the west and the Avila Ranch Area to the south, both of which are located in the Airport Overlay Zone.

San Luis Ranch is not within the city limits and would need to be annexed before the city would have control over land uses in this area. The LUCE calls for a mix of residential and commercial, with substantial open space/agricultural. Residential uses would be consistent with applicable airport policies. Approximately 500 units of residential and 200,000 square feet of commercial are contemplated. The property is separated from the San Luis Ranch area by South Higuera Street which, as mentioned above, is a major thoroughfare.

The land use designation for the Avila Ranch Area will change from "business park" to "dwellings and commercial" with 700 residential units and 25,000 square feet of non-residential. The area would be a mix of residential densities and shops to the north. The subject property is separated from Avila Ranch by Tank Farm Road which is a connector road between east and west and is heavily used by commercial trucks. Property along Tank Farm Road is largely industrial. Build-out of this property is not expected to occur for another five to eight years, in which time the zoning designations could be significantly modified.

**ANALYSIS**

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a government decision in which the official has a financial interest. A public official has a "financial interest" in a government 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.)

From your facts, we assume that Ms. Murry will be participating in making and attempting to influence city decisions by, among other things, making recommendations to the Planning Commission and the City Council, and that Commissioners Fowler and Draze will be participating in making and attempting to influence city decisions by, among other things, making recommendations to the city council. A public official "participates in a governmental decision" when, acting within the authority of his or her position and without significant

substantive or intervening review, the official negotiates, advises, or makes recommendations to the decisionmaker regarding the governmental decision. (Regulation 18702.2.) A public official is attempting to use his or her official position to influence a governmental decision if, for the purpose of influencing the decision, the official contacts or appears before or otherwise attempts to influence, any member, officer, employee, or consultant of his or her agency. (Regulation 18702.3.)

**Ms. Murry.**

You have identified one interest that may result in a conflict of interest for Ms. Murry – ownership of her residence that is within the current ALUP and the Airport Overlay Zone.

Regulation 18706(b) sets forth the applicable rule when the public official's 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 suggest that the decisions regarding the Airport Overlay Zone will not foreseeably have a material financial effect on Ms. Murry's interest in real property:

1. The overlay does not change the underlying zoning or use of her property;
2. The overlay does not change the development potential of her property;
3. New noise standards imposed on properties in the Airport Overlay Zone apply only to new construction and the area surrounding Ms. Murry's property is completely built out.
4. 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.
5. 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.

However, in determining whether the overlay decisions may have a reasonably foreseeable material financial effect on Ms. Murry's real property, we must also consider the

effect of any proposed changes contained in the Airport Overlay Zone plans and the LUCE on nearby property.

#### *Avila Ranch Area*

The Avila Ranch Area is located approximately one-half mile from Ms. Murry's property and is separated from her property by South Higuera Street which is a four-lane street classified as an arterial road and that you describe as a major thoroughfare. Ms. Murry's property is further buffered from any potential influences by developed property on the south/east side of South Higuera Street, so that the proposed development will not result in any changes to the character of her neighborhood such as traffic, view, or noise, changes in use in the Avila Ranch area. Therefore, it is unlikely that decisions regarding the Avila Ranch Area will have a foreseeable financial effect on Ms. Murry's property.

#### *LOVR Creekside Area.*

The land use designation for the LOVR Creekside Area, whose northeastern boundary is located within 500 feet of Ms. Murry's property, will change from "interim open space" to "agricultural and residential." More specifically, residential development will be "medium density" in the northern half of the area and "low density" in the southern half and will add 159 residential units. Property surrounding the northern and eastern boundaries of the area, including Ms. Murry's property, will remain "low density" residential. Property surrounding the western boundary will remain "open space." Thus, residential development in the LOVR Creekside Area will sandwich "medium density" housing between "open space" and existing "low density" neighborhoods.

Recently amended regulations governing the materiality standard for interests in real property provide a list of circumstances under which the reasonably foreseeable financial effect of a government decision on real property in which an official has a financial interest is deemed to be material. Regulation 18705.2(a) provides that the decision:

"(11) Would consider any decision affecting real property value located within 500 feet of the property line of the official's real property .... Notwithstanding this prohibition, the Commission may provide written advice allowing an official to participate under these circumstances if the Commission determines that there are sufficient facts to indicate that there will be no reasonably foreseeable measurable impact on the official's property."

In considering whether the proposed land use changes in the LOVR Creekside Area will have a measurable impact on Ms. Murry's property, we note that although her property is located within 500 feet of the boundary of the LOVR Creekside Area, the property is buffered by existing homes on Mariposa Drive and Chuparrosa Drive. In addition, her access to the nearby green belt located to the west of her property would not be affected by development in the LOVR Creekside Area, which is located southwest of her property. Under these facts, decisions

involving the creation of the Airport Overlay Zone and the land use changes contemplated in the LUCE will not have a measureable impact on Ms. Murry's real property.

### **Commissioner Fowler.**

Under the proposed Airport Overlay Zone, the underlying zoning of Commissioner Fowler's property will not change. The same five factors considered in our analysis of Ms. Murry's property are applicable here. In addition, Commissioner Fowler's property is located approximately 1 ½ miles from the nearest area to be redeveloped, the South Broad Street Area. His property is buffered by a significant developed area and separated by Highway 227 and Orcutt Road. Under these facts, decisions involving the creation of the Airport Overlay Zone and the land use changes contemplated in the LUCE will not have a reasonably foreseeable material financial effect on Commissioner Fowler's real property.

### **Commissioner Draze**

#### *Currently Owned Property*

Commissioner Draze's property is located approximately 0.6 miles from the boundary of the Airport Overlay Zone and nearly one mile from the nearest area proposed for development, the South Broad Street Area. A small portion of the South Broad Street Area is within the Airport Overlay Zone. Existing uses for properties in the South Broad Street Area, primarily light manufacturing, will remain and the only change will be the addition of retail/commercial use. Under these facts, decisions involving the creation of the Airport Overlay Zone and the land use changes contemplated in the LUCE will not have a reasonably foreseeable material financial effect on Commissioner Draze's real property.

#### *Sold Property – Source of Income*

Commissioner Draze and his wife hold a deed of trust on two commercial condominiums located in the Airport Overlay Zone. Under Section 87103(c) and Regulation 18703.3, the purchasers of these properties are a source of income to Commissioner Draze if he receives income totaling \$500 or more within 12 months prior to making or participating in a government decision.

The new requirements imposed on owners of property located in the Airport Overlay Zone - noise standards, activities that cause hazards to flight operations and notices in deeds - will have little or no effect on his source of income's property, as discussed in our analysis of Ms. Murry's situation. However, the property's proximity to two areas slated for development, the San Luis Ranch Area and the Avila Ranch Area, both located about ¾ of a mile from the property, may give rise to a conflict of interest.

San Luis Ranch is not within the city limits and would have to be annexed before the city would control its land uses. In addition, the subject property is separated from the San Luis Ranch by South Higuera Street.

The proposed land use designation for properties in the Avila Ranch Area will change from “business park” to “dwellings and commercial.” Commercial property would consist of retail establishments primarily serving the new residential neighborhoods, but would also include some light manufacturing, and would not include the type of building in which the commercial condominium units are located. In addition, any potential impact of development of the Avila Ranch Area is diminished by the fact that Tank Farm Road, a street heavily used by commercial trucks, separates the property from the Avila Ranch Area. Under these facts, decisions involving the creation of the Airport Overlay Zone and the land use changes contemplated in the LUCE will not have a reasonably foreseeable material financial effect on Commissioner Draze’s real property.

In summary, Ms. Murry, Commissioner Fowler and Commissioner Draze are not prohibited from participating in government decisions regarding the creation of the Airport Overlay Zone or other decisions regarding the LUCE.

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