



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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February 23, 2021

Eric S. Casher
City Attorney
City of Pinole
1999 Harrison Street, 9th Floor
Oakland, California 94612

Re: Your Request for Advice
Our File No. A-20-161

Dear Mr. Casher:

This letter responds to your requests for advice on behalf of Pinole Mayor Norma Martinez-Rubin and City Councilmember Vincent Salimi regarding the Political Reform Act's conflict of interest provisions and Government Code Section 1090, et seq.¹ 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.

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).)

QUESTIONS

1. May Mayor Martinez-Rubin take part in decisions that explicitly involve or would have a reasonably foreseeable, material financial effect on the Pinole History Museum, which her husband works for as a noncompensated officer who has received \$531.18 in reimbursements over the last 12 months?
2. May Councilmember Salimi take part in a decision to create an ad-hoc subcommittee that would make recommendations regarding the use of the Faria House and the parcel on which

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.

it is located (“Property”), given that he owns real property within 500 feet from the Property?

3. May Councilmember Salimi take part in a decision to renovate the Faria House if no use for the Faria House is identified?
4. May Councilmember Salimi take part in a decision to lease the Property to PHM for the purpose of using the Faria House as a museum?

CONCLUSIONS

1. Yes. Under the Act, Mayor Martinez-Rubin’s community property interest in the reimbursements her husband has received in the last 12 months is less than \$500 and, therefore, she does not have an economic interest in PHM. Under Section 1091.5(a)(8), her husband qualifies as a noncompensated officer of a 501(c)(3) that, as one of its primary purposes, supports the functions of the City. Accordingly, Section 1090 also does not prohibit her from taking part in contracts involving PHM, as long as her interest in PHM is noted in the City’s records.
2. No. The Act prohibits Councilmember Salimi from taking part in such a decision, as there is no clear and convincing evidence rebutting the presumption that the development of an ad-hoc subcommittee pertaining to real property located less than 500 feet from Councilmember Salimi’s residence would have a measurable impact on Councilmember Salimi’s real property.
- 3-4. Yes. Based on the facts presented, there is clear and convincing evidence that the potential renovation and use of the Faria House as a local history museum would have no measurable impact on Councilmember Salimi’s real property, which also would not be implicated in any related contract for Section 1090 purposes.

FACTS AS PRESENTED BY REQUESTER

The City of Pinole (“City”) owns real property located at 2100 San Pablo Avenue (“Property”). Located on the Property is a two-story residence constructed around 1890 and commonly known as “the Faria House.” Over the last two decades, the City has considered various options for the future use of the Faria House and the Property. The Faria House was originally located elsewhere within the City of Pinole, but was moved to its current location on the Property in 2005.

In October 2007, the City Council approved an expenditure of \$400,000 to renovate the Faria House, as well as a lease and grant agreement with the Pinole History Museum (“PHM”), a private nonprofit corporation that has received tax exempt status pursuant to Section 501(c)(3) of the IRS Code. However, in August 2008, PHM notified the City in writing that it considered the agreements null and void, and the funds were never spent.

In 2016, the City Council provided preliminary approval to use the Faria House as a future venue for a museum to be operated by PHM. In 2018, the City Council approved a letter affirming its commitment to use the Faria House as a future location of PHM, and anticipating a future agreement between the City and PHM regarding use of the Property. However, the letter was not an

agreement with PHM, and nothing in the letter created any binding commitment on the part of the City.

PHM is organized for charitable purposes and describes its mission as enhancing the preservation and collection of artifacts that represent the City of Pinole's history and culture. A primary purpose of PHM is to preserve and educate the public about the history of the City and its residents. Any museum to be operated by PHM would include exhibits and research opportunities to educate and inspire Pinole residents' community affiliation and civic pride. The City previously entered into the aforementioned agreements with PHM regarding the use of the Faria House, but those agreements do not create any ongoing binding obligation on the City to lease the Faria House to the PHM or otherwise expend funds to renovate the Faria House.

Given the Faria House's age, significant renovations are necessary before the building can be used for any proposed use, including as a museum. In June 2018, the City retained an architecture firm to design the improvements that would be required for the building to serve as a public museum. After developing plans, with input from the City, the architect estimated that the cost of the necessary renovations and related work would be approximately \$1.2 million dollars. These renovations would be necessary before the Faria House could be used as a museum, as well as other potential uses. Nothing about the renovations would restrict the future use of the Faria House to a museum, and the City Council could decide to use the Faria House for a different purpose. In addition to the approximately \$1.2 million in one-time renovation costs, the annual cost of ongoing maintenance is estimated to be approximately \$50,000 per year. At this time, no decision has been made regarding whether the City or the party leasing the Property/Faria House would be responsible for annual maintenance costs. Rather, maintenance costs would be an item included in lease negotiations between the City and the selected party.

The City Council previously created a Committee to provide recommendations to the City Council regarding the use of the Faria House. In November 2020, the City Council considered the Committee's recommendation to approve a lease and MOU between the City and PHM, which also detailed the financial obligations of each party regarding the repairs and ongoing maintenance of the Faria House. The City Council decided not to move forward with any project regarding the Property or Faria House. Neither Mayor Martinez-Rubin nor Councilmember Salimi took part in the decision. However, it is anticipated that the City Council will reconsider the issue in 2021. The City Council may decide to form an ad-hoc subcommittee to study the issue and make recommendations regarding the Property and Faria House to the full City Council.

Mayor Martinez-Rubin was not a member of the City Council in 2016 when the City gave PHM preliminary approval to use the Faria House as a museum and did not take part in the decision as a public official. Mayor Martinez-Rubin's husband serves as Board president of the PHM. He receives no salary or benefits for his service. However, he has received expense reimbursements of \$531.18 for expenses related to PHM's operation in the last 12 months as of the date of this letter. If no further expense reimbursements are received in the future, Mr. Rubin will have received expense reimbursements of \$52.30 in the last 12 months as of April 21, 2021. Besides the expense reimbursements identified above, neither Mayor Martinez-Rubin nor her husband have received any gifts or compensation of any kind from PHM.

Councilmember Salimi's personal residence, which he owns, is located slightly under 500 feet from the boundary of the Property. This side of the Property is located on Buena Vista Drive in a residential neighborhood. The Faria House itself is located on the other side of the Property and is approximately 800 feet away from the boundary of Councilmember Salimi's parcel. The area between Buena Vista Drive and the Faria House is heavily wooded, and the Faria House is not visible from Buena Vista Drive. Salimi's residence is also separated from the Faria House by multiple single-family homes.

The Faria House is located adjacent to San Pablo Avenue, which is a four-lane road and one of the busiest roads within Pinole. The entrance to the parking lot on the Property is accessed from San Pablo Avenue, as is the main entrance of the Faria House. A small public pedestrian path runs across the Property from Buena Vista Drive to San Pablo Avenue. The Faria House has an attractive exterior and is not a visual blight. The interior is not in a state of disrepair, but it is an old building that needs renovation before it could be put to any use by the public. This includes electrical updates and improvements, as well as installation of an elevator and other ADA improvements. The majority of renovation work would occur within the building and exterior impacts would be minor, such as the construction of a wheelchair ramp. No potential renovation of the Faria House would involve construction of a new building and, consequently, the impacts from the potential renovation would be minimal in terms of noise, dust, and number of personnel involved. Furthermore, construction activity would be centered along busy San Pablo Avenue, where the Faria House is located, rather than along Buena Vista Drive. Given the Faria House's small size, the number of daily visitors to the museum will necessarily be relatively small, even on the museum's busiest days. Although some visitors may park on Buena Vista Drive and walk to the Faria House using the pedestrian path, visitors will likely overwhelmingly access the Faria House from San Pablo Avenue, the major thoroughfare on which the Property's Parking lot is located.

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 certain specified economic interests. (Section 87103.) Among those specified economic interests are:

- (a) Any business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more.
- (b) Any real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more.
- (c) Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status,

aggregating five hundred dollars (\$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.

(Section 87103.) Under the Act, “income” generally includes reimbursement for expenses, but does not include reimbursement for travel expenses and per diem received from a bona fide nonprofit entity exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. (Section 82030(a), (b)(2).) Additionally, “income” includes any community property interest in the income of a spouse. (Section 82030(a).)

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).”

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.”

Mayor Martinez-Rubin

Mayor Martinez-Rubin’s husband serves as Board president of the PHM. He receives no salary or benefits for his service, but has received expense reimbursements of over \$500 for expenses related to PHM’s operation in the last 12 months as of the date of this letter. Assuming Mayor Martinez-Rubin has a standard fifty-percent community property interest in her husband’s income, she does not have an economic interest in PHM for purposes of the Act. Given that her husband has received \$531.18 in the past 12 months, Mayor Martinez-Rubin’s community property interest is only \$265.59 and, therefore, does not qualify as a source of income interest under the Act. Accordingly, the Act does not prohibit her from taking part in decisions that would have a reasonably foreseeable, material financial effect on PHM.

Councilmember Salimi

Councilmember Salimi has an economic interest in his real property, which is located less than 500 feet from the Property and approximately 800 feet from the Faria House (located on the property). The decisions at issue would not explicitly involve Councilmember Salimi’s real property economic interest.

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 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)(7).) 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.²

Here, although Councilmember Salimi's property is located within 500 feet from the Property, the facts indicate that Councilmember Salimi's property would be separated from the Faria House (where any potential renovation would occur) by approximately 800 feet, with a wooded area and single-family houses providing additional physical barriers. The Faria House is not visible from Councilmember Salimi's property and construction in renovating the Faria House would be relatively minor. Additionally, if the Faria House became a museum, it would be possible that some visitors would park on Councilmember Salimi's street, but the Faria House parking lot is located on the side of the property opposite Councilmember Salimi's residence. In any case, it is anticipated that the number of visitors on even the museum's busiest days would be relatively small. We think the provided facts establish clear and convincing evidence that the potential renovation and leasing of the Faria House would have no measurable impact on Councilmember Salimi's property. Accordingly, the Act does not prohibit Councilmember Salimi from taking part in such decisions.

With respect to the potential creation of an ad-hoc subcommittee that would make recommendations regarding use of the Property and Faria House, the subcommittee would specifically relate to the Property located within 500 feet from Councilmember Salimi's residence and there is no clear and convincing evidence that the creation of the subcommittee would have no measurable impact on Councilmember Salimi's property. Rather, the subcommittee could recommend uses of the Property and Faria House that would have a measurable impact on Councilmember Salimi's property. Therefore, the Act prohibits Councilmember Salimi from taking part in that decision.

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

² See, e.g., *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.

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 633, 645, 651-652.)

A potential lease agreement between the City and PHM does not implicate Councilmember Salimi's real property interest for Section 1090 purposes and, accordingly, Section 1090 would not bar Councilmember Salimi's participation in the contracting process. With respect to Mayor Martinez-Rubin, a financial interest may be implicated in a contract between the City and PHM. Although Mayor Martinez-Rubin does not have a source-of-income interest in PHM for purposes of the Act, her husband's receipt of reimbursements from PHM could still potentially disqualify her under Section 1090's stricter prohibition. However, under Section 1091.5(a)(8), an officer or employee is deemed not to be interested in a contract if the officer's interest is that of a noncompensated officer of a nonprofit, tax-exempt corporation, which, as one of its primary purposes, supports the functions of the body or board or to which the body or board has a legal obligation to give particular consideration, and provided further that this interest is noted in its official records. For purposes of this provision, an officer is "noncompensated" even though he or she receives reimbursement from the nonprofit, tax-exempt corporation for necessary travel and other actual expenses incurred in performing the duties of his or her office. (Section 1091.5(a)(8).) Mayor Martinez-Rubin's husband is a noncompensated officer of PHM, only receiving reimbursements for actual expenses. As noted above, a primary purpose of PHM is to preserve and educate the public about the history of the City and its residents. Such a purpose supports the functions of the City by providing educational opportunities for the City's population and preserving the City's history. Accordingly, per Section 1091.5(a)(8), Mayor Martinez-Rubin does not have a disqualifying economic interest prohibiting her from taking part in the potential contracting process, as long as her interest in PHM is 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


By: Kevin Cornwall
Counsel, Legal Division

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