



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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February 25, 2025

Samantha W. Zutler
BURKE, WILLIAMS & SORENSEN, LLP
City of Capitola
1 California Street - Suite 3050
San Francisco, California 94111-5432

Re: Your Request for Informal Assistance
Our File No. I-24-147

Dear Ms. Zutler:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹ Because your question is general in nature, we are treating your request as one for informal assistance.²

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, is Capitola City Councilmember Melinda Orbach permitted to take part in governmental decisions relating to the redevelopment of the Capitola Mall site, which is anticipated to include approximately 1,200 new residential units and other improvements approximately 800 feet from her residence?

CONCLUSION

Yes, based on the facts currently known, Councilmember Orbach may take part in the governmental decisions relating to the redevelopment project. It is reasonably foreseeable that the

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.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

project decisions would have a material financial effect on her residence due to the project's scope and the effect it would have on the market value and income-producing potential of Councilmember Orbach's real property. While this interest would ordinarily disqualify her from taking part in project decisions, the "public generally exception" permits her to do so, because more than half of the jurisdiction's commercial real property is located within 1,000 feet of the project site and, based on the current facts, Councilmember Orbach's real property would not be uniquely affected by the decisions as compared to this significant segment.

FACTS AS PRESENTED BY REQUESTER

Melinda Orbach is a member of the Capitola City Council. Councilmember Orbach owns a condominium about 800 feet from the Sears property line at the Capitola Mall ("Mall") site, which is her primary residence. Her property is approximately a three-minute drive from the Mall site, across Capitola Road.

It is likely that during Councilmember Orbach's tenure as a Councilmember, the City Council will hear and take action on items relating to the redevelopment of the Capitola Mall site ("Project"). The existing Capitola Mall building is approximately 35 feet high and currently includes 68 retained tenants. The larger anchor retail stores on the Mall site range from 30-40 feet in height. The City's Zoning Code permits a building height of up to 50 feet in exchange for certain community benefits. The Mall site is zoned in a Regional Commercial Zone, which also allows for residential development.

In 2019, Melone Geier Partners ("MGP"), who own five contiguous Mall parcels, submitted a land redevelopment application that included approximately 339,131 square feet of commercial space, including retail, restaurants, fitness, and entertainment uses, for a net reduction of approximately 34,320 square feet of commercial space. The application also included 637 multi-family residential units at 20 units per acre. In 2020, MGP withdrew the application due to the COVID-19 pandemic.

MGP has approached the City recently to discuss potential redevelopment of the Capitola Mall again. During the City's Housing Element update in 2023/2024, MGP provided public comment that they would need additional height and floor area ratio ("FAR") to make redevelopment work financially. The City committed to updating the zoning code to increase height and FAR in 2025 in the zone where the Mall is located. The zone where the Mall is located includes other properties in addition to the Mall. The City Council must take action on any amendment to the City's Zoning Code.

The City anticipates that MGP will work with the City to update the Capitola Zoning Code as it relates to maximum height and FAR in the Mall zone, then either develop the property or sell it. The City anticipates MGP's next application to approximately double the number of housing units (approximately 1,200 units) and may include a hotel. It seems likely to City staff that MGP's next application will include the same or similar proposal for a new grid of streets and open-air shopping as was included in MGP's 2019 redevelopment application.

37 of the 46 acres of the Capitola Mall are included within the City's Housing Element Sites inventory in its Housing Element. The Housing Element notes that the realistic development density

is proposed at 48 dwelling units per acre. These proposed 48 dwelling units per acre can be achieved by permitting building heights up to 75 feet on the Capitola Mall site, to allow for commercial uses on the ground floor and residential uses on upper floors. The City Council would be required to take action to allow such an increase in height in the area.

While MGP does not currently have an application pending before the City, it seems likely that when MGP submits an application, the City will enter into a Development Agreement with MGP which could include terms regarding the number and income levels of affordable housing units and fees owed to the City for the Project. The City Council may also conduct a conceptual review of the potential Project and rezoning or adoption of a specific plan governing the Mall site. In the event of an appeal of a Planning Commission decision relating to the Project, the City Council would sit as the appeal body and final decisionmaker.

For purposes of application of the public generally exception, the following data was provided:

- Percentage of residential land area within 1,000 feet of the entire Mall site (i.e. the red and blue portions of the attached): about 11.3 percent;
- Percentage of residential land area within 1,000 feet of MGP-owned portions of Mall site: about 10.5 percent;
- Percentage of residential households within 1,000 feet of the entire Mall site (i.e. the red and blue portions of the attached): about 9.24 percent;
- Percentage of residential households within 1,000 feet of MGP-owned portions of Mall site: about 10.06 percent;
- Percentage of commercial parcels within 1,000 feet of Mall site: about 51 percent.

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).)

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).”³

Where 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).)

Councilmember Orbach’s residential property is 800 feet from the proposed Project, which would see hundreds of thousands of square feet of commercial space redeveloped. It is anticipated that the developers will apply to build more than 1,200 new residential units, in addition to new commercial properties, which may include constructing a new hotel. Given its significant scope, this Project would likely, at a minimum, change the income-producing potential and market value of Councilmember Orbach’s real property. As such, she has a financial interest in the proceeding and, unless an exception applies, must recuse herself from governmental decisions relating to the Project.

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 the official’s interests if the decision’s financial effect on the interest is indistinguishable from its effect on the public generally. (See Section 87103.) A governmental decision’s financial effect on a public official’s financial interest is indistinguishable from its effect on the public generally if the official establishes that a significant segment of the public is affected and the effect on the official’s

³ While no facts currently indicate this is the case, future facts could indicate, for example, that the Project would involve “construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and [Councilmember Orbach’s real property] will receive new or improved services that provide a benefit or detriment disproportionate to other properties receiving the services.” (Regulation 18702.2(a)(6).)

financial interest is not unique compared to the effect on the significant segment. (Regulation 18703(a).)

Under Regulation 18703(b), a “significant segment of the public” is:

- (1) At least 25 percent of:
 - (A) All businesses or non-profit entities within the official’s jurisdiction;
 - (B) All real property, commercial real property, or residential real property within the Official’s jurisdiction; or
 - (C) All individuals within the official’s jurisdiction.
- (2) 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.

A “unique effect” on an official’s financial interest relevant to these facts includes a disproportionate effect on the development potential, use of the official’s real property, or on the income-producing potential of the official’s real property, or a disproportionate effect on the official’s real property due to the proximity of the Project. (Regulation 18703(c)(1) and (2).)

Based upon the facts provided, approximately 51 percent of the jurisdiction’s commercial real property is located within 1,000 feet of the Mall site. Therefore, the Project decisions will affect a significant segment of the public. Accordingly, the determinative issue is whether the decision will have a “unique effect” on Councilmember Orbach’s interest in her residence compared to the 51 percent of the commercial real property within the significant segment.

Notably, Councilmember Orbach’s interest is a condominium and a residential property, which will be affected somewhat differently than the commercial properties near the Project site. However, the fact that Councilmember Orbach’s real property is residential and the significant segment of the public is comprised of commercial real property is not determinative as to whether there will be a “unique effect” on the official’s residential property. We have previously advised that the public generally exception applied even where the official’s interest was residential and the significant segment of the public affected by the decision was comprised of commercial property. (See, e.g., *Lyon* Advice Letter, No. A-24-104.) Although commercial property is the basis for establishing that a significant segment of the public would be affected, your facts indicate that the nature of the neighborhood is already a mix of residential and commercial properties. Within this neighborhood, there is no indication that Councilmember Orbach’s residence would be uniquely affected compared to the 51 percent of businesses in the jurisdiction located within 1,000 feet of the Project site. For example, while the development would likely impact the market value and income-producing potential of Councilmember Orbach’s real property, the same would likely also be true for nearby commercial properties. Similarly, while Councilmember Orbach’s residence could experience other proximity-based impacts, such as an increase in nearby traffic, the same would be true for nearby commercial properties. Additionally, there is no indication that the Project would change the development potential of Councilmember Orbach’s real property or nearby commercial properties. Consequently, the public generally exception applies, and Councilmember Orbach may take part in governmental decisions relating to the Project.

We caution, however, that this informal advice is based on the limited facts regarding the Project that are available at this time. If additional information becomes available—for example, an

environmental impact report—that indicates Councilmember Orbach’s real property may be uniquely affected by the Project under one of the factors described above, she should seek additional advice regarding her ability to take part in Project 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

KC:aja