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To: Chair Miadich, Commissioners Cardenas, Hatch, and Hayward

From: Dave Bainbridge, General Counsel, Legal Division
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Subject: *Minner* Advice Letter, No. A-19-032

Date: June 3, 2019

Introduction

At its May 2017 meeting, the Commission was asked to withdraw or modify the *Minner* Advice Letter, No. A-19-032, issued on April 15, 2019.¹ The issue in *Minner* concerned whether the Vice Mayor of Cupertino had a disqualifying conflict of interest in a mixed-use development project (the “Project”) located 939 feet away from her residence. Based on the sheer magnitude of the Project seeking to become the focal point for the community, the letter concluded that the Vice Mayor had a potential conflict of interest in all governmental decisions related to it. However, due to the size, the letter also found that the public generally exception applied because the Project would affect at least 25% of Cupertino’s residences, and the effect on the Vice Mayor’s residence 929 feet from the Project would not be unique in comparison to other properties within the area.

Sean Welch from Nielsen Merksamer appeared at the meeting to provide an overview of his arguments and to request that the Commission take action. By motion, the Commission agreed to review the *Minner* letter at the next meeting and directed staff to provide its analysis of the points raised in Mr. Welch’s letter.

Background

The Sand Hill Property Company is interested in developing a mixed-use Project in the City of Cupertino located mainly on the site of the current Valco Shopping Mall, which is approximately 58 acres. In the early 2000’s, the mall began to decline and by 2018, it had an approximately 76% vacancy rate.

Sand Hill submitted two proposals to the City for the Project in the form of a “streamlined” application process under California Senate Bill 35 and a more traditional land use approval process pursuant to a Specific Plan proposal.

¹ This request was initially made through an undated letter that was submitted the evening before the Commission meeting by Sean Welch of Nielsen Merksamer Parrinello Gross & Leoni (“Nielsen Merksamer”).

Both proposals would be similarly substantial in size and were thus considered together in the analysis. For example, the SB 35 project proposed 2,402 housing units, 1.8 million square feet of office space and 400,000 square feet of retail, with building heights of up to 13 stories. The Specific Plan project proposed 2,923 housing units,² 1,750,000 square feet of office space, 400,000 square feet of retail, and 191 hotel rooms, with building heights of up to 22 stories.

The Environmental Impact Report (“EIR”) stated the City’s objective for the Vallco site was to establish a distinct and memorable mixed-use Town Center that would be a regional destination and also a focal point for the community. The EIR also estimated the Project would take 10 years to complete.

The facts stated there would be significant cumulative traffic impacts on 17 intersections throughout the area, 8 of which are in Cupertino. In addition, the increased traffic on Steven’s Stevens Creek Boulevard could result in “cut-through” traffic and parking intrusion in adjacent neighborhoods, including the Vice Mayor’s neighborhood. However, the EIR concluded that these issues would not be significant with the implementation, if necessary, of traffic calming improvements and a parking permit program.

The EIR stated the noise impacts resulting from the construction for the Project site and surrounding area would be significant and unavoidable; however, the Vice Mayor’s property is outside the area that would experience significant noise impacts.

The Cupertino Vice Mayor owns a two-story home in a cul-de-sac approximately 939 feet from the Project site. Her neighborhood has several hundred similar homes extending in all directions and is separated from the Project site by a concrete wall, which prevents access to the neighborhood from west side of the Project. The facts state her neighborhood is predominantly defined by single-family residential homes and on the valley floor with minimal grade changes. Stevens Creek Boulevard is the nearest major thoroughfare.

Recently amended Regulation 18702.2 provides the materiality standards applicable to a decision’s reasonably foreseeable financial effect on an official’s real property interest. Specifically, under Regulation 18702.2(a)(8), a decision’s effect on an official’s real property interest is material if the decision involves property located more than 500 but less than 1,000 feet from the property line of the official’s parcel, and the decision would change the parcel’s market value, development potential, income producing potential, highest and best use, or character by substantially altering traffic levels, intensity of use, parking, view, privacy, noise levels, or air quality.

The letter found it was reasonably foreseeable that the Project would substantially alter traffic levels and parking in areas near the Vice Mayor’s home, such as Steven’s Creek Boulevard; construction activities related to a project of this size would substantially alter the noise levels in areas near her property; views from her residence would be substantially changed; and her home’s market value and potential rental price would be impacted. The letter thus concluded that all

² However, only 2,668 of those units would be located on the Project site.

governmental decisions concerning the Project would have a reasonably foreseeable and material financial effect on the Vice Mayor's interest in her residence.

The letter then analyzed whether the public generally exception would apply to allow the Vice Mayor to take part in decisions related to the Project. Regulation 18703(a) provides:

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 his or her financial interest is not unique compared to the effect on the significant segment.

For purposes of the exception, 25-percent or more of the residential real property within an official's jurisdiction constitutes a "significant segment of the public." (Regulation 18703(b).) The City provided a map showing that approximately 25-percent of the residential units in the City are within 3,800 feet of the Project.

Cupertino is a relatively small city with a population of approximately 58,300.³ The appraisal provided by the City in connection with the Vice Mayor's residence stated that California freeway 85 (CA-85) to the west of the Project is the major breaking point of Cupertino so residences further west of CA-85 would be removed both physically and psychologically from the Project. In addition, it stated Bollinger Road to the south would be another logical boundary. All of the residences identified as part of the significant segment are located well within those specified boundaries.⁴

As explained, the massive Project, estimated to take 10 years to complete, will add thousands of new housing units and jobs to the Project site that is expected to become a regional destination. The Project will add buildings potentially reaching 22 stories in height, and it will likely create significant cumulative traffic impacts on 17 intersections throughout the area, 8 of which are in Cupertino.

Based on these facts, the letter concluded that the public generally exception applies because the Project will affect a broad segment of the residences in Cupertino. Arguably, considering the magnitude of the project and the size of Cupertino, the decision would have some effect on every residence within the city. At a minimum, the decision appeared to affect the minimum significant segment of 25% of the residences considering the fact that 25% of the residences were within 3,800 feet of the Project. Furthermore, while some of the properties substantially closer than the Vice Mayor's to the Project may be affected disproportionately,⁵ the foreseeable impacts, such as increased property value, increased traffic on several main thoroughfares, intensity of use or views,

³ This figure is based on results from a 2010 census.

⁴ As mentioned, this area is on a valley floor with minimal grade changes.

⁵ For example, a property that is located across the street from the Project will likely be disproportionately affected by construction noise and traffic resulting from the Project as compared to the Vice Mayor's property 939 feet away in a neighborhood separated from the Project by a concrete wall and three blocks of houses.

will not have a unique or disproportionate effect on Vice Mayor Chao's residence, which is 939 feet from the Project, in comparison to the other properties in Cupertino including the 25% of the properties within 3,800 feet of the project.

Discussion

As mentioned, Mr. Welch submitted a letter requesting that the Commission withdraw or modify the *Minner* Advice Letter, alleging that it is legally defective under Regulation 18702.2, which was amended primarily to establish bright-line materiality standards for property interests more than a set distance from property that is the subject of a governmental decision.

Map Is Only Evidence

He initially suggests that the *Minner* letter relied entirely on a map (and a statement about the Project's size), without facts from the requester, to conclude the public generally exception applied. While it is true the City provided a map showing that approximately 25-percent of the residential units in the City are within 3,800 feet of the Project, there is no basis to allege the *Minner* letter relied solely on the map, absent any evidence, to reach its conclusion.

As detailed above, the requestor provided an abundance of facts to establish the basis for concluding the massive Project will have a reasonably foreseeable and material financial effect on the Vice Mayor's interest in her residence. Indeed, the facts leave no room to conclude otherwise.

It is these same facts that provide the basis for a determination that the public generally exception applies in this situation. Just as the Project will affect the Vice Mayor's residence 939 feet away, it will no doubt affect properties throughout Cupertino including the 25% of the properties within 3,800 feet of the project. And because Cupertino is a relatively small city with the significant segment residing within the boundaries described above, the effects of the Project on Vice Mayor Chao's residence will likely not be unique in comparison to other properties.

Accordingly, the determination that the public generally exception applies to allow the Vice Mayor to take part in decisions concerning the Project was made based on the sheer magnitude of the Project on a small jurisdiction such as Cupertino as established by facts from the requester, not solely on the map.⁶

Undermines Regulation 18702.2

Building on the idea that the *Minner* letter did not rely on any specific facts to make the public generally determination, Mr. Welch next claims the *Minner* letter ignores and undermines the "bright-line" rule of amended Regulation 18702.2 that provides that properties beyond 1,000 feet from a project site are presumed to have no material financial effect unless there is "clear and convincing evidence" to the contrary. Therefore, the *Minner* letter improperly concluded, without

⁶ We note that the relevant facts illustrating the massive size and scope of the Project had already been recited in two previous sections of the *Minner* letter so, for purposes of efficiency, reference to the size of the Project was made without repeating the relevant facts, yet again, in the public generally discussion.

clear and convincing evidence to rebut the presumption, that properties up to 3,800 feet away from the Project will have the same impacts as the Vice Mayor's residence 939 feet. This is misleading in at least two important ways.

First, the "bright-line" rules of materiality in Regulation 18702.2 do not pertain to the public generally provisions. In general, the materiality provisions assist in the determination of whether a public official has a prohibitory financial interest in a governmental decision in the first instance. Under Regulation 18702.2(b), the financial effect of a decision on a public official's real property interest is presumed not to be material where it involves property 1,000 feet or more from the official's property. This presumption may be rebutted, but only through the express requirement that there be "clear and convincing evidence the governmental decision would have a substantial effect on the official's property."

No such express "bright-line" rules concerning distance and presumptions exist under the public generally exception. Furthermore, no rules requiring "clear and convincing evidence" to rebut any presumptions exist either. Instead, application of the exception requires that the official establish that a significant segment of the public is affected, and that the effect on the official's interest is not unique compared to the effect on the significant segment.

Second, the *Minner* letter did not involve a public official's real property located more than 1,000 feet from the Project, and therefore no analysis under Regulation 18702.2(b) was provided. However, to the extent such analysis had been necessary, it should not be assumed, as Mr. Welch's letter appears to, that no "clear and convincing evidence" existed to rebut that presumption.

The facts provided by the requestor show that the Project is a significant one, both in size and importance to Cupertino. Again, the largely vacant 58-acre parcel will become populated with thousands of new residents; there will be over a million square feet of office space added as well as 400,000 square feet of retail; significant cumulative traffic impacts will likely occur at 17 intersections throughout the area, 8 of which are in Cupertino; and this Project aims to become a distinct and memorable mixed-use Town Center that would be a regional destination and also a focal point for the community.

Without making a determination whether there is clear and convincing evidence that the Project will have a foreseeable and material financial effect on real property more than 1,000 feet away, the facts do reveal that this large project that aims to transform more than just a small portion of Cupertino will affect those homes like it will affect the Vice Mayor's home 939 feet away.

Scope of Public Generally Exception

Moreover, the public generally exception should not be construed as narrowly as suggested by Mr. Welch. In 2015, the Commission amended the public generally provisions, in part, because the provisions were being construed too narrowly. In order to do this, the Commission decided to replace the former narrowly interpreted "substantially the same manner" test with a "unique effect" test. At that time, staff stated:

The most problematic issue with the existing public generally rule is that even when a “significant segment” can be identified, it is nearly impossible to show that the significant segment will be affected in “substantially the same manner” because the provision has been interpreted very narrowly. Even the smallest differences between the official’s interests and other interests within the “significant segment” usually will preclude an official from successfully asserting that the effect on his or her interest is indistinguishable from the public generally.

For example, when a decision affects an official’s financial interest in real property, current Regulation 18707.1(b)(2)(A) identifies thirteen factors to consider in determining whether the official’s interests will be affected in “substantially the same manner” as the “significant segment.” These factors range from general considerations such as the “magnitude” of the effect on the neighborhood to more specific considerations such as the lot size or square footage of building space. Since a decision’s financial effect is measured by changes in the value of the property in dollars (as opposed to proportionately), each factor can result in a finding that the effect is not “substantially the same.”

(See Staff Memorandum, April 6, 2015, Conflict of Interest Regulations, Public Generally, Regulation 18703.)

Under the current public generally provisions, so long as a significant segment of the public is affected, the “unique effect” test is intended to allow officials to take part in more decisions under the public generally provision despite minor differences between the interests affected by the decision. Here, although there may be minor differences, it was concluded under this broader standard that the impacts from a Project of this magnitude on the Vice Mayor’s property 939 feet away were not unique as compared to other properties affected by the decision.

Material Facts

Finally, Mr. Welch claims that the map provided by the City is irrelevant because it does not appear to capture 25% of the City’s residences; this is because the 3,800 foot radius circle covers substantial parts of two neighboring cities and Experian indicates that only 18% of the City’s households are located within 3,800 feet of the project site.

Every advice letter is issued with the express caveat that the Commission is not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice issued assumes the provided facts are complete and accurate. Where material facts have not been truthfully disclosed by the requestor, no immunity attaches. (Section 83114(b).) Therefore, the advice provided in any letter, including the *Minner* letter, is contingent on the accuracy of the facts provided.

That being said, the City of Cupertino provided extensive information about the project and the community in its letter requesting advice, and there is no indication on the face of the request that any of that information is inaccurate.

Consistent With More Recent Interpretations of the Public Generally Exception

The public generally conclusion was reinforced by looking to the *Nerland* Advice Letter, No. A-18-192, where the San Pablo City Council considered installation of safety measures that would allow for a reduction in train horn noise at up to five railroad crossings in the City. There, trains running on the Burlington Northern Railroad, which runs north-to-south along the City's western border, would sound their horns at each railroad crossing. Two councilmembers owned personal residences within 400 feet of the railroad tracks and within 700 feet of one of the crossings being considered.

With respect to the public generally exception, the *Nerland* letter noted that a large majority of the residences were located within 3,000 feet of the railroad tracks and that given the City's small size and high level of noise from the trains, reduction in train horn noise would affect more than 25-percent of the residences. It further found that there was no indication the reduction in noise would have a disproportionate effect on the councilmembers' real properties within 400 feet of the tracks as compared to other residential parcels within the significant segment as far as 3,000 feet from the tracks.⁷

Conclusion

It is staff's recommendation that the public generally exception was properly applied in the *Minner* letter to conclude that the Vice Mayor can take part in decisions concerning the Project. Accordingly, the Commission should not withdraw or modify the advice.

⁷ Mr. Welch claims that the *Minner* letter is inconsistent with prior FPPC advice in that it uses of an arbitrary distance to find the significant segment as opposed to a bright-line distance set forth in Regulation 18702.2. In the present situation, the significant segment of residences was not within 1000 feet of the Project. But that does not end the analysis. In this case the significant segment included a broad range of the city's residences, including the minimum significant segment of 25% or the residences located within 3,800 feet of the Project. Accordingly, the determinative question was whether the Vice Mayor's residence, 989 feet away, was uniquely affected as compared to the significant segment. As mentioned, given all of the facts, including the relatively small size of the City and the massive size of the Project, the conclusion was that her residence was not uniquely affected, similar to the *Nerland* letter.