



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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March 22, 2023

Jeffrey Ballinger
Partner
City of Palm Springs
655 West Broadway,
15th Floor
San Diego, CA 92101

Re: Your Request for Advice
Our File No. A-23-031

Dear Mr. Ballinger:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹

Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090.

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.

QUESTION

Does Mayor Pro Tem Jeffrey Bernstein have a disqualifying financial interest in the lease of commercial property for his business (Destination PSP) or his business as an entity and source of income that precludes him from participating in decisions regarding the *Forever Marilyn* statue located 536 feet from his business?

CONCLUSION

No. The decisions surrounding the *Forever Marilyn* statue will not impact the use and enjoyment of the leased property that houses Mayor Pro Tem Bernstein’s business, nor will it

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.

impact the amount or length of his lease. Further, given the fact that you have stated the installation of the statue did not result in any increase in business, it is not reasonably foreseeable that the decisions surrounding the statue will have an impact on the Mayor Pro Tem's business as a entity or source of income. Based on the facts provided, the Mayor Pro Tem is not disqualified from taking part in the decisions.

FACTS AS PRESENTED BY REQUESTER

You are the City Attorney for City of Palm Springs ("City") and are seeking advice on behalf of Palm Springs Mayor Pro Tem Jeffrey Bernstein. Mayor Pro Tem Bernstein's business, Destination PSP, leases a commercial property in the City at 170 N. Palm Canyon Drive (the "Property"), with three years remaining on the lease. Mayor Pro Tem Bernstein's has more than a 10% ownership interest in the business, which is valued at more than \$2,000, and provides income to the Mayor Pro Tem of more than \$500 per year.

The Property is approximately 536 feet from a 26-foot-tall statue of Marilyn Monroe, entitled *Forever Marilyn*, owned by a private entity, PS Resorts. The statue was placed within the public right of way by PS Resorts on a two-foot pedestal pursuant to a Temporary Encroachment and License Agreement between the City and PS Resorts (the "Agreement"). The Agreement was entered into in 2020 and will expire on February 22, 2024.

A group of individuals has challenged the placement of the statue and filed a suit against the City and PS Resorts. The lawsuit is currently before the Court of Appeals. Oral argument was heard February 14, 2023, and a written decision will be issued shortly.

At some point, the City Council will be asked to make decisions regarding the lawsuit, as well as possibly the Agreement. Those decisions could involve decisions about whether to remove or move the statue, and if so, where. As part of the possible decisions, if the City considers keeping the statue within the right of way permanently, the City Council could be asked to vacate the public right of way within which the statue is located.

Mayor Pro Tem Bernstein believes that any decision regarding the lawsuit or Agreement would not result in an increase or decrease in Destination PSP's gross revenues, or the value of its assets or liabilities, in an amount equal to or more than \$1,000,000 or 5% of Destination PSP's annual gross revenues. You further assert in your request that it is not reasonably foreseeable that any decision regarding the lawsuit or Agreement would cause Destination PSP to incur or avoid additional expenses equal to or more than \$250,000 or 1% of Destination PSP's annual gross revenues. Additionally, there are three years remaining on his lease and any decisions regarding the lawsuit or Agreement would not change that.

You provided additionally information over email that Mayor Pro Tem Bernstein came to the above conclusions because the business is a retail business that sells household goods and decorations that are Modernism themed, with no tie to Marilyn Monroe or Hollywood generally. The statue was placed in its location in June 2021 and his business did not see any increase in customers, business, or sales. There are situations that do impact the business and customers, such as seasonal climate and large events like the Coachella and Stagecoach festivals, but no such change was seen by the placement of the statue.

While the statue has been a popular tourist draw, it is not believed to affect the potential rental value of the Property. Instead, rental value is affected by more macro factors, such as the availability of rental space in the area and demand for such commercial space. The statue can be seen from some angles of the Property, but the possible removal or relocation of the statue would not have any real impact on the way the Mayor Pro Tem uses the property.

ANALYSIS

Section 87100 prohibits public officials from participating in governmental decisions in which they have a financial interest. Section 87103 provides that 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 his or her immediate family, or on any of the interests specified in Section 87103. The financial interests implicated by your facts are:

- A business entity interest, where an official has a direct or indirect investment of \$ 2,000 or more in a business entity (Section 87103(a)); or in which the official is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d)).
- Any real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more.²
- An interest in a 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).)³

The standard for foreseeability varies depending on whether an interest is explicitly involved in the decision. Mayor Pro Tem Bernstein's business, lease and source of income interests are not explicitly involved in the decisions at issue, in that none of these interests are the subject of, or named as a party in, this decision. (Regulation 18701(a).) For a financial interest that is not explicitly involved in the decision at issue, the financial effect of the decision on an official's interest is reasonably foreseeable if it can be recognized as a realistic possibility and more than hypothetical or theoretical. (Regulation 18701(b).)

² Section 82033 defines "interest in real property" for purposes of the Act and provides that an individual has a real property interest in the real property of any business or trust in which the individual or immediate family owns a 10-percent interest or greater.

³ We note that the Mayor Pro Tem may also have interests in customers of his business as source of income. However, no specific customers have been identified and no facts were provided in relation to this specific conflicts question that would warrant an analysis of this interest. Moreover, retail customers do not result in the disqualification of an official from a decision provided the customer meets the exception for retail customers of a business in Section 87103.5 of the Act and Regulation 18702.3(c). To the extent the decision may implicate a specific customer of the business and the Mayor Pro Tem needs additional assistance regarding the retail customer exception, he should seek additional advice.

Interest in Leased Property

Regulation 18702.2(c) provides that the effect of a decision is material as to a leasehold interest in real property if the decision will: (1) change the termination date of the lease; (2) increase or decrease the potential rental value of the property; (3) change the official's actual or legally allowable use of the real property; or (4) impact the official's use and enjoyment of the real property.

There are no facts to suggest that there would be any changes to the length of the Mayor Pro Tem's lease or in his allowable use of the property due to any decisions surrounding the statue. The question that remains is whether the decision regarding the location of the statue would impact the rental value or the use and enjoyment of the Property. In regards to the rental value, you have stated that the installation of the did not result in any increase in business. Based on that provided fact, there is no indication that decisions regarding the statute will affect the rental value of the property at this time. Examining the use and enjoyment of the property, the statue is noticeable from some angles of the Property. However, it does not appear to be a predominant focal point. Regardless of the location of the statue, the Mayor Pro Tem will use the property in the same manner to run his business. The use and enjoyment of the leased space would not be impacted by the possible removal of the statue. Given the facts, it is not reasonably foreseeable that the decisions will have a material financial effect on Mayor Pro Tem's interest in the leasehold of the Property that houses his business.

Interest in Business Entity and Source of Income

The reasonably foreseeable financial effect of a governmental decision on an official's financial interests in a business as a business entity or source of income is material if the business will be financially affected under the materiality standards in Regulation 18702.1. (Regulation 18702.3(a)(4).) Under Regulation 18702.1, 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.

In this case, while the statue is a tourist draw, you state in your request that Mayor Pro Tem Bernstein does not anticipate his business being affected by any decisions related to the statue by

any of the amounts listed above. Most significantly, you state that while the Mayor Pro Tem has been able to track noticeable changes from events like Coachella or Stagecoach, or changes in climate, there has been no change in business since the introduction of the statue in 2021 that can be attributable to its placement near his business. Other factors will continue to impact the business, but removal of the statue does not appear to be one of them. Additionally, he has not tried to capitalize on the placement of the statue through any Marilyn Monroe or Hollywood themed items, and the business will not incur any expenses due to the removal of the statue.

Given the facts presented, it does not appear foreseeable that the removal of the statue would have such a material financial effect Mayor Pro Tem Bernstein's business and income as to constitute a disqualifying financial interest. He may participate in the upcoming decisions and discussions regarding the *Forever Marilyn* statue.

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

Sincerely,

Dave Bainbridge
General Counsel

By: 
Valerie Nuding
Counsel, Legal Division

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