



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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November 3, 2020

Glen R. Googins
City Attorney
City of Chula Vista
276 Fourth Avenue
Chula Vista, CA 91910

Re: Your Request for Advice
Our File No. A-20-123

Dear Mr. Googins:

This letter responds to your request for advice on behalf of Chula Vista City Councilmember John McCann regarding the conflict of interest provisions of the Political Reform Act (the “Act”) and Government Code Section 1090, et seq.¹ Please note that we are only providing advice under the conflict of interest provisions of the Act and Section 1090 and 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 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 the Act or Section 1090 prohibit Councilmember McCann from voting on a proposed lease renewal with the American Legion for the use of a city-owned building, given that he owns rental properties located within 500 feet of the property line of the building’s parcel and between 500 to 1,000 feet from the building?

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

No. Councilmember McCann may take part in a decision on the proposed lease renewal with the American Legion for the use of a city-owned building because clear and convincing evidence indicates that the lease renewal would have no measurable impact on his properties. Under Section 1090, Councilmember McCann has a noninterest in the lease renewal with the American Legion.

FACTS AS PRESENTED BY REQUESTER

The City owns a building located on a City park (“American Legion Building”). The building has been leased to the American Legion, Post 434 (the “American Legion”), for many years. The lease is expiring, and the City seeks to renew said lease (“Proposed Lease”). The Proposed Lease is generally the same as the prior lease, but has the following new terms: (1) the monthly rent will be reduced to zero from \$1,700; and in exchange the American Legion will make the facility available to all Chula Vista Veterans groups for functions and activities; and (2) the building would be renamed from “American Legion Hall” to “The Chula Vista Veterans Memorial Building” to acknowledge the contributions of all Veterans organizations. The Proposed Lease does not increase or decrease the building size or require any building repairs/upgrades or changes to the parking lot. The building uses will generally remain the same, including that the American Legion will administer and maintain the building at the same standards as they do now.

Pursuant to Chula Vista’s municipal code requirements, City Council approval of the Proposed Lease will be required. The City of Chula Vista has a five-person City Council, consisting of the Mayor and four councilmembers. Councilmember McCann is one of the councilmembers. To approve the Proposed Lease, an affirmative vote of three of the five councilmembers is required. Councilmember McCann would not play any role in the Proposed Lease’s implementation or management nor receive any compensation from the Proposed Lease.

Councilmember McCann’s American Legion Membership

Councilmember McCann has informed Chula Vista that he is a member of the American Legion. The American Legion charges annual dues to be a member of the American Legion. However, Councilmember McCann is a lifetime member and previously paid the dues for the lifetime membership. As a lifetime member, he no longer is required to pay any dues, including the aforementioned annual dues. Councilmember McCann is solely a member of the American Legion; he is not an employee or director for the American Legion. He also does not receive any form of compensation from the American Legion. We note that the American Legion is a nonprofit veterans organization chartered and incorporated by Congress in 1919.²

Councilmember McCann’s Property Interests

The American Legion Building is located at 47 5th Avenue in the City of Chula Vista and is generally in the northwest area of Eucalyptus Park. Eucalyptus park is generally bordered by 4th Avenue on the east, 5th Avenue on the west, C Street on the north and Casselman Street on the

² <https://www.legion.org/>

south. While the American Legion Building is located within Eucalyptus Park it is not considered an amenity for park uses. Councilmember McCann owns a duplex located at 433 and 435 Casselman Street and another nearby 5-unit apartment building located at 70 4th Avenue (collectively the “Properties”). The Properties are located within 500 feet from the southeast boundary of Eucalyptus Park and between 500 to 1,000 feet from the American Legion Building.

You have also included a map of the park and surrounding area, which shows that the American Legion Building and its adjacent parking lot are located in the northwest corner of the park, while the Councilmember’s Properties are located near the southwest corner. As evident on the map, various park amenities, such as baseball fields, tennis courts, and a large grove of trees are located in between the American Legion Building and Councilmember’s Properties.

ANALYSIS

Conflict of Interest under the Act

The Act’s conflict of interest provisions ensure that public officials will perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them. (Section 81001(b).) Section 87100 prohibits a 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. Section 87103 provides that a public official has a “financial interest” in a decision, within the meaning 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 that is distinguishable from the decision’s effect on the public generally.

Section 87103 also describes the interests from which a conflict of interest may arise under the Act. As pertinent to the facts provided, those economic interests include “[a]ny business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more,” “[a]ny real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more,” and “[a]ny source of income . . . aggregating five hundred dollars (\$500) or more in value provided or promised to, [or] received by, the public official within 12 months prior to the time when the decision is made.” (Section 87103(b).) Accordingly, Councilmember McCann has potentially disqualifying economic interests in his rental business as a business entity and source of income, his tenants as sources of income, and the rental properties.³

When a public official’s economic interest is explicitly involved in a governmental decision, Regulation 18701(a) provides that “[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, including any

³ We note that Councilmember McCann also has an interest in his personal finances. However, as he is a lifetime member of the American Legion, and thus no longer is required to pay any dues, his membership is not an interest under the Act as it would not implicate his personal finances. Accordingly, we do not analyze any effect on his personal finances further.

decision affecting a property interest as described in Regulation 18702.2(a)(1)-(6).” (Regulation 18701(a).) Where the financial interest is not explicitly involved in a decision, the financial effect is reasonably foreseeable if it can be recognized as a realistic possibility, more than hypothetical or theoretical. (Regulation 18701(b).) The decision at issue involves a proposed lease renewal with the American Legion. As such, Councilmember McCann’s interests are not a named party in or the subject of the decision. Under Regulation 18701(b), he will have a financial interest in the proposed lease renewal if there is a realistic possibility that the decision will have a material financial effect on any of his economic interests.

Real Property

Regulation 18702.2 provides materiality standards for determining when a reasonably foreseeable effect on an interest in real property is material. Regulation 18702.2(a)(7) provides that the reasonably foreseeable financial effect of a governmental decision on a parcel of real property in which an official has a financial interest, other than a leasehold interest, is material whenever the decision involves property located 500 feet or less from the property line of the parcel unless there is clear and convincing evidence that the decision will not have any measurable impact on the official’s property. Regulation 18702.2(a)(8) provides that the reasonably foreseeable financial effect of a governmental decision on a parcel of real property in which an official has a financial interest, other than a leasehold interest, is material whenever the decision involves property located more than 500 feet but less than 1,000 feet from the property line of the parcel, and the decision would change the parcel’s development potential, income producing potential, highest and best use, character (by substantially altering traffic levels, intensity of use, parking, view, privacy, noise levels, or air quality), or market value.

Here, you have noted that Councilmember McCann owns real properties located within 500 feet from the southeast boundary of Eucalyptus Park, and that the American Legion Building is located within Eucalyptus Park. You have also noted Councilmember McCann’s properties are between 500 and 1,000 feet of the American Legion Building. As the language of Regulation 18702.2 indicates, the relevant distance for purposes of applying the regulation is generally the distance from parcel-to-parcel, not the distance from building-to-building.⁴ Accordingly, for decisions related to the proposed lease renewal, Regulation 18702.2(a)(7) is applicable. Because the decision involves property located 500 feet or less from the property line of Councilmember McCann’s real properties, any foreseeable financial effect on his real property is presumably material unless there is clear and convincing evidence that the decision will not have any measurable impact on the Councilmember’s property.

Based on the facts provided, it is evident that the proposed lease renewal would not change the development potential or highest and best use of Councilmember McCann’s properties. With regard to the properties’ character, the distance and physical barriers created by the aforementioned park amenities between the residences and the American Legion Building indicate that the proposed lease renewal would not impact traffic levels, intensity of use, parking, view, or privacy.

⁴ See also the *Minner* Advice Letter, No. A-19-205, where the analysis of a city hall replacement project also proceeded under the parcel-to-parcel measurement of within 500 feet, despite the official’s residence being 500 to 1,000 feet from the city hall building itself.

Additionally, the facts indicate that the proposed lease renewal would not impact the market value or income producing potential of Councilmember McCann's properties. In addition to the lack of impacts noted above, the proposed lease renewal is merely a continuation of the existing use by the American Legion, which has already been leasing the building "for many years."

Accordingly, we conclude that clear and convincing evidence indicates that the decision on a proposed lease renewal with the American Legion for the use of a city-owned building would not have a measurable impact on Councilmember McCann's properties. Councilmember McCann's properties do not present a disqualifying conflict of interest under the Act, and he may take part in the decision relating to the proposed lease renewal.

Source of Income

Regulation 18702.3 provides the standard for determining whether a reasonably foreseeable financial effect on an official's source of income is material. Among the instances in which an effect will be considered material is where the decision may affect the individual's income, investments, or other assets or liabilities (other than an interest in a business entity or real property) by \$1,000 or more. (Regulation 18702.3(a)(2)(A).) An effect on an individual who is a source of income may also be material if the official knows or has reason to know that the individual has an interest in a business entity or real property that may be affected by the decision. Councilmember McCann has interests in his tenants as sources of income if their rent paid during the 12 months before a decision aggregates to \$500 or more and may be disqualified if he knows or has reason to know the tenant has an interest that may be foreseeably and materially affected by the decision, as explained above. However, as we have concluded there is no foreseeable and material effect on Councilmember McCann's property, there is no indication that the decision will have a foreseeable and material effect on the tenants of the property. Nonetheless, we note that we have not been provided any information regarding any other interests held by the tenants, if Councilmember McCann knows or should know that a tenant has any other business interest or property interest implicated by the decision, he should seek additional advice.

Business Entities

Regulation 18702.1 provides, in relevant part, that the reasonably foreseeable financial effect of a governmental decision on an official's financial interest in a business entity, including a business entity that is a source of income to the official, is material where the decision may result in an increase or decrease of the entity's annual gross revenues, or the value of the entity's assets or liabilities, in an amount equal to or greater than \$1,000,000, or five percent of the entity's annual gross revenues and at least \$10,000. (Regulations 18702.1(a)(2)(A)-(B), 18702.3(a)(4).) The reasonably foreseeable financial effect of a governmental decision on an official's business entity interest is also material where the decision may cause the entity to incur, avoid, reduce, or eliminate expenses equal to or greater than \$250,000, or one percent of the entity's annual gross revenues and at least \$2,500. (Regulation 18702.1(a)(3)(B).) However, for the same reasons we have concluded there is no foreseeable or material effect on the Councilmember McCann's property, there is no indication of a foreseeable and material effect on Councilmember McCann's rental business.

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. 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), 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 direct as well as indirect, and may involve financial losses or the possibility of financial losses, as well as the prospect of pecuniary gain. (*Thomson v. Call* (1985) 38 Cal.3d 6333 ,645, 651-652.)

Under Section 1091.5(a)(7), an officer or employee is deemed not to be interested in a contract if his or her interest is that of a non-salaried member of a nonprofit corporation, provided that the interest is disclosed to the body or board at the time of the first consideration of the contract and noted in its official records. The reference to “member” refers to persons who constitute the membership of an organization, rather than to those individuals that serve on its board of directors. (See 65 Ops.Cal.Atty.Gen. 41 (1982) [concluding that a member of a nonprofit was similar to a shareholder of a corporation, as opposed to a member of the board of directors or other corporate officer].) The American Legion is a nonprofit corporation and Councilmember McCann solely a member of the American Legion; he is not an employee or director. Therefore, Councilmember McCann has no financial interest in the proposed lease renewal between the American Legion and the City. Note, however, that under Section 1091.5(a)(7), he must disclose his interest in the potential contract to the City Council at the time of the first consideration of such contracts, and it must be noted in the City Council’s official records.

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

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary W. Norton
Senior Counsel, Legal Division

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