



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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March 20, 2023

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

Re: Your Request for Advice  
**Our File No. A-23-013**

Dear Ms. Mooney:

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>1</sup> Please note that we are only providing advice under the Act 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 Contra Costa 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 Section 1090 prohibit three officials from taking part in decisions relating to, or the City of Pittsburg from entering into, a development agreement between the City and Faria Land Investors concerning proposed residential project for up to 1,500 homes?

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<sup>1</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.

2. Does the Act prohibit three officials from taking part in governmental decisions relating to a proposed residential project for up to 1,500 homes located between 500 and 1,000 feet of one official's residence and more than 1000 feet from the remaining two officials' residences?

### **CONCLUSIONS**

1. No. Section 1090 does not prohibit the three officials from taking part in decisions relating to, or the City from entering into, the development agreement because they do not have a financial interest in the contract.

2. The Act prohibits Vice Mayor Banales whose residence is between 500 and 1,000 feet from taking part in decisions relating to the project because it is reasonably foreseeable that those decisions would have a material financial effect on his residence. However, the remaining two officials may take part in those decisions because the facts do not provide clear and convincing evidence to rebut the presumption that the decisions would not have a substantial effect on their residences.

### **FACTS AS PRESENTED BY REQUESTER**

You are the City Attorney for the City of Pittsburg seeking this advice on behalf of Planning Commissioner Shavaun Tolliver and City Councilmembers Dionne Adams and Juan Banales.

#### **A. Project Location and Overview**

This request arises from hearings anticipated to be held before both the Planning Commission and the City Council related to a proposed development project known as the Faria/Southwest Hills Annexation Project ("project"). The project is located just southwest of the municipal boundary of the City of Pittsburg, within the Southwest Hills planning sub-area of the Pittsburg General Plan. The project includes approximately 607 acres. The project site is generally bounded by vacant rolling hills with Bailey Road just beyond to the east, the Concord City Limits and the closed Concord Naval Weapons Station to the south and west, and existing residential development (San Marco and Vista Del Mar subdivisions) to the north and northeast with State Route (SR) 4 beyond.

Of the approximately 607 acres, 265 acres would be designated as open space and remain undeveloped, and 341 acres would be designated for low-density residential homes with a 4,000-square foot minimum lot size. The land-use entitlements are for up to 1,500 homes with no office or retail planned.

The project includes a request for approval by the City of the following discretionary entitlements: General Plan amendment; Pre-zoning designation; Master Plan; and Development Agreement.<sup>2</sup>

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<sup>2</sup> You provided the proposed agreement between the City and Faria Land Investors which contains the obligations of both parties in connection with the proposed project.

City staff plan to place the matter on the agenda of the Planning Commission and City Council beginning sometime in early 2023. The seven-member Planning Commission will review and discuss the matter and make a recommendation to City Council. The five-member City Council will discuss the Planning Commission recommendation and make a final decision on the project.

### **B. Planning Commissioner and City Councilmembers**

Shavaun Tolliver is a Planning Commissioner who owns a personal residence 3,354 feet north of the project boundary. Dionne Adams is Councilmember who owns a personal residence 2,256 feet north of the project boundary. Both homes are located in the San Marco subdivision.

Juan Banales is the Vice Mayor and owns a personal residence 972 feet northeast of the project boundary. This distance was measured from the northeastern-most corner of a small 5.2-acre parcel connected to and under common ownership of the larger Faria project site. Due to the existing topography of this parcel (a relatively steep upslope), as well as the placement of existing homes, it is highly unlikely that any housing development would take place in this area, effectively extending the distance to the actual construction beyond 1,000 feet.<sup>3</sup> Further, Vice Mayor Banales' property is located within the Vista Del Mar subdivision. No roadway connections will be made to roadways within the Vista Del Mar subdivision, resulting in no additional traffic impacts to the subdivision where his property is located.

The intersection of Alves Ranch Road and West Leland, which is the closest arterial intersection to the Banales property, was not identified as an intersection where the project would create a significant and unavoidable impact. The EIR for the project identified six transportation-related impacts as being "significant and unavoidable." Even with mitigation proposed, six intersections within the study area would be considered to have unacceptable level-of-service operations under an "existing conditions plus project" scenario, and 11 intersections (which would include four of the intersections listed under the existing plus project scenario) would be deemed to have unacceptable level-of-service operations under a cumulative scenario (long-term plus project).

In addition, two separate freeway segments along State Routes 4 and 242 would result in unacceptable Delay Index (DI) under an existing conditions plus project scenario, and four separate freeway segments (which would include two segments listed under the existing plus project scenario) along State Routes 4 and 242 would result in unacceptable DI under a cumulative scenario (long-term plus project). Two separate freeway segments would result in over-capacity conditions under both the existing conditions plus project scenario and the cumulative scenario (long-term plus project).

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<sup>3</sup> You stated in an email dated February 2, 2023, that with regard to Vice Mayor Banales' property and the 5.2-acre parcel, there are existing homes in the San Marco subdivision and the Vista Del Mar subdivision north of and downslope from the 5.2-acre parcel. Because there are homes already constructed at the base of the relatively steep downslope from the parcel, no change in topography (e.g. grading, raising the elevation etc.) could be made in those areas to facilitate construction on the 5.2-acre parcel.

The EIR also identified 41 other potentially significant impacts, including the project's effects on aesthetics, air quality,<sup>4</sup> agricultural resources, biological resources, cultural and tribal resources, geology and soils, greenhouse gas emissions, hazards/hazardous materials, hydrology and water quality, land use and planning, and public services and utilities. Public service impacts are related to fire response. While the project is outside of the 1.5-mile fire-response radius, the properties are not. The impact identified in the EIR does not include service issues for homes that are within the 1.5-mile radius.

Lastly, views from all three of the subject properties are downslope from existing housing developments. Planning Commissioner Tolliver has a sight line upslope to the hills from the front of her residence. A phase of a separate housing development has been approved south of her home, within the sight line. As there is no vesting tentative map yet for the Faria project, which will be the subject of a future discretionary decision, the particular impact on views from the properties is unknown at this time.

In a follow-up email, you stated fifteen percent of the residences in the City are approximately 4,562 feet from the project boundary.

## ANALYSIS

### 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 financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.) Section 1090 is intended not only to strike at actual impropriety, but also to strike at the appearance of impropriety. (*City of Imperial Beach v. Bailey* (1980) 103Cal.App.3d 191, 197.)

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.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.) Finally, 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. Instead, the entire governing body is precluded from entering into the contract. (*Thomson, supra*, at pp. 647- 649; *Stigall, supra*, at p. 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).)

Vice Mayor Banales, Councilmember Adams and Commissioner Tolliver are all subject to Section 1090's conflict of interest provisions and would be making a contract for purposes of Section 1090 if the City Council approves the development agreement between the City and the

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<sup>4</sup> The EIR indicates planned mitigation measures would reduce the impact, but it would be assumed to remain significant and unavoidable until project-level design details are available and a project-level air quality analysis can be performed.

Faria Land Investors. The determinative question, therefore, is whether any of the three officials would have a financial interest in the development agreement. Here, however, there is no suggestion from the facts that any of the three officials has any connection to Faria Land Investors such that they would have a financial interest in the terms of the contract itself. Therefore, Section 1090 does not prohibit them from taking part in decisions concerning approval of the development agreement.

## **The Act**

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 including an interest in any real property in which the official has an interest of \$2,000 or more. (Section 87103(b).) Therefore, Vice Mayor Banales, Councilmember Adams and Commissioner Tolliver all have a real property interest in their residences.

### 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, as here, 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).)

Regulation 18702.2 provides the standards for determining when a government decision's reasonably foreseeable effect on an official's real property interest is material considering factors such as the proximity of the property subject to the decision to the official's real property parcel. The reasonably foreseeable financial effect is material whenever the decision involves property located more than 500 feet but less than 1,000 feet from the property line of the parcel, and the decision would change the parcel's development potential, income producing potential, highest and best use, character (by substantially altering traffic levels, intensity of use, parking, view, privacy, noise levels, or air quality), or market value. (Regulation 18702.2(a)(8).) Whenever the governmental decision involves property 1,000 feet or more from the official's property, the financial effect of the decision is presumed to not be material as to the official's property, unless rebutted with clear and convincing evidence that the governmental decision would have a substantial effect on the official's property. (18702.2(b).)

### *Vice Mayor Banales*

The personal residence of Vice Mayor Banales is located 972 feet northeast of the project boundary. Therefore, if the project would change any of the factors listed in Regulation 18702.2(a)(8), he will be disqualified from taking part in decisions concerning the project.

Under the facts provided, it does not appear that the project will affect the current use of the Vice Mayor's residence. However, there are indications that the project may significantly affect traffic levels, views, intensity of use, noise levels or parking availability, although it is not certain that these effects will occur near the Vice Mayor's residence. The EIR did identify air quality as a potentially significant impact. Nonetheless, we must also consider whether the decisions regarding development of currently vacant property in close proximity to the official's residence may potentially affect the market value of the property.

We have advised on multiple occasions that the Act's conflict of interest provisions prohibit a city councilmember from taking part in decisions relating to a proposed large residential development project located on undeveloped real property between 500 and 1,000 feet from the official's residence because it is reasonably foreseeable that those decisions would have a material financial effect on the market value of the official's real property interest in a residence under Regulation 18702.2(a)(8)(E).<sup>5</sup>

In this case, decisions relating to the project involve the construction of a substantial residential development, consisting of up to 1,500 single family homes, on 607 acres of vacant property located between 500 and 1,000 feet from the Vice Mayor's residence. As planned, the project will eliminate 341 acres of vacant property in favor of low density residential homes with a 4,000-square foot minimum lot size while designating 265 acres as open space to remain undeveloped, which would possibly improve the market value of nearby residences. Just as significantly, the project all but ensures that the currently vacant property is not available for other projects that may be more detrimental to the market value of nearby property, including commercial purposes or high-density housing. Because the project has the potential to protect or increase the market value of property within a close proximity, it is reasonably foreseeable that decisions will have a material financial effect on the Vice Mayor's residence under Regulation 18702.2(a)(8)(E).

Accordingly, the Act's conflict of interest provisions prohibit the Vice Mayor from taking part in decisions relating to the project and require him to recuse from those decisions pursuant to Regulation 18707.

*Councilmember Adams and Commissioner Tolliver*

Councilmember Adams owns a residence 2,256 feet from the project while Commissioner Tolliver's personal residence is located 3,354 feet from the project so Regulation 18702.2(b) is applicable to those interests. Under that regulation, as mentioned, the financial effect of the

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<sup>5</sup> *Roberto* Advice Letter, No. A-21-043 [interim city manager prohibited from taking part in decisions relating to a proposed 130-unit residential development project located on 16 acres of vacant land about 600 feet from her residence based on its potential to protect or increase the market value of neighboring property]; *Diaz* Advice Letter, No. A-20-113 [councilmember disqualified from taking part in decisions to eliminate 45.17 acres of vacant property between 500 and 1000 feet from his residence in favor of 103 high-end and low-density single-family homes]; *Wisinski* Advice Letter, No. A-20-085 [councilmember disqualified from decisions relating to proposed residential project consisting of 510 units on undeveloped real property located 703 feet from councilmember's residential real property interest]; *Minner* Advice Letter, No. A-20-072 [councilmember disqualified from decisions relating to proposed mixed-use project including up to 620 residential units on largely vacant real property located 939 feet from councilmember's residential real property interest]; see also *Chopra* Advice Letter, No. A-18-098 [reasonably foreseeable that construction of 118 new residential dwellings on land utilized as a public park located about 930 feet from residences of two City of Mountain View councilmembers would have a material financial effect on the market value of their homes].

decisions concerning the project is presumed to not be material as to their residences unless that presumption is rebutted with clear and convincing evidence that the governmental decision would have a substantial effect on their properties.

Similar to Vice Mayor Banales, it does not appear that the project will affect the current use of the officials' residences. There is also nothing in the fact provided that the project will significantly affect traffic levels, views, intensity of use, noise levels or parking availability experienced at their residences, which are located in the San Marco subdivision. While the EIR identified air quality as a potentially significant impact until project-level air quality analysis can be performed, it also states this is an impact that mitigation measures would potentially reduce. Therefore, the available facts do not provide clear and convincing evidence to rebut the presumption under Regulation 18702.2(b).

Accordingly, Councilmember Adams and Commissioner Tolliver are not disqualified under the Act's conflict of interest provisions, and they may take part in decisions concerning the project.

#### Public Generally Exception

Commonly referred to as the "public generally" exception, Regulation 18703(a) permits a public official to take part in a governmental decision that affects one or more of his or her interests if the decision's financial effect on the interest is indistinguishable from its effect on the public generally. (See Section 87103.) In general, an effect on an official's interest is indistinguishable from its effect on the public generally if a significant segment of the public is affected and the effect on the official's interest is not unique when compared to the effect on the significant segment of the public. (Regulation 18703(a).)

A significant segment of the public includes at least 15 percent of residential real property within the official's jurisdiction if the only interest an official has in the governmental decision is the official's primary residence. (Regulation 18703(b)(2).) A unique effect is defined to include a disproportionate effect on an interest in real property resulting from the proximity of a project. (Regulation 18703(c).)

Here, the residence of Vice Mayor Banales is located 972 feet from the boundary of the project. The facts provided indicate that 15 percent of residential parcels are located within 4,562 feet from the project boundary. We are unable to conclude that the effect of the decision concerning the project his residence would not be "unique" as compared to any of the other residences identified in the significant segment. Therefore, Vice Mayor Banales may not participate in the decision under the public generally exception. (Regulation 18703.)

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

Sincerely,

Dave Bainbridge  
General Counsel

By:

*Jack Woodside*  
Jack Woodside  
Senior Counsel, Legal Division

JW:aja