



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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September 11, 2015

Amy R. Webber
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Long Beach City Attorney's Office
333 West Ocean Blvd., 11th Floor
Long Beach, CA 90802-4664

Re: Your Request for Advice
Our File No. A-15-166

Dear Ms. Webber:

This letter responds to your request for advice regarding the conflict of interest provisions of Government Code Section 1090.¹

Because the Fair Political Practices Commission (the "Commission") does not act as a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), this letter is based on the facts presented.

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 Los Angeles District Attorney's Office. We did not receive a written response from either entity. (Section 1097.1(c)(4).)

Please note that the following advice is based solely on Section 1090, and we offer no opinion on the application, if any, of other conflict of interest laws, such as common law conflict of interest. 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 Section 1090 preclude the City of Long Beach from entering into a contract for property tax reduction with Mayor Garcia pursuant to the Mills Act (Section 50280 et seq.)?

2. Does Section 1090 preclude the City from entering into contracts for property tax reduction pursuant to the Mills Act (Section 50280 et seq.) with property owners in a condominium building in which the Mayor owns a loft, even if the Mayor does not enter into a property tax reduction contract with the City for the loft?

¹ All statutory references are to the Government Code, unless otherwise indicated.

CONCLUSIONS

1. Yes. Section 1090 precludes the City from entering into a property tax reduction contract with the Mayor.

2. We do not reach this question because the City's Mills Act Tax Incentive Program ("Mills Act Program") precludes the other property owners in the condominium building from participation by its own terms.

FACTS

Enacted in 1972, the Mills Act authorizes local governments to enter into a contract with the owner of a qualified historical property who agrees to rehabilitate, restore, preserve, and maintain the property in exchange for property tax reductions. According to your letter, if approved for a contract under the City's Mills Act Program, a property owner may receive a 30 to 50 percent reduction in property taxes.

The City recently reinstated its Mills Act Program and solicited applications for participation from qualified owners of qualified historical properties within its jurisdiction. To participate in the program, an owner of such a property must submit an application to the City. If the application is approved, the City may enter into a Mills Act Contract with the owner. The City imposes additional requirements for a condominium or a Home Owners Association controlled property to apply to participate in the program: these types of properties must also submit an additional application for the building's exterior and common spaces, aside from those of the individual owners of each of the constituent units, and applications from these types of properties are eligible for consideration only if all the individual owners consent to apply for and participate in the program.²

Upon submission, an application is reviewed by the City's Planning Bureau Staff, and then by the City's Cultural Heritage Commission, each of which issue recommendations on the application, before finally being reviewed for approval by the City Council. An approved application authorizes the formation of a Mills Act Contract between the property owner and the City.³ The contract is required to remain in effect for a minimum of ten years and is binding on all successors of interest of the property owner during that time. (Section 50281.)

Mayor Garcia owns a loft within the Temple Lofts Building, a condominium building within jurisdiction of the City. The Homeowners' Association for the Temple Lofts Building submitted an application to participate in the City's Mills Act Program that included the individual application of the Mayor for his loft within the building.

² See <http://www.lbds.info/civica/filebank/blobdload.asp?BlobID=5362>, p. 11.

³ *Id.* at pp. 11-12.

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 an official has a conflict of interest under Section 1090.

Step One: Is the Mayor subject to the provisions of Section 1090?

Section 1090 applies to virtually all state and local officers, employees, and multi-member bodies, whether elected or appointed. Section 202(a) of the Long Beach City Charter provides that the Mayor is the “chief legislative officer of the City.” The Mayor is a local officer 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.)

Here, the decision at issue whether the City Council should approve and enter into Mills Act Contracts with the Mayor and the other individual owners of constituent units within the Temple Lofts Building. The decision directly involves contracts.

Step Three: Is the Mayor making or participating in making a contract?

It is important to note that Section 1090 reaches beyond the officials who actually execute the 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.) Individuals in advisory positions can influence the development of a contract during these early stages of the contracting process even though they have no actual power to execute the final contract. (See, e.g., *Schaefer, supra*, 140 Cal.App.2d at p. 291; *City Council v. McKinley* (1978) 80 Cal.App.3d 204.)

Although the Long Beach City Charter provides that the Mayor shall not have a vote on issues before the City Council, it also provides that the Mayor shall be the chief legislative officer of the City, shall have the power to veto actions of the City Council, shall preside at City Council meetings, and may participate fully in the deliberations and proceedings of the City Council. (Long Beach City Charter, § 202(a).) Because the Mayor has the authority to influence deliberations over whether to approve a Mills Act Contract, for the purposes of Section 1090, the Mayor would be participating in the making of such a contract.

Step Four: Does the Mayor 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 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. (*Thomson, supra*, at pp. 645, 651-652; see also *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; *People v. Darby* (1952) 114 Cal.App.2d 412, 431-432; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

As the owner of a loft in the Temple Lofts Building, the Mayor would have a direct financial interest in a Mills Act Contract for his loft because the Mayor would receive a reduction in property taxes on the loft as a result of the contract. Therefore, Section 1090 prohibits the City from making a Mills Act Contract with the Mayor for his loft in the Temple Lofts Building.

In addition, case law and statutory exceptions to Section 1090 make clear that the term “financially interested” must be liberally interpreted. (See, e.g., *People v. Deysher* (1934) 2 Cal.2d 141, 146 [“(h)owever devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void”].) Further, “the certainty of financial gain is not necessary to create a conflict of interest . . . (t)he government’s right to the absolute, undivided allegiance of a public officer is diminished as effectively where the officer acts with a hope of personal financial gain as where he acts with certainty.” (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1298 (citations omitted).)

Because Section 1090 prohibits the City from making a Mills Act Contract with the Mayor, and because condominiums or Homeowners’ Association controlled buildings are ineligible to participate in the City’s Mills Act Program unless all owners of the constituent units consent to applying and participating in the program, the Homeowners’ Association for the Temple Lofts Building and the individual owners of its constituent units are precluded from participation in the program based on its own restrictions.

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

As a general rule, when Section 1090 is applicable 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).) However, the Legislature has created various statutory exceptions to Section 1090's prohibition where the financial interest involved is deemed to be a "remote interest," as defined in Section 1091, or a "noninterest," as defined in 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 merits discussion here is the "noninterest" specified in Section 1091.5(a)(3), which provides that an officer or employee shall not be deemed to be 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 issue distills to whether the property tax reductions available pursuant to the Mills Act program are considered "public services generally provided" under Section 1091.5(a)(3). It has been stated that "[t]he phrase 'public services generally provided' is not self-defining, nor is there any useful legislative history that might shed light on the Legislature's intent." (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1086.) However, Attorney General opinions and case law make clear that the exception is intended to apply only to services that are uniformly provided to all customers and for which rates and charges have been clearly established, such as public utilities (water, gas, and electricity), and the renting of hangar space in a municipal airport on a first come, first served basis. (See e.g., 81 Ops.Cal.Atty.Gen. at p. 319; *City of Vernon, supra*, at p. 516.)

In contrast, where administering officials are required to exercise judgment or discretion, the exception has been found not to apply. For example, a prior Attorney General opinion considered whether Section 1090 barred a city councilman from participating in a city-sponsored loan program for developing businesses within the city. (81 Ops.Cal.Atty.Gen. at p. 317.) When confronting whether this program constituted a "public service" under Section 1091.5(a)(3), the opinion noted that unlike services for public utilities, acquiring a government loan involved more complex considerations, as the "loan applicant must qualify, and the public official approving the loan must exercise some degree of discretion and judgment." (*Id.* at p. 319.) It further stated, "[w]hatever may be the scope of the 'public services' exemption of Section 1091.5, subdivision (a)(3), it does not include the extension of a business development loan, where the conditions of the loan would be specific to the particular proposal in question." (*Ibid.*)

In another opinion, a member of a County Air Pollution Control District's Board of Directors wanted to participate in the county's grant funding program, which provided funds to entities and individuals for the purchase or retrofit of certain engines and equipment. (92 Ops.Cal.Atty.Gen. 67 (2009).) In order to qualify, it was necessary to submit an application to the district, which the district then reviewed "to determine whether it meets all eligibility requirements set forth in the Health and Safety Code, the 2005 Guidelines, and the district's own policies and procedures." (*Id.* at p. 68.)

The opinion examined previous situations where the "public service" exemption had been recognized, concluding that the services in those instances were "provided without any exercise of judgment and discretion by the public officials involved. It is the absence of judgment and discretion that distinguishes these examples from the grant-award process under discussion here." (92 Ops.Cal.Atty.Gen. at p. 70.)

It is clear that the present matter does not concern services such as the provision of public utilities that have predetermined rates uniformly provided to all customers without the need to exercise discretion and judgment. Instead, the Mills Act Program here is similar to the loan and grant funding programs described above in that the administering officials from the City will be required to exercise judgment and discretion not only in negotiating the terms of each Mills Act Contract, but also in the continued enforcement of those terms.

The Mills Act requires a minimum 10-year term with automatic yearly extensions. (Sections 50281(a) & 50282(a).) Moreover, it requires that each contract provide for periodic inspections by the appropriate government officials to determine the owner's compliance with the terms of the contract. (Sections 50281(b)(2) & 50282(a).) The Mills Act also provides discretion to the administering officials to elect *not* to renew the contract for any reason. (Section 50282.) Finally, the administering officials have the authority to impose penalties if they determine the owner has breached the contract or failed to adequately protect the historic property. (Section 50284.)

In our view, from the initial review and approval of the application and contract to the ongoing contract compliance and renewal decisions, the Mills Act requires government officials to exercise discretion and judgment similar to the loan and grant programs described above. For this reason, we do not believe a Mills Act Contract falls within the scope of the "public services generally provided" exemption of Section 1091.5(a)(3), and therefore conclude that the Mayor would violate Section 1090 by entering into such a contract with the City.

Step Six: Does the rule of necessity apply?

In limited circumstances, a "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.

We conclude that Section 1090 prohibits the Mayor from entering a Mills Act Contract with the City. As noted above, we do not reach the question of whether Section 1090 prohibits the City from entering into Mills Act Contracts with the other owners of constituent units in the Temple Lofts Building because the terms of the City’s Mills Act Program preclude such a building from participation unless all owners consent to apply for and participate in the Mills Act Program and because the Mayor is precluded from participation pursuant to Section 1090.

However, if there are additional facts to consider or if the City’s Mills Act Program changes so that it no longer requires all owners of constituent units within a condominium or Homeowners’ Association controlled property to consent to participate, you may request additional advice.

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