



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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April 10, 2023

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500 Castro St.  
PO Box 7540  
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Re: Your Request for Advice  
**Our File No. A-23-055**

Dear Ms. Wright:

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.

## QUESTIONS

1. Under the Act, may City Councilmembers take part in deciding whether the City’s Housing Element update should include a program that would allow for an affordable housing development, given that the Councilmembers each own residential real property located less than 1,000 feet from a potential site for the development project?
2. Under the Act, may City Councilmembers take part in deciding whether the City’s Housing Element update should include a program that would eliminate residential parking minimums in certain areas of the City, some of which are located less than 500 feet away from the Councilmembers’ respective residential properties?

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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.

3. Under the Act, may City Councilmembers take part in deciding whether the City's Housing Element update should include a program that would increase density in the City's "Residential One and Two-Family Zoning District," in a potentially non-uniform manner, given that two of the officials live within such a district and one official lives less than 200 feet from such a district?

### **CONCLUSIONS**

1. Yes, at this preliminary stage of the potential affordable housing development project, where few project details are available, there are no facts indicating the decision to include such a project in the Housing Element update would impact the development potential, income-producing potential, highest and best use, character, or market value. As such, the Act does not prohibit the officials from taking part in the initial decision to include the project in the Housing Element update. However, once additional facts are available that clarify the potential financial impact on the officials' respective real properties, the officials may be disqualified from subsequent decisions relating to the project and should seek additional advice if they are uncertain of their duties under the Act.
2. No, because the Act generally disqualifies officials from taking part in decisions impacting real property located less than 500 feet from the officials' respective real property, and the "public generally exception" regarding limited neighborhood impacts where the decision would amend or eliminate laws restricting on-street parking is inapplicable.
3. The Act generally disqualifies officials from taking part in decisions impacting real property located less than 500 feet from the officials' respective real property. However, because the official with residential property located less than 200 feet away is able to establish that a significant segment of the public would be similarly affected and the impact on the official's real property would not be unique at this preliminary stage, the "public generally exception" permits that official to take part in the decision to include the zoning density increase program in the Housing Element update.

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

The City Council will consider various governmental decisions relating to the adoption of the Sixth Cycle Housing Element Update. The Housing Element provides a policy framework and implementation plan for addressing housing needs in Mountain View over the 2023 to 2031 Housing Element planning period. The Housing Element is a state-mandated component of the City's General Plan. The Housing Element includes a Housing Plan, which is a series of goals, policies, and programs to address the City's housing needs. Three of the programs that the City Council will consider would or may affect sites in close proximity to three of the city councilmembers' primary residences.

Mayor Hicks and Councilmember Abe-Koga own single-family residences in the Old Mountain View neighborhood, which is located adjacent to the Downtown Precise Plan. The Old Mountain View neighborhood is characterized as historic with one- and two-story homes on small

lots located in close proximity to a vibrant downtown commercial area, with offices, shops and restaurants. Castro Street is the main commercial street in the area, and runs roughly Northeast/Southwest. Commercial parcels generally occupy parcels immediately abutting Castro Street, with residential parcels occupying the blocks further removed from Castro Street. Downtown is a high-opportunity and resourced area with excellent access to goods and services, jobs and transit.

Councilmember Matichak owns a condominium primary residence that is located at the end of a small dead-end street, which she uses for access to her condominium, and through traffic is not possible. The condominium is located in a primarily residential neighborhood referred to generally as North Whisman, and more specifically as the Wagon Wheel neighborhood. The Wagon Wheel neighborhood is not considered as high-opportunity or resourced as Downtown, does not have good access to goods and services, and the majority of the neighborhood is more than a half-mile from the nearest transit. It is located close to the East Whisman area, which is a major job center.

#### 1. Development of Affordable Housing on City-Owned Property Downtown

The Council will consider making City-owned properties located in the Downtown available for an affordable housing development. One location that could be considered—Lot 7, currently used for surface public parking—is located in close proximity to Mayor Hicks’s and Councilmember Abe-Koga’s properties at approximately 822 feet and 888 feet, respectively. The details of any such affordable housing development are not yet known but could include a target of approximately 65 units, and a likely height of approximately three to five stories. It is unknown whether the existing public parking at the site would be replaced in the affordable housing project.

The extent of parking impacts could be significant and would be dependent upon the amount of parking provided by the development, the number of off-street public parking spaces removed for the project, and other parking policies in the downtown area. Minimal traffic impacts are anticipated, as well as only a small number of anticipated vehicle trips that would travel from Lot 7 to the street adjacent to the councilmembers’ properties. Additionally, it is unlikely the view from Mayor Hicks’s and Councilmember Abe-Koga’s residences would be affected, given their existing views are limited due to being situated in a densely developed neighborhood with flat topography and other homes immediately nearby. However, depending on the size of the development, it is possible the development could be slightly visible from a particular angle from the councilmembers’ properties. Air quality and noise impacts are not anticipated.

#### 2. Elimination of Residential Parking Minimums

Assembly Bill 2097, beginning January 1, 2023, prohibits the imposition or enforcement of minimum parking requirements on development projects located within a half-mile of a major transit stop. The Council will consider additional elimination of residential parking minimums in specified Precise Plans, including the remaining portion of the Downtown Precise Plan area that is not already covered by AB 2097. These changes are proposed at key transit-oriented areas where reduced parking may facilitate the City’s transportation goals, including traffic and greenhouse gas emissions reductions and promoting alternative modes of transportation.

There are 532 residential units (approximately one percent of residential units in the City) and 17 residential parcels located within the area of the Downtown Precise Plan where parking minimums would be eliminated beyond the AB 2097 requirement. The purpose of the elimination of parking minimums is to remove a constraint on the development of housing and to potentially assist facilitation of the City's transportation goals as noted above. While it is possible for the councilmembers' properties to experience slightly greater traffic and parking effects and likewise market value impacts due to their location on a collector street, their properties are otherwise similarly situated to other properties in similar proximity to the affected Downtown area.

Mayor Hicks and Councilmember Abe-Koga have real property located approximately 374 feet and 99 feet, respectively, from the portion of the Downtown Precise Plan that would be impacted by the Housing Element's potential elimination of parking minimums beyond what is already required by AB 2097. The number of residential units located within 374 feet of the Downtown Precise Plan is approximately two percent of the total City-wide residential units.

### 3. R2 Zone Density Changes

The Housing Element may also include a program to consider increased density to the Residential One and Two-Family Zoning District ("R2 Zone"). The City Council will consider potential increases in density for properties located in the R2 Zone. While the City Council will consider increased density throughout the R2 Zone, the City Council will also consider differentiation based upon a site's access to high-opportunity and resourced areas (as defined in the State's Affirmatively Furthering Fair Housing goals), transit, goods and services and other factors. Sites with the best access, as evaluated by the City Council, could be integrated into the multifamily (R3) rezoning process, currently in progress. This would likely result in zoning to allow 5 or more units per parcel. Other R2 sites would be rezoned to allow 4 units, consistent with Senate Bill 9 (recently enacted legislation that authorizes 4 units on single family home parcels). At this time, which sites may be zoned to allow a greater or lesser increase in density is unknown. If the program is included in the Housing Element, the item would be brought back to Council in the future for further consideration of how to increase density for the sites within the R2 Zone.

Councilmembers Abe-Koga and Matichak live within the R2 Zone, while Mayor Hicks lives within 168 feet of the R2 Zone. There are an estimated 18,453 residential real property parcels and 37,501 residential units in the City. There are 1,877 residential units and 1,252 residential parcels located within the R2 Zone. There are 4,821 residential units and 3,182 residential parcels located within approximately 168 feet of the R2 Zone.

## 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, including "[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).”

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.”

#### *Affordable Housing Development*

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 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:

- (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.

(Regulation 18702.2(a)(8).)

Based on the facts currently available, it does not appear that decisions pertaining to the affordable housing development would have a reasonably foreseeable, material financial effect on Mayor Hicks’s and Councilmember Abe-Koga’s respective properties. The decisions relating to the development of an affordable housing project would not impact the development potential or highest and best use of the councilmembers’ properties; as such, the focus is on whether the decisions pertaining to the development of an affordable housing project would change the properties’ market value, income producing potential, or character.

With respect to character, it does not appear the decision of whether to make Lot 7 available for the development of an affordable housing project would substantially alter traffic levels, intensity of use, parking, view, privacy, noise levels, or air quality. As noted above, anticipated impacts on these categories—if any—are expected to be minimal, particularly with respect to the

councilmembers' properties located more than 800 feet away and separated from Lot 7 by other streets and properties. Regarding market value and income producing potential, although the project would potentially increase the number of available residential units, Mayor Hicks's and Councilmember Abe-Koga's neighborhood is already a densely developed neighborhood, rendering it unclear that the decision would necessarily impact the market value or income producing potential of the officials' properties by increasing the supply of residential properties in the area. Accordingly, at this preliminary stage of a potential project, the Act does not prohibit Mayor Hicks or Councilmember Abe-Koga from taking part in decisions relating to the inclusion of a program in the Housing Element Update that would allow for an affordable housing development located within 1,000 feet of their respective real properties.

Note that we caution: as the project develops, additional details may become known that indicate the project would, in fact, have a reasonably foreseeable, material financial effect on one or both of the officials' properties. For example, a traffic analysis may indicate that the officials' streets will be disproportionately affected by the project, or the project could ultimately be developed in a manner significantly impacting noise levels or air quality. If and when the officials became aware of any such additional facts, they should request follow-up advice from the Commission if they have any uncertainty as to whether those facts may impact their ability to take part in subsequent governmental decisions related to the development project.

#### *Elimination of Residential Parking Minimums*

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).)

As noted above, the City Council will also consider removal of residential parking minimums in specified areas outside of where AB 2097 already requires the elimination of parking minimums. This includes a portion of the Downtown Precise Plan located approximately 374 feet from Mayor Hicks's real property and 99 feet from Councilmember Abe-Koga's real property. Given the lack of facts establishing clear and convincing evidence the decision to remove residential parking minimums will not have any measurable impact on Mayor Hicks's and Councilmember Abe-Koga's real property, the Act prohibits them from taking part in the decision unless an exception applies.

Under what is commonly referred to as the "public generally exception," discussed above, a governmental decision's financial effect on a public official's financial interest is indistinguishable from its effect on the public generally if the official establishes that a significant segment of the public is affected and the effect on his or her financial interest is not unique compared to the effect on the significant segment. (Regulation 18703(a).) A significant segment of the public includes "[a]t least 15 percent of residential real property within the official's jurisdiction if the only interest an official has in the governmental decision is the official's primary residence." (Regulation 18703(b)(2).) A unique effect on a public official's financial interest includes a disproportionate effect on the development potential or use of the official's real property or on the income producing potential of the official's real property. (Regulation 18703(c)(1).)

Approximately two percent of the City's residential units are located within 374 feet of the Downtown Precise Plan. Therefore, a decision to eliminate parking minimums within that area would not similarly impact a significant segment of the public.

Under another provision of the public generally exception, the financial effect on a public official's financial interest is deemed indistinguishable from that of the public generally if the official establishes the decision affects residential real property limited to a specific location encompassing more than 50, or five percent, of the jurisdiction's residential real properties, and the decision establishes, amends, or eliminates ordinances that restrict on-street parking, impose traffic controls, deter vagrancy, reduce nuisance or improve public safety, provided the body making the decision gathers sufficient evidence to support the need for the action at the specific location. (Regulation 18703(e)(3).)

Although more than 50 of the jurisdiction's residential real property units would be affected by a decision to eliminate parking minimums, the decision does not establish, amend, or eliminate ordinances that restrict on-street parking within the meaning of Regulation 18703(e)(3). The decision pertains to the criteria developers must satisfy when developing residential real property within the Downtown Precise Plan area and does not strictly pertain to on-street parking. For example, in *Fazely* Advice Letter, No. A-22-046, in a letter involving then-Vice Mayor Hicks, Councilmembers Abe-Koga and Matichak, and other members of the Mountain View City Council, we advised that Regulation 18703(e)(3) was applicable to a bike lane resolution that would effectuate a city ordinance prohibiting the parking of oversized vehicles adjacent to Class II bikeways. Here, in contrast, the elimination of a parking minimum as a development criteria does not necessarily amend or eliminate a *restriction* on parking, nor does it necessarily pertain to *on-street* parking. Accordingly, Regulation 18703(e)(3) does not apply and Mayor Hicks and Councilmember Abe-Koga are prohibited from taking part in such decisions.

### *R2 Zone Density Changes*

As noted above, under Regulation 18702.2(a)(7), 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).) Additionally, under Regulations 18701 and 18702(a)(2), there is a reasonably foreseeable, material financial effect on real property where the governmental decision would determine the parcel's zoning or rezoning, other than a zoning decision applicable to all properties designated in that category.

The City Council will consider increased density to the R2 Zone in its entirety, although some areas within R2 may change more than others. Mayor Hicks's real property is located within approximately 168 feet of an R2 Zone. Councilmembers Abe-Koga and Matichak are both within an R2 Zone. Lacking clear and convincing evidence the City's zoning decisions would have no measurable impact on the councilmembers' respective properties, the councilmembers are disqualified from taking part in decisions impacting R2 Zones. Further, given that some areas of the R2 Zone may be impacted differently than others, Councilmembers Abe-Koga and Matichak are alternately disqualified under Regulation 18702.2(a)(2), as the zoning decisions are not applicable

to all properties designated in the R2 category. Therefore, all three councilmembers are disqualified from taking part in the zoning decisions impacting the R2 Zone unless an exception applies.

Under the “public generally exception,” discussed above, a governmental decision’s financial effect on a public official’s financial interest is indistinguishable from its effect on the public generally if the official establishes that a significant segment of the public is affected and the effect on his or her financial interest is not unique compared to the effect on the significant segment. (Regulation 18703(a).) A significant segment of the public includes “[a]t least 15 percent of residential real property within the official’s jurisdiction if the only interest an official has in the governmental decision is the official’s primary residence.” (Regulation 18703(b)(2).) A unique effect on a public official’s financial interest includes a disproportionate effect on the development potential or use of the official’s real property or on the income producing potential of the official’s real property. (Regulation 18703(c)(1).)

Councilmembers Abe-Koga and Matichak both own residential real property within the R2 Zone. There are 1,877 residential units and 1,252 residential parcels located within the R2 Zone, comprising approximately 5% and 7%, respectively, of total Citywide residential units and parcels. Accordingly, they are unable to establish that a significant segment of the public would be affected by the zoning decisions pertaining to the R2 Zone. Therefore, the public generally exception does not apply and the councilmembers are prohibited from taking part in the R2 zoning decisions.

In contrast, Mayor Hicks’s residential real property is located within 168 feet of the R2 Zone, as are 4,821 residential units and 3,182 residential parcels, comprising approximately 13% and 17%, respectively, of total Citywide residential units and parcels. Given that more than 15% of the City’s residential parcels would be affected as residential real property located within the same distance of the R2 Zone, Mayor Hicks is able to establish that a significant segment of the public would be affected. Accordingly, if Mayor Hicks is able to establish that his real property would not be uniquely affected by the decision, the public generally exception applies.

As noted above, the R2 Zone density changes may not be uniform throughout all of the R2 Zone. The City Council will consider differentiation based upon a site’s access to high-opportunity and resourced areas, transit, goods and services and other factors. Sites with the best access, as evaluated by the City Council, could be integrated into the multifamily (R3) rezoning process, currently in progress. However, such determinations—which could ultimately result in a unique impact on Mayor Hicks’s real property—would not be made as part of the decision on whether to include the R2 Zone program in the Housing Element. Rather, if the program is included in the Housing Element, the item would be brought back to Council in the future for further consideration of how to increase density for the sites within the R2 Zone. As such, the specific decision of whether to include the R2 Zone program for the purpose of indicating the City Council’s policy direction of increasing density in the R2 Zone would not have a unique impact on Mayor Hicks’s real property and the public generally exception applies to permit Mayor Hicks to take part in the decision.

Note that we caution, however, that Mayor Hicks may be prohibited from future decisions pertaining to the R2 Zone program depending on the circumstances and facts available at that later date.



Finally, as noted in your request for advice, Regulation 18706 provides that an agency may segment a decision in which a public official has a financial interest, to allow participation by the official, provided all of the following conditions apply:

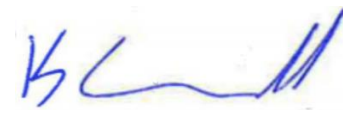
- (1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying financial interest;
- (2) The decision in which the official has a financial interest is segmented from the other decisions;
- (3) The decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official's participation in any way; and
- (4) Once the decision in which the official has a financial interest has been made, the disqualified public official's participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified.

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

Sincerely,

Dave Bainbridge  
General Counsel

By:



Kevin Cornwall  
Counsel, Legal Division

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