



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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April 16, 2015

Hans Van Ligten
City Attorney
City of San Juan Capistrano
611 Anton Blvd, Suite 1400
Costa Mesa, CA 92626

Re: Your Request for Advice
Our File No. A-15-038

Dear Mr. Van Ligten:

This letter responds to your request for advice on behalf of Councilmember John Perry, regarding the conflict of interest provisions of the Political Reform Act (the “Act”)¹ and Section 1090. Please 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.

Regarding our advice on Section 1090, we are required to forward your request 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

Does either Section 1090 or the Act preclude the San Juan Capistrano City Council from approving a settlement agreement in ongoing litigation between the City and a golf course if a Councilmember has a financial interest in the settlement agreement?

CONCLUSION

No. As explained below, neither Section 1090 nor the Act precludes the San Juan Capistrano City Council from approving a settlement agreement in ongoing litigation between the City and a golf course where a Councilmember has a financial interest in the settlement agreement.

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 18110 through 18997 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.

FACTS

Your office serves as the City Attorney for the City of San Juan Capistrano, and you are requesting this advice on behalf of John Perry, a member of its City Council. Councilmember Perry owns a condominium in a development located next to the San Juan Capistrano Hills Golf Course. His home is immediately adjacent to and has views of a fairway on the golf course.

Prior to taking a seat on the City Council, Councilmember Perry worked as a marshal at the golf course until May 29, 2014. He was paid \$535.20 in salary in 2014 and also earned, but did not utilize, the right to free rounds of golf. The golf course is a privately-owned public golf course, and Councilmember Perry does not have any membership or other ownership interest in it.

The City is presently defending a lawsuit brought by the golf club, in which it seeks damages and a permanent injunction against the City relating to certain water rights issues. Specifically, the lawsuit alleges that the City has misappropriated the golf club's superior water rights from an underlying aquifer, which has resulted in, among other things, damage to the golf course's fairways, greens and landscaping. It further alleges that the City's continued extraction of water from the aquifer will result in both ecological damage and financial ruin for the golf club and its course. Councilmember Perry's home overlies the same aquifer, but does not appear to have any water rights attached to it.

A settlement agreement between the parties may become a possibility in the future. Thus far, Councilmember Perry has not participated in or otherwise been involved in any City decisions relating to the matter.

ANALYSIS

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. 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.) 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.)

We employ the following six-step analysis to determine whether Councilmember Perry has a conflict of interest under Section 1090.

Steps One, Two, and Three: Is Councilmember Perry subject to the provisions of Section 1090 and is there a contract at issue in which he will participate in making?

As a member of the San Juan Capistrano City Council, Councilmember Perry is subject to the provisions of Section 1090, as is the City Council itself. (See Section 1090.) Section 1090 applies to contracts subject to the general principles of contract law and is applied broadly to encompass many related transactions. (*People v. Honig, supra*, at p. 351 citing *Stigall, supra*, at pp. 569, 571.) Here, the decision at issue involves a potential settlement agreement between the City and the golf club. As a general rule, an agreement to settle a lawsuit is treated as a contract. (See, e.g., *T. M. Cobb Co. v. Superior Court* (1984) 36 Cal. 3d 273, 280; *Weddington Productions, Inc. v. Flick*, (1998) 60 Cal. App. 4th 793, 810.)

Finally, any settlement agreement between the City and the golf club would need approval from the City Council. Councilmember Perry would therefore participate in the making of a contract.

Step Four: Does Councilmember Perry have a financial interest in the contract?

Section 1090 prohibits a public official from making a contract in which he or she has a financial interest. An official is deemed to have a financial interest in a contract if he or she might profit from it in any way. 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).)

The question here is whether Councilmember Perry has a financial interest, arising from the ownership of his condo, in any settlement agreement between the City and the golf club. As mentioned, Councilmember Perry owns a residence that sits adjacent to (presumably within 500 feet) and has views of a fairway on the golf course. The lawsuit alleges that the diminished supply of water from the aquifer has already resulted in, among other things, damage to the golf course’s fairways, greens and landscaping. It further alleges that the City’s continued extraction of water from the aquifer will result in both ecological damage and financial ruin for the golf club and its course. There can be little doubt that the continued deterioration of the golf course (and the golf club in general) will ultimately negatively impact the value of homes nearby, especially those on the fairways with views of the course.² In light of this, Councilmember Perry has a financial interest in any future settlement agreement between the City and the golf club.³

² This is especially true when considering a governmental decision that may create a substantial change in the views from an official’s real property can result in material financial effect under the Act. (See Regulation 18705.2(a)(10); see also *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090-91, the California Supreme Court applied the “*in pari materia*” canon of statutory construction in its analysis to conclude that Section 1090 should be harmonized with the Act’s conflict of interest provisions whenever possible.)

Step Five: Does either a remote interest or non-interest exception apply?

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. 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).)

The Legislature has created various statutory exceptions to Section 1090's prohibition, however, where the financial interest involved is deemed a "remote interest," (Section 1091), or a "noninterest," (Section 1091.5). If a "remote interest" is present, the contract may be made if (1) the officer in question discloses his or her financial interest in the contract to the public agency, (2) such interest is noted in the entity's official records, and (3) the officer abstains from any participation in the making of the contract. (Section 1091(a); 88 Ops.Cal.Atty.Gen. 106, 108 (2005); 83 Ops.Cal.Atty.Gen. 246, 248 (2000).) If a "noninterest" is present, the contract may be made without the officer's abstention, and generally, a noninterest does not require disclosure. (*City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 514-515; 84 Ops.Cal.Atty.Gen. 158, 159-160 (2001).)

The one exception that appears relevant to your facts is the remote interest under Section 1091(b)(15):

"That of a party⁴ to litigation involving the body or board of which the officer is a member in connection with an agreement in which all of the following apply:

"(A) The agreement is entered into as part of a settlement of litigation in which the body or board is represented by legal counsel.

"(B) After a review of the merits of the agreement and other relevant facts and circumstances, a court of competent jurisdiction finds that the agreement serves the public interest.

³ There is currently no proposed settlement agreement, but we presume any future settlement agreement will contain measures to mitigate the ongoing deterioration of the golf course.

⁴ Councilmember Perry is not a party to the litigation but that fact should not preclude the remote interest from applying to this situation. It is clear from the legislative intent relating to Section 1091(b)(15) that as long as the three specified factors are satisfied, a settlement agreement in which an official has a financial interest should be allowed. (See Assem. Bill No. 2801 (2007-2008 Reg. Sess.) as amended Mar. 25, 2008 [stating key issue is whether "existing conflict of interest rules that prohibit public bodies from making contracts in which members have an interest (should) be modified to permit certain narrowly defined settlement agreements"].)

“(C) The interested member has recused himself or herself from all participation, direct or indirect, in the making of the agreement on behalf of the body or board.”

Accordingly, Councilmember Perry will have only a remote interest in any future settlement agreement as long as the factors set forth in subdivisions (A) – (C) are satisfied. If that is the case, he must follow the requirements in Section 1091(a), and the City Council can approve the settlement agreement between the City and the golf club without violating Section 1090.

Because we conclude that Councilmember Perry will have a “remote interest” in any future settlement agreement between the City and the golf course as long as the specified factors are met, we do not apply the remaining steps in the analysis. Additionally, because the remedy in this situation is for him to abstain from any participation in the approval of such contracts (see Section 1091(a)), we do not analyze the conflict of interest under the Act (Sections 87100 et seq.) as the remedy for conflicts under the Act would not differ from the action already required.

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

Sincerely,

Hyla P. Wagner
General Counsel

By: Jack Woodside
Senior Counsel, Legal Division

JW:jgl