



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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Ansolabehere Advice Letter Nos. A-15-180(a) and A-16-029 SUPERSEDE *Ansolabehere* Advice Letter, No A-15-180 in its entirety.

April 22, 2016

Jon Ansolabehere
Assistant City Attorney
990 Palm Street
San Luis Obispo, CA 93401-3249

Re: Your Request for Advice
Our File Nos. A-15-180(a) and A-16-029

Dear Mr. Ansolabehere:

This letter responds to your requests on behalf of Planning Commissioner Riggs regarding his duties under the conflict of interest provisions of the Political Reform Act (the "Act")¹ and Section 1090. Please note that we do not advise on any other area of law, including common law conflicts of interest. We are also 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. This letter supersedes *Ansolabehere* Advice Letter, No A-15-180 in its entirety.

We are required to forward your request for advice under Section 1090 and all pertinent facts relating to the request to the Attorney General's Office and the San Luis Obispo 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 Commissioner Riggs participate as a Planning Commissioner in City meetings, staff briefings, or internal or external discussions regarding the development of the Mission Plaza Assessment and Master Plan if a local planning and real estate consulting firm (Lisa Wise Consulting or "LWC") is awarded the contract to assist the City in drafting and processing the Plan?

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.

2. Can Commissioner Riggs participate in his official capacity as a Planning Commissioner in City meetings, staff briefings, or internal or external discussions regarding San Luis Ranch when his spouse is a director/employee for LWC and has performed market research for the project?

CONCLUSIONS

1. Commissioner Riggs may not participate as a Planning Commissioner in City meetings, staff briefings, or internal or external discussions regarding the development of the Mission Plaza Assessment and Master Plan if LWC is awarded the contract because the firm is a source of income to him.

2. Commissioner Riggs may participate in his official capacity as a Planning Commissioner in City meetings, staff briefings, or internal or external discussions regarding San Luis Ranch since these decisions will not have a financial effect on his source of income nor on his or his spouse's personal finances.

FACTS

Planning Commissioner Riggs' spouse is the salaried director of a local planning and real estate consulting firm, Lisa Wise Consulting ("LWC"). Commissioner Riggs and his spouse have no ownership interest in LWC. On February 16, 2016 and April 12, 2016, you provided the following additional information concerning LWC:

- Ms. Riggs is the only director, however the director is a directorship in title only. She is not a part of the company's management, is not on salary and does not receive any benefits from the company. She can best be described as an hourly/contract employee. Her pay/work is not tied to any specific contracts or clients.
- She assists with managing employees, business management, and provides high-level strategy on work products. She worked for LWC for more than one year prior to the commissioner's appointment to the planning commission.
- There are roughly 15 employees at LWC, none of whom answer directly to Ms. Riggs. Ms. Riggs answers only to the firm owner and her spouse.
- The firm engages primarily in providing advice to local governments in California, which can include counties, cities, harbor districts, etc. Real estate market analysis is a core of their work for clients throughout California. Ms. Riggs has worked on over 100 projects for LWC throughout the country.
- Most of Ms. Riggs' time is spent working directly for LWC as a contract employee on an on going basis. She also has had her own business and she has worked for other firms in the past. She also teaches real estate finance and financial analysis as a Cal Poly professor.

Mission Plaza Assessment and Master Plan: The City is in the process of developing a "Mission Plaza Assessment and Master Plan" (the "Plan"). The City has recently issued a Request for Proposals for professional services. Mission Plaza is considered one of the City's community and cultural hubs and is a vital component to the City's downtown area. The "General Work Description" for the Plan is as follows:

"In general, primary objectives for this project are to assess the present condition, uses and policies related to the existing Mission Plaza; determine impacts of Plaza events on adjacent residential neighbors, businesses, Old Mission Church operations and San Luis Obispo Creek habitat; explore expansion of the Plaza into the adjacent Broad/Monterey St. 'dogleg' through permanent or temporary street closures; and provide a vision for the future of the Plaza and surrounding streets. The overall goal is to revitalize and refresh this important community hub and provide the City a roadmap for planning of future maintenance and development projects for the Plaza."

Final approval authority for the Plan is the City Council, however, development of the draft Plan will be vetted through several community groups, stakeholders and advisory bodies, including the Planning Commission for recommendations. Commissioner Riggs does not have any real property interest near the Mission Plaza.

LWC intends to bid on the Plan. If selected as the consultant, LWC (including Ms. Riggs) would assist the City in drafting and processing the Plan. LWC's work would be substantively reviewed by City staff, however, it is anticipated that LWC would present information directly to stakeholders, and advisory bodies, including the Planning Commission. The City would be the entity who initiates the proceedings and makes governmental decisions regarding the Plan since the City is considered the project applicant.

You stated that the Planning Commission will not be making any recommendations regarding the selection of a consultant (or consultants) for the Plan. The City's RFP process for the Plan is exclusively performed by the City Council and City staff. No advisory bodies, including the Planning Commission, are involved in that process. Once a firm is selected, that firm will purely assist City staff in the review and processing of the proposed Plan.

The Plan is a City initiated project and the decisions that the Planning Commission will be making regarding this project do not involve the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with LWC. If LWC were selected as the consultant, the selection would not change Ms. Riggs' salary because her salary is not based upon the number of contracts LWC enters into.

San Luis Ranch: The City has received an application for a 131-acre development off of Madonna Road, San Luis Obispo. The development property is currently entitled through a countywide initiative that was approved by the voters in 2006. The current property owner however, has elected to seek new entitlements through the City which include annexation of the property into the City's limits, a general plan amendment, development of a specific plan, zoning code amendments and conditional use permit for 350-500 residential units; 50,000 - 200,000 sq. ft.

of commercial space; 50,000 to 150,000 sq. ft. of office space; 200 room hotel(s); and 50% of land dedicated to open space and agricultural use.

The City's Planning Commission will be reviewing the proposed entitlements for the project and making recommendations to the City Council. The developer of San Luis Ranch used LWC to perform some real estate market analysis for the proposed project. This work is not a specific component of the City's development application, however, that research will likely affect the nature of the entitlements eventually sought by the developer. On February 16, 2016 you provided additional information about the project:

- The work the city required the developer to commission has been completed. The contract between LWC and the developer was executed, completed and fully paid in late 2014/early 2015. This is the only contract that LWC has ever had with the specific developer and there is not a possibility of any future work on this project, and it is likely that the firm will not work with this developer ever again.
- The decision on the application does not add any value to the firm. The analysis provided is peripheral to the application, evaluating whether or not the market can bear the number of housing units being proposed by the applicant. This is the only work that the firm is providing to the project applicant.

ANALYSIS

Conflict of Interest under the Act

1. Mission Plaza Assessment and Master Plan. Section 87100 prohibits any state or local public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. Financial interests include:

- Any real property in which the public official has a direct or indirect interest of at least \$2,000. (Section 87103(b).)
- Any business entity in which the public official has a direct or indirect investment worth at least \$2,000 and any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(a) and (d).)
- Any source of income, such as a business entity, from which the official has received income of \$500 or more within 12 months before the decision. This also includes income from any client of the business entity of at least \$500, provided to and received by the public official within 12 months before the decision is made. (Section 87103(c).)
- Any donor of gift(s) amounting to a total of at least \$460 within 12 months before a decision is made. (Section 87103(e).)
- A public official's own personal finances, or those of a member of his or her immediate family. (Section 87103.)

As a member of the San Luis Obispo Planning Commission, Commissioner Riggs is a public official. He has a financial interest in his own personal finances and those of his immediate family, including his spouse. Commissioner Riggs has a community property interest in his spouse's income from LWC, if the income totaled \$500 or more within twelve months prior to any governmental decision. We focus on Planning Commissioner Riggs's financial interest in LWC as his spouse's employer and source of income.

If LWC is the selected contractor by the city council, the decisions regarding the Plan (and LWC's planning work under the contract) would be the subject of the decisions by the Planning Commission. Therefore, the financial effects on LWC would be foreseeable and material and the Commissioner would have a conflict of interest under the Act. (Regulation 18701(a) and Regulation 18702.2(a)(6) and (7).) Consequently, Commissioner Riggs would have a conflict of interest.

When a public official who holds an office specified in Section 87200 (such as a planning commissioner) has a conflict of interest in a decision noticed at a public meeting, he or she must: (1) immediately prior to the discussion of the item, orally identify each type of economic interest involved in the decision as well as details of the economic interest on the record of the meeting; (2) recuse himself or herself, and (3) leave the room for the duration of the discussion and/or vote on the item. (Section 87105; Regulation 18707.)

2. San Luis Ranch: Neither Ms. Riggs nor LWC are the subject of the San Luis Ranch decision. Under such circumstances the effect is reasonably foreseeable if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable.

Under your facts, it appears LWC delivered a finished product to the developer – a real estate market analysis. Thus, the planning commission decision will not financially affect LWC absent extraordinary circumstances. Since the decision will not have a financial effect on LWC, Commissioner Riggs does not have a conflict of interest in the decision.

Section 1090

Section 1090 codifies the common law prohibition against “self-dealing” with respect to contracts. Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties.² 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.³

² *Thomson v. Call* (1985) 38 Cal.3d 633, 646.

³ *Stigall v. Taft* (1962) 58 Cal.2d 565, 569.

We employ a six-step analysis to determine whether an official has a disqualifying conflict of interest under Section 1090.

Step One: Is the official subject to the provisions of Section 1090?

Section 1090 applies to virtually all state and local officers, employees, and multi-member bodies, whether elected or appointed. The section 1090 prohibition also applies to persons in advisory positions to contracting agencies. (*Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278; *City Council v. McKinley* (1978) 80 Cal.App.3d 204.) This is because such individuals can influence the development of a contract during preliminary discussions, negotiations, etc., even though they have no actual power to execute the final contract. As member of the San Luis Obispo Planning Commission, Commissioner Riggs is subject to the provisions of Section 1090.

Step Two: Does the decision at issue involve a contract?

To determine whether a contract is involved in the decision, one may look to general principles of contract law,⁴ 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.’”⁵

1. Mission Plaza Assessment and Master Plan: Here, the decisions at issue involve a contract to be made between the City and potentially LWC. The City is in the process of developing a “Mission Plaza Assessment and Master Plan” (the “Plan”). The City has recently issued a Request for Proposal for professional services. LWC intends to submit a proposal to the City.

2. San Luis Ranch: The City has received an application for a 131-acre development off of Madonna Road, San Luis Obispo. The development property is currently entitled through a countywide initiative that was approved by the voters in 2006. The current property owner however, has elected to seek new entitlements through the City which include annexation of the property into the City’s limits, a general plan amendment, development of a specific plan, zoning code amendments and conditional use permit for 350-500 residential units; 50,000 - 200,000 sq. ft. of commercial space; 50,000 to 150,000 sq. ft. of office space; 200 room hotel(s); and 50% of land dedicated to open space and agricultural use. Development agreements between a city and a developer are contracts for purposes of Section 1090. (78 Ops.Cal.Atty.Gen. 230 (1995); see also 85 Ops.Cal.Atty.Gen. 34 (2002).)

Step Three: Is the official making or participating in making a contract?

1. Mission Plaza Assessment and Master Plan: Participation in the making of a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.) You asked if Commissioner Riggs may participate as a Planning

⁴ Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995).

⁵ *People v. Honig* (1996) 48 Cal.App.4th 289, at p. 351 citing *Stigall*, supra, at pp. 569, 571.

Commissioner in City meetings, staff briefings, or internal or external discussions regarding the development of the Mission Plaza Assessment and Master Plan.

You noted that the Planning Commission will not be making any recommendations regarding the selection of a consultant (or consultants) for the Plan. The City's RFP process for The Plan is exclusively performed by the City Council and City staff. No advisory bodies, including the Planning Commission, are involved in that process. Once a firm is selected, that firm will purely assist City staff in the review and processing of the proposed Plan. Therefore, the official will not be participating in a contract for purposes of Section 1090. Consequently, we do not further consider the application of Section 1090 to the Plan.

2. San Luis Ranch: The City's Planning Commission will be reviewing the proposed entitlements for the project and making recommendations to the City Council. Thus, the Planning Commissioner will be participating in the development decision.

Step Four: Does the official have a financial interest in the contract?

2. San Luis Ranch: Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest." As used in Section 1090, this means any financial interest that might interfere with a city officer's unqualified devotion to his public duty. Officials are deemed to have a financial interest in a contract if they might profit from it in any way. In addition, an official also has an interest in the community and separate property income of his or her spouse, and the reach of this financial interest is broad.

While Section 1090 does not define "financial interest," the courts have issued decisions applying this provision. In a recent case, an appellate court stated, "[t]he defining characteristic of a prohibited financial interest is whether it has the potential to divide an official's loyalties and compromise the undivided representation of the public interests the official is charged with protecting."⁶

"The certainty of financial gain is not necessary to create a conflict of interest The government's right to the absolute, undivided allegiance of a public officer is diminished as effectively where the officer acts with a hope of personal financial gain as where he acts with certainty."⁷

You noted that the work the city required the developer to commission has been completed. The contract between LWC and the developer was executed, completed and fully paid in late 2014 early 2015. This is the only contract that LWC has ever had with the specific developer and there is not a possibility of any future work on this project, and it is likely that the firm will not work with this developer ever again. Thus, the contract decision in question would not affect LWC's finances or those of the Planning Commissioner's spouse and Section 1090 does not prohibit participation in the decision. (See *Eden Township Healthcare District v. Sutter Health* (2011) 202 Cal. App. 4th 208.)

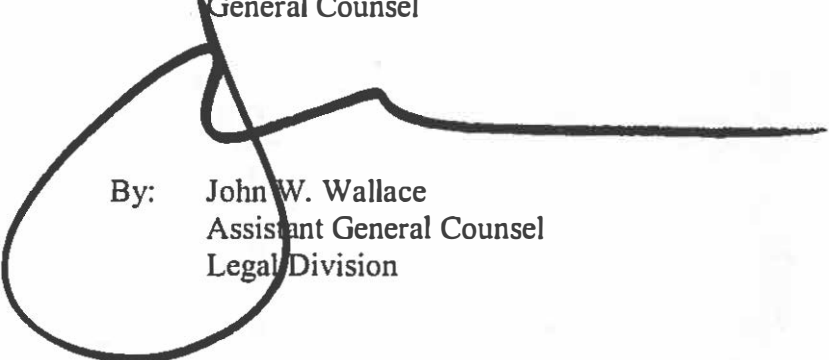
⁶ *People v. Honig*, supra.

⁷ *People v. Honig*, supra.

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

Sincerely,

Hyla P. Wagner
General Counsel



By: John W. Wallace
Assistant General Counsel
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JWW:jgl