



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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January 28, 2022

Daniel G. Sodergren
City of Pleasanton
P.O. Box 520
Pleasanton, CA 94566

Re: Your Request for Advice
Our File No. A-21-164

Dear Mr. Sodergren:

This letter responds to your request for advice on behalf of City of Pleasanton (“City”) Council Member Jack Balch 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.

QUESTIONS

1. May Council Member Balch participate in decisions related to the Housing Sites Inventory for the City’s Housing Element Update when his principal residence is located within 500 feet of one of the sites proposed to be included on the Sites Inventory list?

2. If Council Member Balch is precluded from participating in decisions relating to the sites inventory, may he participate in other aspects of the Housing Element process (including general policy discussions and decisions)?

CONCLUSIONS

1 & 2. Under the Act’s conflict of interest provisions, Council Member Balch has a potentially disqualifying financial interest in governmental decisions related to the Housing Sites

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.

Inventory, which include a site located less than 500 feet from his residence. However, the public generally exception applies to the decision to approve the list as a whole and general policy discussions and decisions applicable to all properties on the list. Accordingly, Council Member Balch may take part in these decisions. However, to the extent the City may consider removing the site located less than 500 feet from his residence from the list, or any discussion of parameters for the site that do not apply to the final list as a whole, the public generally exception may not apply and Council Member Balch should seek further advice before taking part in these decisions.

FACTS AS PRESENTED BY REQUESTER

The City is in the process of updating the Housing Element of its General Plan. As part of this process, the state Planning and Zoning Law requires that the City identify sites throughout the community that can be potentially rezoned for development of housing within the planning period and that are sufficient to provide for the City's share of the regional housing need ("RHNA") for all income levels.

Based upon a City Council adopted set of criteria for site selection, City staff has prepared the Preliminary Sites Inventory ("Sites Inventory"). The Sites Inventory identifies 29 potential sites from various sources, including developer- and property owner- nominated sites, sites that have a known interest in housing development, and sites that may have redevelopment capacity based on their characteristics (such as location, size, and existing utilization or underutilization) and other analysis.

Once the Sites Inventory has been approved by the City Council, it will serve as the basis of review under the California Environmental Policy Act ("CEQA") and will be incorporated into a Draft Housing Element. The Draft Housing Element will then be presented to the Planning Commission and City Council for consideration and final approval after a public hearing process. Concurrently, the City Council will also be considering general housing policies and programs, which will also serve as the basis of review under CEQA and be incorporated into the Draft Housing Element. We note that the locations on the Sites Inventory list vary significantly in size, with the smallest site being 1.39 acres, and the largest 50.40 acres. Current zoning and existing uses also vary, from industrial to commercial, with offices, shops, or other retail, to vacant parcels.

According to the Planning Commission Agenda Report, the capacity generated by all sites on the Sites Inventory exceeds the projected housing unit shortfall/gap (3,143 units), by around 3,486 units. However, staff recommends the initial sites inventory build in a buffer of capacity that is at least 50 percent beyond what would be needed strictly to address the existing zoning shortfall, to provide a conservative basis for the CEQA analysis and allow flexibility to refine the list based on future inputs.

In a follow-up email, you note that the Planning Commission has recommended that the City Council remove four of the 29 sites from consideration (including the St. Augustine site, the site with 500 feet of Council Member Balch's residence). The City Council could discuss all 29 potential sites when they consider the item (including the St. Augustine site).

Housing Element Update

The Housing Element's intent with respect to housing needs in Pleasanton is expressed in two ways. The first is in the form of goals and objectives sought by the community. The second, and more specific aspects of the Housing Element, are policy statements and implementation programs. These describe the way citizens, local government, and other involved agencies or organizations can achieve objectives, and move closer to the City's goals. Policies establish a recognized community position on a particular subject. Programs are more detailed actions that the City, or other specific entities, will implement to ensure the attainment of the Housing Element's goal and objectives.

After CEQA is completed for the housing sites, the list of housing sites will be incorporated into a draft Housing Element (as an appendix) along with the general policies and programs. The draft Housing Element as a whole will then be considered by the Planning Commission and City Council. During consideration of the draft Housing Element by the City Council, the Council could direct staff to remove one or more sites from the list.

Council Member Balch's Residence

Council Member Balch owns a primary residence which is located approximately 45 feet from one of the sites (Site 26 - St. Augustine). This 4.15-acre site is a vacant portion of the St. Augustine Church parcel, located on Bernal Avenue. The Sites Inventory indicates that the site is generally flat and unimproved, with a current zoning designation of "Agriculture District." Surrounding uses are all medium density residential. We note that the other sites on the list are over 1,000 feet from Council Member Balch's residence.²

At least 15 percent of residential real property within the City is located within approximately 654 feet of the 29 sites identified in the Sites Inventory. In a follow-up communication, you confirmed that less than 15 percent of residential real property within the City is located within 500 feet of the 29 sites identified in the Sites Inventory.

ANALYSIS

The Act's conflict of interest provisions ensure that public officials will 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).) Section 87100 prohibits a 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. Section 87103 provides that a public official has a "financial interest" in a decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's interests that is distinguishable from the decision's effect on the public generally.

² At the time you submitted the original request there were 27 sites on the Sites Inventory. Staff subsequently added two sites to the Sites inventory, bringing the present total to 29. You have confirmed that the additional sites are over 1,000 feet from Council Member Balch's residence.

Section 87103 also describes the interests from which a conflict of interest may arise under the Act. As pertinent to the facts provided, those economic interests include “[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).) Accordingly, Council Member Balch has a potentially disqualifying economic interest in his real property.

Foreseeability

A financial effect on a public official’s economic interest is reasonably foreseeable if the economic interest is a named party in, or the subject of, a governmental decision before the official or the official's agency. (Regulation 18701(a).) An economic 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 economic interest, and includes any governmental decision affecting a real property economic interest as described in Regulation 18702.2(a)(1)-(6). (Regulation 18701(a).)

Where a public official’s economic interest is not explicitly involved in the decision, a different standard for determining the reasonable foreseeability of a financial effect is applicable. Under Regulation 18701(b), “[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.”

The decision at issue involves the approval of the Housing Sites Inventory List for the City’s Housing Element Update, and Council Member Balch’s property is not one of the sites identified on this list. As such, Council Member Balch’s real property interest is not a named party in or the subject of the decision. Under Regulation 18701(b), he will have a financial interest in the decision if there is a realistic possibility that the decision will have a material financial effect on his economic interest.

Real Property

Regulation 18702.2 provides materiality standards for determining when a reasonably foreseeable effect on an interest in real property is material. Relevant to Site 26, Regulation 18702.2(a)(7) provides that 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 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. Relevant to the other sites on the list, Regulation 18702.2(b) provides that the financial effect of a decision a decision involving property 1,000 feet or more from the property line of the official’s property is presumed not to be material. This presumption may be rebutted with clear and convincing evidence the governmental decision would have a substantial effect on the official’s property.

Here, you have noted that Council Member Balch owns real property located approximately 45 feet from one of the sites (Site 26 - St. Augustine). Site 26 is currently vacant, with a zoning

designation of “Agriculture District.” Any decisions concerning the potential removal of this site from the list would involve property within 500 feet of Council Member Balch’s residence. The removal of Site 26 would preclude CEQA analysis and further consideration of this site for possible residential use, while the removal of other sites from the list would reduce the number of sites available to address the existing zoning shortfall and make it more likely that those sites remaining on the list, possibly including Site 26, would ultimately be among those considered for future development. You have not provided any evidence to show that these decisions will not have a measurable impact on the Council Member’s property. Based on the facts provided, the above-stated “clear and convincing evidence” standard is not met. Thus, Council Member Balch has a potentially disqualifying financial interest in the decisions and is prohibited from taking part in any decisions related to the Housing Sites Inventory, unless an exception applies.

Public Generally Exception

Commonly referred to as the “public generally” exception, Regulation 18703(a) permits a public official to take part in a governmental decision that affects one or more of their interests if the decision’s financial effect on the interest is indistinguishable from its effect on the public generally. (See Section 87103.) In general, an effect on an official’s interest is distinguishable from its effect on the public generally if a significant segment of the public is affected and the effect on the official’s interest is not unique when compared to the effect on the significant segment of the public. (Regulation 18703(a).) A unique effect is defined to include a disproportionate effect on an interest in real property resulting from the proximity of a project. (Regulation 18703(c).)

Here, Council Member Balch’s property is located 45 feet from a vacant 4.15-acre site. Your request notes that at least 15 percent of residential real property within the City is located within approximately 654 feet of the 29 sites identified in the Sites Inventory. Therefore, a significant segment of residential properties within the City are located within reasonably close proximity to a site on the proposed Sites Inventory. As a result, so long as the decisions do not consider whether to remove Site 26 from the existing list of sites, or include parameters for Site 26 that will not apply to all properties on the final list, the facts provided indicate that the decisions will not have a unique effect on his property resulting from its proximity to one of the sites on the Site Inventory, and the public generally exception applies to allow Council Member Balch to participate in these decisions concerning approval of the Housing Sites Inventory as a whole.

However, please note that the public generally exception applies to a decision to approve or reject the list as a whole and general policy decisions applicable to all of the final sites, but the public generally exception would not apply to the extent that any decisions regarding Site 26 are considered separately from the other sites on the list. To the extent that there may be additional or subsequent decisions regarding the development specific to Site 26, Council Member Balch should seek additional advice.

You have indicated that the City Staff has proposed a separate decision to remove Site 26 from the Sites Inventory List. Should the City move forward with this separate decision, we note that the public generally exception would not permit Council Member Balch to take part in a decision of whether to remove Site 26 from the list. However, in this case, we note that it may be possible to segment the decision under Regulation 18706. A decision may be segmented so long as the decision can be broken down into separate decisions that are not inextricably interrelated to the

decision in which the official has a disqualifying conflict of interest, the decision in which the official is disqualified is made first and without the official's participation, and the subsequent decisions will not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified. Should the City wish to move forward with segmenting the decision, Council Member Balch may wish to seek additional advice.

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

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