



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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March 24, 2023

Serita Young
City Attorney
City of Banning
350 South Grand Avenue
37th Floor
Los Angeles, CA 90071

Re: Your Request for Advice
Our File No. A-23-046

Dear Ms. Young:

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 Riverside 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).)

QUESTIONS

1. Under the Act and Section 1090, may Banning City Councilmember Sheri Flynn take part in decisions related to a development project, including a lawsuit and potential settlement of the lawsuit, given that she was previously an uncompensated officer of the non-profit organization suing the City?

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.

2. Under the Act and Section 1090, may Councilmember Flynn take part in the same decisions, given that she resides as a guest in her daughter's home, located over 2,800 feet away from the nearest boundary of the development project?

CONCLUSIONS

1. Yes, under the Act and Section 1090, Councilmember Flynn does not have an economic interest in the non-profit, nor would decisions related to the project or lawsuit affect her personal finances and, consequently, neither the Act nor Section 1090 prohibit her from taking part in such decisions.
2. Yes, under the Act, given the distance of the real property and the lack of clear and convincing evidence that such decisions would have a substantial effect on it, the Act does not prohibit Councilmember Flynn from taking part in the decisions based on a potential economic interest in her daughter's real property. Further, any contracts under Section 1090 do not implicate Councilmember Flynn's daughter's real property.

FACTS AS PRESENTED BY REQUESTER

In the City of Banning ("City"), the Banning Point Project ("Project") is a proposed development project consisting of approximately 620,000 square feet of warehouse space and approximately 34,000 square feet of retail space to be located on a 47-acre undeveloped piece of land north of Sun Lakes Boulevard, east of Highland Springs Road and south of the Interstate 10 Freeway in the City. The Project applicant is Sun Lakes Highland, LLC.

The Project is proposed to be located immediately north of a large developed planned residential community known as the Sun Lakes Country Club ("Sun Lakes") that is a 55-and-over community mostly of seniors that consists of over 3,000 homes and 6,000 residents. The Project is also located immediately to the west of The Lakes Assisted Living and Memory Care Facility.

On December 1, 2021, the City's Planning Commission approved an application for Design Review Approval of the Project and recommended approval of a tentative parcel map for the Project site. On December 8, 2021, the Design Review Approval was appealed to the City Council and set for a public hearing concurrently with the City Council's review of the tentative parcel map application for the Project site. On February 17, 2022, the City Council held a public hearing to consider the applications and following the hearing, approved both applications.

On April 18, 2022, the Pass Action Group filed a Verified Petition for Writ of Mandate and a Complaint for Injunctive Relief ("Lawsuit") against the City and the City's Council seeking to invalidate the City's approval of the Project for violation of the California Environmental Quality Act and for violation of due process. PAG describes itself as "an association promoting the interests of local Banning residents alarmed over the increasing intensity with which large-scale warehouse projects are being approved in the community, too often without proper environmental review." It is your understanding that PAG is a 501(c)(4) non-profit organization, but it is not yet registered as a non-profit entity with the California Secretary of State's Office.

The Lawsuit only lists PAG as the Petitioner and Plaintiff and does not name Councilmember Flynn as a separate petitioner or plaintiff. However, Sheri Flynn signed the Verification to the Complaint, stating she was authorized to execute the Verification on behalf of PAG in her capacity as Vice President of PAG. Ms. Flynn signed the Verification to the Complaint because she was the only person on the PAG Board at the time the Verification was executed who could, and was willing to, sign the Verification. In her capacity as a volunteer Board Member and Vice President of PAG, Ms. Flynn also served as Co-Chair of the PAG's Legal/Environmental Impact Committee and appeared at City public hearings, on behalf of PAG to oppose the Project. The last time Councilmember Flynn appeared as a representative of PAG in opposition to the Project was during a special City Council meeting held on February 17, 2022.

On November 15, 2022, the City filed an Answer in the Lawsuit disputing the claims and allegations. On December 9, 2022, PAG filed its opening brief in the Lawsuit.

On December 13, 2022, Ms. Flynn was elected to the City Council in a special recall election to represent City Council District 3, the same district in which the Project is located. Councilmember Flynn resigned from her position as a Board Member of PAG as of December 27, 2022 and was sworn in and commenced her duties as a Councilmember on January 10, 2023.

Since resigning from PAG, Councilmember Flynn has not been an official for PAG in any capacity. During her service for PAG, Councilmember Flynn was not compensated for her services, and she is not personally liable for any costs, debts, or the fees of PAG's attorneys or any other legal expenses in the Lawsuit. PAG pays for all costs through donations and Councilmember Flynn has never donated money to PAG.

Councilmember Flynn resides in the Sun Lakes planned residential community in a single family residence that is owned by her 31-year-old daughter. Councilmember Flynn previously owned this residence until May 2020, at which time Councilmember Flynn transferred property ownership of the residence to her daughter. Councilmember Flynn is now a guest residing in her daughter's home and has an informal oral agreement with her daughter to occupy the home.

As a resident in Sun Lakes, Councilmember Flynn's daughter is a member of the Sun Lakes Country Club Homeowners Association ("Sun Lakes Homeowners Association"). Dues to the Sun Lakes Homeowners Association and utility bills for the residence are paid from a joint account that was set up by Councilmember Flynn's mother with funds that were provided by her mother at her mother's death as of April 2017. This joint account is used by Councilmember Flynn and her sister. Councilmember Flynn's daughter pays the property taxes for the residence. Councilmember Flynn is a part owner of the funds in the joint account. Councilmember Flynn does not contribute personal funds to the joint account.

The home in which Councilmember Flynn resides is located approximately 2,808 feet from the closest property line of the Project site. We are informed that there are approximately 3,224 parcels in Council District No. 3 that are zoned for residential uses and that 15 percent of all residential parcels within Council District No. 3 are located within approximately 1,212 feet of the boundaries of the Project site.

Councilmember Flynn's residence is located generally within the interior of the Sun Lakes community, as distinguished from the edge of the community, and trucks coming to and from the

Project site will not be visible directly from her residence. Also, Councilmember Flynn's residence is within the already developed portion of the Sun Lakes community and the Project decisions are not changing the General Plan and zoning of her residence.

Prior to and after the filing of the Lawsuit, PAG and the Project applicant have had periodic confidential settlement discussions. No settlement of the Lawsuit has been reached. The City and the Project applicant (as the real party in interest) filed their opposition brief on February 7, 2023. A court hearing in the Lawsuit has not yet been scheduled. It is uncertain whether either party will recommence settlement discussions.

During the pendency of the Lawsuit and prior to Councilmember assuming her duties as a Councilmember, the City Council met in closed sessions to obtain periodic updates regarding the Lawsuit as is permitted by the Ralph M. Brown Act. As material events or issues arise in the course of the Lawsuit, information regarding those material events will be shared with the City Council. Thus, for example, any court ruling and any potential settlement between the parties will be shared with the City Council.

As the Lawsuit continues, it is possible that the City Council would need to make future decisions in connection with the Lawsuit. Those anticipated City Council decisions ("Lawsuit Decisions") are: (1) whether, if the trial court rules against the City in the Lawsuit, to appeal that decision or support the developer's appeal of that adverse decision ("Category"); (2) whether to consider any potential settlement proposal that is proposed by either PAG, the developer, or City staff prior to or after the trial court decision regarding the Lawsuit ("Category 2"); and (3) whether to approve new Project entitlements, if the trial court issues the Writ of Mandate requiring the City to vacate its approval of the Project and the Project applicant re-submits the same or similar Project for entitlement approvals ("Category 3").

ANALYSIS

The Act

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 official's position to influence a governmental decision in which the official knows or has reason to know the official 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 the official's immediate family," or on certain specified economic interests. (Section 87103.) Among those specified economic interests are:

- "Any real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more."
- "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."

- “Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.”

With respect to PAG, Councilmember Flynn was a volunteer Board Member and the Vice President—that is, she was not compensated for her services. Accordingly, PAG does not constitute a source of income interest for purposes of the Act’s conflict of interest provisions. Moreover, Councilmember Flynn has resigned from the PAG. Thus, even if the PAG does not qualify as a nonprofit entity, Councilmember Flynn does not have an interest in the PAG as a director, officer, partner, trustee, employee, or manager of a business entity. Thus, the only potential interest under the Act is Councilmember Flynn’s potential interest in real property.

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 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.”

Councilmember Flynn transferred ownership of the real property where she currently resides to her daughter in 2020. Though she pays utility bills and dues to the Sun Lakes Homeowners Association, she considers her arrangement with her daughter as that of a guest in her daughter’s home. We do not need to analyze the details of this arrangement and determine whether the arrangement amounts to a real property interest under the Act, however, due to the distance of the real property to the closest property line of the Project site. Under Regulation 18702.2(b), the financial effect of a governmental decision on a parcel of real property in which an official has a financial interest involving property 1,000 feet or more from the property line of the official’s property is presumed not to be material. This presumption may be rebutted with clear and convincing evidence the governmental decision would have a substantial effect on the official’s property. Here, there is no clear and convincing evidence of a substantial effect on any potential real property interest. Accordingly, the Act does not prohibit Councilmember Flynn from taking part in decisions involving the Project or the Lawsuit based on any potential real property interest.

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.)

As noted above, Councilmember Flynn is no longer an officer of PAG, nor has she received income from PAG. Additionally, a settlement of the Lawsuit between PAG and the City does not implicate any potential real property interest Councilmember Flynn may have in her daughter’s home. Finally, although Councilmember Flynn signed the Verification to the Complaint, she states she is not personally responsible for any potential legal fees associated with the Lawsuit. Accordingly, a settlement between the parties also would not implicate her personal finances. Therefore, Section 1090 does not prohibit Councilmember Flynn from taking part in any settlement decisions in her capacity as a City Councilmember.

Finally, we caution that our advice is limited to the provisions of the Act and Section 1090. The Fair Political Practices Commission cannot provide advice outside of these provisions. Accordingly, we express no opinion regarding the potential application of common law conflict of interest provisions.

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

Sincerely,

Dave Bainbridge
General Counsel

By:



Kevin Cornwall
Senior Counsel, Legal Division

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