



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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August 28, 2015

Candice K. Lee
City Attorney for the City of Covina
Richards | Watson | Gershon
355 South Grand Avenue, 40th Floor
Los Angeles, CA 90071-3101

Re: Your Request for Advice
Our File No. A-15-149

Dear Ms. Lee:

This letter responds to your request for advice on behalf of City of Covina's Director of Community Development, Brian Lee, regarding his duties under the conflict of interest provisions of the Political Reform Act (the "Act")¹ and Section 1090.

Please note that we are only providing advice under the conflict of interest provisions of the Act and Section 1090 and not under other general conflict of interest prohibitions such as common law conflict of interest. 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 San Bernardino County Charter Oak 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. May Mr. Lee participate in the making of a contract between either: (a) the City, the Charter Oak School District ("Charter Oak") and a developer; or (b) the City and the developer?

2. When the developer submits applications for land use entitlements, may Mr. Lee process and work on the developer's land use entitlement applications for the project if this type of work is within the scope of his regular duties?

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.

CONCLUSIONS

1. Pursuant to Section 1091.5(a)(6), Mr. Lee does not have a financial interest in his spouse's salary from Charter Oak for purposes of Section 1090. Thus, Mr. Lee may participate in the decisions in question.

2. Based on the "government salary" exception in Section 82030(b)(2), Mr. Lee will not have a conflict of interest under the Act and may participate in the decisions.

FACTS

In July 2014, a private developer and Charter Oak executed an "Agreement for Purchase and Sale and Joint Escrow Instructions" (the "agreement") with an option to purchase approximately 8.14 acres of land. The purchase price, pursuant to the agreement between Charter Oak and the developer is \$14.5 million.

The property that is subject to the agreement is located in the City. The developer originally proposed a residential project comprising approximately 108 residential units. City residents expressed concern about the scope of the developer's proposal, primarily regarding the traffic impacts and the overall density of the project. The City is interested in reducing the density for the developer's proposed project and is exploring the possibility of a three-party agreement between the City, Charter Oak and the developer with the goal of creating public open space and park land for the community and reducing the overall size of the project. Practically speaking, if the City does not approve the project, then the agreement between the developer and Charter Oak may fall through forcing Charter Oak to put the property up for sale again.

The City's proposal could be pursued in two different ways:

- The City may pay the developer for up to two acres of land for open space and park land purposes after the developer purchases the property from Charter Oak. If a financial agreement is made between the City and developer (rather than the three-party agreement discussed below), it is uncertain whether the developer will be able to secure all the necessary land use entitlements prior to the expiration of the agreement. The developer may request that the City assist by asking Charter Oak to extend the option to purchase by the developer under the agreement or even perhaps asking Charter Oak to absorb some of the cost. Therefore, the City would probably have some continued amount of interaction with Charter Oak on the the project.
- Pursuant to a three-party agreement between the City, Charter Oak and the developer, the City will provide funds to Charter Oak for up to two acres of land for open space and park land purposes. You identified the potential benefits of this approach would be to achieve: (a) the developer's goal to proceed with its project, (b) the City's goal of achieving a lower density for its residents, and (c) Charter Oak's goal of successfully completing the sale at the agreed upon price.

Mr. Lee would normally participate in the process by: 1) discussing and negotiating with the developer or Charter Oak, or both, on the potential purchase of land for public open space and park land and the final disposition of the proposal; and 2) supervising the land use entitlement application process for the project. The potential conflict issues arise because Mr. Lee's spouse is a teacher employed by Charter Oak, and Charter Oak is the owner of the Property and potential participant in a three-party agreement between the developer, the City and Charter Oak. Ms. Lee currently teaches Special Education at one of the elementary schools within Charter Oak. On August 19, 2015, you provided the following additional facts: Ms. Lee is starting her fourth year as a Charter Oak employee. She has taught lower level special education her entire tenure with the Charter Oak. Charter Oak is a public entity.

ANALYSIS

Section 1090

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) 103Cal.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 Mr. Lee will have a conflict of interest under Section 1090.

Steps One, Two, and Three: Is Mr. Lee subject to Section 1090 and is there a contract at issue in which he will participate in making?

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.” We have concluded that public agency employees, including city employees such as Mr. Lee, are subject to Section 1090. (*Kohn* Advice Letter, No. A-14-136; See also, *People v. Vallerga* (1977) 67 Cal.App.3d 847.)

You have acknowledged that Mr. Lee would normally participate in the process by: 1) discussing and negotiating with the developer or Charter Oak, or both, on the potential purchase of land for public open space and park land and the final disposition of the proposal; and 2) supervising the land use entitlement application process for the project. Note that if we conclude

that Mr. Lee, as an employee of the City, is financially interested in the contract, the City is only prohibited from making the contract if the employee is involved in the contract-making process. Therefore, as long as the employee abstains from any participation in the contract, the agency may make the contract. (See 80 Ops.Cal.Atty.Gen. 41 (1997).)

Step Four and Five: Does Mr. Lee have a financial interest in the contract² and does either a remote interest or non-interest exception apply??

Prior opinions on Section 1090 state that “The definitions of the remote and non-interest exceptions contained in sections 1091 and 1091.5 should be consulted for guidance to determine what falls within the scope of the term ‘financial interest’ as used in section 1090.” (See 85 Ops.Cal.Atty.Gen. 34 (2002)):

“If a ‘noninterest’ is present, as defined in section 1091.5, the contract may be executed without the abstention of the officer or employee, and generally a noninterest does not require disclosure. (See *City of Vernon v. Central Basin Mun. Water. Dist.* (1999) 69 Cal.App.4th 508, 515; 83 Ops.Cal.Atty.Gen., *supra*, at p. 247; 78 Ops.Cal.Atty.Gen. 362, 369-370 (1995).) ...[W]e believe the ‘noninterest’ provisions of section 1091.5 may provide guidance as to the types of financial interests proscribed by the Legislature in section 1090.

Section 1091.5(a)(6) provides:

“(a) An officer or employee shall not be deemed to be interested in a contract if his or her interest is any of the following:

* * *

“(6) That of a spouse of an officer or employee of a public agency in his or her spouse’s employment or officeholding if his or her spouse’s employment or officeholding has existed for at least one year prior to his or her election or appointment.”

Thus, income from a public agency to the employee’s spouse would normally be considered a financial interest.

However, pursuant to Section 1091.5(a)(6), Mr. Lee does not have a financial interest in his spouse’s salary from Charter Oak because she has been employed with Charter Oak for more than a

² You discuss two possible approaches involving two different contracts. We conclude the application of Section 1090 to the two contracts is identical. “Appellate courts have also stated ‘In considering conflicts of interest we cannot focus upon an isolated “contract” and ignore the transaction as a whole.’ (*People v. Honig* (1996) 48 Cal.App.4th 289, 314 .) The opinion in *Honig* explains that we “‘must disregard the technical relationship of the parties and look behind the veil which enshrouds their activities in order to discern the vital facts. [Citation.] However devious and winding the trail may be which connects the officer with the forbidden contract, if it can be followed and the connection made, a conflict of interest is established.’ [Citation.] (Id. at p. 315.)” *Eden Township Healthcare Dist. v. Sutter Health* (2011) 202 Cal. App. 4th 208, 221.)

year. Thus, this exception applies to allow Mr. Lee to participate in the decisions in question (assuming the Act does not apply).

The Political Reform Act

Section 87100 prohibits any state or local public official from making, participating in making, or using his or her official position to influence a government decision in which the official has a financial interest specified in Section 87103. A public official has a “financial interest” in a government 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).)

Mr. Lee, as a City employee, is a public official and will be making and participating in a governmental decision. Mr. Lee will have a “financial interest” in a governmental 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 following:

“(a) Any business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more.

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

“(c) Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, 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.

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

“(e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating [\$460]³ or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made. The amount of the value of gifts specified by this subdivision shall be adjusted biennially by the commission to equal the same amount determined by the commission pursuant to subdivision (f) of Section 89503.”

Your account of the facts potentially implicates Mr. Lee’s economic interest in Charter Oak as a source of income and his personal finances. However, in regards to any effect on an official’s economic interest in a source of income, the Act’s definition of income expressly excludes “salary

³ The amount of the value of gifts specified by this subdivision shall be adjusted biennially by the Commission to equal the same amount determined by the Commission pursuant to Section 89503(f). The quoted provision above has been modified with the current figure.

and reimbursement for expenses and per diem received from state, local or federal government agency . . .” (Section 82030(b)(2).) Nonetheless, an effect on an official’s governmental salary may still be disqualifying under limited circumstances as a material and foreseeable financial effect on the official’s personal finances. However, your facts show no connection between Ms. Lee’s salary and the decisions in question.

Consequently, with no interest as set forth in Section 87103 that will be impacted financially by the decision, Mr. Lee will not have a conflict of interest under the Act.

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

Sincerely,

Hyla P. Wagner
General Counsel

/s/

By: John W. Wallace
Assistant General Counsel
Counsel, Legal Division

JWW:jgl