



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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October 13, 2023

Elisa Mikiten  
Planning Commissioner  
1601 Delaware  
Berkeley, CA 94703

Re: Your Request for Advice  
**Our File No. A-23-149**

Dear Ms. Mikiten:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”).<sup>1</sup> 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 Planning Commission decisions concerning the Objective Design Standards for the development of the North Berkeley BART station (“BART site”), which is located between 500 and 1,000 feet from your residence, given the development standards, such as residential density, parking, height, and allowable uses have already been adopted by the Berkeley City Council?

### CONCLUSION

No. You are not disqualified from taking part in these design review decisions because the decisions will not impact the viability of the development at the Bart site and generally concern the aesthetics of the Bart site. Based on the facts provided, it is not reasonably foreseeable the Objective Design Standards decisions will have a material financial effect on your real property interest which has no view of the development, has no direct vehicle access to the development, and is separated from the development by nine residential lots and a baseball field.

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<sup>1</sup> 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.

## FACTS AS PRESENTED BY REQUESTER

You are a Commissioner on the City of Berkeley Planning Commission seeking advice concerning Planning Commission actions regarding Objective Design Standards on October 18, 2023. The Objective Design Standards will be applied to a development at the North Berkeley BART Station.

You own your residence located approximately 720 feet east of the Bart site, which is separated by a full city block containing 9 residential lots, a baseball field, and a major thoroughfare with 4 lanes of traffic, a parking lane, and a turning lane.

The street on which your house is located dead-ends at the baseball field. There is no direct path of travel for vehicles between the BART site and your residence, and the BART site is not visible from your residence.

The development capacity and zoning for the BART site has already been directed by Assembly Bill 2923 and adopted by the Berkeley City Council. Development standards, such as residential density, parking, height, and allowable uses have already been adopted. The development will add roughly 750 units of housing to the site.

On October 18, 2023, the Planning Commission is set to examine and recommend a set of design guidelines (Objective Design Standards) for the site. The Objective Design Standards must be consistent with prior agreements adopted by both BART and the City of Berkeley, including the Join Vision and Priorities document which established the design goals.

The Objective Design Standards articulate the following aesthetic details of the project: streetscape design (e.g., sidewalks and trees); on-site circulation for pedestrians; distance the building facade is setback from the sidewalk on the south, west, and north facades; facade articulation and materials; landscaping; distance upper floors are stepped back from lower floors on the south, west, and north facades; overall shape and design elements of the building(s), such as materials used.

The Objective Design Standards will not address the number of units or parking spaces in the development or whether the development should occur. That has already been decided.

## ANALYSIS

The Act's conflict of interest provisions prohibit a public official from taking part in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the official's financial interests distinguishable from the decision's effect on the public generally. (Sections 87100 and 87103.) The financial interests that may give rise to an official's disqualifying conflict of interest under the Act are set forth in Section 87103 including an interest in any real property in which the official has an interest of \$2,000 or more. (Section 87103(b).) Therefore, you have a real property interest in your residence.

### Foreseeability and Materiality

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. (Regulation 18701(a).) Regarding financial interests not explicitly involved in a decision, as here, 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. (Regulation 18701(b).)

Regulation 18702.2 provides the standards for determining when a government decision's reasonably foreseeable effect on an official's real property interest is material considering factors such as the proximity of the property subject to the decision to the official's real property parcel. The reasonably foreseeable financial effect is material whenever the 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 development potential, income producing potential, highest and best use, character (by substantially altering traffic levels, intensity of use, parking, view, privacy, noise levels, or air quality), or market value. (Regulation 18702.2(a)(8).)

Your personal residence is located 720 feet from the Bart site. Therefore, if the Objective Design Standards would change any of the factors listed in Regulation 18702.2(a)(8), you will be disqualified from taking part in decisions concerning the project. However, the facts here do not indicate that the Objective Design Standards decisions affecting the aesthetics of the development will have any impact on your property's development potential, income producing potential, or highest and best use.

Initially, we note that the development standards and zoning for the BART site, including the residential density (750 units of housing), parking, height, and allowable uses, have already been adopted by the Berkeley City Council. The upcoming governmental decisions concern the Objective Design Standards, which will address such things as streetscape design, on-site circulation for pedestrians, landscaping and materials to be used – they will not have any impact on major policy decisions already made by the City Council or the viability of the development itself.

Additionally, the Objective Design Standards decision will not change the character of your property by substantially altering traffic levels, intensity of use, parking, view, privacy, noise levels, or air quality because your residence is located approximately 720 feet from the Bart site and is separated from the site by 9 residential lots, a baseball field, and a four-lane thoroughfare. Also, the street on which your house is located dead-ends at the baseball field, which means there is no direct path of travel for vehicles between the BART site and your residence. Further, the BART site is not visible from your residence. For these same reasons, the facts do not indicate that the Objective Design Standards decisions will change the market value of your residence.

Accordingly, because it is not reasonably foreseeable the decisions involving the development's Objective Design Standards will have a material financial effect on your real property interest, the Act does not prohibit you from taking part in the decisions.

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

Sincerely,

Dave Bainbridge  
General Counsel

By: *Jack Woodside*  
Jack Woodside  
Senior Counsel, Legal Division

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