



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

September 7, 2021

Brad Wiblin
Planning Commissioner
City of Berkeley
600 California St #900
San Francisco, CA 94108

Re: Your Request for Advice
Our File No. A-21-097

Dear Mr. Wiblin:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”) and Government Code section 1090, et seq.¹ 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.

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 Alameda 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 Section 1090 or the Act prohibit you as a member of the Berkeley Planning Commission from participating in rezoning recommendations to the City Council in connection with a Request for Proposals (“RFP”), to be issued by Bay Area Rapid Transit (“BART”), concerning a proposed transit-oriented project on BART-owned property that your employer would like to pursue?

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. Section 1090 does not apply to the recommendations to the City Council because they are regulatory in nature and do not involve contracts. However, the Act prohibits you from taking part in the recommendations because it is reasonably foreseeable that the recommendations would have a material financial impact on your employer.

FACTS AS PRESENTED BY REQUESTER

Rezoning Recommendations of BART Property

You are a Planning Commissioner in the City of Berkeley. The Planning Commission is expecting an upcoming agenda item that will include the rezoning of two BART stations areas in the City of Berkeley. The City is working with BART² to develop zoning and site planning parameters for the Ashby and North Berkeley BART stations to create vibrant places that include housing, open space and community amenities.³ Both sites are owned by BART, and after the rezoning is complete, BART will choose the developer and oversee construction of any projects at their stations.⁴

After a lengthy public process, overseen by an appointed Citizens Advisory Group (“CAG”), the CAG is nearing consensus on new transit-oriented zoning that will meet the requirements of Assembly Bill 2923.⁵ BART is also an active participant in this process.

The current zoning at the sites does not comply with AB 2923. The CAG process and ultimately City Council approval (with the Planning Commission playing an advisory role), is designed to meet State law requirements of AB 2923 for BART-owned land prior to the deadline on July 1, 2022. The City is determined to rezone the property before the deadline. One of the main targets is a minimum density of 70 dwelling units per acre, designed to create dense, transit-oriented developments within ½ mile of the two BART stations.

Once the matter is before the Planning Commission, it will hold a public hearing (or two), to take public comment, and discuss the CAG recommendations and suggest any changes/edits that the Planning Commission believes appropriate. You state the zoning framework the CAG puts forth will meet the requirement of AB 2923, and that the Planning Commission is likely to accept most of the CAG’s recommendations, certainly the actual zoning recommendation. The debate will be

² The City and BART have agreed upon a Memorandum of Understanding (“MOU”) that establishes a framework for development of the Ashby and North Berkeley BART stations, including a community advisory process and a timeline to develop zoning. (*Ibid.*)

³ (*Ibid.*)

⁴ (*Ibid.*)

⁵ AB 2923 became effective in 2018, and grants BART the authority to establish transit-oriented development zoning standards that apply to its property across the Bay Area, including the North Berkeley and Ashby BART Station sites. The intent of the law is to enable BART to work together with cities to maximize the public benefit of scarce transit-adjacent land.

around other issues – currently, the CAG seems to be recommending a minimum of 35% of the units must be affordable so there could be a push by the Planning Commission to increase that number. Ultimately, the Planning Commission’s recommendations will be forwarded to the City Council for the final vote. If approved, BART would ultimately issue the RFP for one or both Berkeley stations.

BRIDGE Housing

You are an Executive Vice President with BRIDGE Housing, a nonprofit entity, and have been employed at BRIDGE for 27 years in a variety of roles. You are currently a member of the Senior Leadership Team and Executive team. You manage a small team of five (5), whose role is business development. In this position, you seek land for new affordable housing development and to acquire existing buildings that may be affordable and in need of preservation, or market rate buildings that you then convert to affordable or “mixed-income.” BRIDGE operates on the West Coast with offices in San Diego, LA, Portland, Seattle and your headquarters in San Francisco.

BRIDGE has built over a dozen transit-oriented developments, so this is a specialty of your company. You are responsible for tracking and acting on these kinds of opportunities for BRIDGE. In this case, after the City has completed its approval, you believe the process will be for BART to issue an RFP for a master development team subject to staff capacity at BART. At that time, BRIDGE would evaluate BART’s goals and if it deems the opportunity worthwhile, BRIDGE will seek development partners to pursue the RFP.

By email dated August 24, 2021, you provided the following additional facts: 1) You believe that BRIDGE will only pursue one of the Berkeley BART projects; 2) There will be multiple teams pursuing each of the opportunities and BRIDGE will be on one team. Based on similar opportunities, you expect there to be 10-12 other teams competing against your team; 3) Over the last 25 years, BRIDGE has provided services to BART by building at Castro Valley Bart, Macarthur Bart and San Leandro Bart. In addition, BRIDGE is currently working at Dublin Bart; 4) BRIDGE has not had any discussions with BART about this project; and 5) There are no decisions concerning rezoning that might favor selection of or increase the likelihood that BRIDGE is chosen over other potential contractors – whatever the City does regarding rezoning will be per the MOU with BART and any land use decisions will create a baseline for development that any prospective developer could act on.

You further stated that, if selected, BRIDGE would build the affordable housing components for the project, and it would earn a development fee in excess of \$1,000,000.

ANALYSIS

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.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) When an officer with a proscribed financial interest is a member of the governing body of a public entity, the prohibition of Section 1090 also extends to the entire body. (89 Ops.Cal.Atty.Gen. at 50.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson, supra*, at pp. 646-649.)

As a member of the Planning Commission, you are subject to Section 1090. However, an important determination in the Section 1090 analysis is whether the decision concerns a contract. In 89 Ops.Cal.Atty.Gen. 258 (2006), the Attorney General stated that in determining whether the subject of a decision is a “contract,” we look to general principles of contract law. For example, in the *Ansolabehere* Advice Letter, No. A-17-160a, we stated:

While many land use decisions are ‘regulatory in nature’ and not contracts, there are some, including development agreements, that are contractual, involving consideration by both the local governmental entity and the project proponent, with the latter typically providing some type of public improvement or facility as a part of this consideration. In determining whether Section 1090 would apply in the context of land use decisions, we must determine whether the decision is purely regulatory, or whether it involves the project proponent providing a public improvement or similar consideration, thus making it contractual in nature.⁶

Nothing in the facts suggests that the present rezoning decisions concerning the two BART station areas are contingent on the future BART contractor(s) providing some type of public improvement or facility as consideration. Therefore, so long as the decisions at issue are regulatory in nature, Section 1090 would not apply to those decisions, and it would not subsequently prohibit BRIDGE from entering into a contract with BART for the project.

The Act

Section 87100 prohibits any public official from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest. (Section 87103.) A public official has a “financial interest” in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on one or more of the public official’s interests. (Section 87103; Regulation 18700(a)).

⁶ Note that the Attorney General’s Office has stated that a development agreement is a contract for purposes of Section 1090 in 78 Ops.Cal.Atty.Gen. 230 (1995).

Pertinent to these facts, Section 87103 defines financial interests to include:

- Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating \$500 or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made. (Section 87103(c).)
- Any business entity⁷ in which the public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d).)

You do not have a business entity interest in BRIDGE due to its nonprofit status. You do, however, have a source of income interest in BRIDGE to the extent that you have received \$500 or more in compensation in the past 12-month period from BRIDGE. Thus, you may not make, participate in making, or in any way use your official position to influence any decisions that will have a reasonably foreseeable material financial effect on BRIDGE.

Foreseeability

Under the Act, an effect on an interest is presumed foreseeable if the interest is explicitly involved in the decision. An interest is explicitly involved if it is a named party in, or subject of, the decision. (Regulation 18701(a).) 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).

Where, as here, the financial interest is not explicitly involved in a decision, the applicable foreseeability standard is whether the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical. (Regulation 18701(b).) If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable.

To determine whether the financial effect is reasonably foreseeable, we consider various factors such as the contingency of a financial effect based on the presence of intervening events (Regulation 18701(b)(1)), whether the official should anticipate a financial effect on the official's financial interest as a potential outcome (18701(b)(2)), whether the governmental decision will provide or deny an opportunity or create an advantage or disadvantage for the official's financial interest (Regulation 18701(b)(5)), or whether the official could reasonably be expected to weigh the advantages and disadvantages of the decision on the official's financial interest in formulating a position (Regulation 18701(b)(6)).

Here, any financial effect on BRIDGE is contingent on at least two intervening events. First, the City Council must approve the Planning Commission's zoning recommendations; however, this appears to be likely given the City and BART have an MOU establishing a framework for

⁷ Section 82005 defines a "business entity" as any organization or enterprise operated for profit, including but not limited to a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation or association

development of the two BART stations and the City is determined to rezone the property before the deadline set by AB 2923. Second, BART must select the BRIDGE team once it issues the RFP. Although there is no guarantee the BRIDGE team will be selected because of the likelihood that several other contractors will be competing for the RFP, the fact remains that BRIDGE specializes in this type of project as it has built over a dozen transit-oriented developments. More importantly, BRIDGE has a pre-existing relationship with BART – indeed, it is currently working for BART in Dublin and has previously worked for BART at three different BART station areas.

Moreover, in your role as an Executive Vice President with BRIDGE, you seek land for new affordable housing developments, and it is your responsibility to find and act on the type of opportunity presented here. Certainly, knowing that BRIDGE specializes in these projects and will likely pursue at least one of the projects, the Planning Commission's recommendations will provide an opportunity for BRIDGE to compete for the eventual BART RFP. Finally, because transit-oriented developments are BRIDGE's specialty, and considering the past and current working relationship it has with BART, it is reasonable to expect that you anticipate a financial effect on BRIDGE as a potential outcome of the current zoning recommendations.

Accordingly, based on these facts, we find it is reasonably foreseeable that the Planning Commission's recommendations will have a financial effect on your interest in BRIDGE.⁸

Materiality - Source of Income

Regulation 18702.3(a)(3) provides the materiality standard applicable to a decision's reasonably foreseeable financial effect on an official's source of income interest in a nonprofit organization including, as relevant to the present situation:

(A) The decision may result in an increase or decrease of the organization's annual gross receipts, or the value of the organization's assets or liabilities, in an amount equal to or more than: (i) \$1,000,000; or (ii) Five percent of the organization's annual gross receipts and the increase or decrease is equal to or greater than \$10,000.

Here, you stated BRIDGE would earn a development fee in excess of \$1,000,000 if it were selected to build the affordable housing components for one of the projects. Therefore, it is reasonably foreseeable that the financial effect of the Planning Commission's recommendations on BRIDGE would be material.

⁸ This conclusion is reinforced by looking to the general rule set forth in *In re Thorner* (1975) 1 FPPC Ops. 198, in which the Commission found that where the business entity in which the official has an economic interest makes a bid on a contract *or is preparing to make a bid*, a financial effect on the business entity is reasonably foreseeable *even if there is substantial competition*. In addition, this same rule of foreseeability applies to decisions that lead up to the contract, such as the decision that sets the foundation for the contractual relationship. In interpreting *Thorner, supra*, the Commission has advised that if an official is preparing or has made a bid with the serious hope of receiving the award, then it is reasonably foreseeable that the official's interest could be materially affected, and the official must disqualify himself. (See, e.g., *Flitner* Advice Letter, No. 77-12-085.)

Accordingly, the Act's conflict of interest provisions prohibit you from taking part in the Planning Commission's consideration of the rezoning of the two BART station areas in the City of Berkeley.

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

Sincerely,

Dave Bainbridge
General Counsel

By: *Jack Woodside*
Jack Woodside
Senior Counsel, Legal Division

JW:dkv