



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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October 21, 2022

Jeffrey S. Ballinger
of BEST BEST & KRIEGER LLP
City Attorney
City of San Juan Capistrano
655 West Broadway, 15th Floor
San Diego, CA 92101

Re: Your Request for Advice
Our File No. A-22-109

Dear Mr. Ballinger:

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 Orange 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 Councilmember Taylor take part in governmental decisions brought to the City Council by his son's employer, given that his son pays him rent and is therefore a source of income?

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

No, both the Act and Section 1090 prohibit Councilmember Taylor from taking part in such governmental decisions because he has a source of income interest in his son, whose employer is the subject of the decisions. However, under Section 1091, Councilmember Taylor's financial interest in a contract between the City and the employer is "remote," such that the City may still permissibly contract with the employer following Councilmember Taylor's recusal.

FACTS AS PRESENTED BY REQUESTER

John Taylor is a member of the San Juan ("City") City Council ("Council"). Councilmember Taylor owns a residential property in the City which he rents to his son to use as a primary residence. His son is employed by, and receives a fixed monthly salary from, a local development company, Frontier Real Estate Investments ("Frontier"). The son's job duties include finding tenants for a Frontier project that is located in the City and is currently under construction.

Frontier is currently involved in the potential purchase of two City parcels (a former redevelopment agency playhouse property and a City parking lot), as well as the potential lease of certain open space in the City, which would allow Frontier to occupy and manage a large portion of City-owned open space. To date, the Councilmember has recused himself from all City decisions regarding these items, since his son accepted his job. The sale and lease, as well as other potential projects, are expected to come before the City Council for further action in the near future.

ANALYSIS

Under Section 87100 of the Act, "A public official at any level of state or local government shall not make, participate in making or in any way attempt to use the public official's position to influence a governmental decision in which the official knows or has reason to know he has a financial interest." "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 are:

- (a) Any business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more.
[¶]
- (c) Any 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.
- (d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

(Section 87103.) Here, Councilmember Taylor has an economic interest in his son as a source of income.

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) which 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.

Regulation 18702.3 provides the standards for determining if the financial effect on a source of income interest is material. The reasonably foreseeable financial effect on an individual source of income is material if the official knows or has reason to know that the individual has an interest in a business entity that will be financially affected under the materiality standards in Regulation 18702.1. (Regulation 18702.3(a)(2)(B).)

An "interest in a business entity," as referenced in Regulation 18702.3(a)(2)(B), is a direct or indirect investment in a business entity worth two thousand dollars or more or, alternatively, any business entity in which the individual "is a director, officer, partner, trustee, employee, or holds any position of management." (Section 87103(a), (d).) In this case, Councilmember Taylor knows his son is an employee of Frontier and, therefore, knows his son has an interest in Frontier as a business, as well as a source of income.

Under Regulation 18702.1, the reasonably foreseeable financial effect of a governmental decision on an official's financial interest in a business entity is material if the entity is a named party in, or the subject of, the decision, including any decision in which the entity:

- (A) Initiates the proceeding by filing an application, claim, appeal, or other request for action concerning the entity with the official's agency;
[¶]
- (C) Bids on, or enters into, a contract with the agency, or is identified as a subcontractor on a bid or contract with the agency;
[¶]
- (E) Applies for a permit, license, grant, tax credit, exception, variance, or other entitlement from the agency;

(Regulation 18702.1(a)(1).) In the present case, because Frontier would be the subject of the various decisions it brings before the City, there would be a reasonably foreseeable, material financial effect on the company and, therefore, also on Councilmember Taylor's son as a source of income to Councilmember Taylor.

Section 1090

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.)

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

Under Section 1091(a):

An officer shall not be deemed to be interested in a contract entered into by a body or board of which the officer is a member within the meaning of this article if the officer has only a remote interest in the contract and if the fact of that interest is disclosed to the body or board of which the officer is a member and noted in its official records, and thereafter the body or board authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for the purpose without counting the vote or votes of the officer or member with the remote interest.

Section 1091(b) defines “remote interest” to include “[t]hat of a landlord or tenant of the contracting party.” (Section 1091(b)(5).)

Here, Councilmember Taylor is not the landlord of the contracting party, but the landlord of an *employee* of the contracting party. We have previously extended application of Section 1091’s remote interest exceptions where the official’s interest is even more remote than the interest specified in the exception. (See, e.g., *Schons* Advice Letter, No. A-17-129 (applying Section 1091(b)(5) where mayor’s tenant was the attorney representing the contracting party, not the contracting party itself); see also *Raymond* Advice Letter, No. A-21-003; *Whitham* Advice Letter, No. A-19-129.) Given that Councilmember Taylor’s interest in a potential contract between the City and Frontier is even more remote than that specified in Section 1091(b)(5), it is logical to extend that exception to the facts here. Accordingly, Councilmember Taylor has a remote interest under Section 1091(b)(5) and, as under the Act, he is prohibited from taking part in the contracting process with Frontier. However, the City is not prohibited from contracting with Frontier as long as Councilmember Taylor properly recuses himself as described in Section 1091(a).

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

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