STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
428 J Street • Suite 620 • Sacramento, CA 95814-2329
(916) 322-5660 • Fax (916) 322-0886

November 12, 2015

Jonathan P. Lowell
City Attorney
City of Pleasanton
123 Main Street
P.O. Box 520
Pleasanton, CA 94566

Re: Your Request for Advice
Our File No. A-15-202

Dear Mr. Lowell:

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

QUESTION

Does the Act prohibit Councilmember Pentin from taking part in the governmental decision on whether to approve the Lund Ranch II development given his residence is 0.65 miles (3,432 feet) away from the development?

CONCLUSION

No. Councilmember Pentin may take part in the decision because the reasonably foreseeable financial effect of the decision on his residence would not be material.

FACTS

You are the City Attorney of the City of Pleasanton and the authorized representative of Councilmember Pentin. The City Council will soon consider whether to approve the Lund Ranch II development, a residential development authorizing the construction of 50 new single-family homes

[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.

on a 195-acre site at 1500 Lund Ranch Road. The Councilmember owns and lives in a single-family residence on Lone Oak Court, at the end of the cul-de-sac, 0.65 miles (3,432 feet) away from the development as the crow flies. The Draft Environmental Impact Report (the "EIR") for the development indicates that construction and the subsequent operation of the development will result in increased traffic and noise and decreased air quality in the immediate and nearby areas.

There will only be one primary access route to the development, and two different potential primary access routes are under consideration as part of the decision on whether to approve the development. The first alternative would use Lund Ranch Road and Junipero Street as the primary access route, and the second would use Sunset Creek Lane and Sycamore Creek Way instead. While the development is not expected to change traffic on Lone Oak Court, there are potential traffic changes on Junipero Street, which intersects with Lone Oak Court approximately 470 feet north of the Councilmember's residence.

Junipero Street is a feeder street for Sunol Boulevard, a main traffic arterial in the City. Junipero Street intersects with Lone Oak Court approximately 500 feet east of its intersection with Sunol Boulevard. The existing daily traffic volume on Junipero Street from its intersection with Sonoma Drive west to its intersection with Sunol Boulevard, the segment of Junipero Street in closest proximity to the Councilmember's residence, is 2,880 trips per day, counting traffic in both directions. If Lund Ranch Road and Junipero Street are selected as the primary access route for the development, there would be 260 additional trips per day on this segment of Junipero Street, a 9% increase.

Additional traffic from the development would exacerbate already deficient levels of service at the Sunol Boulevard/I-680 Northbound Ramp and Sunol Boulevard/I-680 Southbound Ramp intersections. According to the EIR, these intersections would operate at acceptable levels with signalization. These intersections have already been identified in the City's General Plan for future planned improvements, including signalization, to which the developer would contribute through payment of traffic impact fees. The EIR concluded that with mitigation the impact of the additional traffic from the development on these intersections would be less than significant.

The development would also result in permanent traffic increases at minor intersections in the immediate and nearby areas. These increases would not cause those intersections to drop to deficient service levels, and would be mitigated by traffic impact fees paid by the developer. The EIR concluded that with planned mitigation the impact of these increases was less than significant.

During construction of the development, there would be a temporary traffic increase of between 40 to 300 additional trips per day split between Junipero Street and Independence Way. The majority of construction-related trips would occur between 6:00 and 7:00 a.m. and 3:00 to 4:00 p.m., outside normal morning and evening rush hour traffic. As a mitigation of temporary construction traffic noise, the City will require construction traffic to use Independence Way and Bernal Avenue to access the development from the freeway, bypassing the segment of Junipero Street in closest proximity to the Councilmember's residence.

With respect to permanent noise increases due to the development, the segment of Junipero Street in closest proximity to the Councilmember's residence would experience a permanent increase in traffic noise from 58.6 decibels to 59 decibels, a change of 0.4 decibels.

In regard to permanent impacts on air quality due to the development, the EIR concluded that pollutant emissions would not exceed local, state, or federal standards, and therefore, the development's impact on air quality would be less than significant and would not require mitigation.

The EIR concludes that the development proposes to construct residential units at densities that are consistent with the average densities assumed for buildout in the City's General Plan, and that the development would not alter former and existing land uses on the site. The EIR also concludes that all significant and potentially significant impacts resultant from the development would be mitigated to less-than-significant levels by mitigation measures, and that the development would not result in any significant unavoidable adverse impacts.

ANALYSIS

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. Section 87103 provides that a public official has a "financial interest" in a governmental decision if it is reasonably foreseeable that the governmental decision will have a material financial effect on one or more of the public official's interests. Section 87103 also sets forth the interests from which a conflict of interest may arise, and of those interests, the only one implicated by the decision on whether to approve the Lund Ranch II development is the Councilmember's real property interest in his residence. Therefore, to determine if the Councilmember has a conflict of interest under the Act with respect to the decision on whether to approve the development, we must examine whether the financial effect of the decision on the Councilmember's real property interest in his residence would be both foreseeable and material.

Foreseeability:

Under the Act, a conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official's interests is material. The standard for foreseeability differs depending on whether an interest is explicitly involved in the decision. (Regulation 18701.) The Councilmember's real property interest in his residence is not explicitly involved in the decision on whether to approve the Lund Ranch II development. Therefore, the applicable foreseeability standard is: "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."

A material financial effect on the Councilmember's real property interest in his residence is reasonably foreseeable because there is a realistic possibility that the approval of the development could result in a material effect on the Councilmember's real property interest in his residence.

Materiality:

Regulation 18702.2(a) provides a list of circumstances under which the reasonably foreseeable financial effect of a governmental decision on real property in which an official has a financial interest is material. As is pertinent to your inquiry and relevant to your facts, the financial effect on the Councilmember's real property interest in his residence will be material if the decision:

- 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. (Regulation 18702.2(a)(10).)

- Would cause a reasonably prudent person using due care and consideration under the circumstances, to believe that the governmental decision was of such a nature that its reasonably foreseeable effect would influence the market value of the official's property. (Regulation 18702.2(a)(12).)

Therefore, to determine if the decision's financial effect on the Councilmember's real property interest in his residence is material we must consider whether the decision would affect or influence the market value of his residence.

The application of the conflict of interest rules turns on the facts and circumstances of each case. However, it is useful to look at prior advice in similar circumstances. In the *O'Connor* Advice Letter, No. A-15-046, we concluded that a 50% traffic increase throughout a public official's neighborhood due to the potential approval of a development was material. On the other hand, in the *Seto* Advice Letter, No. A-15-177, we found that a traffic increase at an intersection near the public official's home due to the potential approval of a development that would site a private school near that intersection was not material, because (1) school traffic would be limited to weekday mornings and afternoons, and (2) the traffic increase would be mitigated by the demolition of a church and the resultant elimination of associated traffic.

Returning to the case at hand, although the EIR for the Lund Ranch II development indicates that the development's construction and subsequent operation will result in increased traffic and noise and reduced air quality in the immediate and nearby areas, these impacts would not affect the Councilmember's residence in a manner that would affect or influence its market value.

Moreover, although daily traffic on the segment of Junipero Street in closest proximity to the Councilmember's residence could increase by 9% due to the development, the impact of this potential traffic increase is mitigated with respect to the Councilmember's residence. The Councilmember's residence is at the end of the cul-de-sac on Lone Oak Court, 470 feet south of the intersection of Lone Oak Court with Junipero Street. Therefore, there is a significant buffer between the Councilmember's residence and the potential increased traffic on Junipero Street. Furthermore, Junipero Street, a feeder street for Sunol Boulevard, intersects with Lone Oak Court approximately

500 feet east of its intersection with Sunol Boulevard, a main arterial in the City. Therefore, the Councilmember will only be driving 500 feet on Junipero Street, in the potential increased traffic, when accessing Sunol Boulevard from his residence.

Additional traffic from the development would exacerbate already deficient levels of service at the Sunol Boulevard/I-680 Northbound Ramp and Sunol Boulevard/I-680 Southbound Ramp intersections. However, according to the EIR, these intersections would operate at acceptable levels with signalization, these intersections have already been identified for future planned improvements, including signalization, in the City's General Plan, and the developer would contribute to these improvements through the payment of traffic impact fees. Moreover, the EIR concluded that with mitigation the impact of the additional traffic from the development on these intersections would be less than significant.

The development would also result in permanent traffic increases at minor intersections in the immediate and nearby areas, but these increases would not cause those intersections to drop to deficient services levels and would be mitigated by the developer's payment of traffic impacts fees. Furthermore, the EIR concluded that with planned mitigation the impact of these increases would be less than significant.

Temporary traffic increases during the construction of the development would also be mitigated with respect to the Councilmember's residence. If the development is approved, there would be a temporary traffic increase of between 40 to 300 additional trips per day split between Junipero Street and Independence Way. However, the majority of construction-related trips would occur between 6:00 and 7:00 a.m. and 3:00 to 4:00 p.m., outside normal morning and evening rush hour traffic. Moreover, the City would require construction traffic to use Independence Way and Bernal Avenue to access the development from the freeway as a mitigation of the noise resultant from the temporary construction traffic, bypassing the segment of Junipero Street in closest proximity to the Councilmember's residence.

While construction of the development would lead to temporary and permanent noise increases, these increases would either be mitigated or are insignificant with respect to the Councilmember's residence. The segment of Junipero Street in closest proximity to the Councilmember's residence would experience only a minimal permanent increase in traffic noise from 58.6 to 59 decibels, an increase of only 0.4 decibels. Also, the City would require construction traffic to take an alternative route bypassing the segment of Junipero Street in closest proximity to the Councilmember's residence. Furthermore, the Councilmember's residence is insulated from these noise impacts by being 0.65 miles away from the development, 470 feet away from Junipero Street, and at the end of a cul-de-sac.

Although the development will result in permanent impacts on air quality in the immediate and nearby areas, the EIR concluded that pollutant emissions would not exceed local, state, or federal standards, and therefore, the development's permanent impact on air quality would be less than significant and would not require mitigation. Also, the Councilmember's residence is insulated from these air quality impacts by being 0.65 miles away from the development.

Finally, the development would not change the character of the Councilmember's residence or of the residential neighborhoods in the immediate and nearby areas. The EIR concludes that the development proposes to construct residential units at densities that are consistent with the average densities assumed for buildout in the General Plan, and the development would not alter former and existing land uses on the site. The EIR also concludes that all significant and potentially significant impacts resultant from the development would be mitigated to less-than-significant levels by mitigation measures, and that the development would not result in any significant unavoidable adverse impacts.

The construction and subsequent operation of the Lund Ranch II development would lead to increased traffic and noise and reduced air quality in the immediate and nearby areas, but these impacts would be mitigated or are insignificant with respect to the Councilmember's residence. Under the facts provided, there is no evidence to indicate these impacts would affect or influence the market value of the Councilmember's residence. Accordingly, we conclude that the decision on whether to approve the development would not have a reasonably foreseeable material financial effect on the Councilmember's real property interest in his residence.

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

Sincerely,

Hyla P. Wagner
General Counsel

/s/

By: Matthew F. Christy
Counsel, Legal Division

MFC:jgl