STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
428 J Street • Suite 620 • Sacramento, CA 95814-2329
(916) 322-5660 • Fax (916) 322-0886

September 6, 2017

Ansolabehere Advice Letter No. A-17-160 is SUPERSEDED by *Ansolabehere* Advice Letter No. A-17-160a

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

Re: Your Request for Advice
Our File No. A-17-160a

Dear Mr. Ansolabehere:

This letter responds to your request for advice on behalf of City Architectural Review Commission ("ARC") member Allen Root regarding the conflict of interest provisions of the Political Reform Act (the "Act")[1] and Government Code Section 1090. Please note that we do not advise on any other area of law, including the Public Contract Code or 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.

In regard to our advice on Section 1090, we are required to forward your request 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).)

QUESTION

May Commissioner Root participate in his official capacity as an ARC Commissioner in City meetings, staff briefings, or internal or external discussions regarding San Luis Square given his intent to submit an application to work on the Annie's Dance art piece being proposed for the project?

[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.

CONCLUSION

No. However, as long as Commissioner Root has no input or participation in the decisions regarding San Luis Square in his role as an ARC Commissioner, neither the Act nor Section 1090 prohibits him from contracting with the San Luis Obispo County Arts Council to work on the Annie's Dance art piece in his private capacity.

FACTS

Commissioner Root is a member of the City of San Luis Obispo's Architectural Review Commission. The City has received an application for a multi-building, mixed-use development within the City's downtown area which is commonly referred to as "San Luis Square." More specifically, San Luis Square includes three, four-story structures with 19,792 square feet of commercial space, 62 residential units, 36 hotel rooms, and a two-level underground parking garage with 136 parking spaces. The project includes various outdoor seating areas and a public plaza area connecting the buildings and the surrounding area. The ARC is scheduled to review San Luis Square for approval at an upcoming hearing. According to additional information provided by Interim Assistant City Attorney Anne Russell on August 24, 2017, San Luis Square meets all zoning and land use requirements and the ARC has final approval of the project.

San Luis Obispo County Arts Council dba "Arts Obispo," a 501(c)(3) non-profit organization whose mission is to advocate for art and culture in San Luis Obispo County, has been approached by the developer of San Luis Square for assistance with a public art element for the development. One piece of art being considered is "Annie's Dance," a proposed thirty-foot high metal sculpture which is intended to commemorate Ann Ream, a local artist and advocate who passed away. Commissioner Root is one of several artists who have expressed desire to honor Ann Ream with such an art piece since her passing.

If the mixed-use project moves forward at this location, Arts Obispo may contract with the developer for the art piece. Then, based on a final negotiated budget, Art Obispo would finalize the art plan to include community engagement; develop and send a Request for Qualifications, the "call for artists;" and facilitate a panel process to vet applicants and select a team most qualified to fabricate and install the project. Commissioner Root intends to submit an application to participate in the art piece. Although Commissioner Root is a well-qualified artist, there is no promise or guarantee that he would be chosen to participate in the work. If Commissioner Root is chosen however, Arts Obispo will pay him more than $500 for his participation. Arts Obispo will receive funding directly from the developer. There will be no direct contractual relationship between Commissioner Root or any other artist and the developer.

Although not central to the ARC's purview, the Annie's Dance art piece will be referenced in the ARC's agenda packet for this project. It is anticipated that more formal negotiations between the developer and Arts Obispo regarding the sculpture will only take place once the project is entitled, and that Arts Obispo's retention of the group of artists will be approximately one year following those negotiations. Per information provided by Anne Russell, approval of the project itself does not include approval of any particular piece of art. The developer would then need to have the piece considered by a public art jury (under the auspices of the Parks and Recreation Dept.). If approved by the jury, the piece would come back to the ARC for final approval.

ANALYSIS

Government Code Section 1090:

Section 1090 provides, in part, that "[m]embers of the Legislature, state, County, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members." Section 1090 applies to virtually all state and local officers, employees, and multi-member bodies, whether elected or appointed and covers a broad range of actions by a public official other than actually approving a contract, including actions involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing plans and specifications, and solicitation for bids.

Section 1090 applies only when a decision involves a contract. To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), 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.'" (*People v. Honig*, supra, at p. 351 citing *Stigall*, supra, at pp. 569, 571.)

Land Use and Zoning

Land use and zoning regulations are derivative of a City's general police power, which allow local jurisdictions to enact land use and zoning rules to govern future development. (See *DeVita v. County of Napa*, (1995) 9 Cal. 4th 763, 782; see also *Big Creek Lumber Co. v. City of Santa Cruz*, (2006) 38 Cal. 4th 1139, 1159.) In *Village of Belle Terre v. Boraas*, (1974) 416 U.S. 1, the U.S. Supreme Court addressed the scope of such power and stated: "The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." (*Id.* at 9.)

Land use decisions may generally be broadly classified into legislative actions and quasi-judicial (or adjudicatory) actions. Legislative actions involve adoption of generally applicable laws or basic policies and include adoption and amendment of general and specific plans and zoning ordinances. (See, e.g., *Arnel Dev. Co. v City of Costa Mesa* (1980) 28 Cal. 3d 511, 514.) Quasi-judicial actions are those that involve application of preexisting laws or standards to a specific project. (See, e.g., *San Diego Bldg. Contractors Ass'n v City Council* (1974) 13 Cal. 3d 205, 211.)

Some projects can be permitted by city or county planning staff without further approval from elected officials. These projects are typically referred to as "by-right." By-right projects require only an administrative review designed to ensure they are consistent with existing general plan and zoning rules, as well as meet standards for building quality, health, and safety. By-right approval is uncommon for large development projects.[2]

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[2] See the Legislative Analyst's Office report "Considering Changes to Streamline Local Housing Approvals" at: http://www.lao.ca.gov/Publications/Report/3470

In addition to seeking approval of basic building permits, projects are routinely required to go through a "design review" process. Design review primarily aims to ensure that the physical form and aesthetic of a proposed development are in line with the community's established principles and the character of the surrounding neighborhood.

Decisions involving the adoption of generally applicable laws or basic policies, the amendment of general and specific plans and zoning ordinances (as discussed above), are generally not contractual in nature and Section 1090 would not be implicated. Likewise, routine or administrative approvals of permits, subdivisions, or design and site plans, without negotiated conditions of approval, are not generally contractual in nature. However, the Attorney General's Office has consistently stated that development agreements, subdivision improvement agreements and reimbursement agreements executed during the subdivision map approval process constitute "contracts" for purposes of Section 1090. (*See* 78 Ops. Cal. Atty. Gen. 230 (1995); 89 Ops. Cal. Atty. Gen. 278 (2006).)

Development Agreements

The Legislature recognized that the newly authorized development agreements would provide benefits for both municipality and developer. The agreements allowed the developer to proceed with a project with the assurance that the project would be approved based on rules, regulations, and policies existing at the time the development agreement was approved, even if those rules, regulations, and policies changed over the course of the development project. (Gov. Code, § 65864, subd. (b).) In 1984, the Legislature added a declaration that development agreements would also allow municipalities to extract promises from the developers concerning financing and construction of necessary infrastructure. (Gov. Code, § 65864, subd. (c); Stats. 1984, ch. 143, § 1, p. 431.) This declaration makes it clear that the scope of development agreements need not be limited to freezing land use rules, regulations, and policies but can include other promises between the municipality and the developer. Thus, a legislatively approved development agreement gives both parties vested contractual rights.

After approval by ordinance, the development agreement is enforceable despite subsequent changes in the municipality's land use laws. (Gov. Code, § 65865.4.) The development agreement may be amended or cancelled only by mutual consent of the parties to the agreement. (Gov. Code, § 65868.)

With these principles in mind, the Attorney General's Office stated that a development agreement is a contract in 78 Ops. Cal. Atty. Gen. 230 (1995):

> "A development agreement contains the essential elements of a contract as defined by the Legislature. "A contract is an agreement to do or not to do a certain thing." (Civ. Code, § 1549.) "It is essential to a contract that there should be: 1. Parties capable of contracting; 2. Their consent; 3. A lawful object; and, 4. A sufficient cause or consideration." (Civ. Code, § 1550.) A development agreement contemplates that both the city or county and the developer will agree to do or not to do certain things. Both parties will mutually consent to terms and conditions allowable under the law. Both will receive consideration. The developer will essentially receive the local agency's assurance that they can complete the project.

> The local agency in turn will reap the benefit of the development, with all the conditions it might legitimately require, such as streets, parks, and other public improvements or facilities. (See Civ. Code, §§ 1556, 1565, 1595, 1596, 1605.)"

While many land use decisions are "regulatory in nature" and not contracts, there are some, including development agreements, that are contractual; involving consideration by both the local governmental entity and the project proponent, with the latter typically providing some type of public improvement or facility as a part of this consideration. In determining whether Section 1090 would apply in the context of land use decisions, we must determine whether the decision is purely regulatory, or whether it involves the project proponent providing a public improvement or similar consideration, thus making it contractual in nature.

The decision at issue here is the ARC approval of the San Luis Square project. Specifically, the ARC will be reviewing the project to ensure that it complies with applicable architectural guidelines and design rules. This is similar to participating in decisions that involve "routine or administrative approvals of permits, subdivisions, or design and site plans, without negotiated conditions of approval", which are not generally contractual in nature. To be sure, this process does not involve the essential elements of a contract or the project proponent agreeing to provide such as streets, parks, or other public improvements as is common with true development agreements. The decision at issue is not a contract and does not fall within the scope of Section 1090.

Conflict of Interest under the Act:

Section 87100 prohibits any public official from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest. Interests from which a conflict of interest may arise are defined in Section 87103 and include the following:

- An interest in the official's personal finances, including those of the official's immediate family, also known as the "personal financial effects" rule. (Section 87103.)

Foreseeability and Materiality:

Regulation 18701(b) sets out the appropriate standard to determine foreseeability where the financial interest is not explicitly involved in the decision. Regulation 18701(b) states that a financial effect is reasonably foreseeable where it "can be recognized as a realistic possibility and more than hypothetical or theoretical ... absent extraordinary circumstances beyond the public official's control." A financial effect need not be likely to be considered reasonably foreseeable. (Regulation 18701(b).) For a financial effect on an official's personal finances, the effect "is material if the official or the official's immediate family member will receive a measurable financial benefit or loss from the decision." (Regulation 18702.5(a).)

As relevant to your facts, the following factors in Regulation 18701(b) are considered in determining whether the financial effect on an official's financial interest is reasonably foreseeable:

"(2) Whether the public official should anticipate a financial effect on his or her financial interest as a potential outcome under normal circumstances when using appropriate due diligence and care."

"(4) Whether a reasonable inference can be made that the financial effects of the governmental decision on the public official's financial interest might compromise a public official's ability to act in a manner consistent with his or her duty to act in the best interests of the public."

"(5) Whether the governmental decision will provide or deny an opportunity, or create an advantage or disadvantage for one of the official's financial interests, including whether the financial interest may be entitled to compete or be eligible for a benefit resulting from the decision."

"(6) Whether the public official has the type of financial interest that would cause a similarly situated person to weigh the advantages and disadvantages of the governmental decision on his or her financial interest in formulating a position."

You have stated that Arts Obispo would contract with the developer for the art piece and facilitate a panel process to vet applicants and select a team most qualified to fabricate and install the project. Commissioner Root intends to submit an application to participate in the art piece, but that there is no promise or guarantee that he would be chosen to participate.

In this instance, Commissioner Root has expressed a desire to apply to Arts Obispo to work on the proposed art piece, and would be entitled to receive income in excess of $500 if selected to work on the art piece. Although the approval of the San Luis Square project does not guarantee that Commissioner Root will work on the art piece, it is at least foreseeable that his personal finances will be materially affected, because approval of the project will provide an opportunity for him to "compete or be eligible" to participate in the art piece. Therefore, Commissioner Root has a disqualifying conflict of interest in decisions regarding the San Luis Square project.

Provided Commissioner Root recuses himself from any decision related to the San Luis Square development proposal, the Act would not prohibit him from subsequently entering into a future contract to participate in the Annie's Dance art piece in his private capacity.

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

Sincerely,

Jack C. Woodside
General Counsel

By: Zachary W. Norton
Senior Counsel, Legal Division

ZWN:jgl