



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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November 12, 2021

Yolanda M. Summerhill
Assistant City Attorney
100 Civic Center Drive
Newport Beach, California 92660

Re: Your Request for Advice
Our File No. A-21-125

Dear Ms. Summerhill:

This letter responds to your request for advice on behalf of City of Newport Beach (“City”) Planning Commissioner Mark Rosene 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. In his capacity as an employee of Thomas James Homes, may City Planning Commissioner Rosene interact with City staff in the Community Development Department regarding his employer’s construction projects and permit applications within Newport Beach that will only require issuance of a building permit for final approval?
2. In the same work capacity, may Commissioner Rosene interact with staff in the City Community Development Department regarding his employer’s construction projects and permit applications within the City that may require a decision by the Zoning Administrator whose decision is appealable to the Planning Commission?

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 18109 through 18998 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.

3. May Commissioner Rosene participate in the final recommendations to the City Council on the 2021-2029 Final Housing Element?

CONCLUSION

1. Because Commissioner Rosene's employer is the subject of the decisions, the Act generally prohibits him from taking part in the decisions. While the Act does not prohibit communications that are solely ministerial, any communications intended to persuade or otherwise influence City staff are prohibited.
2. No, because Commissioner Rosene's employer is the subject of the decisions and the decisions are not solely ministerial, there is a reasonably foreseeable, material financial effect on Commissioner Rosene's source of income and he is therefore disqualified from taking part in the decisions, including interacting with City staff for the purpose of affecting the decision.
3. No, Commissioner Rosene is prohibited from taking part in the Planning Commission's decision of whether to recommend the 2021-2029 Final Housing Element to the City Council, as the Housing Element would identify sites for residential housing developments that could result in future projects for his employer and Commissioner Rosene's pay structure includes a bonus based on company performance.

FACTS AS PRESENTED BY REQUESTER

Mark Rosene was appointed to the City's Planning Commission on June 25, 2019. He recently took a project management position with Thomas James Homes, a single-lot new home replacement builder. Thomas James specializes in single-lot infill scattered lot development, meaning it builds homes on existing lots but at a higher capacity than a traditional custom lot developer. While Thomas James operates nationwide, the Southern California business plan includes building 150+ homes annually in Southern California in the next few years, with continued growth projected as it expands into Orange County and San Diego counties. Thomas James' approach is to develop its housing projects within the confines of existing code requirements so as to avoid the processing of discretionary land use entitlements.

Mr. Rosene's position with Thomas James includes oversight of all Orange County (which includes Newport Beach) and San Diego County planning and land development. Thomas James currently has five projects (lots) in the City. Applications with the City Community Development Department have not yet been submitted for these projects. However, you state that three of the five projects would require only the issuance of building permits. The other two may require approval of quasi-discretionary approvals before the Zoning Administrator. The Zoning Administrator, whose duties and functions are set forth in Section 20.62.050 of Newport Beach Municipal Code, is the decision-making body, not a recommending body, on the permits considered. However, the Zoning Administrator's decisions are appealable to the Planning Commission. The Zoning Administrator and Planning Commission are both part of the Community Development Department's Planning Division. In follow-up emails, you clarified that the Zoning Administrator is a Planning Division staff member—that is, a member of the same agency as the Planning Commission. In addition to their duties as Zoning Administrator, the staff member also presents projects to the Planning Commission for review and approval.

Mr. Rosene, in his capacity as an employee of Thomas James Homes, will be hiring a team of project management staff to handle daily operations as the Southern California division grows. Until then, he will be working with local jurisdictions' staff to obtain pre-acquisition planning to construction document approvals, including building permits.

Mr. Rosene is a salaried employee of Thomas James and his bonus structure is based on the performance of the company and the Southern California division. He does not have an ownership interest in Thomas James. His role is a management role and will eventually mean he will likely have very little interaction with local jurisdictions staff as he brings on new project management staff.

In his capacity as Planning Commissioner, Mr. Rosene participates in decisions involving individual land use projects as well as making recommendations to the City Council with respect to the Housing Element and General Plan. The City is currently in the process of adopting the 2021-2029 Housing Element for 6th Regional Housing Needs Allocation Cycle. The draft 2021-2029 Housing Element was developed in large part by the Housing Element Update Advisory Committee ("HEUAC"), a committee created by the City Council for the purpose of recommending areas within the City where the 4,845 residential units required under state law should be located as well as recommending which properties should be rezoned for residential uses. The draft Housing Element has largely been completed. The draft 2021-2029 Housing Element was submitted to the California Housing and Community Development ("HCD") for its 60-day review period. Following HCD's review, the Planning Commission will review and make a final recommendation to the City Council on the final 2021-2029 Housing Element for final submittal to HCD. None of the projects referenced above are within 1000 feet of the areas designated for residential under the 2021-2029 Housing Element.

In a follow-up email, you clarified the City's building permit process. In the scenario where an applicant wishes to build a home (or homes), the applicant must evaluate whether the property is "zoned" for housing and meets other zoning requirements to allow residential on that property. If not, the applicant obtains discretionary approval(s) to allow residential from the Planning Commission and/or Zoning Administrator. Once those discretionary approvals are obtained, or when a project fully complies with zoning requirements without discretionary approval(s), the project then proceeds to the building phase.

How buildings are built is governed by the California Building Code, California Residential Code, California Plumbing Code, California Electrical Codes and various other building codes ("Building Codes") that all cities adopt with only some minor deviations based upon local climatic, geological or topographical conditions specific to that city. The applicant and/or his architect prepare building plans in accordance with the Building Codes. Provided the plans meet all of the criteria in the Building Codes, the plans must be approved. The scenario where some discretion applies, involves a scenario where the applicant requests a hearing before the Board of Appeal arguing the Building Code has been incorrectly interpreted. The applicant would be appealing the Building Official determination to the Fire and Building Board of Appeals.

Additionally, an applicant may argue that an alternate equally good or better form of construction or method of protection or safety exists, the Building Official would then evaluate the alternative means and methods. If the applicant disagrees with the Building Official's determination, it would be heard by the Board of Appeals. In more than twenty

years working for the City, you have only seen two such hearings, one of which involved application of Building Codes to a historically designated structure.

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.) Most pertinent to these facts, is an interest in “[a]ny source of income . . . aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.” (Section 87103(c).)

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).”

Where an official’s economic interest is not explicitly involved in the governmental decision, the applicable standard for determining the foreseeability of a financial effect on the economic interest is found in Regulation 18701(b). That regulation provides, “[a] financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official’s control, it is not reasonably foreseeable.”

The reasonably foreseeable financial effect of a governmental decision on an official’s financial interest in a source of income is material if the source is a business entity that will be financially affected under the business entity materiality standards in Regulation 18702.1. (Regulation 18702.3(a)(4).) The reasonably foreseeable financial effect of a governmental decision on an official’s financial interest in a business entity is material if the entity is a named party in, or the subject of, the decision, including any decision in which the entity “[i]nitiates the proceeding by filing an application, claim, appeal, or other request for action concerning the entity with the official’s agency,” or “[a]pplies for a permit, license, grant, tax credit, exception, variance, or other entitlement from the agency.” (Regulation 18702.1(a)(1)(A), (E).)

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).)

“Making, participating in, or influencing a governmental decision” does not include actions by a public official that are solely ministerial, secretarial, or clerical. (Regulation 18704(d)(1).) The Commission has previously advised that “an action is ministerial, even if it requires considerable expertise and professional skill, if there is no discretion as to the outcome (or at least, no discretion with respect to any part of the result which could influence the governmental decision in question).” (*Kaplan Advice Letter*, No. A-82-108.)

Commissioner Rosene’s employer, Thomas James, currently has five projects in the City of Newport Beach. No applications have been submitted to the Newport Beach Community Development Department yet, but your inquiry indicates three applications will require only the issuance of building permits and suggests that these permits must be approved and maybe ministerial. However, as the applications have not currently been submitted and the nature of Commissioner Rosene’s communications with City staff have not been specifically identified, we do not have sufficient information to determine if the communications would be ministerial at this time. Generally, as indicated above, the reasonably foreseeable financial effect of a governmental decision on a business entity source of income is material whenever the business entity is the subject of the decision, including when the business entity has applied for a permit from the agency. (Regulation 18702.1(a)(1)(E).) Accordingly, the Act prohibits Commissioner Rosene from taking part in any permit decisions involving his employer, including contacting or appearing before any official in his agency for the purpose of affecting the decision. (Regulation 18704(c)(1).)²

In regard to the exception for ministerial actions, we have previously advised that an official may contact his or her agency to pose general questions which are ministerial in nature, such as

² Commissioner Rosene’s agency includes staff assigned to the Planning Division as well as any City staff that may be shared with the Planning Division. Shared city staff are considered to simultaneously represent each of the multiple agencies they work under during a review process. If a City staff member is shared with his agency, he is prohibited from attempting to influence the shared staff member regarding a decision that is before his agency.

questions about the required contents and form of applications submitted for building and safety department processing. (*Torrance* Advice Letter, No. A-94-084.) However, we must caution that any contact made to pose a question ministerial in nature may not be used to attempt to influence any agency action. For example, the official may not raise or question the interpretation of an ordinance or attempt to persuade the agency in making a determination relative to a project or feasibility of a project. (See *Barisone* Advice Letter, No. I-14-067; *Torrance* Advice Letter, A-94-084.) In other words, even to the extent an action is ministerial, Commissioner Rosene must refrain from any interaction with City staff that may have any influence on decisionmaking. If you need further assistance in determining whether any particular communication is ministerial in nature, you should seek further advice describing the nature of the communication.

You indicate that the other two projects may require quasi-discretionary approvals by the Zoning Administrator, a decision-making body whose decisions are appealable to the Planning Commission. Commissioner Rosene's employer is the subject of these decisions, and therefore the reasonably foreseeable financial effect on his employer is material. Commissioner Rosene is therefore disqualified from taking part in these decisions, including contacting or appearing before any official in the prohibited official's agency—including the Zoning Administrator—for the purpose of affecting the decision. (Regulation 18704(c)(1).) Because the decisions are not solely ministerial, the exception contained in Regulation 18704(d)(1) and discussed above does not apply.

Finally, you have inquired whether Commissioner Rosene may take part in the Planning Commission's final recommendations to the Newport Beach City Council regarding the City's 2021-2029 Final Housing Element. The draft 2021-2029 Housing Element was developed in large part by a committee created by the City Council for the purpose of recommending areas within the City where the 4,845 residential units required under state law should be located, as well as recommending which properties should be rezoned for residential uses. None of Thomas James's five projects discussed above are within 1000 feet of the areas designated for residential zoning under the 2021-2029 Housing Element.

A reasonably foreseeable financial effect on a source of income's real property interest is considered material where the property is the subject of the decision under Regulations 18701(a) and 18702.2(a)(1)-(6) or where there is clear and convincing evidence the decision would have a substantial effect on the property. Additionally, Regulation 18702.3(b) establishes an alternate standard for determining the materiality of a governmental decision's financial effect on a source of income, referred to as the "nexus test." Under the "nexus test," "[a]ny reasonably foreseeable financial effect on a source of income to a public official or the official's spouse is material if the decision will achieve, defeat, aid, or hinder a purpose or goal of the source and the official or the official's spouse receives or is promised the income for achieving the purpose or goal." Commissioner Rosene is a salaried employee of Thomas James. His work involves working with local jurisdictions' staff to obtain pre-acquisition planning to construction document approvals and his bonus structure is based on the performance of the company and the Southern California division.

The Housing Element would identify various sites for residential development or redevelopment for the purpose of reaching the mandatory 4,845 residential units required under state law. Thomas James is a single-lot new home replacement builder specializing in single-lot infill scattered lot development, meaning the company builds homes on existing lots but at a higher capacity than a traditional custom lot developer. As such, it appears the Housing Element

recommendation could result in new potential projects for Thomas James in the future. Given that Commissioner Rosene's pay structure at Thomas James includes a bonus based on company performance, it appears there is a nexus between the governmental decision at issue and Commissioner Rosene's role at Thomas James. Accordingly, the Act prohibits Commissioner Rosene from taking part in a decision on whether to recommend the proposed 2021-2029 Housing Element to the City Council.

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