



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION 1102
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September 8, 2023

Rachel H. Richman
City of Delano
444 South Flower Street, Suite 2400
Los Angeles, CA 90071-2953

Re: Your Request for Advice
Our File No. A-23-110

Dear Ms. Richman:

This letter responds to your request for advice regarding the Political Reform Act (the “Act”) and Government Code Section 1090, et seq.¹ Please note that we are only providing advice under the Act and 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 Kern 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

Does the Act or Section 1090 prohibit City of Delano Mayor Joe Alindajao and Councilmember Mario Nunez, who both own rental properties in the City, from taking part in decisions whether to issue a Request for Proposals (“RFP”) to obtain proposals from consultants to perform an analysis regarding the implementation costs of the City’s proposed rent control program, and which consultant to award the eventual contract?

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.

CONCLUSION

The Act prohibits them from taking part in the decision whether to issue an RFP and to award a contract to a consultant because their real property interests in their rental properties would be the “subject” of the decisions under Regulation 18702.2(a)(3); however, the public generally exception under Regulation 18703(e) applies to allow Councilmember Nunez to participate in the decisions. In addition, Section 1090 does not prohibit Councilmember Nunez from taking part in the decisions because his interest in rental properties do not result in a financial interest in the eventual contract between the City and the consultant for purposes of Section 1090.

FACTS AS PRESENTED BY REQUESTER

You are the City Attorney for the City seeking advice on behalf of Mayor Joe Alindajao and Councilmember Mario Nunez. Mayor Alindajao owns one 4-unit rental property in the City. Councilmember Nunez and his spouse own a single-family rental property, and his spouse owns two more single-family rental properties as part of a partnership. In addition, his adult son and adult daughter have one rental property of their own in partnership. Neither child lives at the home of Councilmember Nunez. All the rental properties are in the City.

Currently, the City does not have any provisions in its Municipal Code regarding rent control or rent stabilization. You provided a Staff Report to the City Council that recommends the City Council have a discussion and potentially take action to issue a Request for Proposals to obtain proposals from consultants to perform an analysis regarding the potential cost to the City to implement a rent stabilization program and the potential annual fee for tenants and property owners to implement and enforce the program.

The Staff Report states that City Council briefly discussed rent stabilization in October of 2022 and direction was given to bring back more information on rent stabilization including considerations and elements that could be a part of a rent stabilization program. In December of 2022, the City Council further discussed the possibility of a rent stabilization ordinance and directed staff to prepare a draft ordinance, similar to the City of Bell Gardens, that is limited to 70-percent CPI or 3-percent cap per year, whichever is higher.² In April of 2023, the City Council directed staff to “perform a study to determine the cost in administering, implementing, and enforcing the draft rent stabilization ordinance and to implement a rental registration fee and to consider the issuance of an RFP for such study.” The Staff Report noted an RFP had been prepared but “since the City Council has not developed program parameters, potential proposers may have trouble providing a responsive proposal.” Neither Mayor Alindajao nor Councilmember Nunez has participated or voted on those items.

You provided a proposed RFP to perform a comprehensive fee study associated with the potential rent stabilization program. The RFP makes the selected consultant responsible for the “development of an estimated program fee(s), for establishing rental registry rates and charges” and “general and administrative overhead allocations to RSP Program activities, including, without

² You stated that while you had prepared a draft ordinance based on the Bell Gardens ordinance, there has never been any City Council action/direction in support of the draft ordinance, and it is not included in the draft RFP.

limitation registry data base creation and maintenance, City staff allocation, and City attorney costs for enforcement.” All duties and responsibilities of the consultant relate to the fees/costs of the potential rent stabilization program.³ The proposals submitted in response to the proposed RFP should only indicate a consultant’s ability to gather data needed and conduct an analysis of that data, as well as what that cost would be from each proposer, as that cost is also a potential concern.

The City Council will review, discuss, and determine whether the RFP should be issued to receive proposals. A decision to issue the RFP will not directly result in any rent control changes. In a follow up email, when asked about the practical effect of a decision not to issue the RFP, you stated one outcome is that the topic of rent control may not be considered further; however, it would also be possible that the “City Council may still want to proceed with an ordinance irrespective of the RFP or direct staff to do the research/analysis in-house but that is less likely.” You have also indicated that it is possible that responses to the RFP and the selection of a consultant may influence the final ordinance. For instance, if the costs, including costs of staffing, come back in an amount that is considered too high, a Councilmember may not want the ordinance or want to draft the ordinance in a way to reduce staff costs.

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 his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.” Under Section 87103, “[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,”⁴ or on certain specified economic interests including:

- Any business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more.
- Any real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more. An indirect interest in business or real property means a business or real property interest owned by the spouse or dependent child of the official.
- Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without

³ You stated that the consultant would not be assisting in drafting the ordinance, only providing potential costs and fees associated with a rent control program based on the number of rental units and staff time needed to implement and enforce the program.

⁴ Under Section 82029, “immediate family” is defined as “the spouse and dependent children.” “Dependent children,” in turn, is defined as “a child ... of a public official who is under 18 years old and whom the official is entitled to claim as a dependent on his or her federal tax return.” (Regulation 18229.1.)

regard to official status, 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.

Relevant to your request, Mayor Alindajao and Councilmember Nunez each have a real property interest in their rental properties.⁵ They also have a business entity interest and source of income interest in their rental property businesses, as well as potential source of income interests in their rental property tenants.⁶

Foreseeability and Materiality

Regulation 18701(a) provides that a governmental decision's financial effect on an official's financial interest is presumed to be reasonably foreseeable if the official's interest is "explicitly involved" in the decision; an official's interest is "explicitly involved" if the interest is a named party in, or the subject of, the decision; and an 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 interest. In addition, an official's real property interest is explicitly involved in any decision affecting the real property as described in Regulation 18702.2(a)(1)-(6).

Regulation 18701(b) sets forth the foreseeability standard applicable to a decision's effect on an official's interest that is not explicitly involved in the decision and provides that the effect on such an interest is reasonably foreseeable if it "can be recognized as a realistic possibility and more than hypothetical or theoretical."

Real Property

Regulation 18702.2 provides materiality standards for determining when a reasonably foreseeable effect on an interest in real property is material, including decisions that "[w]ould impose, repeal, or modify any taxes, fees, or assessments that apply to the parcel." (Regulation 18702.2(a)(3).) A reasonably foreseeable financial effect on an interest in real property is also material, if the decision "[i]nvolves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use of or improvement to the parcel ... that changes the permitted use of, or restrictions placed on, the property." (Regulation 18702.2(a)(5).)

According to the facts, the City does not have any laws regarding rent control or rent stabilization, and the City Council plans to have a discussion about such laws. At the December 2022 meeting, the City Council directed staff to prepare a draft rent stabilization ordinance and it

⁵ For Councilmember Nunez, this would include the two rental properties owned by his spouse as part of a partnership but not the rental property owned in partnership by his adult children.

⁶ Section 82030 provides that an individual's "income" 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." Because they both have greater than a 10 percent interest in their rental property businesses, Mayor Alindajao and Councilmember Nunez would have a source of income interest in any tenants from whom they receive \$500 or more in income in the 12 months prior to the decision at issue.

will now consider whether to issue an RFP to hire a consultant to perform an analysis to determine the potential program implementation cost to the City as well as the annual fee for tenants and property owners necessary to implement and enforce the program.

While a decision to issue the RFP will not directly result in the creation of new rent control laws, the facts indicate a practical effect of a decision not to issue the RFP would be the topic of rent control is not further considered by the City Council; therefore, it would be a decision to potentially avoid imposition of new fees on rental properties within the City and possible to avoid additional restrictions on the property. In addition, if the costs, including costs of staffing, come back in an amount that is considered too high, councilmembers may not want to pursue the ordinance. Like the decision whether to issue the RFP, the decision as to which consultant to award the contract could ultimately result in the avoidance of new fees and additional restrictions on rental properties in the City. Because the decisions identified may determine fees and restrictions that would apply to all rental properties in the City, the real property interests of Mayor Alindajao and Councilmember Nunez in their rental properties would be the "subject" of the decisions. Therefore, under Regulation 18702.2(a)(3) and (5), it is reasonably foreseeable the decisions would have a material financial effect on their interests in their rental properties.

Public Generally Exception

Notwithstanding that it is reasonably foreseeable a decision may have a material financial effect on an official's interest under the Act, where the financial effect of a decision on an official is indistinguishable from the effect on the public generally, the public official may nonetheless participate in the decision under the public generally exception. (Section 87103.) Relevant to this issue, Regulation 18703(e) provides specific rules for special circumstances, including where the decision solely impacts an official's interest in the lease of residential real property, as the lessor of the property. The exception in Regulation 18703(e)(4) applies to a decision concerning a rent control ordinance where the official establishes that the decision affects all residential rental properties within the official's jurisdiction and the official owns no more than three residential rental units.

Here, based on the facts provided, the decisions concerning the proposed rent control ordinance will apply to all residential rental properties in the City. Therefore, the public generally exception in Regulation 18703(e)(4) applies to allow Councilmember Nunez to take part in the RFP decision so long he has no other interests in the decision other than those interests related to the three residential rental properties identified.

Accordingly, while Mayor Alindajao, who owns a 4-unit rental property, is disqualified under the Act from taking part in City Council decisions whether to issue an RFP to hire a consultant, and which consultant to award the contract in connection with a City rent control program, Councilmember Nunez may take part in those decisions pursuant to Regulation 18703(e)(4).

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.) Section 1090 is intended not only to strike at actual impropriety, but also to strike at the appearance of impropriety. (*City of Imperial Beach v. Bailey* (1980) 103Cal.App.3d 191, 197.)

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. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (Id. at pp. 646-649.) Finally, 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. (*Thomson, supra*, at pp. 647-649; *Stigall, supra*, at p. 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).)

Here, the City Council will decide whether to issue an RFP to obtain consultant proposals to perform an analysis concerning specified costs and fees associated with a rent control program as well as which consultant to hire to perform those services under the contract. Therefore, the determinative issue is whether Councilmember Nunez would have a prohibitory financial interest under Section 1090 in the RFP and any resulting contract between the City and the successful consultant related to the City's proposed rental ordinance.⁷

We have found on several occasions that an official does not have an interest in a contract under Section 1090 merely because the official owns real property or a business adjacent to or in close proximity to a project. (See e.g., *Bordsen* Advice Letter, No. A-1 7-059 [official did not have a financial interest in a contract involving a highway project under Section 1090 simply because the official had a business adjacent to the project]; *Marroquin* Advice Letter, No. A-22-103 [close proximity of official's residence to a project involving a 90-unit affordable senior housing complex does not alone establish a financial interest under Section 1090 with respect to any agreements relating to the project].)

In the present situation, the RFP and consultant contract would relate only to a proposed ordinance of general application, and the only interest Councilmember Nunez would have is the potential effect of the ordinance on all rental properties in the City. Similar to the situations discussed above, we find that the mere ownership of three rental units in relation to a proposed citywide rental ordinance of general application is not alone sufficient to establish a financial interest under Section 1090 with respect to any consultant contract to perform an analysis of costs and fees associated with the City's proposed rental ordinance.⁸

⁷ We do not fully analyze Section 1090 as applied to Mayor Alindajao in light of our conclusion that he is prohibited from taking part in the decisions under the Act. However, we note that the Mayor similarly does not have an interest in a resulting contract with a contractor for purposes of Section 1090 merely because of the rental property interest identified.

⁸ Importantly, this conclusion is consistent with and follows the California Supreme Court's directive that the Act and Section 1090 are "in pari materia" and should be construed together so that all parts of the statutory scheme are

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

Sincerely,

Dave Bainbridge
General Counsel

By: *Jack Woodside*
Jack Woodside
Senior Counsel, Legal Division

JW:aja