



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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October 8, 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-15-154

Dear Mr. Dorsey:

This letter responds to your request for advice on behalf of Elizabeth Swift regarding the conflict of interest restrictions that may apply to her as a city council member. Please note that we only provide conflict of interest advice under the Political Reform Act (the “Act”)¹ and Section 1090. We do not provide advice on other conflict of interest restrictions, if any, that could arise such as those governed by the common law. We are also not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), meaning that any advice we provide assumes the facts the requester provides to us are accurate. If this is not the case, then our advice could be different.

QUESTIONS

Is Councilmember Swift prohibited by the conflict of interest provisions of the Act or Section 1090 from participating in decisions to create a tourism marketing district (the “TMD”) and making contracts relating to the TMD where she owns property within 500 feet of a hotel that will be part of the district?

CONCLUSIONS

No. Under the Act, there will be no reasonably foreseeable measurable impact on Councilmember Swift’s property from a decision to create the TMD. Under Section 1090, Councilmember Swift would not have a financial interest in any contracts involving the TMD.

FACTS

You are the City Attorney for the City of Buena Park. The city is working with all of its 21 hotels to explore the formation of a Tourism Marketing District (“TMD”). The purpose of the TMD would be to collect revenues to operate a tourism marketing program. As currently under consideration, the hotels would add a 2% TMD charge to the bills of persons staying at the hotels.

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.

The city would enter into an agreement with the TMD under which the TMD would transfer the funds it collects to the city in exchange for the city operating the tourism marketing program. The city would combine the TMD payments with \$350,000 of city funds and \$100,000 collected from tourist attractions, such as Knott's Berry Farm, to operate the program. The goal of the program would be to increase tourism and consequently increase the number of persons staying at the city's hotels. It is anticipated that the total annual expenditures for the program will be approximately \$1,395,000 per year.

Over a number of years the city has approved construction of an approximately one million square foot retail high-rise, office and 170-room hotel project located at the southwest intersection of Beach Boulevard and Commonwealth Avenue. The project is currently under construction. The project includes a seven-level parking structure with 1,800 parking spaces. The primary entrance to the parking structure will be located on Beach Boulevard and a secondary entrance will be located on Brenner Avenue. Visitors, including some using the hotel, will travel on Brenner Avenue to access the parking structure. The overall project will substantially impact the amount of traffic on Brenner Avenue.

Councilmember Swift, together with her husband, owns and resides in a home located on Brenner Avenue. The home is located within 500 feet of the parcel upon which the hotel will be built.

Councilmember Swift has not participated in decisions involving the project or the TMD, including the decision to retain a consultant to explore the possibility of forming the TMD. You stated that the decision to form the TMD will have no bearing on whether the project as a whole and the hotel, in particular, will be built. These facilities are under construction and will be completed and operated regardless of whether the TMD is created. You also stated the councilmember will continue to abstain from all decisions affecting the project.

The tourism marketing plan funded by the TMD may generate additional business for the hotel and could result in an incremental increase in traffic on Brenner Avenue. However, given the substantial amount of traffic the overall one million square foot project will already generate, any increase in traffic on Brenner Avenue caused by the increase would appear to be minimal.

ANALYSIS

Political Reform Act Conflict of Interest

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest.² A public official has a "financial interest" in a governmental decision, within the meaning

² When a public official who holds an office specified in Section 87200, including a council member, has a conflict of interest in a decision noticed at a public meeting, then he or she must: (1) immediately prior to the discussion of the item, orally identify each type of economic interest involved in the decision as well as details of the economic interest on the record of the meeting; (2) recuse himself or herself, and (3) leave the room for the duration of the discussion and/or vote on the item. (Section 87105; Regulation 18707.)

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 as set forth in Section 87103.

Interests from which a conflict of interest may arise include any real property in which the public official has a direct or indirect interest worth \$2,000 or more. Presumably, Councilmember Swift's interest in her property is \$2,000 or more.

Foreseeability:

A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official's interests is material. The standard for foreseeability differs depending on whether an interest is explicitly involved in the decision. 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'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 interest, and includes any governmental decision affecting a real property interest of the official. (Regulation 18701(a).) Under your facts, Councilmember Swift's property is not explicitly involved in the subject decision. Thus, the applicable foreseeability test is in Regulation 18701(b) and provides: "[I]f 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."

Materiality

Regulation 18705.2(a) provides a list of circumstances under which the reasonably foreseeable financial effect of a governmental decision on an official's real property interest is material. The materiality rule applicable to your facts is stated in Regulation 18705.2(a) (11). The financial effect will be material if the decision "would consider any decision affecting real property value located within 500 feet of the property line of the official's real property . . . Notwithstanding this prohibition, the Commission may provide written advice allowing an official to participate under these circumstances if the Commission determines that there are sufficient facts to indicate that there will be no reasonably foreseeable measurable impact on the official's property."

You state that the project will include the hotel and parking structure whether or not the TMD is formed. Also, the overall one-million square foot project in and of itself is expected to have a substantial impact on traffic on Brenner Avenue and any potential increase attributable to higher hotel occupancy generated by the marketing program would be minimal. Under these facts, we find that there will be no reasonably foreseeable measurable impact on Councilmember Swift's property from decisions involving the creation of the TMD and Councilmember Swift is not prohibited by the provisions of the Act from participating in such decisions.

Section 1090 Conflict of Interest

Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest" (*People v. Honig* (1996) 48 Cal.App.4th 289, and 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. (*Thomson v. Call* (1985) 38 Cal.3d 633.; *see also People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; *People v. Darby* (1952) 114 Cal.App.2d 412, 431-432; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

More recently, in *Eden Township Healthcare Dist. v. Sutter Heath* (2011) 202 Cal.App.4th 208, the court of appeal held that “to be prohibited under section 1090, the public official’s financial interest must be related to the contract The purpose of the prohibition is to prevent a situation where a public official would stand to gain or lose something with respect to the making of a contract over which in his official capacity he could exercise some influence.” (*Id.* at p. 225)) Importantly, the court held that “if the contract itself offers no benefit to the official, either directly or indirectly, then the official is not financially interested in the contract” (*Id.* at 228.)

In the instant matter, Councilmember Swift’s property would not be related to any foreseeable contracts involving the TMD. Moreover, we do not think Section 1090 was intended to address the indirect, speculative effects of a contract on matters so far removed from the general subject matter of the contract, such as the remote likelihood of impacts on Councilmember Swift’s property. Our conclusion is supported by our finding that there will be no reasonably foreseeable measureable impact on Councilmember Swift’s property from decisions involving the creation of the TMD. On this basis, we find that Councilmember Swift does not have a financial interest in such contracts and neither she nor the city council would violate Section 1090 by making 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