STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

April 20, 2021

Gregory P. Wayland
City Attorney
Amador City
15232 Medella Circle
Sloughhouse, California 95683

Re: Your Request for Advice
Our File No. A-21-030

Dear Mr. Wayland:

This letter responds to your request for advice regarding the post-government employment provisions of the Political Reform Act ("Act") and Government Code Section 1090, et seq.[1] Please note that we are only providing advice under the post-government employment provisions of the Act and Section 1090. We therefore offer no opinion on the application, if any, of other conflict of interest or post government employment laws.

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.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General's Office and the Amador County District 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. Are you prohibited from hiring former Amador City Council member David L. Groth under the post-government provisions of the Act?

2. Are you prohibited from hiring Mr. Groth under your current legal services contract with the Amador City, where Mr. Groth participated in the formation and execution of the contract as a

[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.

City Council member? May you negotiate with the City in the future to allow for a paralegal position, to bill for Mr. Groth's services?

CONCLUSIONS

1. The Act's prohibition on post-governmental employment for local officials, prohibits Mr. Groth from appearing as a compensated representative for any person before the City to influence a contract. (Section 87406.3(a).) We advise that you may not identify the former mayor as a potential employee in any negotiations you may have with the City, nor may Mr. Groth appear as your agent, prior to the end of the one-year period in which the mayor is prohibited from appearing before the City to influence a contract.

2. Section 1090 prohibits officers from financially benefitting from a contract in which they participated in their official capacity. Past case law is clear that an official may not participate in making a contract, and then benefit from that contract after leaving office. Accordingly, due to his past participation as a City Council member in its formation and execution, Section 1090 prohibits Mr. Groth from employment under the present legal services contract. However, in the event that the City Council engages in a substantive review of the contract at the end of its annual period to alter your compensation terms, and so long as Mr. Groth is not involved in these negotiations in any manner or identified in seeking the renewal of the contract at the end of its annual period, prior to the end of the Act's one-year ban, the resulting contract would be a new proceeding distinct from Mr. Groth's past participation and influence such that it would not fall under the Section 1090 prohibitions.

FACTS AS PRESENTED BY REQUESTER

You are the City Attorney for Amador City, an incorporated general law city with a population less than 200. You were appointed to this position, after your successful competitive bid, and work as an independent contractor under a contract executed with the City in 2018, commencing in 2019 and continuing to this date. Your only client is the City. You wish to hire Mr. Groth to conduct paralegal work on a part-time basis under this contract. Mr. Groth was the mayor at the time your contract with the City was executed in 2018, and as a City Council member participated in the decision to appoint you and approve the contract. As mayor, he signed the legal services contract on behalf of the City. He served as mayor at all times during your service until January 2021, when he left office.

You provided additional facts by email that the City has contracted out its legal services since at least the 1980's. This contract is similar to your predecessor's contracts, with a slight increase in the set monthly rate. You state this contract is best described as a "periodic on an annual basis" agreement. Under its terms, you are paid monthly at a rate of $400 a month for attending twelve regular City Council meetings and twenty-four hours of legal services in a calendar year. If you are called upon to perform more than twenty-four hours of legal services in that year, you may bill the City at a rate of $125 for legal services and $60 for your clerical services. You may obtain outside contractors with the City Council's permission. Your contract continues until terminated by

the City or by you upon 60 days' notice. No Council action is required to continue the contract, and none has occurred since your initial appointment.

To hire Mr. Groth, you would either seek the Council's approval for "specialized services," bill it under clerical work for $60 an hour under the contract's existing terms or seek Council approval to amend the contract to expressly include a paralegal position. To date, the contract has not been modified in any manner. There was no discussion of a paralegal position at the time you entered into contract with the City.

ANALYSIS

The Act

Specified local governmental officials, including city councilmembers, who leave governmental service are subject to the Act's one-year ban for local officials in Section 87406.3, also known as the local "one-year ban." Under this ban, the former local official is prohibited from communicating with their former agency, for compensation and in representation of another person, for the purpose of influencing any legislative or administrative actions, including quasi-legislative and quasi-judicial actions, or any discretionary actions involving the issuance, amendment, awarding, or revocation of a permit, license, grant or contract, or the sale or purchase of goods or property. (Section 87406.3.) Therefore, Mr. Groth is prohibited from appearing before the City as your representative, or being identified as a potential candidate for the position, if he is being compensated or promised compensation to influence the proceeding, including the renewal of legal services contract at issue at the end of its annual period, for one year following his date of leaving office. (Section 87406.3(a).)

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.) 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.)

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 phrase "financially interested" broadly encompasses anything that would tie a public official's fortunes to the existence of a public contract. (*Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323,

1335.) It also includes employment relationships.[2] Mr. Groth would have a financial interest in the legal services contract as your employee.

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.) 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).) There is no question that Mr. Groth participated in and executed the legal services contract as a City Council member. It is the contract executed in 2018 that is in operation today. We find that none of the Legislature's defined "remote" or "noninterest" exceptions are applicable to these facts. (See Section 1091 and 1091.5.)

Leaving public office does not avoid a Section 1090 violation where the official was involved in the contract process. In *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572, a board member of a sanitary district was appointed to the position of District Manager after he resigned from the board. He announced at a board meeting that he was interested in the position and, at a later meeting, distributed a statement of his qualifications. The board offered him the position to be effective upon his resignation. The court held that his appointment to the District Manager position violated Section 1090. Similarly a county employee could not propose an agreement for consulting services, then resign, and provide the proposed services (66 Ops.Cal.Atty.Gen. 156 (1983)); a 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); a former member of a city planning commission was prohibited from entering a consultant contract with the city in a later fiscal cycle, where the official was instrumental in proposing contracting out services instead of using staff members. (Cal.Atty.Gen., Indexed Letter, No. IL 92-1212 (Jan. 26, 1993)). In each the above matters, Section 1090 prohibited an officer that had participated in the formation of the contract from later benefitting from the contract after leaving office.

Therefore, Mr. Groth is prohibited under Section 1090 from receiving a financial benefit from the contract. We find the prohibition includes any attempt to bill for his services under your present legal services contract. To find otherwise would allow an official to leave office after participating in a contract and then gain employment under the contract.

Nonetheless, the prohibition of Section 1090 applies only to the extent that the current contract remains in effect. It is well settled that a decision to make changes to existing contracts, including modifications, extensions, or renegotiations are themselves "contracts" under Section 1090, and which require an examination of an official's participation in that contract. (See, e.g., *City of Imperial Beach v. Bailey* supra at p. 193; see also 98 Ops.Cal.Atty.Gen. 102 (2015) In the

[2] See 89 Ops. Cal. Atty. Gen. 278 at p, 282, ft. 4, (2006), "The existence of employment-based remote and noninterest exceptions to section 1090's prohibition (see §§ 1091, subds. (b)(1), (b)(2), (b)(3), 1091.5, subds. (a)(11), (a)(12), (a)(13), (b)) further demonstrates that the Legislature finds employees to be generally interested in contracts made by their employers, but that in certain circumstances such interests may not prevent execution of the contracts."

event that you seek to alter the terms of the contract at the end of the contract's current annual period to change your compensation to include additional services for the current City Council's consideration and negotiations, these circumstances would present a distinct proceeding. These negotiations would be removed from Mr. Groth's past participation in the initial contract in 2018, and ability to influence the resulting contract. A key question in determining a Section 1090 violation is whether the official "had the opportunity to, and did, influence the terms of the contract to promote his personal interests." (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) Upon the end of the current annual period, any new agreement formed with its terms and compensation, would be made by the current City Council, which does not include Mr. Groth. Therefore, under these particular circumstances, we find Section 1090 would not prohibit you from seeking to employ Mr. Groth under a separately negotiated and fully reconsidered contract at the end of this contract's annual period.

We caution, however, that the Act's one-year ban may still be in effect at the end the current contract's annual period. Prior to the end of the Act's one-year ban, Mr. Groth may not be involved in these negotiations in any manner or identified in seeking the renewal of the contract at the end of its annual period.

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

Sincerely,

Dave Bainbridge
General Counsel

L. Karen Harrison

By: L. Karen Harrison
Senior Counsel, Legal Division

LKH:dkv