

October 20, 2014

Harriet A. Steiner
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500 Capitol Mall, Suite 1700
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-14-175

Dear Ms. Steiner:

This letter responds to your request for advice on behalf of Davis City Councilmember Robb Davis regarding his duties under the conflict of interest provisions of the Political Reform Act (the “Act”).¹ Because 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), this advice is based solely on the facts presented. Please also 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.

FACTS

Robb Davis is a newly elected Council Member for the City of Davis. On July 16, 2014, he entered into a year-long residential lease to rent a loft in the downtown core area of Davis that expires August 31, 2015. The lease establishes the monthly rent for the duration of the year-long lease and prohibits subletting. The lease does not provide for an option to renew or extend the term, but Mr. Davis expects to renew the lease at the end of the lease term.

Over the next few months, the City Council will consider a number of projects that are located in or near the downtown area and relatively close to Mr. Davis’s rented residence. The decisions are detailed in the analysis below.

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.

QUESTIONS, ANALYSES AND CONCLUSIONS

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 one or more of the public official’s interests.² (Section 87103.)

Regulation 18706(b) defines when a financial effect is foreseeable under these circumstances. 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.

Question 1. Does the recently amended Regulation 18705.2, setting forth the standard for a material financial effect on real property, not consider the distance between a public official’s leased property and the subject of a decision?

New Regulation 18705.2 provides that the effect of a decision is material as to a leasehold interest in real property if the decision will: (1) change the termination date of the lease; (2) increase or decrease the potential rental value of the property; (3) increase or decrease the rental value of the property, and the official has a right to sublease the property; (4) change the official’s actual or legally allowable use of the real property; or (5) impact the official’s use and enjoyment of the real property. This would be true irrespective of the distance between the leased property and the subject property.

Question 2. Termination Date of the Lease. Regulation 18705.2(b)(1) provides that a governmental decision is material if the decision will change the termination date of the lease. Mr. Davis’s lease will expire on August 31, 2015. He does not have an option to renew the lease but anticipates being able to do so.

(a) Should you consider only whether the lease might be terminated by the landlord prior to its expiration as a result of a project being considered by the City?

Yes. You should consider whether such a result is reasonably foreseeable.

(b) Does the relevant inquiry also extend to whether the project will affect Mr. Davis’s ability to renew the lease?

² When a public official who holds an office specified in Section 87200 (including city councilmembers) has a conflict of interest in a decision noticed at a public meeting, he or she must: (1) immediately prior to the discussion of the item, orally identify each type of interest involved in the decision as well as details of the 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.

No. This factor only considers whether the lease will be terminated, as a consequence of the decision, before August 31, 2015.

(c) If Mr. Davis rents the property on a yearly basis and a project has the potential to change the termination date of the lease in two or three years rather than the next year, would that change the termination date of the lease even though a new lease has not yet been entered into?

No. You need not look beyond the term of the current lease (which is the property interest in question) with respect to this factor.

(d) If the action or decision before the Council will not result in any actual land use changes for one or more years beyond the current lease term, would that time frame be relevant in determining if Mr. Davis can participate in the land use decisions?

No. Under this standard you would only consider effects on the termination date of the existing lease. Any new lease after that date is speculative and not a current property interest.

Question 3. Change to Potential Rental Value. Regulation 18705.2(b)(2) provides that a governmental decision is material if the decision will increase or decrease the potential rental value of the property. This factor now considers the potential rental value rather than the actual amount of rent paid by the lessee (the factor under former Regulation 18705.2(a)(2)(B)). Mr. Davis has a one-year lease with a fixed rent. You are trying to determine at what point in time the *potential* rental amount is to be considered.

(a) It is possible that any one of the upcoming decisions could potentially affect (positively or negatively) the potential rental value for the unit Mr. Davis rents. But the change in actual rent may not occur during his tenancy or even several years from now. For example, the Nishi project would add more housing units to the City. That, in addition to the rest of the rental market, may affect the potential rental value of the leased property. However, the impact may not be realized until after Mr. Davis vacates the unit. Does the time of the official's actual tenancy matter to this analysis? You believe that the only relevant inquiry is whether the public official's potential rent for a new or extended lease will change as that would be the official's only financial interest in the property as the lessee and not the property owner.

(b) As another example, if more trains carrying highly flammable oil travel through downtown Davis, the potential rental value of the property may decrease if fewer people want to live near the train tracks. Mr. Davis's rent may not change, however, either for the duration of his lease or during the next year if he chooses to renew the lease. Does it matter whether his actual rent will change or whether there is only the potential for it to change?

While slightly reworded from the original language, this factor still focuses on the public official's rent on his current lease, or the amount the official could lease the property for if he

could sublease it. Assuming that there is no impact or change in the lease price during the term of the lease and the property cannot be subleased, this factor would not be met.

Question 4. Use of the Leased Property. The remaining factors to be considered under Regulation 18705.2(b) appear to be the same as in the regulation prior to its amendment — a change to the actual or legally allowable use of the property and the impact on the official's use and enjoyment of the property. You assume that you evaluate such factors as the access to the property, traffic, odor, and noise conditions, and other factors that may influence quality of life.

By analogy, Regulation 18705.2(a)(10) considers traffic levels or intensity of use, including parking, of property surrounding the official's real property, the view, privacy, noise levels, or air quality, including odors, or any other factors that would affect the market value of the real property parcel in which the official has a interest. These factors are also relevant in evaluating the application of Regulation 18705.2(b)(4) and (5) as well. The factors are not intended to be exclusive, however, and if other factors suggest that there will be a change in the official's actual or legally allowable use of the real property, or an impact the official's use and enjoyment of the real property, you should evaluate these factors as well.

Question 5. Does Mr. Davis have a conflict of interest with respect to any of the eight projects listed below?

- Parking Task Force Recommendations (adjacent). A Citizens Task Force made a series of recommendations on downtown parking management in late 2014. Recommendations include conversions from free to paid parking, additions to the parking supply (including possibly a third parking structure), and improved parking enforcement. The area proposed for conversion to paid parking includes the streets surrounding Mr. Davis's loft. The City Council has "accepted" the report of the Task Force but has not taken any specific actions for implementation. The City Council may consider specific items in the future. Mr. Davis does not currently own a car. Mr. Davis's lease includes an option to rent parking, but he has not exercised this option. Thus, neither he nor his leased property would be individually affected by these decisions. The decisions about parking in the downtown could, however, result in increased or decreased parking availability on the streets in the downtown, including those near his loft and could possibly include more paid, rather than free, street parking.

The parking decisions will not change the termination date of the councilmember's lease, increase or decrease the potential rental value of the leased property, or affect the actual or legally allowable use of the real property. No facts suggest that the councilmember's use and enjoyment of the real property will be affected. Therefore, the decision will not have a material financial effect on the councilmember's interest.

- Incubator Project (300 feet). The City has leased a downtown building approximately 300 feet from Mr. Davis's loft to the Davis Roots organization for supporting start-up companies and expanding research collaboration opportunities with private industry partners. The lease calls for Davis Roots to pay future revenues from its investments as a small business

incubator as partial consideration for the lease. During 2015, the Council will consider whether to extend the lease.

The decision to extend the lease for the downtown building to a support organization for start up businesses will not change the termination date of the councilmember's lease, increase or decrease the potential rental value of the leased property, or affect the actual or legally allowable use of the real property. No facts suggest that the councilmember's use and enjoyment of his real property is affected by the specific use of the nearby property. And the pending decision is an extension of the current use of the Davis Roots property, so the use of the nearby property will not change. Therefore, the decision will not have a material financial effect on the councilmember's interest.

- Richards Boulevard Underpass Area Improvements (500 feet). The City is exploring improvements to the Richards Boulevard corridor, which provides access to downtown from South Davis and 1-80 via a two-lane tunnel. The northernmost portion of the corridor (the Davis Subway underpass) is approximately 500 feet from Mr. Davis's loft. Future decisions that might come before the Council could include consideration of a decorative arch/entrance feature for the downtown, construction of a second bike tunnel on the east side of the tunnel, and/or acquisition of property near the tunnel, including property on both the east and west sides of the tunnel at the south portion of the corridor. These considerations may include property acquisition, environmental review, construction contracts, and utilization of property already owned by the City of Davis, all of which would require approval by the City Council.

The conflict of interest rules must be applied on a decision by decision basis. While the Richards Boulevard Underpass Area Improvements will not change the termination date of the councilmember's lease, increase or decrease the potential rental value of the leased property, or affect the actual or legally allowable use of the real property, future decisions may affect the councilmember's use and enjoyment of the real property. You should review each future decision concerning the underpass to determine if the Councilmember will be impacted and to what extent.

- Trains Transporting Crude Oil (500 feet). Valero and the City of Benicia are considering an increase in the delivery of crude oil by rail. The rail line is adjacent to downtown Davis, approximately 500 feet from Mr. Davis's leased loft. The City of Davis has been collaborating with other public agencies and the SACOG to provide comments on the EIR issued by the City of Benicia and is considering further actions as appropriate. In addition, there are other projects that are currently under evaluation, including one in San Luis Obispo County that could also add to the number of trains per day carrying crude oil through the Sacramento region, including Davis. The federal government is currently evaluating new train car safety regulations and other safety regulations designed to improve crude oil train shipments. The City intends to participate in these proceedings through filing a comment letter. In reviewing this project, SACOG created a map showing ¼ mile and 1 ½ mile evacuation zones throughout the region, should a derailment occur. Of course, only the area

closest to a derailment would actually be evacuated. The City Council has already approved a comment letter to Benicia (Mr. Davis did not participate in this discussion or vote). You anticipate that the City Council will continue to consider additional actions and to approve of, or give direction to staff to comment on, the impacts this project could have on the City of Davis.

The pertinent governmental decision that could increase rail traffic will be made by the City of Benicia and Valero, not the City of Davis. The decision by the City of Davis concerning whether to submit a public comment letter on the matter does not give rise to a conflict of interest under these circumstances.

- Housing Element Update (more than 500 feet). The City will be revising the Housing Element of the General Plan, as required by law. The City's determination that it has sites appropriately zoned to accommodate statutory requirements for housing is anticipated to rely on the redevelopment potential of several downtown sites. All of the initially identified sites are further than 500 feet from Mr. Davis's leased loft, but some of these sites are in the downtown area. The Housing Element does not change the allowed land use for the properties.

These decisions will not change the termination date of the councilmember's lease, increase or decrease the potential rental value of the leased property, or affect the actual or legally allowable use of the real property. While generally these decisions will not affect the councilmember's use and enjoyment of the real property, specific facts concerning a specific site may change this general conclusion. You should review each of these decisions independently to determine if the Councilmember will be impacted. As noted above, the conflict of interest rules must be applied on a decision by decision basis.

- Nishi Gateway District (800 feet). The City and the property owner are exploring development of a mixed-use innovation district on a 40-acre property at the west end of West Olive Drive, approximately 800 feet from Mr. Davis's leased loft. The project, as currently proposed, would include approximately 500-700 units of housing, including both ownership and rental units. The University of California Davis is participating in the consideration of this project because it may involve access through the campus. The County is also participating because development of the site will require annexation to the City. The project requires environmental review, planning entitlements, and approval by the voters. Review and planning for this site is just starting. The City Council will be asked to consider (1) approving a contract with environmental and planning consultants for preparation of an Environmental Impact Report and project planning services (to occur this year); (2) approving all applicable planning entitlements (general plan amendment, zoning code amendment, development agreement, and similar planning approvals, but City Council consideration of the merits of the Project proposal will not occur until late 2015 at the earliest); and (3) placing a measure on the ballot for the voters to consider approving the project (required by a local land use measure). This last action would occur only if, and after, the Council decides to approve a general plan amendment for this site. Actual

development would not be permitted to start until after the election and only if the project is approved by the voters

The Nishi Gateway District decision will not change the termination date of the councilmember’s lease, increase or decrease the potential rental value of the leased property, or affect the actual or legally allowable use of the real property. However, such a large development near the councilmember’s property could affect his use and enjoyment. Having said that, the approval of a contract with environmental and planning consultants for preparation of an Environmental Impact Report and project planning services, in itself, would not affect the councilmember’s use and enjoyment and would not result in a conflict of interest. We have generally considered these types of decisions (choice of the contractor) merely preliminary decisions that do not give rise to a conflict of interest.

The other decisions may not take place until after the end of the councilmember’s current lease. At the termination of his current lease, the councilmember may relocate or enter into a new lease with different terms. Therefore, it is premature to advise whether future decisions will result in a conflict of interest.

- Hotel/Conference Center (1,200 feet). The City is processing an application for a full-service hotel conference facility on Richards Boulevard, approximately 1,200 feet from Mr. Davis’s loft.

Current	Proposed
43-room hotel	125-room hotel
Single story	Seven stories
4,000 square foot restaurant	3,000 square foot restaurant
	8,000 square foot conference center
	Could include a parking garage and a swimming pool

Vehicle trips are estimated to increase by about 1,150, with approximately 225 of these trips in the AM peak and the same number in the PM peak. At this time, it appears that there could be traffic impacts, including possible traffic impacts on First Street near the Lofts, although these impacts may be “less than significant” as defined under CEQA.

The hotel decision will not change the termination date of the councilmember’s lease, increase or decrease the potential rental value of the leased property, or affect the actual or legally allowable use of the real property. Moreover, while the intensity of use of the hotel site will be increased substantially, it will still be used for the same purposes. You also noted that the increased use would have impacts on traffic near the councilmember’s residence, but the impacts will be “less than significant.” Thus, it does not appear that the councilmember’s use or enjoyment of his property will be impacted. Therefore, the councilmember would not have a conflict of interest in the decision.

- Art in Downtown (locations to be determined). The City Council has determined to establish an arts and entertainment district as part of economic development and downtown revitalization activities. The City is considering a contract with a non-profit agency for identifying the district activities, forming and nurturing an Arts Alliance, and related activities. In addition, the City owns multiple pieces of public art throughout the community — including downtown — and anticipates requests for installation and/or maintenance of other pieces. Thus, it is likely that more art (whether public and/or private art placed in areas open and accessible to the public) may be installed throughout downtown Davis. Possible considerations for the City Council include considering a contract with a non-profit, considering expenditures for art located within the downtown, and determining to review and perhaps modify zoning or other land use requirements to promote art placement within the downtown.

The decision on Art downtown will not change the termination date of the councilmember's lease, increase or decrease the potential rental value of the leased property, or affect the actual or legally allowable use of the real property. It is also difficult to imagine that the councilmember's use or enjoyment of his property will be affected at all. Consequently, the councilmember would not have a conflict of interest in that decision.

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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