



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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June 23, 2017

Martin Lysons
Assistant City Attorney
150 City Park Way
Brentwood, CA 94513

Re: Your Request for Advice
Our File No. A-17-131

Dear Mr. Lysons:

This letter responds to your request for advice on behalf of City of Brentwood Councilmembers Joel Bryant, Karen Rarey, and Claudette Staton, Planning Commissioners John Fink and Jodi Marfia, and City Manager Gustavo Vina 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. Furthermore, please note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice provided assumes your facts are complete and accurate.

QUESTIONS

1. Do the named officials have conflicts of interest in making, participating in making, or influencing decisions concerning a Shadow Lakes/Deer Ridge project, under the following circumstances:
 - a. Councilmember Bryant's residence is within the golf communities and 75 feet from one of the housing project sites.
 - b. Councilmember Rarey's residence is within the golf communities and 125 feet from the alternate housing site.
 - c. Councilmember Staton's residence is outside of the golf communities but within 500 feet of one of the subdivisions.

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.

d. Planning Commissioner Fink's residence is within the golf communities and approximately 400 feet from the nearest golf hole proposed to be removed.

e. Planning Commissioner Marfia's residence is within the golf communities and approximately 350 feet from the nearest golf hole proposed to be removed.

f. City Manager Vina's residence is within the golf communities and approximately 150 feet from the nearest golf hole proposed to be removed.

CONCLUSIONS

1a - b. The project will have a material financial effect on the Councilmembers Bryant and Rarey's residences, given their proximity to one of the project sites.

1c - f. No. The facts presented evidence that the project will not have a material financial effect on the remaining officials' residences as discussed below.

FACTS

You are the assistant city attorney for the City of Brentwood. Brentwood is a general law city in Contra Costa County. Its borders encompass two residential subdivisions, each featuring an 18-hole golf course separated by a major arterial road – Balfour Road. Those subdivisions were planned, approved, constructed, and marketed as golf communities; however, the golf courses are wholly owned by third parties. The residents of the subdivisions do not participate in the maintenance of the courses. There are no mandatory dues collected from the residents that benefit the courses; residents are afforded no special privileges associated with the courses, and; the subdivisions have no financial connection to the golf courses.

On March 9, 1993, the five-person Brentwood City Council approved the adjacent golf communities. Shadow Lakes subdivision is a "densely-populated residential area" north of Balfour Road. Its counterpart, Deer Ridge subdivision, is south of the road. Collectively, these subdivisions comprise the "golf communities."

City staff was recently approached by representatives of both golf communities (the "applicants"). Due to economic constraints, the applicants intend to formally propose to consolidate the golf courses into a single 18-hole golf course. This proposal will eliminate a total of 18 holes from the courses, eight from the Shadow Lakes course and 10 from the Deer Ridge course. Additionally, the applicants propose the construction of a pedestrian bridge to traverse the road.

The applicants will also propose to develop two multi-family senior housing units (the "project sites"), with one site located within each golf community. An alternate site has also been selected if development of one of the proposed sites becomes impractical. The applicants claim that the senior housing units will require a rezoning of nine percent of the golf communities. City Council anticipates receiving a formal application shortly.

The City anticipates that the development of the multi-family senior housing units in lieu of a portion of the removed 18 holes will be a controversial proposal. Several residents purchased their

residences within the golf communities with the expectation that both golf courses would remain active. In addition, there may be several physical effects imposed on the communities by the proposed senior housing, including increased traffic, noise, and aesthetic impacts. Furthermore, several property owners believe that their property value will decrease if the golf holes are eliminated and replaced with senior housing.

Three councilmembers, two planning commissioners, and the city manager all participate in the decision-making process and public hearings as they pertain to the project, including approval or denial of the project. These public officials reside within or near the golf communities. Specifically, Councilmembers Joel Bryant and Karen Rarey own residences within the Shadow Lakes subdivision; Councilmember Claudette Staton owns a residence outside of the golf communities but within 500 feet of the Shadow Lakes subdivision; Planning Commissioners John Fink and Jodi Marfia own residences within the Deer Ridge subdivision; lastly, City Manager Gustavo Vina rents his residence within the Deer Ridge subdivision.

Councilmember Involvement:

The City Council will be tasked with several decisions related to the proposed project. First, the City will select and award a contract to a consultant to assist in the California Environmental Quality Act process and draft the initial study and environmental impact report ("EIR") for the project. The project will include a general plan amendment ("GPA") and zoning amendment ("ZA"), both discretionary approvals. In addition, the City Council will act as the hearing body for any appeal of the Planning Commission's decision on a design review application associated with the project.²

The names and relative locations of the Councilmembers' residences are as follows:

- Councilmember Bryant (lives within the Shadow Lakes subdivision and 75 feet from the Shadow Lakes project site)
- Councilmember Rarey (lives within the Shadow Lakes subdivision and 125 feet from the alternate site)
- Councilmember Staton (lives 425 feet outside the Shadow Lakes subdivision, 3,150 feet from the alternate site, and 575 feet from the nearest golf hole)

Councilmember Staton resides on a cul-de-sac with two intervening streets and 425 feet distancing her residence from the Shadow Lakes subdivision. The Councilmember resides approximately 3,150 feet away from the alternate site. Approximately 40 residences and large green spaces separate her residence and the alternate site.

² Design review may be a part of the project application. An application for design review would be received as the applicant is getting ready to construct, which may be immediately but may also be months or years after the GPA and ZA approvals.

Planning Commissioner Involvement:

The Planning Commission will make a final decision on the design review (unless the City receives an appeal to that decision) for the project and, by resolution, make recommendations to the City Council on approval or denial of the EIR, GPA, and ZA.

The names and relative locations of the Planning Commissioners' residences are as follows:

- Planning Commissioner Fink (lives within the Deer Ridge subdivision, 3,300 feet from the Deer Ridge project site, and 400 feet from the nearest golf hole proposed to be removed).
- Planning Commissioner Marfia (lives within the Deer Ridge subdivision, 700 feet from the Deer Ridge project site, and 350 feet from the nearest golf hole proposed to be removed).

In the Deer Ridge subdivision, Planning Commissioners Fink lives on a cul-de-sac approximately 400 feet away from a golf hole proposed to be removed. Planning Commissioner Marfia also resides on a cul-de-sac in Deer Ridge, approximately 350 feet away from a hole proposed to be removed. You informed me that the developer intends to passively develop the land previously occupied by the golf holes. According to the developer's website, it contemplates that it will use the newly vacant land for a combination of walking trails, vineyards, bike paths, community gardens, and open space.³ These proposed land uses will not require a rezoning. You also indicate that "it could be argued that views, traffic levels or intensity of use may be altered around [the officials'] homes because of the proposed [p]roject."

City Manager Involvement:

Typically, the City Manager participates in all City Council meetings, including those pertaining to land development issues. Most of the City Manager's participation during the hearing involves weighing in on procedural matters, but he occasionally answers questions pertaining to City policy or interactions with the public. Outside of the public hearings, the City Manager may participate in public outreach and answer questions from the press or the public. The City Manager may also act as liaison between City Council and the staff and public.

City Manager Vina lives in a leased property within Deer Ridge, approximately 150 feet away from the nearest golf hole to be removed and passively developed. His lease prohibits subleasing. The relative location of City Manager Vina's residence is as follows:

- City Manager Vina (lives within the Deer Ridge subdivision, 2,350 feet from the Deer Ridge project site, and 150 feet from the nearest golf hole proposed to be removed).

You informed me that the City has no data to assess whether the project has the potential to increase or decrease the rental value of City Manager Vina's residence or affect the use and

³ The developer's website for the proposed project indicates that "[e]very closed hole will be repurposed as new outdoor amenities [that is, walking trails, vineyards, bike paths, community gardens, and open space] based on residents' preferences."

enjoyment of his leasehold interest. The City Manager's residence affords him no special privileges associated with the golf course.

ANALYSIS

Under Section 87100, a conflict of interest exists whenever a public official makes, participates in making, or uses his or her position to influence a governmental decision which has a reasonably foreseeable material financial effect on one or more of the official's financial interests.

Section 87103(b) indicates that an official has a financial interest in "[a]ny real property in which the public official has a direct or indirect interest of at least \$2,000." Section 87103 also indicates that an official has a financial interest in his or her "personal finances, including those of his or her immediate family, also known as the 'personal financial effects' rule."⁴ We now consider the financial effect of the decisions at issue on the officials' respective real property interests.

Foreseeability:

A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official's interest is material. (Section 87100.) The standard for foreseeability differs depending on whether an interest is explicitly involved in the decision. (Regulation 18701.) An interest is explicitly involved in a decision if the interest is a named party in, or the subject of, the governmental decision. (Regulation 18701(a).) Under the facts you have provided, the officials' properties are not explicitly involved in the decisions regarding the project. Thus, as applied to each official's respective real property interest, Regulation 18701(b) provides: "[i]n general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable."⁵

Materiality:

A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official's interests is material. As relevant to the facts here, the financial effect of the decisions on the officials' respective real property interests is material if the decisions:

- Involve the adoption of or amendment to a general [] or specific plan, and the parcel is located within the proposed boundaries.⁶ (Regulation 18702.2(a)(1).)

⁴ Effects on an official's personal finances are not considered separately from the effect on an official's interest in real property. (Regulation 18702.5(c).) Thus, we do not consider the personal financial effects rule further.

⁵ Regulation 18701(b) also provides a non-exhaustive list of six factors that may be considered in the "reasonably foreseeable" determination.

⁶ You indicated that the City Council will be tasked with a decision(s) regarding the project's GPA. You also indicated that the Planning Commission will make recommendations to the City Council on approval or denial of the GPA.

- Would change the character of the parcel of real property by substantially altering traffic levels or intensity of use, including parking, of property surrounding the official's real property parcel, the view, privacy, noise levels, or air quality, including odors, or any other factors that would affect the market value of the real property parcel in which the official has a financial interest. (Regulation 18702.2(a)(10).)
- Would consider any decision affecting real property value located within 500 feet of the property line of the official's real property, other than commercial property containing a business entity where the materiality standards are analyzed under Regulation 18702.1. Notwithstanding this prohibition, the Commission may provide written advice allowing an official to participate under these circumstances if the Commission determines that there are sufficient facts to indicate that there will be no reasonably foreseeable measurable impact on the official's property. (Regulation 18702.2(a)(11).)
- Would 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. (Regulation 18702.2(a)(12).)

The reasonably foreseeable financial effects of a governmental decision on any real property in which the official has a leasehold financial interest is material whenever the governmental decision will:

- Increase or decrease the potential rental value of the property. (Regulation 18702.2(b)(2).)
- Impact the official's use and enjoyment of the real property. (Regulation 18702.2(b)(5).)

The Project:

As stated above, the developer proposes to eliminate eight golf holes from the Shadow Lakes course and 10 holes from the Deer Ridge course in order to consolidate the Shadow Lakes and Deer Ridge courses into one. In place of the removed golf holes, the developer proposes to develop walking trails, vineyards, bike paths, community gardens, and leave a portion of the land as open space. The two senior housing units will require a rezoning of nine percent of the golf communities.

You stated that the communities may experience "several physical impacts imposed... by the proposed senior housing, including increased traffic, noise, and aesthetic impacts." A faction of property owners voiced concerns that their property value will decrease if the golf holes are eliminated and replaced with senior housing. The project will inevitably affect the composition of the communities, especially the residences near the project sites, alternate site, and removed golf holes.

Councilmember Joel Bryant:

Councilmember Bryant resides on a cul-de-sac in Shadow Lakes. His residence is located within 75 feet of the Shadow Lakes project site. You have indicated that the implementation of senior housing may result in increased traffic, noise, and aesthetic impacts. Given the proximity of the Councilmember's residence to the property that is the subject of the decision, the project site and the golf course, his residence is considered materially financially affected by City Council's decisions unless facts establish that there is no measurable impact on the property. However, considering the potential traffic, noise, and aesthetic impacts foreseeably arising from the senior housing, the facts in this case do not establish that the decisions in question will have no measurable impact. Consequently, Councilmember Bryant has a disqualifying conflict of interest in the decisions.

You inquire whether the Councilmember may participate in an upcoming decision to retain a consultant to complete an environmental analysis of the project proposal. Generally, an official disqualified from a decision is not also disqualified from subsequent implementation decisions. Implementation decisions merely carry out decisions already made. (*Boga* Advice Letter, No. A-03-067.) The specific decision you contemplate is not whether to prepare an EIR, but instead, to whom to award the consultant contract to perform the task. Therefore, consistent with our advice in *Athan*, this is likely an implementation decision. (*Athan* Advice Letter, No. A-86-094.)⁷

Councilmember Karen Rarey:

Councilmember Rarey resides within Shadow Lakes, 125 feet from the alternate site. Considering the distance to the alternate site and golf course, her residence will be materially financially affected by the City Council's decision unless facts establish that there is no measurable impact on the property. However, as stated above, the facts in this case do not establish that the decisions will have no measurable impact. Thus, Councilmember Rarey has a disqualifying conflict of interest in the decisions.

The same allowance for implementation decisions applies to Councilmember Rarey as does Councilmember Bryant. She can take part in implementation decisions related to the project, such as deciding which consultant to retain to compose an EIR.

Councilmember's Bryant and Rarey – Disqualification and Potential Segmentation:

Considering that Councilmembers Bryant and Rarey have disqualifying conflicts of interest in participating in project-related governmental decisions, all must publicly identify in detail the interest that creates the conflict, step down from the dais, and must then leave the room.⁸ Each official must identify his or her financial interest following the announcement of the agenda item to be discussed or voted upon but before either the discussion or vote commences.⁹

⁷ Please note that this advice is only applicable to the extent the City Council has already decided to have an EIR conducted. If the decision to conduct an EIR has not already occurred, the decision to select a consultant would not constitute an implementation decision.

⁸ (Section 87105 and Regulation 18707 applicable to persons holding positions specified in § 87200.)

If the decision is to take place during a closed session, the identification of the financial interest must be made during the public meeting prior to the closed session but is limited to a declaration that the official has a conflict of interest. The financial interest that is the basis for the conflict need not be disclosed. The official may not be present during consideration of the closed session item and may not obtain or review any nonpublic information regarding the decision.

Under certain circumstances, a public official disqualified from one decision may participate in other related decisions if the official's participation does not affect the decision in which he or she has a conflict of interest. (Regulation 18706.) The Commission has consistently advised that an official may segment a decision in which the official has a conflict of interest from other decisions in which he or she does not have a conflict of interest to allow participation by the official in one or several related decisions if the decisions are not too interrelated to be considered separately.

All project decisions, including the merger of the golf courses, the development of the senior housing, and the passive development, are currently "inexplicably interrelated" and cannot be segmented. At this initial stage of project proposal, it appears that the officials would have a conflict of interest in all future decisions, except for implementation decisions as addressed above. If you believe a future decision may be segmented from other project decisions, you should seek further advice providing the relevant facts.¹⁰

Councilmember Claudette Staton:

Councilmember Staton does not live within the golf communities. Her residence is in a cul-de-sac within 500 feet of Shadow Lakes, over 3,000 feet from the alternate site, and outside of 500 feet of the golf course itself. The Councilmember's residence is buffered from the subdivision by two streets. Additionally, the subdivision is a densely-populated residential area. There are approximately 40 houses and large green spaces between her residence and the alternate site, with an even greater distance and obstruction from the project site. Given that the Councilmember resides outside of the subdivision, relatively far from the alternate site, and over 500 feet from the nearest golf hole, her residence is not likely to experience a material financial effect from the decisions.

Planning Commissioner John Fink:

Planning Commissioner Fink owns his residence in a cul-de-sac in Deer Ridge. His residence is 3,300 feet away from the Deer Ridge project site and approximately 400 feet away from the nearest golf hole proposed to be removed. Considering the distance between the Planning Commissioner's residence and the project site, it is unlikely that project-related decisions will have a material financial effect on the residence.

⁹ Pursuant to Regulation 18707(a)(1)(A)(iii), the official need only identify the general location of his or her residence but does not have to disclose the exact address of the property.

¹⁰ Moreover, officials may participate as a member of the public with respect to their wholly owned interests in their real property. (Regulation 18704(d)(2)(A).)

Moreover, you have indicated that outside of the identified housing projects, the developer has proposed only minor development of the removed holes. As informally proposed, the newly-open land will be developed to incorporate alternatives, limited to walking trails, vineyards, bike paths, community gardens, or other open space. These anticipated passive developments do not require rezoning and are consistent with the nature of the neighborhood as currently constituted. Notwithstanding the fact that the property is within 500 feet of the golf course, it does not appear that the merger of the golf course and removal of holes will have a measurable effect on the residence. Thus, Planning Commissioner Fink's residence will not experience a material financial effect by the Planning Commission's decisions regarding the merger of the golf courses.

Planning Commissioner Jodi Marfia:

Planning Commissioner Marfia resides on a cul-de-sac within Deer Ridge. Her residence is 700 feet away from the Deer Ridge project site and approximately 350 feet away from the nearest golf hole proposed to be removed. For the same reasons as provided for Commissioner Fink, it does not appear that the decisions, including decisions regarding the housing projects and the merger of the courses, will have a foreseeable and material effect on Commissioner Marfia's residence.

City Manager Gustavo Vina:

City Manager Vina rents his residence in Deer Ridge, 2,350 feet from the Deer Ridge project site and approximately 150 feet from the nearest golf hole proposed to be removed. Because his interest is a leasehold interest, a potential financial effect is analyzed under Regulation 18702.2(b). Given the distance between the City Manager's residences and the project site and the scope of the proposed development for the removed holes, there is no indication that the decisions will affect either the rental value of the residence or the City Manager's use and enjoyment of the residence. Thus, City Manager Vina is not disqualified from the decisions.

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

Sincerely,

Jack C. Woodside
General Counsel



By: Ryan P. O'Connor
Counsel, Legal Division

RPOC:jgl