



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

November 25, 2024

Michael Guina
Burlingame City Attorney
City Hall
501 Primrose Rd.
Burlingame, CA 94010-3997

Re: Your Request for Advice
Our File No. A-24-121

Dear Mr. Guina:

This letter responds to your request for advice on behalf of Burlingame City Councilmember Michael Brownrigg 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. Finally, the Commission is not authorized and does not provide advice concerning past conduct. (Section 1097.1(c)(2) and Regulation 18329(b)(6)(A).) Therefore, nothing in this letter should be construed to evaluate any conduct that may have already taken place, including Councilmember Brownrigg’s previous appearance before the Burlingame Planning Commission, and any conclusions contained in this letter apply only to prospective actions.

QUESTION

Under the Act, may Councilmember Brownrigg take part in governmental decisions concerning a project involving the construction of a school athletic center that would impact two parcels of property, respectively located less than 500 feet and between 500 and 1,000 feet from his residence?

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.

CONCLUSION

No, because Councilmember Brownrigg's real property is located less than 500 feet from the project site, which impacts both nearby parcels, and there is no clear and convincing evidence the project-related decisions would have no measurable impact on his real property, the Act prohibits Councilmember Brownrigg from taking part in the decisions.

FACTS AS PRESENTED BY REQUESTER

The Burlingame ("City") City Council established a Planning Commission of seven members. The Burlingame Planning Commission performs those functions authorized by Government Code Section 65103, including review and approval of land use approvals. Any quasi-judicial permits and actions of the Planning Commission may be appealed or called for review to the City Council.

Mercy High School ("MSH") is a private girls' high school located in Burlingame. The Sisters of Mercy ("SOM") convent is also located in Burlingame. The SOM property includes residential, religious, and educational uses. The SOM and MHS are separate legal entities but have historically coexisted on the same parcel and have shared land uses, such as educational functions and parking. In 2007, the City issued a single set of land use approvals, including a Conditional Use Permit ("CUP"), which regulated uses for both MHS and SOM. The CUP was amended in 2010 and continued to regulate uses for both MHS and SOM. In March 2023, a Lot Line Adjustment was recorded, which created two separate legal parcels, one for the MHS campus and one for the SOM campus. However, even with the Lot Line Adjustment, MHS and SOM continue to share the same land use approvals, including the CUP.

In January 2024, MHS and SOM jointly submitted an application for land use approvals for a new athletic center (the "Project"), which includes a new gymnasium and replacement of an existing outdoor swimming pool. The Project requires the following land use approvals, pursuant to the Burlingame Municipal Code: an amendment to the CUP, a Commercial Design Review, a Hillside Area Construction Permit, and a Variance from building height limitations. The Project requires CUP amendments for the MHS uses but does not require amendments pertaining to the SOM uses.

On October 15, 2024, the Planning Commission conducted a duly-noticed public hearing on the Project to consider whether to approve the land use approvals and associated environmental impacts required by the California Environmental Quality Act ("CEQA"). During the public comment portion of the agenda item, Councilmember Brownrigg offered public comment on the Project regarding traffic impacts.² He identified himself as a member of the public who lives in the

² We caution that an appearance by a city councilmember before the planning commission is generally prohibited to the extent it is reasonably foreseeable that the decision will have a material effect on the councilmember's economic interest as any contact with or appearance before the planning commission is an attempt to use the official's position to influence the decision. (See Sections 87100, 87103; Regulation 18704(c)(1).) Notably, there is a narrow exception to this general prohibition that allows a public official to appear before an agency as a member of the general public to represent the official's personal interest. For an interest in real property the exception applies only if (1) the property is wholly owned by the official and/or the official's immediate family, (2) the appearance is in the course of the prescribed governmental function (or in other words made as a member of the public during the comment

neighborhood and not as a Councilmember. Other public comments received for the Project included concerns regarding traffic impacts, parking impacts, and noise levels.

At the conclusion of the public hearing, the Planning Commission approved the CEQA determination and approved the land use approvals for the Project, including amendments to the CUP. The approved CUP amendments continue to regulate the land uses for both the SOM parcel as well as the MHS parcel.

If the Project is appealed, the Burlingame City Council will act as the final administrative appeals body, pursuant to the Burlingame Municipal Code. Any future land use applications by either MHS or SOM will be considered by the Planning Commission, with the City Council as the administrative appeals body.

Michael Brownrigg is a City Councilmember. Councilmember Brownrigg owns his residence, a single-family home, in the same neighborhood as the MHS and SOM properties. His residence is presumed to be valued at more than \$2,000 and is located less than 500 feet from the SOM parcel property line. His residence is also located more than 500 feet, but less than 1,000 feet, from the MHS parcel property line.

In follow-up emails, you provided additional information pertaining to the Project.

The Project site consists of the two aforementioned lots owned by SOM and MHS, respectively. The SOM lot is approximately 31 acres and the MHS lot is approximately 5 acres. The proposed athletic center would be contained entirely to the MHS lot and would relocate some existing school sporting events from off-site locations to the MHS campus. Due to cross-access easements and the existing conditional use permit in place for the uses, the two sites are evaluated as a single site for the purposes of zoning and building code requirements. The SOM lot contains ten parking lots, and the MHS lot contains one parking lot.

The proposed athletic center will host MHS classes, sporting events, and various functions that serve the existing MHS population of a maximum of 540 students and 83 staff. Examples of the proposed athletic center uses include events that currently take place on the site in other buildings or outdoors, such as student assemblies, physical education classes, and emergency drills. The athletic center will also host athletic practices and competitions for sports such as basketball and volleyball, which currently take place off-site because the school lacks a gymnasium. Although, at one time, swim meets did take place at MHS, the existing pool on site currently does not meet high school regulation size requirements. The applicants propose demolishing the existing outdoor

period of a public meeting), and (3) the appearance is related *solely* to the official's interest in the real property. (Regulation 18704(d)(2)(A).) Thus, to the extent the exception for representing a personal interest does not apply, Councilmember Brownrigg has potentially made an appearance before the planning commission in violation of the Act's conflict of interests' provisions. However, because the Commission cannot provide advice regarding past conduct, we can express no opinion as to whether the appearance before the planning commission violated the Act or whether the narrow exception for representing the official's personal interest applied to the appearance. (See Regulation 18329(b)(6)(A).)

swimming pool and building a new one that meets the regulation size requirements. The athletic center site will be located primarily in the footprint of the existing tennis courts and pool area.

The proposed gymnasium is single-story, but as it must meet a minimum interior height requirement for sports equipment and competitions, the overall height of the building as measured from the grade adjacent to the building is 37'-3". The Zoning Code requires the building height to be measured from the average top of curb at the street level and given that this is property is zoned R-1, the height maximum of 30'-0" for single unit dwellings applies to the proposed gymnasium. The proposed height of the gymnasium, as measured from the average top of curb, is 51'-10" and therefore requires a variance for building height. The proposed athletic center is single-story and is located on a steeply sloped lot so that the new building mass is well below the skyline of the properties that are higher and located to the north, west, and south of the subject site. Substantial existing tree cover on the site screens the new building from the surrounding properties uphill from the building.

The Project also would establish closing hours for the athletic center no later than 10 p.m. on Monday through Thursday and no later than 11 p.m. on Friday through Sunday. This is consistent with the typical hours for gymnasium events in the area.

The Project would also involve increasing the sites' total number of parking spaces from 378 to 393. During construction, an on-site lot will be used for construction workers' parking, and construction vehicles and materials will be kept on site. Construction workers will traverse from the construction parking lot through the SOM campus to reach the Project site on the MHS parcel.

Mercy High School is not proposing an increase in student enrollment; therefore, the Project would not increase vehicular trip generation during peak school hours. The Project would reduce the need for off-site practices, meets, games, matches, and other sporting events (specifically for swimming, water polo, basketball, and volleyball). It is anticipated that relocated sporting events would increase the number of trips to and from the Mercy campus during the late afternoon and early evening period (3:00 – 6:00 PM). However, practices and games held at the new athletic center would reduce the number of vehicle trips by student-athletes and coaches who leave campus immediately after school is dismissed to travel to an off-site athletic facility. Thus, the project would reduce the number of trips during the school's peak dismissal period between 2:40 and 2:58 PM. The project would not add any trips during the AM commute period or the PM peak dismissal period when congestion on neighboring streets is noticeable. The proposed project would only add trips to the adjacent roadway network when scheduled events at the athletic center occur. Adding project-generated trips on the roadway network would not noticeably worsen traffic conditions on neighboring streets.

With respect to landscaping, 57 trees, 20 of which are of protected size, would be removed. Twenty trees would be planted elsewhere on the Project site to replace the protected-size trees removed under the Project.

A noise report prepared as part of the Project estimates intermittent (not sustained) noise levels from events in the gymnasium between 30 to 50 dBA at the distance to neighboring properties (approximately 612 feet to the closest properties facing the gymnasium entry doors).

You also provided various maps of the proposed Project site and surrounding area. Columbus Avenue—the street Councilmember Brownrigg resides on—is a block away from the nearest edge of the MOS lot. Councilmember Brownrigg’s property is located on the side of the street further away from the MOS lot. The properties are separated by Columbus Avenue, residential real property located on Columbus Avenue, residential real property located on Hoover Avenue, and Hoover Avenue itself. The closest portion of the MOS property (i.e., the side of the property running along Hoover Avenue) primarily comprises landscaping and a parking lot for permitted staff members.

ANALYSIS

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.) Among those specified economic interests is “[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).)

A public official makes a governmental decision if the official authorizes or directs any action, votes, appoints a person, obligates or commits the official’s agency to any course of action, or enters into any contractual agreement on behalf of the official’s agency. (Regulation 18704(a).) A public official participates in a governmental decision if the official provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review. (Regulation 18704(b).) A public official uses an official position to influence a governmental decision if the official: (1) Contacts or appears before any official in the official’s agency or in an agency subject to the authority or budgetary control of the official’s agency for the purpose of affecting a decision; or (2) Contacts or appears before any official in any other government agency for the purpose of affecting a decision, and the public official acts or purports to act within the official’s authority or on behalf of the official’s agency in making the contact. (Regulation 18704(c).) A public official with a disqualifying financial interest is not prohibited from making an appearance as a member of the general public before an agency in the course of its prescribed governmental function, but such an appearance must be limited to matters related *solely* to the official’s personal interests, such as their real property. (Regulation 18704(d)(2).)

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).”

Where, as here, 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."

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 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)(7).)

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 also material whenever the governmental 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:

- (A) Development potential;
- (B) Income producing potential;
- (C) Highest and best use;
- (D) Character by substantially altering traffic levels, intensity of use, parking, view, privacy, noise levels, or air quality; or
- (E) Market value.

(Regulation 18702.2(a)(8).)

Given Regulation 18702.2(a)(8)'s reference to "the property line of the parcel," the relevant distance between a public official's real property and the real property at issue in a governmental decision, for purposes of the Act, is the distance measuring directly from parcel to parcel or "as the crow flies." In limited instances where the decision affects only a clearly defined, specific and isolated site, such as a particular building on a large tract of land, we have advised that the parcel to parcel measurement would not be the appropriate distance to determine materiality. (See, e.g., *Leishman* Advice Letter, No. A-21-154.)

Here, although MSH and SOM have two separate legal parcels, the parcels are significantly interconnected both in terms of use and treatment under the law (e.g., the parcels are treated as a single parcel for zoning and building code purposes). In any case, the Project site incorporates both parcels. While the MHS parcel is the primary site of construction, the SOM parcel will also be impacted by the Project both during and after project construction (e.g., impacts to landscaping and parking). Consequently, the current Project does not present the type of situation involving a clearly defined, specific, and isolated site within a larger tract. Therefore, in determining the impact that Project-related decisions would have on Councilmember Brownrigg's real property, the relevant distance is the parcel-to-parcel distance between Councilmember Brownrigg's real property and the Project site, which includes the SOM parcel.

Because Councilmember Brownrigg's real property is less than 500 feet from the Project site, he is prohibited from taking part in a Project-related decision unless there is clear and convincing evidence the decision would not have any measurably impact on his property. Although there are multiple physical obstacles in between Councilmember Brownrigg's real property and the Project site, there is no clear and convincing evidence the Project would have no measurable impact on Councilmember Brownrigg's real property. For example, significant structural improvements to a school could foreseeably impact the value of nearby residences. Consequently, the Act prohibits Councilmember Brownrigg from taking part in Project-related activities.

You have also inquired about Councilmember Brownrigg's ability to take part in governmental decisions pertaining to the MHS and SOM properties, but unrelated to the Project. In general, decisions involving a project impacting both the MHS and SOM properties will presumably have a reasonably foreseeable, material financial effect on Councilmember Brownrigg's real property based on its location less than 500 feet away. However, where a decision would solely affect the MSH property or where a series of decisions could feasibly be segmented to exclude any decision that would have any impact on the SOM property, a different standard, such as Regulation 18702.2(a)(8) may apply. However, this would be a highly fact-specific determination and, consequently, Councilmember Brownrigg should seek additional advice before taking part in any such decision.

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

Sincerely,

Dave Bainbridge
General Counsel

By:


Kevin Cornwall
Senior Counsel, Legal Division

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