December 15, 2014

Nathaniel Bates
City Councilmember
300 Seaview Drive
Richmond, CA 95801

Re: Your Request for Advice
Our File No. A-14-188

Dear Mr. Bates:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act").[1] 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 Section 1090. Moreover, this letter is based on the facts presented. The Fair Political Practices Commission does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTION

May you participate in city council decisions regarding a condominium development project that is located approximately 440 feet from your real property?

CONCLUSION

No. Under the facts provided, we are not able to determine that there will be no reasonably foreseeable measurable impact on your property.

FACTS

You are a city council member of the City of Richmond, California. You own your residence located at 300 Seaview Drive in which you have a financial interest of more than $2,000.

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[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.

Later this year, the city council will be asked to consider approval of a development project known as the Bottoms Property Residential Project (the "Project"). The Project consists of approximately 60 condominium units to be situated on roughly six acres of land near the shoreline in the city's Point Richmond District. Your property is located approximately 440 feet from the nearest boundary of the Project site, and 565 feet from the nearest proposed condominium structure. The Recirculated Draft Environmental Impact Report ("RDEIR") for the Project, prepared by independent experts, determined that the Project would not significantly impact traffic, noise, parking, neighborhood aesthetics or air quality.

The Project will generate only about 35 to 40 vehicle trips during morning and evening commutes. This is expected to cause one second of delay at some local intersections. Overall noise in the area from additional traffic will also be less than significant and, specific to your street, the noise level will not change at all because your home is not located on a route where Project traffic is expected to travel. The Project will include sufficient on-site parking to meet demand. Views from certain vantage points will be significantly obstructed but not from your property. The Project will also have no significant impact on the aesthetics of the area inasmuch as its high-quality design, materials and landscaping will be similar to those of surrounding neighborhoods. Finally, with standard mitigations, the Project will not significantly affect air quality or other health factors.

Project decisions will involve land use and zoning changes, which will eliminate the current mix of Planned Area, Coastline Commercial, Community Regional Recreation, and Marine Industrial, to a single Planned Area use. The area will be rezoned to a combination of medium and high density residential for what appears to be high-end condominiums.

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. The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given government decision.

Your letter eliminates the need to analyze the initial steps of the standard analysis. You are a public official and you are asking whether you may participate in city council decisions regarding the Project in light of the fact that you own real property in close proximity to the Project.

Recently revised Regulation 18705.2(a) provides a list of circumstances under which the reasonably foreseeable financial effect[2] of a government decision on real property in which an

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[2] 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 a public official's control, it is not reasonably foreseeable. (Regulation 18706.(b).)

official has a financial interest is material. As relevant to your facts, the financial effect will be material if the decision:

> "(10) Would change the character of the parcel of real property by substantially altering traffic levels or intensity of use, including parking, of property surrounding the official's real property parcel, 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 financial interest;
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> "(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."

Changes to the character of your real property. (Regulation 18705.2(a)(10).)

Based on the findings in the RDEIR, the Project would not significantly impact traffic, noise, parking, views, aesthetics, or air quality relative to your property. However, you have not addressed any factors other than those set forth in the RDEIR. Therefore, application of this provision is not determinative of the question.

Effects on the value of your real property. (Regulation 18705.2(a)(11).)

Under Regulation 18705.2(a)(11), any decision affecting real property located within 500 feet of an official's property is material. Recent changes to the 500 foot rule allow the Commission to make a determination, based upon the facts provided by the official, that the rule does not apply to a specific situation. The Commission may now make a determination that the governmental decision will not have a material financial effect on an official's real property when there are sufficient facts to indicate that there will be *no* reasonably foreseeable measurable impact on the property. One of the impetuses for this new rule was to create a vehicle whereby we could avoid the strict presumption of materiality in clear cases where the finding of a conflict is supported by nothing more than mere distance of the official's property from the site of the property at issue in the governmental decision. As an exception, we are careful to apply it only when it appears clear to us that we have good cause to do so.

The facts you have provided do not support a finding that the decision is so insignificant that it will have no measureable impact on the value of your property. In fact, the indication is just the opposite -- the impact from the magnitude of this decision may well extend to properties

located beyond 500 feet from the Project. Your facts do not address whether there are any other factors that would affect the market value of your real property, or why the land use changes would have no financial impact on surrounding neighborhoods. Specifically, you have not addressed the land use and zoning changes, which will eliminate the current mix of Planned Area, Coastline Commercial, Community Regional Recreation, and Marine Industrial, to a single Planned Area use. The area will be rezoned to a combination of medium and high density residential. It is difficult to imagine that transforming vacant waterfront land to high-end condominiums would not have a measureable impact on property located just 440 feet away. Under the given facts, we cannot say that there are sufficient facts to indicate that there will be no reasonably foreseeable measurable impact on your property as a result of the decision.

Therefore, it appears you will have a conflict of interest in city council decisions regarding the Project.[3] If you have other questions on this matter, please contact us at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Valentina Joyce
Counsel, Legal Division

VJ:jgl

[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.