



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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January 24, 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 Nos. A-24-001, A-24-002, and A-24-003<sup>1</sup>**

Dear Mr. Pierik:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”) and Government Code Section 1090, et seq.<sup>2</sup> Please note that we are only providing advice under the Act’s conflict of interest provisions and Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest.

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.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General’s Office and the Monterey County District Attorney’s Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice “is not admissible in a criminal proceeding against any individual other than the requestor.” (See Section 1097.1(c)(5).)

## QUESTIONS

1. Does the Act or Section 1090 prohibit Mayor Dave Potter or Mayor Pro Tem Bobby Richards from participating in the City Council’s decision to enter into a Mills Act contract for the

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<sup>1</sup> As these separate requests contain similar facts and require application of the same principles of law, we have consolidated your requests in this response.

<sup>2</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.

Cypress Inn property, which is located within 361 feet of real property owned by Mayor Potter and within 375 feet of real property owned by Mayor Pro Tem Richards?

2. Does the Act or Section 1090 prohibit Councilmember Jeff Baron from participating in the City Council's decision to enter into a Mills Act contract for the Cosmas House property, which is located within 245 feet of real property owned by Councilmember Baron?

## **CONCLUSIONS**

1. Under the Act and based on the facts provided, it is reasonably foreseeable that the Mills Act decision regarding the Cypress Inn would have a material financial effect on Mayor Potter's and Mayor Pro Tem Richards's respective real property interests located less than 500 feet from the Cypress Inn. Mayor Potter and Mayor Pro Tem Richards may not participate in the Cypress Inn decision. Under Section 1090, neither official's real property interest constitutes an interest in the contract for purposes of Section 1090, and the City is not prohibited from entering into the Mills Act contract.

2. Under the Act and based on the facts provided, it is reasonably foreseeable that the Mills Act decision regarding the Cosmas House would have a material financial effect on Councilmember Baron's interest in his real property located less than 500 feet from the Cosmas House. Councilmember Baron may not participate in the Cosmas House decision. Under Section 1090, his real property interest does not constitute an interest in the contract for purposes of Section 1090, and the City is not prohibited from entering into the Mills Act contract.

## **FACTS AS PRESENTED BY REQUESTER**

The City of Carmel-by-the-Sea ("City") is considering whether to enter into Mills Act contracts with several property owners. The process involves the owner of a qualified property submitting a Mills Act Contract application to the City. The application is first processed by the Historical Resources Board ("HRB"), which makes a recommendation to the City Council. The City Council then makes the final decision as to whether to enter into a Mills Act contract with the applicant. The City's Municipal Code sets forth criteria for the HRB and the City Council on whether to agree to enter into a Mills Act contract. This criteria includes that the property be designated as a historic resource by the City and listed on its Register.

If the City enters into a Mills Act contract with a property owner, the property owner agrees to make repairs to the property and maintain its historical status in exchange for a reduction in property taxes. In this scenario, the City sustains a revenue loss for its portion of the property tax which was reduced. Other taxing agencies (such as schools) that rely on the property tax also see a reduction in their share of the property tax. Even if multiple potential Mills Act contracts appear on a single City Council agenda, the City Council considers approval of each potential Mills Act contract independently, as separate decisions. A decision on one contract is not dependent on, nor does it affect any other decision on another potential Mills Act contract. The City's Staff Report for this application states that the City Council is limited to 15 Mills Act contracts that can be approved in any three-year calendar period. No applications were approved in 2020 or 2021, four were approved in 2022, one was approved in 2023, and four applications are currently in review.

### *Cypress Inn*

One property under consideration is the Cypress Inn, a small hotel with historic, architectural, and design significance. The Staff Report states that the Mills Act rehabilitation and maintenance plan for the Cypress Inn will include interior building system upgrades (such as plumbing, elevators, and fire alarm upgrades), structural upgrades to the plaster, and exterior upgrades (such as painting, and window, roofing, termite repairs). Additionally, the building's exterior gate, stairs, walkways, and door landings would be rehabilitated. You note that the nature of a Mills Act contract is that the repairs and rehabilitation are to maintain and preserve the historic buildings and do not contemplate significant alterations or additions.

Mayor Dave Potter's personal residence that he owns is located 361 feet from the Cypress Inn and is separated from the Inn by a city block. Mayor Pro Tem Richards owns a duplex that he rents to tenants, located 375 feet from the Cypress Inn. Mayor Pro Tem Richards' duplex is separated from the Cypress Inn by a city block.

### *Cosmas House*

Another property under consideration is the "Cosmas House," a residence built in 1961 and designed by architects Albert Henry Hill and John Kruse. The house has been determined significant as a good example of the Bay Region Modern/Second Bay Region style designed by Hill and Kruse; both the style and the architects are recognized in the Carmel Historic Context Statement. According to a Staff Report on the property, the applicant's rehabilitation and maintenance plan covers a period of 10 years from 2024 through 2033 and estimates \$87,300 in work projects. The plan includes structural deck/roof wood post repair or replacement, a new roof, staining the exterior deck and siding, repainting door and window trim, repainting beams and eaves, termite testing and repairs, landscape maintenance, and sump cleanout/maintenance. The Staff Report notes, "[w]hile the repair of the structural wood post qualifies as rehabilitation, the majority of the planned work items qualify as maintenance, rather than rehabilitation."

Councilmember Jeff Baron owns real property—his home and primary residence—located approximately 245 feet from the Cosmas House.

### *Additional Information*

You provided a statement from Reed Bartron, a state residential certified appraiser, with experience in residential appraisals in the Monterey County area. His letter states that the appraisal process for residential property would consider the property's location, parcel, size, views, quality, condition, living area and room count. It would not consider whether a neighboring property was near a property under a Mills Act contract. You additionally provided a 2017 study, "Estimating the Value of the Historical Designation Externality" by Andrew Narwold which attempts to quantify the impact of a historically designated property with a Mills Act contract on the value of near-by non-historic houses in the City of San Diego. The study concludes:

The results presented in this paper suggest that the loss in property tax revenue is more than compensated for by a general increase in the property value of other houses in the neighborhood. The value associated with the proximity of a historically significant

house in the neighborhood varies with distance. For distances up to 250 feet, a historical house adds 3.7% to a house's value with this amount decreasing to 1.6% for distances of 250 to 500 feet.

The City has a population of approximately 3,196. It is only one square mile in size and is often referred to as a village. It is a tourist destination for visitors from around the world, with 40 boutique hotels and inns, 60 restaurants, nearly 100 art galleries, and hundreds of shops. It has 3373 single-family housing units, and 1.2 percent of the residential real property in the City is within 500 feet of the Cypress Inn and of the Cosmas House.

On October 3, 2023, the City Council held preliminary discussions on a potential Mills Act contract for the Cypress Inn and for the Cosmas House. Mayor Potter, Mayor Pro Tem Richards, and Councilmember Baron each recused himself from these discussions due to potential conflicts of interest, and to allow time to request advice from the FPCC on the matter.

## ANALYSIS

### *The Act*

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. (Section 87103; Regulation 18700(a).) Section 87103 defines a financial interest to 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 duplex, and Councilmember Baron has a real property interest in his residential home. Mayor Pro Tem Richards also has an interest in his duplex as a rental business and in his tenants as sources of income.<sup>3</sup>

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).) The decisions at issue do not explicitly involve any of the officials' real property interests, and thus the latter standard applies.

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)(7) states that the reasonably foreseeable financial effect of a government decision on a real property

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<sup>3</sup> Section 87103 defines a business interest and a source of income interest. However, no additional facts were provided in regard to Mayor Pro Tem Richards' rental business or source of income in his tenants and due to our conclusion that he has a disqualifying interest due to his real property interest, we do not further analyze these interests.

parcel is material where the 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.”

Here, Mayor Potter and Mayor Pro Tem Richards each own real property within 500 feet of the Cypress Inn, and Councilmember Baron’s real property is within 500 feet of the Cosmas House. Therefore, under Regulation 18702.2(a)(7), the respective decisions will have a material financial effect on their properties unless there is clear and convincing evidence that the decision will have no measurable impact on their properties. We find that the facts provided do not rebut this presumption.

The facts indicate that the Cypress Inn and Cosmas House are of historical significance to the small City of Carmel, and each requires significant repairs. The decision to allow each property to enter into a Mills Act contract will provide the property’s owners with funds for maintenance and repairs and obligate them to make these repairs. You provided a study that concludes Mills Act contracts return a benefit to the community through a general increase in property values in the neighborhood and that the benefit is greatest to those properties in close proximity. While the study specifically examined San Diego, the study appears relevant to the decisions in question and the City of Carmel. Indeed, due to the fact that the City is only one square mile, the presence of well-maintained properties in one’s immediate area would seem to have a more significant impact on the market value of nearby properties.

In addition to the study, you provided a letter from a property appraiser, Reed Bartron, that states proximity to a property that has been granted a Mills Act contract is not something that is considered when appraising properties and concludes that the Cypress Inn or the Cosmas House being a Mills Act property will not have any impact at all on the relevant officials’ properties. In general, we have found appraisals are not determinative of conflict of interest issues. (See *Leishman* Advice Letter, No. A-22-059.) Here, the appraisal process letter does not address the potential impact on the official’s real property interest due to the condition of a nearby property, or how that property’s condition may be implicated by its inclusion in a Mills Act contract. Additionally, we note that the appraisal letter states that location and views are considered in determining market value, and these factors would include the general condition and possible state of repair or disrepair of a nearby property. Therefore, the facts do not provide clear and convincing evidence that the Mills Act contract decisions will have no measurable impact on the officials’ properties. Due to their disqualifying interests, Mayor Potter and Mayor Pro Tem Richards may not participate in the Cypress Inn decision, and Councilmember Baron may not participate in the Cosmas House decision.

### *Section 1090*

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is “concerned with any financial interests, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of” their respective agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.” (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) Section 1090 is a separate body of law and requires a

separate analysis related to whether an official is “financially interested” in the making of a contract.

A contract that violates Section 1090 is void, regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.) An officer is conclusively presumed to be involved in the making of agency contracts when the officer is a member of a board or commission that has the authority to execute the contract at issue. (*Id.* at pp. 645 and 649.) Significantly, when Section 1090 applies to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain; the entire governing body is precluded from entering into the contract. (*Id.* at pp. 647-649.)

As concluded above, Mayor Potter and Mayor Pro Tem Richards are prohibited from taking part in the Cypress Inn decision, and Councilmember Baron is prohibited from taking part in the Cosmas House decision under the provisions of the Act. At issue is whether any or all of the officials’ interests are also disqualifying under Section 1090, such that the City is prohibited from entering into the contracts. We advise they are not.

Although Section 1090 does not specifically define the term “financial interest,” case law and Attorney General opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (*Thomson v. Call*, *supra*, at pp. 645, 651-652; see also *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)<sup>4</sup>

We have previously advised that under Section 1090, an officer does not have a financial interest in a contract based only on the proximity of the officer’s ownership of real property or business interest to the contract property. (See e.g., *Bordsen* Advice Letter, No. A-1 7-059 [official did not have a financial interest in a contract involving a highway project under Section 1090 simply because the official had a business adjacent to the project]; *Marroquin* Advice Letter, No. A-22-103 [close proximity of official’s residence to a project involving a 90-unit affordable senior housing complex does not alone establish a financial interest under Section 1090 with respect to any agreements relating to the project].) Similarly, the fact that each officer’s real property, and Mayor Pro Tem Richard’s rental business, is near one of the properties under consideration does not establish that the officer has a financial interest in the particular Mills Act contract at issue under Section 1090. Barring additional facts to the contrary, Section 1090 does not prohibit the City from entering into the contracts relating to the two properties. However, as concluded above, Mayor Potter and Mayor Pro Tem Richards are prohibited from taking part in the Cypress Inn decision, and Councilmember Baron is prohibited from taking part in the Cosmas House decision under the provisions of the Act.

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<sup>4</sup> The Legislature has defined certain financial interests involved in a contract as “remote interests” in Section 1091 or “noninterests” in Section 1091.5, which provide particular exceptions to the Section 1090 prohibitions on participation; however, none of those provisions are relevant here.

If you have other questions on this matter, please contact me at [KHarrison@FPPC.ca.gov](mailto:KHarrison@FPPC.ca.gov).

Sincerely,

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General Counsel

*L. Karen Harrison*

By: L. Karen Harrison  
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