



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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September 3, 2021

Thomas D. Jex
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Re: Your Request for Informal Assistance
Our File No. I-21-063

Dear Mr. Jex:

This letter responds to your request for advice on behalf of Planning Commission Members Clint Stoker and Brad Napientek, Town Council Members Jeff Drozd and Robert Lombardo, Mayor Pro Tem Jim Schooler, and Mayor Merl Able for the Town of Yucca Valley (“Town”) regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹ Because your inquiry is general in nature, we are treating your request as one for informal assistance.²

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.

QUESTION

Under the Act’s conflict of interest provisions, may Town Planning Commission Member Clint Stoker and Brad Napientek, Town Council Members Jeff Drozd and Robert Lombardo, Mayor Pro Tem Jim Schooler, or Mayor Merl Able participate in upcoming decisions regarding the Town’s Short Term Vacation Rental (“STVR”) ordinance due to each official’s financial interests detailed below?

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.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

CONCLUSION

Due to the anticipated broad nature of the Planning Commission and the Town Council's STVR ordinance decisionmaking process, which will include the consideration of a wide range of possible limitations and fee increases to the STVR permits, under the standards in Regulation 18701(a) and Regulation 18702.2(a)(5) it is reasonably foreseeable that these decisions will have a material financial effect on each official's residential real property interests. Further, none of the officials are able to demonstrate that the financial effect on their financial interests is indistinguishable from the decisions' effect on the public generally at this time. Therefore, each of the officials has a prohibitive financial interest in the STVR ordinance decisions. (Sections 87100 and 87103.) Even if disqualified under Section 87100, Section 87101 provides that the prohibition does not prevent a public official from making or participating in the making of a governmental decision to the extent his or her participation is legally required for the action or decision to be made. Under this limited exception, it appears that the Town Council will be unable to establish a quorum of noninterested members and it will be appropriate to follow the procedures in Regulation 18705 for establishing a quorum, as discussed below.

FACTS AS PRESENTED BY REQUESTER

The Town's Current Short Term Vacation Rental Ordinance

The Town's STVR ordinance regulates the use of privately-owned single family residential dwellings and duplex units as short term vacation rentals. Under this ordinance, all single family residential units or duplex units constructed and permitted for residential dwelling purposes may apply for a STVR permit. Single family residential units and duplex units make up approximately 87.7 percent of the residentially zoned property in the Town. Currently, there are 203 active STVR permits in the Town. This represents approximately 2.5 percent of eligible residential properties within the Town which have a STVR permit. There are approximately 35 pending applications for STVR permits.

All applicants that submit a properly filled out application, the required application fee of \$434.00, and meet the requirements of the ordinance, are issued a STVR permit. The STVR permit must be renewed every two years. The current STVR ordinance does not place a limit on the number of permits issued or limit permits as to particular geographic areas. The permitted occupancy rate is based on the number of bedrooms.

Potential Future Changes to the Town's Short Term Vacation Rental Ordinance

Town staff is looking into various changes to the STVR ordinance. While it is unclear at this time what changes will be considered, the Town Council could be presented with recommendations to make some or all the following changes:

- Limiting the total number of STVR permits issued within the Town or in a given area of the Town.
- Limiting the geographical areas in which STVRs are authorized.

- Limiting the number of people permitted to stay in a STVR.
- Increasing permit fees.

Prior to the Town Council deliberating or taking any action on the Town's STVR ordinance, the Planning Commission will consider these issues and will make recommendations to the Town Council. However, staff has made clear in discussions with you that they anticipate that the Town Council will be considering the full range of options.

Planning Commission Member Clint Stoker

The Town's Planning Commissioner, Clint Stoker, and his spouse own two properties in the Town with permitted STVRs. One is a property separate from his primary residence and is used as a full time STVR property, and the other is his guest house on the same parcel as his primary residence and is used as a part-time STVR unit. Commissioner Stoker rents the full-time STVR property approximately 290 days during the year and the part time STVR property approximately 200 days during the year. Commissioner Stoker receives approximately \$100,000 in gross income from these rentals during the year. His primary residence is eligible for a STVR permit.

Commissioner Stoker's spouse manages the two STVR units owned by her and Commissioner Stoker and manages three additional STVR units. Two are owned by other family members and one is owned by a third party. Commissioner Stoker's spouse received approximately \$33,000 in gross income during the previous twelve months from managing the three STVR units.

Commissioner Stoker is employed by a construction company and oversees the building and remodeling of homes throughout the area, including within the Town. In the past three years, Commissioner Stoker has only worked on two projects in the Town (an interior facelift/refresh of a home, and the construction of a single family home). Commissioner Stoker is unaware whether either of these properties were being used or going to be used as a STVR property.

Planning Commission Member Brad Napientek

Commissioner Napientek owns a primary residence and a separate residential parcel that are each eligible for a STVR permit.

Town Council Member Jeff Drozd

Council Member Drozd and his spouse own real property located in the Town and have used the property as a permitted STVR for three years. The STVR unit is located on the same parcel as his primary residence. Council Member Drozd rents this property out approximately 139 days during the year and receives approximately \$22,000 in income for these rentals during the year. His primary residence is eligible for a STVR permit.

Town Council Member Robert Lombardo

Council Member Robert Lombardo owns his residence and owns two other STVR eligible properties.

Mayor Pro Tem Schooler

Mayor Pro Tem Schooler and his spouse own two real property parcels located in the Town. One parcel has a STVR that has been permitted for three years. The STVR property is on a separate parcel located across town from his primary residence. Mayor Pro Tem Schooler rents this property out approximately 220 to 240 days during the year and receives approximately \$35,000 to \$45,000 per year in gross revenue for these rentals during the year. His primary residence is eligible for a STVR permit.

Mayor Pro Tem Schooler is a licensed real estate agent with Inspire Real Estate, and works throughout the Morongo Basin, including in the Town. He does not have an ownership stake in Inspire Real Estate. He is an independent contractor and receives a percentage of the brokerage commission from his transactions. In the past, Mayor Pro Tem Schooler has represented potential buyers who have informed him that they are looking to purchase real property in the Town for use as a STVR. Over the past three years, approximately 20 potential buyers have informed Mayor Pro Tem Schooler that they were interested in purchasing property in the Town for use as a STVR. To his knowledge, he has completed two transactions for property that he knows were expressly for STVR purposes.

Mayor Merl Able

Mayor Abel and his spouse own their primary residence, which is eligible for a STVR permit, and eight other properties eligible for STVR permits. He and his spouse are licensed real estate agents who work throughout the Morongo Basin, including in the Town. Both are agents with Inspire Real Estate. Neither have an ownership stake in Inspire Real Estate, but work as independent contractors, and receive a percentage of the brokerage commission from their transactions. In the past, Mayor Abel and his wife have represented potential buyers who have informed them that they are looking to purchase real property in the Town for use as a STVR. Over the past three years, approximately 30 to 40 percent of their potential buyers have stated that they were interested in purchasing property for use as a STVR. Together, the couple has represented approximately three buyers in the past three years who are using their property for a STVR, one of which is in the Town.

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. (Section 81001(b).) Section 87100 prohibits any public official from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest. (Section 87103.) A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on one or more of the public official's

interests. (Section 87103; Regulation 18700(a).) Section 87103 defines financial interests to include:

- An interest in a business entity in which the official has a direct or indirect investment of \$2,000 or more (Section 87103(a)); or in which the official is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d)).
- An interest in real property in which the official has a direct or indirect interest of \$2,000 or more (Section 87103(b)), including a pro rata share of interests in real property of any business entity or trust in which the individual or immediate family owns, directly, indirectly, or beneficially, a 10-percent interest or greater (Section 82033).
- An interest in a source of income to the official, or promised income, which aggregates to \$500 or more within 12 months prior to the decision (Section 87103(c)) including any community property interest in the income of a spouse and a pro rata share of the income of any business entity or trust in which the official (or his or her spouse) owns directly, indirectly, or beneficially, a 10-percent or greater interest (Section 82030(a)).
- Personal finances, meaning the financial effect of a governmental decision on the personal finances of a public official or his or her immediate family.

Under the Town's current STVR ordinance, any residential real property that is a single family home or a duplex is eligible for a permit. Each official has identified at least two residential real property interests eligible or currently permitted for an STVR. The officials with STVR permits have identified a business entity and source of income interest related to these decisions. No specific facts are provided regarding STVR-related clients as sources of income and we do not further consider this issue at this time.

Foreseeability and Materiality: Real Property Financial Interests

Regulation 18701 provides the standard to determine the foreseeability of a decision's financial effect on an official's financial interest. Under the Act, an effect on an interest is presumed foreseeable if the interest is explicitly involved in the decision. (Regulation 18701(a).) An official's financial interest is explicitly involved in a governmental decision if the interest is a named party in, or subject of, the decision. (*Ibid.*) 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 the materiality standard for real property financial interests, Regulation 18702.2(a)(1)-(6). (*Ibid.*) Regulation 18702.2(a)(5) states that a decision's financial effect is material when it "[i]nvolves the issuance, denial or revocation of a ... permit or other land use entitlement authorizing a specific use of or improvement to the parcel or any variance that changes the permitted use of, or restrictions placed on, the property."

Because the Planning Commission and the Town will be considering possible limitations to the occupancy rates, geographic areas, and number of STVR permits issued these decisions may affect all single family or duplex residential property owners' current land use entitlement. Therefore, under the standards in Regulation 18701(a) and Regulation 18702.2(a)(5), each of the above officials' residential real property interest is explicitly involved, and it is reasonably foreseeable that the decisions would have a material financial effect on each official's residential real property interest.³

Public Generally Exception

A public official that has a reasonably foreseeable and material financial interest in a decision may still participate if the official demonstrates that the financial effect is indistinguishable from its effect on the public generally. (Regulation 18703.) Under Regulation 18703(a), a decision's financial effect on a public official's financial interest is indistinguishable if the official establishes that a significant segment of the public is affected and the effect on the official's financial interest is not unique compared to the effect on the significant segment.

Regulation 18703(b)(1)(B) defines a "significant segment of the public" to include at least 25 percent of all residential real property within the official's jurisdiction. Where the only interest an official has in the decision is the official's primary residence, Regulation 18703(b)(1)(C)(2) defines a "significant segment" as at least 15 percent of residential real property within the official's jurisdiction. Single family residential units and duplex units currently eligible for a STVR permit make up approximately 87.7 percent of the residentially zoned property in the Town, and, as a general matter, the decisions will therefore affect a significant segment of the public.

Regulation 18703(c) provides that a "unique effect" on a public official's financial interest exists if a decision will have a disproportionate effect on:

- (1) The development potential or use of the official's real property or on the income producing potential of the official's real property or business entity.
- (2) The official's business entity or real property resulting from the proximity of a project that is the subject of a decision.
- (3) The official's interests in business entities or real properties resulting from the cumulative effect of the official's multiple interests in similar entities or properties that is substantially greater than the effect on a single interest.
- (4) The official's interest in a business entity or real property resulting from the official's substantially greater business volume or larger real property size when a decision affects all interests by the same or similar rate or percentage.
- (5) A person's income, investments, assets or liabilities, or real property if the person is a source of income or gifts to the official.
- (6) The official's personal finances or those of his or her immediate family.

³ Due to this finding, we need not separately consider the remaining financial interests of each official.

None of the above officials can establish at this time that the financial effect of a decision on their financial interests is not unique compared to its effect on the public generally because the specific nature of the decisions, such as limits on the number of STVR's and geographical limitations, are not yet known. As a result, we cannot determine if the public generally exception would apply without more specific information about the STVR decisions.

Legally Required Participation

Even if disqualified under Section 87100, Section 87101 provides that the prohibition does not prevent a public official from making or participating in the making of a governmental decision to the extent his or her participation is *legally required* for the action or decision to be made. Section 87101 is narrowly interpreted to permit the participation of the fewest financially interested persons possible in any decision. (*In re Hudson* (1978) 4 FPPC Ops. 13; *Gillig* Advice Letter, No. A-96-150; *Hill* Advice Letter, No. I-89-160.)

Regulation 18705(c) states:

(c) This regulation shall be construed narrowly, and shall:

(1) Not be construed to permit an official, who is otherwise disqualified under Section 87100, to vote to break a tie.

(2) Not be construed to allow a member of any public agency, who is otherwise disqualified under Section 87100, to vote if a quorum can be convened of other members of the agency who are not disqualified under Section 87100, whether or not such other members are actually present at the time of the disqualification.

(3) Require participation by the smallest number of officials with a conflict that are "legally required" in order for the decision to be made. A random means of selection may be used to select only the number of officials needed. When an official is selected, the official is selected for the duration of the proceedings in all related matters until the official's participation is no longer legally required, or the need for invoking the exception no longer exist.

Regulation 18705 further specifies that the legal requirement for participation may be established only if there is no alternative source of decision, the legal basis for the determination is disclosed, the official discloses the conflict and describes with particularity the nature of their financial interest(s).⁴ Thus, a public official disqualified under Section 87100 may participate in the making of a governmental decision only if a quorum cannot be convened of other members who are not disqualified under Section 87100.

We have determined that four of the five members of the Town Council have a prohibited financial interest in the STVR decisions, and it thus appears appropriate to invoke the legally required participation exception to establish a Town Council quorum. Once the process moves

⁴ See the following link for the full text of Regulation 18705: [§ 18705. Legally Required Participation. \(ca.gov\)](#)

forward to a point where a set of proposed decisions are before the Town Council, you may wish to seek additional advice on the application of the public generally exception to the Town Council officials.

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

Sincerely,

Dave Bainbridge
General Counsel

L. Karen Harrison

By: L. Karen Harrison
Senior Counsel, Legal Division

LKH:dkv