

January 4, 2012

Bruce Gibson
Supervisor, District 2
San Luis Obispo County
1055 Monterey, Room D430
San Luis Obispo, CA 93408-1003

**Re: Your Request for Advice
Our File No. A-11-202**

Dear Mr. Gibson:

This letter is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹

Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws such as common law conflict of interest or Government Code Section 1090. In addition, the Commission will not advise with respect to past conduct. (Regulation 18329(b)(8)(A).)

QUESTION

May you participate in any of the matters listed below, in County hearings regarding proposals to amend the Vacation Rental Ordinance ("VRO") despite owning property next door to a VR:

- (a) Change the provisions for the minimum distance required between VRs;
- (b) Change the provisions for enforcement of the VRO rules and the length of time that a permit to operate a VR is granted, and;
- (c) Extend the VRO to the communities of Los Osos and Avila Beach. Currently the VRO applies only in the communities of Cambria and Cayucos.

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.

CONCLUSION

You may participate in County hearings regarding proposals to amend the Vacation Rental Ordinance with respect to changes in the minimum distance required between VRs and change the provisions for enforcement of the VRO rules and the length of time that a permit to operate a VR is granted so long as more than 5,000 properties will be affected in substantially the same manner as your property.

You may participate in the decision to extend the VRO to the communities of Los Osos and Avila Beach since these decisions will not materially affect your economic interests.

FACTS

You are a San Luis Obispo County Supervisor (District 2). You own an interest in a single-family residence in the city of Cayucos in San Luis Obispo County (in your district). You stated the residence is not your primary residence and that you have rented the property to the same tenant for almost 13 years. You currently report this property on your Statement of Economic Interest. You also noted the house is typical for Cayucos.

The county's Coastal Zone Land Use Ordinance (the "coastal ordinance") applies within Cayucos and includes specific provisions governing short-term rentals (less than 30-day rentals), often referred to as the "vacation rental ordinance." The VRO contains standards for what properties can be licensed as VRs, as well as operational standards for maximum occupancy, parking, management, etc.

The County Planning Commission finished hearings on amendments to the VRO and the Board of Supervisors is scheduled to consider enacting their recommendations early next year. The recommended amendments include:

a) Changes to provisions setting minimum distances between VRs. Where the VRO currently applies (in Cayucos and Cambria), a proposed VR must be more than 200 feet away from any existing VR. If an existing VR is closer than 200 feet, the proposed VR cannot be licensed under the VRO. However, the property owner may apply for a VR license under a more expensive and time-consuming Minor Use Permit process. No VRs have been granted in Cambria or Cayucos under the Minor Use permit process.

b) Changes to the enforcement provisions of the VRO and the length of time that a permit to operate a VR is granted.

c) Extension of the VRO to the communities of Los Osos and Avila Beach. Currently, the VRO applies only in the communities of Cambria and Cayucos.

Your property in Cayucos is adjacent to an existing VR. Thus, you could not apply for the property to be made a VR under the existing ordinance except through the Minor Use Permit

process. You have asked whether you may participate in hearings regarding amendments to the VRO.

You provided the following information about your district.

District 2 Population -----	51,399
District 2 Parcels (including an estimate of the city parcels within the district) -	43,437
Parcels Eligible to be VRs (Cambria, Cayucos, Los Osos) -----	14,354
Current Number of VRs (Cambria, Cayucos[451], Los Osos[19]) -----	470
Properties near VRs (Within approximately 500 Feet). You also provided a--- link to maps that show that the VR parcels are fairly evenly distributed through the cities and not clustered in one area.	more than 5,000

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 any 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.

The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).) The general rule, however, is that a conflict of interest exists whenever a public official makes a governmental decision that has a reasonably foreseeable material financial effect on one or more of his or her economic interests.

Steps 1 and 2. Are you a “public official” within the meaning of Section 87100 and will you be making, participating in making or influencing a governmental decision?

Section 82048 defines a public official as “every member, officer, employee or consultant of a state or local government agency.” As a member of the county board of supervisor, which is a local government agency, you are a public official. Therefore, you may not make, participate in making, or otherwise use your position to make, participate in making or influence any decisions that will have a reasonably foreseeable material financial effect on any of your economic interests.

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her

agency. (Regulation 18702.1.) A public official “participates in a governmental decision” when, acting within the authority of his or her position and without significant substantive or intervening review, the official negotiates, advises, or makes recommendations to the decisionmaker regarding the governmental decision. (Regulation 18702.2.) A public official is attempting to use his or her official position to influence a governmental decision if, for the purpose of influencing the decision, the official contacts or appears before or otherwise attempts to influence, any member, officer, employee, or consultant of his or her agency.² (Regulation 18702.3.)

Voting on or participating in the VRO discussions would be making and participating in governmental decisions.

Step 3. What are your economic interests?

The Act’s conflict-of-interest provisions apply only to conflicts of interest arising from certain enumerated economic interests. These economic interests are described in Section 87103 and Regulations 18703-18703.5, including:

- A public official has an economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more. (Section 87103(a); Regulation 18703.1(a).)
- A public official has an economic interest in a business entity in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d); Regulation 18703.1(b).)
- A public official has an economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)
- An official has an economic interest in any source of income, including promised income, totaling \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- A public official has an economic interest in any source of gifts to him or her if the gifts total \$420 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)

² If a public official’s office is listed in Section 87200 (“87200 filers” include members of county boards of supervisors) and he or she has a conflict of interest in a decision noticed at a public meeting, then he or she must: (1) immediately prior to the discussion of the item, verbally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in Regulation 18702.5(b)(1)(B), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences and speaking as a member of the public regarding personal interests, special rules found in Regulation 18702.5, subdivisions (c) and (d) apply. (Section 87105.)

- A public official has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is commonly referred to as the “personal financial effects” rule. (Section 87103; Regulation 18703.5.)

Your question concerns a single-family residence located in the county that has been rented to the same tenant for approximately 13 years. Thus, under the Act’s definition of economic interest, you have an interest in real property, a source of income, and a business interest in the lease of your property.³

Step 4: Is the economic interest directly or indirectly involved in the governmental decision?

“In order to determine if a governmental decision’s reasonably foreseeable financial effect on a given economic interest is material, it must first be determined if the official’s economic interest is directly involved or indirectly involved in the governmental decision.” (Regulation 18704(a).) Generally, the Act imposes stricter materiality standards when an official’s economic interest is directly involved in a decision.

Real Property: For governmental decisions that affect real property interests, the standards set forth in Regulation 18704.2 apply. (Regulation 18704(a)(2).) Regulation 18704.2(a)(1) states, among other standards, that an official’s real property is directly involved in a decision if::

“The real property in which the official has an interest, or any part of that real property, is located within 500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the governmental decision. For purposes of subdivision (a)(5), real property is located “within 500 feet of the boundaries (or proposed boundaries) of the real property which is the subject of the governmental decision” if any part of the real property is within 500 feet of the boundaries (or proposed boundaries) of the redevelopment project area.”

Because your property is within 500 feet of property subject to the VRO your property is considered to be directly involved in any decision that affects that specific VR, such as changes to the enforcement provisions of the VRO and the length of time that a permit is to operate if a VR is granted.

With respect to other decisions, your property may be indirectly involved. For example, if the county considers changes to minimum distances between VRs, the decision would not be one for which current VRs are the subject, but all properties that could in the future be VRs in the county. Similarly, for a decision to extend the current VRO to the communities of Los Osos and Avila Beach, your property would not be within 500 of the any properties that could be converted to a VR in those communities. Therefore, the indirect standard would apply.

³ Section 82005 provides that “business entity” means any organization or enterprise operated for profit, including but not limited to a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation or association.

Source of Income and Business Interest: With respect to your source of income and the property rental business you have, Regulation 18704.1(a) provides that these economic interests are directly involved in a decision as follows:

“A person, including business entities, sources of income, and sources of gifts, is directly involved in a decision before an official’s agency when that person, either directly or by an agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

“(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official’s agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.”

Neither of these criteria apply to your rental business or your tenant. If the business entity or source of income is not directly involved in a governmental decision, it is indirectly involved. (Regulation 18704(a).)

Steps 5 and 6: Is it reasonably foreseeable that the decision will have a material financial effect on your economic interest?

A conflict of interest arises only when the reasonably foreseeable⁴ financial effect of a governmental decision on a public official’s economic interest is material. (Regulation 18700(a).)

Real property directly involved: For real property directly involved in a governmental decision, any financial effect, even “one penny,” is presumed to be material. (Regulation 18705.2(a)(1).) This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect on the real property.

Real property indirectly involved: Regulation 18705.2(b)(1) states that the financial effect of a governmental decision on real property that is indirectly involved in a governmental decision is presumed not to be material. This presumption may be rebutted by proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real property in which the official has an economic interest that make it reasonably

⁴ An effect upon economic interests is considered “reasonably foreseeable” if there is a substantial likelihood that it will occur. (Regulation 18706(a).) Whether the financial consequences of a governmental decision are substantially likely at the time the decision is made depends on the facts surrounding the decision. A financial effect need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

foreseeable that the decision will have a material financial effect on the real property in which the official has an interest.

Examples of specific circumstances that will be considered include, but are not limited to, circumstances where the decision materially affects the following:

- The development potential or income producing potential of the real property;
- The use of the real property in which the official has an economic interest;
- The character of the neighborhood including, but not limited to, substantial effects on: traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood. (Regulation 18705.2(b)(1).)

With respect to decisions in which your interest in real property is directly involved, if there is even a one penny financial effect on the value of your property due to a specific VRO decision, the effect is considered material, and you are required to disqualify yourself absent an exception (discussed below). You must make this determination on a decision-by-decision basis.

For example, a decision to reduce the required distance between dwellings that can be allowed as VRs, allowing additional VRs to be closer to your property, may affect the fair market value of your property by a penny. In contrast, changes to the length of time that a permit is effective or enforcement rules may not have a foreseeable and material financial effect. However, the determination of whether the financial consequences of a governmental decision are material and reasonably foreseeable at the time the decision is made is ultimately a factual determination left to the official.

Finally, where the decision concerns only VRs beyond 500 feet of your property and your property is considered indirectly involved, there is a presumption of no materiality, and you would not have a conflict of interest absent factors to rebut that presumption. This would apply to decisions to extend the VRO to the communities of Los Osos and Avila Beach.

However, this presumption may be rebutted by proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real property in which the public official has an economic interest that make it reasonably foreseeable that the decision will have a material financial effect on the real property in which the public official has an interest. (Regulation 18705.2(b)(1).) You have described no facts to indicate whether the expansion of the VRO would or would not impact your property.

Business Interest and Source of Income: For economic interests in business entities indirectly involved in a decision, including business entities that are a source of income to an official, the materiality standard is given at Regulation 18705.1(c). The thresholds for materiality under this regulation vary with the size of the business. Regulation 18705.1(c)(4) provides that the financial effect of a governmental decision on a business, not publicly traded and relatively modest in economic size, is material if it is reasonably foreseeable that:

“(A) The governmental decision will result in an increase or decrease in the business entity’s gross revenues for a fiscal year in the amount of \$20,000 or more; or,

“(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,

“(C) The governmental decision will result in an increase or decrease in the value of the business entity’s assets or liabilities of \$20,000 or more.”

Source of Income: Your renter is an individual, and not a business entity. Regulation 18705.3 provides that the effect of a decision is material as to an individual who is a source of income to an official if any of the following applies:

“(A) The decision will affect the individual’s income, investments, or other tangible or intangible assets or liabilities (other than real property) by \$1,000 or more; or

“(B) The decision will affect the individual’s real property interest in a manner that is considered material under Title 2, California Code of Regulations, sections 18705.2(b).”

With respect to your business interest in renting your property or your tenant as a source of income to you, both of which interests are indirectly involved in the decision, it would not appear that any of the decisions you described will affect these interests. But again, we must leave the factual determination of materiality to you on a case-by-case basis.

Steps 7: Public generally exception⁵

The remaining questions concern general regulatory decisions imposed on VRs, such as:

- Setting minimum distances between VRs. Where the VRO currently applies (in Cayucos and Cambria), a proposed VR must be more than 200 feet away from any existing VR. If an existing VR is closer the 200 feet, the proposed VR cannot be licensed under the VRO, however the property owner may apply for a VR license under a more expensive and time-consuming Minor Use Permit process. No VRs have been granted in Cambria or Cayucos under the Minor Use permit process.
- Changes to the enforcement provisions of the VRO and the length of time that a permit to operate a VR is granted.

⁵ You have not presented any facts indicating that the step 8’s “legally required participation.” exception would be applicable here, thus we do not analyze this issue. (Section 87101; Regulation 18708.)

Despite a conflict of interest related to these questions, you may participate in the governmental decision if the requirements of the public generally exception under Regulation 18707.1 are met. For the basic rule, Regulation 18707(b) provides:

“Steps to Determine Application of Public Generally. To determine if the effect of a decision is not distinguishable from the effect on the public generally as set forth in subdivision (a) of this regulation, apply Steps One through Four:

“(1) Step One: Identify each specific person or real property (economic interest) that is materially affected by the governmental decision.”

Your interest in real property is at issue. The property is not a VR but is adjacent to a VR.

“(2) Step Two: For each person or real property identified in Step One, determine the applicable ‘significant segment’ rule according to the provisions of 2 Cal. Code Regs. section 18707.1(b).”

For decisions that affect a public official’s real property, such as yours, “significant segment” is defined as 10-percent or more of all property owners or all residential property owners in San Luis Obispo County (or your district), or 5,000 property owners or residential property owners in the county (or your district). (Regulation 18707.1(b)(1)(B).)

“(3) Step Three: Determine if the significant segment is affected by the governmental decision as set forth in the applicable ‘significant segment’ rule. If the answer is “no,” then the analysis ends because the first prong of a two-part test set forth in 2 Cal. Code Regs. section 18707.1(b) is not met, and the public official cannot participate in the governmental decision. If the answer is ‘yes,’ proceed to Step Four.”

You stated that more than 5,000 properties are within approximately 500 feet of a VR. Your maps indicate that the VRs are evenly spread throughout the city.

“(4) Step Four: Following the provisions of 2 Cal. Code Regs. section 18707.1(b)(2), determine if the person or real property identified in Step One is affected by the governmental decision in ‘substantially the same manner’ as other persons or real property in the applicable significant segment. If the answer is “yes” as to each person or real property identified in Step One, then the effect of the decision is not distinguishable from the effect on the public generally and the public official may participate in the decision. If the answer is “no” as to any person or real property identified in Step One, the public official may not participate in the governmental decision unless one of the special rules set forth in 2 Cal. Code Regs. sections 18707.2 through 18707.9 applies to each person or real property triggering the conflict of interest.”

According to your facts, your property is a single-family residence. You noted it is typical for Cayucos not unusual in size or value in comparison to other single-family residences in the jurisdiction. Because your property will be impacted due to its proximity to a VR, presumably all the properties near VR's would be similarly affected as your property. Therefore, a significant segment of more than 5,000 property owners will be similarly affected and the exception applies. Thus, based on your facts, you may participate in decisions setting minimum distances between VRs, and changes to the enforcement provisions of the VRO and the length of time that a permit to operate a VR is granted.

Please note that this 8-step analysis needs to be applied on a decision-by-decision basis. So as new decisions related to the VRO come before you, you will need to analyze these decisions consistent with the analysis set forth herein.

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

Sincerely,

Zackery P. Morazzini
General Counsel

by: John W. Wallace
Assistant General Counsel
Legal Division

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