



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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February 4, 2025

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Commission
555 Capitol Mall, Suite 600
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Re: Your Request for Advice
Our File No. A-24-136

Dear Ms. Wood and Ms. Gillick:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act").

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

Under the Act, may Sacramento City Councilmember and Sacramento Local Area Formation Commissioner ("LAFCo") Lisa Kaplan ("Councilmember Kaplan") take part in decisions relating to a development project located near her and her partner's residence?

CONCLUSION

No. For purposes of the Act, Councilmember Kaplan has an equitable real property interest in her residence, which is owned by a revocable trust in which she is the sole beneficiary, and for which she has made regular mortgage payments over the course of 13 years. Because decisions related to the overall project site and the immediate proposed development would have reasonably foreseeable, material financial effects on her residence, she is prohibited from taking part in those decisions, as discussed below.

FACTS AS PRESENTED BY REQUESTER

The Airport South Industrial Park Project (“Industrial Park Project”) is a proposal to develop an industrial park on approximately 353 acres, including up to 5,204,500 square feet of industrial uses and approximately 98,200 square feet of retail/highway commercial uses (73,400 of which would be for hotel/hospitality development), on currently undeveloped land in unincorporated Sacramento County. The proposed project site is approximately 474.4 acres (approximately 353 of which would be used for the proposed industrial park) and currently consists of vacant, fallow agricultural land historically used as hay fields with intermittent rice fields from 1937 until at least 2020. The project site is divided into two portions: (1) the industrial park, which consists of the majority of the western portion and the northeastern corner of the overall site; and (2) the nonparticipating parcels, primarily located in the southeastern portion of the overall site.

The proposed project site is outside the City’s Sphere of Influence and outside City boundaries. The development requires that the Industrial Park Project land, together with some additional acreage necessary to ensure the new City boundary is contiguous, be added to the City’s Sphere of Influence and then annexed into the City. This larger annexation area is referred to as the “Annexation Area” and includes not only the Industrial Park Project land, but also the nonparticipating parcels noted above. The nonparticipating parcels comprise approximately 83 acres, including “Parcel 8,” which is approximately 64.3 acres.

While the entire project site is proposed for annexation into the City limits, only the 353-acre industrial park portion of the project site is currently proposed for development as part of requested entitlements. However, the proposed project would also result in first-tier entitlements for future industrial uses of approximately 1,404,800 square feet within the nonparticipating parcels.

Because of the required amendment to the Sphere of Influence and annexation into the City, development of the Industrial Park Project entitlements are required from both the LAFCo and the City of Sacramento. These are as follows, in sequential order:

1. LAFCo (applicable to the entire Annexation Area):

- Final Environmental Impact Report
- Sphere of Influence Amendment

2. City (some applicable to the entire Annexation Area and some to only the Industrial Park Project, as noted):

a. Annexation Area

- Final Environmental Impact Report
- General Plan Amendment
- Rezoning
- Tentative Parcel Map
- Site Plan and Design Review
- Water Supply Assessment
- Amendment of Bicycle Master Plan
- Finance Plan

- Annexation

b. Industrial Park Project

- Planned Unit Development (PUD)
- Development Agreement (DA)

3. LAFCo (applicable to the entire Annexation Area):

- Reorganization, including Annexation to City and related Detachments

The City of Sacramento's approval of the PUD and DA may occur separate from and after the City's final approval of the entitlements related to the entire Annexation Area. The City could elect to approve the entitlements related to the Annexation Area, and not approve the entitlements related to the PUD and DA. The approval of the entitlements related to the Annexation Area does not necessarily mean the PUD and DA will be approved, although the City may not approve the PUD or DA without the earlier approval of the entitlements related to the entire Annexation Area.

A Draft Environmental Impact Report ("DEIR") was prepared for the entitlements listed above. The DEIR concludes that the Industrial Park Project will include the following impacts:

- Significant and unavoidable degradation of existing visual character or quality of public views of the site;
- Significant and unavoidable change in visual character associated with the cumulative development of the proposed project;
- Significant and unavoidable impacts related to the conversion of farmland to non-agricultural use and the cumulative loss of agricultural land;
- Significant and unavoidable conflicts with or obstruction of implementation of the applicable air quality plan during project operation; and
- Significant and unavoidable cumulatively considerable net increase of any criteria pollutant for which the project region is in nonattainment under an applicable federal or State ambient air quality standard (including releasing emissions that exceed quantitative thresholds for ozone precursors).

Additionally, as a mitigation measure directed at reducing ambient noise levels, the Project will require construction of an eight-foot-tall concrete sound wall along the Project's eastern boundary.

Councilmember Kaplan serves as an elected member of the City of Sacramento and an appointed member of the LAFCo board. Her primary residence ("Residence") is a single-family home located in a fully developed subdivision, approximately 624 feet from the Annexation Area boundary and approximately 1,008 feet from the edge of the Industrial Park Project. The portion of the Annexation Area closest to the Residence is Parcel 8, which does not have a specific development proposal. The Residence is separated from the Annexation Area by Egret Park to the North.

Councilmember Kaplan and her partner each contribute fifty percent (approximately \$2,000 per month) to its maintenance and operation, which includes mortgage and utility payments. Fair market value for rental of the Residence would be approximately \$3,500 a month. A revocable trust

owns the Residence, and Councilmember Kaplan's partner, who is not her spouse, is both the trustor and trustee. Councilmember Kaplan is the sole beneficiary of the trust.

In follow-up emails, you clarified that Councilmember Kaplan and her partner have lived together in the Residence since it was purchased in 2012. Councilmember Kaplan did not contribute to the down payment for the house and her name has never been on the title of the property. Aside from being held in trust, Councilmember Kaplan and her partner have no other agreement regarding the property. There is no understanding or anything in writing to spell out any right to equity in the property based on Councilmember Kaplan's contributions to the mortgage. Further, there is no rental agreement between Councilmember Kaplan and her partner.

Your request for advice also included a link to a copy of the Draft Environmental Impact Report (DEIR). The DEIR notes, "because the proposed project would not include any development of the nonparticipating parcels at this time, this EIR includes a *program-level* analysis of the environmental impacts associated with the proposed entitlements for the nonparticipating parcels," in contrast to the more specific "project-level analysis" for the currently proposed development of the industrial park. The DEIR also notes that a "reduced footprint alternative" to the proposed project would consist of buildout of the project site as proposed for the majority of the parcels, and leaving Parcels 9, 10, and 11, as well as an approximately 51.3-acre portion of Parcel 8, as undeveloped agricultural land, and would result in a reduction of 419,809 square feet of industrial buildings. The DEIR also notes that site-specific development plans or designs have not proposed for Parcel 8, but "because the potential exists for a future distribution center to be developed on Parcel 8 within 1,000 feet of the existing sensitive receptors, future development of Parcel 8 could expose sensitive receptors to excess concentrations of pollutants, and the proposed project could result in a significant impact related to [diesel particulate matter]."

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).)

"An official has an economic interest in the pro rata share of the interests in real property, sources of income, and investments of a trust in which the official has a direct, indirect, or beneficial interest of 10 percent or greater." (Regulation 18234(a).) Regulation 18234 further specifies the circumstances in which an official is considered to have a direct, indirect, or beneficial interest in a trust, depending on whether the official is a trustor or beneficiary. (Regulation 18234(c).) An official has an interest in a trust if the official is a beneficiary and presently receives income from the trust or has an irrevocable future right to receive income or principal. (Regulation 18234(c)(2).) Councilmember Kaplan is not a trustor, but a beneficiary of her partner's trust. Councilmember Kaplan does not receive income from the trust.

In *Marvin v. Marvin* (1976) 18 Cal.3d 660, the California Supreme Court held:

[c]ourts may inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract or implied agreement of partnership or joint venture (see *Estate of Thornton* (1972) 81 Wn.2d 72 [499 P.2d 864]), or some other tacit understanding between the parties. The courts may, when appropriate, employ principles of constructive trust (see *Omer v. Omer* (1974) 11 Wash.App. 386 [523 P.2d 957]) or resulting trust (see *Hyman v. Hyman* (Tex.Civ.App. 1954) 275 S.W.2d 149). Finally, a nonmarital partner may recover in quantum meruit for the reasonable value of household services rendered less the reasonable value of support received if he can show that he rendered services with the expectation of monetary reward. (See *Hill v. Estate of Westbrook, supra*, 39 Cal.2d 458, 462.)

(*Marvin, supra*, at p. 684.)

Councilmember Kaplan and her partner have lived in the Residence for nearly thirteen years. Councilmember Kaplan contributes half of the housing costs each month, including the mortgage payment. Although Councilmember Kaplan and her partner are not married, they consider each other life partners and have established a trust that would ensure Councilmember Kaplan inherits the property in the event of her partner's passing. To conclude Councilmember Kaplan does not have an equitable interest in the Residence would mean that despite both partners living in the Residence since its initial purchase thirteen years ago and both partners contributing to the mortgage payments since that time, only Councilmember Kaplan's partner would be entitled to the equity earned from payments toward the principal loan amount, as well as any appreciation in the value of the Residence that has occurred over the last thirteen years.

Despite not contributing to the initial down payment, and the lack of any formal written agreement beyond the revocable trust, we believe the facts establish a realistic and significant likelihood that Councilmember Kaplan could support a claim of partial ownership based on an implied contract or "*Marvin* agreement." Taking all of the above into consideration, in addition to the Act's broad definition of interest in real property, which includes not only directly owned property but "beneficial" interests owned "indirectly, or beneficially" by an official, and the Act's mandate that it be "liberally construed to accomplish its purposes" (Section 81003), we find that the official's potential interest in the residence under the *Marvin* standards is a sufficient interest in real property subject to the Act's disqualification rules.¹

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

¹ Our advice is expressly limited to the context of whether Councilmember Kaplan has a real property interest for purposes of the Political Reform Act. Our advice does not establish or determine an equitable right to real property, nor do we comment on how the exact value of that interest would be calculated.

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 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.)

The financial effect of a governmental decision on a parcel of real property in which an official has a financial interest involving property 1,000 feet or more from the property line of the official’s property is presumed not to be material. This presumption may be rebutted with clear and convincing evidence the governmental decision would have a substantial effect on the official’s property. (Regulation 18702.2(b).)

You have noted that the project site is divided into two portions: (1) the industrial park; and (2) additional remnant CalTrans parcels and Parcel 8, located in the Southeast corner of the annexation area. Together, these portions make up the overall Annexation Area. Councilmember Kaplan’s residence is less than 1,000 feet from the Annexation Area. The scope of the overall project involves 474.4 acres of land, with 353 acres making up the proposed industrial park, and the development of up to 5.2 million square feet of industrial uses and nearly 100,000 square feet of retail/highway commercial uses. As discussed above, the DEIR also notes several significant and unavoidable environmental impacts on nearby property, including degradation of visual character and quality of public views, loss of agricultural land, impacts on air quality, and the need to construct an eight-foot-tall concrete sound wall to mitigate impacts on noise levels. Taken as a whole, these facts indicate that the Industrial Park Project would change the Residence’s character

by substantially altering the view and air quality, and would likely also impact the income-producing potential and market value of the property. Consequently, Councilmember Kaplan is prohibited from taking part in decisions relating to the Annexation Area.

You have also asked whether Councilmember Kaplan may take part in decisions specifically relating only to the Industrial Park Project and not the overall Annexation Area—that is, decisions relating more specifically to the 353 acres making up the proposed industrial park, located more than 1,000 feet from the Residence. These decisions include consideration and potential approval or rejection of the Planned Unit Development and Development Agreement. If the distance between the Residence and the property at issue in the respective governmental decision was greater than 1,000 feet, Regulation 18702.2(b) would be the applicable materiality standard, rather than Regulation 18702.2(a)(8), which applies to properties between 500 and 1,000 feet apart. However, this is not the case.

As noted above, the project site consists of the entire 474.4 acres of land that make up the Annexation Area, not merely the 353 making up the proposed industrial park. Additionally, while a specific development project has not been submitted for Parcel 8, the DEIR indicates it is intended that Parcel 8 will likely be developed in the long-term as part of the overall project. Thus, in addition to the immediate impacts the Industrial Park Project will have on the entire project site/Annexation Area and surrounding areas, decisions impacting the initial development stage of the project will necessarily impact the likelihood of Parcel 8's future development. Further, the facts and governmental decisions at issue are distinct from the limited circumstances in which we have determined a different method of measurement was appropriate. (See, e.g., *Leishman* Advice Letter, No. A-21-154 [involving decisions specifically related to the eighteenth hole of a golf course]; cf. *Guina* Advice Letter, No. A-24-121 [involving separate parcels comprising a single project site, both of which would be impacted by the overall project].) Consequently, Regulation 18702.2(a)(8) remains applicable to decisions specifically relating to the development of the industrial park, as the overall project site for the industrial park includes the entire Annexation Area. For the reasons stated above with respect to the reasonably foreseeable, material financial effect on her real property interest, Councilmember Kaplan is prohibited from taking part in such decisions.

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