



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

May 9, 2022

Michael Ng
San Francisco Bay Conservation and Development Commission
375 Beale St., Suite 510
San Francisco, CA 94105

Re: Your Request for Advice
Our File No. A-22-035

Dear Mr. Ng:

This letter responds to your request for advice on behalf of San Francisco Bay Conservation and Development Commission Chair Zachary Wasserman regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹

Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest 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 should contact us for additional advice.

QUESTION

Under the Act, may Chair Wasserman take part in decisions regarding a Bay Plan Amendment and anticipated baseball park development involving a former client of Chair Wasserman’s law firm, where he is an equity partner?

CONCLUSION

Yes, the Act permits Chair Wasserman to take part in such decisions because the decisions would not have a reasonably foreseeable, material financial effect on the law firm, as the firm did not represent the former client regarding developing a new ballpark and no longer has a relationship with the client.

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 18104 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.

FACTS AS PRESENTED BY REQUESTER

The San Francisco Bay Conservation and Development Commission (“BCDC”) is a state agency. BCDC’s geographic jurisdiction under the MPA includes San Francisco Bay itself, a 100-foot shoreline band, salt ponds, managed wetlands, and certain other specified waterways. In 1969, BCDC adopted and submitted to the Governor and Legislature the San Francisco Bay Plan (the “Bay Plan”), which constitutes the plan which the Commission uses to establish policies for reviewing and acting on projects within BCDC’s jurisdiction.

The Commission exercises both land use permitting and planning functions. Any person or governmental agency wishing to place fill, extract materials, or make any substantial change in use of any water, land, or structure within the area of the Commission’s jurisdiction must secure a permit from the Commission. The Commission is also empowered to amend, or repeal and adopt a new form of, all or any part of the Bay Plan but any Bay Plan Amendment (“BPA”) must be consistent with the findings and declarations of policy within the McAteer-Petris Act (the law administered by BCDC). If the BPA pertains to a policy or standard in the Bay Plan, the BPA requires the affirmative vote of two-thirds of the Commission members. Any agency, organization, or individual may propose a BPA by submitting the requisite application form.

On January 17, 2019, the Commission voted to initiate BPA No. 2-19, which was submitted by the Oakland Athletics Investment Group, LLC (“Oakland Athletics”). BPA No. 2-19 proposes to remove an existing planning designation (Port Priority Use Area) from a piece of property situated at the Port of Oakland (Howard Terminal). If the Commission approves BPA No. 2-19 it can reasonably be expected that the Oakland Athletics will then submit a permit application to the Commission for the development of a ballpark and mixed-use development on the Howard Terminal site (the “Ballpark Project”).

Importantly, the Port Priority Use Area designation at Howard Terminal must be removed prior to any Commission approval of a permit for the Ballpark Project for permit approval to be found consistent with BCDC’s laws and policies. While BPA No. 2-19 is a necessary “precondition” for the Ballpark Project to be realized at Howard Terminal, BPA No. 2-19 is a quasi-legislative action which is independent of and does not then compel the Commission to approve a (as-yet unsubmitted) permit application for the Ballpark Project (which constitutes a quasi-adjudicative action).

In relation to both BPA No. 2-19 and the ultimately anticipated Ballpark Project, on October 11, 2019, Assembly Bill No. 1191, Bonta (“AB 1191”) was approved by the Governor and filed with the Secretary of State. As relevant here, section 8(a) of AB 1191 provides:

BCDC shall determine by February 28, 2020, or 140 days after the certification by the [of Oakland] of a project-level environmental impact report for the [Ballpark Project], whichever is later, whether the Howard Terminal property and adjacent areas designated for port priority use, or portions of them, are no longer required for port priority use and shall be deemed free of the port priority use area designation for purposes of the Oakland Sports and Mixed-Use Project, or whether these areas are needed for port priority use and should continue in port priority use designation.

The City of Oakland certified a project-level environmental impact report for the Ballpark Project on February 17, 2022. Per section 8(a) of AB 1191, this set a 140-day deadline for the Commission's consideration of BPA No. 2-19 to July 7, 2022.

Chair Wasserman is a 2.5% partner in the law firm of Wendel Rosen LLP ("Wendel Rosen"). His compensation is determined annually by a five-member compensation committee (which he does not sit on) based on a set of factors, including work originated, work done, relationship with client and a subjective set of factors regarding non-economic contributions to the firm. As an equity partner, his general job duties mostly relate to managing his own clients, but he sometimes helps with other matters and participates on various administrative committees.

Beginning in April 2018, Wendel Rosen represented the Oakland Athletics in certain commercial leasing matters. Chair Wasserman represented the Oakland Athletics with the City of Oakland and Alameda County acquisition of the Oakland Coliseum for a large mixed-use development. However, the Oakland Athletics are not currently a client of Wendel Rosen and in the last 12 months have paid the firm less than \$2,500. The last outstanding bill was paid in November 2021 in the amount of \$250. For several reasons, Wendel Rosen has terminated its relationship with the Oakland Athletics effective October 21, 2021, and does not expect it to be revived. In a follow-up email, Chair Wasserman stated that his work for the Athletics "was primarily focused on acquisition of the County's interest in the Coliseum. While there was some discussion of potential . . . development scenarios, I did not work on any of those scenarios and they were all very conceptual. They potentially included hotels, office/research space, housing, and open spaces with the possibility of sports venues other than baseball or football. The acquisition of the County's interest and the potential development were totally independent of and not in any way affected then or prospectively by the Howard Terminal ballpark project"

As previously stated, the Oakland Athletics applied to BCDC for BPA No. 2-19 to remove the Port Priority Use Area designation from the Howard Terminal site at the Port of Oakland. Wendel Rosen has never represented the Oakland Athletics in any matter pertaining to BPA No. 2-19 or the Ballpark Project. As also previously stated, a BPA is a quasi-legislative administrative agency that is distinct and separate from any permit application which can be expected to be submitted by the Oakland Athletics for the Ballpark Project if the Commission approves BPA No. 2-19.

In 2019, when Wendel Rosen still actively represented the Oakland Athletics, Chair Wasserman recused himself twice early in the process pertaining to BPA No. 2-19 (and stated on the record that he was doing so due to his law firm's representation of the Oakland Athletics on matters other than BPA No. 2-19 and the Ballpark Project): first, at the January 17, 2019 Commission meeting at which the Commission initiated the process for BPA No. 2-19; and second, at the June 6, 2019 Commission meeting at which the Commission considered a staff report and took certain positions on various pending legislation, including AB 1191. Out of an abundance of caution, Chair Wasserman also recused himself a third time at the February 3, 2022 Commission meeting at which staff briefed the Commission on the status of BPA No. 2-19.

ANALYSIS

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 [the official] 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 business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more.” (Section 87103(a).) A public official also has an economic interest in “[a]ny source of income . . . 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(c).)

Chair Wasserman has a business entity and source of income interest in Wendel Rosen. Although the Oakland Athletics are a source of income to Wendel Rosen, they are not a source of income to Chair Wasserman, whose compensation is determined by a five-member committee.²

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, as here, 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.”

The reasonably foreseeable financial effect of a governmental decision on an official’s financial interest in a business entity is material 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 greater than: (A) \$1,000,000; or (B) five percent of the entity’s annual gross revenues and the increase or decrease is at least \$10,000. (Regulation 18702.1(a)(2).)

² Income of an individual also includes a pro rata share of any income of any business entity or trust in which the individual or spouse owns, directly, indirectly, or beneficially, a 10-percent interest or greater. (Section 82030.) As Chair Wasserman is a 2.5-percent equity partner, his income does not include a pro rata share of Wendel Rosen’s income.

The reasonably foreseeable financial effect on a business entity 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 greater than: (A) \$250,000; or (B) one percent of the entity's annual gross revenues and the change in expenses is at least \$2,500. (Regulation 18702.1(a)(3).)

None of the provided facts indicate it is reasonably foreseeable Wendel Rosen would be financially affected by BCDC's decision regarding BPA No. 2-19 under the materiality thresholds in Regulation 18702.1(a)(2) or (3). Wendel Rosen was not hired to represent the Oakland Athletics in this matter. Wendel Rosen has terminated its relationship with the Oakland Athletics effective October 21, 2021 and does not expect it to be revived. Accordingly, it does not appear the BCDC's decision would have a reasonably foreseeable, material financial effect on Chair Wasserman's business entity interest in Wendel Rosen.

As noted, Chair Wasserman also has an interest in Wendel Rosen as a source of income. The reasonably foreseeable financial effect of a governmental decision on an official's financial interest in 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. (Regulation 18702.3(a)(4).) As explained above, the facts do not indicate the decision would have any such effect on Wendel Rosen.

In addition to the materiality thresholds identified above, the reasonably foreseeable financial effect on a source of income to a public official or the official's spouse is material if the decision will achieve, defeat, aid, or hinder a purpose or goal of the source and the official or the official's spouse receives or is promised the income for achieving the purpose or goal. (Regulation 18702.3(b).) This alternative materiality threshold is commonly referred to as the "nexus test." In regard to the nexus test, Wendel Rosen terminated its relationship in October 2021 and does not anticipate representing the Oakland Athletics in the future. Further, Wendel Rosen represented the Oakland Athletics on various leasing matters and the acquisition of Alameda County's interest in the Oakland Coliseum. The decision before BCDC is unrelated, as it ultimately pertains to the development of a separate ballpark. Given the distinct issues and lack of an ongoing relationship with the Oakland Athletics from which Wendel Rosen could benefit, it does not appear there is a "nexus" between Chair Wasserman's prior work for the Oakland Athletics and the decisions now coming before BCDC.

Based upon the facts provided, it is not reasonably foreseeable that the decision will have a material effect on Chair Wasserman's interests in Wendel Rosen as a business entity and source of income. Accordingly, he is not prohibited from taking part in the decisions.

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

KMC:aja