



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

September 7, 2021

Alex J. Lorca
City Attorney
City of Del Rey Oaks
2801 Monterey-Salinas Highway
Post Office Box 791
Monterey, California 93942-0791

Re: Your Request for Advice
Our File No. A-21-115

Dear Mr. Lorca:

This letter responds to your request for advice on behalf of Del Rey Oaks Mayor Alison Kerr and City Councilmembers John Gaglioti, Kim Shirley, Patricia Lintell, and Scott Donaldson 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.

QUESTION

May Mayor Kerr and Councilmembers Gaglioti, Shirley, Lintell, and Donaldson participate in City decisions concerning the Fort Ord Regional Trail and Greenway (“FORTAG”) project as it moves forward and as specific details, including routing, are contemplated?

CONCLUSION

Based on the facts presented, Councilmember Lintell does not have a financial interest in her residence that would preclude her from participation in decisions relating to the FORTAG project. Because Councilmembers Gaglioti’s and Shirley’s residences are located less than 500 feet from the proposed trail location, they are subject to a standard that requires clear and convincing

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 18109 through 18998 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.

evidence the proposed trail would have no measurable effect on their residential real property. There is no clear and convincing evidence the project would not have a measurable effect on the properties, and they have disqualifying conflicts of interests under the Act. City decisions concerning the FORTAG project do not appear to affect the value of Councilmember Donaldson's and Mayor Kerr's real properties, and they may take part in the decisions.

FACTS AS PRESENTED BY REQUESTER

The FORTAG is a proposed project on the Monterey Peninsula consisting of an approximately 27-mile long, 12-foot-wide, continuous paved bicycle and pedestrian trail with an open-space buffer on both sides ("Project"). The Project will extend over and within various jurisdictions on the Monterey Peninsula.

In 2018, the jurisdictions through which the Project will be routed entered into the "FORTAG Master Agreement" (Agreement), along with the Transportation Agency for Monterey County (together, the "Parties"). The Agreement's objective was to facilitate collective and coordinated actions by the Parties, including the possible dedication of rights-of-way and the need to maintain any improvements approved within each Parties' jurisdiction.

Although routing of the Project has been proposed through various preliminary maps in various Project documents, the Agreement confirms that the exact routing of the Project through each Parties' jurisdiction will be established via supplemental agreements. (To date, no supplemental agreements have been signed.)

Your request includes a link to the Environmental Impact Report ("EIR") for the Project. The EIR states that the Project:

would provide an active transportation option for commuting between homes and places of employment in the cities of Marina, Seaside, Del Rey Oaks, and Monterey, as well as parts of Monterey County and the CSUMB campus. For example, the Ryan Ranch segment of the Trail would provide access to a major jobs center near the cities of Seaside, Monterey, and Del Rey Oaks. People in the project area could shift from vehicle commutes to bicycle commutes to reach these places of employment, reducing vehicle trips and associated VMT [vehicle miles travelled] in the project area. People using the Trail for commuting, as well as general recreation users, may drive to the Trail. This would induce some VMT.

The EIR also states that the "project would improve pedestrian and bicyclist access and circulation in northwestern Monterey County, generally around the cities of Del Rey Oaks..." and that "[c]urrently, the Trail alignment is not open to pedestrian or bicycle access, although some segments of the proposed alignment coincide with existing streets, which are currently open to active transportation modes. The proposed Trail would introduce a route dedicated to pedestrians and bicyclists, with some limited use for horseback travel." The EIR states that the "project would add a variety of amenities for Trail users, such as rest areas, benches, and shade structures."

Relatedly, the City recently became aware of a citizen's initiative being circulated involving the Project, which proposes to limit the routing of the Project to specific areas within the City.

Councilmembers' Residences

With respect to the Project, the following is true of the City's five Councilmembers:

- Councilmembers Gaglioti, Shirley, and Lintell live within 500 feet of the proposed routing.
- Councilmembers Gaglioti and Shirley own their residences. You confirmed that Councilmember Lintell lives in a home owned by her son and does not pay rent. In a subsequent email, you also confirmed that she transferred title to this residence to her adult son several years ago. While she previously retained an interest in the property resulting from a contract provision that allowed title to revert to her in the event she survives her son, this is no longer the case, and Councilmember Lintell has no current, future, or contingent interest in the home.
- Councilmember Donaldson lives between 500-1,000 feet of the proposed routing in a home he owns. We note that his residence is separated from the proposed route by the surrounding neighborhood and a major roadway, Canyon Del Rey Boulevard.
- Mayor Kerr lives more than 1,000 feet from the proposed routing in a home she owns.

ANALYSIS

Under Section 87100 of the Act, “[n]o public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.” “A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family,” or on certain specified economic interests. (Section 87103.) Among those specified economic interests are “[a]ny real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more.” (Section 87103(b).) Mayor Kerr and Councilmembers Gaglioti, Shirley, and Donaldson all own their residences, and as such, have economic interests in their respective real properties.

You state that Councilmember Lintell has no direct, indirect or beneficial interest in her residence under the Act, because she transferred her interest in the property to her son.² Thus, Councilmember Lintell does not have an interest in real property. As such, she does not have a conflict of interest under the Act that prevents her from participating in decisions regarding the Project.

² Councilmember Lintell does not have an interest in her son as a source of gifts. Under Section 82028, a gift from a child is not a disqualifying interest under the Act.

Regulation 18701(a) provides the applicable standard for determining the foreseeability of a financial effect on an economic interest explicitly involved in the governmental decision. It states, “[a] financial effect on a financial interest is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official’s agency. A financial 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 financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6).” Mayor Kerr’s and Councilmembers Gaglioti’s, Shirley’s, and Donaldson’s real property interests are not explicitly involved in the governmental decisions relating to the construction of the Project.

Where, as here, an official’s economic interest is not explicitly involved in the governmental decision, the applicable standard for determining the foreseeability of a financial effect on the economic interest is found in Regulation 18701(b). That regulation provides, “[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.”

Councilmembers Gaglioti and Shirley

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 presumed 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 EIR states that the proposed trail route is not currently open to pedestrian or bicycle access, but that the proposed trail would introduce a route dedicated to pedestrians and bicyclists, with some limited use for horseback travel. No evidence has been provided to indicate that the decisions on the Project would not have a measurable impact on these Councilmembers’ properties. Based on the facts provided, that standard is not met.

However, once a decision concerning a location has been made, Councilmembers Gaglioti and Shirley may wish to seek further advice for future decisions relating to the Project.

Councilmember Donaldson

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 more than 500 feet 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.

(Regulation 18702.2(a)(8).)

Because Councilmember Donaldson's real property interest is located between 500 and 1,000 feet from the proposed routing, the relevant materiality standard is Regulation 18702.2(a)(8). Based on the facts presented, it does not appear likely that the construction of the Project would affect the development potential or highest or best use of Councilmember Donaldson's real property, nor does it appear likely the decision would affect the property's market value or income producing potential. Further, the facts do not indicate that the Project would substantially alter traffic levels, intensity of use, parking, and air quality in the vicinity of Councilmember Donaldson's residence, which is separated from the proposed route by the surrounding neighborhood and a major roadway. Moreover, it would appear that the greatest impacts would be experienced by properties in the immediate area near the bicycle and pedestrian trail. Accordingly, under the Act, it is not reasonably foreseeable that the decision on the Project would have a material financial effect on Councilmember Donaldson's real property and he may take part in the decisions pertaining to the Project.

Mayor Kerr

Decisions related to the Project will involve property more than 1,000 feet from Mayor Kerr's residence and are thus presumed not to have a material financial effect on her real property interest. (Regulation 18702.2(b).) This presumption may be rebutted if clear and convincing evidence indicates the decision would have a substantial effect on Mayor Kerr's property. As the potential location for the bicycle and pedestrian trail is all located more than 1,000 feet from Mayor Kerr's residence, there is no clear and convincing evidence presented indicating the decision would have a substantial effect on her property, and she does not have a financial interest in the decision concerning the Project.

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

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary W. Norton
Senior Counsel, Legal Division

ZWN:dkv