



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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April 19, 2021

Nira Doherty
City Attorney
City of Menlo Park
Burke, Williams, and Sorensen LLP
181 Third Street - Suite 200
San Rafael, California 94901-6587

Re: Your Request for Advice
Our File No. A-21-045

Dear Ms. Doherty:

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

May Menlo Park Mayor Drew Combs participate in the consideration of a Resolution to change the Community Amenities (“Amenities”) in the City Municipal Code by revising the existing Amenities List, adding new Amenities and/or removing Amenities that a developer may provide in exchange for Bonus Level Development (“BLD”)?

CONCLUSION

No. Mayor Combs has a conflict of interest in any decisions relating to the proposed modifications of Amenities because the modification of development criteria would have a financial effect on real property owned by his employer and source of income.

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 18110 through 18997 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

On November 6, 2018, Drew Combs was elected as the District 2 Menlo Park Council Member. The City Council appointed him Mayor in November 2020.

Facebook, Inc., (“Facebook”) engages in the development of social media applications for people to connect through mobile devices, personal computers, and other platforms. It enables users to share opinions, ideas, photos, videos, and other activities online. Its products include Facebook, Instagram, Messenger, WhatsApp, and Oculus. Facebook is headquartered in Menlo Park, California and employs approximately 25,110 people, of which approximately 14,000 are located in Menlo Park. For the purposes of this analysis, you state that five percent of Facebook’s annual gross revenues is \$4.3 billion dollars, and that one percent of Facebook’s annual gross revenues is \$860 million dollars.

Facebook Employment

Mayor Combs has worked for Facebook for approximately six years and ten months, since May 2015. Currently, Combs holds a position in Facebook’s Privacy organization. His duties include managing a team of privacy program managers, who are tasked with reviewing new features and changes to the platform based on the company’s own privacy guidelines and its consent decree with the FTC. He has previously held positions in the company’s online operations org. His current position (as was the case with all of his past positions at the company) does not involve work on real estate development or transactions. Combs is a full-time salaried employee making more than \$500 per year and owns less than three percent of Facebook stock. In addition, Mayor Combs’ wife is employed as a Content Manager at WhatsApp, a Facebook owned company, also making more than \$500 per year.

Facebook Owned Property

Facebook itself or through a wholly owned subsidiary owns and has developed three campuses in the Bayfront Area of Menlo Park. The East Campus (also referred to as the Classic Campus) is a 56.9-acre site located at 1 Hacker Way (previously 1601 Willow Road). The site contains nine buildings with approximately 1,035,840 square feet. Facebook has implemented a vehicular trip cap, which allows approximately 6,600 employees to occupy the East Campus. The West Campus is an approximately 22-acre site located at 1 Facebook Way (previously 312 and 313 Constitution Drive). The West Campus includes one building containing approximately 433,555 square feet. Finally, the approximately 58-acre Expansion Campus located at 301-309 Constitution Drive contains two new office buildings totaling approximately 962,400 square feet plus an existing office building with approximately 180,108 square feet. The Expansion Campus approvals also include the potential for a 240-room limited-service hotel of approximately 90,868 square feet at the corner of Chilco Street and Bayfront Expressway. For each of these three developments there are Development Agreements which include community benefit payments and guaranteed on-going revenue streams for the City of Menlo Park. The Expansion Campus required an amendment to the East Campus permits and Development Agreement.

Additionally, Facebook owns property located at 1350 Willow Road in the Bayfront Area which consists of approximately 59 acres (commonly referred to as the Willow Village). On July 6, 2017, Peninsula Innovation Partners, LLC, on behalf of Facebook submitted a formal application to comprehensively redevelop the site. The proposed master plan project would include approximately 1,729 residential dwelling units, 1.6 million square feet of office space, 200,000 square feet of retail space, and a 193-room hotel. The public process began with a City Council study session on the proposed project on February 26, 2019, and then after the project moves through the planning process, City Council reviews of the application components, including a Conditional Development Permit and Development Agreement and an Environmental Impact Report. The City Council must make the final decision on the entitlements.

In total, Facebook (or through a wholly owned subsidiary) owns 194.09 acres in the Bayfront Area of the City of Menlo Park. As the Bayfront Area is 562 acres, Facebook is the largest single landowner, owning 34.5 percent of the property. With respect to the entire city, which is approximately 3,215 acres, Facebook owned property comprises six percent of the total land area.

Facebook Leased Property

In addition to the property owned by Facebook, Facebook leases an additional 46.16 acres in the Bayfront Area, some of which may be under contract to purchase and some is under long-term ground leases allowing Facebook to redevelop the properties. If added to the Facebook owned property, in total, Facebook owns or leases 42.7 percent of the land in the Bayfront Area. This comprises 7.5 percent of the total land in the city.

CITY COUNCIL MEETING ON APRIL 20, 2021

At its meeting on April 20, 2021, the City Council will have a study session to discuss a possible amendment to the City's Municipal Code and to corresponding Resolutions regarding bonus level development ("BLD"). The Codes include Sections 16.43.070 (Office District), Section 16.44.070 (Life Science District) and 16.45.070 (R-MU Residential Mixed-Use Development).

After the study session on April 20, 2021, it is anticipated that the City would bring back to a future Council meeting an item for the Council to take action on proposed changes to the Community Amenities Resolution and City codes as described below.

BLD allows a project to develop at a greater level of intensity with an increased floor area ratio and/or increased height.

Each of the three Sections regarding Community Amenities ("Amenities") contains subsection (1) which reads as follows:

(1) Amenities. Community needs were initially identified through the robust community engagement process generally referred to as ConnectMenlo. The city council of the city of Menlo Park adopted by resolution those identified community needs as community amenities to be provided in exchange for bonus level development. The identified community amenities may be updated from time to time by city council resolution. All community amenities, except for

affordable housing, shall be provided within the area between U.S. Highway 101 and the San Francisco Bay in the city of Menlo Park. Affordable housing may be located anywhere housing is allowed in the city of Menlo Park.

Subsection (1) quoted above references a resolution which identifies community needs as community amenities to be provided in exchange for the BLD. This would be Resolution No. 6360.

Each of the three Sections regarding Community Amenities also include the following subsection (4)(B) which reads as follows:

(B) Payment of a fee. If the city adopts an impact fee that identifies a square foot fee for community amenities, an applicant for the bonus development shall pay one hundred twenty percent (120%) of the fee; provided, that the fee adopted by the city council is less than full cost recovery and not less than the total bonus value less the affordable housing amenity value as calculated pursuant to subsection (3) of this section.

We note that the proposed language for each of the three Sections also states that “[c]onstruction of the amenity is preferable to the payment of a fee.”

Section 16.43.070 and Section 16.44.070 each contain the same subsection (3) on Value of Amenity which reads:

(3) Value of Amenity. The value of the community amenities to be provided shall equal fifty percent (50%) of the fair market value of the additional gross floor area of the bonus level development. The value shall be calculated as follows: The applicant shall provide, at their expense, an appraisal performed within ninety (90) days of the application date by a licensed appraisal firm that sets a fair market value in cash of the gross floor area of the bonus level of development (“bonus value”). The form and content of the appraisal, including any appraisal instructions, must be approved by the community development director. The appraisal shall determine the total bonus value without consideration of the community amenities requirement established under this section. Fifty percent (50%) of the total bonus value is the value of the community amenity to be provided.

The Value of Amenity in subsection (3) of Section 16.45.070 is different from subsection (3) of Section 16.43.070 and Section 16.44.070 and reads:

(3) Value of Amenity. The value of the community amenities to be provided shall equal fifty percent (50%) of the fair market value of the additional gross floor area of the bonus level development. The value shall be calculated as follows: The applicant shall provide, at their expense, an appraisal performed within ninety (90) days of the application date by a licensed appraisal firm that sets a fair market value in cash of the gross floor area of the bonus level of development (“total bonus”). The form and content of the appraisal, including any appraisal instructions, must be approved by the community development director.

You state that the City is *not* considering any amendments to the Value of Amenity for any of the three Code Sections. In other words, the cost to any developer in developing a BLD, is to remain static, because at this time, the City Council is not considering changing the Value of Amenity.

As noted, the City Council will be conducting a study session at its meeting on April 20, 2021 to discuss (but not decide upon) potential changes involving Community Amenities including the following:

1. Changes to Resolution No. 6360 that may include revising the existing Amenities and adding new Amenities and/or removing existing Amenities.

2. Adopt procedures to require a developer to obtain approval by the City Council of the Amenity *before* the developer can apply for a BLD. The current procedures allow a developer to apply for a BLD at the same time the developer requests approval of an Amenity.

3. Adopt an in-lieu fee pursuant to which a developer could pay a fee instead of developing an Amenity, in exchange for BLD.

In a subsequent email, you state that approximately 1.6 percent of total parcels within the City would be affected by these changes, and that Facebook owns 14.9 percent of the parcels in the three zones subject to the changes. The three zones (Office, Life Science, and R-MU-B) are located within the “Bayfront Area” and these zones are the subject of the BLD change, so the BLD change would affect all the properties within such zones. The Bayfront Area consists of 562 acres, and the three zones above consists of approximately 459.74 acres of land, so the changes would affect approximately 81.8% of the Bayfront Area.

ANALYSIS

The Act’s conflict of interest provisions prohibit a public official from making, participating in making, or attempting to use his or her official position to influence a governmental decision if it is reasonably foreseeable that the decision would have a material financial effect on one or more of the official’s financial interests. (Sections 87100 and 87103.) An official’s financial interests that may give rise to a disqualifying conflict of interest are identified in Section 87103 and include all the following:

- An interest in any business in which the official has an investment worth \$2,000 or more (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 any real property in which the official has an interest worth \$2,000 or more. (Section 87103(b).)
- An interest in any source of income aggregating \$500 or more in the 12 months prior to the decision. (Section 87103(c).)

- An interest in any source of a gift or gifts aggregating \$520 or more in the 12 months prior to the decision.² (Section 87103(e).)
- An interest in the official's personal finances and those of immediate family members.³ (Section 87103.)

Mayor Combs is employed by Facebook and has stock in Facebook that is worth \$2,000 or more. Based on the facts provided, Mayor Combs would have an interest in Facebook as a business entity and source of income. He would also have an interest in WhatsApp, the employer of his spouse, as a source of income. Assuming he does not have a periodic tenancy of one month or less, he would have a real property interest in his current residence.

Foreseeability and Materiality

Facebook Real Property

Foreseeability standards vary depending on whether an interest is explicitly involved in a governmental decision. A financial effect is presumed to be reasonably foreseeable when it is explicitly involved in a decision. Financial interests that are explicitly involved include an interest that is a named party in, or subject of, a government decision. An interest in real property is the subject of the decision and explicitly involved in the decision anytime the decision affects the property as described in Regulation 18702.2(a)(1)-(6). (Regulation 18701(a).)

Providing the materiality standard for real property explicitly involved in a decision, Regulation 18702.2(a) states in pertinent part, a reasonably foreseeable effect is material if the decision:

- (1) Involves the adoption of or amendment to a development plan or criteria applying to the parcel.

The addition of new Amenities and/or removal of existing Amenities, and the addition of the option of an in-lieu fee, where a developer could pay a fee instead of developing an Amenity in exchange for BLD, change the criteria applicable to Facebook's real property. The reduction of qualifying amenities could make it more difficult to obtain BLD, while the addition may make obtaining BLD easier. Further, creating an in-lieu fee would streamline the process for obtaining BLD, as a project proponent would not need to obtain approval for, and construct, an Amenity. Facebook's real property interests are located within the zone subject to the community amenities decision. Since these changes would affect so much of the Bayfront area, (81.8%), of which Facebook owns a significant portion, and is currently attempting to develop Willow Village, a 59-acre master planned redevelopment that would include office and residential, the changes in the BLD criteria would have a material effect on the value of Facebook's real property interest, and

² Section 87103(e) requires the amount of the value of a gift or gifts set forth therein to equal the same amount as the gift limit specified in Regulation 18940.2. This gift limit was recently adjusted from \$500 to \$520, effective January 1, 2021, pursuant to Section 89503(f).

³ Section 82029 defines "immediate family" to mean the spouse and dependent children.

Mayor Combs would have a conflict of interest in any decisions relating to the proposed modifications.

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

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary W. Norton
Senior Counsel, Legal Division

ZWN:dkv