



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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March 07, 2022

Catherine C. Engberg
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, CA 94102

Re: Your Request for Advice
Our File No. A-22-008

Dear Ms. Engberg,

This letter responds to your request for advice on behalf of Half Moon Bay Planning Commissioner James Benjamin, 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. Does the exception for repairs, replacement or maintenance of existing infrastructure apply to permit Commissioner Benjamin to participate in decisions relating to the approval of repairs to the Pilarcitos Avenue Outfall Repair Project at Kehoe Watercourse (the “Project”)?

2. May Commissioner Benjamin submit written comments to City staff on the Biological Resource Evaluation (“BRE”), and other documents circulated for public comment?

3. May Commissioner Benjamin contact other agencies, (including members of the City Council and City Manager) as a private citizen to comment on aspects of the BRE and subsequent documents which may inform those agencies’ review and comment on the Project?

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.

CONCLUSION

1-3. Based on the facts provided, the exception to the materiality rules found in Regulation 18702.2(d)(1) for decisions that “solely concerns repairs, replacement or maintenance of existing streets, water, sewer, storm drainage or similar facilities” applies and Commissioner Benjamin does not have a conflict of interest, and may make, as well as comment on, decisions related to the Project.

FACTS AS PRESENTED BY REQUESTER

The City is proposing the Project, which involves removing and replacing a portion of the 24-inch concrete storm drain that needs repair at the terminus of the Pilarcitos Avenue in Kehoe Watercourse, and other unspecified maintenance activities. The Kehoe Watercourse is a vegetated riparian corridor identified as an Environmentally Sensitive Habitat Area (“ESHA”) in the City’s Certified LCP. The Kehoe Watercourse receives water from the surrounding areas and run-off from both an adjacent neighborhood and the east side of Highway 1 that travels beneath the road via culverts and an open channel. The Kehoe Watercourse and adjacent riparian area contains or supports special status species and is not a “Public Works” facility as defined by the Coastal Act, Public Resources Code Section 30114. The riparian corridor extends westerly onto State Parks lands (beyond the northern side of the Sewer Authority Mid-Coastside treatment plant) located approximately 250 feet southwest of the Project site, where it meets the Pilarcitos Creek. The Project area contains potential wetlands.

In December 2020, Commissioner Benjamin notified the City that there appeared to be an issue with the storm water outfall near his home and that bank erosion into and near the outfall and watercourse was occurring. The City’s Public Works Department assessed the outfall and existing conditions and determined that repair/replacement was necessary. The City determined that the existing conditions did not warrant an emergency repair. The City Council approved creation and funding of the Project. The Project is subject to Coastal Act requirements including the issuance of a Coastal Development Permit (“CDP”) by the Planning Commission.

The Project involves removing and replacing a portion of the 24-inch concrete storm drain that needs repair at the terminus of Pilarcitos Avenue in Kehoe Watercourse. Approximately 3 feet of the culvert outlet has detached with its southern end lying in the water flow of the watercourse. The main goal of the Project is to conduct necessary repairs and facilitate long term maintenance. Anticipated work includes the replacement of fallen culvert pieces with a new concrete or polyvinyl chloride culvert extension of the same size with a concrete splash pad and rock dissipator at the new terminus.

Vegetation clearance and removal of fallen/broken tree limbs within the Project work area are required for construction equipment staging and for crew to safely access the site, perform culvert replacement activities, and establish a pathway for future maintenance access. The Project work area in the drainage will be accessed on foot and culvert replacement work will be performed by hand. Work will occur within the drainage beneath the culvert.

Thinning of vegetation is expected to include the use of chainsaws, pruners, loppers, pull saws, and other equipment necessary to thin and remove vegetation. Vegetation will be removed from the area for offsite disposal. The Project also includes removing an existing chain-link fence

that extends along the southern extent of Pilarcitos Avenue and replacing the fence after Project completion to include a gate for future maintenance access. No ground disturbance will occur within the staging area. The Project will take approximately two months to complete.

The Project is located at the southern terminus of Pilarcitos Avenue and approximately 1,500 feet west of Highway 1 and 1,200 feet east of the Pacific Ocean in the western portion of the City. The Public Works Department intends to seek a Coastal Development Permit to replace the failed culvert and outfall and the Planning Commission will consider whether to issue the project a Coastal Development Permit. Moreover, the City retained an environmental consultant to provide environmental support services, including conducting a biological resource survey and preparing a BRE in support of the Project. The purpose of the BRE is to document the biological resources within the Project biological study area, identify significant direct or cumulative impacts to ESHA and/or its special status species, or to on- or off-site ecosystem functionality, and to recommend feasible mitigation measures if impacts may occur.

The City's Planning Commission is charged with evaluating whether proposed development is consistent with the City's General Plan (including its Local Coastal Land Use Plan), Municipal Code (including the Local Coastal Program Implementation Plan), and consideration of related California Environmental Quality Act documents. The Planning Commission will consider whether to issue a coastal development permit for the Project. Prior to issuance of a CDP, a BRE report must be prepared and circulated for public and jurisdictional regulatory agency review and comment. Additional environmental and permitting documents will also be circulated for public and jurisdictional regulatory agency review prior to consideration of the CDP by the Planning Commission.

Your request states that Commissioner Benjamin wants to submit comments on the BRE report and other environmental documents to the City and other jurisdictional regulatory agencies.² In a subsequent email, you confirmed that "other jurisdictional regulatory agencies" refers to the California Department of Fish and Wildlife, the Regional Water Quality Control Board, the US Army Corps of Engineers, the US Fish and Wildlife Service, and/or the National Marine Fisheries Service. In addition, it refers to the Half Moon Bay City Council and the California Coastal Commission.

Commissioner Benjamin's Property

Commissioner Benjamin has an ownership interest in a parcel of real property located at the southwest corner of Half Moon Bay's Casa del Mar neighborhood (the "Property") that the Commissioner uses as his residence. The Property is located within 500 feet of the Project.

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

² We note that your request also includes draft language of the comments that Commissioner Benjamin intends to submit in concerning the BRE report.

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.

Section 87103 also describes the interests from which a conflict of interest may arise under the Act. As pertinent to the facts presented and the decision at issue, an official has a potentially disqualifying conflict if the decision will have a reasonably foreseeable and material effect on any interest in real property in which the official has a direct or indirect interest of \$2,000 or more. (Section 87103(b).) Accordingly, we must analyze the potential effect of the decisions at issue on Commissioner Benjamin’s interest in his residential property.

Where the financial interest is not explicitly involved in a decision, the financial effect is reasonably foreseeable if it can be recognized as a realistic possibility, more than hypothetical or theoretical. (Regulation 18701(b).) Commissioner Benjamin owns real property within 500 feet of the Project, and his real property is not the subject of the Precise Plan decisions. Under Regulation 18701(b), he will have a financial interest in the Precise Plan decisions if it is a realistic possibility the decisions will have a material financial effect on his real property interest.

Regulation 18702.2 provides the materiality standards for decisions affecting real property. Specifically, Regulation 18702.2(d)(1) establishes an exception to the general materiality standards. This regulation states that “[t]he financial effect of a governmental decision on a parcel of real property in which an official has a financial interest is not material if. . . [t]he decision solely concerns repairs, replacement or maintenance of existing streets, water, sewer, storm drainage or similar facilities.”

In the *Edwards* Advice Letter, No. A-18-011, we advised that the materiality exception applies for decisions regarding repairs, replacement, or maintenance of the streets, sidewalks, and sewer laterals for damage caused by the trees, including the removal of trees to prevent further damage. In this matter, the Project involves removing and replacing a portion of a 24-inch concrete storm drain. The project will include the removal of vegetation necessary to access the site, as well as the removal and replacement of an existing chain-link fence.

Under the facts provided, the decisions concerning the replacement of the damaged section of storm drain culvert, including the necessary thinning and removal of vegetation as well as the replacement of a chain link fence with a similar fence and gate to facilitate regular maintenance, constitutes repair, replacement or maintenance of the storm drainage infrastructure. Accordingly, the decisions you have described meet the terms of the exception and thus do not have a material financial effect on Commissioner Benjamin’s interests in real property.³

³ We note that our conclusion is based on facts provided, Commissioner Benjamin should seek additional advice to the extent that the project will include additional work not yet identified including, but not limited to, additional aesthetic work or improvements to the fencing exceeding a gate to facilitate regular maintenance.

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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