



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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June 1, 2022

Richard D. Pio Roda
Meyers Nave
1999 Harrison Street, 9th Floor
Oakland, California 94612

Re: Your Request for Advice
Our File No. A-22-050

Dear Mr. Pio Roda:

This letter responds to your request for advice on behalf of San Leandro Vice-Mayor Pete Ballew, 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.

QUESTION

Does Vice-Mayor Ballew have a conflict of interest in decisions regarding the application for a Vesting Tentative Tract Map, a Planned Development Project, Site Plan Review, and Use Permits, including Project entitlements, for the Monarch Bay Shoreline Development Project (the “Project”) where he owns a residence that is located more than 1,000 feet of the Project?

CONCLUSION

Yes. It is reasonably foreseeable that the decision would have a material financial effect on Vice-Mayor Ballew’s real property interest, and he should not take part in the decisions pertaining to 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 18104 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.

FACTS AS PRESENTED BY REQUESTER

The Project is a proposed development along 75 acres of the northern portion of the San Leandro shoreline, which currently includes the following components: 491 housing units; a 210-room hotel with attached restaurant; a 15,000 square foot two-story restaurant/banquet facility; a 3,000 square foot market/cafe; a redesigned nine-hole golf course; and related site improvements including a new public library.

The Planning Commission will review the Project's application for a Vesting Tentative Tract Map, a Planned Development Project, Site Plan Review, and Use Permits. In particular, the Planning Commission shall consider the application for the following Project entitlements: 1) The establishment of 12 larger parcels/blocks that correspond to the new layout of the site and to facilitate the property sale and lease; 2) a 210-room hotel with an attached restaurant, a detached 15,000 square foot two-story restaurant/banquet facility; a 3,000 square foot market/cafe, and associated parking located north of Mulford Point Drive and west of Monarch Bay Drive; 3) a 285-unit multi-family apartment complex with associated parking located south of Pescador Point Drive and west of Monarch Bay Drive; and 4) a "for-sale" development of 144 detached single-family homes and 62 townhomes located on approximately 16 gross acres east of Monarch Bay Drive, south of Marina Boulevard, and north of Fairway Drive ("Entitlements"). The Planning Commission will review the application for the Entitlements and forward a recommendation to the City Council for its consideration. The City Council will be the ultimate decision maker regarding the Entitlements.

Environmental Impact Report

In a follow up communication, you provided additional information, including a link to the Environmental Impact Report ("EIR") for the Project. You also stated that the Project would not result in significant impacts to air quality, noise, and traffic. We note that, per the EIR, the Project includes a total of 75 acres of the Shoreline Recreational Area. This site consists of two peninsulas, Mulford Point to the north and Pescador Point to the south, that encircle the boat harbor and include existing commercial and recreational facilities. The Project site also includes portions of the existing 9-hole Marina Golf Course and an existing 2,000 square-foot public library building with a related parking lot. There are approximately 1,450 existing parking lot spaces throughout the Project site. The EIR states that the "Project would be an infill development project that would improve the existing facilities along the shoreline and increase residential and non-residential land uses."

The Shoreline Recreational Area includes three existing commercial enterprises and one partially demolished restaurant/banquet facility. These include the 131-room Marina Inn, opened in 1985; Horatio's Restaurant, completed in 1978; and an El Torito Restaurant, which originally opened as part of the Tia Maria chain in 1970. The foundation and deck piers of the former Blue Dolphin Restaurant remain on-site.

Boating facilities currently include a 462-slip public boat marina with a separate boat launch and support operations, and two private yacht clubs. Due to physical constraints caused by build-up of silt both in the harbor and the 2-mile federal channel, occupancy of the marina currently stands at less than 30 percent.

The Project would involve the removal of many of the structures on the site including the existing El Torito restaurant building, the Mulford Branch Library building, the San Leandro Yacht Club building, the Spinnaker Yacht Club building, the harbor master's office and fuel pump/dock, public restrooms, and the 462 boat slips.

The Project would include demolishing and reconstructing the existing 2,000 square foot Mulford-Marina branch library building. The new facility would be approximately 2,500 square feet in size and would include a community meeting space, constituting approximately 500 square feet of additional space compared to the existing library.

Additionally, the nine-hole marina Golf Course would be reconfigured in order to accommodate proposed residential development on the grounds of the course. In a follow-up email, you indicated that the Marina Golf Course is one of two courses that comprise the City's Monarch Bay Golf Club, which also includes a separate 18-hole course located due south of the Marina Golf Course, a double deck driving range with heaters, windscreens, and a music system, and a clubhouse that includes a full stocked golf shop along with a bar and grill and banquet facilities. The existing Marina Inn building and the Horatio's restaurant building are not part of the proposed Project.

The Bay Conservation and Development Commission (BCDC) requires projects to plan for the upper range of sea level rise, approximately 65 inches. The Project will require imported fill to raise the base elevations of portions of the site in order to meet FEMA flood zone and BCDC requirements. It is estimated that approximately 208,000 cubic yards of imported fill will be required.

Vice-Mayor Ballew's Property Interest

Vice-Mayor Ballew currently owns a town home in San Leandro as his personal residence. The total fair market value of Vice-Mayor Ballew's economic interest in this property is over \$2,000. At its nearest point, Vice-Mayor Ballew's residence is 1,012 feet from the Project. You note that the EIR indicates that the Project will have no significant effects on Vice-Mayor Ballew's residence related to noise levels, air quality, or traffic. You have also confirmed that the portion of the Monarch Bay Golf Club that includes the separate 18-hole course, driving range and Monarch Bay clubhouse facilities is located south of Fairway Drive, directly east of, and adjacent to, the town home complex where Vice-Mayor Ballew owns his residence. The 9-hole course is adjacent to the rest of the Club separated only by Fairway Drive. You have also confirmed that Vice-Mayor Ballew's residence is located within 500 feet of the Club, and that no work is anticipated related to the 18-hole golf course as part of the Project.

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 or the financial interests of persons who have supported them. (Section 81001(b).) Section 87100 prohibits a public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. Section 87103 provides that a public official has a "financial interest" in a decision, within the meaning of the Act,

if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's interests that is distinguishable from the decision's effect on the public generally.

Section 87103 also describes the interests from which a conflict of interest may arise under the Act. As pertinent to the facts provided, those economic interests include "[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).) Accordingly, Vice-Mayor Ballew has a potentially disqualifying economic interest in his residential real property.

When a public official's economic interest is explicitly involved in a governmental decision, Regulation 18701(a) provides that "[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, including any decision affecting a property interest as described in Regulation 18702.2(a)(1)-(6)." (Regulation 18701(a).) Where the financial interest is not explicitly involved in a decision, the financial effect is reasonably foreseeable if it can be recognized as a realistic possibility, more than hypothetical or theoretical. (Regulation 18701(b).) The decision at issue involves approval of various aspects of the Project. As such, Vice-Mayor Ballew's interest is not a named party in or the subject of the decision. Under Regulation 18701(b), he will have a financial interest in the proposed Project if there is a realistic possibility that the decision will have a material financial effect on his real property interest.

Real Property

Regulation 18702.2 provides the standards for determining when a government decision's reasonably foreseeable effect on an official's real property interest is material considering factors such as the proximity of the property subject to the decision and its impacts on the official's parcel. Applicable to these facts, the reasonably foreseeable financial effect is material:

- Whenever the decision involves property located 500 feet or less from the property line of the official's parcel unless there is clear and convincing evidence that the decision will not have any measurable impact on the official's property. (Regulation 18702.2(a)(7).)
- Whenever the 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 development potential, income producing potential, highest and best use, character (by substantially altering traffic levels, intensity of use, parking, view, privacy, noise levels, or air quality), or market value. (Regulation 18702.2(a)(8).)

Conversely, the financial effect of a governmental decision on a parcel of real property in which an official has a financial interest involving property 1,000 feet or more from the property line of the official's property is presumed not to be material. This presumption may be rebutted with

clear and convincing evidence the governmental decision would have a substantial effect on the official's property. (Regulation 18702.2(b).)

Vice-Mayor Ballew's residence is 1,012 feet from the nearest boundary of the Project but within 500 feet of the Monarch Bay Golf Club which operates the 9-hole golf course as part of its adjacent complex. In this case, the facts indicate that the project is limited to the 9-hole course, but it is unclear whether changes may implicate or affect the remainder of the Club. Accordingly, based on the facts provided, it is unclear whether to apply the materiality standards for property 1,000 feet or more from the decision or the other more stringent standards for property within 1,000 feet² However, it is unnecessary to make this determination as it appears there is clear and convincing evidence to rebut the presumption of non-materiality in this particular instance.

Applying Regulation 18702.2(b) based upon the 1,000-foot measurement, Vice-Mayor Ballew's neighborhood and town home community are adjacent to the Project, separated by the easternmost portion by Fairway Drive. The location of the Project, consisting of 75 acres along the northern portion of the San Leandro shoreline, is currently in a state of decline, underutilized, and includes older infrastructure that would be redeveloped, such as a partially demolished restaurant/banquet facility and a marina impacted by silt build up with occupancy at less than 30 percent. Under these facts, the financial effect of such a major redevelopment and revitalization of a large area in the immediate vicinity of the residential properties would have a reasonably foreseeable material financial effect on the market value of the properties.

Moreover, it is significant that Vice-Mayor Ballew's town home community and the Monarch Bay Golf Club are adjacent to one another. While the project may include physical improvements only to the 9-hole course, this course is encompassed within the larger golf complex that makes up a large portion of the Marina. Considering the objective to revitalize the Marina, the proximity of the town home community to both the Marina and the Club, and the fact that Vice-Mayor Ballew's residence is within 500 feet of the golf complex, it appears highly likely the financial effect will extend beyond 1,000 feet of the physical project and to Vice-Mayor Ballew's property. Based on the facts presented, there is clear evidence that the Project would affect the market value and income producing potential of Vice-Mayor Ballew's real property. Accordingly, under the Act, it is reasonably foreseeable that the decision would have a material financial effect on Vice-Mayor Ballew's real property interest, and he should not take part in the decisions pertaining to the Project.³

² When a project encompasses only a portion of a larger property, we have previously advised that a measurement to the project as opposed to the boundaries of the larger property is permissible where the governmental decision affects only a clearly defined, specific and isolated site, such as a particular building on a large tract of land. (See, e.g. the *Whitson* Advice Letter, No. A-03-007; the *Ball* Advice Letter, No. A-01-279; the *Kaplan* Advice Letter, No. A-98-224.)

³ We note that you have stated that it is unlikely the decision will affect 15 percent or more of the residential properties within the City. Accordingly, the public generally exception does not appear to apply, and we do not address it further. (See Regulation 18703(b)(2).)

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

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary W. Norton
Senior Counsel, Legal Division

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