



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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March 15, 2021

Rubens Advice Letter No. A-20-111 is SUPERSEDED by *Rubens* Advice Letter No. A-20-111(a)

Gregory J. Rubens,
City Attorney
City of San Carlos
600 Elm Street
San Carlos, CA 94070

Re: Your Request for Advice
Our File No. A-20-111(a)

Dear Mr. Rubens:

This letter responds to your request for advice on behalf of San Carlos Vice Mayor Laura Parmer-Lohan regarding conflict of interest provisions of the Political Reform Act (the "Act"), as well as Government Code Section 1090, et seq.¹ Please note that we are only providing advice under 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.

We are required to forward your request regarding Section 1090 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

Under the Act and Section 1090, may San Carlos Vice Mayor Laura Parmer-Lohan consider a development agreement between the City and Alexandria Real Estate Equities regarding the development of a biotechnology corporate campus in the City given that the Vice Mayor works for

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.

Amgen, a biotechnology a company which currently leases office space from Alexandria elsewhere in the United States?

CONCLUSIONS

Yes, the Vice Mayor may participate in consideration of the development agreement, provided that the city does not know and cannot currently determine the identity of Alexandria's prospective tenant. Under the Act, so long as the prospective tenant is not currently identified, the Vice Mayor does not have a financial interest for which it is reasonably foreseeable that the development agreement would have any material financial effect. Additionally, pursuant to Section 1090, the Vice Mayor does not have a financial interest in the contract.

FACTS AS PRESENTED BY REQUESTER

You serve as the City Attorney for the City of San Carlos and seek advice on behalf of Vice Mayor Laura Parmer-Lohan.

Alexandria Real Estate Equities ("Alexandria"), a nationwide real estate developer, has purchased two large parcels in the City of San Carlos. Its application for development and request for a development agreement will be reviewed in the next few months for a large biotechnology corporate campus in the City of San Carlos.

Amgen, a nationally recognized publicly traded company leases office space from Alexandria elsewhere in the United States. Amgen also operates a large biotech campus and facilities, leased from another landlord, in the City of South San Francisco, approximately 20 miles from San Carlos.

Vice Mayor Parmer-Lohan works for Amgen as its Site Lead - Strategic Planning & Operations in South San Francisco. Vice Mayor Parmer-Lohan's responsibilities pertain to the South San Francisco location only, providing internal business operations support such as internal communications and external outreach, staff planning, tactical actions and execution concerning the South San Francisco site, and direct access and visibility to leadership to achieve the overall site mission and goals. She reports to a vice president responsible for the site in the organization. Vice Mayor Parmer-Lohan holds no hiring or firing authority at Amgen and her position does not include any decision-making authority related to real estate or leasing. The Vice Mayor advises that Amgen has just committed to a significant development in South San Francisco and has no plans or interest for leased space in San Carlos.

In further information provided via email, you stated that the City is unaware of any specific biotech companies which Alexandria may have approached to gage interest in leasing of the planned development. There is currently no indication that the project is being specifically marketed to a competitor of Amgen. However, you have stated that the campus may or may not ultimately be intended or used by a competing biotechnology company. At this time, information of this type has not been shared with the City by Alexandria and the City has not asked for or attempted to require the disclosure of this information.

Since the issuance of our initial advice, you have provided further facts relevant to the analysis. For purposes of our initial advice, Amgen was not previously identified as the company for which the Vice Mayor works. Amgen's 2019 reported revenue was \$23.3 billion and assets were valued at \$59.7 billion. Additionally, the development site in question was purchased two years ago. However, it could be up to ten years (depending upon various factors) before the site is ready for a lessee to take possession. There is also the potential that during this time Alexandria decides to halt the project or sell the site, thereby never reaching a point at which it is leased by Alexandria. And based on non-disclosure agreements and other proprietary concerns, there is no way for the City to currently know whether or not the site is being developed with a competitor of Amgen's in mind.

ANALYSIS

The Act

Section 87100 prohibits any 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. A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on one or more of the public official's interests. (Section 87103; Regulation 18700(a).) The financial interests relevant to Vice Mayor Parmer-Lohan are:

- *Source of Income*: An interest in any source of income aggregating \$500 or more in the 12 months prior to the decision. (Section 87103(c).)
- *Business Entity*: 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)).

A financial effect on a public official's economic interest is reasonably foreseeable if the economic interest is a named party in, or the subject of, a governmental decision before the official or the official's agency. (Regulation 18701(a).) Where a public official's economic interest is not explicitly involved in a decision, as here, a different standard for determining the reasonable foreseeability of a financial effect is applicable. Under Regulation 18701(b), "[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."

Regulation 18701(b) also provides factors that should be considered in determining whether a governmental decision will have a reasonably foreseeable financial effect on a financial interest not explicitly involved in a decision. These factors include in part:

- (1) The extent to which the occurrence of the financial effect is contingent upon intervening events, not including future governmental decisions by the official's agency, or any other agency appointed by or subject to the budgetary control of the official's agency.

...

- (5) Whether the governmental decision will provide or deny an opportunity, or create an advantage or disadvantage for one of the official's financial interests...

Given the facts provided, it appears there are multiple intervening events which would need to take place for this decision to have a foreseeable financial effect on Amgen: development of the biotech campus would need to be completed; a lessee would need to enter into a contract with Alexandria for use of the space; the lessee would need to be a competitor of Amgen; and any potential effect from the competitor would need to be material. Further, the City has no knowledge at the current time as to whether or if the development is being designed or marketed to a competitor of Amgen's, such that the Vice Mayor would knowingly be taking part in a decision which could provide or deny an opportunity to her financial interest.

Where a business entity is not explicitly involved in a decision, whether or not the effect is material will depend upon the decision's ability to impact gross revenues, assets or liabilities, and expenses of the entity as enumerated in Regulation 18702.1(a)(2) and (a)(3).² Given that Amgen is a large, publicly-traded company, with current assets valued at \$59.7 billion, it is unlikely, under the known facts, that any decision to develop the site in question would have a material financial effect on Amgen or its holdings merely because the project is intended as a biotechnology campus.

Based on the size and valuation of Amgen, along with the fact that the City has no knowledge of any lease agreement or prospective tenants, there is no reasonably foreseeable material financial effect to Amgen at this time. Therefore, the Vice Mayor does not have a disqualifying financial interest under the Act and may participate in the proceedings. We caution, however, that this analysis applies only to the facts as currently presented and that the Vice Mayor may be disqualified from future decisions as the project comes into closer focus. At such point that a prospective tenant becomes ascertainable, the Vice Mayor may wish to seek further advice prior to taking part in any further proceedings.

Section 1090

Section 1090 generally prohibits a public officer or employee from making or participating in the making of a contract in which he or she is financially interested. Section 1090 is concerned with financial interests, other than remote interests and noninterests, that prevent a public officer or employee from exercising absolute loyalty and undivided allegiance in furthering the best interests of his or her agency. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) A contract made in violation of Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.)

Under Section 1090, a member of a public agency's governing body is conclusively presumed to participate in the making of a contract under the governing body's authority, irrespective of whether he or she actually participates in the making of that contract. (*Thomson v. Call, supra*, at pp. 649-650.) Therefore, Section 1090 prohibits the entire body from entering into a contract in which a member of the body is financially interested, even if that member abstains from participating in the making of, or fully discloses his or her financial interest in, the contract. (*Ibid.*)

² The materiality standard for a financial interest in a source of income which is a business entity is found in Regulation 18702.1 (18702.3(a)(4).)

Here, the contract at issue is the development agreement between the City and Alexandria. Amgen is not a party to the development agreement, and there are no other facts to suggest that the Vice Mayor has a financial interest in the contract merely because the project is intended as a biotechnology campus. Accordingly, she does not have a conflict under Section 1090 at this time. However, we again caution that the Vice Mayor may wish to seek additional advice once a perspective tenant is ascertainable.

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 "EM Boyd".

By: Erika M. Boyd
Senior Counsel, Legal Division

EMB:aja