



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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October 25, 2023

David J. Ruderman
Colantuono, Highsmith & Whatley PC
City of Sonoma
670 West Napa St., Suite F
Sonoma, CA 95476

Re: Your Request for Advice
Our File No. A-23-132

Dear Mr. Ruderman:

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 Sonoma 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. Is the Sonoma Community Housing Corporation (“SCHC”)—a non-profit public benefit corporation created by the City of Sonoma—considered a government agency for purposes of the Act and Section 1090?
2. Does the Act or Section 1090 prohibit a tenant of SCHC’s housing facility from serving on SCHC’s Board of Directors, or continuing to reside at the housing facility, given the tenant’s prior year-long lease that converted to an ongoing month-to-month tenancy several years ago?

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.

CONCLUSIONS

1. Yes, based on the facts that SCHC was formed and originally funded by the City of Sonoma to provide services public agencies are legally authorized to perform and, in fact, traditionally have performed, and SCHC is treated as a public entity in other respects, we advise SCHC is a government entity for purposes of the Act and Section 1090.
2. No, under Section 1090, the renewal of the tenant's month-to-month tenancy under pre-existing terms, or terms applicable to all tenants, does not constitute a prohibited contract. Additionally, the Act does not preclude a tenant from sitting on the board, but we caution that the tenant is prohibited from taking part in subsequent decisions by the board if it is reasonably foreseeable the decision will have a material financial effect on the individual's interests including the individual's personal finances as discussed below.

FACTS AS PRESENTED BY REQUESTER

The Sonoma Community Housing Corporation ("SCHC") is a non-profit public benefit corporation created by the City and its Community Development Agency in 1986 to develop and administer the Sonoma Creek Senior Housing facility ("Sonoma Creek"). Sonoma Creek is a thirty-four-unit rental apartment complex for low-income seniors. SCHC owns Sonoma Creek and the City contracts with a third-party non-profit affordable housing corporation for property management and day-to-day management of Sonoma Creek, such as administrative oversight, supervising repairs and maintenance, addressing tenant questions or complaints, and finding new tenants. Sonoma Creek tenants enter into lease agreements with SCHC as landlord.

SCHC is not funded by regular transfers from the City's general fund. Nothing in SCHC's articles of incorporation or bylaws indicate it is a "housing authority" under the Housing Authorities Law (Health & Saf. Code Section 34200 et seq.) or a community development commission under Health and Safety Code Section 34100 et seq. SCHC's articles of incorporation and certain bylaw provisions are subject to amendment by the City Council. Currently, the Board of Directors of SCHC (the "Board") is comprised of two members of City Council (chosen by the City Council), the City Manager, a public member designated by the City Manager, and a public member appointed by the City Council. The Board of SCHC meets on an as-needed basis to review and adjust rents, adopt and revise tenant policies and rules, and address concerns raised by the property manager. The property manager is charged with entering into new leases according to Sonoma Creek's Resident Selection Plan. Board Directors receive no compensation but are entitled under its bylaws to reimbursement for reasonable and necessary expenses. SCHC's bylaws state that SCHC Board Meetings "are subject to and shall be noticed and conducted in accordance with the requirements of the Ralph M. Brown Act (California Government Code Sections 54950-54962) as it may be amended from time to time."

A current tenant of Sonoma Creek would like to serve as the public Board Director of SCHC. The tenant originally signed a one-year lease at Sonoma Creek many years ago, but is now subject to a month-to-month lease. In a follow-up email, you clarified the tenant's initial one-year lease converted to a month-to-month tenancy after the initial one year term. This tenant is not a recipient of housing assistance under Section 8 of the U.S. Housing Act of 1937 (42 U.S.C. Section 1437f).

In a follow-up email, you clarified it is your understanding that SCHC holds title to the Sonoma Creek property, but has no other assets or liabilities. Sonoma Creek itself is self-funded through rents, which the City's contract property manager uses to cover expenses related to the property. The property manager manages the accounting for Sonoma Creek, as well as overseeing operations and maintenance using rental proceeds.

If SCHC were to dissolve, any remaining assets would be distributed to a "similar non-profit corporation or to an agency of government." The SCHC's directors would therefore be able to distribute any remaining assets to any such entity. However, unless the Attorney General waives objections to the disposition in writing (Corp. Code Section 6716(c)), the disposition must be made by decree of the superior court in a proceeding in which the Attorney General is a party (Corp. Code Section 6716(b)). There is no assurance that the City would take ownership of any remaining assets. (Corp. Code Section 6716.)

Generally, the City is not liable for any debts incurred by SCHC or Sonoma Creek. SCHC is a separate legal entity that generally shields its members from liabilities. (Corp. Code Section 5350(a).) However, the City would be liable to its contract property manager if rents from Sonoma Creek were insufficient to cover operating expenses pursuant to the City's contract with the property manager.

In response to a request for clarification regarding the extent of SCHC's authority/duties, you clarified that, while the Board is tasked with meeting annually, the Board has not met for a number of years and institutional knowledge of the Board's authority and duties is limited. Thus, the above description of the Board's authority comes from the description in the bylaws and an undated policy and procedures document you attached in your response. You are not aware of any other Board duties at this point, but the City is seeking to reconstitute the Board, which was the genesis of your letter. SCHC's articles of incorporation state:

[SCHC's] public purpose is to cooperate with and assist materially the government of the City of Sonoma, a municipal corporation, to work for adopted and declared goals to provide and maintain affordable housing within the corporate limits of the City of Sonoma, according to the City's General Plan and other officially adopted policies, laws, rules, and regulations.

Its charitable purpose is the provision of housing and related facilities and services, on an affordable basis.

To carry out its primary purpose, which is its exclusive purpose, this corporation may enter into and undertake obligations under cooperative contracts, agreements and any other appropriate legal arrangements with the City of Sonoma, the City of Sonoma Community Development Agency (a public corporation), and any and all other agencies of government which may cooperate with or receive the cooperation of this corporation in the promotion, fostering, planning, designing, building and maintenance of affordable housing within the City of Sonoma.

In a follow up email, you indicated that the extent to which the City has treated SCHC as a public agency may have evolved over time. In 2000, SCHC amended its bylaws because, among other reasons, the prior bylaws "contain[ed] provisions that [were] in conflict with

California’s open meeting law, the Ralph M. Brown Act.” Additionally, although you are not aware of whether SCHC has ever adopted its own conflict of interest code, SCHC Board Directors were previously included in the City’s conflict of interest code until the City’s most recent update of that code in 2022, when those positions were removed from the code. You explained it is not clear to you why removal from the conflict of interest code occurred, but may have been because the SCHC Board had not met for an extended period of time by that point.

ANALYSIS

Qualification as a Government Agency

A “local government agency” is defined in the Act as “a county, city, or district of any kind including school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency of the foregoing.” (Section 82041.)

The Commission-established criteria for determining whether an entity is governmental in character are found in its opinion *In re Siegel* (1977) 3 FPPC Ops. 62. The *Siegel* factors determine whether local entities are public or private in character. The Commission has applied the following four-part test:

- (1) Whether the impetus for formation of the entity originated with a government agency.
- (2) Whether the entity is substantially funded by, or its primary source of funds is, a government agency.
- (3) Whether one of the principal purposes for which the entity was formed is to provide services or undertake obligations which public agencies are legally authorized to perform and which, in fact, they traditionally have performed.
- (4) Whether the entity is treated as a public entity by other laws.

The Commission subsequently clarified that it is not necessary that all four of the *Siegel* factors be satisfied for an entity to be considered a local government agency. (*In re Vonk* (1981) 6 FPPC Ops. 1.) It is only necessary that the entity satisfy enough of the four factors for its overall character to correspond to that of a local government agency. Therefore, the *Siegel* factors are not intended to be a definitive litmus test for determining whether an entity is public for purposes of the Act. Ultimately, the test must still be a factual analysis on a case-by-case basis.

After taking each *Siegel* factor into consideration, the SCHC must be treated as a governmental entity for purposes of the Act. SCHC was created by the City and its Community Development Agency in 1987 to develop and administer Sonoma Creek. Thus, the impetus for formation of the entity originated with a government agency. With respect to the second *Siegel* factor, SCHC has no assets or liabilities and Sonoma Creek is self-funded through rent. However, given that SCHC was created by the City and its Community Development Agency and owns Sonoma Creek, SCHC’s ownership of the Sonoma Creek property presumably originates from the City, which is also liable for payment of property management services in the event that Sonoma Creek rents were insufficient to cover such costs. Regarding the third *Siegel* factor, SCHC’s primary purpose, according to its articles of incorporation, is essentially to cooperate and collaborate with the City and other government agencies to promote, establish, and maintain affordable housing within the City. Public agencies are legally authorized to provide public housing

and, in fact, traditionally have performed that service. Finally, with respect to whether SCHC is treated as a public entity by other laws, you have noted that SCHC's Board meetings are conducted in accordance with the Brown Act.² The Brown Act generally does not apply to non-profit organizations, but rather, to "the legislative body of a local agency." (Section 54953.) Further, the SCHC Director positions were included in the City's conflict of interest code until recently, and may have been removed only because the Board had not met for an extended period of time. Additionally, we note that the Board Directors of the SCHC are either government officials or appointed by government officials. Considering each of these facts, we conclude SCHC qualifies as a governmental entity for purposes of the Act.³

With respect to Section 1090, the Supreme Court of California has stated that the Act and Section 1090 are "in pari materia"—meaning they should be construed together so that all parts of the statutory scheme are given effect. (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1091.) "Accordingly, to the extent their language permits, we will read section 1090 et seq. and the Political Reform Act as consistent." (*Ibid.*) Section 1090 applies to "[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees" (Section 1090(a).) Based on the above discussion of the relevant facts and *Siegel* factors, we also consider SCHC Directors as city officers for purposes of Section 1090.

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 public official's official 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 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 types of economic interests. (Section 87103.) Such economic interests include "[a]ny real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more."

Typically, an interest in real property may include a leasehold interest. (See Regulation 18702.2(c).) However, Regulation 18233 specifies that the terms "interest in real property" and "leasehold interest" do not include the interest of a tenant in a periodic tenancy of one month or

² Section 54850 *et seq.* (pertaining to public meetings of local legislative bodies).

³ Though related to SCHC's qualification as a governmental entity, we are not advising on any past obligations of SCHC Board members to file annual statements of economic interests, nor are we advising or commenting on the appropriateness of removing SCHC Board members from the City's conflict of interest code. However, in light of our conclusion, we note that Conflict of Interest Codes are required to enumerate positions within the agency that involve the making or participation in making of decisions which may foreseeably have a material effect on any financial interest and for each enumerated position, the specific types of investments, business positions, interests in real property, and sources of income which are reportable. (Section 87302(a).) Such positions are referred to as "designated employees." (See Section 82019.) Amendments to conflict of interest codes based on changed circumstances must be submitted to the code reviewing body within 90 days after the changed circumstances necessitating the amendments have become apparent. (Section 87306(a).) Regulation 18219 specifies the relevant disclosure provisions for positions not yet included in an amended conflict of interest code and specifies that, until included in the City's conflict of interest code and among other requirements, SCHC Directors should file their statements of economic interests under the City's broadest disclosure category. (Regulation 18219(b).)

less. You have indicated that the tenant who would like to serve as a Board member of SCHC is subject to a month-to-month lease. Accordingly, she does not have an economic interest in her residence for purposes of the Act. As such, under the Act, she would not be disqualified from taking part in any SCHC decision on the basis of her residency at Sonoma Creek.

Furthermore, while the Act's conflict of interest provisions (Section 87100, et seq.) do not preclude any individual from serving in any governmental position based on the individual's economic interest, an individual may be required to recuse themselves from taking part in a particular governmental decision if that decision would have a reasonably foreseeable, material financial effect on one or more of their economic interests, such as a real property interest or source of income. (Section 87100, 87103.) Relevant here, while a tenant does not have an "interest in real property" or "leasehold interest" based on a periodic tenancy of one month or less (Regulation 18233, certain decisions by the Board of Directors may implicate the tenant's personal finances—a separate type of economic interest considered for purposes of the Act's conflict of interest provisions once the tenant becomes a Director. Generally, if it is reasonably foreseeable a decision may result in the official, or a member of the official's immediate family, receiving a financial benefit or loss of \$500 or more in any 12-month period, the official is disqualified from taking part in the decision. Thus, while the Act does not prohibit a tenant from serving on the Board, the tenant may be disqualified from taking part in future board decisions, which would need to be analyzed further once the decisions are identified. If the tenant-Director has any questions about whether she would be disqualified from taking part in a specific governmental decision based on the potential effect on her personal finances, she should seek advice before taking part in the decision.

Section 1090

Under California Government Code 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 members." 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. 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) 103 Cal.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.) Typically, a contract is "made" on mutual assent of the involved parties. (*Stigall, supra*, 58 Cal.2d at p. 569.) In addition, making or participating in making a contract has been broadly construed to include those instances where a public official has influence over the contract or its terms. (See 80 Ops.Cal.Atty.Gen. 41.) 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 are fair and equitable to all parties. (*Id.* at pp. 646-649.)

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).) Officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*Honig, supra*, 48 Cal.App.4th at p. 333.)

In *Winuk* Advice Letter, No. A-19-234, we advised, in relevant part, that where a lease contained a “holdover” provision—such that the lease would convert to a month-to-month tenancy after the contracted term—continued tenancy under those pre-contracted terms without renegotiation of terms did not constitute creation of a new “contract” each month for purposes of Section 1090. You have clarified that the tenant’s initial one year lease converted to a month-to-month lease many years ago. As such, the tenant’s current month-to-month tenancy is similar to scenario considered in *Winuk* Advice Letter, No. A-19-234, and her continued tenancy would not constitute a “contract” for purposes of Section 1090. Accordingly, unless new terms were applied to her month-to-month tenancy that did not apply to all residents generally, Section 1090 would not force the tenant to either resign from her position as Director or leave her current residence.

Note, however, that future contract proposals before the SCHC must each be analyzed separately to determine if the board member, including a tenant, has a financial interest in the contract. Our conclusion is limited solely to the renewal of the tenant’s month-to-month tenancy under pre-existing terms, or terms applicable to all tenants.

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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