

October 8, 2014

Robert H. Pittman
Burke, Williams & Sorensen, LLP
1901 Harrison Street, Suite 900
Oakland, CA 94612

Re: Your Request for Advice
Our File No. A-14-167

Dear Mr. Pittman:

This letter responds to your request for advice on behalf of Cupertino City Councilmember Barry Chang regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹ Please note that we are 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 are also not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71) so any advice we provide assumes the facts the requester provides to us are accurate, and our conclusion is based on those facts.

QUESTION

Do the facts of this situation indicate decisions on the Project and the Development Agreement will not have a reasonably foreseeable measurable impact on Councilmember Chang's property under Regulation 18705.2(a)(11)?

CONCLUSION

Yes, under Regulation 18705.2(a)(11), you have presented sufficient facts to indicate that decisions on the Project Approvals and the Development Agreement will not have a reasonably foreseeable measurable impact on the official's property. Therefore Councilmember Chang is not prohibited by the Act's conflict provisions from participating in decisions on the Project Approvals and the Development Agreement.

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

The City of Cupertino (the “City”) is a general law city located in Santa Clara County. The City encompasses an area of 11.3 square miles and has a current estimated population of 58,302. Councilmember Chang was elected to the Cupertino City Council on November 3, 2009, and his current term expires in 2014. He owns a single-family home located on Canyon View Circle, which is the source of his potential conflict here. The home serves as his personal residence.

The City is currently considering a residential subdivision known as the Parkside Trails Project (“Project”). The Project involves the proposed development of 18 luxury homes on 8.5 acres adjacent to existing neighborhoods and preservation of 34 acres of open space connected to a park.

The Project site is 42.4 acres of revegetated vacant land historically used for quarry access and as an orchard. The Project is located off of Stevens Canyon Road, immediately south of the existing residences on Ricardo Road. The 42.4-acre site is currently designated very low density residential (5-20 acre slope density formula) and zoned RHS (residential hillside). Under the existing zoning designation, development on the Project site would be limited to two single family homes.

The Project proposes to subdivide the 42.4-acre site into three parcels -- the residential (8.5 acres), corridor (4.1 acres), and park (29.8 acres) parcels. The residential parcel would be further subdivided and developed with 18 single family homes. The proposed single family homes are consistent with the density and character of other homes in the vicinity of the Project site. The remainder of the 42.4-acre site would be preserved in perpetuity as open space for the benefit of the public – the corridor parcel to protect the Stevens Creek corridor and the park parcel as parkland.

Project implementation requires amendments to the General Plan land use designation and zoning for all three parcels, a tentative subdivision map, a development permit, and architectural and site approval (the “Project Approvals”). The changes to the General Plan land use designation and zoning on the residential parcel are necessary to permit the proposed subdivision; the Project proponent has voluntarily proposed the General Plan amendments and zone changes for the corridor and park parcels. The Project proponent has also requested that the City enter into a Development Agreement to lock in certain development rights and to facilitate certain on and off-site improvements and land dedications.

The Project proponent owns approximately 86.1 acres of undeveloped land in addition to the Project site. This additional land is composed of three parcels and shown in the cross-hatched pattern on a map you provided. The Project proponent has proposed the dedication of certain on and off-site land for use as open space and future trails in connection with the Project. The land being offered for these dedications includes: (1) an irrevocable offer of dedication in fee title for the remainder of the 42.4-acre site (the corridor and park parcels described above);

(2) an irrevocable offer of dedication in fee title for an offsite parcel (Old Haul road) for a future trail to connect McClellan Ranch Preserve to Linda Vista Park; and (3) an irrevocable offer of dedication in easement for future trails and a parking lot on adjacent parcels (the old quarry site composed of two parcels) to connect Linda Vista Park to Stevens Creek County Park and Fremont Older Open Space Preserve (collectively, the “Dedications”). The Dedications will be accomplished through the Development Agreement being negotiated in connection with the Project. The Dedications are being proposed by the Project proponent as a material inducement to the City to enter into the Development Agreement.

Councilmember Chang owns real property located beyond 500 feet of the Project site but within 500 feet of the boundary of one of the offsite dedication areas. He lives within 500 feet of one of the old quarry parcels (“the quarry parcel”) on which trail alignments are identified in a Trails Feasibility Study, though the exact location of the proposed easements on the old quarry parcels have not yet been determined.

You have enclosed several attachments with your letter, including a map illustrating the location of Mr. Chang’s residence relative to the Project and the Dedications and the fact that Mr. Chang’s residence is located within 500 feet of the quarry parcel where an easement for hiking trails is proposed as part of the Dedications under the Development Agreement. The attachments also included a copy of an appraisal analyzing the impact of the Parkside Trails Project and the Dedications on Councilmember Chang’s single family home.

ANALYSIS

Section 87100 prohibits any state or local 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 specified in Section 87103. 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; Regulation 18700(a).)

Your letter does not raise issues with the first several steps of the conflicts analysis. Councilmember Chang is a public official who will be making a governmental decision if he participates in city council votes on the Project Approvals and the Development Agreement. Under the facts provided, Mr. Chang has one financial interest for purposes of the Act that raises a possible conflict of interest issue that being an interest in real property worth \$2,000 or more based on his ownership of his residence located within 500 feet of the Dedications. (Section 87103(b) and Regulation 18703.2.)

You ask whether the facts of this situation indicate that decisions on the Project and the Development Agreement will not have a reasonably foreseeable measureable impact on Councilmember Chang’s property under Regulation 18705.2(a)(11).

An official does not have a conflict of interest under the Act unless the government decision in which he or she participates has a “reasonably foreseeable material financial effect” on his or her interests. (Sections 87100 and 87103.) In the case of a real property interest such as Mr. Chang’s, Regulation 18705.2(a) sets forth twelve factors to examine in determining whether the reasonably foreseeable financial effect of a government decision relating to a parcel of real property owned by an official would be deemed material and thus create a conflict of interest for the official, absent an exception such as the public generally or legally required participation. The first ten factors address specific direct affects to the real property owned by the official. Factor 11 addresses property located within 500 feet of the property involved in the decision, which automatically would make the financial affects material unless staff concludes otherwise, and factor 12 is the general rule that covers reasonably foreseeable financial effects from a reasonably prudent person standard.

From the information you have presented, the only factor among the first ten direct affect that is relevant is that pertaining to the view. (Regulation 18705.2(a)(10).)

Additionally, because Mr. Chang’s residential property is within 500 feet of the Dedications, subdivision (a)(11) of the regulation is applicable. Subdivision (a)(11) provides that a government decision that has a reasonably foreseeable² financial effect on a parcel of residential real property owned by an official is “material” if the decision would affect the value of real property “located within 500 feet of the property line of the official’s real property.” This provision also states that “[n]otwithstanding 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.”

You have undertaken a comprehensive analysis of the impact of the Project and the Dedications being made pursuant to the Development Agreement on Councilmember Chang’s real property and you believe that these decisions would not have a reasonably foreseeable measureable impact on his property. Your facts state that the proposed subdivision of 18 homes is consistent with the existing character and density of the neighborhood. The facts state that there would not be increased traffic in Councilmember Chang’s neighborhood as a result of the subdivision, that there are already adequate access roads, and that the areas proposed to be dedicated for trails such as in the old quarry, are already used by hikers for that purpose.³ The Trails Feasibility Study discusses proposed trails on existing informal hiking paths, none of which are within very close proximity to Councilmember Chang’s property. The Trails Feasibility Study also proposes adding 12 parking spaces to Linda Vista Park’s existing 35

² Under Regulation 18706, for the effect of a decision to be reasonably foreseeable, the effect need not be likely but only needs to be “recognized as a realistic possibility and more than hypothetical or theoretical . . .”

³ Regulation 18706(b)(1) recognizes that where the occurrence of the financial effect is contingent upon intervening events, not including future governmental decisions by the official’s agency, or any other agency appointed by or subject to the budgetary control of the official’s agency, it may not be foreseeable. Of course, future decisions concerning further use or development of the quarry parcel, if any, may have a material financial effect on the official’s interest and you should contact us at that time for further advice.

spaces, also not in very close proximity to Councilmember Chang's property. With respect to the quarry parcel, your facts state that it is currently undeveloped, and approval of the Dedications would essentially preserve the parcel in this state. You note that the quarry parcel is largely undevelopable, so there would be no change in the current, or future, use of the land resulting from the decisions.

An appraisal was conducted to ascertain the market value impact, if any that the Parkside Trails Project may have on Councilmember Chang's residential property. The appraisal stated that because of the distance between the subdivision site from his property, no measurable impact to value is reasonably foreseeable as a result of the proposed residential development. The appraisal also examined the irrevocable offers of dedication for easements on the quarry parcel for future hiking trails. The appraisal reviewed various factors and their possible impact on value to the subject property, including land use, utility, access, traffic/noise/parking, views, crime and marketability. The appraisal concluded that the market value of Councilmember Chang's property in the "before" condition would be the same as in the "after" condition, assuming the Parkside Trails Project and Dedications.

While there was discussion in both your letter and the appraisal report of many factors listed in our regulation that appear unrelated to the analysis (such as there would be no change to the income producing potential of Councilmember Chang's non-income producing property) there was very little discussion on the one factor that, from our perspective, seems most important – the view from Councilmember Chang's property. The appraisal report merely states "the potential trails are not located within the views of the subject property ... [and] ...no structures or planting will fall within view of the subject property." In essence, the report finds that the view from the property will be exactly the same after any potential decision is implemented as it was before the decision and, for that reason, there will be no change to the value of the property because of it.

However, this does not fully answer the question. If a decision preserves a pristine view in perpetuity, and there is some evidence to at least suggest that this issue could be in play here, the value of the property is enhanced over what it would be if the view could be subject to change by some future event. In short, it is not enough to merely state that the view will not change by the decision; the analysis must also address how the potential for change is altered.

Because of this issue, we contacted the appraiser to get more information. This information satisfied our questions, and provides the basis for our finding that there are sufficient facts to indicate that there will be no reasonably foreseeable measurable impact on the official's property, despite the fact that the property is located within 500 feet of the property that is the subject of the governmental decision.

As it turns out, Mr. Chang's property is oriented with views to the east, of the city lights, and not to the west. Because of the location of his property across the street from the property subject to the decision, and the severe slope of that property immediately adjacent to the road, the view of the property to the west does not include the canyon, where the trails will be. His

only view is of the ridge on the other side of the canyon, which, as we understand it, is not subject to this decision. Because of this, and the highly speculative nature of where any other home sites may be located in the future within this zone, we find that the decision will not have a reasonably foreseeable financial effect on Councilmember Chang's property.

Because we have determined that Councilmember Chang does not have a conflict of interest under the Act in decisions on the Project Approvals and Development Agreement, and because they do not apply to your facts, we do not discuss the limited exceptions of public generally and legally required participation that may permit an otherwise disqualified official to participate in a decision.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Hyla P. Wagner
Senior Counsel, Legal Division

HPW:jgl