



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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June 22, 2020

Tom Schroeter
City Attorney
City of Tehachapi
254 H Street
Bakersfield, CA 93304

Re: Your Request for Advice
Our File No. A-20-062

Dear Mr. Schroeter:

This letter responds to your request for advice regarding the Political Reform Act (“the Act”) and 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, including Public Contract Code. We also do not address any restrictions on incompatible activities the City may impose, which are also outside the purview of the Act.

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 Kern 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 Tehachapi City Councilmember Christina Scrivner take part in decisions related to the development of Sage Ranch, given that the Sage Ranch developer has pledged to donate \$250,000 to Adventist Health Tehachapi Valley, Councilmember Scrivner’s employer, where she works raising funds for hospital 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, to the extent the pledged donation is in no way contingent upon any particular outcome for a governmental decision or the successful development of Sage Ranch, and her employment position and income would be unaffected by the donation, Councilmember Scrivner may take part in decisions related to the Sage Ranch development, as such decisions would not have a reasonably foreseeable, material financial effect on her source of income or personal finances.

FACTS AS PRESENTED BY REQUESTER

Councilmember Scrivner was appointed to the Tehachapi City Council in March 2020. She is an employee of Adventist Health Tehachapi Valley (Adventist Tehachapi), the 501(c)(3) hospital in Tehachapi. She serves as the hospital's Director of Philanthropy and raises funds for specific hospital projects. She receives no commission, nor other compensation based on the donations.

Prior to appointment to the City Council, Councilmember Scrivner, acting in her capacity as Director of Philanthropy, met with and secured a donation and a verbal pledge from Jeff Ciachurski, CEO of Greenbriar Capital Corporation ("Greenbriar"), a company that is proposing a residential development in Tehachapi called Sage Ranch. Greenbriar's donation and pledge are for the hospital's imaging department. The donation was \$15,000, paid in February 2019, and the pledge was for an additional \$250,000. There is no written pledge agreement, nor any timeline or schedule for payment of the pledged amount.

Councilmember Scrivner's husband is a member of the Kern County Board of Supervisors representing the Tehachapi area and, in 2018, received a donation for his re-election from Greenbriar.

The Sage Ranch development is categorized by the Tehachapi Municipal Code as a Planned Development, which means that all entitlements go first through the planning commission for initial approval and then to the City Council for final approval. This would include, among other things, a tentative tract map, a final tract map, an EIR, and a subdivision improvement agreement between Greenbriar and the City. There will likely be other approvals requested from the City Council in the usual processing of a Planned Development.

In a follow-up email, Councilmember Scrivner explained that Mr. Ciachurski announced the \$250,000 pledge, on behalf of Greenbriar, to support the hospital's imaging pavilion at a benefit dinner in front of 250 Tehachapi residents on April 9, 2019, approximately one year prior to her appointment to office. She further explained that she intended to formalize a timeline and process for the pledge once the imaging department project broke ground, and that it is not uncommon for a pledge gift to be made and paid over several years. The project is a \$4-5 million imaging pavilion, which will have an MRI and upgraded CT scanner, and will represent a significant upgrade to Adventist Tehachapi's diagnostic capabilities. There are no other local hospitals, and no MRIs are available within forty miles. The project will be built regardless of Greenbriar's pledge, as the Philanthropy Department has completed its commitment of \$2 million toward the project, and if any pledge did not come through, the Philanthropy Department would find a new donor.

Councilmember Scrivner stated that Adventist Tehachapi's annual gross receipts are approximately \$126 million.

ANALYSIS

The Act

Under Section 87100 of the Act, "[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 a specified economic interest, including any source of income aggregating five hundred dollars (\$500) or more in value provided or promised to or received by the official within 12 months prior to the time when the decision is made. (Section 87103(c).) Pertinent to these facts, Councilmember Scrivner has an interest in her own personal finances, as well as a source of income interest in Adventist Tehachapi through her work as Director of Philanthropy.

Regulation 18701(a) provides the applicable standard for determining the foreseeability of a financial effect on an economic interest explicitly involved in the governmental decision. It states, "[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 or 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 financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6)." Here, Adventist Tehachapi is not explicitly involved in the decisions.

Where an official's economic interest is not explicitly involved in the governmental decision, the applicable standard for determining the foreseeability of a financial effect on the economic interest is found in Regulation 18701(b). That regulation provides, "[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."

Under Regulation 18702.5, a governmental decision's reasonably foreseeable financial effect on a public official's financial interest in his or her personal finances or those of immediate family, also referred to as a "personal financial effect," is material if the decision may result in the official or the official's immediate family member receiving a financial benefit or loss of \$500 or more in any 12-month period due to the decision. (Regulation 18702.5(a).) While she indicates that it is not uncommon for a pledge gift to be made and paid over several years, this may place her in a situation where a party with a decision before the City Council has an uncertain pledge of \$250,000 pending to her employer. Under Regulation 18702.5, the focus is on whether it is reasonably foreseeable that a Sage Ranch decision may result in a \$500 change in her income from her employer, Adventist Tehachapi, in any 12-month period related to the decision. The facts show

Councilmember Scrivner's job duties as Director of Philanthropy are solely related to obtaining donations to her employer. She receives a salary, and does not receive a bonus or commission based on pledges or received donations. However, it is reasonably foreseeable that her continued and successful employment, including raises and promotions, is tied to her success in obtaining pledges and donations to her employer, including this pledge. Mitigating these circumstances is the fact that this verbal pledge was made over one year prior to her appointment to public office. The facts indicate the project is not dependent upon Greenbriar's pledge, and may be replaceable by other pledges. Given that the facts do not indicate that her income or employment success would be affected by this particular donation, nor that Greenbriar's donation to her employer is contingent upon Sage Ranch development decisions, it does not appear reasonably foreseeable that a Sage Ranch decision would have a material financial effect on her personal finances. The Act does not prohibit her participation in the decisions due to her personal financial interest in her employment. However, we caution that facts to the contrary could change this determination.

Regulation 18702.3 provides the standards for determining the materiality of a financial effect on a non-profit source of income. Under that regulation, a reasonably foreseeable financial effect on a non-profit source of income is material if the decision may result in an increase or decrease of: the organization's annual gross receipts, or the value of organization's assets or liabilities, in an amount equal to or more than \$1,000,000; or five percent of the organization's annual gross receipts, and the increase or decrease is equal to or greater than \$10,000. (Regulation 18702.3(a)(3)(A).) Additionally, under Regulation 18702.3's "nexus test," any 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 [of income] and the official or the official's spouse receives or is promised the income for achieving the purpose or goal. (Regulation 18702.3(b).)

Based on the facts provided, it does not appear that Tehachapi City Council decisions concerning the development of Sage Ranch would have a reasonably foreseeable, material financial effect on Adventist Tehachapi. With respect to Regulation 18702.3(a)(3)(A), no facts have been presented indicating any such decision—even one that might impede the development of Sage Ranch—would have a financial effect on Adventist Tehachapi. The facts indicate the imagining pavilion project is not dependent upon Greenbriar's pledge. We also note that the amount of Greenbriar's \$250,000 pledge is far below the five percent of Adventist Tehachapi's annual gross receipts of \$126 million and, thus, this donation, or its loss, would not be a material financial effect on her source of income under Regulation 18702.3(a)(3)(A).

Similarly, with respect to the nexus test, if decisions on the development will impact Greenbriar's ability or willingness to pay its promised \$250,000 to Adventist Tehachapi where Councilmember Scrivner receives income for raising funds and obtaining promised payments from entities, including Greenbriar, as Director of Philanthropy, then the foreseeable financial effect of the decisions would be considered material. Again, however, no fact has been presented indicating a City Council decision related to the development of Sage Ranch would achieve, defeat, aid, or hinder Adventist Tehachapi's goal of fundraising. That conclusion could only be reached if there was something to suggest that Greenbriar's pledge to Adventist Tehachapi was contingent on the successful development of Sage Ranch. Although the \$250,000 pledge has not been formalized in writing, it has been publicly announced and the pledge was made prior to Councilmember Scrivner becoming a Tehachapi City Councilmember. Councilmember Scrivner has also explained her intent

to formalize the pledge once the project breaks ground, and that it is not uncommon for pledges to be made and paid over several years. Based on the facts presented, it does not appear that decisions pertaining to the development of Sage Ranch would achieve, defeat, aid, or hinder a purpose or goal of Adventist Tehachapi. Accordingly, Councilmember Scrivner is not disqualified under the nexus test.

You also indicated Councilmember Scrivner's husband received a campaign contribution from Greenbriar. Campaign contributions are not an economic interest specified under Section 87103 and, therefore, do not implicate the Act's conflict of interest provisions. Section 84308 does contain a provision prohibiting officers from taking part in proceedings involving a license, permit, or other entitlement for use pending before the agency if the officer willfully or knowingly received a contribution greater than \$250 during the 12 months preceding the governmental decision. (Section 84308(c).) This provision is not implicated by the present facts, however, given that the contribution was to her spouse, he is not involved in these decisions, and the contribution occurred more than 12 months prior to the governmental decisions at issue.

Based on the facts presented and the above analysis, we conclude the Act does not prohibit Councilmember Scrivner from taking part in City Council decisions relating to the development of Sage Ranch as a result of her fundraising activities, including the \$250,000 pledge from Greenbriar.

Section 1090

Section 1090 generally prohibits a public officer or employee, while acting in his or her official capacity, from making or participating in the making of a contract in which the officer or employee is financially interested. 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.) A development agreement is a contract for purposes of Section 1090. (*Wilkins Advice Letter*, No. A-18-227; 78 Ops.Cal.Atty.Gen. 230 (1995).)

Torres v. City of Montebello (2015) 234 Cal.App.4th 382 concerned an allegation that a councilmember (Salazar) had a Section 1090 conflict of interest in a decision by the city whether to contract with a company, Athens, a private donor to her nonprofit organization. At the time of the decision, the Councilmember was the chief executive director of MELA Counseling Services Center (MELA). The Councilmember and her husband founded MELA (a nonprofit drug counseling organization) in 1993 and the Councilmember received an annual salary of \$75,000 from MELA. MELA received its funding from county contracts, grants, and private donations. The allegation was that the councilmember was financially interested in the Athens contract because Athens had donated money in the past to MELA. The Court of Appeal disagreed:

Had the vote concerned a contract with MELA, or had Athens conditioned future contributions to MELA on approval of the Contract, then Salazar, as a MELA officer, would have been subject to section 1091's disclosure and abstention requirements. But MELA was not a party to the Contract and the trial court specifically found, based on the evidence, that 'Salazar did not receive any promises from Athens for her vote.' MELA simply had no financial interest in the Contract.

And, because MELA had no financial interest in the Contract, it follows that Salazar had no remote interest by virtue of her employment as a MELA officer.

(*Torres, supra*, 234 Cal.App.4th at p. 402.)

The *Torres* court's analysis of Section 1090 and 1091 (pertaining to remote interests) is applicable here. Councilmember Scrivner would have a remote interest in the governmental decisions at issue if they involved a contract with her non-profit employer, Adventist Tehachapi, or if Greenbriar conditioned its \$250,000 pledge on the City Council's approval of contracts involving Sage Ranch. However, Adventist Tehachapi is not involved in any potential contract at issue here. Also, although Greenbriar has not yet paid Adventist Tehachapi the pledged amount, the pledge was made prior to Councilmember Scrivner becoming a member of the Tehachapi City Council and has been publicly announced. There are no facts indicating Councilmember Scrivner received the pledge, or any other promise from Greenbriar in exchange for her vote(s) on contracts involving Sage Ranch. Accordingly, Adventist Tehachapi has no financial interest in any contract between the City and Greenbriar. Section 1090 is inapplicable and Councilmember Scrivner may take part in decisions related to Sage Ranch, including contract decisions.

To the extent that Greenbriar's pledged donation is, in fact, in any way contingent upon a particular outcome for a governmental decision, or the successful development of Sage Ranch, the above advice is inapplicable and Councilmember Scrivner would be prohibited under the Act and Section 1090 from taking part in decisions involving the development of Sage Ranch. We also note that Section 1090 and the Act's conflict of interest provisions establish a floor for the conduct of public officials, not a ceiling, and public officials may still recuse themselves from decisions where they are not strictly prohibited under the Act.

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

Sincerely,

Dave Bainbridge
General Counsel

Kevin Cornwall

By: Kevin Cornwall
Counsel, Legal Division

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