



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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September 12, 2019

Molly S. Stump  
Palo Alto City Attorney  
250 Hamilton Ave, 8th Floor  
Palo Alto, CA 94301

Re: Your Request for Advice  
**Our File No. A-19-159**

Dear Ms. Stump:

This letter responds to your request for advice on behalf of City of Palo Alto Mayor Eric Filseth and City Councilmember Liz Kniss 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 any other conflict of interest laws. 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

Do the Act's conflict of interest provisions prohibit:

(1) Mayor Filseth from taking part in governmental decisions relating to the separation of City streets that cross the Caltrain rail corridor tracks from the grade of the tracks given that the nearest potential grade-separation project currently under consideration is nearly 1.5 miles from the Mayor's residence?

(2) Councilmember Kniss from taking part in those decisions given that none of the potential grade-separation projects currently under consideration is located within 1,000 feet of the multifamily residential rental property in which the Councilmember has an ownership interest?

### CONCLUSIONS

(1) No. The Act's conflict of interest provisions do not prohibit the Mayor from taking part in decisions relating to the potential grade-separation projects currently under consideration because it is not reasonably foreseeable that those decisions would have a material financial effect on the

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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 (the "Commission") are contained in Sections 18110 through 18997 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.

Mayor's real property interest in his residence or his interest in his personal finances based on the facts presented.

(2) No. The Act's conflict of interest provisions do not prohibit the Councilmember from taking part in those decisions because it is not reasonably foreseeable that they would have a material financial effect on any of the Councilmember's financial interests at issue based on the facts presented.

### **FACTS AS PRESENTED BY REQUESTER**

The Caltrain rail corridor bisects the City of Palo Alto, separating the northeastern portion of the City from the southwestern portion. The rail corridor runs parallel to Alma Street and passes close by many residential parcels within the City. The State's High Speed Rail Authority and Caltrain, which is governed by the Peninsula Corridor Joint Powers Board, intend to increase both the frequency and length of trains running on the rail corridor tracks. Toward that end, Caltrain has initiated a project to transition the Caltrain system from diesel to electric power. This project will change the infrastructure along the Caltrain system's right-of-way by adding aerial wires ("catenary wires"), thereby enabling the use of trains that are quieter, faster, and more frequent. Caltrain expects to begin electrified service in 2022.

Responding in part to the prospect of more frequent trains, the City has begun planning to separate its east-west streets that cross the tracks at grade level from the grade of the tracks to limit interruption of traffic circulation and increase safety. There are three separated roadway crossings (University Avenue, Embarcadero Avenue, and Oregon Expressway), and four at-grade crossings (Palo Alto Avenue, Churchill Avenue, Meadow Drive, and Charleston Road), located within the City. The City has conducted vehicle circulation studies that have shown that increased gate-down time at its at-grade crossings resulting from the more frequent use of the tracks will be felt throughout the City. Commencement of the City's grade-crossing modification projects will not begin until 2023 at the earliest, and completion of the projects will take a decade or more.

At an earlier stage of the City's planning process, the Commission issued the *Stump* Advice Letter, No. A-18-106, advising that the Act's conflict of interest provisions prohibited then-Vice Mayor Filseth from taking part in decisions relating to the grade-separation projects then under consideration because it was reasonably foreseeable that those decisions would have a material financial effect on then-Vice Mayor Filseth's real property interest in his residence located within 500 feet of the tracks and the existing at-grade crossing at Palo Alto Avenue. That letter also advised that then-Mayor Kniss was disqualified from taking part in those decisions because it was reasonably foreseeable that they would have a material financial effect on her business interest in her multifamily residential rental property located within 500 feet of the tracks.

The City initially considered various options for each crossing: raising the tracks above the street or depressing the street under the tracks; raising the street over the tracks; putting the tracks in a trench or underground tunnel; and closing the crossing. In addition, the potential grade-separation project options initially under consideration included an underground tunnel potentially running the entire length of Caltrain's right-of-way, from the City's northern border with the City of Menlo Park to its southern border with the City of Mountain View.

The City has now narrowed the potential options for the grade-separation projects. On January 22, 2019, with Councilmembers Filseth and Kniss abstaining, the City Council voted to separate the Palo Alto Avenue crossing from the primary planning effort underway for the other grade-separation projects, and to instead include it in a separate comprehensive planning effort focused on the City's downtown and prioritizing transportation.

On May 13, 2019, again with Councilmembers Filseth and Kniss abstaining, the City Council voted to: (1) eliminate the "citywide" option of placing the entire Caltrain right-of-way into an underground tunnel, and (2) affirm consideration of a "South Palo Alto" tunnel concept. Construction activity and excavation for a South Palo Alto tunnel would begin south of the Alma Street and Oregon Expressway interchange, descending from street level in a southeast direction along the Caltrain right-of-way to a sufficient depth to run under the existing street intersections at Meadow Road and Charleston Road, then resurfacing to street level near the City's boundary with Mountain View.

Mayor Filseth resides in a single-family home located on Palo Alto Avenue in the far north of the City. The nearest potential grade-separation project currently under consideration, the Churchill Avenue crossing, is located nearly 1.5 miles from the Mayor's residence.

None of the grade-separation projects currently under consideration are located within 1,000 feet of the Councilmember Kniss's multifamily residential rental property. The closest grade-separation project currently under consideration to the Councilmember's multifamily residential rental property is the South Palo Alto tunnel, and the closest part of the tunnel would be separated from that multifamily residential rental property by the California Avenue retail district, a commercial and light industrial area, and a major thoroughfare that runs in that area (the Oregon Expressway) in a trench depressed beneath the level of the surrounding land uses.

## 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 would 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.) An official's interests that may give rise to a disqualifying conflict of interest under the Act are identified in Section 87103. With respect to decisions relating to the grade-separation projects currently under consideration:

- Mayor Filseth has a real property interest in his residence assuming he has an interest in that property worth \$2,000 or more (see Section 87103(b)); and an interest in his personal finances and those of immediate family members (see Section 87103);
- And Councilmember Kniss has a real property interest in her multifamily residential rental property assuming she has an interest worth \$2,000 or more in that rental property (see Section 87103(b)); a business interest in her real property management business that manages her multifamily residential rental property if she has an investment in that business worth at least \$2,000 (see Section 87103(a)); a source of income interest in that business, or a tenant of her multifamily residential rental property, if she aggregates \$500 or more from that source in the

12 months prior to the decisions at issue (see Section 87103(c)); and an interest in her personal finances and those of immediate family members (see Section 87103).

### Foreseeability and Materiality

Regulation 18701(a) provides that a decision's financial effect on an official's financial interest is presumed to be reasonably foreseeable if the official's interest is "explicitly involved" in the decision; an official's interest is "explicitly involved" if the interest is a named party in, or the subject of, the decision; and an 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 interest. In addition, an official's business interest is explicitly involved in any decision affecting the business as described in Regulation 18702.1(a)(1), and an official's real property interest is explicitly involved in any decision affecting that real property as described in Regulation 18702.2(a)(1)-(6).

Regulation 18701(b) sets forth the foreseeability standard applicable to a decision's effect on an official's interest that is not explicitly involved in the decision, and provides that the decision's effect on such an interest is reasonably foreseeable if it "can be recognized as a realistic possibility and more than hypothetical or theoretical."

Regulation 18702.1 provides the materiality standards applicable to a decision's reasonably foreseeable financial effect on an official's business interest, and Regulation 18702.3 provides the materiality standards applicable to a decision's reasonably foreseeable financial effect on an official's source of income interest. The Commission repealed the former versions of Regulations 18702.1 and 18702.3, and adopted a new version of each of those regulations, at its regular meeting on July 23, 2019. Therefore, the analyses below apply those regulations as updated.

Regulation 18702.5 sets forth the materiality standard applicable to a decision's reasonably foreseeable financial effect on an official's personal finances or those of an immediate family member. Subdivision (c) of that regulation, however, provides that if the decision at issue affects the official's business interest, then materiality is determined pursuant to Regulation 18702.1, and if the decision affects the official's real property interest, then materiality is determined under Regulation 18702.2.

### Mayor Filseth

Regulation 18702.2(b) provides that the reasonably foreseeable financial effect of a decision involving real property located 1,000 feet or more from the official's real property interest is presumed immaterial unless there is clear and convincing evidence that the decision would have a substantial effect on the official's real property interest.

Whereas the Mayor's residence was located within 500 feet of a grade-separation project under consideration at the time the Commission issued the *Stump* Advice letter, No. A-18-106, the closest potential grade-separation project currently under consideration is nearly 1.5 miles away from the Mayor's residence. Thus, Regulation 18702.2(b) applies with respect to the updated facts presented, rather than Regulation 18702.2(a)(7) (colloquially known as the Act's "500-foot rule"). The facts presented provide no indication that those decisions would have a substantial effect on the

Mayor's real property interest in his residence. Therefore, the Act does not prohibit the Mayor from taking part in decisions relating to the potential grade-separation projects currently under consideration because it is not reasonably foreseeable that those decisions would have a material financial effect on his real property interest in his residence or his interest in his personal finances and those of immediate family members based on the facts presented.

### Councilmember Kniss

Regulation 18702.3 sets forth the Act's materiality standards applicable to a decision's reasonably foreseeable effect on an official's source of income interest, and subdivision (a)(4) of that regulation provides that a decision's reasonably foreseeable effect on such an interest is material if the source is a business that will be financially affected under the materiality standards of Regulation 18702.1. As noted above, Regulation 18702.5(c) provides that if the decision at issue affects the official's interest in a business or a real property, materiality is determined pursuant to Regulation 18702.1 or Regulation 18702.2 respectively. Therefore, we apply Regulations 18702.1 and 18702.2 to determine whether decisions relating to the potential grade-separation projects currently under consideration would have a disqualifying effect on the Councilmember's interests at issue.

Regulation 18702.1(a)(2) provides that a decision's reasonably foreseeable financial effect on an official's business interest is material if the decision may result in an increase or decrease of the business's annual gross revenues, or the value of the business's assets or liabilities, in an amount equal to or more than \$1,000,000, or five percent of the business's annual gross revenues and at least \$10,000.<sup>2</sup> In addition, Regulation 18702.1(a)(3) provides that the effect is material if the decision may cause the business to incur or avoid additional expenses, or to reduce or eliminate expenses, in an amount equal to or more than \$250,000, or one percent of the business's annual gross revenues and at least \$2,500.

Based on the facts presented, there is no indication that decisions relating to the potential grade-separation projects currently under consideration would result in an increase or decrease of the annual gross revenues or assets and liabilities of the Councilmember's real property management business. The facts presented also provide no indication that those decisions may cause the Councilmember's business to incur, avoid, reduce, or eliminate expenses. Therefore, it is not reasonably foreseeable that those decisions would have a disqualifying effect on the Councilmember's business interest in her real property management business.

As noted above, Regulation 18702.2(b) provides that the reasonably foreseeable effect of a decision involving real property 1,000 feet or more from the official's real property interest is presumed immaterial unless there is clear and convincing evidence that the decision would have a substantial effect on the official's real property interest.

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<sup>2</sup> Regulation 18702.1(a)(4) provides that a decision's reasonably foreseeable financial effect on an official's business interest is material if the official knows or has reason to know that the business has an interest in real property and there is clear and convincing evidence that the decision would have a substantial effect on that interest. Because the Councilmember also has a real property interest in her multifamily residential rental property separate from her real property management business's real property interest in that real property, we apply Regulation 18702.2, rather than Regulation 18702.1(a)(4), to determine whether decisions relating to the potential grade-separation projects currently under consideration would have a disqualifying effect on the Councilmember's multifamily residential rental property.

The facts presented provide no indication that decisions relating to the potential grade-separation projects currently under consideration would have any financial effect on the Councilmember's real property interest in her multifamily residential rental property located 1,000 feet or more from the nearest grade-separation project currently under consideration. Therefore, it is not reasonably foreseeable that those decisions would have a material financial effect on the Councilmember's real property interest in her multifamily residential rental property.

Thus, the Act's conflict of interest provisions do not prohibit either the Mayor or the Councilmember from taking part in decisions relating to the potential grade-separation projects currently under consideration.<sup>3</sup>

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

Sincerely,

Dave Bainbridge  
General Counsel



By: Matthew F. Christy  
Counsel, Legal Division

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<sup>3</sup> This conclusion only applies to the extent that the decisions regarding the grade-separation projects are final and subsequent decisions regarding the projects will not reopen the City's initial decisions. Under Regulation 18706, subsequent decisions may not be segmented from an earlier decision in which an official is disqualified if the subsequent decisions "will effectively determine, affirm, nullify, or alter the result" of the initial decision.