



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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April 3, 2023

Jean B. Savaree
Aaronson, Dickerson, Cohn and Lanzone
140 B. Street, Suite 5, Box 115
Davis, California 95616

Re: Your Request for Advice
Our File No. A-23-049

Dear Ms. Savaree:

This letter responds to your request for advice on behalf of Town of Woodside Councilmember Richard “Dick” Brown 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.

QUESTIONS

1. Does Councilmember Brown have a disqualifying financial interest in decisions related to the Town’s Housing Element due to his principal residence being approximately 375 feet from the property line of the High Road Site, which is proposed for rezoning and development on the current working draft of the Town’s Housing Element update?

2. In the event that, while Councilmember Brown is recused and not participating in decisions related to the Town’s Housing Element due to his principal residence being approximately 375 feet from the property line of the High Road Site, the remainder of the Town Council directs that the High Road Site no longer be included as a site proposed for rezoning and

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.

development in the draft Housing Element, would Councilmember Brown cease to have a disqualifying interest and therefore be allowed to participate in future decisions related to the Housing Element?

3. If the High Road Site continues to be included on the working draft of the Housing Element, is Councilmember Brown precluded from participating in the discussion and actions related to environmental review of the Housing Element under CEQA?

4. When the Town Council formally adopts a Housing Element with a final list of properties proposed for rezoning and development, will this constitute the “final decision” under Regulation 18706(a)(3), so as to allow Councilmember Brown to participate in future decisions related to housing policy and implementation of the Housing Element that can be segmented from decisions related specifically to the High Road Site, such as rezonings and decisions on specific projects proposed at sites other than the High Road Site that are also identified in the Housing Element for such rezonings and development?

CONCLUSIONS

1. & 2. Under the Act, Councilmember Brown is generally disqualified from taking part in decisions involving the High Road Site. However, if governmental decisions involving the High Road Site are segmented and considered first, with a final decision that the High Road Site no longer be included as a site proposed for rezoning and development reached without Councilmember Brown’s participation, then he may take part in the remaining decisions, as long as any such decision does not reopen the prior decisions regarding the draft Housing Element.

3. Yes. Councilmember Brown is disqualified from discussion and actions related to environmental review of the Housing Element under CEQA if the High Road Site continues to be included among the sites identified on this list. A decision may be segmented so long as the decision can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying conflict of interest, the decision in which the official is disqualified is made first and without the official’s participation, and the subsequent decisions will not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified.

4. Yes. To the extent that any governmental decisions involving High Road Site are segmented and considered first, with a final decision reached without Councilmember Brown’s participation in any way, Councilmember Brown may take part in the remaining decisions, as long as any such decision does not reopen the prior decisions regarding the parcels. When properly segmented, this would include rezonings and decisions on specific projects proposed at sites other than the High Road Site that are also identified in the Housing Element.

FACTS AS PRESENTED BY REQUESTER

Councilmember Brown has served on the Town Council since his initial election in 2018. He was reelected on November 8, 2022, and will serve a term that will end in 2026. Councilmember Brown owns his home on Northgate Drive in Woodside, which is approximately

375 feet from an empty parcel at the corner of Woodside Road and High Road that is owned by the Town (“High Road Site”).

For more than a year, the Town has been engaged in the process of drafting and adopting an update to its Housing Element, which is a required element of the Town’s General Plan. State law (Government Code section 65580 et seq.) specifies the topics that the Housing Element must address. Local jurisdictions like the Town receive their shares of the Regional Housing Needs Allocation (“RHNA”) every eight years and must revise their housing elements to support the development of the housing units allocated to them. Of particular relevance to Councilmember Brown, State law requires that the Town “identify sites that can be developed for housing within the planning period...” (Government Code Section 65583.2(a)).

The Town Council will not formally adopt a final Housing Element until the Town receives certification from the California Department of Housing and Community Development (“HCD”) that its proposed element complies with all applicable laws and adequately plans for the RHNA. Government Code Section 65585 prescribes the process through which cities seek this certification. In May 2022, consistent with that process, the Town circulated a draft of the Housing Element for public review and comment. That draft indicated that, if the Town were to fall behind on its projected housing development during the eight-year cycle, the Town would consider rezoning the High Road Site and/or two other Town-owned parcels to accommodate additional housing production. It did not, however, commit to rezone or develop the High Road Site.

At the end of the public comment period, the Town Council reviewed the comments received and directed staff to make several changes to the draft prior to submitting the draft to HCD. Notably, the updated draft was to designate the High Road Site as a parcel to be rezoned to accommodate up to 10 housing units as part of the Town’s plan to meet its RHNA number. Due to the proximity of the High Road Site to his home, Councilmember Brown recused himself from further participation on items related to the Housing Element when the High Road Site was included as a site proposed for rezoning and development under the then-current draft of the Housing Element. Town staff determined that a total of 28 parcels are within 500 feet of the High Road Site and 151 parcels are within 500 feet of any of the four sites on the current draft RHNA plan. There are 2,535 total parcels in Woodside.²

The Town submitted a draft of the Housing Element to HCD in July 2022 and received an extensive comment letter back from HCD in October 2022. The Town has since worked to address the comments in that letter and provide an updated draft of its Housing Element for reconsideration by HCD. The Town Council has considered several proposals for addressing HCD’s comments, including some plans that would not include the High Road Site as designated for rezoning and development. However, the Town plans to make its first resubmission to HCD since the October 2022 comment letter within the next week, and the draft to be submitted identifies the High Road Site for rezoning and development. For this reason, Councilmember Brown remains recused from participating on items related to the Housing Element.

² Based on the information provided, there is no indication that the public generally exception may apply.

The Town plans to formally adopt an updated Housing Element after receiving certification from HCD, although it is not known at this time whether additional edits and resubmissions will be required to obtain that certification. In addition to the formal act of adopting the Housing Element, the Town Council will also be required to take several other formal actions in support of the Housing Element. For example, the Town Council will need to make findings and certify an Environmental Impact Report or take other action to satisfy the requirements of the California Environmental Quality Act (“CEQA”) prior to adopting the Housing Element. It will also be required to make several zoning code amendments to allow for greater residential development and density at the sites identified in the Housing Element, take other project-specific actions to facilitate development on those rezoned sites, and potentially make other General Plan Amendments to conform to the Housing Element updates.

ANALYSIS

The Act’s conflict of interest provisions ensure that public officials will perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them. (Section 81001(b).) Section 87100 prohibits a public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. Section 87103 provides that a public official has a “financial interest” in a decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official’s interests that is distinguishable from the decision’s effect on the public generally.

Section 87103 also describes the interests from which a conflict of interest may arise under the Act. As pertinent to the facts provided, those economic interests include “[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).) Accordingly, Councilmember Brown has a potentially disqualifying economic interest in his real property.

Foreseeability

A financial effect on a public official’s economic interest is reasonably foreseeable if the economic interest is a named party in, or the subject of, a governmental decision before the official or the official’s agency. (Regulation 18701(a).) An economic 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 economic interest, and includes any governmental decision affecting a real property economic interest as described in Regulation 18702.2(a)(1)-(6). (Regulation 18701(a).)

Where a public official’s economic interest is not explicitly involved in the decision, a different standard for determining the reasonable foreseeability of a financial effect is applicable. Under Regulation 18701(b):

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 decision at issue involves the approval of the Town's Housing Element update for the Town's General Plan, and Councilmember Brown's property is not one of the sites identified on this list. As such, Councilmember Brown's real property interest is not a named party in or the subject of the decision. Under Regulation 18701(b), he will have a financial interest in the decision if there is a realistic possibility that the decision will have a material financial effect on his economic interest.

Real Property

Regulation 18702.2 provides materiality standards for determining when a reasonably foreseeable effect on an interest in real property is material. Relevant to High Road Site, Regulation 18702.2(a)(7) provides that 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 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.

Here, you have noted that Councilmember Brown owns a primary residence approximately 375 feet from the High Road Site. The High Road Site is currently an empty parcel, owned by the Town. The updated draft Housing Element indicated that, if the Town were to fall behind on its projected housing development during the eight-year cycle, the Town would consider rezoning the High Road Site and/or two other Town-owned parcels to accommodate additional housing production. It would designate the High Road Site as a parcel to be rezoned to accommodate up to 10 housing units as part of the Town's plan to meet its RHNA number. You have also stated that there are other proposals that would not include the High Road Site as designated for rezoning and development. Any decisions concerning the updated draft Housing Element, which take into consideration either the inclusion or exclusion of the High Road Site, would involve property within 500 feet of Councilmember Brown's residence. You have not provided any facts to indicate that these decisions will not have a measurable impact on the Councilmember's property. Thus, Councilmember Brown has a disqualifying financial interest in the decisions and is prohibited from taking part in any decisions related to the High Road Site.³

Segmentation

In general, the Act disqualifies Councilmember Brown from taking part in governmental decisions that would have a reasonably foreseeable, material financial effect on his real property; specifically, governmental decisions pertaining to the High Road Site. However it is possible that the Town Council could segment certain decisions related to the draft Housing Element, such that Councilmember Brown may take part in decisions to a limited extent. Under Regulation 18706,

³ We do not analyze the "public generally" exception, as your facts indicate that it would not apply.

Councilmember Brown would be permitted to take part in Housing Element decisions to the extent that the following segmentation procedure is adhered to:

- (1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying financial interest;
- (2) The decision in which the official has a financial interest is segmented from the other decisions;
- (3) The decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official's participation in any way; and
- (4) Once the decision in which the official has a financial interest has been made, the disqualified public official's participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified.

(Regulation 18706(a).)

Regulation 18706(c) further provides, “[o]nce all the separate decisions related to a budget or general plan affecting the entire jurisdiction have been finalized, the public official may participate in the final vote to adopt or reject the agency’s budget or to adopt, reject, or amend the general plan.”

Accordingly, to the extent that any governmental decisions involving the High Road Site are segmented and considered first, with a final decision reached without Councilmember Brown’s participation in any way, Councilmember Brown may take part in the remaining decisions, as long as any such decision does not reopen the prior decisions regarding the parcels. Moreover, to the extent there is a single final vote to amend the Town’s General Plan to encompass all the separate decisions related to the plan previously finalized, Councilmember Brown may take part in the vote to amend the Town’s General Plan pursuant to Regulation 18706(c). However, we caution this exception applies only to participating in the final vote and does not extend to discussions of reopening any of the previously finalized decisions or any discussions occurring if the amendment is rejected.

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

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