



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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July 6, 2021

Andrea Visveshwara  
Interim City Attorney  
City of Emeryville  
1333 Park Avenue  
Emeryville, CA 94608

Re: Your Request for Advice  
**Our File No. A-21-069**

Dear Ms. Visveshwara:

This letter responds to your request for advice on behalf of City of Emeryville Planning Commissioner Steven Keller regarding the conflict of interest provisions of the Political Reform Act (the “Act”).<sup>1</sup>

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.

The Commission does not provide advice regarding past conduct (Regulation 18329(b)(6)(A)), nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter only apply to prospective actions.

### QUESTION

Do the Act’s conflict of interest provisions prohibit Planning Commissioner Keller from taking part in the Planning Commission’s determination of whether the proposed final development plan for the current phase of the Emeryville Public Market Project substantially conforms with the Preliminary Development Plan for the Project given that the nearest boundary of the Project is between 500 and 1,000 feet of the parcel upon which the Commissioner’s condominium unit sits?

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<sup>1</sup> 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.

## CONCLUSION

No. The Act's conflict of interest provisions do not prohibit the Commissioner Keller from taking part in the determination regarding the proposed final development plan because it is not reasonably foreseeable that determination would have a material financial effect on the Commissioner's real property interest in his condominium unit based on the facts presented.

## FACTS AS PRESENTED BY REQUESTER

You are the Interim City Attorney of the City of Emeryville (the "City") and the authorized representative of Emeryville Planning Commissioner Steven Keller. You provided additional facts on June 24, 2021, and June 28, 2021.

### *Public Market Project Background, Buildout, and Subsequent Approvals Required*

The Emeryville Public Market Project (the "Public Market Project") involves buildout of approximately 15 acres (on Parcels A through G) located on either side of Shellmound Street, generally between 62<sup>nd</sup> Street and Shellmound Way.

Approved in 2008, the Public Market Project included, among other things, establishing a mixed-use zoning district (the "Public Market PUD"), approval of a Preliminary Development Plan for the entire project area (the "Public Market PDP"), approval of a development agreement (the "Public Market DA"), and certification of an environmental impact report for the project (the "Public Market EIR") pursuant to the California Environmental Quality Act ("CEQA"). The Public Market PDP entitled up to 675 residential units and 300,000 square feet of commercial space over six parcels of varying size.

The City is urban and only 1.2 square miles in size. The Public Market Project area is surrounded by developed real property, which is characterized by dense, urban residential and commercial uses. The City's General Plan recognizes and encourages concentration of retail uses in and around the Project.

Almost all of the Bayfront and freeway edge area to the west of the railroad tracks, which mark the Public Market Project's eastern border, have been redeveloped in the past 30 years. Much of this space is devoted to retail and office uses in large-scale developments, such as Bay Street, IKEA, Powell Street Plaza, and the Project, all of which serve and attract a regional clientele. Powell Street Plaza shopping center alone attracts approximately 27,000 vehicles per day. Hyatt House Emeryville, to the south of the Project, is a 12-story, 234-room hotel. Residential developments in this area, including the Pacific Park Plaza building in which Planning Commissioner Keller's condominium unit is located, are also large in size and high in density, and this type of housing comprises approximately half the housing in the City.

The area to the east of the Public Market Project, just on the other side of the railroad tracks, is the AMTRAK transit center and the two million square foot Wareham EmeryStation campus. The campus includes office, laboratory, retail, residential, and transit uses. This area to the east of the railroad tracks is connected to the Project by a pedestrian bridge which provides access to the Project.

Since the 2008 approvals, the Public Market Project has been built out in phases. Subsequent City approval is required for each phase, in the form of a final development plan, as that phase is built. The City's Municipal Code requires each final development plan to "substantially conform" to the approved Public Market PDP.<sup>2</sup> Final development plans contain information about the exact location, design, massing of structures, and approved uses. A staff Report for a final development plan generally recommend a finding of substantial conformity if the plan is consistent with the major components of the preliminary development plan, including the conditions of approval, floor area ratio, height and massing, density, and uses.

Of the 675 residential units authorized by the Public Market PDP, 474 of those units have been built. Of the 300,000 square feet of commercial space permitted by the Public Market PDP, 30,000 square feet have been built, and 183,300 square feet have approved final development plans and are ready for construction.

You state that Planning Commission approval authority for final development plans for the Public Market Project is thus limited: the entitlements for the entire Public Market Project have already been approved, and approval of a final development plan requires the Planning Commission to confirm the final development plan's substantial conformity with the approved Public Market PDP.

#### *Planning Commissioner Keller's Residence*

Planning Commissioner Keller owns a residential condominium unit, which serves as the Commissioner's personal residence. The Commissioner's unit is located within the Pacific Park Plaza, a building on Christie Avenue in the City. Pacific Park Plaza is more than 300 feet tall, and the Commissioner's unit is on the building's top (30<sup>th</sup>) floor. The I-80 Freeway and the San Francisco Bay are located to the west of the building, there are multi-family residences to the north, Christie Park and existing commercial uses to the east (including built out phases of the Public Market Project), and parking lots and commercial uses to the south. The Commissioner's unit includes a dedicated (deeded) off-street parking space, as well as access to exclusive homeowners' association's amenities.<sup>3</sup> The Commissioner's unit is located approximately 700 feet from the boundaries of both Parcel A and Parcel B of the Public Market Project, and the parcel upon which the Commissioner's unit is located is between 500 to 1,000 feet from the nearest boundary of the Project.

#### *The Current Phase of the Public Market Project*

There are currently approved final development plans for all Public Market Project parcels, but the current phase of the Project proposes to replace the existing final development plan for parcels A, B, and F and replace it with a new final development plan for those parcels (the "Proposed Final Development Plan") which is consistent with the entitlements set forth in the

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<sup>2</sup> See Emeryville Municipal Code Section 9-7.1004(b) [requiring a finding that the final development plan substantially conforms with the preliminary development plan] and Section 9.7-1011 [directing Planning Commission action on a final development plan].

<sup>3</sup> These amenities include, but are not limited to, a pool and spa, a fitness center, tennis courts, and a lounge.

Public Market PDP. The Proposed Final Development Plan proposes approximately 440,729 square feet of development, including a life-sciences building on Parcel B, an 840-space parking lot with a public pedestrian access bridge connecting the Public Market Project campus with the Amtrak station and properties east of the tracks on Parcel A, and a residential building containing 18 affordable housing units on Parcel F.

Under the Proposed Final Development Plan, the tallest structure of the current phase of the Public Market Project would be 120 feet tall, which is consistent with the Public Market PDP limit, and located on Parcel B. The Proposed Final Development Plan does not propose any amendments to the Public Market PDP and is consistent with the allowed floor-area ratio.

The Public Market EIR determined that all impacts of the Public Market Project could be reduced to less than significant levels with mitigation, except for certain traffic impacts for which the City adopted a Statement of Overriding Considerations given the Public Market Project's advancement of local plans for the City, job creation, and revenue generation. All noise impacts of the Public Market Project could be mitigated to less than significant levels, including construction noise impacts. The following are the Public Market Project's significant and unavoidable traffic impacts:

- Delay at the I-80 Eastbound Ramp intersection with Powell Street, located approximately 1,460 feet from the Commissioner's unit.
- Delay and spillback at the intersection of Powell Street and Christie Avenue, located approximately 1,440 feet from the unit.
- Delay and spillback at the intersection of Shellmound Way and Christie Avenue, located approximately 1,125 feet from the unit.
- Delay at the intersection of Shellmound Way and Shellmound Street, located approximately 1,290 feet from the unit.
- Delay at the intersection of Ashby Avenue and San Pablo Avenue, located approximately 4,500 feet from the unit.
- Delay at the intersection of Powell Street and Hollis Street, located approximately 2,225 feet from the unit.
- Delay at the intersection of Shellmound Street and Marketplace Driveway, located approximately 775 feet from the unit.
- Delay at the Shellmound Garage Driveway, located approximately 1,200 feet from the unit.

The Public Market EIR used the "level of service" or "LOS" method to determine the above traffic impacts when it was prepared in 2008. Since that time, CEQA has been amended to prohibit this methodology and instead requires agencies to use the "vehicle miles traveled" or "VMT" metric to determine traffic impacts. This CEQA amendment was intended to promote infill development, as the VMT methodology generally identifies traffic impacts only where projects are located large distances from other development or transportation hubs.

The City has since adopted its own VMT thresholds under CEQA. You state that, given the state and local shift to VMT methodology, none of the above impacts identified using LOS methodology in 2008 would even be considered impacts under the current CEQA.

A preliminary traffic analysis, performed for the current phase of the Public Market Project, demonstrated that development of up to 179,000 square feet of a research and development/laboratory use on Parcel A, which is the proposed commercial use for that parcel under the Proposed Final Development Plan, would result in the same trip generation and traffic impacts identified in the Public Market PDP. Additionally, in 2019, a traffic study prepared by Kimley-Horn in connection with the approval of the existing final development plan applicable to Parcel B concluded that traffic analysis for a similarly massed project on Parcel B would not result in trip generation or traffic impacts not analyzed in the Public Market EIR.

Because the current phase of the Public Market Project does not require any amendments to the Public Market PDP, the Planning Commission's discretion with respect to the Proposed Final Development Plan would be limited to determining whether the current phase substantially conforms to the approved Public Market PDP. You state that the current phase of the Public Market Project would not impact the City's General Plan, zoning, or other regulations, or the development potential of the parcel upon which the Commissioner's unit sits. You also state that the current phase would not affect the views from the Commissioner's unit because the unit is located on the 30<sup>th</sup> floor of the Pacific Park Plaza building. The Commissioner provided the City with a parking survey conducted for the Pacific Park Plaza building, dated August 2015, which concludes that 23 percent of the available parking spaces for the building are unused.

### ANALYSIS

The Act's conflict of interest provisions prohibit a public official from making, participating in making, or attempting to use the official's position to influence a governmental decision if it is reasonably foreseeable that the decision would have a material financial effect on one or more of the official's financial interests. (Sections 87100 and 87103.) An official's financial interests that may give rise to a disqualifying conflict of interest under the Act are identified in Section 87103. With respect to decisions relating to the Proposed Final Development Plan, Planning Commissioner Keller has the following financial interests based on the facts presented:

- A real property interest in his residential condominium unit within the Pacific Park Plaza building, assuming the Commissioner has an interest in the unit worth \$2,000 or more. (See Section 87103(b).)
- An interest in the Commissioner's personal finances and those of immediate family members. (See Section 87103.)

#### *Foreseeability and Materiality*

Regulation 18701(a) provides that a governmental decision's financial effect on an official's financial interest is presumed to be reasonably foreseeable if the official's interest is "explicitly involved" in the decision; an official's interest is "explicitly involved" if the interest is a named party in, or the subject of, the decision; and an interest is the "subject of a proceeding" if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the interest. In addition, an official's real property interest is explicitly involved in any decision which affects that interest as described in Regulation 18702.2(a)(1)-(6).

Regulation 18701(b) sets forth the foreseeability standard applicable to a decision's effect on an official's interest that is not explicitly involved in the decision and provides that the effect on such an interest is reasonably foreseeable if it "can be recognized as a realistic possibility and more than hypothetical or theoretical."

Under Regulation 18702.2(a)(8), the reasonably foreseeable financial effect of a decision on a parcel of real property in which an official has a financial interest, other than a leasehold interest, is material whenever the decision involves property located more than 500 but less than 1,000 feet from the property line of the parcel, and the decision would change the parcel's:

- (A) Development potential;
- (B) Income producing potential;
- (C) Highest and best use;
- (D) Character by substantially altering traffic levels, intensity of use, parking, view, privacy, noise levels, or air quality; or
- (E) Market value.

The Planning Commission's discretion with respect to the Proposed Final Development Plan will be limited to determining whether the Plan substantially conforms to the Public Market PDP. Planning Commissioner Keller's residential condominium unit is located approximately 700 feet from the boundaries of both Parcel A and Parcel B, and the nearest boundary of the Public Market Project is between 500 to 1,000 feet of the parcel upon which the unit sits.

You state that the Proposed Final Development Plan will not impact the City's General Plan, zoning, or other regulations, nor the development potential of the parcel upon which the Commissioner's unit sits. The railroad tracks serve as the eastern border of the Public Market Project, and almost all of the Bayfront and freeway edge area to the west of the railroad tracks, which includes the Pacific Park Plaza, has been redeveloped in the past 30 years. Therefore, it does not appear that the Planning Commission's determination of whether the Proposed Final Development Plan substantially conforms to the Public Market PDP would change the development potential or highest and best use of the parcel upon which the Commissioner's unit sits.

The Commissioner's unit is a unique real property due to its location on the top floor of the Pacific Park Plaza Building, with distinctive views of the San Francisco Bay, the City, and the rest of the East Bay. The unit includes a dedicated off-street parking space as well as access to exclusive homeowner's association amenities.

The Public Market Project area is surrounded by developed real property, which is characterized by dense, urban residential and commercial uses. The City's General Plan recognizes and encourages concentration of retail uses in and around the Project area. Of the 675 residential units authorized by the Public Market PDP, 474 of those units have been built; and of the 300,000 square feet of commercial space permitted by the Public Market PDP, 30,000 square feet have been built, and 183,000 square feet are ready for construction. Because the Public Market Project was originally approved in 2008, and has been underway for more than a decade, there has already been considerable time to digest the Project's market implications.

For these reasons, it does not appear likely that the Planning Commission's determination regarding the Proposed Final Development Plan would affect the market value or income producing potential of the Commissioner's unit.

The tallest structure included in the Proposed Final Development Plan would be 120 feet tall, more than 180 feet shorter than Pacific Park Plaza, and the Commissioner's unit is on the top (30<sup>th</sup>) floor of the Plaza. The Commissioner's unit is more than twice as high as the tallest proposed structure. Therefore, the facts presented indicate that the Planning Commission's determination regarding the Plan will not substantially alter the views experienced at the Commissioner's unit.

The Public Market EIR indicates that all noise impacts of the Public Market Project, including construction noise, could be mitigated to less than significant levels. The Commissioner's unit is on the 30<sup>th</sup> floor of the Pacific Park Plaza, and there is no indication the current phase of the Public Market Project would affect the noise levels, privacy, or air quality experienced at the Commissioner's unit. Therefore, the facts presented also indicate that the Planning Commission determination regarding the Plan will not substantially alter the noise levels, privacy, or air quality experienced at the Commissioner's unit.

With respect to parking, the Commissioner's unit includes a dedicated off-street parking space, and a parking survey for Pacific Park Plaza conducted in 2015 concluded that 23 percent of parking spaces available for the building were unused. The current phase of the Public Market Project covered by the Proposed Final Development Plan includes an 840-space parking lot. Although it is possible that the current phase of the Public Market Project may result in increased demand for street parking in the area surrounding Parcels A, B and F, that parking is already in high demand. Therefore, the facts presented do not indicate that the Planning Commission's determination regarding the Plan would substantially alter parking for the Commissioner's unit.

Due to Pacific Park Plaza's proximity to the San Francisco Bay and related facilities, I-80 Freeway, and popular commercial establishments nearby (such as IKEA, the Hyatt House, and those within the Powell Street Plaza), traffic and intensity of use in the area surrounding the building is already substantial. The area surrounding the Project area is characterized by dense, urban residential and commercial uses, the Hyatt House south of the Project area is 12-story, 234-room hotel, and the Powell Street Plaza shopping center alone attracts 27,000 vehicles per day.

While the current phase of the Public Market Project would increase the traffic and intensity of use of the area surrounding Parcels A, B, and F, these increases were already been considered in the approved Public Market PDP and are consistent with the City's General Plan. A preliminary traffic analysis performed in connection with the Proposed Final Development Plan demonstrated that the proposed development of up to 179,000 square feet of commercial space on Parcel A would result in the same trip generation and traffic impacts identified in the Public Market PDP. Additionally, a traffic study conducted in 2019 for a similarly massed project on Parcel B concluded that traffic analysis for that project on Parcel B would not result in trip generation or traffic impacts not analyzed in the Public Market EIR.

Therefore, the facts presented do not indicate that the Planning Commission's determination of whether the Proposed Final Development Plan substantially conforms with the Public Market PDP would substantially alter traffic or the intensity of use experienced at the Commissioner's unit.

Thus, based on the facts presented, it is not reasonably foreseeable that the Planning Commission's determination of whether the Proposed Final Development Plan substantially conforms to the Public Market PDP would have a material financial effect on the Commissioner's real property interest in his condominium unit under Regulation 18702.2(a)(8). Accordingly, the Act's conflict of interest provisions do not prohibit the Commissioner from taking part in that determination.<sup>4</sup>

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

Sincerely,

Dave Bainbridge  
General Counsel

*Matthew F. Christy*

By: Matthew F. Christy  
Counsel, Legal Division

MFC:dkv

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<sup>4</sup> Regulation 18702.5(c) provides that if a decision will have a reasonably foreseeable financial effect on an official's real property interest, any related effect on the official's personal finances is not considered separately. Therefore, we do not analyze the effect of the Planning Commission's determination regarding the Final Development Plan on the Commissioner's interest in his personal finances or those of immediate family members.