



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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September 9, 2022

Marc Pfenninger, AIA
CEO, Principal
STUDIOS Architecture
149 D Street
Redwood City CA, 94063

Re: Your Request for Formal Advice
Our File No. A-22-092

Dear Mr. Pfenninger:

This letter responds to your request for advice regarding Government Code Section 1090, et seq.¹ Please note that we are only providing advice under Section 1090, 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.

We are required to forward your request regarding Section 1090 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 the Act and Section 1090, may you take part in Architectural Advisory Committee decisions regarding a redevelopment project initially submitted by your architectural firm on behalf of your firm's then (and now former) client, the project developer?

CONCLUSION

No, the Act prohibits you from taking part in such decisions because they would aid or hinder a goal of your firm for which you are paid to achieve as CEO and partial owner of your firm.

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.

Because you are disqualified under the Act, we do not further analyze whether you have a prohibited interest in a potential development agreement under Section 1090 except to advise that the recusal required under the Act will similarly satisfy any potential recusal requirements under Section 1090.

FACTS AS PRESENTED BY REQUESTER

You are on the Architectural Advisory Committee (“Committee”) for Redwood City, California (“City”). The Committee’s purpose is to provide advice to the Planning Commission on development buildings, landscape, and public structures in order to provide enhancement of the natural beauty of the environment, and to provide for the orderly and harmonious appearance of structures and grounds. All members of the Committee are required to be licensed architects and live or work in the City. While the Committee provides recommendations, all final decisions are made by the Planning Commission or City Council.

The Committee was first established in 1991 and is designated in the City’s Conflict of Interest Code. The most recent City Resolution establishing the rules and duties of the Committee states, “[t]he authority of the Committee shall be limited to making recommendations in accordance with [the Resolution] and the Committee shall not be vested with authority to grant or deny any entitlement or approval.” Generally, substantive Committee recommendations are approved or adopted without significant amendment or modification by the bodies receiving the recommendations. You explained, “[t]he Planning Commission entrusts [the Committee] with their expertise in architectural design, as most [Committee] recommendations are cosmetic and do not affect land use, size, or intensity of a project.” However, you further explained, “[t]here are times when the Planning Commission has deviated from the [Committee] recommendations, for example, on a recent Downtown residential multifamily building the Planning Commission did not support [the Committee’s] recommendation to increase the rear yard area.”

The Sequoia Station Project (“Project”) is a major redevelopment project of existing retail space next to the City’s train station. It is a transient-oriented, mixed-use development on six blocks (12 acres) with 631 multifamily residential units (including 254 affordable units), 1,230,000 square feet of office space, 166,600 square feet of retail space, a 10,000 square foot childcare facility, and 86,000 square feet of public open space.

The Committee’s role with respect to the Project would involve providing feedback to the project applicant and City staff in multiple study sessions on the Project, more specifically providing comments and direction for the Project with respect to its surroundings, appearance, architectural detailing, articulation, scale, massing, and design. The Committee would respond to specific questions from staff, including:

- Detailing being appropriated for residential and commercial space
- Is there enough variety in the commercial buildings?
- Is there enough relief in the massing?
- Is there sufficient variety in the ground level to activate the public realm?
- Should the corners of the building be articulated more?
- Comments on the exterior materials and colors
- Comments on the location and arrangement of service areas

Future meetings will likely include the Committee's opinion on consistency of the proposal with City plans and regulations and, where applicable, the acceptability of deviations from City plans and regulations.

You are the CEO and Principal of STUDIOS Architecture ("firm"). You are the owner and an officer of the firm. You currently own a little over 5% of the firm. As CEO, you are responsible for overall strategic leadership, planning, and guidance of the business, including both long term strategic planning and day-to-day execution of plans and directions established. As a principal you are also responsible for the long term stewardship of the firm, beginning with being responsible for securing projects and revenue streams, as well as direct leadership and engagement on those projects.

Your firm used to be involved with the Project. The applicant ("Developer") originally retained your firm to study the site. Your firm's efforts ended in mid-2020 and you received your last payment around that time. In total, your firm's fees amounted to approximately \$500,000. Your efforts included identifying the options for the development and making the initial submission to initiate City review and feedback. The aesthetic appearance of the project as currently presented to the Committee is completely different from what your firm had developed. However, there are some planning and site organization qualities that remain the same as your firm had proposed to the City, including block structure and urban design principals, as well as some proposals to exceed prior height limits and density limits due to the proximity of transit.

In early/mid-2020, the client switched architects due to needed expertise. Your firm has not worked on the Project since and the last income received for work on the Project was received more than 12 months ago. However, the Developer is active with other projects with which your firm may seek future involvement.

Around 2010, your firm also worked with the Developer on a potential developer led delivery of a new academic facility at UC Berkeley, but the project did not go forward and was not built. Over the past few years, the firm has occasionally collaborated with the Developer on small feasibility efforts, but none of those have become approved projects.

Because of your firm's previous work on the Project, you have recused yourself from the Committee's prior advisory sessions. It has been over two years since your firm was involved in the Project.

ANALYSIS

The Act

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."

"Public official" is defined as "every member, officer, employee, or consultant of a state or local government agency," except for specified exceptions not relevant here. (Regulation 18700(c)(1).) The term "member," in turn, "does not include an individual who performs duties as

part of a committee, board, commission, group, or other body that does not have decisionmaking authority.” (Regulation (c)(2).) A committee possesses decisionmaking power whenever:

- (i) It may make a final governmental decision;
- (ii) It may compel or prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto that may not be overridden; or
- (iii) It makes substantive recommendations and, over an extended period of time, those recommendations have been regularly approved without significant amendment or modification by another public official or governmental agency.

The Committee was initially created in 1991 and although the Planning Commission does not always adopt the Committee’s recommendations, in general, substantive Committee recommendations are approved or adopted by the Planning Commission without significant amendment or modification by the bodies receiving the recommendations. Thus, although the City Resolution states that the Committee is not vested with the authority to grant or deny any entitlement or approval, the Committee possesses decisionmaking power for purposes of the Act.

Moreover, while the Committee has been named an “advisory” committee, the name is not determinative and the City itself has previously determined that the Committee is not an advisory committee for purposes of the Act when it designated the Committee in the City’s Conflict of Interest Code. The Act requires agencies, in adopting and promulgating a Conflict of Interest Code, to enumerate the positions within the agency “that involve the making or participation in the making of decisions which may foreseeably have a material effect on any financial interest” (Section 87302(a).) Such positions are referred to as “designated employees.” (Section 82019(a)(3).) The term “designated employee” does not include “any unsalaried member of any board or commission which serves a solely advisory function” (Section 82019(b)(1).) Accordingly, based on the City’s previous determination (see Section 87301), you qualify as a “public official” subject to Section 87100’s conflict of interest prohibition.

“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 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).)

Your firm has not received any income from the Project applicant within the past 12 months. Accordingly, you do not have a source of income interest in the Project applicant. You do, however, have a source of income interest in your firm.

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 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).) Under Regulation 18702.1, the Act provides that the reasonably foreseeable financial effect of a governmental decision on an official’s financial interest in a business entity, including a business entity that is a source of income, 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.
- 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.
- The official knows or has reason to know that the entity has an interest in real property and the property is a named party in, or the subject of, the decision under Regulations 18701(a) and 18702.2(a)(1) through (6), or there is clear and convincing evidence the decision would have a substantial effect on the property.

A material financial effect also exists, however, if the decision will achieve, defeat, aid, or hinder a purpose or goal of the source of income 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 is commonly referred to as the “nexus” test. As an owner, CEO, and Principal of your firm, you are responsible for the long term stewardship of the firm, including securing projects and revenue streams. Your firm’s work was used as the initial submission to the City, elements of your firm’s initial work remain part of the Project, and you have a working relationship with the Developer and may work with them again in the future. With this in mind, your relationship with the Developer and your ability to secure subsequent projects and revenue streams would likely be hindered if, for example, after your firm performed foundational work for the Developer, the Committee deemed the submission insufficient or inconsistent with City plans and regulations. As such, the Committee’s decisions with respect to the Project would have a reasonably foreseeable, material financial effect on your source of income interest and the Act prohibits you from taking part in the Committee’s decisions regarding the Project.

Under Section 1090, public officials “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 a member.” 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.) 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.) A contract that violates Section 1090 is void, 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 is applicable to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain; the entire governing body is precluded from entering into the contract. (*Id.* at pp. 647-649.)

You have not identified any contract coming before the Committee. However, to the extent that the Committee’s advice may ultimately affect a development agreement between the City and the applicant, we note that a development agreement is a contract for purposes of Section 1090. (78 Ops.Cal.Atty.Gen. 230 (1995).) Further, the “making” of a contract has been interpreted to include planning, preliminary discussions, negotiations, compromises, reasoning, drawing of plans and specifications and solicitation for bids. (*Stigall, supra*, 58 Cal.2d at p. 569.)

Based on the facts presented, we do not need to further analyze whether you also have a disqualifying financial interest in a potential development agreement under Section 1090. Typically, when Section 1090 applies to a member of a governing body of a public entity, the prohibition generally cannot be avoided by having the interested board member abstain from the decision. Rather, the entire governing body is precluded from entering the contract. (*Thomson, supra*, at pp. 647-649.) Here, however, the Committee would not be entering a contract with the Developer—rather, any development agreement would be between the Developer and the City represented by City Council. Therefore, to avoid any potential Section 1090 conflict and in accordance with your disqualification under the Act, you should simply recuse yourself from taking part in any aspect of the contracting process the Committee may be involved with, including advising the City Council regarding the Project and a potential development agreement. (See 80 Ops.Cal.Atty.Gen. 41 (1997); 85 Ops.Cal.Atty.Gen. 34, 36 (2002).)

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