STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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December 30, 2015

Bill Horn, Chairman
Supervisor, 5th District
County of San Diego
1600 Pacific Highway, RM 335
San Diego, CA 92101-2470

RE: Your Request for Advice
Our File No. A-15-185(a)

Dear Supervisor Horn:

This letter responds to your request for reconsideration of written advice that was issued to you on October 13, 2015 regarding your duties as a member of the San Diego Board of Supervisors under the Political Reform Act (the "Act").[1] On December 2, 2015, you requested that we consider additional information provided by the Sutton Law Firm representing the developer of the Lilac Hills Ranch project ("LHR") and additional facts provided by others, including Ms. Patsy Fritz.

The staff of the Fair Political Practices Commission does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) In other words, advice letters are based on the facts provided by the requestor. While an official is never mandated to seek advice, formal written advice does provide the official with immunity. (Section 83114(b).) We further note that when advice is sought from Commission staff, Commission staff, in its advisory role, applies the law to the facts provided. We believe your request for reconsideration provides some additional facts, but they are essentially the same facts that the first advice letter considered. Rather you dispute the application of the law to the facts you provided and the legal conclusions reached in the prior letter.

Background

In our prior letter you were advised that under the facts presented, a reasonable inference could be made that the financial effect of the LHR project in a relatively undeveloped, rural area would have a reasonably foreseeable material financial effect on the market value of your real property. Therefore, you were advised that you had a conflict of interest in decisions involving the project and you must recuse yourself from participating in these decisions.

In reaching the conclusion in the original advice letter we were mindful of and guided by the general purposes for which the Act was adopted in 1974. The people found and declared that public

[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 18110 through 18997 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.

officials, whether elected or appointed, should 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)) and that the Act was adopted to ensure that "[a]ssets and income of public officials which may be materially affected by their official actions should be disclosed and in appropriate circumstances the officials should be disqualified from acting in order that conflicts of interest may be avoided." (Section 81002(a).)

> "To this end the PRA should be liberally construed to accomplish its purposes. (Section 81003.) The PRA seeks to bring a degree of credibility to government by providing that those who hold a public trust must act, and appear to act, ethically. Erosion of confidence in public officials is detrimental to democracy. The election and appointment of ethical public officials depends upon an informed, interested and involved electorate. To maintain confidence and to avoid public skepticism, conflicts of interest must be shunned." (*Consumers Union of U.S., Inc. v. California Milk Producers Advisory Bd.* (1978) 82 Cal.App.3d 433, 443.)

After a careful review of the additional facts submitted and the analysis of our original advice letter, for the reasons set forth below, we have concluded that new or revised advice is not warranted in this case.

Financial Effects are Reasonably Foreseeable

As applicable to your question, Regulation 18701(b) provides that 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.

This language was new as of April 2015 and changed the definition that had required that effects be substantially likely to occur which was construed by some to be "more likely than not." Under the current definition we concluded that the effect was a realistic possibility and not merely hypothetical or theoretical. A realistically possible effect would not be hypothetical or theoretical merely due to delay.

1. The Williamson Act. At the outset we decline to consider the property's Williamson Act status as a relevant fact regarding foreseeability or materiality. You argue that the Williamson Act makes a change of use unforeseeable. We stated in the original letter that "we note this is a temporary contract, and in some circumstances, can be terminated before the effective end date. Even if you intended to continue agricultural uses of the property for the duration of the Williamson contract, this is not an appropriate factor to consider in our analysis." The Williamson Act designation can be terminated (not renewed) without penalty after 9 years.[2] According to the Planning Commission staff report on the project (dated August 7, 2015), the LHR development will take up to 10 years to complete. Thus, we reconfirm that the Williamson Act designation is not a factor to consider in our analysis.

[2] Obviously you will lose the benefits of accepting the Williamson Act designation over the course of the nonrenewal period.

2. Arguments Concerning Current Use. The new facts provided by you and by LHR's representative generally support the proposition that you may not have a current intent to immediately develop your property in part due to current costs and burdens associated with developing your property.

However, as we cautioned in the original advice letter "we must look at the objective effect upon the value, not whether the owner will act to realize the increased value by selling or developing the property." This is in part (to paraphrase the Commission in *In re Legan* (1985) 9 FPPC Ops. 1), because there is no guarantee that an official will not change the use of the property once the decision has been made and any benefit conferred. The day following the decision a buyer might make an offer that the official "can't refuse" because of the increased value.

At footnote 10 in *In re Legan*, the Commission cited *Cogan v. City of Los Angeles* (1973) 34 Cal.App.3d 516, 52l-22:

> "We are constrained to hold that a special use to which property is put cannot be considered as affecting the amount of benefits, but that such amount is to be measured by the benefit which would be received by the property if devoted to any use which might reasonably be made of it. It would be inequitable and unfair to exempt particular property from an assessment when a special use is voluntarily made of it by the owner, and which he may change at any time so as to reap the benefits of an improvement that does not, at the time an assessment is made, benefit him because of a special use to which he has voluntarily put his property."

The Sutton letter, dated November 18, 2015, at footnote 3, acknowledges that the LHR project area is "largely agricultural" and currently has "insufficient infrastructure (street and sewer improvements) to support [the LHR development]." It can be inferred from these facts that having the LHR development built in the region improves the ability to provide infrastructure for further development. Thus, it is reasonably foreseeable that the value and development potential of your property will be affected.

3. Other Legal Burdens. Your letter, and the letter from Mr. Sutton (with attachments from KLM Group Inc. and Xpera Group) emphasize current regulatory burdens on the development of your property under current county ordinances.[3] Many of these regulatory burdens would appear to exist for many properties in the jurisdiction. However, as we noted above, we are not limiting our analysis to current development potential. What we must determine is if there is a reasonable foreseeable financial effect on your property caused by the decision. As you point out (and as other parties have noted) the project itself may not be completed for 10 years and benefits may be

[3] We also note that the future development potential of your property is not necessarily limited to the boundaries of your parcels. For example, your property could be one of multiple properties in the area acquired and aggregated to form a larger development project in the future. Thus, the costs associated with overcoming the obstacles to develop (such as fire engine access, new sewer facilities, or bridging the creek) might be reduced by being shared between all the properties in the larger future development. Moreover, the costs might even be avoided entirely if the ultimate use of your property within the larger development stays essentially the same in order to provide mitigation land as upland habitat or wetlands.

deferred until that time. The fact that amendments have been proposed for this LHR project and may be accepted suggests the realistic possibility that such amendments could be proposed and enacted for future development projects. Such changes are foreseeable and would not be merely hypothetical or theoretical.

We confirm the prior conclusion that for purposes of an analysis under the Act's conflict of interest rules, the decision on the LHR project will have a foreseeable financial effect on your property.

Materiality

As discussed in the original letter, Regulation 18702.2 sets out a list of standards to determine if an official's property will be materially affected. The original letter concluded that financial effect was material under the following provisions because the decision would:[4]

- Change the development potential of the parcel of real property[5] (Regulation 18702.2(a)(7));

- Change the highest and best use of the real property in which the official has an interest (Regulation 18702.2(a)(9));

- Cause a reasonably prudent person, using due care and consideration under the circumstances, to believe that the governmental decision was of such a nature that its reasonably foreseeable effect would influence the market value of the official's property. (18702.2(a)(12).)

With respect to the use or development potential of your property (Regulation 18702.2(a)(7) and (a)(9)) we agree with the prior conclusion. Relevant to the analysis is the proposed introduction of 90,000 SF of commercial development that could serve housing within a 2 to 5 mile radius of LHR (including your property) and the introduction of other resources in the region.

With respect to (a)(12), we note that "[a] reasonably prudent person is not the exceptionally cautious or skillful individual, but a person of reasonable and ordinary carefulness." (*United States v. Pruett* (2012) 681 F.3d 232.) A reasonably prudent person in this context is not a trained real estate professional or developer, but an ordinary prudent citizen that the Act seeks to protect. Applying this test to your facts, the original letter concluded:

> "Under these facts, a reasonable inference can be made that the financial effect of such a major development in a relatively undeveloped, rural area would have a reasonably foreseeable material financial effect on the market value of your

[4] Mr. Sutton also cites to an enforcement closure letter and suggests this resolves the issue of financial effect. The enforcement letter is based on facts distinct from yours. In addition, it goes without saying that determinations as to whether facts support the assessment of a penalty after the fact is a far different process than determining facts required for prospective disqualification or immunizing advice.

[5] Your letter and Mr. Sutton's and KLM Group Inc.'s letters appear to focus solely on the development potential for residential purposes. Regulation 18702.2 is not so limited, and other types of development should be considered.

real property. Therefore, you have a conflict of interest in decisions involving the Project and you must recuse yourself from participating in these decisions."

Considering the significant size of the LHR project, the existing use of the project site, and your substantial holdings in the region, we confirm the finding that a reasonably prudent person would believe that the decision on the LHR project was of the nature that it would have a reasonably foreseeable material financial effect on the market value of your property.

Consequently, your new facts do not rebut the conclusion in the original advice letter. We confirm the original advice that you have a conflict of interest in the LHR decision.

Should you have any additional questions on this matter, please contact the Commission at (916) 322-5660.

Sincerely,

Hyla Wagner
General Counsel

/s/

By: John W. Wallace
Assistant General Counsel
Legal Division

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