



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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January 10, 2022

Timothy Carmel
City Attorney
694 Santa Rosa Street
San Luis Obispo, CA 93401

Re: Your Request for Advice
Our File No. I-21-130 & I-21-149¹

Dear Mr. Carmel:

This letter responds to your requests for advice on behalf of City of Arroyo Grande (“City”) Mayor Caren Ray Russom and City Councilmembers Kristen Barneich, Lan George, and Keith Storton regarding the conflict of interest provisions of the Political Reform Act (the “Act”).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. As you have sought general advice and have not yet identified specific decisions before the officials, we are providing informal assistance.³

QUESTIONS

1. May Mayor Russom and City Councilmembers Barneich, George, and Storton take part in governmental decisions relating to the adoption of an Accessory Dwelling Unit (“ADU”) ordinance, given that Mayor Russom has a permitted Secondary Dwelling Unit (the predecessor to

¹ You have submitted two requests for advice involving similar facts and analysis under the Act. Due to the related nature of your inquiries, we combine our responses—Advice Letter Nos. I-21-130 and I-21-149—into this single response.

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

an ADU), Councilmembers George and Storton are constructing permitted ADUs, and Councilmember Barneich received income from Councilmember George for designing her ADU?

2. Under the Act, may Arroyo Grande Mayor Russom and City Councilmember Barneich take part in decisions related to the City's Vacation Rental Ordinance, given that they have City-permitted Vacation Rentals?

3. May City Councilmembers George and Storton take part in decisions related to the Vacation Rental Ordinance, given that they do not have City-permitted Vacation Rentals, but are in the process of constructing ADUs that could potentially become City-permitted Vacation Rentals?

CONCLUSIONS

1. As a general matter, a decision affecting the City's ADU Ordinance would likely affect the land use entitlements of all residential real property within the City and therefore it is reasonably foreseeable that the decision will have a material financial effect on each officials' residential real property interests. The public generally exception is not applicable however, as the effect(s) on the officials' economic interests would be unique and therefore distinguishable from the effect on the public generally. The Act would likely prohibit each official from taking part in ADU Ordinance decisions unless the official's participation was legally required.

2. Similarly, changes to the Vacation Rental Ordinance would likely impact the land use entitlements of all residential real property in the City. However, because Mayor Russom and Councilmember Barneich already have Vacation Rental permits, a change to the Vacation Rental Ordinance would uniquely effect their economic interests. Therefore, it is reasonably foreseeable that a Vacation Rental Ordinance decision would have a material financial effect on each official's property, distinguishable from the effect on the public generally. As such, the public generally exception would not apply and the Act would prohibit each official from taking part in Vacation Rental Ordinance decisions.

3. Although neither Councilmember George nor Storton has a Vacation Rental permit nor is in the process of obtaining one, they are both currently constructing ADUs. Accordingly, any decision impacting Vacation Rentals and Vacation Rental permits would have a greater impact on the development and income-producing potential of their property compared to properties without ADUs. Accordingly, the public generally exception would not apply and Councilmembers George and Storton would generally be prohibited from taking part in Vacation Rental Ordinance decisions. The four City Councilmember would be required to follow the "legally required participation" provisions of Regulation 18705.

FACTS AS PRESENTED BY REQUESTER

Accessory Dwelling Units

Due to recent changes in state law to facilitate development of more ADUs and to address perceived barriers to their development, the updated state Planning and Zoning Law restricts local agencies' authority to impose requirements and limitations on ADUs. The updated Planning and Zoning Law's increased permissiveness of ADUs has rendered many local agencies' existing regulations governing ADUs invalid. As a result, the City Council will soon consider an ordinance

to update its current regulations governing ADUs (the “ADU Ordinance”), necessary to bring the City’s regulations governing ADUs into compliance with state law.

Many of the necessary changes relate to site development standards, such as lot size and coverage, building size and height, setback and parking requirements. Others relate to the provision of utilities and imposition of development impact fees. Some changes would be procedural in nature and intended to streamline the permitting process.

Under state law, certain ADUs known as “by-right” ADUs must be rented for more than 30 days. However, ADUs that are not “by-right” can be used as Vacation Rentals per the discretion of the respective local agency. The City Council will consider whether to extend the 30-day requirement to all new ADUs. Current ADUs built or permitted under the prior ADU Ordinance would be “grandfathered in” and would not be subject to a 30-day rental period requirement.

In a follow-up email, you included a draft of the proposed ADU Ordinance. Among other provisions, that ADU Ordinance permits the potential construction of a “Junior Accessory Dwelling Unit” (JADU), which may be “established within the space of the primary dwelling” and may also be constructed “in combination with the construction of one detached, new construction ADU” You also clarified that although the City does not track the number of ADUs in the City, 102 projects have the term “ADU” in their project description since 2016.

Vacation Rentals

Within Arroyo Grande, some Vacation Rental properties have become a source of controversy in the community due to their potential impact on neighbors and concerns regarding impacts to the availability of long-term housing within the City. This has resulted in some discussions at the City staff level about modifying the City’s regulations to address any identified problems. The City Council has directed that a discussion regarding these issues be agendaized. There are currently 72 approved Vacation Rentals, 6,086 single-family residences, and 118 multi-family water accounts in the City.

Currently, the Arroyo Grande Municipal Code regulates Vacation Rentals and requires approval of a minor use permit and that Vacation Rentals comply with certain performance standards and conditions. Vacation Rental permits do not need to be renewed. Mayor Russom and Councilmember Barneich both have permitted Vacation Rentals.

As noted above, the City may amend its ADU Ordinance to prohibit new ADUs from being used as Vacation Rentals (i.e., rented for periods shorter than 30 days). The City Council has not specified the exact decisions it may consider regarding a Vacation Rental Ordinance. One council member mentioned a possible moratorium. The City Council may also consider changing the minimum distance required between vacation rentals located on the same street or expand the regulation so that the 300-foot separation requirement is simply within 300 feet of a property line. They may also consider imposing parking standards, revising the application and approval process, and prohibiting Vacation Rentals in certain zones and/or cap the total number of vacation rentals allowed.

In a follow-up email, you provided a copy of the City’s current Vacation Rental Ordinance. Under the City’s current Vacation Rental Ordinance, Vacation Rentals “may be

permitted only with approval of a minor use permit. Vacation rentals shall comply with the property development standards of the underlying district and the performance standards and special conditions listed in [the Ordinance].” The Vacation Rental Ordinance does not limit Vacation Rentals to ADUs or any other type of building, so long as the Vacation Rental is “compatible with the neighborhood in which it is located in terms of landscaping, scale, and architectural character” and “harmonious and compatible with the existing uses with the neighborhood.”

City Councilmember Interests

Mayor Russom has a Second Dwelling Unit (SDU), which was the predecessor permit to an ADU permit and is the functional equivalent. Mayor Russom also has a Vacation Rental permit.

Councilmember Barneich has received or is promised to receive \$1500 from Councilmember George for the design of Councilmember George’s ADU. Councilmember Barneich has a Vacation Rental permit.

Councilmember George recently received approval for and began constructing an ADU on her property. She does not have a Vacation Rental permit.

Councilmember Storton also recently received approval for and began constructing an ADU on his property. He does not have a Vacation Rental permit.

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 are:

- (a) Any business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more.
- (b) Any real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more.
- (c) Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, 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.)

Each of the four officials has identified a real property interest in their residential property. Mayor Russom and Councilmember Barneich have also identified a business entity and source of

income interest in their respective Vacation Rental businesses. Councilmember Barneich additionally has a source of income interest in Councilmember George.⁴

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 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 material whenever the governmental decision involves a 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. (Regulation 18702.2(a)(5).)

Under the “public generally exception,” a public official that has a financial interest in a decision may still take part in it if the official demonstrates that the financial effect is indistinguishable from its effect on the public generally. A governmental decision’s financial effect on a public official’s financial interest is considered indistinguishable from the effect on the public generally 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(a).) A significant segment of the public includes at least 15 percent of residential real property within the official’s jurisdiction if the only interest an official has in the governmental decision is the official’s primary residence. (Regulation 18703(b)(2).) If the official has other interests in the decision, a significant segment of the public can be established by an effect on at least 25 percent of residential real property. (Regulation 18703(b)(1)(B).) A unique effect on a public official’s economic interest includes a disproportionate effect on 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. (Regulation 18703(c)(1).)

The ADU Ordinance

The ADU Ordinance decision involves land use entitlements authorizing a specific use of or improvement to all residential real property in the City. (See Regulation 18702.2(a)(5).) The Ordinance would change ADU development standards, involve development impact fees, and potentially restrict the way in which an ADU can be rented (i.e., for periods shorter than 30 days). As noted above, the ADU Ordinance would also provide for the construction of Junior ADUs in combination with ADUs under certain circumstances. The current version of the ADU Ordinance provides only for the construction of a single ADU per single-family plot. Thus, even property that already contains an ADU would potentially be impacted by the proposed ADU Ordinance. Further,

⁴ No specific facts were provided regarding rental clients as sources of income, and we do not further consider this issue at this time. Likewise, given our conclusion based on our analysis of the effect on the officials’ real property interests and on Councilmember Barneich’s source of income interest, we do not further analyze the effect of governmental decisions on the officials’ business entity interests.

although existing ADUs would not be affected by new development standards, the ADU Ordinance would still potentially be applicable in the future, if an owner chose to tear down and construct a new ADU. As such, the ADU Ordinance decision would ordinarily be deemed to have a reasonably foreseeable, material financial effect on each of the above members of the City Council, which would prohibit them from taking part in the decision.

As discussed above, an otherwise disqualified official is not prohibited from taking part in a decision if the public generally exception applies. Here, an ADU Ordinance decision would affect a significant segment of the public, given that it would affect the property rights of all residential real property owners in the City.⁵ As noted above, however, an official must also demonstrate that the effect on their economic interest is not unique compared to the effect on the significant segment. (Regulation 18703(a).) Here, Mayor Russom already has an SDU and Councilmembers George and Storton are constructing ADUs. The permitted ADUs will be grandfathered into the current ADU Ordinance. Most notably, the officials would not be subject to a potential new restriction on ADU rental periods. Accordingly, the impact on their property is disproportionate to the impact on the residential real property of others who have not already built ADUs and will be subject to new development requirements and prohibitions. Therefore, the public generally exception does not apply to Mayor Russom or Councilmembers George and Storton.

As noted, Councilmember Barneich does not have an ADU. However, aside from her economic interest in her own real property that would be subject to the ADU Ordinance, Councilmember Barneich also has a source of income interest in Councilmember George. Under Regulation 18702.3(a)(2)(C)(i), 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 of income is an individual and the official knows or has reason to know that the individual has an interest in real property that is the subject of the governmental decision under Regulation 18702.2(a)(1) through (6). As discussed above, Councilmember George's real property would be considered the subject of the ADU Ordinance decision(s) under Regulation 18702.2(a)(5), as the decision(s) would involve a 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. (Regulation 18702.2(a)(5).)

Under the public generally exception, a "unique effect" also includes a disproportionate effect on "a person's income, investments, assets or liabilities, or real property if the person is a source of income or gifts to the official." (Regulation 18703(c)(5).) As concluded above, the ADU Ordinance would have a disproportionate effect on Councilmember George's real property. Councilmember George is currently a source of income to Councilmember Barneich. Accordingly, the public generally exception does not apply to Councilmember Barneich, and she is also disqualified from taking part in ADU Ordinance decisions during the time period in which Councilmember George qualifies as a source of income to her.

⁵ You have indicated that while the City does not track the number of ADUs, only 102 projects since 2016 include the term "ADU" in their project descriptions. Given that low number in comparison to the 6,000+ single-family residences, as well as the lack of exact or more approximate figures, it does not appear that that residential real properties with ADUs constitute a significant segment of the public. To the extent that properties with an ADU may meet the applicable significant segment threshold, you may wish to seek further advice.

Based on the facts provided, four of the City Council's five members would be disqualified under the Act. Under Regulation 18705, "[a] public official who has a financial interest in a decision may establish that the official is legally required to make or to participate in the making of a governmental decision within the meaning of Section 87101 only if there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision." (Regulation 18705(a).) Regulation 18705(c) requires the exception to be construed narrowly. The exception cannot be invoked to allow a financially interested official to participate in a decision if a quorum can be convened of other members of the agency who are not disqualified, and participation is required to be limited to the smallest number of officials with a disqualifying interest that are "legally required" to make the decision. (Regulation 18705(c)(2)-(3).)

Because the City Council is made up of five councilmembers, at least three are necessary to form a quorum with respect to decisions regarding the ADU Ordinance. Mayor Russom and Councilmembers Barneich, George, and Storton, as discussed above, would ordinarily all be prohibited from taking part in ADU Ordinance decisions. Accordingly, in order to establish a quorum of three councilmembers, two otherwise disqualified councilmembers may be "legally required" to participate as provided under Regulation 18705.

Accordingly, the City may use a random means of selection to select two otherwise disqualified councilmembers to form a quorum with respect to decisions relating to the ADU Ordinance. (See Regulation 18705(c)(3).) When two councilmembers are selected, those councilmembers are selected for the duration of the proceedings and in all related matters until those councilmembers' participation is no longer legally required, or the need for invoking the exception no longer exists. (*Ibid.*) The selected councilmember will be required to state the existence of the potential conflict of interest as specified in Regulation 18705(b).

The Vacation Rental Ordinance

Similar to changes to the ADU Ordinance discussed above, the potential changes to the Vacation Rental Ordinance would generally involve changes to the permitted use of, or restrictions placed on, the property in terms of whether a property is eligible for a vacation rental permit, and the restrictions to that permit. (Regulation 18702.2(a)(5).) As such, changes to the Vacation Rental Ordinance have the potential to affect all residential real property, including the real property owned by the officials on the City Council. Currently the City is considering changes to address existing vacation rental problems, a possible interim moratorium on permits, as well as future restrictions on numbers and locations of permits. However, because Mayor Russom and Councilmember Barneich already have Vacation Rental permits which do not need to be renewed, they would be uniquely affected, as they would not be subject to new or additional requirements to obtain a Vacation Rental permit. As such, the public generally exception would not apply and they would be prohibited from taking part in Vacation Rental Ordinance decisions.

Neither Councilmember George nor Storton has a Vacation Rental permit at this time, but will have ADUs that will not be restricted in their use as Vacation Rentals under the ADU Ordinance. Although neither official is currently in the process of preparing or submitting a permit application, decisions impacting Vacation Rentals and the officials' ability to obtain a Vacation Rental permit would have a more significant impact on the development and income-producing potential of the officials' property as compared to residential real property without an existing ADU. The reasonably foreseeable, material financial effect on Councilmember George and

Storton's real property interests is distinguishable from the effect on the public generally and, therefore, the public generally exception would not apply. Under the Act, each of the four officials would generally be prohibited from taking part in the Vacation Rental Ordinance decisions. Accordingly, the City Council may follow the requirements of Regulation 18705, discussed above, to permit two otherwise-disqualified officials to establish a quorum and take part in the Vacation Rental Ordinance decisions.

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

Sincerely,

Dave Bainbridge
General Counsel



Kevin Cornwall
Counsel, Legal Division

KMC:dkv