STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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July 20, 2015

Sarah Carrillo
County Counsel
County of Tuolumne
2 South Green Street
Sonora, CA 95370

Re: Your Request for Advice
Our File No. A-15-075

Dear Ms. Carrillo:

This letter responds to your request for advice, on behalf of Tuolumne County Supervisor Evan Royce, regarding Government Code Section 1090 and the provisions of the Political Reform Act (the "Act").[1] Please note that we do not advise on any other area of law, including Public Contract Code or common law conflicts of interest. We are also 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.

In regard to 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 Tuolumne County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. We are also required to advise you that, for purposes of Section 1090, the advice "is not admissible in a criminal proceeding brought against any individual other than the requestor." (Section 1097.1(c)(5).)

QUESTIONS

1) May Supervisor Royce apply for a Community Development Block Grant while holding office?

2) In light of his interest in applying for a Community Development Block Grant, may Supervisor Royce participate in actions pertaining to CDBG loan programs and projects?

CONCLUSION

1) Section 1090 precludes Supervisor Royce from applying for a CDBG Loan while serving on the Board of Directors.

[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.

2) To the extent that Supervisor Royce intends to apply for a CDBG Loan upon leaving office, he may be precluded from applying for the loan if he takes part in a decision regarding the CDBG Program that would increase or decrease the chances of qualifying or receiving the loan.

FACTS

Your office represents the County of Tuolumne and is seeking advice on behalf of Supervisor Evan Royce. Supervisor Royce would like to apply for a Community Development Block Grant ("CDBG") while holding office. The CDBG Program is part of the Federal Omnibus Budget Reconciliation Act of 1981, which provides for state administration of the Federal Community Development Block Grant Non-Entitlement Program. California regulations set forth the policies and procedures governing the state's management and use of those funds. Therefore, both state and federal law applies to program compliance.

The primary objectives of the CDBG Program is the development and preservation of cities and counties by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income.

The County's CDBG Program for economic development is the Small Business Revolving Loan Program ("SBRL Program") that assists local businesses and low-income microenterprise owners to create or preserve jobs for low-income workers in rural communities. The Board of Supervisors has delegated authority to review and approve loan applications to the Small Business Revolving Loan Review Committee, and further delegated to County staff authority to prepare and execute the necessary loan documents. This delegation has been in place since at least 1994. The Board has adopted Guidelines for the SBRL Program and occasionally considers amendments to the Guidelines. Loans are awarded pursuant to objective criteria unrelated to official status.

The County may also submit applications for CDBG funds for other specific projects related to community development and infrastructure improvement. Past examples include funding for Meals on Wheels, a sewer line extension, planning grants, and the local food bank. The applications could include requests for additional funding for the Program. The Board of Supervisors retains authority to approve the specific CDBG projects. Because of the County's participation in these programs and projects, the Board of Supervisors regularly considers and approves items including selection of projects, project applications and documents, appointment of members for the Committee, allocation of funds, and consultant agreements. These items may concern a specific loan program, a specific project, or a combination (e.g. an annual project list).

Supervisor Royce was elected in the 2010 general election and assumed office in January 2011. Prior to and during Supervisor Royce's term in office, he has maintained the position of director and officer of Royce Construction & Design, Inc. ("Royce Construction"), a local construction contracting business. Supervisor Royce receives annual income for Royce Construction of more than $500 and has an investment in the business of $2,000 or more.

Having entered into a loan agreement with the County's SBRL Program prior to assuming office, which was recently paid off, Royce Construction would now like to apply for another CDBG Loan. Since assuming office, Supervisor Royce has recused himself from all items involving the

SBRL Program except an item on July 19, 2011 concerning performance reports for CDBG loans and items involving individual CDBG Projects.

ANALYSIS

1) May Supervisor Royce apply for a Community Development Block Grant while holding office?

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 the Supervisor Royce will have a conflict of interest under Section 1090 should Royce Construction apply for a CDBG Loan.

Step One: Will the provisions of Section 1090 apply?

Section 1090 provides, in part, that "[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by anybody or board of which they are members." All county supervisors are subject to the provisions of Section 1090.

Step Two: Does the decision at issue involve a contract?

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that "specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of 'contract.'" (*People v. Honig, supra*, at p. 351 citing *Stigall, supra*, at pp. 569, 571.)

In this case, the Tuolumne County's CDBG Program is not in itself a contract. However, under the program any loans made to a private business such as Royce Construction will constitute a contract between the county and the business. If Royce Construction applies for a CDBG loan, decisions regarding Royce Construction's application will be decisions involving a contract and subject to the provisions of Section 1090. Moreover, general decisions regarding the CDBG Program are also decisions involving the contract to the extent that the decisions will increase or decrease the chances that Royce Construction will qualify or receive a loan.

Step Three: Will the public employee or official be making or participating in making a contract?

Typically, a contract is "made" on mutual assent of the involved parties. (*Stigall, supra,* 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.) Notably, in relation to a public body, when members of a public board, commission or similar body have the power to execute contracts, each member is conclusively presumed to be involved in the making of all contracts by his or her agency regardless of whether the member actually participates in the making of the contract. (*Thomson v. Call, supra* at pp. 645 & 649; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201; 89 Ops.Cal.Atty.Gen. 49 (2006).)

You have more specifically asked that we consider whether Section 1090 applies where the authority to review and approve CDBG loans has been delegated to the Tuolumne County's SBRL Review Committee. However, because the ultimate power to execute the contracts rests in the Board of Supervisors, Supervisor Royce is considered to have participated in all the contracts the agency makes regardless of whether or not the Board of Supervisors has delegated the decision to the SBRL Review Committee.

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

Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest" (*People v. Honig, supra,* at p. 333), and officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*Ibid*.) Although Section 1090 nowhere specifically defines 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. (See e.g., *Thomson, supra,* at pp. 645, 651-652; see also *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5.)

As an officer and director of Royce Construction, Supervisor Royce has a financial interest in any CDBG loan the company obtains.

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

As a general rule, when Section 1090 applies to one member of a governing body of a public entity, as here, the prohibition cannot be avoided by having the interested board member abstain; 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 including certain exceptions for "remote interests" and "non-interests." Of these exceptions, the only exception warranting additional analysis is the non-interest exception for the receipt of public services. Under Section 1091.5(a)(3), an officer or employee is deemed not interested in a contract if his or her interest is "[t]hat of a recipient of public services generally provided by the public body or board of which he or she is a member, on the same terms and conditions as if he or she were not a member of the body or board."

The phrase "on the same terms and conditions" requires there be no special treatment of an official, either express or implied, because of that person's status as an official. (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1101.) Accordingly, the public services exception generally will *not* apply when the provision of the service involves an exercise of discretion by the public body that would allow favoritism toward officials, or occurs on terms tailored to an official's particular circumstances.[2]

In this case, a CDBG Loan involves an independent review of each application and proposed project. Moreover, the review of an application or project for a supervisor would involve an exercise in discretion by the public body that would allow favoritism toward the official and occur on terms tailored to the official's application and project. Thus, the non-interest exception for public services does not apply to obtaining a government loan such as a CDBG Loan. (See 81 Ops.Cal.Atty.Gen. 317, 320 (1998).)

Step Six: Does the rule of necessity apply?

In limited circumstances, the "rule of necessity" has been applied to allow the making of a contract that Section 1090 would otherwise prohibit. (88 Ops.Cal.Atty.Gen. 106, 110 (2005).) Under the rule of necessity, a government agency may acquire an essential service, despite the existence of a conflict, when no source other than that which triggers the contract is available; the rule "ensures that essential government functions are performed even where a conflict of interest exists." (*Eldridge v. Sierra View Hospital Dist.* (1990) 224 Cal. App. 3d 311, 322.) You have provided no facts to suggest the "rule of necessity" would apply in the present situation.

Based upon the foregoing analysis, Section 1090 precludes Supervisor Royce from applying for a CDBG Loan while serving on the Board of Directors.[3]

2) In light of his interest in applying for a Community Development Block Grant, may Supervisor Royce participate in actions pertaining to CDBG loan programs and projects?

Political Reform Act

Supervisor Royce is subject to the Act's conflict of interest provisions. Under Section 87100, a public official may not make, participate in making, or use his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's interests. (Section 87103; Regulation 18700(a).) Section 87103 identifies interests from which a conflict of interest may arise and includes:

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[2] *Lexin, supra* at 1088, 1100 at note 28; 88 Ops.Cal.Atty.Gen. at 128 ("discretionary or highly customized services" benefitting official would not come within "public services" exception), 92 Ops.Cal.Atty.Gen. at 71.

[3] Because we have concluded that Supervisor Royce is prohibited under Section 1090 from applying for a CDBG Loan while serving on the Board of Directors, we do not analyze the question under the Act.

- An interest in a business entity in which the official has a direct or indirect investment of $2,000 or more (Section 87103(a)); or in which the official is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d)).

- An interest in real property in which the official has a direct or indirect interest of $2,000 or more. (Section 87103(b).)

- An interest in a source of income to the official, including promised income, which aggregates to $500 or more within 12 months prior to the decision. (Section 87103(c).)

- An interest in a source of gifts to the official if the gifts aggregate to $460 or more within 12 months prior to the decision. (Section 87103(e).)

- An interest in the official's personal finances, including those of the official's immediate family, also known as the "personal financial effects" rule. (Section 87103.)

Generally, for any decisions involving an individual CDBG Project, Supervisor Royce will have to determine if the decision implicates any interest he may have including but not limited to his interest in Royce Construction. However, as you have not identified any particular decision, we cannot determine whether the decision would have a foreseeable and material effect on Supervisor's Royce interests at this time. Should Supervisor Royce have additional questions regarding a specific decision involving an individual CDBG Project he should seek further advice providing a full description of the proceeding.

For decisions involving the CDBG Program, these general decision may have a reasonably foreseeable material effect on Supervisor Royce's interest in Royce Construction to the extent that Supervisor Royce intends to pursue a CDBG Loan after leaving office and the decision would likely increase or decrease the chances of Royce Construction qualifying for or receiving the loan. For purposes of a potential effect on Royce Construction resulting from a general decision regarding the CDBG Program, the effect of the decision is material "if a prudent person with sufficient information would find it is reasonably foreseeable that the decision's financial effect would contribute to a change in the price of the business entity's publicly traded stock, or the value of a privately-held business entity." (Regulation 18702.1(b).)

However, without knowing the details of the actual decision, we can only generally advise that Supervisor Royce must carefully consider a general decision's potential effect on Royce Construction should he intend to apply for loan upon leaving office. If a decision may increase or decrease the chances of Royce Construction qualifying for or receiving a loan, Supervisor Royce may wish to seek further advice describing the actual decision before the Board of Supervisors.

Section 1090

Similarly, under Section 1090, Supervisor Royce is precluded from participating in certain decisions involving the CDBG Program if he intends to apply for a CDBG Loan upon leaving office. For example, the Attorney General's Office has opined that a city council member could not participate in the establishment of a loan program and then leave office and apply for a loan. (81

Ops.Cal.Atty.Gen. 317 (1998).) Generally, if a decision may increase or decrease the chances of Royce Construction qualifying for or receiving a loan, Supervisor Royce may wish to seek further advice describing the actual decision before the Board of Supervisors.

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

Sincerely,

Hyla P. Wagner
General Counsel

/s/

By: Brian G. Lau
Senior Counsel, Legal Division

BGL:jgl