



California Fair Political Practices Commission

January 29, 1992

Kathy Lund
3970 Rocklin Road
P. O. Box 1138
Rocklin, CA 95677

Re: Your Request for Advice
Our File No. A-92-053

Dear Ms. Lund:

This letter is in response to your request for advice regarding your duties and responsibilities under the conflict-of-interest provisions of the Political Reform Act (the "Act").¹

QUESTIONS

1. What criteria or evidence should a public official use to determine whether or not a decision on a development project will have a financial effect on that official's ownership interest in real property?
2. Should the slope area located between your home and the developable portion of the project site be counted as part of the development project for purposes of applying Regulation 18702.3?
3. If so, is it reasonably foreseeable that decisions regarding the proposed subdivision will have a material financial effect on the value of your residence which is distinguishable from its effect on the public generally?

¹ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

CONCLUSIONS

1. A public official is required to make a reasonable good faith effort to determine the financial effects of a governmental decision on his or her economic interests.
2. Regulation 18702.3 does not take into consideration the contour of the land. It only sets forth standards for determining materiality in terms of distance to the boundaries of the project.
3. If decisions regarding the proposed subdivision will have a material financial effect on your economic interests, such an effect will be distinguishable from the effect on the public generally.

FACTS

You are a City of Rocklin Councilmember. You seek our advice to determine whether you may participate in pending governmental decisions regarding a proposed subdivision which is located near your residence in the City of Rocklin.

The project, known as The Summit, is proposed for the top of a hill located to the east of your home within the City of Rocklin. The developable portion of the project site is a 300 to 800 foot wide hilltop rising 120 feet above the surrounding neighborhoods. The hill runs essentially from north to south. There is existing residential development surrounding the hill on three sides; the west, the south, and the east.

The site is currently zoned RE-20. The development request for a subdivision map and use permit is consistent with the current zoning. The applicant is requesting a rezoning to PD-RE-20 for technical reasons. This rezoning will not change the density allowed on the site. The RE-20 zone is a low density residential zone, requiring minimum lots of 20,000 square feet.

The City of Rocklin General Plan contains a policy prohibiting development on hillsides with a greater than 20 percent slope. Virtually the entire west side of the hill has a slope approximating 30 percent and is not proposed for development. This slope is also heavily wooded. Access to the hilltop, as well as all utility hookups, are planned for the east side of the hill. The reasons for this design include the steepness of the slope and the number of trees on the west side along with the fact that the existing infrastructure on the east side of the hill was designed to service the hilltop. A street in an adjacent subdivision stubs into the logical access to the hilltop and the utilities in the subdivisions adjacent to the site on the east were designed to extend up to the hilltop. As a result, you believe there will be no development impact from the project extending down the western slope.

While not proposed, it is possible that a secondary access could be designed that would bring traffic down the northwest side and along Clover Valley Road. You state that even if this were done, the increase in traffic on Clover Valley Road would be nominal.

You own a residence which fronts on the west side of Clover Valley Road. The hillside is located across Clover Valley Road and behind the lot that faces yours. The distance between your lot and the nearest point of the project site is 260 feet. The entrance to the project is 1.4 road miles from your property. From your home, you cannot see the top of the ridge or any of the developable area. The distance between your property line and the developable portion of the project is more than 500 feet. Despite the proximity of your lot to the project boundary, you believe that your property is both physically and visually cut off from the proposed development. You have submitted for our consideration maps showing the project site, the location of your home, and other characteristics of the project.

You believe that the proposed development will have no impact on your residence because of the existing oak trees in the open space area, the slope of the hill, and the fact that virtually all traffic and services will access the site from the east side of the hill. The city has retained a real estate appraiser who has determined that the development would have no effect on the homes in your neighborhood.

ANALYSIS

Section 87100 prohibits public officials from making, participating in, or using their official position to influence a governmental decision in which they know or have reason to know they have a financial interest. As a City of Rocklin Councilmember, you are a public official. (Section 82048.)

An 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, or on a member of the official's immediate family,² or on:

Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more.

² An official's "immediate family" are his or her spouse and dependent children. (Section 82029.)

Making, Participating in Making, or Attempting to Influence a Governmental Decision

A public official makes a governmental decision or participates in the making of a governmental decision whenever the public official votes on a matter, commits the agency to a course of action, or enters into any contractual agreement on behalf of the agency. (Regulation 18700(b).) Additionally, a public official participates in a governmental decision when, acting within the authority of his or her position, the public official:

(1) Negotiates, without significant substantive review, with a governmental entity or private person regarding the decision; or

(2) Advises or makes recommendations to the decision-maker, either directly or without significant intervening substantive review, by:

(A) Conducting research or making any investigation which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision; or

(B) Preparing or presenting any report, analysis or opinion, orally or in writing, which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision.

Regulation 18700(c).

With regard to a governmental decision which is within or before an official's agency or an agency appointed by or subject to the budgetary control of his or her agency, an official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official contacts, or appears before, or otherwise attempts to influence any member, officer, employee or consultant of the agency. Attempts to influence include, but are not limited to, appearances or contacts by the official on behalf of a business entity, client, or customer. (Regulation 18700.1.)

Accordingly, if it is reasonably foreseeable that your economic interest in your residence, which we presume to be worth more than \$1,000, will be materially affected by decisions regarding the proposed subdivision, you must not only disqualify yourself from participating in formal decisions of the city council which may affect the value of your residence, but you must

also abstain from attempting to influence the decisions by communicating with other members of the city council or the staff regarding the decisions.

Foreseeability

The effect of a decision is reasonably foreseeable if there is a substantial likelihood that it will occur. To be foreseeable, the effect of a decision must be more than a mere possibility; however, certainty is not required. (Downey Cares v. Downey Community Development Comm. (1987) 196 Cal.App.3d 983, 989-991; Witt v. Morrow (1977) 70 Cal.App.3d 817; In re Thorner (1975) 1 FPPC Ops. 198.) The Act seeks to prevent more than actual conflicts of interest; it seeks to prevent even the appearance of a possible conflict of interest. (Witt v. Morrow, supra at 823.)

You have stated in your request for advice that the wooded hillside obscures the view of the site of the proposed subdivision from your home. In addition, you state that the proposed subdivision will not result in an increase in traffic in your neighborhood. However, it is foreseeable that a subdivision located at the top of a hill which abuts your home will have an effect on the value of your home. Even assuming that no traffic will move through your neighborhood and that you will not see this subdivision at the top of the hill from your residence, the proposed subdivision may lead to soil erosion which might wash down the west side of the hill where your home is located. It is also foreseeable that there will be a change in the pollution and noise levels in your neighborhood. Accordingly, the foreseeability element is met. The next step is to determine whether the effect of the pending decisions on the value of your residence will be material.

Materiality

Regulation 18702 sets forth the guidelines for determining whether an official's economic interest in a decision is materially affected by a decision. Your residence will be affected indirectly by the pending decisions. As you correctly point out in your request for advice, when an official's interests in real property are indirectly involved in a governmental decision, the appropriate standard for determining materiality is that of Regulation 18702.3 which states in pertinent part that the effect of a decision is material as to real property in which an official has a direct, indirect or beneficial ownership interest (not including a leasehold interest), if the following applies:

The real property in which the official has an interest, or any part of that real property, is located within a 300 foot radius of the boundaries (or the proposed boundaries) of the property which is the subject of the decision, unless the decision will have no financial effect upon the official's real property interest.

Regulation 18702.3(a)(1), emphasis added.

You have asked whether the slope area located between your home and the developable portion of the project site should be counted as part of the development project for purposes of applying Regulation 18702.3. Regulation 18702.3 does not take into consideration the contour of the land but rather limits itself to setting standards for materiality with respect to distances. Pursuant to Regulation 18702.3, the effect of governmental decisions on real property situated within 300 feet of property which is the subject of a governmental decision is presumed material. Therefore, unless you can show that the pending decisions will have no financial effect on your residence, your disqualification is required.

You have also asked what criteria or evidence should be used to determine whether or not a decision on a development project will have a financial effect on an official's ownership interest in real property. We have previously advised that a public official is required to make a reasonable good faith effort to determine the financial effects of a governmental decision on his interests in real property. (McLaughlin Advice Letter, No. I-91-141.) You have stated that the city has sought the services of an appraiser on your behalf and that this individual has determined that the proposed subdivision will have no financial effect on your residence.³ Please note, however, that pursuant to subdivision (d) of Regulation 18702.3, factors which must be considered in determining whether a governmental decision will have a material financial effect on an official's real property include, but are not limited to:

(1) The proximity of the property which is the subject of the decision and the magnitude of the proposed project or change in use in relationship to the property in which the official has an interest;

(2) Whether it is reasonably foreseeable that the decision will affect the development potential or income producing potential of the property;

³ In rendering advice, the Commission does not Act as a finder of fact. (In re Oglesby (1975) 1 FPPC Ops. 71, 77.)

(3) In addition to the foregoing, in the case of residential property, whether it is reasonably foreseeable that the decision will result in a change to the character of the neighborhood including, but not limited to, effects on traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood.

Regulation 18702.3(d).

To the extent that you believe that the appraisal has taken into consideration all factors that may affect the value of your property, we will defer to your judgment to rely on the appraisal. However, if it is determined that decisions relating to the proposed subdivision which is located within 300 feet of your residence will have any financial effect on the value of your residence, your disqualification is required unless the "public generally" exception applies, as discussed below.

Public Generally

Even if the reasonably foreseeable financial effect of a decision is material, disqualification is required only if the effect is distinguishable from the effect on the public generally. (Section 87100.) If the decision does not affect all members of the public in the same manner, disqualification may be required unless the effect of the decision on the public official's financial interests is the same as the effect on a significant segment of the public. (Regulation 18703.) For purposes of our discussion, the public is the entire population of the city. (In re Legan (1985) 9 FPPC Ops. 1; In re Owen (1976) 2 FPPC Ops. 77; Jorgensen Advice Letter, No. A-90-017.)

Your home fronts Clover Valley Road. The hillside where the subdivision will be located is located across this road and immediately behind the lot that faces yours. The project will tower 120 feet above your neighborhood. Under this set of facts, it is apparent that decisions regarding the proposed subdivision will affect your economic interests and those of your immediate neighbors in a manner which is distinguishable from the effect on individuals who are more removed from the project. Accordingly, the "public generally" exception is not applicable to your facts.

Bifurcation

Under certain circumstances, large and complex decisions may be divided into separate decisions when an official has a disqualifying interest in one component of the decisions which is not interdependent upon other components. However, under some circumstances, a series of decisions may be too interrelated to be considered separately. (Miller Advice Letter, No. A-82-119.) This would be the case if a decision on one aspect of the subdivision will substantially affect a decision on another aspect

of the subdivision. Under such circumstances, if you must disqualify yourself from participating in one of the decisions, you are also disqualified from participating in the other decisions.

For example, in a decision to select one of two autopark sites, a decision to select one of the sites is essentially a decision against the other autopark site. (Boogaard Advice Letter, No. I-90-347.) Similarly, decisions regarding the proposed subdivision may be so interrelated that decisions regarding one aspect of the subdivision will affect other decisions regarding the proposed subdivision.

However, if it is possible to consider one particular aspect of the proposed subdivision independently of the others, and if the items are not interrelated, they may be bifurcated. If certain decisions regarding the proposed subdivision may be bifurcated, then you would be required to abstain from participating in discussions of disqualifying aspects of the decisions while participating freely in other decisions regarding the subdivision.

For example, you state in your request for advice that, while not proposed, it is possible that a secondary access could be designed for the proposed subdivision which would bring traffic down the northwest side of the hill and along Clover Valley Road. If this road is built, it will result in an increase in traffic in your neighborhood which will foreseeably affect the quality of life in your neighborhood and potentially have an effect on your economic interest in your residence. Conversely, decisions concerning the type of pavement to be used in the proposed subdivision are likely to have no effect at all on the value of your residence.

If you determine that certain decisions regarding the proposed subdivision are not so interrelated that decisions regarding one aspect of the subdivision will affect other decisions, such decisions may be bifurcated and considered separately from other decisions regarding the subdivision. In order to bifurcate the pending decisions, the city council must adhere to the following procedure:

(1) The decisions in which you have a disqualifying financial interest must be segregated from other decisions.

(2) The decisions from which you are disqualified must be considered first, and a final decision must be reached by the city council without your participation.


(3) Once a final decision has been reached on a particular item, you may participate in the deliberations and vote regarding other matters in the proposed subdivision so long as those

deliberations and vote do not affect the previous decisions from which you were disqualified. (Merkuloff Advice Letter, No. I-90-542; McNatt Advice Letter, No. I-90-714.)

We trust this letter adequately responds to your inquiry. Should you have any further questions regarding this matter, do not hesitate to call me at (916) 322-5901.⁴

Sincerely,

Scott Hallabrin
Acting General Counsel


By: Blanca M. Breeze
Counsel, Legal Division

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⁴ Copies of Commission regulations and Opinions are available in many law libraries. Alternatively, copies of these materials and Commission advice letters may be obtained from the Commission at a cost of 10¢ per page.