



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3050 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

August 18, 2023

Christine Dietrick
City Attorney
City of San Luis Obispo
990 Palm Street
San Luis Obispo, CA 93401-3249

Re: Your Request for Informal Assistance
Our File No. I-23-118

Dear Ms. Dietrick:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹ Because your request does not concern a specific governmental decision, we are treating it as a request for informal assistance.²

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

Under the Act, may San Luis Obispo Vice Mayor Jan Marx and Assistant City Attorney Markie Kersten take part in governmental decisions relating to the construction of the Prado Interchange at interstate Highway 101 (“Project”), where each official lives in a neighborhood development that is subject to an assessment for the Project, would be more directly connected to the City by the interchange, but whose parcels are further than 1,000 feet from the Project site?

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.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

CONCLUSION

Whether an official is disqualified from a governmental decision is a determination that can be made only in relationship to a specific governmental decision. In making this determination, an official must first identify the official's interests and determine if any interest is explicitly involved in the decision. In this case you have identified interests in residential property but only general decisions that may come before the city. Accordingly, we cannot determine if the interests identified are explicitly involved in the decision and can only caution that an official is generally disqualified from any decision in which they official has an interest in property explicitly involved. Should you need further assistance determining if any interest is explicitly involved in a specific decision before the City, you should seek additional advice identifying the decision. However, we can also generally advise that if the only interest implicated by a decision is the official's interest in real property, which is not explicitly involved in the decision, any financial effect on the official's property located more than 1,000 feet from the property subject to the decision is presumed not material under Regulation 18702.2(b) absent clear and convincing evidence of a substantial effect on the property. We recommend you seek further advice as needed for specific decisions.

FACTS AS PRESENTED BY REQUESTER

Jan Marx is the City Council Vice Mayor for the City of San Luis Obispo. Vice Mayor Marx was elected to the City Council in November 2020. Vice Mayor Marx lives in the San Luis Ranch community, a neighborhood still being developed.

The City is in the preliminary stages of constructing an interchange at interstate Highway 101 in an area close to Vice Mayor Marx's home (the "Prado Interchange" or "Project"). The Project is considered an important regional transportation facility, on which the City is working closely with CalTrans and the regional transportation agency, SLOCOG. In addition to local funds, the Project funding plan currently includes \$6 million in regional funds committed by SLOCOG, a \$1.4 million contribution already provided by the County of San Luis Obispo, and a fair share financial contribution by the San Luis Ranch developer. The developer will be funding a portion of those revenues via bond sales and Community Facilities District ("CFD") revenues, which involve taxation of property owners throughout the development.

There is a current CFD through which current residents are taxed that was established by the developer prior to occupancy of the Project. Any new or increased CFD taxes would require approval by 2/3 of the registered voters in the district. Changes to the CFD, including a new or increased special tax, would proceed pursuant to the terms of the Mello-Roos Act, which requires a petition process, followed by the City Council's consideration whether to place the issue on the ballot. However, the current CFD tax already in place is designed to include funding for facilities, system improvements, utility improvements, and other improvements for the development. Under the rate and method of apportionment, the tax is adjusted annually to cover these and other authorized costs (e.g., administrative costs), without additional City Council action. In a follow-up email, you included a copy of the City Council's 2019 resolution authorizing the levy of the current CFD tax, which lists "Prado Road/US 101 Overpass and North Bound Lanes," among other transportation improvements, as an authorized facility the CFD may fund.

The City will be seeking additional grant funding through regional, state and federal infrastructure funding programs. The Project has been a part of the City's General Plan and Land Use and Circulation element for several decades.

Vice Mayor Marx's home is in the San Luis Ranch community and located approximately 1,140 feet away from the Project. San Luis Ranch is located on the western side of Highway 101. The interchange will connect the western side of the freeway—which contains, in that area, San Luis Ranch, two popular shopping centers, a postal office, and an open space recreational area—to the eastern side of the freeway—which contains, in that area, retail, commercial, and industrial buildings as well as the City of San Luis Obispo Public Works Corporation Yard, San Luis Obispo Regional Transit Authority (RTA) depot, the City's Water Resources Recovery Facility, and a homeless services center. The next nearest overpass over Highway 101 to the north is approximately 0.64 miles, and, to the south, approximately 0.95 miles. Construction of the Project is expected to begin in 2027.

Conceptual renderings and aesthetic concepts for the Project have been completed. The City has obtained a traffic operations analysis report (TOAR), intersection control evaluation (ICE), and vehicle miles travelled (VMT) memo. An Initial Study with Proposed Mitigated Negative Declaration (IS-MND) was prepared for the Project in June 2022. All necessary requests for proposals (RFPs) for the Project were authorized by the City Council prior to the commencement of Vice Mayor Marx's term.

Vice Mayor Marx is seeking formal advice whether she may participate in her official capacity on items of business related to construction of the Prado Interchange that will come before the Council over the next few months and years. It is anticipated that, going forward, Council will be asked to decide on matters related to land acquisition, recommendations for design modifications proposed by a third-party Value Analysis, selecting between interchange design alternatives, and recommending certification of the IS-MND, among others. The City foresees certain contracts related to the Project, including a contract for a final design phase consultant—the RFP for which is expected to be released in 2023—and possibly additional contracts for real property/land acquisition by the City in order to facilitate construction of the interchange. The next Council action related to the Project is the selection of an interchange design from proposed alternatives, which is expected to occur in September 2023.

Additionally, Assistant City Attorney Markie Kersten also lives in the San Luis Ranch community, approximately 1214 feet away from the Project. Accordingly, you are also requesting advice as to whether Assistant City Attorney Kersten may offer legal advice and opinions to City staff and/or Council on matters related to this Project.

ANALYSIS

The Act

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. (Section 87103.) Those specified economic interests include "[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).) You have identified that Vice Mayor Marx and Assistant City Attorney Kersten each have a financial interest in their real property parcel located in the San Luis Ranch community.

No specific decisions with accompanying facts as to the impact or lack of impact on either official's real property are provided for a full analysis. The following is provided for general information.

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)."

Regulation 18702.2(a)(1)-(6) sets forth materiality standards for real property explicitly involved in a decision. It provides:

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:

- (1) Involves the adoption of or amendment to a development plan or criteria applying to the parcel;
- (2) Determines the parcel's zoning or rezoning, other than a zoning decision applicable to all properties designated in that category; annexation or de-annexation; inclusion in or exclusion from any city, county, district, or local government subdivision or other boundaries, other than elective district boundaries;
- (3) Would impose, repeal, or modify any taxes, fees, or assessments that apply to the parcel;
- (4) Authorizes the sale, purchase, or lease of the parcel;
- (5) Involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use of or improvement to the parcel or any variance that changes the permitted use of, or restrictions placed on, the property; or
- (6) Involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the parcel will receive new or improved services that provide a benefit or detriment disproportionate to other properties receiving the services.

(Regulation 18702.2(a)(1)-(6).)

You have indicated that, going forward, the City Council will be asked to decide on matters related to land acquisition, recommendations for design modifications proposed by a third-party Value Analysis, selecting between interchange design alternatives, and recommending certification of the IS-MND, among others. Without a specific governmental decision to analyze, we cannot definitively state whether either official would be prohibited from taking part in any of the above types of decisions. If, for example, facts suggested that a particular decision concerning construction of the Project would provide a disproportionate benefit or detriment to either official, then Regulation 18702.2(a)(6) may be applicable, but without additional facts to apply to a specific governmental decision, it is not feasible to advise on the various scenarios in which Regulation 18702.2(a)(1) through (6) may be implicated.

Where 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."

For a decision related to the Project site that does not implicate Regulation 18702.2(a)(1) through (6), the applicable real property materiality standard is set forth in Regulation 18702.2(b). This provision states that the financial effect of a governmental decision on a parcel of real property in which an official has a financial interest involving property 1,000 feet or more from the property line of the official's property is presumed not to be material. This presumption may be rebutted with clear and convincing evidence the governmental decision would have a substantial effect on the official's property. (Regulation 18702.2(b).)

Both Vice Mayor Marx and Assistant City Attorney Kersten have real property interests in their residences, which are located more than 1,000 feet from the Project site. Accordingly, decisions on the Project that do not explicitly involve the officials' properties, per Regulation 18702.2(a)(1) through (6), are presumed to not have a material effect on each respective property, so long as there are no facts that would establish clear and convincing evidence that a governmental decision concerning the Project would have a substantial effect on either official's real property. We recommend that you seek additional advice, as needed, for a particular decision.

Additionally, you note that the City foresees certain contract decisions as related to the Project that raise the additional application of Section 1090 and its prohibitions on officials with a financial interest participating in the making of the contract. Without specific contracts to consider, however, we are unable to advise on Section 1090. We recommend that you seek additional advice as needed for a decision involving a particular contract when more information is available.

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

KMC:aja