



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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August 16, 2021

Brian Pierik
City Attorney
City of Carmel
2310 East Ponderosa Drive - Suite 25
Camarillo, California

Re: Your Request for Advice
Our File No. A-21-109

Dear Mr. Pierik:

This letter is in response to your request for advice on behalf of Karen Ferlito, Councilmember with the City of Carmel-by-the-Sea (the City), regarding the conflict-of-interest provisions of the Political Reform Act (the Act).¹ Please note that we are providing advice under the Act only and not under any other body of law. Our advice is based solely on the facts provided; we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71). If the facts underlying these decisions change, then you should contact us for additional advice.

QUESTION

Would Councilmember Ferlito have a conflict of interest in participating in a City Council decision to change or modify the Pesticide Policy?

CONCLUSION

No. While there is a presumption that the financial effect on Councilmember Ferlito's real property interest is both foreseeable and material, the facts provided establish clear and convincing evidence that a decision regarding potential modification of the Pesticide Policy would have no measurable impact on her real property interest.

FACTS AS PRESENTED BY REQUESTER

The City has historically operated under an informal, unwritten policy for City maintenance operations that avoids using pesticides and herbicides. The City is now considering whether to formalize its practices into a Pesticide Policy that governs when, where, and what amounts of pesticides or herbicides may be used. The draft Pesticide Policy (the Policy) currently forbids the

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.

use of fertilizer, herbicide, or other chemical within 100 feet of riparian areas located in environmentally sensitive habitat areas (ESHA). This requirement was included in the Policy to conform with Chapter 17.20.220 of the municipal code relating to ESHA.

Public comments from the community indicate there may be some situations where pesticides use may be needed. Consequently, the City Council may consider whether to modify the Policy to allow pesticide or herbicide for maintenance of certain noxious, invasive weeds so it can continue to maintain City properties in accordance with existing standards. The decision to modify the Policy would involve public safety concerns. For instance, the decision would affect pest impacts on City trees, thus addressing tree mortality, maintenance and public safety concerns associated with the City's trees, and environmental concerns, such as the responsible use of pesticides for maintenance of noxious weeds in the City's restoration of ESHA.

Councilmember Ferlito has a real property interest in three parcels of property (collectively the Property Interest) located within 500 feet of the Mission Trail Nature Preserve. Lot A is an irregularly shaped lot that contains her primary residence and owned in full by Councilmember Ferlito and her immediate family through the Hugo and Karen Ferlito Revocable Trust. Lots B and C are adjacent to Lot A and are co-owned with her neighbor through the Hugo and Karen Ferlito Revocable Trust and "Zelus Marsha M Tr et al." The Mission Trail Nature Preserve is a city-owned property and has been identified as an ESHA. The Property Interest is approximately 300 feet away from the Mission Trail Nature Preserve and is buffered by one parcel between the councilmember's Property Interest and the Mission Trail Nature Preserve. The City does not anticipate any pesticide, herbicide, or chemical used at the ESHA affect the Property Interest due to the distance and its separation from the ESHA by at least one parcel.

ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) Specifically, Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. The only interest at issue based on the facts provided is an interest in real property in which an official has a direct or indirect interest worth \$2,000 or more. (Section 87103(b).)

A. Foreseeability.

Generally, a financial effect is presumed to be reasonably foreseeable if the interest is "explicitly involved" in a decision. An interest is "explicitly involved" in a decision if the interest is a named party in, or the subject of, a governmental decision before the official or the official's agency. (Regulation 18701(a).) Real property is the subject of a decision when "the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6).

If an interest is not explicitly involved in the decision, then a financial effect is reasonably foreseeable if the effect can be recognized as a realistic possibility and more than hypothetical or theoretical. If the financial result cannot be expected absent extraordinary circumstances not subject to the official's control, then it is not reasonably foreseeable. (Regulation 18701(b).)

B. Materiality.

Different standards apply to determine whether a reasonably foreseeable financial effect on an interest will be material depending on the nature of the interest. Regulation 18702.2 defines when a financial effect of a government decision on real property is material. Under Regulation 18702.2(a)(7), the reasonably foreseeable financial effect of a governmental decision on a parcel of real property in which an official has a financial interest is material whenever the governmental decision involves property located 500 feet or less from the property line of the parcel unless there is clear and convincing evidence that the decision will not have any measurable impact on the official's property.

In this case, the councilmember's Property Interest is located within 500 feet of the Mission Trail Nature Preserve which is in the ESHA that would be the subject of the governmental decision. Accordingly, the financial effect of the governmental decisions on the Councilmember Ferlito's Property Interest is foreseeable under Regulation 18701(a) and presumed material under Regulation 18702.2(a)(7).

C. The Exception Under Regulation 18702.2(a)(7).

The reasonably foreseeable financial effect of a governmental decision on a parcel of real property in which an official has a financial interest, other than a leasehold interest, is material whenever the governmental decision involves property located 500 feet or less from the property line of the parcel *unless* there is clear and convincing evidence that the decision will not have any measurable impact on the official's property. (Regulation 18702.2(a)(7).)

The purpose of the Policy is to maintain the status quo and continue to address landscaping and vegetation at certain city-owned properties. This governmental decision should not change the character of the existing neighborhoods. The facts indicate that the councilmember's Property Interest is located within 300 feet of the Mission Trail Nature Preserve, but the City does not anticipate any pesticide, herbicide, or chemical used at the ESHA will affect the Property Interest due to its distance from the ESHA, including the one parcel of property that buffers it from the ESHA. There is also no indication that weed control or other forms of landscaping intended to maintain current standards or the status quo would result in a financial benefit to the Property Interest that are located at least one parcel away from the area being landscaped.

We find that the facts provided establish clear and convincing evidence that a decision regarding potential modification of the Policy would have no measurable impact on Councilmember Ferlito's Property Interest. Accordingly, the Act does not prohibit Councilmember Ferlito from taking part in the decision.

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

Sincerely,

Dave Bainbridge
General Counsel

/s/ John M. Feser Jr.

By: John M. Feser Jr.
Senior Counsel, Legal Division

JMF:dkv