



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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February 23, 2021

Yolanda Summerhill
City Attorney's Office
City of Newport Beach
100 Civic Center Drive
Newport Beach, California 92660

Re: Your Request for Advice
Our File No. A-21-017

Dear Ms. Summerhill:

This letter responds to your request for advice on behalf of City of Newport Beach Planning Commissioner Erik Weigand 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 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

Do the Act's conflict of interest provisions prohibit Newport Beach Planning Commissioner Erik Weigand from taking part in governmental decisions relating to an application for a conditional use permit necessary for a proposed project to expand the Westcliff Plaza shopping center given that the Planning Commissioner's single-family residence is located approximately 715 feet from the project?

CONCLUSION

No. The Act's conflict of interest provisions do not prohibit the Planning Commissioner from taking part in decisions relating to the conditional use permit application because it is not reasonably foreseeable that those decisions would have a material financial effect on the Planning Commissioner's real property interest in the residence based on the facts presented.

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.

FACTS AS PRESENTED BY REQUESTER

You are an Assistant City Attorney for the City of Newport Beach and the authorized representative of Newport Beach Planning Commissioner Erik Weigand. You provided additional information on February 12, 2021 and February 17, 2021.

Westcliff Plaza is a 10.78-acre shopping center, with 113,514 square feet of building area, located at the eastern corner of the intersection of Westcliff Drive and Irvine Avenue within the City. The shopping center abuts the City's boundary line with the City of Costa Mesa. Westcliff Plaza contains a mix of commercial uses, including a grocery store, a drug store, banks, various retail and service establishments, and several restaurants, as well as a 580-space parking lot that serves all uses within the shopping center. There are residential neighborhoods to the north, east, and west of the shopping center, and a mixture of commercial uses to its south and west.

The owner of Westcliff Plaza, Irvine Company Retail Properties, proposes to construct a 9,641 square-foot building for up to three future restaurant tenants at Westcliff Plaza (the "Project"), with 9,055 square feet of floor area and 2,312 square feet of outdoor dining area. The Project would also repurpose two existing retail suites at Westcliff Plaza, totaling approximately 15,000 square feet, by converting them into a restaurant, a gym, and medical office uses.

Discretionary review of the Project is not required by the City's zoning laws because the Project's commercial building does not meet the threshold for commercial square footage necessitating a Site Development Review application. The City's zoning laws require future tenants of Westcliff Plaza to obtain individual use permits.

The Project would also modify Westcliff Plaza to increase its on-site parking supply from 580 to 610 parking spaces by reconfiguring existing angled parking stalls to new 90-degree stalls, eliminating the existing secondary driveway along Westcliff Drive to provide more parking spaces, and reworking an existing pedestrian walkway to provide better vehicular access and circulation. Pursuant to City zoning laws' formula for determining requisite parking spaces, 749 total on-site parking spaces are required for the existing and proposed uses at Westcliff Plaza. Because the Project would only increase total on-site parking spaces to 610, the Project would result in a deficit of 139 parking spaces. In order to accommodate the Project, Irvine Company Retail Properties has applied to the City for a conditional use permit authorizing that deficit.

The Planning Commission Staff Report on the conditional use permit application, dated January 21, 2021, reviewed parking and traffic studies prepared for the Project, noted that the Project is exempt from the California Environmental Quality Act,² and recommended the application's approval.

² The Staff Report provides as follows: "This project is exempt from the California Environmental Quality Act (CEQA) pursuant to Section 15303 under Class 3 (New Construction or Conversion of Small Structures) of the CEQA Guidelines, California Code of Regulations, Title 14, Chapter 3, because it has no potential to have a significant effect on the environment."

The parking study determined that peak demand for parking spaces at Westcliff Plaza, including demand from the Project's additional uses, would result in 88-percent utilization of the proposed 610 parking spaces, and concluded that the reconfigured parking lot will be adequate to accommodate the existing and proposed uses at the shopping center. The parking study also included a parking management plan that would be implemented if actual parking demand exceeds supply. The traffic study prepared under the supervision of the City Traffic Engineer predicted no significant traffic delays due to the Project, found no improvements were necessary, and concluded that the Project would not cause any significant traffic-related impacts.

The Planning Commission Staff Report notes that the Project's three future restaurants would be consistent with Westcliff Plaza's existing mixture of commercial uses, and that Westcliff Plaza is suitable for the type and intensity of the Project's proposed development because the infrastructure serving Westcliff Plaza and the surrounding area has been designed and developed to accommodate additional commercial development.

Planning Commissioner Weigand's one-story single-family residence is held in a trust in his name. The Planning Commissioner owns at least 10 percent of the trust, he is a trustee of the trust, and his interest in the residence is worth at least \$2,000 or more. The residence is located approximately 715 feet east of the Project, within an established residential neighborhood, and there are only single-family residences in the immediate vicinity of the residence.

There are three roads and an alleyway to the west of the Planning Commissioner's residence, between the residence and Westcliff Plaza. The two roads directly west of that residence are lined with single-family residences; the alleyway west of those roads has single-family residences on its east side and multi-family residences on its west side; and those multi-family residences line the east side of the westernmost road, with Westcliff Plaza on its west side. Those multi-family residences are in multistory buildings. There are at least four rows of residential structures between the Planning Commissioner's residence and Westcliff Plaza. Although that residence is approximately 715 feet away from the Project measured by map in a direct line, it is approximately 0.4 miles away from the Project by road if the shortest route is taken.

The Planning Commission will soon consider the conditional use permit application associated with the Project. The Planning Commission was scheduled to address the application at its January 21, 2021 meeting, but the matter was continued pending the receipt of this advice letter.

ANALYSIS

The Act's conflict of interest provisions prohibit a public official from making, participating in making, or attempting to use his or her official position to influence a governmental decision if it is reasonably foreseeable that the decision would have a material financial effect on one or more of the official's financial interests. (Sections 87100 and 87103.) An official's financial interests that may give rise to a disqualifying conflict of interest are identified in Section 87103 and include all the following:

- An interest in any business in which the official has an investment worth \$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 any real property in which the official has an interest worth \$2,000 or more. (Section 87103(b).)
- An interest in any source of income aggregating \$500 or more in the 12 months prior to the decision. (Section 87103(c).)
- An interest in any source of a gift or gifts aggregating \$520 or more in the 12 months prior to the decision.³ (Section 87103(e).)
- An interest in the official's personal finances and those of immediate family members.⁴ (Section 87103.)

Section 82033 defines “interest in real property” and provides in pertinent part that an individual's real property interests include a pro rata share of the real property interests of any business or trust in which the individual or immediate family owns, directly, indirectly, or beneficially, a 10-percent interest or more. Because the Planning Commissioner owns at least a 10-percent interest in the trust that owns his residence, and because his interest in that residence is worth at least \$2,000, the Planning Commissioner has a real property interest in that residence.

Therefore, based on the facts presented, the Planning Commissioner has a real property interest in his residence and an interest in his personal finances with respect to decisions relating to the conditional use permit application.⁵

Foreseeability and Materiality

Regulation 18701(a) provides that a governmental decision's financial effect on an official's financial interest is presumed to be reasonably foreseeable if the official's interest is “explicitly involved” in the decision; an official's interest is “explicitly involved” if the interest is a named party in, or the subject of, the decision; and an 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 interest. In addition, an official's business interest is explicitly involved in any decision affecting the business as described in Regulation 18702.1(a)(1),

³ Section 87103(e) requires the amount of the value of a gift or gifts set forth therein to equal the same amount as the gift limit specified in Regulation 18940.2. This gift limit was recently adjusted from \$500 to \$520, effective January 1, 2021, pursuant to Section 89503(f).

⁴ Section 82029 defines “immediate family” to mean the spouse and dependent children.

⁵ Section 82005 provides that “business entity” means any organization or enterprise operated for profit, including a business trust. The principal distinction between a business trust and an ordinary trust is the trust's purpose. (*Hodge* Advice Letter, No. A-13-002; *Eccelstein* Advice Letter, No. I-03-293.) The purpose of a business trust is to carry on a business enterprise for profit whereas the purpose of an ordinary trust is to conserve the property and other assets of the trust, with incidental powers of sale and investment. (*Ibid.*) The facts presented provide no indication that the trust that owns the Planning Commissioner's residence is a business trust or that he receives any income from the trust. Therefore, the Planning Commissioner has neither a business interest nor a source of income interest in the trust. However, you should seek additional advice if there is any indication that the Planning Commissioner has a business or source of income interest in the trust.

and an official's real property interest is explicitly involved in any decision affecting the real property as described in Regulation 18702.2(a)(1) through (6).

Regulation 18701(b) sets forth the foreseeability standard applicable to a decision's effect on an official's interest that is not explicitly involved in the decision and provides that the effect on such an interest is reasonably foreseeable if it "can be recognized as a realistic possibility and more than hypothetical or theoretical."

At issue is whether decisions relating to the conditional use permit application would have a disqualifying financial effect on the Planning Commissioner's real property interest in his single-family residence. Regulation 18702.2 provides the materiality standards applicable to a decision's reasonably foreseeable financial effect on an official's real property interest. Because the Planning Commissioner's residence is located approximately 715 feet away from the Project, the materiality standard of Regulation 18702.2(a)(8) applies. That materiality standard provides that the effect is material if the decision involves property located more than 500 feet but less than 1,000 feet from the property line of the official's parcel and 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, noise levels, or air quality; or
- (E) Market value.

The Planning Commissioner's residence is within an established residential neighborhood east of the Project, and there are only single-family residences in the immediate vicinity of that residence. The facts presented provide no indication that decisions relating to the conditional use permit application would have any effect on the development potential, income producing potential, highest and best use, or market value of the Planning Commissioner's residence. Therefore, we need only determine whether those decisions would change the character of that residence by substantially altering its traffic levels, intensity of use, parking, view, noise levels, or air quality.

The facts presented also provide no indication that decisions relating to the conditional use permit application would affect the character of the Planning Commissioner's residence by substantially altering its views, noise levels, or air quality. There are three roads and an alleyway and at least four rows of residential structures between the Planning Commissioner's residence and Westcliff Plaza. Because the residence is one story, and the multi-family residences between it and Westcliff Plaza are multiple stories, the Project is unlikely to affect the residence's views. The Planning Commission Staff Report notes that the Project "has no potential to have a significant effect on the environment." There are already various commercial uses at Westcliff Plaza, and the Project's proposed additional uses are consistent with those existing uses.

With respect to parking demand, the parking study for the Project determined that peak demand for parking spaces at Westcliff Plaza, including demand from the Project's additional uses, would only result in 88-percent utilization of the proposed 610 parking spaces, and concluded that the reconfigured parking lot will be adequate to accommodate the existing and proposed uses at Westcliff Plaza. If actual parking demand exceeds supply, a parking management plan included in

the parking study would be implemented. Because the Planning Commissioner's residence is 0.4 miles away from Westcliff Plaza by road, it does not appear likely that it will experience any significant parking impacts due to the Project. In regard to traffic levels, a traffic study prepared under the supervision of the City's Traffic Engineer predicted no significant traffic delays due to the Project, found no improvements were necessary, and concluded that the Project would not cause any significant traffic-related impacts.

Although the Project may increase the intensity of use of Westcliff Plaza and the surrounding area, there is no indication that increase would change the character of the Planning Commissioner's residence. The Planning Commission Staff Report notes that the Project would be consistent with Westcliff Plaza's existing mixture of commercial uses, and is suitable for the Westcliff Plaza and the surrounding area because the infrastructure serving this area has been designed and developed to accommodate additional commercial development.

Therefore, based on the facts presented, decisions relating to the conditional use permit application would not change the character of the Planning Commissioner's residence by substantially altering its traffic levels, intensity of use, parking, view, noise levels, or air quality. Thus, it is not reasonably foreseeable that those decisions would have a material financial effect on the Planning Commissioner's real property interest in his residence under Regulation 18702.2(a)(8).

Accordingly, the Act's conflict of interest provisions do not prohibit the Planning Commissioner from taking part in decisions relating to the conditional use permit application necessary for the Project because those decisions would not have a disqualifying financial effect on his real property interest in his residence.⁶

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

Sincerely,

Dave Bainbridge
General Counsel

Matthew F. Christy

By: Matthew F. Christy
Counsel, Legal Division

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⁶ Regulation 18702.5(c) provides that if the decision at issue affects an official's financial interest in real property, any related effect on the official's personal finances is not considered separately. Because decisions relating to the conditional use permit application affect the Planning Commissioner's real property interest in his residence, we do not analyze the effect of those decisions on the Planning Commissioner's interest in his personal finances.