



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

December 22, 2021

Robert N. Black  
City of Eureka  
531 K Street  
Eureka, California 95501-1165

Re: Your Request for Advice  
**Our File No. A-21-158**

Dear Mr. Black:

This letter responds to your request for advice on behalf of Eureka City Councilmember Leslie Castellano regarding Government Code Section 1090, et seq.<sup>1</sup> Please note that we are only providing advice under Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including Public Contract Code.

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

Under the Act and Section 1090, may the Eureka City Engineer approve an encroachment permit affecting the City's sidewalk right-of-way upon application by a licensed contractor acting as agent for City Councilmember Castellano and her husband as landowners?

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<sup>1</sup> 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 18109 through 18998 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

The encroachment permit does not constitute a contract and therefore does not implicate Section 1090. However, because the issuance of a permit would impact the authorized use of Councilmember Castellano's real property, it would have a reasonably foreseeable, material financial impact under the Act. Accordingly, Councilmember Castellano is prohibited from taking part in the decision beyond submitting the application and any information necessary for processing.

## FACTS AS PRESENTED BY REQUESTER

Councilmember Leslie Castellano was elected to the Eureka ("City") City Council in November 2018 and is currently serving in that capacity. In December 2019, Councilmember Castellano and her husband acquired title as joint tenants to a property ("the Property") in the City. The Property has an existing structure that Ms. Castellano and her husband intend to improve into a performing arts venue.

The Property owned by Councilmember Castellano and her husband includes the land beneath the sidewalk and the pavement of the sidewalk itself. The City of Eureka has a right-of-way for the public to pass on the sidewalk and for utilities to run beneath the sidewalk. However, the duty of maintenance of the sidewalk is assigned by law to the adjacent owners, per Streets and Highways Code Section 5610.

In connection with the improvement of the Property to provide a performing arts venue, public access to the building on the property must be compliant with Americans with Disabilities Act (ADA) standards. There is no room on the property outside of the sidewalk to place a wheelchair ramp. Between the building and the street line the sidewalk is of adequate width to place a wheelchair ramp abutting the property, parallel to the property frontage, while still leaving a width of free sidewalk adequate for ADA purposes.

Councilmember Castellano and her husband have employed a licensed contractor who will apply for an encroachment permit to construct an ADA-compliant ramp on the sidewalk in front of the Property. The kind of encroachment they are requesting is somewhat common in certain neighborhoods within the City. Since the beginning of 2020, Eureka has issued eight similar sidewalk or alley encroachments. The City requires anyone receiving a permit to encroach to enter first into a recordable undertaking by which the property owner agrees, among other things:

1. To "indemnify, defend, and hold harmless CITY, and its officers . . .," etc.;
2. To take out general liability insurance in the amount of \$2,000,000 "for the benefit of the City;"
3. To maintain safe access along the sidewalk;
4. To maintain the facilities constructed per the encroachment permit "in safe and functional condition;" and
5. To recognize the right of the City to terminate the "Encroachment Permit at any time with or without prior notification."

The City accepts and records the undertaking as a pre-condition of the encroachment permit but there is no additional consideration in the document itself.

In a follow-up email, you provided a copy of the City's ordinance governing encroachment permits. The ordinance states, "[n]o permit shall be issued unless the use proposed is in the public interests and there will be no substantial injury to city property, tidelands, streets or easements or prolonged impairment of its use as a result thereof."

## 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 [their] 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 certain specified economic interests. (Section 87103.) Among those specified economic interests is "[a]ny real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more." (Section 87103(b).)

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)."

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 governmental decision involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use of or improvement to the parcel or any variance that changes the permitted use of, or restrictions placed on, the property. (Regulation 18702.2(a)(5).) Here, the governmental decision would involve the issuance of a permit authorizing a specific use of Councilmember Castellano's real property. Accordingly, the decision would have a reasonably foreseeable, material financial effect on Councilmember Castellano's real property interest and she is prohibited from taking part in the decision, including using her official position to influence the decision.

A public official uses an official position to influence a governmental decision if the official contacts or appears before any official in the official's agency or in an agency subject to the authority or budgetary control of the official's agency for the purpose of affecting the decision. (Regulation 18704(c)(2).) Generally, Councilmember Castellano may not appear before or communicate with the City Engineer or other City employees regarding her encroachment permit

application except as permitted under Regulation 18704(d)(2).<sup>2</sup> Regulation 18704(d)(2) provides a limited exception allowing an official to appear at a public meeting of the governing board, as a member of the public, to address matters related solely to the official's interest in real property owned entirely by the official or the official and members of the official's immediate family.

Moreover, contact with City staff must be limited. Councilmember Castellano may not contact or appear before City staff, including the City Engineer, regarding the encroachment permit application except as necessary to apply for the permit and provide staff with any necessary information with respect to processing the request. (See *Sipes* Advice Letter, No. A-09-124 [an official is not making, participating in making, or influencing a governmental decision in submitting a request and providing necessary information as required for processing the request so long the official avails themselves of the same procedure typically available to any member of the public and is not granted special access to city officials or employees].)

### *Section 1090*

Under Section 1090, public officials "shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are a member." 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.) 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, regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.)

Generally, one may look to general principles of contract law to determine whether a contract is involved in the decision (84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that "specific rules applicable to sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of 'contract.'" (*Honig, supra*, 48 Cal.App.4th at p. 351 citing *Stigall, supra*, 58 Cal.2d at pp. 569, 571.) In interpreting the definition of contract for purposes of Section 1090, the Attorney General's office has opined that a decision amending a "license" or "regulatory permit" was a "regulatory matter and not a 'contract' in the ordinary sense of the word." (84 Ops.Cal.Atty.Gen., *supra*, at p. 36; see also 101 Ops.Cal.Atty.Gen. 1, 21 (2018); *Diaz* Advice Letter, No. A-15-229; *Miller* Advice Letter, No. A-15-236.)

Here, Councilmember Castellano would not be negotiating unique terms in order to obtain the encroachment permit. Rather, the issuance of the permit, as with any encroachment permit, involves a recordable undertaking of pre-conditions to permit approval that serve to ensure the affected street will remain safe and maintained and the City will not expose itself to additional

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<sup>2</sup> We note that while Regulation 18704(d)(1) provides an exception with respect to actions that are "solely ministerial," the encroachment permit process does not appear solely ministerial. Rather, it involves a degree of discretion in determining the encroachment permit would (1) be in the public interests and (2) not cause substantial injury to city property, tidelands, streets, or easements or prolonged impairment of its use as a result thereof.

liability. These circumstances support the conclusion that the encroachment permit at issue does not constitute a contract and, therefore, does not implicate Section 1090.

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

Sincerely,

Dave Bainbridge  
General Counsel



Kevin Cornwall  
Counsel, Legal Division

KMC:dkv