



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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March 4, 2024

Brian A. Pierik
City Attorney
City of Carmel by the Sea
2310 East Ponderosa Drive - Suite 25
Camarillo, California 93010-4747

Re: Your Request for Advice
Our File No. A-24-021

Dear Mr. Pierik:

This letter responds to your request for advice 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.

QUESTION

Does the Act prohibit Mayor Dave Potter, Mayor Pro Tem Bobby Richards, or City Councilmember Jeff Baron from participating in the City Council decision regarding the Wave Astound Broadband Fiber Optic Project, where each official has a real property interest located within 500 feet of the nearest point of the fiber optic line installation?

CONCLUSION

No. There is clear and convincing evidence that the decision will not have any measurable impact on the officials’ real property, and therefore, it is not reasonably foreseeable that the decision would have a material financial effect on any of the officials’ real property interests.

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.

FACTS AS PRESENTED BY REQUESTER

Wave Astound Broadband, also known as Astound Broadband, LLC, is the project applicant for a proposed Fiber Optic Project (“Project”) in the City. Wave Astound Broadband is a private utility, authorized by the state as both a video/cable TV services provider and a telephone company, with a certificate of public convenience and necessity issued by the California Public Utilities Commission. Wave Astound Broadband intends to use its fiber network to offer business and enterprise-class broadband internet and telephone.

The bulk of the Project consists of installing a continuous fiber optic cable (also referred to as “fiber optic line”) attached to existing PG&E power poles in the northern and central portions of the City and installing a segment of fiber optic conduit below San Carlos Street between Ocean and Seventh Avenues. Additionally, Wave Astound Broadband will install up to nine support anchors and guy wires to reinforce specific existing power poles. As a part of this Project, Wave Astound Broadband is requesting the City authorize the issuance of an Encroachment Permit with Special Conditions of Approval.

The Project is estimated to take two to three months and “have minimal disruption to the community.” Carmel is a small city, one square mile in size, and the fiber optic line will be installed throughout a large portion of the City. There are no anticipated visual impacts because the fiber optic line will be installed on existing PG& E infrastructure, or below ground. Most commercial and residential properties in the City will be eligible to access the fiber optic services if they choose to subscribe.

Mayor Potter’s primary residential real property is located 147 feet from the nearest point of the Project’s fiber optic line. Mayor Pro Tem Richards owns two parcels of real property, his primary residence, and a rental duplex, located 150 and 114 feet from the nearest point of the Project’s fiber optic line. Councilmember Baron’s primary residential real property is located 436 feet from the nearest point of the Project’s fiber optic line. None of the parcels is located on the street where the line will be installed, and each parcel is separated from the installation area by at least one parcel.

You estimate that of the 3,275 parcels in the City, 1,212 (37 percent) are located within 500 feet of the Project, and 1,009 (31 percent) of these parcels are residential.

ANALYSIS

The Act’s conflict of interest provisions prohibit any public official from making, participating in making, or otherwise using their official position to influence a governmental decision in which the official has a financial interest. (Section 87100.) A public official has a financial interest in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on one or more of the public official’s interests specified in Section 87103. (Section 87103; Regulation 18700(a).) These specified interests include any real property in which the public official has a direct or indirect interest worth \$ 2,000 or more. You have identified that Mayor Potter has a real property interest in his residential home, Mayor Pro Tem Richards has a

real property interest in his residential home and in his duplex, and Councilmember Baron has a real property interest in his residential home.

The specified interests in Section 87103 also include any business entity in which the official has a direct or indirect investment of \$2,000 or more, and any source of income aggregating \$500 or more promised or received by the official within 12 months prior to the decision. Mayor Pro Tem Richards has also identified an interest in his duplex as a rental business and in his tenants as sources of income. No additional facts were provided in regard to Mayor Pro Tem Richards' rental business or his tenants as a source of income, and we do not further analyze these interests.²

A financial effect is presumed reasonably foreseeable where the official's financial interest is explicitly involved as a named party in, or subject of, the decision. (Regulation 18701(a).) Where the financial interest is not explicitly involved in the decision, the financial effect is reasonably foreseeable if it can be recognized as a realistic possibility, more than hypothetical or theoretical. (Regulation 18701(b).)

Regulation 18702.2 provides the materiality standards for determining the materiality of a financial effect on an interest in real property. Relevant to these facts, Regulation 18702.2(a) states that the reasonably foreseeable financial effect of a government decision on a real property parcel is material when the decision:

(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;

(7) 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).)

The decision to authorize the Encroachment Permit for the Project will allow for "business and enterprise-class" broadband internet and telephone throughout the City, available for those who choose to subscribe to the Wave Astound Broadband service, a private utility provider. The materiality presumption in Regulation 18702.2(a)(6) does not apply, as the facts indicate the new or improved service will be widely available, and, therefore, will not provide a benefit or detriment to the officials' properties disproportionate to other properties receiving the service.

However, each official's real property is located within 500 feet of the Project's fiber optic line, and we examine the application of Regulation 18702.2(a)(7). The facts state that the fiber optic

² Please seek additional advice in the event that the decision implicates his rental business or tenants.

line will be placed on the existing PG&E infrastructure or below ground. Besides the two to three months of construction that will add the line, anchors, and supporting guy wire, the Project will have minimal or no visible impacts on the area. None of the officials' parcels are located on the street where the line will be installed, and each parcel is separated from the installation area by at least one parcel. While fiber optics services are generally understood to provide improved internet and phone services, as noted above, the services will be available to most City properties. The proximity of the officials' parcels is not a factor, and the installation is not likely to impact the value or desirability of the officials' property. As a result, the facts provide clear and convincing evidence that the decision will not have any measurable impact on any of the officials' property.

Under these facts, we advise that it is not reasonably foreseeable that the Project decision would have a material financial effect on the officials' real property interests. Additionally, we note that any effect on the officials' real property would not be distinguishable from its effect on the public generally. The facts indicate that a significant segment, 37 percent of City parcels, including 31 percent residential, of the City's real property parcels are located within 500 feet of the Project installation area, and that any effect on the officials' real property would not be unique compared to the effect on the significant segment.³ (Section 87103, Regulation 18703.) Regulation 18703(b) provides that a "significant segment" is at least 25 percent of all real property within the official's jurisdiction, applicable to Mayor Pro Tem Richards, who owns two parcels of real property, and at least 15 percent of residential property in the jurisdiction where the only interest the official has in the decision is their primary residence, applicable to Mayor Potter and Councilmember Baron. Regulation 18703(c) sets forth the factors for when the effect of a decision on an official's interest is "unique." None of the factors are indicated here.

If you have other questions on this matter, please contact me at KHarrison@fppc.ca.gov.

Sincerely,

Dave Bainbridge
General Counsel

L. Karen Harrison

By: L. Karen Harrison
Senior Counsel, Legal Division

KH:aja

³ As noted above, no facts were provided regarding Mayor Pro Tem Richards' rental business and tenants, and we do not analyze any unique effect for these interests. Please seek additional advice as needed in regard to these interests.