



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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November 9, 2022

Veronica Ramirez  
Redwood City, CA 94063

Re: Your Request for Advice  
**Our File No. A-22-089**

Dear Ms. Ramirez:

This letter responds to your request for advice on behalf of Redwood City Councilmember Jeff Gee regarding the conflict of interest provisions of the Political Reform Act (the “Act”)<sup>1</sup> and Government Code section 1090, et seq. Please note that we are only providing advice under the conflict of interest provisions of the Act and Section 1090 and 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.

Regarding 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 Mateo 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

Under Section 1090 and the Act’s conflict of interest provisions may Redwood City (“City”) Councilmember Jeff Gee participate in decisions surrounding the formation of a new Transit District and related contracts between the City and Lowe Enterprises (“Lowe”) regarding land use entitlements and a development agreement within the Transit District given his interest in Swinerton Management and Consulting, a subsidiary of Swinerton Inc., which receives income from Lowe through a separate subsidiary?

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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 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.

## CONCLUSION

Under Section 1090, Councilmember Gee is prohibited from participating in any decisions involving a contract between the City and Lowe because of his interest in the contract resulting from income paid by Lowe to Swinerton Management and Consulting's parent company and a separate subsidiary also owned by the parent company. Councilmember Gee is also prohibited from taking part in decisions related to establishing the Transit District that will be an essential element of the contracts between the City and Lowe. However, if Councilmember Gee recuses himself from the decision related to the contract and the creation of the Transit District, the City may enter the contract and establish the Transit District because Councilmember Gee's interest is a remote interest under Section 1091(b)(2).

## FACTS AS PRESENTED BY REQUESTER

You are the City Attorney for the city of Redwood City and the authorized representative of City Councilmember Jeff Gee. Jeff Gee has been a City Councilmember for multiple years but was most recently elected in 2020. As a City Councilmember he has been appointed to the SamTrans Board and JPB, which both set seats aside for councilmembers in their respective regions.

In his private employment, Councilmember Gee is the Vice President of Swinerton Builders, doing business as Swinerton Management and Consulting since 2002. Swinerton Builders is a wholly owned subsidiary of Swinerton Inc., a nationwide construction company with more than 4,500 employees. Swinerton Inc., is employee owned, with no individual owning more than 3% of the company. Councilmember Gee owns less than 1% of the company.

The City has initiated a planning process to establish a Transit District, which would accommodate transit-oriented uses and would enable redevelopment of the Sequoia Station Shopping Center ("Center"). The redevelopment of the Center would result in increased service by Caltrain. Lowe Enterprises, a large-scale real estate investment and development firm, owns much of the property within the Transit District area and would seek land use entitlements to redevelop the Center. SamTrans also owns property within the Transit District, which Lowe Enterprises seeks to acquire. The City anticipates entering into a development agreement with Lowe Enterprises surrounding the entitlements and acquisitions.

At this time, Lowe Enterprises has a contract with Swinerton Builders Orange County and Los Angeles (OCLA), which is also a subsidiary owned by Swinerton Inc., but is a separate entity from Swinerton Management and Consulting. Under this contract, OCLA is currently working for Lowe Enterprises to provide preconstruction services on an unrelated project in Southern California. Additionally, OCLA has contracted with Lowe at least one time previously for preconstruction services on a separate development project. It is your understanding that Lowe Enterprises has not contracted with any affiliate of Swinerton Inc., including OCLA, to provide any services for projects within the planned Transit District. Regardless, OCLA and its parent company, Swinerton Inc., is currently, and has previously received income from Lowe as a paid contractor.

## ANALYSIS

### *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. City of Taft* (1962) 58 Cal.2d 565, 569.) A contract that violates Section 1090 is void, and the prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.) When Section 1090 applies to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain. Instead, the entire governing body is precluded from entering into the contract. (*Thompson, supra*, at pp. 647-649; 86 Ops.Cal.Atty.Gen. 138, 139 (2003).)

Initially, employees have been found to have a financial interest in a contract that involves their employer, even where the contract would not result in a change in income or directly involve the employee, because an employee has an overall interest in the financial success of the firm and continued employment. (84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

Here, however, the contract at issue would be between the City and Lowe, a company that has an ongoing relationship with OCLA, a subsidiary owned by Swinerton Inc. Therefore, the determinative issue is whether Councilmember Gee has a prohibitory financial interest in the potential contract between the City and Lowe by virtue of his employment with Swinerton Management and Consulting, a separately owned subsidiary of Swinerton Inc.

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.) 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 General opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (*People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn.5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; 85 Ops.Cal.Atty.Gen. 34, 36.:38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

In addition, case law and statutory exceptions to Section 1090 make clear that the term “financially interested” must be liberally interpreted. (See, e.g., *People v. Deysher* (1934) 2 Cal.2d 141, 146.) Further, “the certainty of financial gain is not necessary to create a conflict of interest... (t)he 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.” (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1298 (citations omitted).)

We have previously concluded that the financial ties between a parent company and its wholly owned subsidiary render the two entities inseparable under Section 1090. (*Ramirez Advice Letter*, No. A-21-053.) Similarly, we find no distinction with Councilmember Gee’s interest in

Swinerton Management and Consulting, which would extend to both Swinerton Inc. as the parent company and OCLA as a separately owned subsidiary of Swinerton Inc.

Considering the current contract between OCLA and Lowe, as well as the previous contract between the two companies, Councilmember Gee could potentially be influenced by a desire to maintain favorable ongoing relationships between Lowe and Swinerton Inc., as well as any subsidiary owned by Swinerton Inc. Moreover, given his employment with Swinerton Management and Consulting and ownership share in Swinerton Inc., Councilmember Gee's interest in the income received by Swinerton Inc. and its owned subsidiary, OCLA, may prevent the Councilmember from providing the absolute, undivided allegiance to the City required under Section 1090. (See e.g., *Reyes* Advice Letter, No. A-15-099 [A city mayor was disqualified under Section 1090 even though his employer was not the contracting party but was instead a subcontractor of the contracting party.]; *Schons* Advice Letter, No. A-15-114 [A consulting firm was disqualified from conducting the hiring process for potential vendors even though the process would be conducted blindly because the consulting firm knew that it had financial interests in at least some of the potential vendors.].) Therefore, Councilmember Gee would have a prohibitory financial interest in any contracts between the City and Lowe resulting from OCLA's existing and previous contract with Lowe.

#### Remote Interest/Noninterest Exception

The Legislature has created various statutory exceptions to Section 1090's prohibition where the financial interest is deemed to be a "noninterest," as defined in Section 1091.5, or a "remote interest," as defined in Section 1091.

If a noninterest is present, the contract may be made without the officer's abstention, and a noninterest generally does not require disclosure. (*City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 514-515.) If a remote interest is present the contract may be made if: (1) the officer discloses the interest in the contract to his or her public agency; (2) that interest is noted in the agency's official records; and (3) the officer abstains from any participation in the making of the contract. (Section 1091(a).)

There is no indication that a noninterest exception applies to the facts presented. Turning to the remote interest exceptions, Section 1091(b)(2) provides that a governmental officer has a remote interest if: (1) the contracting party has 10 or more employees; (2) the officer was an employee or agent of the contracting party for at least three years prior to the officer initially accepting his or her office; (3) the officer owns less than three percent of the contracting party's shares of stock; (4) the officer is not a director or officer of the contracting party; and (5) the officer did not directly participate in formulating the bid of the contracting party.

In applying the remote interest exception to Councilmember Gee's interest in the contract resulting in OCLA's income from Lowe, we find that it applies. Extension of a remote interest is appropriate where the officer's interest at issue is no less remote. (*Whitham* Advice Letter, A-19-129; *Schons* Advice Letter, No. A-17-129; *Craft* Advice Letter, No. A-14-168.) Here, Councilmember Gee's interest as it relates to Swinerton Management and Consulting and its parent company Swinerton Inc., meets every element: the companies have more than 10 employees; Councilmember Gee has been with Swinerton Management and Consulting since 2002 and did not take his current office until 2020; he owns less than 1% of Swinerton Inc., and he has not

participated in any bid on behalf of Swinerton Inc., its subsidiaries, or Lowe. While Swinerton Inc. and its subsidiaries are not the contracting party, we find extension of the remote interest exception is appropriate because, just as the exception would apply to a contract between the City and Swinerton Inc. or its subsidiaries, it would also apply to Councilmember Gee's interest in the City's contract with Lowe, which is no less remote.

In conclusion, Councilmember Gee may not participate in the creation of the Transit District or any contract between the City and Lowe. However, the City may still establish the Transit District and enter the contract if Councilmember Gee follows the procedure outlined in Section 1091(a).

*Government Code Section 87100 of the Act*

Additionally, because Councilmember Gee must abstain from any participation in the establishment of the Transit District and related contracts between the City and Lowe under Section 1090, we do not need to further analyze the potential conflict of interest issue raised under the Act. His abstention under Section 1090 would also satisfy the requirements of the Act.

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

Sincerely,

Dave Bainbridge  
General Counsel

By:   
Valerie Nuding  
Counsel, Legal Division

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