



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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August 12, 2015

Steven L. Dorsey
Buena Park City Attorney
Richards, Watson & Gershon
355 South Grand Avenue, 40th Floor
Los Angeles, California 90071

Re: Your Request for Advice
Our File No. A-15-136

Dear Mr. Dorsey:

This letter responds to your request for advice, on behalf of City Councilmember Fred Smith for the city of Buena Park regarding Government Code Section 1090 and the provisions of the Political Reform Act (the “Act”).¹ Please note that we do not advise on any other area of law, including the Public Contract Code or common law conflicts of interest. We are also 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.

In regard to 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 Orange County District Attorney’s Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. We are also required to advise you that, for purposes of Section 1090, the advice “is not admissible in a criminal proceeding brought against any individual other than the requestor.” (Section 1097.1(c)(5).)

QUESTION

May Council Member Smith participate in decisions regarding contracts for the Beach Boulevard Streetscape Improvement Project where the project will be located on the street on which Knotts Berry Farm (KBF) is located, and Council Member Smith provides services to the owners of KBF?

CONCLUSION

Yes. Under the Act, it is not reasonably foreseeable that the decisions regarding the contracts, and other decisions relating to the project, will have a material financial effect on his

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.

interests. For Section 1090, Council Member Smith does not have a financial interest in contracts involving the project.

FACTS

Council Member Smith is the sole owner of Smith and Sons Glass. The firm is a glazing contractor providing retail sales and installation of glass and related services and products. Knotts Berry Farm (“KBF”) is an amusement park located in the city that is owned by Cedar Fair, L.P. Smith and Sons Glass has performed work for Cedar Fair at the KBF location for more than five years prior to Mr. Smith’s election to office for which his business has received over \$500 per year. Cedar Fair, which is listed on the New York Stock Exchange, has fifteen amusement parks, market capitalization of over \$3 billion and revenues of about \$1 billion. More than 3 million people visit KBF each year.

The City Council has approved the Beach Boulevard Streetscape Improvement Project which will make improvements to Beach Boulevard. The project will be located mostly along a one-mile stretch of Beach Boulevard north of La Palma Avenue and south of State Route 91. Beach Boulevard is a six-lane major arterial highway and the area of the project. Over the next few months, the city council will consider awarding contracts for Phase I of the project.

Phase 1 will, in general, involve construction of streetscape and landscaping and include such items as constructing new medians, landscaping existing medians, installing landscaping at the interchange of State Route 91 and Beach Boulevard, installing lights in palm trees and replacing wayfinding signage, including signs with arrows showing directions to KBF. The new signs will be larger and will incorporate the overall entertainment corridor design.

KBF is located on Beach Boulevard. This is the west side of the property and where entrances are located. The north side of the park is on La Palma Avenue. The improvements located nearest to the park are two wayfinding signs – one located on the south side of La Palma Avenue adjacent to the park property and the other on the north side of La Palma just east of Beach Boulevard and 80 feet north of the park. The other more substantial improvements will start on the north side of the intersection of Beach Boulevard and La Palma Avenue.

At its August 25, 2015 meeting, the City Council will consider approving the first portion of Phase 1 of the project which consists of installing the palm tree lighting and pruning necessary to install the lighting. No new lighting will be installed along the KBF property. Contracts for the remaining Phase 1 improvements will be presented in subsequent meetings. Phase 2 will be presented to the City Council later in the year or the early part of next year. Phase 2 will consist of installing similar but far fewer improvements on Beach Boulevard north of State Route 91.

ANALYSIS

Conflict of Interest under the Act

Under Section 87100, a conflict of interest exists whenever a public official makes, participates in making, or uses his or her position to influence a governmental decision that has a

reasonably foreseeable material financial effect on one or more of the official's financial interests. (Section 87103.)

Financial Interests

Investment in a Business Entity - Section 87103(d) provides that an official has a financial interest in any business entity in which the official has a direct or indirect investment of \$2,000 or more. As the owner of Smith and Sons Glass, Council Member Smith has a financial interest in his company as a business entity.

Source of Income - An official has an interest in any source of income, including promised income that aggregates to \$500 or more within 12 months prior to the decision. Also, if a public official owns a 10-percent or greater interest in his or her business, customers who are sources of income to that business are also considered sources of income to the public official. Council Member Smith's business is a source of income to him. If Cedar Fair pays Smith and Sons Glass \$500 or more in the 12 months prior to a governmental decision, Cedar Fair will also be a source of income to Councilmember Smith. (Section 87103(c).)

Foreseeability and Materiality

Generally, a financial effect is presumed to be reasonably foreseeable if the interest is "explicitly involved" in a decision. An interest is "explicitly involved" if a decision is made by a named party in, or the subject of, a governmental decision before the official or the official's agency. (Regulation 18701(a).) If the interest is "not explicitly involved" in the decision, a financial effect is reasonably foreseeable if the effect can be recognized as a realistic possibility and more than hypothetical or theoretical. A financial effect need not be likely to be considered reasonably foreseeable. (Regulation 18701(b).) Different standards apply to determine whether a reasonably foreseeable financial effect on an interest will be material depending on the nature of the interest. (Regulation 18702.) The materiality standards for any particular interest are provided in Regulations 18702.1 through 18702.5.

As applied to the facts here, neither Councilmember Smith's interest in his business nor his interest in Cedar Fair is "explicitly involved" in decisions regarding the project. Accordingly, the financial effect of the decisions on these interests is foreseeable only if the effect is more than hypothetical or theoretical.

In this case, you state that the project is intended to beautify the area and identify the area as the city's entertainment corridor. None of the proposed improvements, with the exception of the two replacement signs on La Palma Avenue, will border the park. We believe that beautifying Beach Boulevard may benefit small retail businesses located along the boulevard but would have little or no effect on Cedar Fair. The park already draws more than 3 million customers a year, so it is unlikely that any increase in customers resulting from the improvements would affect the amount of business at the park. Also, given the size of Cedar Fair, it is unlikely that the improvements will have a material financial effect on Cedar Fair. Accordingly, Councilmember Smith would not have a conflict of interest in decisions regarding the project.

Conflict of Interest under Section 1090

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Under Section 1090, the prohibited act is the making of a contract in which the official has a financial interest and officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) Based on the facts you have provided, Councilmember Smith simply does not have a discernible financial interest in the contracts at issue. Accordingly, Section 1090 does not prohibit him from participating in decisions involving such contracts.

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

Sincerely,

Hyla P. Wagner
General Counsel

/s/

By: Valentina Joyce
Counsel, Legal Division

VJ:jgl