



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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June 16, 2023

Jason R. Alcala  
City Attorney  
City of Livermore  
1052 S. Livermore Ave  
Livermore, CA 94550 1052

Re: Your Request for Advice  
**Our File No. A-23-092**

Dear Mr. Alcala:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”).<sup>1</sup>

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 City of Livermore City Councilmember, Ben Barrientos, take part in decisions related to project entitlements for the Garaventa Hills Project given that Councilmember Barrientos owns a property more than 500 but less than 1,000 feet from the project site?<sup>2</sup>

### CONCLUSION

No. Councilmember Barrientos may not take part in decisions surrounding the Garaventa Hills Project because he has a disqualifying financial interest in his real property located 700 feet from the Project. Based on the facts provided, it is reasonably foreseeable the proposed 44 new

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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.

<sup>2</sup> We note that you also requested advice under common law conflicts of interest rules, we cannot address that issue as we only provide advice on the Political Reform Act and, when appropriate, Government Code Section 1090.

residential properties on a 31-acre site near the Councilmember's residence may change the income producing potential, character, and market value of the Councilmember's residence.

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

You are the city attorney for the City of Livermore ("City") and are seeking advice on behalf of City Councilmember Ben Barrientos. Councilmember Barrientos owns real property more than 500 but less than 1,000 feet from the site of a project that will be subject to decisions by the City Council.

Lafferty Communities ("Lafferty") owns a 31-acre undeveloped site in the Garaventa Hills of the City, which adjoin the 24-acre Garaventa Wetlands Preserve. In 2011, Lafferty submitted an application to the City Planning Commission proposing a 76-home development, known as the Garaventa Hills Project ("Project"). The City determined an Environmental Impact Report ("EIR") would be prepared in accordance with the California Environmental Quality Act ("CEQA"). In 2012, the City Planning Commission held a public hearing to receive comments on the draft EIR, Lafferty made changes accordingly, and a final EIR was distributed in June 2014. In July 2014, the City Planning Commission recommended against approval of the application because of concerns about the project's effect on the adjacent preserve.

In 2015, the City received revised plans for the project and the Planning Commission conducted a public hearing on the new plans. After the public hearing the Planning Commission recommended certification of the EIR and approval of the project by the City Council. The City Council directed the project be returned to the Planning Commission with direction for various modifications. In 2017 Lafferty revised the application and proposed a smaller development that reduced the number of homes to 44 and a Re-Issued Final EIR ("RFEIR") was prepared. In 2018 the Planning Commission held a public meeting and recommended approval, and in April 2019, the City Council approved the project.

In May 2019, a group called Save The Hill filed a petition in Alameda County Superior Court challenging the RFEIR and the City Council's decision to approve the project. The Superior Court judge ruled for the City, however ultimately, in March 2022, a California Court of Appeals repealed that decision and ruled in favor of Save the Hill due to a lack of consideration of a "no project" alternative plan in violation of CEQA. As a result, the City was required to rescind its previous approval for the project and did so in November 2022.

Lafferty is currently preparing a revised EIR for the Project that further explores the "no project" alternative for consideration by the City, along with the project entitlements related to the project, including adoption of findings and facts related to the project and approval of a tract map and site plan design review. The revised EIR and renewed application will be submitted to the Planning Commission and upon recommendation by the Planning Commission the revised EIR and renewed application will come before the City Council for approval.

Ben Barrientos was elected to City Council on November 8, 2022, as a City Councilmember for District 2, where the Project is located. Councilmember Barrientos owns real property 700 feet from the Project at the shortest measurable distance, which is used as his primary residence. The Project is not visible from his property. The backside of Councilmember Barrientos' property

directly abuts a road that can be used as a route for vehicle ingress and egress from the Project site. If the Project is developed as proposed there would likely be an increase in traffic and a change in property value of the existing properties due to the 44 residential units that would be built. In a follow-up email you stated that Councilmember Barrientos' property value would increase as the new developments are likely to be expensive given their quality, size, and location. Further, Councilmember Barrientos anticipates an increase in traffic due to increased population in the area specifically on a road shared by the development and Councilmember Barrientos' home that is a popular road used to avoid rush hour traffic.

## ANALYSIS

As a public official, Councilmember Barrientos is subject to the Act's conflict of interest provisions. Under Section 87100, a public official may not make, participate in making, or use the official's position to influence a governmental decision in which the official has a financial interest. A public official has a "financial interest" in a governmental 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. (Section 87103; Regulation 18700(a).) Section 87103 identifies interests from which a conflict of interest may arise, including any real property in which the public official has a direct or indirect interest worth more than two thousand dollars (\$2,000) or more. (Section 87103(b)). Here, Councilmember Barrientos' interest at issue is his property more than 500 but less than 1,000 feet of the Project Site.

The standard for foreseeability and for materiality are dependent on whether an interest is explicitly involved in the decision. Regulation 18701(a) provides that a decision's effect on an official's interest is presumed to be reasonably foreseeable if the interest is "explicitly involved" as a named party in, or the subject of, the decision. An 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 interest including any decision affecting an interest in real property as described in Regulation 18702.2(a)(1) through (6). Where, as here, the official's financial interest is not explicitly involved as a named party or subject of the decision, the financial effect is "reasonably foreseeable" if it can be recognized as a realistic possibility, more than hypothetical or theoretical. (Regulation 18701(b).)

Regulation 18702.2(a)(8) is the applicable materiality standard regarding an official's real property parcel that is located 500 to 1,000 feet from property involved in a decision. Under Regulation 18702.2(a)(8)(A)-(E), a decision's effect on an official's real property interest is material if the decision would change the parcel's development potential, income producing potential, highest and best use, character of the parcel (by substantially altering traffic levels, intensity of use, parking, view, privacy, noise levels, or air quality), or market value.

As noted above, Councilmember Barrientos' property is 700 feet from the Project at the shortest measurable distance. However, his property abuts a road that may be used to access the Project and the proposal will allow for the construction of 44 residential properties on a currently undeveloped 31-acre site. In this case, you also state that if the Project is developed as proposed, adding 44 residential units to the area, traffic levels would increase on an already busy road and property values of the surrounding existing properties, including the Councilmember's would likely be affected. Based on the facts provided and the nature of the Project, the proposed 44 residential properties and initial development of the 31-acre site near Councilmember Barrientos' property

may change the income producing potential, the character of, and the market value of the Councilmember's property as specified in Regulation 18702.2(a)(8)(A)-(E). Accordingly, it is reasonably foreseeable the decisions will have a material financial effect on Councilmember Barrientos' interest in his residence and he may not take part in the decisions.

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

Sincerely,

Dave Bainbridge  
General Counsel



By: Valerie Nuding  
Counsel, Legal Division

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