

January 13, 2014

Peter M. Thorson  
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355 South Grand Avenue, 40th Floor  
Los Angeles, CA 90071-3101

Re: Your Request for Advice  
**Our File No. A-13-157**

Dear Mr. Thorson:

This letter is in response to your request for advice on behalf of Temecula Mayor Mike Naggar, and Councilmembers Jeff Comerchero and Charles Washington regarding their duties under the conflict-of-interest provisions of the Political Reform Act (the “Act”).<sup>1</sup> This letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when rendering advice. (*In re: Oglesby* (1975), 1 FPPC Ops. 71.) Also, 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 outside the Act.

### QUESTION

May Temecula Mayor Naggar, and Councilmembers Comerchero and Washington participate and vote on the approval of the Final Subdivision Map and Subdivision Agreements for Tract 23103-2, which is adjacent to the Europa Vineyard Estates and includes improvements also required for the Europa Vineyard Estates development (a project in which the three officials have an interest)?

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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 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

Yes. The conflict-of-interest prohibition in Section 87100 of the Act does not apply to ministerial decisions, including the approval of the final map, so long as no substantive issue arises before the council as to whether the final map is in fact in substantial compliance with the tentative map. Additionally, the city council may not be asked to approve the final map in exchange for the developer's agreement to post a bond or other security to ensure that improvements required as part of the tentative map are completed.

## FACTS

### *The Subject Tract*

The Temecula City Council will be considering the approval of the Final Subdivision Map and Subdivision Agreements for Tract 23103-2 (the "Tract"). The Tentative Tract Map and the development conditions for the Tract were approved by the City Council on July 26, 2005.

These approvals consisted of a Tentative Tract Map pursuant to the Subdivision Map Act, and an ordinance amending the Margarita Village Specific Plan Zoning Ordinance providing for development standards for the project. The Tract consists of 37 single-family homes to be constructed on 18.36 gross acres with 14.33 acres net for development and includes three parcels of open space. The single-family home parcels will average 10,547 square feet (roughly one quarter acre) in Planning Area 7 of the Tract and 24,803 square feet (roughly one half acre) in Planning Area 9A of the Tract.

The Conditions of Approval for the Tract require the developer to design and construct public improvements for the Tract. The developer is required to design and construct roads within the interior of the Tract on which homes would be constructed, and design and construct improvements to the roads surrounding the Tract which were found necessary to accommodate the traffic that would be generated by the development of the Tract.

Conditions of Approval 30 and 31 of the Tentative Tract Map for the Tract specifically require specific improvements to Butterfield Stage Road, which separates the Tract from another development (the Europa Vineyards Estates). The developer is required to design and construct "half-width street improvements," which means the developer is required to build one-half of the required width of the street on the side that borders the Tract. The developer is also required to construct curb, gutter, sidewalks, drainage facilities, street lights and a raised center median on Butterfield Stage Road. The Conditions for the Tentative Tract Map for the Tract also specify the design standards that are required for these public roads, water, and other utility improvements.

The approval of the Final Map is currently set for January 14, 2014. At that time the Council will be asked to:

"1. Approve Tract Map 23103-2 in conformance with the Conditions of Approval;

“2. Approve the Subdivision Improvement Agreements for Butterfield Stage Improvements and for in-tract Improvements, and accept the Faithful Performance Bonds and Labor and Materials Bonds as security for the Agreement;

“3. Approve the Subdivision Monument Agreement and accept the Subdivision Monument Bond as security for the Agreement.”

The estimated costs for the public improvements for the Tract are: (1) Butterfield Stage Road street and drainage improvements \$643,500; street and drainage improvements for in-tract improvements \$1,683,000; (2) water improvements \$184,500; and (3) sewer improvements \$126,000. Total public improvements of \$2,637,000. The costs of the subdivision monuments (permanent markers embedded in the land that allow surveyors a starting point to precisely measure parcel lines) are \$8,000.

The Subdivision Improvement Agreement is an agreement between the City and the developer. It requires the developer to construct the improvements in accordance with plans and specifications that have been approved by the City Engineer for the implementation of the public improvements required by the Conditions of Approval for the Tract and approved by the City Council on July 25, 2005. The Subdivision Improvement Agreement also includes provisions for surety bonds to guarantee performance and payments to workers and suppliers, indemnification, acquisition and dedication of right-of-way, inspections, alterations to plans, default remedies, replacement of improvements, warranties, vesting of ownership, and schedule of completion.

### **The Europa Vineyards Estates Project**

The Tract is adjacent to the Europa Vineyard Estates separated by the existing width of Butterfield Stage Road. The Europa Vineyard Estates development is owned by Temecula Vineyard Estates, LLC and consists of residential and vineyard lots, including 50 2.5-acre estate lots, three 10-acre vineyard estate lots, and five 26-acre winery estate and vineyard parcels. Europa Vineyard Estates is located in the unincorporated area of Riverside County adjacent to Butterfield Stage Road, which is the border between City of Temecula and unincorporated Riverside County. The County of Riverside approved the Tentative Tract Map for the Europa Vineyard Estates project on September 7, 2006 with conditions of approval. The conditions of approval for the Europa Vineyard Estates Project requires its owner to construct Butterfield Stage Road within the boundaries of the project to its full width prior to the issuance of certificates of occupancy for 80% of the total recorded residential lots.

The Europa Vineyard Estates Property is owned by Temecula Vineyards Estates LLC. The managing member of the LLC is Mr. Daniel Stephenson. Mr. Stephenson has been developing commercial and residential property in Riverside County for more than 35 years under the marketing name of “Rancon Group.” In a prior advice letter (*Thorson Advice Letter*, No. A-08-015), we concluded that while Mayor Naggar and Councilmembers Comerchero, and Washington did not have any direct investments in Temecula Vineyards Estates LLC, the owner

of the Europa Vineyard Estates, these entities were “otherwise related” to businesses in which each of the officials had investment interests. Therefore, they are deemed to have an interest in the Europa Vineyard Estates Property and the Temecula Vineyards Estates LLC.

You also stated the following:

- The approval of the Final Map for the Tract and the Subdivision Improvement Agreements will not have any financial effect on the Europa Vineyard Estates project.
- The decision of the County of Riverside to require the Europa Vineyard Estates project to improve Butterfield Stage Road was not made until September 7, 2006 nearly one year and two months after the Temecula City Council approved the Tract’s tentative map.
- The approval of the Final Map for the Tract would merely confirm that the public road requirements and design standards for Butterfield Stage Road as established by the Conditions of Approval have been implemented and does not expand or modify the public road requirements and design standards established in those Conditions of Approvals in accordance with the Subdivision Map Act in Section 66458(a).
- The Subdivision Agreement and the Faithful Performance and Labor and Material Bonds are normal actions that occur for each final map approved by the City. The bonds are authorized by and their form determined by the Subdivision Map Act in Sections 66499.1 and 66488.2. The Subdivision Improvement Agreement and the surety bonds have not been specially negotiated with the developer.
- The Council is required to approve the Final Map if it meets the requirements of the Subdivision Map Act and the Temecula Subdivision Ordinance at the time of approval of the Tentative Map and the Conditions of Approval of the Tentative Map. The Council has no authority to impose new road requirements or design standards on the Tract without a formal public hearing process before the Planning Commission and City Council to modify those Conditions of Approval.
- If the City Council fails to act on a final map within the time required and the developer complies with the applicable law and conditions of approval on the tentative map, the final map is “deemed approved.”

### **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 provides:

“No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.”

The Commission has adopted an eight-step standard analysis for deciding whether an official has a “financial interest” in a decision. (Regulation 18700(b).) In order to find that a conflict of interest exists, the criteria in the first six steps of the analysis must be met.<sup>2</sup>

**Steps 1 and 2. Are Temecula Mayor Mike Naggar, and Councilmembers Jeff Comerchero and Charles Washington “public officials” within the meaning of Section 87100 and will they 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 members of the Temecula City Council (a local government agency), all three would be considered public officials under the Act. 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 govern-mental 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. (Regulation 18702.3.)

In contrast, the prohibition in Section 87100 does not apply to actions that are solely ministerial. (Regulation 18702.4(a)(1).) We have said in the past that the approval of a final map is a ministerial decision once the appropriate officials certify that the map is in substantial compliance with the previously approved tentative map and its attendant conditions. (*Fishman* Advice Letter, No. A-00-096; See Also *City of West Hollywood v. Beverly Towers, Inc.* (1991) 52 Cal.3d 1184, 1191 n.5 [final map approval is merely ministerial if the application for such approval is in substantial compliance with the tentative map and its attendant conditions].) For example, in the *Humbert* Advice Letter, No. I-93-178, we stated:

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<sup>2</sup> When a public official who holds an office specified in Section 87200 has a conflict of interest in a decision noticed at a public meeting, he or she must: (1) immediately prior to the discussion of the item, orally 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), 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(c) and 18702.5(d) apply.

“Regulation 18700(d)(1) [now Regulation 18702.4(a)(1)] provides that, for purposes of Section 87100, officials do not ‘make’ government decisions when they engage in ministerial acts.

“A governmental action is not ministerial where governmental officials have discretion in determining what that action will be. (See *Sperry Advice Letter*, No. A-83-235.)

“Section 66474.1 of the Subdivision Map Act (Government Code Section 66410 et seq.) states: A legislative body shall not deny approval of a final or parcel map if it has previously approved a tentative map for the proposed subdivision and if it finds that the final parcel map is in substantial compliance with the previously approved tentative map.

“The question is whether it is a ministerial decision when a city council is asked to approve a final map for a subdivision after the tentative map for the proposed subdivision previously has been approved and the city staff indicates that the proposed final map is in substantial compliance with the previously approved tentative map.

“Since the law prohibits the city council from denying approval of the final map at this stage, we believe that the city’s approval of the final map is generally considered to be a ministerial decision.”

However, the letter cautioned that there were two situations where the decision on the final map would not be ministerial.

- “First, Section 66474.1 requires that the final map be in ‘substantial compliance’ with the previously approved tentative map. If a substantive issue arises before the council as to whether the final map is in fact in substantial compliance with the tentative map, the council’s deliberations on this issue could become discretionary and lose their ministerial nature. In that case, if a councilmember has a financial interest in the decision, he or she must disqualify pursuant to Section 87100.”<sup>3</sup>
- “Second, we understand that sometimes during the approval process for final subdivision maps, the city council will approve the final map in exchange for the developer’s agreement to post a bond or other security to ensure that improvements required as part of the tentative map are completed. The alternative to this procedure is that the developer will have met all of the city’s

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<sup>3</sup> For example, in *Fishman* we contrasted a situation where a tentative map is approved subject to conditions and those conditions are not met. Under such circumstances, approval of a final subdivision map is not a ministerial act.

requirements by the time the final map is presented to the city council for approval. Where a bond or security is posted to ensure future compliance with the tentative map, the city council's approval is required presumably because there has not been substantial compliance with the tentative map. Therefore, in this specific situation the city council's approval of the final map is not ministerial and any councilmember with a financial interest in the decision must disqualify pursuant to Section 87100.<sup>4</sup>

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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<sup>4</sup> You stated that while a faithful performance bond and labor and material bond were received from the developer, these bonds were not negotiated with the developer and are normal for each final map considered and approved by the city. The city council has yet to consider the final map.