



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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February 3, 2021

Douglas T. Sloan
City Attorney
City of Fresno
2600 Fresno St
Fresno, CA 93721

Re: Your Request for Advice
Our File No. A-20-146

Dear Mr. Sloan:

This letter responds to your request for advice regarding Government Code Section 1090, et seq.¹ Please note that we are only providing advice under Section 1090, as well as under the Political Reform Act's ("Act") conflict of interest provisions, but 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 Fresno 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).)

QUESTIONS

1. Does City Councilmember Garry Bredefeld's current status as a landlord under contract with the Fresno City Housing Authority ("Housing Authority") for the Section 8 housing assistance payment ("HAP") program require him to recuse himself from City Council decisions to approve mayoral appointments to the Housing Authority Board and

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.

decisions regarding the development agreement with The Arthur at Blackstone, LP (“Agreement”) involving the Housing Authority?

2. If he enters into a new Section 8 HAP contract with the Housing Authority, for a unit not currently subject to a Section 8 contract, will his financial interest prohibit the City from entering into contracts with the Housing Authority under Section 1090?

3. Is Councilmember Bredefeld prohibited from participation in either decision due to his financial interests under the Political Reform Act?

CONCLUSION

1. No. Where his HAP contracts are not directly or indirectly implicated in these decisions, Councilmember Bredefeld does not have a prohibitive financial interest requiring his recusal under Section 1090.

2. Councilmember Bredefeld will have a financial interest in any new HAP contract. Under the prohibition in Section 1090, he may not participate in the making of any contract decision in which he has a financial interest. The City does not participate in HAP contract decisions and has no authority over the Housing Authority. Whether this financial interest is implicated in future City decisions involving the Housing Authority will depend on the facts.

3. No. The facts indicate there will not be a foreseeable and material financial impact on his rental business, real property or tenants as a source of income related to either decision. (Regulations 18701-18702.3) Additionally, as to the Housing Authority as a government entity source of income, there are no unique effects on Councilmember Bredefeld as a result of either decision, (Regulation 18703(e)(7).) Therefore, the councilmember is not disqualified from taking part in the decision under the Act. (Regulations 18701-18702.3, and 18703(e)(7).)

FACTS AS PRESENTED BY REQUESTER

The Fresno Housing Authority is a public agency, separate from the City of Fresno. The Fresno City Housing Authority (“Housing Authority”) is governed by a seven-member Board of Commissioners. The Board Commissioners receive a \$50 per diem for attendance at no more than four meetings per month. The City Board is appointed by the mayor and confirmed by the City Council.² Five of the seven commissioners are appointed to four-year, staggered terms. The other two members are appointed to two-year terms from among both the Housing Choice Voucher and Public Housing programs. Councilmember Bredefeld does not serve on the Housing Authority Board of Commissioners. Councilmembers may not sit on the Housing Authority Board. The City does not share staff or resources with the Housing Authority. The City does not approve the Housing Authority’s budget; and the City is not involved in any manner in approving the Housing Authority’s Section 8 housing contracts.

² If the Council rejects the mayor’s appointment, the mayor chooses another appointee for confirmation.

Councilmember Bredefeld owns a four-plex apartment in the City. Three of the four units are subject to a Section 8 housing assistance payment (“HAP”) contract between Councilmember Bredefeld and the Housing Authority. Under these contracts, the councilmember agrees to accept housing assistance payments that pay 70% of a Section 8 tenant’s fair market rent. The Housing Authority determines that the rent is fair market and the unit habitable prior to entering the HAP contract. At some time in the future, Councilmember Bredefeld would like to rent the remaining apartment not occupied by a Section 8 tenant to an incoming Section 8 tenant. The vacancy rate in the City is approximately 3 percent.

In response to our request for additional information about the Section 8 housing assistance payment program, City Attorney Laurie Avedisian-Favini directed us to the website for the Housing Authority, which describes the Section 8 program and contracts as follows:

Housing Choice Voucher Program (formerly Section 8) is a federally-funded program that provides rental assistance to more than 12,000 eligible low-income individuals and families in Fresno County – enabling them to secure affordable, quality housing in diverse neighborhoods throughout Fresno County.

Eligible applicants who receive a voucher are responsible for finding an apartment or house in the private rental market. Close to 3,000 owners of rental properties in Fresno County accept tenants who participate in the program. Rental units must meet Housing Quality Standards (PDF) set by the U.S. Department of Housing and Urban Development (HUD).

The Housing Choice Voucher (HCV) Program relies on a set of legally-binding agreements between three parties: the Fresno Housing Authority, the HCV participant (tenant), and an independent owner of rental property (landlord).

- The Voucher is the agreement between Fresno Housing Authority and the tenant.
- The Lease Agreement is between the tenant and the independent owner of rental property (landlord).
- The Housing Assistance Payment (HAP) Contract is the agreement between the Fresno Housing Authority and the independent owner of the rental property (landlord).
- HCV families pay at least 30% of their adjusted gross income as rent to the landlord. The balance of the rent (up to a certain established amount) is paid to the owner by Fresno Housing Authority.

In a follow up conversation with the Housing Authority, Preston Prince, Chief Executive Officer, Tracewell Hanrahan, Deputy Executive Director and Kenneth Price, legal counsel, explained the following: the Housing Authority has a \$100 million Section 8 housing program and oversees approximately 13,000 voucher agreements. Housing assistance payment contracts are subject to extensive policy and regulatory requirements. The Housing Authority has approximately 40,000 applicant’s seeking housing. With the demand for housing high, and a 3 percent City vacancy rate, it is a “landlord’s market.” The Housing

Authority actively recruits and educates landlords about its programs, and the Section 8 tenant applicants often have barriers to overcome, like a lack of security deposits and poor credit scores. The councilmember's Section 8 HAP contracts represent a miniscule part of this large program.

The City is considering entering an Agreement with The Arthur at Blackstone, Limited Partnership, where the Housing Authority acts as the Developer. Tracy N. Parvanian, Senior Deputy City Attorney, explained the following details by phone: to advance the supply of affordable rental housing in the City, the City will agree to loan the developer funds the City received from the federal government in a HOME Investment Partnerships ("HOME") Program grant. The developer agrees in exchange to construct a 45-unit apartment complex with units preserved as "very low and low income rental housing" as those terms are defined by the HOME Program. The Housing Authority acts as the developer and will be a signator to the Agreement. In the follow up conversation with the Housing Authority staff, it was explained that the development will create 45 affordable housing units, 40 of which will have housing choice vouchers that attach to the units (not to tenants). 20 of the 40 will be traditional vouchers and 20 will be Rental Assistance Demonstration Vouchers. Housing Authority CEO, Mr. Prince, stated that because the Agreement does not affect the many policies and procedures implementing the HAP program and the Agreement is too small to impact the totality of the rental market, the decisions on the Agreement would not change how the Housing Authority treats existing Section 8 HAP contracts, including those of the councilmember, and the Agreement does not implicate these contracts.

ANALYSIS

Government Code Section 1090

Section 1090 generally prohibits a public officer or employee from making or participating in the making of a contract in which he or she is financially interested. Section 1090 is concerned with financial interests, other than remote interests and noninterests, that prevent a public officer or employee from exercising absolute loyalty and undivided allegiance in furthering the best interests of his or her agency. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.)

A contract made in violation of Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646), and an official with a prohibited interest in the contract is subject to administrative and civil penalties (Sections 1097.1 and 1097.3), as well as criminal penalties if the violation was willful (Section 1097).

Under Section 1090, a member of a public agency's governing body is conclusively presumed to participate in the making of a contract under the governing body's authority, irrespective of whether he or she actually participates in the making of that contract. (*Thomson v. Call, supra*, at pp. 649-650.) Therefore, Section 1090 prohibits the entire body from entering into a contract in which a member of the body is financially interested, even if that member abstains from participating in the making of, or fully discloses his or her financial interest in, the contract. (*Ibid.*)

The Legislature has created various statutory exceptions to Section 1090 where the interest involved in the decision is deemed to be a “remote interest,” as defined in Section 1091, or a “noninterest,” as defined in Section 1091.5. If a remote interest is present, the officer is not deemed to be interested in a contract entered into by the board of which they are a member so long as: (1) the officer in question discloses his or her interest in the contract to the public agency; (2) that interest is noted in the entity's official records; and (3) the officer abstains from any participation in the making of the contract. (Section 1091(a); 88 Ops.Cal.Atty.Gen. 106, 108 (2005); 83 Ops.Cal.Atty.Gen. 246, 248 (2000).) If a noninterest is present, the contract may be made without the officer's abstention, and the presence of a noninterest generally does not require disclosure. (*City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 514-515.)

As a public official, Councilmember Bredefeld is subject to Section 1090. He has identified a financial interest in his existing HAP contracts with the Housing Authority. For purposes of Section 1090, “financial interest” is given a broad analysis, and includes grants or contracts that may directly or indirectly benefit the officer. “An official has a financial interest in a contract when, among other things, he has a contingent possibility of monetary or proprietary benefits” or “put in simple terms, the official might profit from it.” (See *People v. Honig* (1996) 48 Cal. App. 4th 289, p. 333 and *People v. Darby* (1952) 114 Cal. App. 2d 412, p.433, ft. 4.)

However, the HAP contracts are not the subject of the decisions at issue, and neither the City nor Councilmember Bredefeld in his public capacity has authority over the HAP contract decisions. In this case, you have asked whether the councilmember's interest in his HAP contracts is a disqualifying interest in particular city decisions that relate to the Housing Authority Board. Namely, decisions to confirm mayoral appointments to the board and decisions related to the Agreement.

In regard to a decision to confirm mayoral appointments to the Housing Authority Board, even assuming for analysis that this is a “contract decision,” there are no facts indicating that this type of decision implicates the councilmember's financial interest in his HAP contracts, directly or indirectly. The City Council does not have authority over policy decisions of the Housing Authority. Its only authority is to confirm or reject an appointment to the Housing Authority Board. Therefore, Councilmember Bredefeld does not have a financial interest in a contract under Section 1090 that would prohibit him from taking part in the confirmation decision.

The decision relating to the Agreement also does not present a cognizable financial interest in a contract for the councilmember. The City and the Housing Authority both state it is their understanding that the Agreement, which provides a loan of federally sourced City HOME funds to a developer in exchange for building approximately 45 low income housing units, including 20 units subject to Section 8 housing vouchers, will not have a direct or indirect impact on Councilmember Bredefeld's HAP contracts. The Agreement does not touch on the terms, policy, or extensive procedural requirements that govern his existing HAP contracts. There are no facts to suggest that the decision to build 20 Section 8 designated units will foreseeably alter the market for his current Section 8 units or tenants. With a 3 percent

vacancy rate that makes it a “landlord’s market” in the City, and a high demand for housing units and Section 8 housing, the facts suggest that the impact of Agreement decisions on the housing market will be minimal. Therefore, where his HAP contract financial interest is not the subject of the Agreement, and are not implicated in the Agreement decisions, he does not have a prohibitory financial interest under Section 1090.

We note that similar to his existing HAP contracts, Councilmember Bredefeld will have a financial interest in any new Section 8 housing assistance payment contract he enters, which will potentially prohibit him from participating in, and the City from entering into, any City contract that directly or indirectly involve his financial interest. If he needs additional assistance regarding any other City contracts, Councilmember Bredefeld may wish to seek further advice identifying and describing the contract.

Conflict of Interest under the Act

The Act’s conflict of interest provisions prohibit 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 87100.) The Act’s provisions require a separate analysis, with separate standards for a prohibitive financial interest in a decision. 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).) Relevant to these facts, Section 87103 defines a financial interest as follows:

- (a) Any business entity in which the public official has a direct or indirect investment worth \$2,000 or more; or is a director, officer, partner, trustee, employee, or holds any position of management.
- (b) Any real property in which the public official has a direct or indirect interest worth \$2,000 or more.
- (c) Any source of income, aggregating \$500 or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.

Councilmember Bredefeld has a business entity and a source of income interest in his rental business, a real property interest in his apartment complex, a source of income interest in his tenants, and in the Housing Authority through the Section 8 HAP contracts, to the extent the above threshold amounts are met. However, where a government entity qualifies as a source of income, the official is disqualified from taking part in the decision only if there is a unique effect on the official. (Regulation 18703(e)(7).) As discussed above, the facts indicate there will be no unique effect on the councilmember as a result of the mayoral confirmation decisions, or the Agreement. We examine the financial effect of the two decisions on the councilmember’s remaining financial interests.

A financial effect is presumed reasonably foreseeable where the official's financial interest is explicitly involved as a named party in, or subject of, the decision. (Regulation 18701(a).)³ Where the financial interest is not explicitly involved in the decision, the financial effect is reasonably foreseeable if it can be recognized as a realistic possibility, more than hypothetical or theoretical. (18701(b).) Neither decision explicitly involves his rental business, his apartment complex, or his tenants and the latter standard applies.

Business Entity Interest

The reasonably foreseeable financial effect of a governmental decision on an official's financial interest in a business entity is material, as applicable to these facts, if 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 more than \$1,000,000; or five percent of the entity's annual gross revenues and the increase or decrease is at least \$10,000. The financial effect is also material if the decision may cause the entity to incur or avoid additional expenses or to reduce or eliminate expenses in an amount equal to or more than \$250,000; or one percent of the entity's annual gross revenues and the change is at least \$2,500. (Regulation 18702.1(a)(2).) The facts indicate that neither a change in the councilmember's rental business income or expenses is anticipated as a result of either decision.

Real Property Interest

The reasonably foreseeable financial effect of a government decision on an official's real property interest is presumed not to be material when the decision involves property located more than 1,000 feet or more from the property line of the official's property. This presumption may be rebutted with clear and convincing evidence the governmental decision would have a substantial effect on the official's property. (Regulation 18702.2(b).) The facts indicate that these decisions will not have an impact on the official's real property. The Agreement involves the development of a small number of low income housing units in an area more than 1,000 feet from the councilmember's property. The mayoral confirmation does not relate to his real property in any manner.

Source of Income: Individual Tenants

The reasonably foreseeable financial effect of a government decision on an official's source of income is material 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

³ 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); i.e., involves, particular to the parcel: development plan criteria, zoning, taxes fees or assessments, or involves the property's sale or lease, the parcel's license, permit or land use, or facility improvements affecting the parcel. (See Regulation 18701 and 18702.2(a).)

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 real property, such as a leasehold interest, that may be affected by the decision. Councilmember Bredefeld 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. He may have a disqualifying interest if he knows or has reason to know the tenant may be foreseeably and materially affected by a decision, by \$1,000 or more. However, under the facts presented, there is no indication that Councilmember Bredefeld is aware of any other interest held by the tenants. Absent additional facts, it is not reasonably foreseeable that there would be a material financial impact on the tenants as a result of the two decisions.

Due to the lack of foreseeable and material impacts on his financial interests under the standards of the Act, Councilmember Bredefeld does not have a prohibitive financial interest in these decisions.

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

Sincerely,

Dave Bainbridge
General Counsel

L. Karen Harrison

By: L. Karen Harrison
Senior Counsel, Legal Division

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