



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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April 8, 2021

Manu Koenig
First District Supervisor
Santa Cruz County
701 Ocean Street, Suite 500
Santa Cruz CA 95060-4069

Re: Your Request for Advice
Our File No. A-21-031

Dear Mr. Koenig:

This letter responds to your request for advice 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.

Also note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTIONS

1. Under the Act, may you take part in governmental decisions affecting a real estate development that would include 150 new rental units and commercial space, among other additions, given that the project site would be located between 500 and 1,000 feet from your condominium?
2. If prohibited from taking part in such decisions, are you still permitted to organize community meetings, conduct surveys, gather other public input around the project, and/or present your views on the projects to the developer and request changes be made, given that you would not be voting or interacting with staff on the project?

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.

CONCLUSIONS

1. No. Under the Act, the development project would have a reasonably foreseeable, material financial effect on your real property, as it is reasonably foreseeable the project would affect the income producing potential and market value of your condominium. Accordingly, you are disqualified from taking part in decisions affecting the development project.
2. No. While a comprehensive list of permitted and prohibited conduct is not practicable, in general, the conduct you have specifically inquired about would be considered impermissible instances of “providing information” or “providing an opinion” under Regulation 18704. However, you may appear as a member of the general public solely with regard to the effect of the decision(s) on your real property.

FACTS AS PRESENTED BY REQUESTER

The Santa Cruz County Board of Supervisors (“Board of Supervisors”) anticipates receiving a development proposal involving the East Cliff Village Shopping Center (“Shopping Center”) located at 21501 East Cliff Drive in Santa Cruz. The Shopping Center occupies an approximately 6-acre site on one of the primary arterial roads in the County. Currently the site is home to a shopping mall and serves as the site for a weekly farmers market. The current draft development proposal includes constructing approximately 150 units of rental housing, a senior care facility, commercial space including a grocery store, space for the farmers market, and approximately 200 underground parking spaces.

You serve as the First District Supervisor on the Board of Supervisors. You own a condominium located between 500 and 1000 feet from the Shopping Center, while the closest boundary of your condominium complex is within 500 feet of a small portion of the corner of the Shopping Center property. As a condominium owner, you share ownership over common areas of the condominium property.

In a follow-up email, you clarified that no environmental impact report or initial study has been conducted yet. However, it is anticipated that the project will have significant economic impacts because there is no housing on the site currently and the current retail space is fairly rundown. You also confirmed that there is currently an unmet demand for additional housing in your neighborhood and, by one measure, Santa Cruz is the fourth least affordable real estate market in the world. The proposed shopping center is located on East Cliff Drive, which is generally fronted by commercial zoning and visitor accommodations while everything off East Cliff Drive is residential. Fourteenth Avenue is one of the primary avenues for accessing your condominium complex. Currently, the Shopping Center has pedestrian access from Merrill Street, which connects to 14th Avenue, but that will be closed off with the renovation. A traffic study is pending. Although 14th Avenue is not a route to directly access the Shopping Center, you could envision that vehicles might circle back onto 14th Avenue or look for parking in the general area. The developer has stated that the additional parking will create approximately forty additional parking spots.

ANALYSIS

Under Section 87100 of the Act, “[n]o 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.” “A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family,” or on certain specified economic interests. (Section 87103.) Among those specified economic interests is “[a]ny real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more.” (Section 87103(b).)

Under Regulation 18702.2(e)(4), “[r]eal property in which an official has a financial interest does not include any common area as part of the official’s ownership interest in a common interest development as defined in the Davis-Sterling Common Interest Development Act.” (See Cal. Civ. Code Section 4500.) Accordingly, for purposes of the Act, your real property interest in your condominium unit does not include your shared ownership of the common areas of the condominium property. Therefore, your real property interest is located between 500 and 1,000 feet from the Shopping Center, rather than under 500 feet.

Regulation 18701(a) provides the applicable standard for determining the foreseeability of a financial effect on an economic interest explicitly involved in the governmental decision. It states, “[a] financial effect on a financial interest is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official’s agency. A financial interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6).” The governmental decision at issue does not explicitly involve your real property interest.

The reasonably foreseeable financial effect of a governmental decision on a parcel of real property in which an official has a financial interest, other than a leasehold interest, is also material whenever the governmental decision involves property located more than 500 feet but less than 1,000 feet from the property line of the parcel, and the decision would change the parcel’s:

- (A) Development potential;
- (B) Income producing potential;
- (C) Highest and best use;
- (D) Character by substantially altering traffic levels, intensity of use, parking, view, privacy, noise levels, or air quality; or
- (E) Market value.

(Regulation 18702.2(a)(8).)

The anticipated development proposal would introduce 150 new residential units, a senior care facility, and new commercial space, including a grocery store. It is anticipated that the project would have significant economic impacts because there is no housing on the site, the current retail space is fairly rundown, and there is an unmet demand for additional housing in your neighborhood.

Additionally, pedestrian access to the Shopping Center from Merrill Street would be closed off, the number of public parking spots would increase, and it is foreseeable people may look for parking spots on 14th Avenue, where your condominium is located. Based on these facts, it is reasonably foreseeable that the development project would change your condominium's income producing potential and market value. Because of these reasonably foreseeable, material financial effects on your real property, you have a disqualifying conflict of interests and are prohibited from taking part in decisions related to the anticipated development proposal.²

You have also inquired about whether a conflict of interest would prohibit you and your staff "from organizing community meetings, conducting surveys, or gathering other public input around the project," and "present[ing] [your] views on the projects to the developer and request changes be made, given that [you] would not be voting or interacting with staff on the project."

To clarify, a public official disqualified from a governmental decision based on a conflict of interest is not merely prohibited from voting on the item. Rather, the official is prohibited from making, participating in making or in any way attempting to use their official position to influence a governmental decision in which they know or have reason to know they have a financial interest. (Section 87100.) Regulation 18704 includes definitions for "making a decision," "participating in a decision," and "using official position to influence a decision." "A public official makes a governmental decision if the official authorizes or directs any action, votes, appoints a person, 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 18704(a).) "A public official participates in a governmental decision if the official provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review." (Regulation 18704(b).) A public official uses his or her official position to influence a governmental decision if he or she:

- (1) Contacts or appears before any official in his or her agency or in an agency subject to the authority or budgetary control of his or her agency for the purpose of affecting a decision; or
- (2) Contacts or appears before any official in any other government agency for the purpose of affecting a decision, and the public official acts or purports to act within his or her authority or on behalf of his or her agency in making the contact.

(Regulation 18704(c).)

Because you have a disqualifying conflict of interest, any conduct that meets the above definitions is prohibited. Although a definitive list of prohibited conduct would not be practicable, in general, the type of conduct you have inquired about would be prohibited under the Act, as it would be considered "providing information" or "providing an opinion" and constitute using your position to influence the decision. We note, however, that the Act does not prohibit you from appearing as a member of the general public if you are appearing solely with regard to real property

² We also note that if you were to sell your property, the buyer would constitute a potentially disqualifying "source of income" interest for one year following the sale. (Section 87103(c).) Under Regulation 18702.3(a)(2)(C)(ii), you would be disqualified from taking part in decisions where there is "clear and convincing evidence the decision would have a substantial effect on the property." Although this would be a heightened standard for disqualification, we would still conservatively advise you recuse yourself from the decisions in the event of a property sale for the reasons discussed above.

owned entirely by you and/or members of your immediate family and limit your comments to the potential effect the decision will have on your real property. (Regulation 18704(d)(2)(A).)

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

Sincerely,

Dave Bainbridge
General Counsel



By: Kevin Cornwall
Counsel, Legal Division

KMC:dkv