



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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May 23, 2022

Andrew Morris
Town Attorney
Town of Truckee
10183 Truckee Airport Road
Truckee, CA 96161-3306

Re: Your Request for Advice
Our File No. A-22-040

Dear Mr. Morris:

This letter responds to your request for advice regarding Government Code Section 1090, et seq.¹ Please note that we are only providing advice under Section 1090, not under other general conflict of interest prohibitions such as common law conflict 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.

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 Nevada 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

Under Section 1090, may the Town of Truckee contract with an economics consulting company to develop guidelines for a short-term rental permit incentive program where the company's employee served on the stakeholder advisory committee that made recommendations to the Town Council, including the proposed incentive program?

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 18104 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.

CONCLUSION

Yes, because the employee worked on the committee in a voluntary, advisory capacity and his work did not involve any contracting duties on behalf of the Town Council, he did not qualify as a government “officer” or “employee” subject to Section 1090 and, therefore, such a contract is permissible.

FACTS AS PRESENTED BY REQUESTER

Truckee is a year-round resort community near Lake Tahoe. It has been an extremely popular visitor destination for decades, which in recent years has meant a tremendous demand for short-term rental (STR) accommodations. The Town is currently engaged in a comprehensive effort to develop strategies for regulating STRs, balancing the housing needs of the community against the continued demand for visitors for this type of accommodations.

In 2021, Town staff convened a stakeholder advisory committee to work with staff to consider STR management options and develop recommendations including potential STR regulations, for consideration by the Town Council. The committee’s composition was purposeful to capture a broad spectrum of stakeholders that would be affected by any changes to the STR program, including a range of different perspectives on STRs comprised of representative categories who both are and are not financially or operationally involved in STRs in Truckee.

None of the committee members were compensated by the Town for their participation. One member of the committee was Mr. Aaron Nousaine, a Truckee resident who is an Associate Principal at a consulting business known as BAE Urban Economics (“BAE”). Mr. Nousaine took part in the advisory committee in his personal capacity, noted as an “Economist,” and not as an official representative of BAE.

The advisory committee met three times for a total of six hours to review and discuss data, consider management options, and ultimately identify recommendations. The study process was iterative, in that throughout the process, committee members identified additional information, research, and data needs to inform their consideration of the complex issue and the committee requested this information from Town staff.

One recommendation from the advisory committee was to limit the number of STR permits issued by the Town. The committee also recommended that the Town create an incentive program to allow developers of housing for the local workforce to obtain STR permits and made further recommendations about the parameters of this program. The advisory committee’s discussion briefly touched on the need for the Town to determine how to value STR permits in order to create an effective program, but the committee did not discuss contracting with BAE or any other consultant. In a follow-up email, your colleague clarified:

[O]ne committee member suggested that the cost of creating one new workforce housing unit is greater than the revenue potential of one short-term rental, therefore the incentive offered should be closer to a 10:1 ratio than a 1:1 ratio in order to make reasonable business sense. Another committee member disagreed with 10:1 and thought that was too high. Staff then suggested that additional analysis could be completed as part of the program development to determine a reasonable valuation framework and the committee agreed with this recommendation.

Future or potential work with BAE was never discussed during committee meetings.

Town staff are currently developing guidelines for the workforce housing STR permit incentive program. The Town would like to contract with BAE Urban Economics for this work, ideally with Mr. Nousaine as the lead consultant for this effort.

ANALYSIS

Under Section 1090, state and local “officers shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are a member.” 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.) 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.) “[T]he negotiations, discussions, reasoning, planning and give and take which goes beforehand in the making of a decision to commit oneself must all be deemed to be a part of the making of an agreement in the broad sense.” (*Stigall*, at p. 569.) A contract that violates Section 1090 is void, regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.)

In *People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, the California Supreme Court held that Section 1090’s reference to “officers” applies to “outside advisors with responsibilities for public contracting similar to those belonging to formal officers” and “formal employees” (*id.* at p. 237), and held that not all independent contractors are covered by Section 1090; rather, “independent contractors come within the scope of section 1090 when they have duties to engage in or advise on public contracting that they are expected to carry out on the government’s behalf.” (*Id.* at p. 245.) The *Sahlolbei* Court alternately phrased its holding, writing, “[S]ection 1090 liability extends only to independent contractors who can be said to have been entrusted with ‘transact[ing] on behalf of the Government.’” (*Id.* at p. 240 (citation omitted).) The *Sahlolbei* Court illustrated, “for example, a stationery supplier that sells paper to a public entity would ordinarily not be liable under section 1090 if it advised the entity to buy pens from its subsidiary because there is no sense in which the supplier, in advising on the purchase of pens, was transacting on behalf of the government. (*Ibid.*)

In comparison with the paper supplier example used by the California Supreme Court in *Sahlolbei*, Mr. Nousaine’s conduct is even further removed from the ambit of Section 1090. When Mr. Nousaine, in his capacity as a Truckee resident, took part in an advisory committee, he did not have duties to engage in or advise on public contracting he was expected to carry out on the Towns’s behalf. The advisory committee’s role was to help staff develop recommended STR regulations for consideration by the Town Council. The advisory committee did not discuss contracting with BAE or any other consultant, and the mere noting of a need to appropriately measure the value of STRs does not equate to self-dealing prohibited by Section 1090, particularly given that such a recommendation did not inherently involve any contract. These facts indicate that Mr. Nousaine does not qualify as a “officer” for purposes of Section 1090.

This conclusion is bolstered by the fact that Mr. Nousaine also does not qualify as a “public official” for purposes of the Act. The California Supreme Court has advised, “‘to the extent their language permits, we will read section 1090 et seq. and the Political Reform Act as consistent’ and will ‘incorporat[e] congruent principles’ so as to ‘render the laws governing government contracts consistent with those governing government decisions more generally.’” (*Sahlolbei, supra*, 3 Cal.5th at p. 238.) In *Sahlolbei*, the Court looked to the Act’s definition of “public official” to conclude that independent contractors are included among the “[m]embers of the Legislature, state,

county, district, judicial district, and city officers or employees” under Section 1090(a). (*Sahlolbei, supra*, 3 Cal.5th at pp. 238-239.)

Excluded from the Act’s definition of “public official” and relevant here, however, is “an individual who performs duties as part of a committee, board, commission, group, or other body that does not have decisionmaking authority.” (Regulation 18700(c)(2).) A committee does not possess decisionmaking authority if it is formed or engaged for the sole purpose of researching a topic and preparing a report or recommendation for submission to another public official or government agency that has final decisionmaking authority, and none of the following apply:

- (1) The committee may make a final governmental decision;
 - (2) The committee may compel or prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto that may not be overridden;
 - (3) The committee makes substantive recommendations and, over an extended period of time, those recommendations have been regularly approved without significant amendment or modification by another public official or governmental agency.
- (Regulation 18700(c)(2)(B).)

Here, Mr. Nousain was part of an advisory committee formed for the sole purpose of researching a topic and preparing a report or recommendation for consideration by the Town Council. The committee did not have final decisionmaking powers, was unable to compel or prevent a governmental decision, and given its recent creation, had no extended history of its substantive recommendations being approved without significant amendment or modification. Accordingly, under the Act, Mr. Nousain, as a member of the advisory committee, does not qualify as a “public official” for purposes of the Act and, incorporating congruent principles for the sake of reading the statutes consistently, also should not be considered an “officer” for purposes of Section 1090. Accordingly, the contemplated contract between the Town and BAE would not involve a financially interested Town officer for purposes of Section 1090.²

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

Sincerely,

² Although you have only expressly inquired regarding Section 1090, given the fact that Mr. Nousaine is not a “public official,” a contract between the Town and BAE also would not implicate the Act’s conflict of interest provisions.

Brian G. Lau
Assistant General Counsel

By:



Kevin Cornwall
Counsel, Legal Division

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