



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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July 9, 2021

Julia M. Lew
City Attorney
City of Porterville
4010 South Demaree Street
Visalia, CA 93277

Re: Your Request for Advice
Our File No. A-21-073

Dear Ms. Lew:

This letter responds to your request for advice regarding the Political Reform Act and Government Code Section 1090, et seq.¹ Because your question under the Act seeks general guidance and is not limited to a specific governmental decision, we are treating your request as one for informal assistance.² 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.

Also, 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 Tulare 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).)

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 Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

QUESTIONS

1. Do the conflict of interest provisions under the Act prohibit Councilmember Carrillo from taking part in governmental decisions concerning the Tule River Indian Tribe (the “Tribe”) or her employer?
2. Do the conflict of interest provisions under Section 1090 prohibit Councilmember Carrillo from participating in, and the Porterville City Council from entering into, an amended agreement between the City and the Tribe?

CONCLUSIONS

1. Yes. While there are no specific governmental decisions at issue, Councilmember Carrillo will generally be disqualified from taking part in any decisions if it is reasonably foreseeable that the decision will have a material financial effect on the Tribe or her employer, including any decision in which either the Tribe or her employer is a named party in or subject of the decision.
2. Yes. Councilmember Carrillo has a prohibitive financial interest in an amended agreement between the City and the Tribe; however, the rule of necessity applies to allow the City Council to amend the agreement so long as she abstains from any participation in her official capacity.

FACTS AS PRESENTED BY REQUESTER

You are the City Attorney of the City of Porterville seeking advice on behalf of Councilmember Kellie Carrillo who was elected to the City Council in November 2020. Councilmember Carrillo is a member of the Tule River Indian Tribe. As a member of the Tribe, she receives an annual amount each year totaling more than \$500.00. The annual amount is provided to all Tribe members and fluctuates based on an annually adopted budget set by the Tribal Council. Currently the amount is under \$7,000.00, and the amount can and does vary based on the Tribe’s economic activities and financial position.

Councilmember Carrillo was a board member on the Tule River Economic Development Corporation (“TREDC”) until her resignation on January 14, 2021. TREDC worked hand in hand with the Tribe in pursuit of economic development opportunities supported by the Tribe, with some of those opportunities located in the City. While a member of the board, Councilmember Carrillo received \$100 per month as a meeting stipend.

In addition, Councilmember Carrillo is the Deputy Director for the Owens Valley Career Development Center (“OVCDC”). The OVCDC is a separate regional organization that develops and implements career development, social services and welfare assistance programs for various Tribal entities, and some Tule River Indian Tribe members/families receive assistance and benefits from the OVCDC, along with many participants from several other tribes. In her capacity as Deputy

Director, Ms. Carrillo oversees all programs, such as the “Family Literacy” and the “Tribal Assistance to Needy Families” programs. She is a paid employee for the organization.³

The Tule River Indian Tribe’s reservation is located several miles outside of the City. However, the Tribe owns land and operates businesses within the City limits and often contributes funding to, or even co-sponsors, City events. In 2020 (prior to Ms. Carrillo’s election to the City Council), the Tribe, with the City’s full support, was successful in placing the land in the City into trust for gaming purposes and has received approval from State and Federal authorities to relocate its Eagle Mountain Casino on the trust land.

In 2019, the City and the Tribe entered into a Memorandum of Understanding (“MOU”) concerning the mitigation of impacts and recognition of the benefits of the project. The Tribe and the City are still negotiating over the process for the completion of various needed public improvements and are additionally exploring potential opportunities to jointly support the development of public infrastructure and additional economic development opportunities in the areas adjacent to the new casino site. For example, the parties are currently negotiating the terms and conditions of the development of a tertiary water treatment facility to support the water supply needs of the project, to also provide water to the City’s sports complex in the near vicinity. Additionally, due to some changes in the scope and phasing of the Tribe’s casino relocation project, the parties may need to negotiate amendments to the current MOU.

ANALYSIS

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. Section 87103 provides that an official has a “financial interest” in a decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the official’s interests identified in that section.

Section 87103 identifies interests from which a conflict of interest may arise. Most pertinent to the analysis are the following:

- An interest in any source of income to the official aggregating \$500 or more in value provided to, received by, or promised to, the public official within 12 months prior to the decision.
- An interest in a business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

Additionally, Regulation 18704 defines “making,” “participating in making,” and “influencing” a governmental decision:

- *Making a Governmental Decision:* A public official “makes a governmental decision” when the official “authorizes or directs any action, votes, appoints a person, obligates or commits

³ You have no recollection and are not aware of the OVDCD ever having any interest or involvement in a City decision.

his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency.”

- *Participating in Making a Governmental Decision:* A public official “participates in a governmental decision if the official provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review.”

- *Influencing a Governmental Decision:* A public official “uses his or her official position to influence a governmental decision’ if he or she ‘contacts or appears before any official in his or her agency or in an agency subject to the authority or budgetary control of his or her agency for the purpose of affecting a decision.’ A public official also ‘uses his or her official position to influence a governmental decision’ if he or she contacts or appears before any official in any other government agency for the purpose of affecting a decision, and the public official acts or purports to act within his or her authority or on behalf of his or her agency in making the contact.”

Councilmember Carrillo receives more than \$500.00 each year from the Tribe and therefore has a source of income interest in the Tribe.⁴ In addition, as the Deputy Director of the OVDC, Councilmember Carrillo has a business entity interest in the OVDC. Based on these interests, you have generally inquired when Councilmember Carrillo must abstain from governmental decisions concerning the Tribe and the OVDC.

Foreseeability and Materiality

Regulation 18701(a) provides the applicable standard for determining the foreseeability of a financial effect on an economic interest explicitly involved in the governmental decision. It states, “[a] financial effect on a financial interest is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official’s agency. A financial interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6).”

Where an official’s economic interest is not explicitly involved in the governmental decision, the applicable standard for determining the foreseeability of a financial effect on the economic interest is found in Regulation 18701(b). That regulation provides, “[a] financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official’s control, it is not reasonably foreseeable.”

Regulation 18702.3 provides the materiality standards applicable to a decision’s reasonably foreseeable financial effect on an official’s source of income interest, and provides, in part, that the decision’s effect is material if “[t]he source is a business entity that will be financially affected

⁴ We have previously stated that income paid by a tribe of \$500 or more within the 12 months preceding a governmental decision constitutes a disqualifying interest. (*Galante* Advice Letter, No. A-97-469; see also *Santana* Advice Letter, No. A-01-002 [official who receives more than \$500 from a tribe has a source of income interest in the tribe – the government salary exception in Section 82030(b)(2) does not apply].)

under the materiality standards in Regulation 18702.1.” (Regulation 18702.3(a)(4).) In turn, Regulation 18702.1 provides that the decision’s effect is material if:

- The business is a named party in, or the subject of, the decision. (Regulation 18702.1(a)(1).)
- The decision may result in an increase or decrease of the business’s annual gross revenues, or the value of the business’s assets or liabilities, in an amount equal to or more than \$1,000,000.00, or five percent of the business’s annual gross revenues and the increase or decrease is at least \$10,000.00. (Regulation 18702.1(a)(2).)
- The decision may cause the business to incur or avoid additional expenses or to reduce or eliminate expenses by equal to or more than \$250,000.00, or one percent of the business’s annual gross revenues and the change in expenses is at least \$2,500.00. (Regulation 18702.1(a)(3).)
- The official knows or has reason to know that the business has a real property interest that is explicitly involved in the decision under Regulations 18701(a) and 18702.2(a)(1) through (6), or there is clear and convincing evidence the decision would have a substantial effect on the property. (Regulation 18702.1(a)(4).)

Accordingly, whenever a governmental decision meets any of the criteria under Regulation 18702.1(a)(1)-(4) with respect to the Tribe or the OV CDC, Councilmember Carrillo is prohibited under the Act from taking part in the decision. Under the applicable regulations, Councilmember Carrillo is generally prohibited from any decision in which the Tribe or the OV CDC is a named party in or subject of the decision.⁵

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. 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

⁵ If you need additional assistance determining if the Tribe or the OV CDC is a named party in or the subject of any specific decision or whether Councilmember Carrillo is disqualified from any specific decision, including a decision in which the Tribe or the OV CDC is not explicitly involved, we recommend you seek further advice from the Commission at that time.

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).)

Councilmember Carrillo is subject to Section 1090's conflict of interest provisions and would be making a contract with the Tribe, for purposes of Section 1090, if the City Council amended the current MOU between the City and the Tribe.⁶ The determinative question, therefore, is whether she would have a financial interest in any amended contract between those two entities.

According to the facts, the Tribe owns land within the City limits. In 2020, it was successful in placing the land in the City into trust for gaming purposes and has received approval to relocate its Eagle Mountain Casino on the trust land. In 2019, the City and the Tribe entered into a MOU concerning the mitigation of impacts and recognition of the benefits of the project. The Tribe and the City are still negotiating over the process for the completion of various needed public improvements and are additionally exploring potential opportunities to jointly support the development of public infrastructure and additional economic development opportunities in the areas adjacent to the new casino site such as the development of a tertiary water treatment facility to support, among other things, the water supply needs of the project. Due to some changes in the scope and phasing of the Tribe's casino relocation project, the parties may need to negotiate amendments to the current MOU.

With respect to what constitutes a financial interest for purposes of Section 1090, the California Supreme Court held:

“[T]he term ‘financially interested’ in section 1090 cannot be interpreted in a restricted and technical manner.” (*People v. Honig, supra*, 48 Cal.App.4th at p. 315.) The defining characteristic of a prohibited financial interest is whether it has the potential to divide an official's loyalties and compromise the undivided representation of the public interests the official is charged with protecting. (See *Stigall v. City of Taft, supra*, 58 Cal.2d at p. 569.) Thus, that the interest “might be small or indirect is immaterial so long as it is such as deprives the [people] of his overriding fidelity to [them] and places him in the compromising situation where, in the exercise of his official judgment or discretion, he may be influenced by personal considerations rather than the public good.” (*Terry v. Bender* (1956) 143 Cal. App. 2d 198, 208 [300 P.2d 119]; see also *Thomson v. Call, supra*, 38 Cal.3d at p. 645 [direct and indirect interests are equally prohibited].)”

(*Lexin v. Superior Court* (2010) 47 Cal. 4th 1050, at p. 1075.)

Initially, we note the Tribe pays all Tribe members, including Councilmember Carrillo, an amount each year that fluctuates based on the Tribe's economic activities and financial position. An

⁶ A decision to modify, extend, or renegotiate a contract constitutes involvement in the making of a contract under section 1090. (See, e.g., *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191.)

amendment to the MOU may ultimately impact the amount each tribe member annually receives. Councilmember Carrillo is therefore financially interested in any amendment to the current MOU between the City and Tribe because of real potential it would have to place her in a compromising situation, as both a Councilmember and a member of the Tribe, where she may be influenced by personal considerations instead of the public interests she is charged with protecting. This is precisely the type of situation Section 1090 intends to preclude.

Accordingly, Section 1090 prohibits Councilmember Carrillo from participating in, and the City from entering into, any amendment to the current MOU unless an exception applies.

Rule of Necessity

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).) The rule of necessity has two facets: in procurement situations, it has permitted a government agency to acquire an essential supply or service despite a conflict of interest; in nonprocurement situations, it has permitted a public officer to carry out the essential duties of the office despite a conflict of interest where the officer is the only one who may legally act. (65 Ops.Cal.Atty.Gen. 305, 310 (1982).) In nonprocurement situations, such as the situation here, the rule of necessity ensures that essential government functions are performed even where a conflict of interest exists. (*Ibid.*)

In a nonprocurement situation where the rule of necessity applies to allow a multi-member body to act when it otherwise would have been precluded from doing so due to a member’s conflict of interest, the member with the conflict of interest must abstain from participation. (88 Ops.Cal.Atty.Gen. 106, 111 (2005); 69 Ops.Cal.Atty.Gen. 102, 112 (1986).)

Thus, to determine if the rule of necessity applies, we must examine whether amending the current MOU between the City and the Tribe is an essential duty of the City Council and whether the City Council is the only government entity legally capable of doing so. As mentioned, the MOU concerns the mitigation of impacts of the casino project, and negotiations over the process for the completion of various needed public improvements as well as potential opportunities to jointly support the development of public infrastructure and additional economic development opportunities, including a water treatment facility that will provide water to the City’s sports complex, will presumably be part of the new MOU.

Ensuring project impacts are properly mitigated and providing new infrastructure and economic opportunities to the City are undoubtedly essential duties of the City Council – duties that only it is legally capable of performing. Accordingly, pursuant to the rule of necessity, the City Council may amend the City’s current MOU with the Tribe. However, Councilmember Carrillo must abstain from any participation in her official capacity.⁷

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

⁷ Note that participation in the making of a contract, for purposes of Section 1090, is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237.)

Sincerely,

Dave Bainbridge
General Counsel

By: *Jack Woodside*

Jack Woodside
Senior Counsel, Legal Division

JW:dkv