



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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January 21, 2022

Damien Brower
City of Brentwood
150 City Park Way
Brentwood, CA 94513

Re: Your Request for Advice
Our File No. A-21-159

Dear Mr. Brower:

This letter responds to your request for advice on behalf of City of Brentwood Mayor Joel Bryant, City Councilmember Susannah Meyer, and City Councilmember Karen Rarey regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹ Please note that we are only providing advice under 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

Do the Act’s conflict of interest provisions prohibit Mayor Bryant, Councilmember Meyer, or Councilmember Rarey (the “Councilmembers”) from taking part in governmental decisions relating to a proposed project to replace a water feature located on City-owned property with a planter given that the Councilmembers’ respective residences are located more than 1,000 feet from the site of the proposed project?

CONCLUSION

No. The Act’s conflict of interest provisions do not prohibit the Councilmembers from taking part in decisions relating to the proposed project because those decisions would only have a nominal effect on the Councilmembers’ respective real property interests in their residences based on the facts presented.

FACTS AS PRESENTED BY REQUESTER

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.

You are City of Brentwood's City Attorney and the authorized representative of Mayor Joel Bryant, City Councilmember Susannah Meyer, and City Councilmember Karen Rarey (the "Councilmembers").

The Councilmembers own their respective residences located in the Shadow Lakes Neighborhood (the "Community") within the City. The Community is governed by a homeowners' association incorporated as the Shadow Lakes Community Association (the "Association"). The Association consists of 780 separate property interests.² According to the Association's 2021 Budget Report, every Association member pays a monthly assessment of \$50, the Association's annual income is \$468,017.40, and all that income went to paying the Association's annual expenses. None of the three Councilmembers serve on the Association's Board of Directors.

The City approved the Community in 1993. At that time, the Community was called "Brentwood Lakes." Thereafter, the Community was rebranded as "Boulder Ridge." Part of this rebranding included City consideration of certain modifications to the Community's entryway hardscaping and landscaping. On March 21, 2000, the City's Planning Commission adopted Planning Commission Resolution No. 00-22 (the "PC Resolution") which approved these modifications. Among other things, the PC Resolution required the Community to install proposed enhancements to existing entry features (the "Improvements"), including curved walls with pilasters and modified landscaping and hardscaping located on City-owned property at a vehicle entrance to the Community at the corner of Balfour Road and East County Club Drive. The City's records are incomplete regarding the Improvements but confirm that the Improvements included installation of a water feature (the "Water Feature").

On July 12, 2000, the City, the developer of the Community, and the Association's predecessor in interest (the "Former Association") executed a license agreement (the "Licensing Agreement") allowing the Former Association to access the City-owned property at an entry to the Community for the construction and maintenance of the Improvements. Under the License Agreement, the City's sole remedy is to remove the Improvements if the developer, the Former Association, or their successors fail to maintain the Improvements. Pursuant to the License Agreement, \$25,000 was paid to the City as a one-time fee.³ The License Agreement expressly provides that in exchange for that fee neither the developer nor the Former Association may be held liable for any costs incurred by the City to remove the Improvements.

On February 2, 2021, the Association filed an application with the City for a proposed project to replace the Water Feature with a planter (the "Proposed Project"). The Association estimates that the Proposed Project would cost a total of \$37,000, which equates to \$47 per Association member.

² Statement by Common Interest Development Association filed with the Secretary of State on April 1, 2021 for Shadow Lakes Community Association (State Entity No. C2345380).

³ This \$25,000 fee was "equivalent to City amenities that would have been required by [the Community's developer] at the time of the initial tentative subdivision map approval."

In its application for the Proposed Project, the Association notes that the Water Feature is not in working order. The Association estimates that repair of the Water Feature would cost \$75,000 to \$100,000. Based upon these estimates, the maximum approximate repair cost would be \$129 per Association member.⁴

The association is authorized to impose a special assessment of up to five percent of gross expenses from the previous fiscal year.⁵ A special assessment exceeding this amount must be approved by a majority of a “quorum” of the Association’s members.⁶ Applying that provision to the Association’s 2021 Budget Report, you state that the maximum special assessment that the Association’s Board of Directors could authorize in the 2022 fiscal year is \$23,401 (five percent of \$468,017), or \$30 per Association member, and that a larger special assessment would require the approval of a majority of a quorum of the Association’s members.

The City may soon consider governmental decisions regarding the Proposed Project. The site of the Proposed Project (the “Project Site”) is located approximately 1,650 feet from Mayor Bryant’s residence, 2,345 feet from Councilmember Meyer’s residence, and 2,450 feet from Councilmember Rarey’s residence. You note that the Water Feature is a central feature of the Community’s aesthetics, and that governmental decisions relating to the Water Feature’s potential removal or replacement will likely generate considerable public participation.

ANALYSIS

The Act’s conflict of interest provisions prohibit a public official from making, participating in making, or attempting to use the official’s position to influence a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the official’s financial interests distinguishable from the decision’s effect on the public generally. (Sections 87100 and 87103.) An official’s interests that may give rise to a disqualifying conflict of interest are identified in Section 87103. With respect to decisions relating to the Proposed Project, each of the Councilmembers has the following interests based on the facts presented:

- A real property interest that official’s owned residence, assuming the official has an interest in that real property worth \$2,000 or more.⁷ (See Section 87103(b).)

⁴ We note that you have provided an estimate of \$500,000 to \$600,000 to reconstruct the Water Feature. However, there is currently no indication that this option will be pursued as the Association has no obligation at this time to reconstruct the Water Feature.

⁵ See Civil Code Section 5605(b).

⁶ A “quorum” is fifty percent of the Association’s membership. (See Civil Code 50605(c).)

⁷ Under Regulation 18702.2(e)(4), “[r]eal property in which an official has a financial interest does not include any common area as part of the official’s ownership interest in a common interest development as defined in the Davis-Sterling Common Interest Development Act.” (See Civil Code Section 4500.)

- An interest in the official's personal finances and those of immediate family members.⁸ (See Section 87103.)

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 real property interest is explicitly involved in any decision which affects that interest as described in Regulation 18702.2(a)(1)-(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."

Regulation 18702.2 sets forth the materiality standards applicable to a decision's reasonably foreseeable financial effect on an official's real property interest. Under subdivision (a)(3) of that regulation, a decision's financial effect on an official's real property interest is disqualifying if the decision "[w]ould impose, repeal, or modify any taxes, fees, or assessments that apply to the parcel."

Decisions relating to the Proposed Project may result in the modification or imposition of an assessment on each of the Councilmembers' respective real property interests at issue: if the Proposed Project is approved, the Association would incur the cost to construct the Proposed Project, and each Association member would be liable for a share of that cost. The Association's estimated total cost to construct the Proposed Project is \$37,000, or approximately \$47 per Association member.

If the Proposed Project is not approved, the Association may alternatively decide to repair the Water Feature or may decide to do nothing and allow the City to remove the Improvements pursuant to the Licensing Agreement. The Association estimates that repair of the Water Feature would cost \$75,000 to \$100,000, or as much as \$129 per member. If the Association decides to do nothing, there would be no additional cost to the Association or its members because the City's sole remedy for failure to maintain the Improvements is to remove them at City expense.

However, notwithstanding Regulation 18702.2, a decision's financial effect on an official's financial interest is not material "if it is nominal, inconsequential, or insignificant." (Regulation 18702(b).) We conclude that the potential cost of not more than \$129 to be assessed on each of the Councilmembers due to their ownership of real property within the Community would be nominal. Thus, decisions relating to the Project would not have a disqualifying financial effect on the

⁸ Section 82029 defines "immediate family" to mean the spouse and dependent children.

Councilmembers' respective real property interests in their residences, and the Act does not prohibit those Councilmembers from taking part in those decisions.⁹

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

Sincerely,

Dave Bainbridge
General Counsel

Brian Lau

By: Brian Lau
Assistant General Counsel

MFC:dkv

⁹ Under Regulation 18702.5(c), if a decision would have a reasonably foreseeable financial effect on an official's real property interest, any related effect on the official's interest in his or her personal finances is not considered separately, and the financial effect on the official's real property interest is solely analyzed under Regulation 18702.2. Therefore, we do not further analyze the financial effect of decisions relating to the Proposed Project on the Councilmembers' respective interests in their personal finances.