

April 7, 2015

Krishan Chopra, Assistant City Attorney
City of Mountain View
500 Castro Street
Post Office Box 7540
Mountain View, CA 94039-7540

Re: Your Request for Advice
Our File No. A-15-025

Dear Mr. Chopra:

This letter responds to your request for advice on behalf of Mountain View Mayor John McAlister 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.

QUESTION

May Mayor McAlister participate in governmental decisions relating to the El Camino Real Bus Rapid Transit Project (the "Project") being proposed by another governmental agency, the Santa Clara Valley Transportation Authority ("SCVTA") in the City of Mountain View?

CONCLUSION

Mayor McAlister has a conflict of interest, and may not make, or participate in making decisions involving recommendations to the Transportation Authority regarding the Project options.

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 Project: The proposed Project consists of enhanced bus service to be operated by SCVTA. The project will increase ridership by offering shorter travel times, new specialized vehicles, technological improvements, and stations with real-time passenger information. The proposed project would run 17.6 miles on the El Camino Real, the main arterial road that passes through or near the downtown areas of the cities of Palo Alto, Los Altos, Mountain View, Sunnyvale, Santa Clara, and a portion of San Jose.

The portion of El Camino Real in the City of Mountain View is 3.87 miles long. The Project would coexist with SCVTA's existing local bus service in Mountain View. This current service would continue to operate along El Camino Real.

CalTrans has jurisdiction and approval authority over all projects affecting El Camino Real and has allowed SCVTA to pursue the Project. SCVTA is conducting the required California Environmental Quality Act analysis and is now seeking specific input on project alternatives from the cities affected by the project. Project design is scheduled to begin in late 2015. Construction is expected to be completed by summer 2018 and the Project service will begin that fall.

SCVTA has developed seven alternatives that vary in scope, featuring combinations of mixed flow and dedicated lane configurations.² The Project is designed to improve traffic conditions along the El Camino Real corridor by increasing ridership on public transportation and making public transportation more efficient. The Project affects 308 businesses out of the 2,934 total in the City, or 10.5% of businesses citywide.

The Mayor's Interest: Mayor McAlister is the proprietor of a Baskin Robbins ice cream franchise which he operates in a leased space at 1249 West El Camino Real in the City. The property is located directly on W. El Camino Real at the intersection of Shoreline Boulevard, with one outer boundary situated approximately ten feet from West El Camino Real.

The site within which the business is located is a small, multi-tenant commercial building with a small adjacent parking lot. The uses include other restaurants, retail, and personal service uses. It is one-story built in 1967 and is not historic. The building abuts the sidewalk and has no setback on the side or rear of the property. The building frontage is about 40 feet and the parcel frontage is approximately 100 feet.

In a prior advice request on June 17, 2013, you stated that over the past five years, gross revenue for the Mayor's Baskin Robbins has ranged from approximately \$429,000- \$495,000,

² In a mixed flow configuration, the Project vehicle operates in the right lanes with other vehicles, stopping at curbside bulb-out stations. Bulb-out stations are essentially sidewalk extensions that increase the sidewalk width at stops and create defined spaces for passenger waiting outside of the normal sidewalk traffic. In a dedicated lane configuration, one lane in each direction adjacent to the median would be converted to a Project-only lane, leaving two lanes (instead of the existing three) in each direction for other vehicles. In that configuration, bus stops and stations would be located in the center median.

with an average gross revenue of approximately \$470,000. On June 20, 2013, you stated that the Mayor's rent is not fixed, but is variable at 6.5 percent of gross sales per month. The rent is generally not exactly the same due to slightly variable gross sales. The average yearly rent is about \$35,000 per year.

The business' lease expires in June 2016, and there is no option in the lease agreement to renew the lease. In an email dated April 3, 2015, you stated that when the lease expires, Mayor McAlister has the right of first refusal to purchase the entire property (which houses his and other leaseholds) in the small shopping center. He may also enter into another five year lease, which would likely contain an initial five year term and an optional five year extension. He has operated the franchise under a leasehold arrangement since 2002 and is likely to continue on with another renewed lease upon expiration of the current lease. The Mayor plans to continue operating the franchise.

The Project's Effects on the Mayor's Business: The seven alternatives involve infrastructure improvements such as curbside bulb-out stations, improvements to pedestrian islands, extension of curbs, bus stops and restriping of crosswalks. Option 7 involves road construction of a dedicated lane and the loss of two existing vehicle lanes on the portion of El Camino Real and Shoreline Boulevard where Mayor McAlister's business is located. The construction may cause increased traffic and disturbance to Mayor McAlister's business. It could "pose a temporary deterrent to customers resulting in lower business volume for the period of construction" which is approximately one year.

Three bus stops along El Camino Real will be used in various Transit Project alternatives, and will receive infrastructure improvements: Castro Street (1,550 feet from the property); Escuela Avenue (2,963 feet from the property); and San Antonio Road (8,784 feet from the property). However, no new bus stops are contemplated for the Transit Project on the block where the Mayor's business is located. Your facts indicate that the Transit Project buses will "essentially 'pass through' the block of El Camino Real where the business is located."

The seven alternatives are follows:

- **Option 1** (No Build): mixed-flow traffic configuration along the entire El Camino Real corridor that include improvements regardless of whether the Transit Project is implemented. Buses that currently provide rapid service would be replaced in 2015 by hybrid diesel-electric buses. Service frequency would increase; no change to lane configuration in Mountain View or any new infrastructure. Estimated ridership will increase from 3,278 daily riders per day (based on 2013 figures) to 8,159 daily riders per day in 2018.
- **Option 2** (17.6-Mile All Mixed Flow from San Jose to Palo Alto): curbside bulbouts in Mountain View; mixed-flow lanes along the entire El Camino Real corridor. In Mountain View, curbside bulb-out stations would be constructed at Castro Street and Showers Drive, with a potential additional station at Escuela Avenue; no change to lane configuration. Existing bus stops at Castro Street and Showers Drive will be used.

Removal of existing pork-chop islands and extension of existing curbs to make smaller intersections and crosswalks restriped. Estimated ridership will increase from 3,278 daily riders per day (based on 2013 figures) to 9,223 daily riders per day in 2018.

- **Option 3** (3-Mile Short Dedicated Lane): dedicated lanes for the Transit Project in portions of Santa Clara only; mixed flow, with no new infrastructure or change to lane configuration in Mountain View. Estimated ridership will increase from 3,278 daily riders per day (based on 2013 figures) to 9,561 daily riders per day in 2018.
- **Option 4** (3-Mile Short Dedicated Lane): Curbside bulbout stations in Mountain View: mixed-flow in Mountain View, Sunnyvale, Los Altos, and Palo Alto; new curbside bulbout stations at Castro Street, Showers Drive and potentially Escuela Avenue; no change to lane configuration in Mountain View. Estimated ridership will increase from 3,278 daily riders per day (based on 2013 figures) to 10,090 daily riders per day in 2018.
- **Option 5** (7.1-Mile Long Dedicated Lane with Mixed Flow): dedicated Transit Project lane in a 7.1-mile segment from Santa Clara to State Route 85 in Mountain View; dedicated lanes from Sunnyvale to SR 85; curbside bulbout stations in Mountain View. Estimated ridership will increase from 3,278 daily riders per day (based on 2013 figures) to 10,801 daily riders per day in 2018.
- **Option 6** (10.1-Mile Long Dedicated Lane with Mixed-Flow: dedicated lane segment from Santa Clara to Showers Drive in Mountain View): median stations at Castro Street, Showers Drive and possible Escuela Avenue. Estimated ridership will increase from 3,278 daily riders per day (based on 2013 figures) to 11,808 daily riders per day in 2018.
- **Option 7** (13.9-Mile Long Dedicated Lane from Santa Clara to Palo Alto): median Stations in Mountain View; dedicated Transit Project lanes throughout Mountain View and loss of travel lane; median station at Castro Street and Showers Drive. Estimated ridership will increase from 3,278 daily riders per day (based on 2013 figures) to 13,104 daily riders per day in 2018. *This option would involve construction on the portion of El Camino Real and Shoreline Boulevard where Mayor McAlister's business is located. Construction activities would cause some disturbance to traffic during the duration of the project, which is approximately one year.*

Three existing bus stops along El Camino Real will continue to service local buses: Pettis Street (1087 feet from the Property); Shoreline Boulevard (175 feet from the Property); and Miramonte Avenue (394 feet from the Property).³

³ There are also the three bus stops along El Camino Real that will receive infrastructure improvements and will be used in various Transit Project alternatives are as follows: San Antonio Road (8,784 feet from the Property); Escuela Avenue (2,963 feet from the Property); and Castro Street (1,550 feet from the Property).

The City Council, in its official capacity, will be asked to formally declare a position on the Project alternatives, and provide input on the alternatives. The SCVTA will receive input from all six affected jurisdictions and will approve the final Project alternative.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision⁴ 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 the public official or any interest describe in Section 87103.

The interests that can give rise to conflicts of interest under the Act and that are pertinent to your request are the following:

- **Business Entity** – A public official has an interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d)).
- **Real Property** – A public official has an interest in real property in which he or she has a direct or indirect interest of \$2,000 or more (Section 87103(b)). Under the Act, an “interest in real property” includes a leasehold interest in real property within the official’s jurisdiction. (Section 82033.) However, the terms “interest in real property” and “leasehold interest” as used in the Act do not include the interest of a tenant in a periodic tenancy of one month or less. (Regulation 18233.)
- **Sources of Income** – A public official has an interest in any source of income, including promised income, aggregating \$500 or more within 12 months prior to the decision (Section 87103(c)).
- **Personal Finances** – A public official has an interest in his or her personal finances, including those of his or her immediate family – this is the “personal financial effects” rule (Section 87103).

⁴ Regulation 18704.3(b) states: “With regard to a governmental decision which is within or before an agency [other than the official’s agency or an agency appointed by or subject to the budgetary control of his or her agency], the official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official acts or purports to act on behalf of, or as the representative of, his or her agency to any member, officer, employee or consultant of an agency. Such actions include, but are not limited to the use of official stationery. Your facts indicate that the city council will be making a formal recommendation to SCVTA regarding its preferences on the Project options. In making a recommendation, the city councilmembers will be acting in their official capacity and participating in a governmental decision.

You have identified three potentially disqualifying interests:

(1) *Baskin Robbins Business*: The business is an interest as a business entity in which the councilmember has an investment of \$2,000 or more (Section 87103(a)), holds a position of management (Section 87103(d)), and also from which he receives income. (Section 87103(c).)

(2) *Real Property*: An interest in real property (in this case a leasehold interest) in which he has a direct or indirect interest of \$2,000 or more (Section 87103(b)).

(3) *Personal Finances*: A financial effect on an official's personal finances is material if the official or the official's immediate family member will receive a measurable financial benefit or loss from the decision. However, Regulation 18705.5 provides a limitation that avoids duplicative analysis of this interest, providing: "[N]either a financial effect on the value of real property... nor a financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which the official has a direct or indirect investment interest will be considered." Because only those two interests are identified as possibly at issue in this letter, and there is no suggestion that the decision in question would otherwise have a personal financial effect on the councilmember, we do not separately consider his interest in "personal finances."

Foreseeability and Materiality:

Regulation 18701 states that for a financial interest that is not explicitly involved in a decision: "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."

As relevant to your facts, the following factors in Regulation 18701(b) are considered in determining whether the financial effect on an official's financial interest is reasonably foreseeable:

"(1) The extent to which 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."

"(4) Whether a reasonable inference can be made that the financial effects of the governmental decision on the public official's financial interest might compromise a public official's ability to act in a manner consistent with his or her duty to act in the best interests of the public."

"(6) Whether the public official has the type of financial interest that would cause a similarly situated person to weigh the advantages and disadvantages of the governmental decision on his or her economic interest in formulating a position."

Although no new bus stops are planned near the Mayor's business, a reasonable inference can be made that at least one of the options being considered by the city (Option 7) will have an impact on the surrounding neighborhood through increased traffic and congestion due to prolonged construction and the loss of two existing vehicle lanes. This option will likely have a financial effect on the Mayor's business, as it would result in increased traffic in the area and could pose a "temporary deterrent to customers resulting in lower business volume" during the approximately one year construction period.

Therefore, a reasonable inference can be made that the financial effects of selecting a particular Project alternative may compromise Mayor McAlister's ability to act in a manner consistent with his duty to act the best interests of the public. It would also cause a similarly situated person to weigh the advantages and disadvantages of the governmental decision on his or her economic interest. Accordingly, a financial effect on Mayor McAlister's financial interests is considered reasonably foreseeable.

Real Property:

Revised Regulation 18702.2(b) provides a list of circumstances under which the reasonably foreseeable financial effect of a governmental decision on real property in which a governmental official has leasehold interests is material. As relevant to your facts, the financial effect will be material whenever the decision will:

“(2) Increase or decrease the potential rental value of the property;

* * *

“(5) Impact the official's use and enjoyment of the real property.”

Your facts indicate that the rent for the Mayor's business is “not fixed” and is “variable at 6.5 percent of gross sales per month.” Therefore, the decision to recommend a Project option could reasonably have an impact on the Mayor's leasehold interest, depending on the option selected because any change in business volume and sales would impact the amount paid for rent. In addition, any construction along the El Camino Real corridor near the business would likely affect the Mayor's use and enjoyment of the real property. Accordingly, the facts support a finding of materiality under this test.⁵

Business Entities:

Revised Regulation 18702.1(a) provides a list of circumstances under which the reasonably foreseeable financial effect of a governmental decision on a business entity in which

⁵ The seven options presented as alternatives are considered inextricably interrelated. Thus, when one of the seven options will have a material financial effect on an official's interest, he is disqualified with respect to all of the decisions on the options.

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

“(b) For a governmental decision not identified in subdivision (a), the financial effect is material if a prudent person with sufficient information would find it is reasonably foreseeable that the decision’s financial effect would contribute to a change in the price of the business entity’s publicly traded stock, or the value of a privately-held business entity. Examples of decisions that may be applicable include those that:”

“(4) Make improvements in the surrounding neighborhood such as redevelopment projects, traffic/road improvements, or parking changes that may affect, either temporarily or permanently, the amount of business the business entity receives;”

“(5) Decide the location of a major development, entertainment facility, or other project that would increase or decrease the amount of business the entity draws from the location of the project; or”

“(6) Increase or decrease the tax burden, debt, or financial or legal liability of the business entity.”

Your facts suggest that the decision to recommend a Project option would have a reasonably foreseeable financial effect on Mayor’s business because it could have an impact on the value of the privately-held business entity, and it could involve changes in the surrounding neighborhood that would impact, traffic, noise, accessibility of the business. In addition, the decision could also “increase or decrease the amount of business the entity draws,” depending on the option selected. Therefore, the facts also support a finding of materiality under this test.

Public Generally & Legally Required Participation:

An official who otherwise has a conflict of interest in a decision may still participate in a decision if the financial effect of a decision on a public official’s economic interests is substantially the same as the effect on a significant segment of the public (Section 87103; Regulation 18707(a)) or the official is legally required to participate in the decision. (Section 87101; Regulation 18708.)

Regulation 18707.1(b)(1)(C) provides that the material financial effect of a governmental decision on a public official’s business entity is indistinguishable from its effect on the public generally if the decision also affects:

“...either 2,000 or twenty-five percent of all business entities in the jurisdiction or the district the official represents, so long as the effect is on persons composed of more than a single industry, trade, or profession...”

Your facts indicate that the decision affects 308 businesses out of the 2,934 total in the City, or 10.5% of businesses citywide. Therefore, the neither criteria is met, so the public generally exception does not apply.

You state that the Mayor is not legally required to participate in the Project decision since you are able to convene a quorum. Therefore, the legally required participation exception does not apply.

Accordingly, the Mayor has a conflict of interest, and may not make, or participate in making decisions involving recommendations to the Transportation Authority regarding the Project options.

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

Sincerely,

Hyla P. Wagner
General Counsel

By: Emelyn Rodriguez
Counsel, Legal Division

ER:jgl