



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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August 20, 2019

Gabrielle Whelan
San Mateo City Attorney's Office
330 West 20th Ave
San Mateo, CA 94403-1388

Re: Your Request for Advice
Our File No. 19-148

Dear Mr. Whelan:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act")¹ and Section 1090. Please note that we are only providing advice under the conflict of interest provisions of the Act, and Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest.

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.

Regarding our advice on Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General's Office and the San Mateo County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice "is not admissible in a criminal proceeding against any individual other than the requestor." (See Section 1097.1(c)(5).)

QUESTION

May a member of the San Mateo Planning Commission take part in hearings related to a planning application for a large mixed-use development project, given that an investor in the project has previously contracted with the commissioner's employer on other projects?

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.

CONCLUSION

Yes. Based on the facts provided, the decision before the Planning Commission would not have a reasonably foreseeable, material financial effect on the commissioner's employer, a source-of-income economic interest, because the commissioner's employer does not do the type of construction work that the project would entail. Similarly, a development agreement between the city and the project applicant would not implicate a disqualifying financial interest under Section 1090.

FACTS AS PRESENTED BY REQUESTER

The City of San Mateo's Planning Commission will be considering a planning application for a 961-unit mixed use development project called Concar Passage ("Project"). The Project applicant is California Coastal Communities, LP ("CCC"). An entity named Brookfield Residential Properties, Inc. ("Brookfield"), is an investor (not a partner) in the Project. In a follow-up email, Commissioner Ebneter indicated he had been told a year ago that Brookfield's investment in the Project was approximately \$250,000,000.

Commissioner Ebneter is employed by Swinerton Construction Company ("Swinerton"). Commissioner Ebneter is a project management executive at Swinerton and works on scheduling projects and making sure they come in under budget. He runs a construction group at Swinerton that works on about \$15 million worth of projects at a time. He does not have business development duties. He is a salaried employee whose bonus is not tied to any performance data. He also owns stock in Swinerton.

Swinerton has served as a general contractor for Brookfield on a Brookfield project in Austin, Texas. Swinerton currently has a contract with a related Brookfield company (owned by the same Brookfield parent company but separate from Brookfield Residential Properties, Inc.) to construct a project in San Francisco. A Swinerton division other than Commissioner Ebneter's division is working with that separate Brookfield entity on the San Francisco project. Swinerton has worked on fifteen projects with various divisions of Brookfield over the last nine years. Swinerton does not do the type of construction work (stick frame construction) that will be used for the Project.

ANALYSIS

The Act

Section 87100 of the Act provides that "[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 enumerated economic interests. (Section 87103.) Among those economic interests is "[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).) An official also has an economic interest in any business entity in “[a]ny business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.” (Section 87103(d).) Based upon the facts provided Commissioner Ebneter has economic interests in Swinerton as a source of income and as a business entity.

A financial effect on a financial interest is presumed to be reasonably foreseeable if the financial interest is involved in the decision. An interest is explicitly involved if the interest is “a named party in, or the subject of, a governmental decision before the official or the official's agency.” (Regulation 18701(a).) In this case, Swinerton is not explicitly involved the decisions involving the project. Accordingly, Regulation 18701(b) applies to determine if the financial effect of a decision is foreseeable. Under this regulation, 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.

A reasonably foreseeable financial effect on an interest in a business entity, including a source of income, is material if the business entity will be financially affected under Regulation 18702.1. (Regulation 18702.3(a)(4).) Under Regulation 18702.1, where a business entity is not explicitly involved in a governmental decision, the financial effect of the decision on the business entity is material if the decision may result in an increase or decrease of the entity's annual gross revenues, or the value of the entity's assets or liabilities, in an amount equal to or more than \$1,000,000, or five percent of the entity's annual gross revenues and the increase or decrease is at least \$10,000. Regulation (18702.1(a)(2).) Alternatively, the financial effect may also be deemed material if the decision may cause the entity to incur or avoid additional expenses or to reduce or eliminate expenses in an amount equal to or more than \$250,000, or one percent of the entity's annual gross revenues and the change in expenses is at least \$2,500. (Regulation 18702.3(a)(3).)

Based upon the facts provided, there is no indication that a governmental decision pertaining to the Project would have an effect on Swinerton meeting the materiality thresholds for an indirectly involved business entity. Swinerton has contracted with Brookfield or Brookfield-related companies on other projects, but there is nothing indicating that Swinerton would profit as a result of Brookfield's investment in the Project. That is particularly true given that Swinerton does not do the type of construction work that the Project would entail.

Additionally, Regulation 18702.3(b) provides that “[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.” However, you have indicated that Commissioner Ebneter is a salaried employee whose bonus is not tied to any performance data, and he does not have any business development duties in his role as an executive project manager. Based on the facts provided, it does not appear there is any nexus between Commissioner Ebneter's employment at Swinerton and the governmental decision before him concerning the Project.

Accordingly, Commissioner Ebneter does not have a disqualifying financial interest under the Act and he may take part in decisions relating to the Project.

Section 1090

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested in. Section 1090 is concerned with financial interests, other than non-interests or remote interests, that prevent public official from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.) Section 1090 is intended “not only to strike at actual impropriety, but also to strike at the appearance of impropriety.” (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.)

The determinative issue here is whether Commissioner Ebneter has a prohibitive financial interest in a potential development agreement between the City and California Coastal Communities, LP.

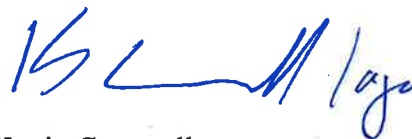
Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.” (*People v. Honig, supra*, at p. 333.) Officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*Ibid.*) Although Section 1090 does not specifically define the term “financial interest,” case law and Attorney General opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (*People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn.5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

Here, CCC has submitted an application for the Project to the City Planning Commission for its consideration. Presumably, if the application is approved, CCC would request a development agreement with the City for the Project. As an investor in the Project, Brookfield would stand to benefit from such an agreement. Although Commissioner Ebneter’s employer, Swinerton, has contracted with Brookfield and Brookfield-related companies on other projects, there is nothing indicating that Commissioner Ebneter or Swinerton would also benefit from a development agreement between the City and CCC. To the contrary, Swinerton does not do the type of construction work that the Project would entail and, thus, it appears there is no possibility that Swinerton could serve as a general contractor or subcontractor on the Project. Based on the facts provided, Commissioner Ebneter does not have a disqualifying financial interest under Section 1090.

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

Sincerely,

Dave Bainbridge
General Counsel

A handwritten signature in blue ink, appearing to read "Kevin Cornwall", is written over the typed name.

By: Kevin Cornwall
Counsel, Legal Division

KMC:aja