



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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November 7, 2023

Taylor Anderson
Deputy City Attorney
City of Long Beach
411 W. Ocean Blvd., 9th Floor
Long Beach, CA 90802

Re: Your Request for Advice
Our File No. A-23-129

Dear Ms. Anderson:

This letter responds to your request for advice on behalf of Long Beach City Councilmember Kristina Duggan 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

Under the Act, may Long Beach City Councilmember, Kristina Duggan, take part in decisions related to the City's Colorado Lagoon Open Channel Project given that Councilmember Duggan owns a property less than 500 feet from one of the parcels affected by the project but approximately 790 feet from the site on which the construction will occur?

CONCLUSION

Because the Project affects only a clearly defined, specific and isolated site on the parcel closest to the Councilmember's property, the distance between the Councilmember's property and

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 18104 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.

property subject to the decision can be measured from the site of construction as opposed to the parcel boundary. Accordingly, Councilmember Duggan's property is approximately 790 feet from the property subject to the decision and the Councilmember is not disqualified from the decision as a result of this property interest unless it is foreseeable the financial effect of the decision will meet or exceed the materiality standards in Regulation 18702.2(a)(8). Based on the facts provided, the Project will maintain the general nature of the land's use with little or no change in intensity of use. These facts do not suggest that the proposed changes will have a material financial effect on the Councilmember's property, nor do they suggest a material effect on her rental business as a business entity and source of income. Thus, Councilmember Duggan is not prohibited from taking part in the decision barring additional facts.

FACTS AS PRESENTED BY REQUESTER

Councilmember Duggan is serving her first term as a member of the Long Beach City Council ("City Council"). Under the Charter of the City of Long Beach, the nine-member City Council has broad authority over contracts and policies in the City. As a City Councilmember, Councilmember Duggan will vote on final decisions, and make contractual and policy commitments on a wide range of City business, including contracts for improvements to City property. Some of these decisions will involve the City's Colorado Lagoon Open Channel Project ("Project") which is located within Councilmember Duggan's district.

The City has undertaken a multi-phased restoration plan for an 18-acre saltwater tidal lagoon located within the City commonly known as the Colorado Lagoon ("Lagoon"). The Lagoon serves three primary functions: it hosts estuarine habitat, it provides public recreation, and it retains and conveys stormwater. The Lagoon is connected to the Pacific Ocean and Alamitos Bay underground through a tidal culvert to an adjacent waterway, Marine Stadium. The Lagoon is separated from Marine Stadium by two roads and a large park. Marine Stadium is a marine venue located within Alamitos Bay used for rowing, boat racing, waterskiing, and similar water-based events.

The Lagoon restoration project has occurred in multiple phases. Previous improvements finished in 2010 and 2012. The final phase of the City's Lagoon restoration plan, known as the Open Channel Project, is currently underway. The Project involves creating an open water channel between the Lagoon and Marine Stadium. The Project area includes a 0.28 acre triangle-shaped area largely comprised of Marina Vista Park, that is adjacent to the north end of Marine Stadium.

The Project involves hydraulic sediment dredging of the Lagoon to create new subtidal and eelgrass habitats. Specific improvements on the north side of the Lagoon include installation of a new decomposed granite walking trail, pedestrian bridge improvements, reclaimed water irrigation system, replanting with native species, and a vegetated bioswale to assist with the removal of pollution from surface runoff water.

Councilmember Duggan and her husband own the Property which faces Marine Stadium and a parking lot that abuts the site. The distance from the Property to the boundary line of Marine Stadium is approximately 143 feet, while the distance from the Property to the closest physical change to Marine Stadium is approximately 790 feet. Councilmember Duggan and her husband gross approximately \$84,000 in income from the Property, which they manage themselves.

The initial contracts related to the Project were approved by the City Council prior to Councilmember Duggan assuming office. However, the City Council, including Councilmember Duggan, will consider the City's budget which includes an allocation of funding related to the Project. Further, contract amendments related to the Project may arise which the City Council will be required to vote on, such as amendments to the terms or the contract amount.

Since the Project is located within Councilmember Duggan's district, she may receive complaints or concerns from residents about the Project which require Councilmember Duggan and her staff to work with City staff to address. At this point in the Project, the majority of Councilmember Duggan's involvement with the Project would be working with City staff to address complaints regarding the Project with City staff.

The Environmental Impact Report for the Project concluded the following:

- Traffic Levels – The traffic levels resulting from operation of the Project are not anticipated to change as a result of the Project, and no cumulative operational traffic impacts would occur. The EIR found that an adjacent project, the Termino Drain project, may have an impact on the Lagoon project, but with mitigation measures cumulative short-term construction traffic impacts are reduced to a less than significant level and no longer-term traffic impacts will occur.
- Intensity of Use – “The proposed project would retain the existing recreation and open space uses of the project site and no intensification of uses would occur. Any change in park attendance and patterns of use are expected to be negligible as a result of project implementation. The proposed project would not result in significant adverse impacts related to recreation at Marine Stadium, and no mitigation is necessary.”
- Parking – “The only impact to long term parking is that the north parking lot must be removed. Removal of north parking lot will not cause a parking deficiency, overcrowding of the remaining parking areas, or other adverse impacts.”
- Noise Levels – Construction of the proposed project improvements would result in a temporary periodic increase in existing ambient noise levels in the project area.
- Air Quality – With all implementation of all feasible mitigation measures, the EIR found that the Project would have a “significant unavoidable short-term construction air quality impacts (odors and nitrogen oxides [NOX, a precursor to ozone (O3)]).”

Further, the view from the Property will not be blocked or impeded due to the Project. The Property's view is already partially blocked by a City maintenance building. The only change in view from the Property due to the Project will be that a portion of the park will be moved to allow for the open channel waterway. A portion of the channel mouth feeding into Marine Stadium will likely be visible from the Property.

In a follow up email to the initial request, the City stated that the only change to Marine Stadium is that the current underground culvert will be moved to a surface-level open water

channel. The mouth of the channel would be located approximately 790 feet from the Councilmember's property. Other than the change to an open water channel leading to the Lagoon, you have indicated that there will be no other changes to the design or use of Marine Stadium as all other changes are specific to the Lagoon.

ANALYSIS

Under Section 87100 of the Act, “[a] public official at any level of state or local government shall not make, participate in making or in any way attempt to use the official’s position to influence a governmental decision in which the official knows or has reason to know the official 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 the official’s immediate family,” or on certain specified economic interests. (Section 87103.) Among those specified economic interests are:

- (a) Any business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more.
- (b) Any real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more.
- (c) Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.
- (d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

Councilmember Duggan has a real property interest in her property, interests in her rental business as both a business entity and source of income, and possible interest in tenants of the rental property as sources of income. At issue then is whether it is reasonably foreseeable that the Project decisions will have a material financial effect on Councilmember Duggan’s interests in her real property and rental business.²

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

² Specific information regarding tenants was not provided in the request. Thus, we cannot provide an analysis of disqualification based on the effect of a decision on Councilmember Duggan’s tenants. To the extent there is any indication that a tenant qualifying as a source of income to Councilmember Duggan will be affected by the decision outside of the potential financial effect on Councilmember Duggan’s rental property, the Councilmember should seek further advice identifying the tenant and possible effects on the tenant.

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)."

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."

With respect to potential financial effects on the Councilmember's rental business, the reasonably foreseeable financial effect of a governmental decision on an official's financial interest in a business entity and sources of income that are business entities is material if the source is a business entity that will be financially affected under the materiality standards in Regulation 18702.1. (Regulation 18702.3(a)(4).) The reasonably foreseeable financial effect of a governmental decision on an official's financial interest in a business entity is material if the decision may result in an increase or decrease of the entity's annual gross revenues, or the value of the entity's assets or liabilities, in an amount equal to or greater than: (A) \$1,000,000; or (B) five percent of the entity's annual gross revenues and the increase or decrease is at least \$10,000. (Regulation 18702.1(a)(2).) The facts provided state that the Councilmember grosses approximately \$84,000 in income from her rental business each year. A 5% increase or decrease would be equal to \$4,200, well below the \$10,000 threshold required for application of the materiality standard found in Regulation 18702.1(a)(2).

The reasonably foreseeable financial effect on a business entity is also material if the decision may cause the entity to incur or avoid additional expenses or to reduce or eliminate expenses in an amount equal to or greater than: (A) \$250,000; or (B) one percent of the entity's annual gross revenues and the change in expenses is at least \$2,500. (Regulation 18702.1(a)(3).) There is nothing in the facts to indicate that the proposed changes will increase or decrease costs to the official's business.

And finally, the reasonably foreseeable financial effect on a business entity is also material if the official knows or has reason to know that the entity has an interest in real property and the property is a named party in, or the subject of, the decision under Regulations 18701(a) and 18702.2(a)(1) through (6), or there is clear and convincing evidence the decision would have a substantial effect on the property. (Regulation 18702.1(a)(4).) However, this standard does not apply to the extent that the official has an interest in the property. We turn then to the Councilmember's interest in her real property. 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); emphasis added.) Thus, the relevant distance is generally the distance from the official's parcel to the property line of the parcel subject to the decision. However, in cases where

the decision affects only a clearly defined, specific and isolated site, such as a particular building on a large tract of land, we have advised that the parcel to parcel measurement would not be the appropriate distance to determine materiality. (See for example, *Leishman* Advice Letter, No. A-21-154.) Here, the decision would affect a culvert located at the north end of Marine Stadium located roughly 790 feet from the Councilmember's property. While some construction on a small portion of the Marine Stadium parcel will be necessary to connect the culvert to the Lagoon, you have stated that there will be no other changes to Marine Stadium and nothing to indicate that the planned changes will vary the intensity of current use. Therefore, the applicable standard in this matter is the 790-foot distance from the official's Property to the construction site.

Regulation 18702.2(a)(8) provides the applicable materiality standard where an official's real property parcel is located within 500 to 1,000 feet from property involved in a decision. The reasonably foreseeable effect of a decision on the official's parcel will be material if the decision would change the official's 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.

Finally, Regulation 18702(b) provides that "the financial effect of a governmental decision is not material if it is nominal, inconsequential, or insignificant."

Based on the proposed changes to allow for a new tidal channel through Marina Vista Park, there is nothing to indicate that the Project will affect the Councilmember's property's development potential, income producing potential, or highest and best use. None of the zoning is to be changed allowing for building – either commercial or residential – in the current open space, such that the development potential and highest and best use of the property remains unchanged. Additionally, as outlined in the EIR excerpts provided, while unavoidable during construction, no long-term impacts to traffic levels, intensity of use, parking noise levels or air quality are anticipated.

Further, based on the facts provided, the view from the Property will not be substantially altered. The Property's view to the Project is already partially blocked by an existing building which is set to be maintained. And the only change in view from the Property due to the Project will be that a portion of the park will be moved to allow for the open channel waterway. A portion of this channel feeding into Marine Stadium will then be visible from the Property.

As Marina Vista Park is set to be maintained for its current uses, albeit, with a new tidal channel among other design changes, nothing in the facts provided suggest that the market value of the Councilmember's Property will be affected. The proposed environmental impacts, such as improving the estuary habitat and better facilitating the removal of pollution from surface water runoff are directed towards the Park and Lagoon and not Marine Stadium. Barring additional indications of environmental benefits or changes of use to Marine Stadium, there are no indications that the changes directed towards the Park and Lagoon would financially impact the Property's value.

Accordingly, Councilmember Duggan does not have a conflict under the Act and is permitted to take part in decisions related to the Project, including consulting with City staff as necessary.

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

Sincerely,

Dave Bainbridge
General Counsel

A handwritten signature in blue ink, appearing to read "EM Boyd". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

By: Erika M. Boyd
Senior Counsel, Legal Division

EMB:aja