STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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August 3, 2021

Christopher J. Diaz
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City Attorney
Town of Colma
2001 N. Main Street 390
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Re: Your Request for Advice
Our File No. A-21-071

Dear Mr. Diaz:

This letter responds to your request for advice on behalf of the Town of Colma (the Town) regarding the Political Reform Act[1] and Section 1090, et seq. 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 San Mateo 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. Does either the Act or Section 1090 prohibit a councilmember from taking part in a decision to amend the Town's one-year prohibition against former officials, including councilmembers, applying for tenancy in the Complex if any one councilmember may be contemplating applying for tenancy in the Complex within one year after leaving office, assuming the policy is changed?

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[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 18109 through 18998 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 either the Act or Section 1090 prohibit a councilmember from participating in decisions regarding the annual rent adjustment for the Complex where adult in-law relatives of two councilmembers are tenants at the Complex?[2]

CONCLUSIONS

1. No. Councilmembers who may be contemplating an application for tenancy in the Complex within one year after leaving office do not have a financial interest that would give rise to a conflict of interest under the Act because it is not reasonably foreseeable the decision will have a material effect on the officials. Likewise, this does not constitute a conflict of interest under Section 1090 because the noninterest exception under Section 1091.5(a)(3), for "public services generally provided," applies to allow the councilmembers to take part in a decision to amend the Town's one-year prohibition for former officials applying for tenancy in the Complex.

2. No. Neither the Act nor Section 1090 prohibit a councilmember from taking part in decisions concerning the Complex's annual rent adjustment where the in-law relatives are nondependent adult tenants at the Complex, receive no financial support from the councilmembers, receive no financial contributions from the councilmembers for residing at the Complex, and have no financial ties with the councilmembers.

FACTS AS PRESENTED BY REQUESTER

Your law firm serves as City Attorney to the Town and you seek advice on behalf of the Colma City Council. The Town is a general law city located in San Mateo County that owns a senior housing complex, known as Creekside Villas (the Complex).

You request follow-up advice in connection with the advice provided in the *Diaz* Advice Letter No. A-20-080, which concluded the following:

1. There are no provisions under the Act that would prohibit a member of the Colma City Council from becoming a tenant in the Complex within one year after leaving office.

2. Assuming former members of the City Council have a prohibitory financial interest under Section 1090 in a lease for the Complex, Section 1091.5(a)(3) would apply to allow them to become tenants in the Complex.

The City Council is now considering amending the Town's one-year prohibition against former officials applying for tenancy in the Complex within one year after leaving office.

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[2] You submitted a third question that stated: "Are there any other areas of law, including common law conflicts of interest, that would prohibit a councilmember from participating in decisions regarding the Town's one-year prohibition and the annual rent adjustment for the Complex?" However, the Commission has the authority to provide advice only under the Act and Section 1090. Thus, we provide no opinion regarding the application of any other bodies of law.

In 2005, the Colma City Council adopted certain rental policies "to enhance the quality of life for senior residents and give a limited preference to Colma residents for residency at [the Complex]." (Colma Administrative Code (CAC), § 2.02.010.)

The policies include eligibility rules and restrictions governing Colma's ability to rent, lease, or permit occupancy of a unit at the Complex. A person applying for tenancy in the Complex must be 62 years or older at the commencement of the tenancy, must not have a recurring need for supportive care and must not require the availability of continuous skilled nursing care, and must be financially able to pay the rent. (CAC, § 2.02.030(a).) There are also procedures for determining priority for residents based on prior residency and when a rental application is completed. (CAC, § 2.02.050.)

The policies further provide that the following individuals, by virtue of their position or relationship, are ineligible to become a tenant in the Complex:

- All former employees and officials of the Town who, by virtue of their position or relationship, for one year prior to the date of application for tenancy, had policy-making authority or influence over the implementation of the housing program. (CAC, § 2.02.040(a)(ii).)

There is also a Town policy requiring that any vacancy must be kept for interested residents of the Town of Colma for 60 days after becoming available. If multiple Town residents express interest within the 60-day period, the names of each interested resident are drawn by lottery at the 60th day and applications are accepted in the order of the lottery draw. There is no pre-qualification of applicants prior to the lottery. If the first applicant does not qualify, then the next name drawn in the lottery submits their application and this continues until a qualified applicant has been selected. If no Town residents express interest, then individuals residing outside the Town may be considered.

In addition, the Town's policies require an annual rent adjustment for inflation using a formula based on changes in the consumer price index. (CAC, § 2.02.060.) From time to time, the City Council makes decisions regarding the annual rent adjustment for the Complex, which includes suspending or increasing rent.

The City Council is now considering increasing the annual rent for the Complex. Two councilmembers have adult in-law relatives living at the Complex. These councilmembers do not provide any financial support to their respective in-law relatives and there are no financial ties between them.

ANALYSIS

A. The Act.

Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. 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, distinguishable from its effect on the public generally, on one or more of the public official's interests. (Section 87103; Regulation 18700(a).)

Section 87103 of the Act lists several types of financial interests that can give rise to a conflict of interest, including:

- An economic interest in a business entity in which he or she has a direct or indirect investment of $2,000 or more (Section 87103(a); Regulation 18702.1); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d).)
- An economic interest in real property in which he or she has a direct or indirect interest of $2,000 or more. (Section 87103(b); Regulation 18702.2.)
- An economic interest in any source of income, including promised income, aggregating $500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18702.3.)
- An economic interest in any source of gifts to him or her if the gifts aggregate to $500 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18702.4.)
- An economic interest in his or her personal finances, including those of his or her immediate family. (Section 87103; Regulation 18702.5.)

1. One-year ban.

Under Regulation 18702.5, a governmental decision's reasonably foreseeable financial effect on a public official's financial interest in his or her personal finances or those of immediate family, also referred to as a "personal financial effect," is material if the decision may result in the official, or the official's immediate family member, receiving a financial benefit or loss of $500 or more in any 12-month period due to the decision. (Regulation 18702.5(a).)

In this case, a decision regarding elimination of the one-year ban potentially implicates a financial interest in the official's personal finances. However, based on the facts provided it does not appear that the effect on an official's personal finances is reasonably foreseeable. As mentioned in the *Diaz* Advice Letter No. A-20-080, that leasing of a residence in the Complex is available to all Town residents 62 years of age or older, the property manager had virtually no discretion to pick and choose among applicants and the lease terms for a former councilmember would be provided on substantially the same terms as for any other constituent. (*Ibid.*) So long as these qualification requirements are not altered, it is not reasonably foreseeable that the elimination of the one-year ban will have a material effect on an official's personal finances merely because the official is contemplating applying for a residence within a year of leaving office [3]

2. Annual rent adjustment.

You ask whether the two councilmembers whose adult in-law relatives are tenants at the Complex have a conflict of interest under the Act with respect to decisions concerning the

[3] We note that this conclusion is limited to a decision regarding the elimination of the one year-ban. To the extent a decision involves the elimination or modification of the qualification requirements, including the current lottery policy, the Town should seek additional assistance describing the nature of the decision.

Complex's annual rent adjustment. There are no facts to suggest the relatives are sources of income to the councilmembers. In addition, there are no facts to indicate that the relatives are in any manner dependent on the councilmembers for support. The facts provided state that neither of the in-law relatives receives any financial support from their respective in-law councilmember, nor is there any financial tie between them; neither councilmember contributes any money to or pays for the in-law relative's expenses for residing at the Complex. As defined by the Act, a public official's interests do not extend to the real property interests of an official's in-laws. (See, e.g., *Podesta* Advice Letter, No. A-05-025; *Tessitor* Advice Letter, No. A-03-167.)

Accordingly, the Act's conflict of interest provisions do not prohibit any councilmember from taking part in the decision to amend the Town's one-year prohibition against former officials applying for tenancy in the Complex under the circumstances provided. In addition, the Act does not prohibit the two councilmembers with adult in-laws that are currently tenants at the Complex from taking part in decisions concerning the Complex's annual rent adjustment.

B. 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.) When an officer with a proscribed financial interest is a member of the governing body of a public entity, the prohibition of Section 1090 also extends to the entire body, and it applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id*. at pp. 646-649.)

1. One-year ban.

You ask whether Section 1090 prohibits a councilmember from taking part in a decision to amend the Town's one-year prohibition against former officials applying for tenancy in the Complex if any individual councilmember at the time of the vote may be contemplating applying for tenancy in the Complex within one year after leaving office. As mentioned, the *Diaz* Advice Letter No. A-20-080 concluded that, even assuming former members of the City Council have a potential financial interest under Section 1090 in a lease for the Complex, Section 1091.5(a)(3) would apply to allow them to become tenants in the Complex. In determining that the noninterest exception applied, the letter found it significant that leasing a residence in the Complex was broadly available to all Town residents 62 years of age or older, the property manager had virtually no discretion to pick and choose among applicants and the lease terms for a former councilmember would be provided on substantially the same terms as for any other constituent. (*Ibid*.)

Likewise, in the present case, the noninterest exception set forth in Section 1091.5(a)(3) for "public services generally provided" also applies. This exception provides that an officer or employee "shall not be deemed to be interested" in a public contract if his or her interest in that contract 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." Assuming the one-year ban were eliminated, leasing a residence in the Complex would still be broadly available to all Town residents 62 years of age or older, the current lottery policy would continue to provide the property manager with virtually no discretion to pick and choose among applicants and the lease terms for a former councilmember would be provided on substantially the same terms as for any other constituent. Thus, the noninterest exception under Section 1091.5(a)(3) applies to allow the councilmembers to take part in a decision to amend the Town's one-year prohibition against former officials applying for tenancy in the Complex even where one of the councilmembers may be contemplating applying within one year of leaving office.

2. Annual rent adjustment.

Regarding the in-law relatives of two councilmembers who are tenants at the Complex, in 92 Ops.Cal.Atty.Gen. 19 (2009), the Attorney General analyzed whether a redevelopment agency board member had a conflict of interest if the agency entered into a loan agreement with the board member's adult son who resided with the board member but was not her dependent. In the portion of the opinion analyzing Section 1090, it was noted that, under Section 1091(b)(4), an official has a "remote interest" in the earnings of his or her minor child, but the Section 1090 statutory scheme makes no reference to interests in an adult child. Further, the opinion stated that there was no evidence the board member would profit from the loan transaction. Consequently, the opinion concluded that the board member had no financial interest in the contract and thus had no conflict of interest under Section 1090, stating: "[a] parent is not legally compelled to support an adult child absent special circumstances not present here, such as the child's incapacity. Conversely, an adult child has no legal duty to support a parent, unless the parent is 'in need and unable to support himself or herself by work,' a circumstance also not present here." (Footnotes omitted.)

We agree with this opinion and think its rationale applies here. Under the facts considered in the Attorney General opinion, the official's son was an adult, not a dependent of the official and, even though he lived with the official, had no apparent financial relationship with the official. Here, the relationship at issue is even more remote – the facts state that the councilmembers' in-law relatives do not receive any financial support from their respective in-law councilmembers, nor is there any financial tie between them; neither councilmember contributes any money to or pays for the in-law relative's expenses for residing at the Complex. Consequently, we conclude that these councilmembers have no financial interests in the contracts of the in-law relative tenants for purposes of Section 1090 and are thus not prohibited from taking part in a decision concerning the annual rent adjustment at the Complex.[4]

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[4] This conclusion is consistent with *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090-91, which applied the "in pari materia" canon of statutory construction in determining that Section 1090 should be harmonized with the Act when possible. As explained by the court, "it is well established that Section 1090 and the Act are "in pari materia." (*Ibid*.) "Statutes 'in pari materi' should be construed together so that all parts of the statutory scheme are given effect." (*Ibid*., citing *People v. Lamas* (2007) 42 Cal.4th 516, 525.)

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

Sincerely,

Dave Bainbridge
General Counsel

/s/ John M. Feser Jr.

By: John M. Feser Jr.
Senior Counsel, Legal Division

JMF:dkv