



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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June 29, 2023

Donna Mooney
City Attorney
City of Pittsburg
65 Civic Avenue
Pittsburg, CA 94565

Re: Your Request for Advice
Our File No. A-23-091

Dear Ms. Mooney:

This letter responds to your request for advice on behalf of City of Pittsburg (“City”) Mayor Shanelle Scales-Preston and Councilmember Jelani Killings 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.

QUESTIONS

1. Does Mayor Shanelle Scales-Preston have a prohibitive financial interest in the City Council’s decision to introduce an ordinance approving the Objective Design Standards 2023 (“ODS 2023”), adding language to the City’s Municipal Code to establish objective design standards, and amending the Zoning Map with the overlay for the standards due to her residential real property located within 500 feet of proposed Transect Neighborhood 3 (“T3N”) subject to the ODS 2023?

2. Does Councilmember Jelani Killings have a prohibitive financial interest in the ODS 2023 decision, where he resides under a one year lease in property located within the proposed Transect Neighborhood 4 (“T4N”), subject to the ODS 2023?

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.

CONCLUSIONS

1. Yes, because Mayor Scales-Preston's residential property is located within 500 feet of the T3N zone and there is no clear and convincing evidence that the ODS 2023 decision, which will encourage and discourage particular types of the multi-family and mixed-use housing developments in the T3N zone, will have no measurable impact on the official's property, she is prohibited from participating in the decision. (Regulation 18702.2(a)(7).)

2. Yes, because it is reasonably foreseeable that the ODS 2023 decision would increase or decrease the potential rental value of Councilmember Killing's leased property by encouraging or discouraging particular types of multi-family and mixed-use housing developments applicable to his leased property parcel and in the area, he is prohibited from participating in the decision. (Regulation 18702.2(c)(2).)

FACTS AS PRESENTED BY REQUESTER

Staff and a City consultant have drafted proposed "objective design standards" applicable to affordable housing projects as required by state law. The purpose of the state law is to facilitate the production of affordable housing. In response to our request for clarification, you explained that the ODS 2023 is intended to ensure there are no subjective standards or room for discretionary judgments in the approval process for affordable housing projects, such as multi-family affordable housing or mixed use developments with affordable housing. The concept is that objective standards will facilitate shorter approval time. It does not expressly change the possible use of any property, the zoning, or the allowable density.

The proposed framework for the City is a draft overlay of "transect zones" or "ODS zones" to the Zoning Map for the City. The City Council will consider whether to introduce an ordinance approving Objective Design Standards 2023 ("ODS 2023"), adding language to the Municipal Code to establish objective design standards, and amending the Zoning Map with the overlay for the standards. You provided the May 2023 Final Draft of the ODS 2023, along with your request. The ODS 2023 sets forth requirements for height, lot coverage, setbacks, massing, and other details.

For a particular transect zone, an objective design standard overlay would govern the redevelopment of the property if a project was submitted to the City of under Senate Bill 35 of 2017, Senate Bill 330 of 2019, or the Housing Accountability Act.² You confirmed by email that the ODS 2023 would apply to projects that are all or partly (such as mixed use) affordable housing. For these types of projects, the ODS 2023 replaces the City's current procedures for reviewing discretionary applications. Staff wants to be clear that the proposed transect zones are only identified as such because the zoning and general plan currently permit or conditionally permit multi-family and/or mixed-use development there. Areas that are not proposed as transect zones do not permit or conditionally permit multi-family housing or mixed-use development. Staff

² SB 35 of 2017 relates to a streamlined approval process for affordable multifamily residential housing under Section 65913.4. SB 330 of 2019, the "Housing Crisis Act," relates to the suspension of certain restrictions of new housing developments and expediting of permitting by local government for housing in certain areas. The Housing Accountability Act ("HAA") Section 65589.5 relates to restrictions on a local government's ability to take action against housing development projects.

determined that the proposed transect zones affect less than 15 percent of all residential property in the City.

Additionally, you confirmed that ODS 2023 applies to the remodel or tear-down of existing residential housing for redevelopment and applies if the proposed project involves a single-family home in a zoning designation that permits or conditionally permits multi-family housing (two or more units).

Mayor Shanelle Scales-Preston

Mayor Shanelle Scales-Preston owns residential property occupied by a relative located within 500 feet of proposed transect zone T3N. You confirmed by email that the Mayor is not receiving rent and has not received rent from this relative or another tenant in the 12 months prior to the decision's anticipated date.

The Final Draft of the ODS 2023 states the T3N intent is "a walkable neighborhood environment of small-to-medium footprint, low-intensity housing choices, supporting and within short walking distance of neighborhood-serving retail and services." It is proposed to allow for the following building types: "Duplex Side-by-Side," "Duplex Stacked," "Cottage Court," and "Townhouse." The transect zone allows for a maximum of three stories, 35 feet to the highest eave/parapet, and 40 feet in overall maximum height. The zone requires a minimum front and street-side setback from the public right of way of 15 feet and maximum setback of 25 feet, 7-foot setback from a nonstreet side, and 20 feet from a non-street rear. Other development regulations are applicable to the T3N, such as allowed non-residential uses.

There is no undeveloped parcel within 1,000 feet of the Mayor's property. In response to our request for additional information, you provided that no projects are proposed or anticipated for the proposed T3N zone adjacent to the Mayor's property. Additionally there are no particular tear-down or remodel projects that would be impacted by the ODS anticipated in the area near the Mayor's real property because the neighborhood is built-out and the City has not been notified of any interest by property owners or developers in redevelopment, or in increasing the number of units on the parcels there.

Councilmember Jelani Killings

Councilmember Jelani Killings has a one-year lease of his residence in an apartment complex located within the proposed transect zone T4N. The Final Draft of the ODS 2023 states the T4N intent is a "walkable neighborhood of small to medium footprint, moderate intensity housing choices, supporting and within short walking distance of neighborhood-serving retail and services." This ODS 2023 transect zone would allow for the following building types: "Multiplex small," "Townhouse," and "Courtyard Building Small" for a maximum of four stories, 45 feet to the highest eave/parapet, and 50 feet in overall maximum height. The zone requires a 40-foot minimum

front setback from the public right of way, 20-foot setback from any corner-side right of way, 5-foot setback from a non-street side, and 5 feet from a non-street rear.³

As to the potential impact of the ODS decision on Councilmember Killing's neighborhood, you note that there is no undeveloped parcel within 1,000 feet of the official's real property interest. In response to our request for additional information you stated by email that the City does not know whether the imposition of objective standards for the T4N zone will incentivize or encourage more units at the apartment complex where Councilmember Killings lives. Additionally, you state that there are no projects anticipated by the City in the area near Councilmember's leasehold interest because the neighborhood is built-out and the City has not been notified of any interest by property owners or developers in redevelopment, or in increasing the amounts of units on the parcels there. The apartment complex where the Councilmember resides is surrounded by a hotel, a middle school, and a permanent stormwater basin.

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 and include:

- Any real property in which the public official has a direct or indirect interest worth more than \$2,000 or more. (Section 87103(b)).
- A business entity interest, where an official has a direct or indirect investment of \$ 2,000 or more in a business entity (Section 87103(a)); or in which the official is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d)).
- An interest in a source of income, 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. (Section 87103(c).)

Both officials have identified a real property interest related to the ODS 2023 decision. Mayor Scales-Preston's real property is currently occupied by a relative and the Mayor has not received rent from this relative or another tenant in the 12 months prior to the decision's anticipated date. To the extent that Mayor Scales-Preston receives income from this property in the future, she

³ The specific transect zone area that the Councilmember resides within contains a relatively large parcel: greater than five acres in size and more than 800 feet in width. For that reason, the ODS 2023 has distinct criteria for large parcel development which includes the following: 10 percent of development dedicated to civic space, connectivity to existing surrounding roadways, prohibition of the creation of dead-end streets in general, among other large site details.

will have a business interest in her rental business and a source of income interest in any tenant who pays or promises to pay \$500 or more in value within 12 months of the decision. As the facts indicate that the relative is occupying the property, rather than a paying tenant, we do not further analyze the rental business or tenant as a source of income interest.⁴

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, 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).)

Different standards apply to determine whether a reasonably foreseeable financial effect on an interest will be material depending on the nature of the interest. Regulation 18702.2 defines when a financial effect of a government decision on real property is material.

Mayor Shanelle Scales-Preston

For a decisions involving property, other than a leasehold interest, located 500 feet or less from the property line of the official's parcel, Regulation 18702.2(a)(7) provides that the reasonably foreseeable financial effect of a governmental decision on the official's property is material 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).)

The facts provided do not present clear and convincing evidence that the ODS 2023 decision will not have any measurable impact on the official's residential property. Approval of the ODS 2023 will subject affordable housing projects in the near-by T3N zone to particular objective design standards with the intent of facilitating shorter approval times. Although it is presented that the decision "will not change the allowable use" of the neighboring properties in the T3N zone, an area that already permits or conditionally permits multi-family housing or mixed-use development, the ODS will set what type of multi-family or mixed-use projects will be encouraged in the adjacent zone while discouraging other types of multi-family or mixed-use projects. For example, in the T3N zone the proposed ODS 2023 would encourage "Duplex Side-by-Side," "Duplex Stacked," "Cottage Court," and "Townhouse" at a maximum of three stories. In comparison, the T4N zone proposes four-story multifamily projects of a different character, with a "moderate intensity." The decision will have an impact on the future development and intensity of use of the near-by T3N zone, which will in turn affect the housing market as well as the character of the immediate area. The lack of current plans known to the City for development does not negate that the decision

⁴ Regulation 18703 provides that 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 the official's interest is not unique compared to the effect on the significant segment. The facts indicate the criteria in Regulation 18703 is not met, and we do not further examine this exception for either official.

intends to change the housing development standards, and thus the housing market, for the T3N zone. Therefore it is not established that the decision will have no measurable impact on the official's property and the presumption, that the reasonably foreseeable financial effect of the ODS 2023 decision on the Mayor's residential property will be material, is not rebutted.

Councilmember Killings

For a leasehold interest in real property, Regulation 18702.2(c) provides that the effect of a decision is material as to if the decision will: (1) change the termination date of the lease; (2) increase or decrease the potential rental value of the property; (3) change the official's actual or legally allowable use of the real property; or (4) impact the official's use and enjoyment of the real property.

Approval of the ODS 2023 will set design standards to streamline the development of affordable housing development projects, including remodels and tear-down projects, in his apartment's proposed T4N zone. The T4N zone would allow for moderate intensity housing developments. There is no indication from the facts that the ODS 2023 decision will change the termination date of the official's lease, change the allowable use of the property as multi-family housing, or impact the official's use and enjoyment of the property. However, it is reasonably foreseeable that the ODS 2023 decision would increase or decrease the potential rental value of the official's property because the decision will impact the encouragement of a particular type of intensity of housing developments applicable to Councilmember Killing's leased property and the surrounding area and thus would affect the housing market and character of the area.

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

Sincerely,

Dave Bainbridge
General Counsel

L. Karen Harrison

By: L. Karen Harrison
Senior Counsel, Legal Division

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