



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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September 22, 2015

William D. McMinn
Deputy General Counsel
San Diego Unified Port District
3165 Pacific Highway
P.O. Box 120488
San Diego, CA 92112-0488

Re: Your Request for Advice
Our File No. A-15-162

Dear Mr. McMinn:

This letter responds to your request for advice on behalf of Port Commissioner Bob Nelson regarding the conflict of interest provisions of the Political Reform Act (the “Act”)¹ and Section 1090.

Please note that our advice is based solely on the provisions of the Act and Section 1090, and we offer no opinion on the application, if any, of other conflict of interest laws, such as Public Contract Code or common law conflicts of interest. Please also note that this letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

When a request for advice involves potential issues raised under Section 1090, the Commission is required to forward a copy of the request to the Attorney General’s Office and the local district attorney prior to proceeding with the advice. (Section 1097.1(c)(3).) Accordingly, we have forwarded your request to the Attorney General’s Office and the San Diego County District Attorney’s Office. We did not receive a written response from either entity. (Section 1097.1(c)(4).)

Finally, the following advice is not admissible in a criminal proceeding against any individual other than the requestor. (Section 1097.1(c)(5).)

QUESTIONS

1. Does the Act prohibit Commissioner Bob Nelson from participating in the governmental decision of whether to renew and extend the lease between the San Diego Unified Port District (“District”) and Pacific Gateway, Ltd. (“Pacific”) as a result of his month-to-month Maritime Contract for Private Wharfage (“Boat Slip Agreement”) with Marriott International, Inc. doing business as San Diego Marriott Marquis & Marina (“Marriott”)?

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. Does Section 1090 prohibit the Commissioner from participating in or the Board of Port Commissioners from entering into a lease renewal and extension with Pacific as a result of his Boat Slip Agreement with Marriott?

CONCLUSIONS

1. No. Under the Act, the Commissioner does not have a disqualifying conflict of interest with respect to the governmental decision of whether to renew and extend the lease between the District and Pacific because his month-to-month Boat Slip Agreement with Marriot is not considered an interest in real property.

2. No. Section 1090 does not prohibit the Commissioner from participating in or the Board of Port Commissioners from entering into a lease renewal and extension with Pacific because he does not have a financial interest in the lease.

FACTS²

You are the Deputy General Counsel representing the District. Commissioner Bob Nelson is a member of the District's Board of Commissioners. You are the Commissioner's authorized representative. The Commissioner has a month-to-month Boat Slip Agreement with Marriott that requires him to pay a wharfage fee of \$1,000 per month for exclusive use of a boat slip at the marina.

Pacific is a tenant of the District and leases approximately 1,608,463 square feet of tidelands and water area in the City of San Diego. That tidelands and water area includes two hotel towers, buildings, a lobby, a convention center, restaurants, meeting rooms, administrative offices, parking, and a 435 slip marina (hereafter collectively referred to as the "hotel"). Marriott manages the hotel on behalf of Pacific pursuant to a management agreement between Pacific and Marriott. Pacific and Marriott are separate business entities.

The District will vote on whether to renew and extend the lease between the District and Pacific.

ANALYSIS

Conflict of Interests under the Act:

Section 87100 prohibits any public official from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest. Section 87103 provides that 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 official's interests. Section 87103 describes financial interests from which a conflict of interest may arise, and provides in pertinent part:

² We base these facts on your written request for advice as well as our telephone call with you on September 15, 2015.

87103. A public official has a financial interest in a decision within the meaning of Section 87100 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: . . .

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

A real property interest includes a leasehold interest in real property. Regulation 18233, however, provides that a periodic tenancy of one month or less is excluded from the Act's definition of "interest in real property" and "leasehold interest." Because the Commissioner rents the boat slip on a month-to-month basis, he does not have a financial interest in the property that could give rise to a conflict of interest under the Act.

Under the facts presented, we conclude that the Commissioner does not have a conflict of interest under the Act.

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) 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 analysis to determine whether an official has a conflict of interest under Section 1090.

Is the official subject to the provisions of Section 1090?

Section 1090 provides, in pertinent 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."

The Commissioner is a member of a board that is the governing body of a district. Therefore, he is subject to the provisions of Section 1090.

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.)

The contract at issue here is the renewal or extension of the lease between the District and Marriott.

Is the Commissioner making or participating in making a contract?

Section 1090 casts a wide net to capture those officials who participate in any way in the making of the contract. (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) Therefore, for purposes of Section 1090, participation in the making of a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitations for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.) 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, supra* at pp. 645 & 649; *Fraser-Yamor Agency, Inc. v. County of DelNorte* (1977) 68 Cal.App.3d 201; 89 Ops.Cal.Atty.Gen. 49 (2006).)

A decision to modify, extend, or renegotiate a contract constitutes involvement in the making of a contract under Section 1090. (See *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191 [exercising a renewal option and adjusting the payment rates in making a contract within the meaning of Section 1090].) Further, where an existing contract requires periodic renegotiation of payment terms, the modification of such terms constitutes the making of a contract. (81 Ops.Cal.Atty.Gen. 134 (1998).)

The governmental decision at issue here is whether to approve the renewal or extension of the lease between the District and Pacific, and this decision qualifies as the making of a contract for purposes of Section 1090. Therefore, if the Commissioner participates in this governmental decision he would be participating in the making of a contract for purposes of Section 1090.

Does the Commissioner 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.*)

The Commissioner rents a boat slip on a month-to-month basis from Marriott. The governmental decision at issue is whether to renew and extend the lease between the District and Pacific. There is no indication from the facts provided that the District’s decision on whether to

renew and extend the lease will affect the Boat Slip Agreement between Marriott and the Commissioner. There is no indication of a potential for profit or loss with respect to the Boat Slip Agreement between Marriott and the Commissioner as a result of the approval or denial of the renewal or extension of the lease between the District and Pacific. Therefore, the Commissioner does not have a financial interest in the lease between the District and Pacific.

Because we have determined that the Commissioner does not have a financial interest in the lease between the District and Pacific, our Section 1090 analysis ends here. Under the facts provided, we conclude that Section 1090 does not prohibit either the Commissioner or the District from participating in the decision on whether to renew and extend the lease between the District and Pacific because the Commissioner does not have a financial interest in the lease.

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

Sincerely,

Hyla P. Wagner
General Counsel

/s/

By: Matthew F. Christy
Counsel, Legal Division

MFC:jgl