



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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May 25, 2021

Randy J. Risner
Chief Assistant City Attorney
555 Santa Clara Street
Vallejo, CA 94590

Re: Your Request for Advice
Our File No. A-21-065

Dear Mr. Risner:

This letter responds to your request for advice regarding the conflict of interest provisions under the Political Reform Act (the “Act”) and Government Code section 1090, et seq.¹ Please note that we are only providing advice under the Act and Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including Public Contract Code. 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 Solano 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).)

QUESTION

Does either Section 1090 or the Act prohibit Councilmember Diaz from representing buyers in a potential purchase of City property even where she recuses herself from the City’s decision-making process and provides her representation without any compensation?

CONCLUSION

Yes. As explained below, Councilmember Diaz would have a prohibited financial interest under Section 1090 in a contract between the buyers and the City even if she did not participate in her official capacity in the City’s decision and provided representation without any compensation.

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.

FACTS AS PRESENTED BY REQUESTER

You are the Chief Assistant City Attorney for the City of Vallejo seeking advice on behalf of Councilmember Mina Diaz, a licensed California real estate agent. Her broker is RE/MAX Gold in Benicia, California.

Councilmember Diaz represents Carmela Sandoval and Daniel Rueda (the “Buyers”), who are local business owners in Vallejo. Buyers desire to purchase a City-owned parking lot located in the 400 block of Broadway Street in Vallejo near Tennessee Street (the “Property”). Prior to her election to the City Council, she presented two offers for the Property to the City. One offer was presented on December 27, 2019 and the second offer was presented on January 29, 2020. Neither offer was presented to the City Council for consideration.

Councilmember Diaz now desires to submit a third offer for the Property with the following terms: 1) purchase price of \$125,000; 2) \$10,000 deposit; 3) 21-day escrow; 4) Buyers pay escrow and title fees; and 5) commission of two percent payable entirely to RE/MAX Gold.

Even though Councilmember Diaz is representing the Buyers, she does not intend to accept a commission. However, as set forth above, her broker will accept a two percent (2%) commission. The offer and purchase of the Property will be while Councilmember Diaz is a sitting councilmember. In addition to declining her commission, Councilmember Diaz intends to recuse herself from any vote by the City Council concerning the sale of the Property.

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. City of 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.) Finally, when Section 1090 applies to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain. Instead, 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).)

In this instance, it is not contested that Councilmember Diaz is a public officer subject to the provisions of Section 1090 and that any agreement between the City and the Buyers regarding the Property is a contract for purposes of Section 1090. Additionally, as a member of the Vallejo City Council, Councilmember Diaz is presumed to be involved in the making of all contracts by the City irrespective of whether she actually participates in the making of the contract. (*Thomson, supra*, at pp. 645, 649.) Thus, the primary question is whether Councilmember Diaz has a financial interest in any contract between the City and the prospective Buyers regarding the Property and, if so, whether her interest is a “remote interest” or a “noninterest” as defined in Sections 1091 and 1091.5.

Of the statutory exceptions established for remote interests and noninterests, two exceptions concern real estate agents providing real estate services to the contracting party. First, under Section 1091(b)(6), a real estate agent who renders services to the contracting party has a remote interest in a contract between the government entity and the contracting party where the agent has “not received and will not receive remuneration, consideration, or a commission as a result of the contract and if these individuals have an ownership interest of 10 percent or more in the ... real estate firm.” Second, under Section 1091.5(a)(10), a real estate agent who renders services to the contracting party has a noninterest in a contract between the government entity and the contracting party where the agent has “not received and will not receive remuneration, consideration, or a commission as a result of the contract and if these individuals have an ownership interest of less than 10 percent in the ... real estate firm.”

Assuming Councilmember Diaz does not have an ownership interest of 10 percent or more in RE/MAX Gold, the remote interest exception under 1091(b)(6) would not apply to this situation. The issue therefore is whether the current situation comes within the noninterest exception under Section 1091.5(a)(10) given Councilmember Diaz has less than a ten percent ownership interest in RE/MAX Gold and would not receive any commission resulting from the sale of the Property to the Buyers.

A recent Attorney General Opinion addressing whether a councilmember could act as an attorney for a contracting party with interests adverse to the city is instructive. (See 101 Ops.Cal.Atty.Gen. 1 (2018).) There, the Attorney General ultimately concluded that neither the remote interest exception under 1091(b)(6) nor the noninterest exception under Section 1091.5(a)(10) would apply where the representation involves the contract at issue. (*Id.* at p. 7; fn. 76 [“the phrase ‘an attorney of the contracting party’ pertains to the representation of the client in other, unrelated matters, not in the contract with the city”].) The Attorney General explained that this narrow interpretation of the exception is necessary to avoid undermining the purpose of Section 1090 in ensuring that public officials discharge their fiduciary duties with undivided allegiance. (*Ibid.*) As to the financial interest, the Attorney General stated that the “outcome would not vary merely because a representation was without compensation,” because “pro bono representation may still produce economic gains, goodwill, or prestige” for an official’s business.” (*Id.* at p. 8.)

In the present situation, Councilmember Diaz would like to submit an offer for the Property to the City on behalf of the Buyers, and she would recuse herself from any vote by the City Council. Similar to the Attorney General Opinion, even though she is willing to represent the Buyers without any compensation, the noninterest exception under Section 1091.5(a)(10) would not apply because she would represent the Buyers in the specific contract at issue – the contract for the purchase of the Property from the City, not some other, unrelated matter. And Councilmember Diaz cannot avoid

the Section 1090 prohibition by her recusal from the decision-making process because in the case of a financially interested board member, the official generally cannot avoid the conflict by disqualification; rather the official must resign from office or eliminate the private interest to avoid the proscription of Section 1090. (See *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191; *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572.) Due to this prohibition, no further analysis is necessary under the Act as to whether the Councilmember Diaz may act as the real estate agent for the Buyers in a potential purchase of the Property from the City.

Accordingly, Section 1090 prohibits Councilmember Diaz from representing the Buyers in a potential purchase of the City's Property even where she does so without compensation and recuses from the City's decision-making process.

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

Sincerely,

Dave Bainbridge
General Counsel

By: *Jack Woodside*
Jack Woodside
Senior Counsel, Legal Division

JW:dkv