



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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April 9, 2019

Gary S. Winuk
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A Professional Corporation
621 Capitol Mall, Suite 1900
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-18-275

Dear Mr. Winuk:

This letter responds to your request for advice regarding 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, not under other general conflict of interest prohibitions such as common law conflicts of interest.

Also, 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. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

In regard to our advice on Section 1090, we are required to forward your request and all pertinent facts to the Attorney General's Office and the Los Angeles County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from the Attorney General's Office, and the Los Angeles County District Attorney declined to advise on the facts presented (a copy of their written correspondence is enclosed). (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 The Albright continue its pre-existing lease with the Santa Monica Pier Corporation, under the present terms and conditions of the lease until the lease expiration in June 2020 under Government Code Sections 1090 and 87100?

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. May The Albright renew its pre-existing lease with the Pier Corporation, as per the Pier Leasing Guidelines administered by the Office of Pier Management (“OPM”) and the Pier Corporation under Government Code Sections 1090 and 87100?

3. Do the City approvals required for any improvements of The Albright required under the lease between The Albright and the Pier Corporation create a conflict of interest for Councilmember Morena under Government Code Sections 1090 and 87100?

4. May RSR continue its pre-existing lease with the Pier Corporation under the present terms and conditions of the lease until the lease expiration in September 2024 under Government Code Sections 1090 and 87100?

5. May RSR extend its pre-existing lease with the Pier Corporation, as per the terms and conditions of the lease between RSR and the Pier Corporation under Government Code Sections 1090 and 87100?

6. May RSR enter into a lease amendment for a second extension option with the Pier Corporation, as per the terms and conditions of that certain term sheet acknowledged and confirmed by RSR and the OPM dated November 28, 2017 under Government Code Sections 1090 and 87100?

7. Does Councilmember Morena have a conflict of interest under Government Code Section 1090 or 87100 with regard to The Albright or RSR leases?

8. If there is a conflict of interest in the RSR lease, is the City prohibited under Government Code Section 1090 from continuing the lease between the Pier Corporation and RSR if Councilmember Morena discontinues his management agreement and any other financial interest with RSR but retains a purchase option for the potential future purchase of RSR?

9. Do the City approvals required for the improvements of RSR required under the lease between RSR and the Pier Corporation create a conflict of interest for Councilmember Morena under Government Code Sections 1090 and 87100?

CONCLUSIONS

1 & 4. Yes. The Albright and RSR may continue their pre-existing lease with the Santa Monica Pier Corporation, under the present terms and conditions of the lease until the lease expiration, as the mere continuation of the existing leases would not involve the making of any governmental decisions, and thus not implicate either the Act or Section 1090.

2, 5, 6, 7, & 8. Councilmember Morena has a “financial interest” in The Albright resulting from his ownership interest, and in RSR resulting from both the management agreement and purchase option, and Section 1090 prohibits the renewal or amendment of these leases.

3 & 9. We are unable to determine whether approvals required under the leases create a conflict of interest under Section 1090 or 87100 without identifying the specific decision and the nature of the decision. Generally, routine or administrative approvals of permits or design and site

plans, without negotiated conditions of approval, are not contractual in nature. To the extent that the approvals needed for improvements of The Albright and RSR required under the lease consist of permitting or similar decisions, that involve staff-level review designed to ensure they are consistent with existing zoning rules, as well as meet standards for building quality, health, and safety, these are not the type of decisions that would implicate Section 1090. Moreover, where these decisions are not made by the city council, and Councilmember Morena does not make, participate in making, or use his official position to influence the decision, there would generally be no conflict under the Act.

FACTS AS PRESENTED BY REQUESTER

Greg Morena was a successful candidate for Santa Monica City Council in the November 6, 2018 City election. Councilmember Morena and his wife, Yunnice Kim Morena, are joint owners and officers of EST. 1977 SMPS Co. ("The Albright") which owns, manages and operates a restaurant located on the Santa Monica Pier called The Albright. The Santa Monica Pier is located within the City of Santa Monica. The Morenas own the restaurant along with Ms. Hae Ju Lee Kim, Yunnice Morena's mother. Ms. Kim opened The Albright in 1977. The Morenas took over management of the The Albright in 2013. The Albright currently leases the premises on which it operates from the Pier Corporation (via the City of Santa Monica). The Albright lease is set to expire in June, 2020. There is anticipated to be a lease renewal process, which may be accomplished through a Request for Proposal ("RFP") process. The RFP would not be reviewed by the City Council.

Councilmember Morena recently entered into a management agreement with Hospitality Industry Management Group, LLC d/b/a Rusty's Surf Ranch, and has proposed a purchase option to manage and operate the restaurant next door to The Albright named Rusty's Surf Ranch ("RSR"). The management agreement will provide income in excess of \$500 per year to Councilmember Morena. RSR also leases the premises on which it operates from the Pier Corporation. The RSR lease term is set to expire on September 30, 2024. The lease contains one five-year extension option. RSR and the OPM acknowledged and confirmed, on November 28, 2017, a term sheet for a second five-year extension option. RSR is currently undergoing construction for tenant improvements as contemplated under the RSR lease.

There are several relevant governmental and quasi-governmental entities that have some effect on the leases and their provisions, as follows:

Santa Monica Pier Corporation - The Pier Corporation is a California nonprofit public benefit corporation, with the City of Santa Monica as the sole member of the corporation. The City Council appoints members to the Pier Corporation Board (7 staggered Board Members for a 4-year term). Appointments to the Pier Corporation Board are expected to be made during Councilmember Morena's term. The authority of the Pier Corporation is delegated from the City Council pursuant to the Pier Corporation Bylaws and Service Agreement with the City of Santa Monica. The City Council has the authority to review the Pier Corporation governance structure. The Service Agreement is a limited term agreement, subject to renewal and modification by the City Council.

Actions of the Pier Corporation are generally not appealable to the City Council. If the Pier

Corporation operates within the bounds of the service agreement, the Corporation's decisions cannot be appealed to the City Council. However, if the Pier Corporations' actions have broader City impacts, such as increased City costs to provide public safety support for special events at the Pier, the City Council can use its budget authority to cause changes in event planning. With specific regard to leases, the Pier Corporation has authority to enter into leases of less than 25 years in duration without City Council approval. This includes authority for modifications and renewals of leases that total less than 25 years. The lease and lease modifications between The Albright and the City and RSR and the City are actions by the Pier Corporation and not appealable to the City Council.

Santa Monica Housing and Economic Development Department/Economic Development Division - The Housing and Economic Development Department creates affordable housing opportunities and a sustainable economy in Santa Monica. The Department is responsible for implementing City real estate transactions, promoting economic sustainability, serving as liaison to the business districts, managing leasing and licensing of City property, and managing the Santa Monica Pier.

The Economic Development Division manages the City's real estate assets. The Division, among other duties, has leasehold management responsibility for a variety of properties throughout the City, including the Pier. The Division provides technical assistance to City departments in lease negotiation, property management, and property reuse and development.

With regard to The Albright and RSR leases, the Department will assist the Pier Corporation Board with evaluating decisions around The Albright and RSR lease renewals, modifications, amendments, extensions, approvals, consents, etc. (if any).

Office of Pier Management ("OPM") - OPM administers the Service Agreement between the City and the Pier Corporation. It serves as the City of Santa Monica's on-site coordinator of Pier services and programs, and manages community, tenant and visitor relations. Additionally, the OPM, as part of the Economic Development Division, administers the leasing process in accordance with the Pier Leasing Guidelines. The OPM assists with evaluating decisions around The Albright and RSR lease renewals, modifications, amendments, extensions, approvals, consents, etc. (if any). As an office of the City, the OPM also follows the City's standard practices with respect to procurement, budgeting, and appropriations for its internal operations, including seeking Council approval as required by the City Charter and Municipal Code for these internal operations.

Santa Monica Public Works Division - Manages all maintenance on the Pier, evaluates and approves building and construction issues with sewer, water and electrical issues, most of which are outside of the OPM Purview.

Office of Sustainability and the Environment - Evaluates, addresses and/or approve issues related to recycling and sustainability ordinances. This office may consider these issues with regard to The Albright and RSR leases. It is part of the Public Works Division.

Santa Monica City Planning Division - Evaluates and approves building and construction planning modifications and mobility requirements that are outside of the OPM's purview.

Santa Monica Building and Safety Division - This Division is a subset of the Planning Division. It evaluates and approves building and construction related permits for The Albright and RSR. Per the Santa Monica Municipal Code, none of the actions of this Division with regard to the permits and approvals needed for either The Albright or the RSR lease projects require City Council approval or are appealable to the City Council.

Santa Monica Landmarks Commission - This Commission will evaluate and approve signage and aesthetic changes to The Albright and RSR in connection with building and construction. This Commission is part of the Building and Safety Division

ANALYSIS

Government Code 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.) The prohibition applies regardless of whether the terms are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.)

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).) Officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.)

In this case, the facts provided show that Councilmember Morena has an interest in The Albright as the owner and operator of the restaurant, as well as in RSR as the result of both the management agreement and purchase option. As such, he is financially interested in all contracts to which The Albright and RSR are a party.

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, 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).)

When a governmental board ultimately has the authority over the contracts made by a subordinate decision maker, generally the board members have participated in the resulting contract thereby triggering Section 1090 by exercising their authority to review or not to review the contracts. (See *City of Imperial Beach v. Bailey*, supra, 103 Cal.App.3d at p. 195 [where the city council has authority to approve the city's unilateral action to set the rate charged to a concession stand, "it is not [the councilmember's] participation in the voting which constitutes the conflict of interest [under Section 1090], but her potential to do so"]; 88 Ops.Cal.Atty.Gen. 122, 124 (2005) [a city council has indirectly participated in the city's decisions regarding advertising rates in the city's quarterly brochure because "in effect" the city council approves the advertising rates in approving the proposed revenue derived from advertising specified in the city budget]; 87 Ops.Cal.Atty.Gen. 9 (2004) [the governing board of a school district may not avoid Section 1090 by adopting a policy delegating to the district superintendent its authority to contract on behalf of the district].)

We note The Albright and RSR may continue their pre-existing lease with the Santa Monica Pier Corporation, under the present terms and conditions of the lease until the lease expiration, as the mere continuation of the existing leases would not involve the making of any governmental decisions, and thus not implicate Section 1090. However, in the present situation, Councilmember Morena would like to modify or extend existing contracts with the City, in which he is financially interested, that were entered into prior to his election to the City Council and concern the operation of businesses on City property. Instructive on this issue are two matters discussed below.

In *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, the city sought declaratory relief as to whether the city council could renew or extend the contract it had with a beach concession operator who was also a councilmember. (*Id.* at p. 193.) The contract, which had been in effect prior to the councilmember's election, involved the operation of a concession stand to sell bait, fishing tackle and refreshments on a municipal pier. (*Id.* at p. 194.) After her election to the city council, the councilmember sought to exercise the option to renew the contract, but the city refused on the ground that it was prohibited by Section 1090. (*Ibid.*)

The *Imperial Beach* Court held, in part, that the exercise of the option to renew would constitute the "making" of a contract in violation of Section 1090 as long as she was a member of the city council. (*Id.* at p. 197.) In doing so, it emphasized that although the councilmember's integrity was above reproach and she would have to decide whether to remain on the city council or as owner of the concession, the purpose of Section 1090 is "not only to strike at actual impropriety, but also to strike at the appearance of impropriety." (*Ibid.*; *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.)

In another matter, a general partnership had a real property lease and water purchase agreement with a city. (81 Ops.Cal.Atty.Gen. 134 (1998).) The lease required renegotiation of the rental rate and water fees every five years in accordance with guidelines specified in the agreement. (*Ibid.*) After entering the agreement but before the mandatory deadline for renegotiation, one of the general partners was elected to the city council. (*Ibid.*) The opinion addressed the effects Section

1090 had on the ability of the city council to renegotiate a contract executed prior to the election of a city councilmember with a financial interest. (*Ibid.*)

The opinion stated that the circumstances were similar to those in the *Imperial Beach* matter and concluded, in part, that where one of the general partners was a councilmember, Section 1090 prohibited the city council from approving a new rental rate and fees because that would constitute the making of a contract:

The court's reasoning in *Imperial Beach* is applicable to the specified renegotiation of the contract between the city and the partnership. Even though the original contract contains guidelines for establishing the rental rates and water fees for each subsequent five-year period, negotiation of the actual amounts would both constitute the "making" of a contract and present, at the least, the appearance of a conflict of interest that section 1090 prohibits. Hence, such renegotiation would be impermissible under the statute.

(*Id.* at p. 137.)

The present matter is very similar to the *Imperial Beach* matter and the Attorney General opinion just described. As mentioned, Councilmember Morena would like to modify or extend existing contracts with the City, in which he is financially interested, that were entered into prior to his election to the City Council and concern the operation of businesses on City property. As explained above, this is exactly the type of action prohibited by Section 1090.

You mention that past contracts that have typically been made between the City and The Albright and RSR have been made through the Pier Corporation without involvement of the City Council. However, the City Council's delegation of its authority to approve leases for the pier is not sufficient to avoid a violation of Section 1090. (See 87 Ops.Cal.Atty.Gen. 9 (2004) and 88 Ops.Cal.Atty.Gen. 122 (2005) [a body such as a city council cannot avoid application of Section 1090 by delegating its contracting authority to another individual or body].)

Therefore, unless Councilmember Morena divests himself of the proscribed financial interest, the City is prohibited from modifying or extending the existing leases, even if he abstains from participating in the decision.

In addition to modifying or extending the existing leases, you also ask if the City approvals required for any improvements of The Albright and RSR required under the respective leases create a conflict of interest for Councilmember Morena under Government Code Sections 1090 and 87100. However, we are unable to determine whether approvals required under the leases create a conflict of interest under Section 1090 or 87100 without identifying the specific decision and the nature of the decision. More generally, we do note that routine or administrative approvals of permits or design and site plans, without negotiated conditions of approval, are not contractual in nature. (84 Ops.Cal.Atty.Gen. 34 (2001).) To the extent that the approvals needed for improvements of The Albright and RSR required under the leases consist of permitting or similar decisions, that involve staff-level review designed to ensure they are consistent with existing zoning rules, as well

as meet standards for building quality, health, and safety, these are not the type of decisions that would implicate Section 1090.

The Political Reform Act

In light of our conclusion that Section 1090 prohibits the renewal or amendment of these leases, further advice under the Act concerning the renewal or amendment of the leases is not necessary. In regard to other decisions, such as City approvals required for any improvements of The Albright and RSR required under the respective leases city approvals, a public official must not make, participate in making, or attempt to influence a decision in regards to an application before his or her agency if it would have a reasonably foreseeable material financial effect upon the official's interests. Generally, the Act's conflict of interest provisions apply only when a public official "make[s], participate[s] in making, or in any way attempts to use his [or her] official position to influence a governmental decision in which he [or she] knows or has reason to know he [or she] has a financial interest." (Section 87100; Regulation 18700(b)(2).) Under these provisions, the official must also not use his or her official position to attempt to influence a decision by contacting or appearing before *any agency subject to the authority or budgetary control* of the official's agency. (Regulation 18704(c)(1).)

However, the Act's conflict of interest provisions would not prevent City staff from processing ordinary approvals of permits or design and site plans, so long as the financially interested official does not make, participate in making, or use his or her official position in an attempt to influence the decision.

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

Sincerely,

Dave Bainbridge
General Counsel



By: Zachary W. Norton
Senior Counsel, Legal Division

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Enclosure