



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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July 1, 2020

Heather Minner
City Attorney
City of Cupertino
1300 Torre Avenue
Cupertino, CA 95014-3255

Re: Your Request for Advice
Our File No. A-20-072

Dear Ms. Minner:

This letter responds to your request for advice 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. Also note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

You are the City Attorney for the City of Cupertino seeking advice on behalf of Cupertino Councilmember Liang Chao. You ask whether Councilmember Chao may take part in future closed session City decisions involving strategy for litigation against the City that challenges recent General Plan and Zoning Code Amendments for the Vallco Shopping District Special Area.

Councilmember Chao previously sought advice from the Commission regarding participation in governmental decisions concerning two mixed-use development projects (the Vallco SB 35 project and the Vallco Town Center Specific Plan project) on the Vallco site, the nearest boarder of which is located 939 feet away from her residence. (See *Minner* Advice Letter, No. A-19-032.)² There, the Sand Hill Property Company planned to develop a mixed-use project located mainly on the site of the current Vallco Shopping Mall, which is approximately 58 acres. The mall began to decline in the early 2000’s and by 2018, it had an approximately 76% vacancy rate.

Both proposals were similarly substantial in size: 1) the SB 35 project proposed 2,402 housing units, 1.8 million square feet of office space and 400,000 square feet of retail, with building heights of up to 240 feet; and 2) the Specific Plan project proposed 2,923 housing units, 1,750,000

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.

² We note that Councilmember Chao was the Vice Mayor at the time the *Minner* letter was issued.

square feet of office space, 400,000 square feet of retail, and 191 hotel rooms, with building heights of up to 22 stories. (*Minner, supra.*)

The Commission concluded that although Councilmember Chao had a conflict of interest in governmental decisions concerning both proposed projects, the public generally exception applied to allow her to take part in the decisions.³ (*Ibid.*)

The City Council has since rescinded its approval of the Vallco Town Center Specific Plan and the associated General Plan Amendment and Development Agreement in response to certified referendum petitions challenging their approvals. With respect to the SB 35 project, the Santa Clara County Superior Court issued a ruling that upheld the City's approval of it on May 6, 2020. The deadline for Petitioners to appeal that decision has not yet expired.

The 2019 Vallco General Plan and Zoning Amendments and Litigation

On August 20, 2019, the City Council adopted General Plan Amendments that amended land use regulations for the 58-acre Vallco site and on September 3, 2019, the City Council adopted corresponding Zoning amendments (collectively the "GPA"). Councilmember Chao recused herself from those decisions. The new GPA made the following changes:

- 1) Removed "office" as a permitted use for the Vallco Shopping District Special Area;
- 2) Established a 60-foot height limit for the entire site;
- 3) Permits a maximum of 620 residential units 13.1 acres to the east of Wolfe Road, and limited ground floor commercial uses are also permitted, but not required, in connection with residential development.

The General Plan Amendments did not change other allowed uses and General Plan policies for the site. On the remaining roughly 45-acres (designated Regional Shopping), the following mix of non-residential uses are still allowed:

- 1) 1,207,704 square feet of commercial; and
- 2) 339 hotel rooms.

General Plan policies requiring: (1) a specific plan, (2) a minimum of 600,000 square feet of retail use and no more than 30 percent of commercial spaced developed with entertainment uses, and (3) development in a street grid with improved public street connections to encourage development in the form of a town center are also retained for the Regional Shopping designation.

The City Council also made corresponding changes to the zoning code, and adopted a second addendum to the Environmental Impact Report ("EIR") for the 2014 General Plan, finding that no subsequent environmental review is required for these actions because there are no substantial changes to the project or the circumstances under which the project is to be undertaken that would result in new or substantially more severe environmental impacts requiring major revisions to the Final EIR. Additionally, it found there is no new information that involves new

³ The Commission further advised that Councilmember Chao should seek additional advice if the City Council were asked to consider a potential alternative Specific Plan proposal with similar or less impacts than the current Specific Plan proposal.

significant environmental effects or a substantial increase in the severity of previously identified environmental effects that would require preparation of a subsequent EIR.

Finally, the City Council directed staff to initiate a Specific Planning process for the portion of the site designated “Regional Shopping” by the General Plan amendments and consider as part of that process a plan that would include a maximum of 1,500 units of housing for the entire site and reduce the amount of required retail within the area to 400,000 square feet.

The property owner of approximately 51 acres of the Vallco site has since filed a petition for writ of mandate in Santa Clara County Superior Court, challenging the City’s approval of the GPA on several grounds. The GPA Lawsuit is currently stayed by agreement of the parties and the Court, until 30 days after a final judgment in the lawsuit challenging the Vallco SB 35 project. As mentioned, in its ruling dated May 6, 2020, the Santa Clara County Superior Court upheld the City’s approval of the Vallco SB 35 project. Judgement was filed on May 22nd and the deadline for Petitioners to appeal that decision has not yet expired.

The City Council will need to make a number of decisions regarding the GPA lawsuit, including litigation strategy if the case proceeds, and you expect there will be future closed sessions to provide updates on the case, facilitate discussions, and receive direction from Council.

Initially, we must determine whether it is reasonably foreseeable that a project under the new GPA could have a material financial effect on Councilmember Chao’s residence 939 feet away. As we explained with respect to foreseeability and materiality in our previous advice:

The Vice Mayor’s interest in her residence is not explicitly involved in any of the decisions at issue. Therefore, with respect to this interest, the effect of each of those decisions is reasonably foreseeable if it can be recognized as a realistic possibility and more than hypothetical or theoretical.

...

Under Regulation 18702.2(a)(8), a decision’s effect on an official’s real property interest is material if the decision involves property located more than 500 but less than 1,000 feet from the property line of the official’s parcel, and the decision would change the parcel’s market value, development potential, income producing potential, highest and best use, or character by substantially altering traffic levels, intensity of use, parking, view, privacy, noise levels, or air quality.

(Minner Advice Letter, supra.)

In your previous advice request, we concluded that based on the facts provided, including the massive scale of both proposed projects, governmental decisions concerning either the Specific Plan Project or the SB 35 Project would have a reasonably foreseeable material financial effect on the Vice Mayor’s interest in her residence. *(Ibid.)*

Our conclusion is the same in the present matter. Even though any project under the new GPA would be considerably smaller than both the Specific Plan Project and the SB 35 Project, a project under the new GPA on the largely vacant Vallco site that proposed approximately 620 residential units, over 1,000,000 square feet of commercial, and 339 hotel rooms is still a substantial project that would likewise have a reasonably foreseeable and material financial effect on the Councilmember's residence 939 feet from the project.

The determinative question therefore is whether the public generally exception would apply to allow Councilmember Chao to take part in decisions concerning litigation strategy with respect to the lawsuit challenging the new GPA. We conclude that it does not.

For the exception to apply, Regulation 18703(a) provides:

A governmental decision's financial effect on a public official's financial interest is indistinguishable from its effect on the public generally if the official establishes that a significant segment of the public is affected and the effect on his or her financial interest is not unique compared to the effect on the significant segment.

For purposes of the exception, 25-percent or more of the residential real property within an official's jurisdiction constitutes a "significant segment of the public." (Regulation 18703(b).)

In the previous advice request, you provided a map showing that approximately 25-percent of the residential units in the City are within 3,800 feet of the Project. (*Minner* Advice Letter, *supra*.) Concluding that the public generally exception applied, we stated:

Given the massive size of this Project, which will add thousands of new housing units and jobs to the Project site that is expected to become a regional destination, it appears that the Project will affect all the residences identified in the significant segment within 3,800 feet of the Project. Furthermore, while some of the properties in closer proximity may be affected disproportionately, there is no indication that the foreseeable impacts, such as increased property value, increased traffic on several main thoroughfares, intensity of use or views, will have a unique or disproportionate effect on Vice Mayor Chao's residence, which is 929 feet from the Project, in comparison to the other properties within 3,800 feet of the project.

(*Ibid.*)

There are two important differences between the present situation and the previous one. First, as mentioned, any project under the new GPA will be significantly smaller than the massive Specific Plan and SB 35 projects, which both proposed well over 2,000 new housing units and almost 2 million square feet of office space. Here, there can only be a maximum of 620 housing units and office space is not even permitted. Second, there was an Environmental Impact Report ("EIR") prepared as a result of the proposed projects in the previous advice request that contained important factual information concerning the specific impacts of those projects on which we could

base our conclusion that the public generally exception applied. No such EIR was prepared in the present matter because under the updated GPA “there is no new information that involves new significant environmental effects or a substantial increase in the severity of previously identified environmental effects that would require preparation of a subsequent EIR.” Therefore, Councilmember Chao has not established that the public generally exception applies in the present situation.

Accordingly, the Act’s conflict of interest provisions prohibit Councilmember Chao from taking part in future closed session City decisions involving strategy for litigation against the City that challenges recent General Plan and Zoning Code Amendments for the Vallco Shopping District Special Area.

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

Sincerely,

Dave Bainbridge
General Counsel

By: *Jack Woodside*
Jack Woodside
Senior Counsel, Legal Division

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