



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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October 21, 2015

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

Re: Your Request for Advice
Our File No. A-15-158

Dear Mr. Dorsey:

This letter responds to your request for advice on behalf of Mayor Pro Tem Fred R. Smith regarding the conflict of interest provisions of the Political Reform Act (the “Act”)¹ and Section 1090. Please note that we do not advise on any other area of law, including 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.

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.

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 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. (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

Does either the Act or Section 1090 limit Mayor Pro Tem Smith’s participation in decisions regarding the potential Tourism Marketing District?

CONCLUSION

No. As discussed below, neither law prohibits or limits his participation.

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.

FACTS

You are the City Attorney for the City of Buena Park (the “City”) and you write on behalf of Mayor Pro Tem Fred R. Smith. The City is considering working with all of its 21 hotels to create a Tourism Marketing District (“TMD”) pursuant to the Property and Improvement District Law of 1994 (Streets and Highways Code Section 36600, *et seq.*). The TMD’s purpose is to collect revenue to operate a tourism marketing program. Knott’s Berry Farm (“KBF”) owns one of the hotels that would be a part of the TMD. As currently under consideration, the hotels will add a 2% TMD charge to the bills of persons staying at the hotels (a “Transit Occupancy Tax” or TOT). If the City forms the TMD, the TMD will then form a non-profit corporation of which many of the hotels, almost certainly including the KBF hotel, will be members.

It is proposed that the non-profit corporation will enter into a contract with the City. Under the terms of the contract, the City will transfer its TOT proceeds to the non-profit corporation. The nonprofit corporation will combine these funds, likely about \$350,000, with the TMD funds and approximately \$100,000 that tourist attractions such as KBF will pay to the non-profit corporation. It is anticipated that the expenditures for the tourism marketing program will be approximately \$1,395,000 per year. The non-profit will use all of these funds to operate the tourism marketing program. The hope is that the program will increase tourism in the City and consequently increase the number of persons staying at each of the Buena Park hotels.

The City initiated the idea to form a TMD. Each hotel that is included in the TMD will be named in an exhibit to the formation documents. It is possible, though unlikely, that the City will enter in an agreement or agreements with the hotel owners. Mayor Pro Tem Smith has not participated in any decisions to date involving the TMD, including the decision to hire a consultant to assist the City with formation of the TMD.

Mayor Pro Tem Smith is the sole owner of Smith and Sons Glass. Smith and Sons Glass is a glazing contractor providing retail sales and installation of glass and related services and products. KBF is an amusement park located in the City. KBF is a part of Cedar Fair, L.P. Cedar Fair is listed on the New York Stock Exchange and had a market capitalization of \$3.17 billion on July 17, 2015. Cedar Fair operates 15 additional theme parks and related facilities. Cedar Fair’s revenue in 2014 was \$1.16 billion. KBF owns and operates a hotel in the City as part of its amusement park. The KBF hotel, like all hotels in the City, will be included in the TMD if it is formed.

Smith and Sons Glass performed work for KBF for more than five years prior to Mr. Smith’s election to office and continues to provide glazing services for KBF. Last year Smith and Son’s’ income from KBF totaled approximately \$14,000.

You stated that the decision to form the TMD should have no bearing whatsoever on the amount of business Smith and Son’s Glass performs for KBF.

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, Mayor Pro Tem 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. Mayor Pro Tem Smith's business is a source of income to him. If KBF pays Smith and Sons Glass \$500 or more in the 12 months prior to a governmental decision, KBF will also be a source of income to Mayor Pro Tem Smith. (Section 87103(c).) Considering KBF paid Smith and Sons Glass over \$14,000 last year, we assume this will be the case.

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" in a decision 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).) 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).)

Considering KBF's size and the relatively small volume and nature of sales to KBF by Smith and Sons Glass, it is not reasonably foreseeable that the decisions regarding the TBD will have a material financial effect on Mayor Pro Tem Smith's interest in Smith and Sons Glass.

The City is deciding whether to create a division that involves all 21 hotels within its boundaries, including the hotel that KBF owns. The decision would add a 2% occupancy tax to patrons of each hotel to fund the TBD. The individual hotels are not explicitly involved in the decision to form the TBD as they are not "the subject of" the decision under Regulation 18701(a). The standard is therefore whether the effect 'can be recognized as a realistic possibility,' which it can. The decision will create the TBD, add a 2% occupancy tax to each hotel stay, and boost the public face of tourism for the area (a benefit to the hotels).

Regulation 18702.1(b) states that a financial effect is material “if a prudent person with sufficient information would find it is reasonably foreseeable that the decision’s financial effect would contribute to a change in the price of the business entity’s publicly traded stock, or the value of a privately-held business entity.” Cedar Fair, LP, the parent company to KBF, is a publicly-traded partnership that takes in over a billion dollars annual income. The hotel is not KBF’s primary business as it is primarily in the business of amusement parks. Given that the hotel tax will be a 2% tax on the hotel patrons for one of its hotels, we cannot see a change in price for the publicly traded stock.²

Because the decisions before the City Council will not have a reasonably foreseeable material financial effect on Mayor Pro Tem Smith’s financial interest, he does not have a prohibitive conflict of interest under the Act.

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. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials 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.)

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, 333.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

You have postulated several contracts that could arise during this process. The contracts include: contracts with KBF, contracts between the City and third parties such as consultants, the TMD, or the non-profit corporation that the TBD will form. You have also stated that even though forming the TMD will not involve a contract, the formation decision will lead to contracts. For Section 1090 to prohibit or limit contracts, the public official must have a financial interest *in the contract*. While case law has stated that the interest could be ‘direct or indirect,’ we do not see Mayor Pro Tem Smith’s interest in his business, which contracts with KBF for glass work, to extend to his having an “interest” in the contracts that you describe. If the upcoming contracts between the City and KBF (and others) were to impact his business, increase (or decrease) the work he does (and therefore income he receives) from KBF, or have any other impact on his financial interests, our answer may be different. Under your facts, however, Mayor Pro Tem Smith does not have a financial interest in the contracts and Section 1090 will not apply.

² Nor would the ‘start-up’ amount of \$100,000 that KBF will contribute to the TBD’s formation.

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

Sincerely,

Hyla P. Wagner
General Counsel

/s/

By: Heather M. Rowan
Counsel, Legal Division

HMR:jgl