



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

March 04, 2022

Wei-Tai Kwok
Councilmember
1123 Oak Hill Rd
Lafayette, CA 94549

Re: Your Request for Advice
Our File No. A-22-014

Dear Mr. Kwok:

This letter responds to your request for advice 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

Does the Act prohibit you from taking part in a City Council decision regarding proposed rezoning of a property that would allow for construction of a multi-story residential development located approximately 1,450 feet from your residence?

CONCLUSION

No, the Act does not prohibit you from taking part in the rezoning decision due to your interest in real property located over 1,000 feet from the property, because there is not clear and convincing evidence rebutting the presumption that any financial effect on your real property would not be material. Rather, the decision concerns property separated from your residence by homes, trees, and hillsides, the rezoning is mandated by a recent change in state law and would not inherently lead to the development of a multi-story residential property.

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.

FACTS AS PRESENTED BY REQUESTER

The Lafayette City Council will be considering decisions related to a proposed change in zoning of an eleven-acre parcel owned by the Bay Area Rapid Transit (“BART”) District and currently used as a parking lot (“Property”) adjacent to the Lafayette BART station. The proposed rezoning of this Property will change the allowable density of the Property from four units per acre to seventy-five units per acre and increase the allowable height from two and a half stories to five stories and over fifty to sixty feet in height. The rezoning of the Property would allow for the construction of a multi-story residential development. The rezoning is required under Assembly Bill 2923 of 2018, which gives local jurisdictions until July 2022 to rezone BART properties to meet or exceed the minimum densities and zoning standards established in AB 2923.² The City anticipates that the greatest impacts of a future residential development would be in the immediate two-block radius, which does not include your residence.

You are a member of the City Council. You own your primary residence, which is located approximately 1,450 feet from the Property. Your residence is located uphill in a residential neighborhood, surrounded by other single-family residential properties, all of which are accessible via three streets that intersect with Deer Hill Road, which borders the Property to the North. You cannot see the Property from your residence, which is separated from the Property by rows of homes, trees, and hillsides. This is also reflected in an aerial view photograph you included with your request for advice, which displays your residence and its proximity to the Property.

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 [their] official position to influence a governmental decision in which [the official] 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 is “[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).)

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).”

² According to the City’s Planning Department Staff Report from January 2022, “In Lafayette, these standards include allowing 75 du/acre, 5 stories, 3.0 FAR, and maximum 1 parking space/unit.”

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."

The financial effect of a governmental decision on a parcel of real property in which an official has a financial interest 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. (Regulation 18702.2(b).)

Here, your residence is located more than 1,000 feet from the Property that may be rezoned. Your residence is separated from the Property by rows of homes, trees, and hillsides. Further, the rezoning decision would not inherently involve the development of a multi-story residential building but would make such development possible. It appears that under the legislation affecting this BART property, minimum increased density and height standards AB 2923 would require at least this height and density for this property. Accordingly, based on the facts provided, there is not clear and convincing evidence rebutting the presumption that any financial effect on your residential real property would not be material.

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

Sincerely,

Dave Bainbridge
General Counsel



Kevin Cornwall
Counsel, Legal Division

KMC:dkv