



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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March 11, 2022

Michael G. Vigilia  
City of Hayward  
777 B Street  
Hayward, CA 94541

Re: Your Request for Informal Assistance  
**Our File No. I-21-173**

Dear Mr. Vigilia:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”).<sup>1</sup> Please note that we are only providing advice under the Act and not under other general conflict of interest prohibitions such as common law or Section 1090. 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 or Mr. Zucca should contact us for additional advice. Because your question is general in nature and not limited to a specific governmental decision, we are limited to providing informal assistance.<sup>2</sup>

### QUESTION

Does the Act prohibit Mr. Zucca, as the incoming Assistant Director of Public Works for the City of Hayward, from reviewing and evaluating proposals by EKI Environment & Water (EKI), given that he is a former EKI employee, a current stockholder and creditor of EKI, and a participant in EKI’s employee stock ownership plan?

### CONCLUSIONS

Yes. Because Mr. Zucca has a financial interest in EKI, and because EKI is explicitly involved in the City’s decisions concerning contracts between the City and EKI, Mr. Zucca is disqualified from any decisions relating to, or resulting from, any contracts between the City and EKI.

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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.

<sup>2</sup> Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

## FACTS AS PRESENTED BY REQUESTER

You serve as Senior Assistant City Attorney for the City of Hayward (the “City”). Matthew Zucca is being considered for the position of Assistant Director of Public Works for the City. Your request for advice follows the recently issued *Zucca* Advice Letter No. A-21-107, in which we advised that Section 1090 would prohibit Mr. Zucca, as Assistant Director of Public Works, from making or participating in the making of any contract between the City and Mr. Zucca’s former employer, EKI, an engineering firm with whom the City has done business and may contract with in the future. However, in the *Zucca* letter we also advised that, as long as Mr. Zucca disqualifies himself from all participation and plays no role whatsoever in the contracting process, the City may contract with EKI without violating Section 1090. You are now requesting follow-up advice regarding the same facts under the Act, including whether Mr. Zucca may take part in decisions relating to, or resulting from existing contracts between the City and EKI.

Mr. Zucca left EKI in 2018, after nearly 20 years of employment with the company. During his tenure at EKI, he acquired EKI common stock and vested in EKI’s employee stock ownership plan (ESOP).<sup>3</sup> Upon separating from EKI, Mr. Zucca entered into an agreement with EKI for the repurchase of shares of its common stock (the Repurchase Agreement). Under the terms of the Repurchase Agreement, EKI agreed to purchase 8,700 shares of Mr. Zucca’s common stock for a total price of \$41,934.00. This purchase is in the form of a promissory note payable over sixty months at an annual interest rate of six percent, with the last payment occurring on October 5, 2023. Payments on this promissory note are \$810.70 per month, or \$9,728.40 per year.

Separate from the Repurchase Agreement, Mr. Zucca owns 32,418 shares of EKI stock valued at \$175,531.90, as well as \$4,112.11 in cash, as part of the ESOP. EKI estimated that Mr. Zucca’s balance of EKI stock accounts for approximately 1.8 percent of the total number of shares of stock in the ESOP. EKI’s ESOP is intended to qualify as an Employee Stock Ownership Plan as defined in Section 4975(e)(7) of the Internal Revenue Code, and an employee stock ownership plan meets the definition of a qualified contribution plan under Section 401(a) of the Internal Revenue Code. Beginning in November 2023, EKI is obligated under the ESOP to begin making distributions to Mr. Zucca from the ESOP account. These distributions must be completed within five years, at which point they will exceed five percent of Mr. Zucca’s annual income. Mr. Zucca plans to transfer these disbursements from the ESOP into a separate tax-advantaged retirement account.

According to Mr. Zucca, the Assistant Director of Public Works would be “expected to, at a minimum, manage EKI’s work efforts as part of the position’s duties.”

## ANALYSIS

The Act’s conflict of interest provisions prohibits a public official from taking part in a governmental decision if it is reasonably foreseeable that the decision would have a material

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<sup>3</sup> An employee stock ownership plan is a qualified contribution plan under Section 401(a) of the Internal Revenue Code designed to invest primarily in qualifying employer securities.

financial effect on one or more of the official's financial interests, distinguishable from the decision's effect on the public generally. (Sections 87100 and 87103.) As Assistant Director of Public Works for the City, Mr. Zucca would be a public official subject to the Act's conflict of interest provisions. (Section 82048.) The next question is whether it is reasonably foreseeable that the City's decisions regarding EKI would have a material financial effect on Mr. Zucca's financial interests.

#### *Source of Income Interest in EKI*

Section 87103(c) provides that an official has a financial interest in a source of income from which the public official has aggregated \$500 or more in income in the 12 months prior to the decision at issue. Here, Mr. Zucca currently receives \$810.70 per month, or \$9,728.40 per year, from EKI under the Repurchase Agreement.

Notably, there is a limited exception for income from a former employer found in Regulation 18700.1(b), under which an official does not have an interest in a former employer as a source of income if:

- The income was received by or accrued to the public official prior to the time he or she became a public official;
- The income was received in the normal course of the previous employment; and
- There was no expectation by the official at the time the official assumed office of renewed employment with the former employer.

However, this exception only applies to income received or accrued prior to the time the individual becomes a public official. In this case, while EKI's principal payments to Mr. Zucca after he commences employment with the City may not be income, the interest on the note accrues as it becomes due and does not meet the exception. Because the facts indicate that interest payments to Mr. Zucca in 2021 exceeded \$500 within a twelve-month period and will continue to do so for the duration of the note until 2023, Mr. Zucca has a financial interest in EKI as a source of income. (See *Gore* Advice Letter, No. A-15-071, and *Holzhaus* Advice Letter, I-14-218.)

#### *Investment Interest in EKI*

Section 87103(d) provides that an official has a financial interest in any business entity in which the official has a direct or indirect investment of \$ 2,000 or more. Under Section 82034, an "investment" includes any financial interest in a debt instrument. In the *Holzhaus* Advice Letter, No. I-14-218, we said that an official had an investment interest in his former employer where the former employer purchased the official's stock with a five-year note because a note is a debt instrument. Similarly, Mr. Zucca has an investment interest in EKI based upon his interest in the Repurchase Agreement. Additionally, Mr. Zucca owns 32,418 shares of EKI stock, valued at \$175,531.90, through his EKI ESOP account. Thus, Mr. Zucca also has an investment interest in EKI resulting from his stock ownership.<sup>4</sup>

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<sup>4</sup> You have indicated that the ESOP is a qualified contribution plan under Section 401(a) of the Internal Revenue Code. We note that "income" under the Act does not include "payments received under a defined benefit

### *Foreseeability and Materiality*

Having established that Mr. Zucca has an investment interest in EKI and an interest in EKI as source of income, we next turn to whether it is reasonably foreseeable that the City's decisions concerning EKI could have a material financial effect on Mr. Zucca's interests.

Foreseeability standards vary depending on whether an interest is explicitly involved in a governmental decision. An official's financial interest is explicitly involved in a decision, and is presumed to be reasonably foreseeable, if the interest is a named party in, or the subject of, a decision before the official or the official's agency. (Regulation 18701(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." It further provides that 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.

Under Regulation 18702.1, the reasonably foreseeable financial effect of a governmental decision on an official's financial interest in a *business entity* is material if the entity is explicitly involved, or in other words, if the entity is a named party in, or the subject of, the decision including any decision in which the entity:

- (A) Initiates the proceeding by filing an application, claim, appeal, or other request for action concerning the entity with the official's agency;
- (B) Offers to sell a product or service to the agency;
- (C) Bids on, or enters into, a contract with the agency, or is identified as a subcontractor on a bid or contract with the agency;
- (D) Is the named or intended manufacturer or vendor of any products to be purchased by the agency with an aggregate cost of \$1,000 or more in any 12-month period;
- (E) Applies for a permit, license, grant, tax credit, exception, variance, or other entitlement from the agency;
- (F) Is the subject of any inspection, action, or proceeding under the regulatory authority of the agency; or
- (G) Is subject to an action taken by the agency that is directed at the entity.

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pension plan qualified under Internal Revenue Code Section 401(a)." (Section 82030(b)(11).) However, the ownership of stock is an investment interest notwithstanding any payments that will be received. While we have previously advised that some investment interests in a defined benefit plan that qualifies under Section 401(a) of the Internal Revenue Code are not disqualifying investments under the Act (see *Chaffin* Advice Letter No. A-21-034, *Ueda* Advice Letter No. A-19-073, and *Gillian* Advice Letter No. A-95-304), this advice is limited to situations in which the investment is held by a private entity and the official no longer holds an investment in stock.

Additionally, Regulation 18702.3(a) provides materiality standards to determine when a reasonably foreseeable effect on an official's *source of income* is material. A decision's effect on a financial interest that is a source of income is material if the source is a named party or the subject of the decision, including a claimant, applicant, respondent, or contracting party. (Regulation 18702.3(a)(1).) Likewise, a decision's effect on a financial interest that is a source of income is material if the source is a business entity that will be financially affected under the materiality standards in Regulation 18702.1, detailed above. (Regulation 18702.3(a)(4).)

You have not provided facts concerning specific City decisions regarding EKI. However, the types of decisions you have identified are decisions in which EKI will be explicitly involved, or in other words, decisions in which EKI is a named party in, or the subject of, the decisions. Under the applicable regulatory standards explained above, it is reasonably foreseeable that these decisions will have a material financial effect on Mr. Zucca's interests in EKI.

Therefore, the conflict of interest provisions of the Act prohibit Mr. Zucca from taking part in the City's review and evaluation of proposals by EKI, as well as decisions concerning, relating to, or resulting from contracts between the City and EKI.

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

Sincerely,

Dave Bainbridge  
General Counsel

By: Toren Lewis  
Counsel, Legal Division

TAL:dkv