



FAIR POLITICAL PRACTICES COMMISSION

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December 16, 2014

Steven L. Dorsey
Norwalk City Attorney
Richards, Watson & Gershon
355 South Grand Avenue, 40th Floor
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Re: Your Request for Advice
Our File No. A-14-200

Dear Mr. Dorsey:

This letter responds to your request for advice on behalf of a city council member and the city's Economic Development Manager regarding conflict of interest under Government Code section 1090 et seq.¹ Because the Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders assistance (*In re Oglesby* (1975) 1 FPPC Ops. 71), this letter is based on the facts presented.

Please note that after forwarding your request to the Attorney General's Office and the Los Angeles District Attorney's Office, we did not receive a written response from either entity. (See Section 1097.1(c)(4).) Finally, we are required to advise you that 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 Section 1090 prohibit councilmember Leonard Shryock (the "Council Member") for the City of Norwalk (the "City"), or Bing Hyun, the City's Economic Development Manager (the "Manager"), each of whom is married to a teacher employed by the Norwalk La Mirada Unified School District (the "School District"), from participating in the making of a contract with or otherwise prohibit the City from making a contract with the School District?

¹ All further statutory references are to the Government Code, unless otherwise indicated.

CONCLUSION

No. Under the facts presented, neither the Council Member nor the Manager are “financially interested” in the contract for purposes of Section 1090, and neither they nor the city council would violate Section 1090 by making the contract.

FACTS

The City owns real property that is used for the Norwalk Golf Center. The City Council is contemplating entering into a property exchange agreement with the School District to exchange certain City property for a small piece of land owned by the School District that is located adjacent to the golf course. The swap would facilitate the City’s plan to sell the golf course to the County of Los Angeles, which has indicated an interest in owning the adjacent land. In the alternative, should the exchange transaction fall through, the City Council would consider purchasing the School District’s property outright.

The spouses of the Council Member and the Manager are both employed by the School District as teachers.

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. 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.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

Typically, we employ the following six-step analysis to determine whether an official has a disqualifying conflict of interest under Section 1090.

Step One: Is the official subject to the provisions of Section 1090?

Section 1090 provides, in part, that “[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees 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 members.” The City’s council members and Manager are plainly covered by this prohibition.

Step Two: Does the decision at issue involve a contract?

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001);² 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that “specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’” (*People v. Honig, supra*, at p. 351 citing *Stigall, supra*, at pp. 569, 571.)

You have identified two potential contracts to which the City will be a party – a property exchange agreement and a purchase agreement. There is no question that these proposed agreements are contracts for purposes of Section 1090.

Step Three: Is the official making or participating in making a contract?

Section 1090 applies to officials who participate in any way in the making of the contract, including involvement in matters such as 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; see also *Stigall v. City of Taft, supra* at p. 569.)

Here, we presume the City Council will have to approve any contract between the School District and the City. Therefore, the Council Member would be making a contract. With respect to the Manager, he would be participating in the making of a contract if he is in any way involved in the negotiations, discussions, reasoning, or planning which go beforehand in the making of the decision to enter into a contract. Thus, for purposes of this analysis, we will presume the Manager will participate in the making of a contract.

Step Four: Does the official have a financial interest in the contract?

Initially, we note that as a general rule, a member of a board or commission, as well as an employee thereof, has a financial interest in his or her spouse’s source of income for purposes of Section 1090. (See e.g. 78 Ops.Cal.Atty.Gen. 230, 235 (1995).) Therefore, our analysis focuses on the potential financial impact of the city council’s decision with respect to the spouses of the Council Member and the Manager.

Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest” (*People v. Honig, supra*, at p. 333), and officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*Ibid.*) Although Section 1090 does not specifically define the term “financial interest,” case law and Attorney General

² It is noteworthy to point out that opinions issued by the Attorney General’s Office are entitled to considerable weight (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17), especially where, as here, it has regularly provided advice concerning a particular area of law. (*Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal.App.4th 655, 662; *Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 829.)

opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (*Thomson, supra*, at pp. 645, 651-652; *see also People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; *People v. Darby* (1952) 114 Cal.App.2d 412, 431-432; 85 Ops. Cal. Atty. Gen. 34, 36-38 (2002); 84 Ops. Cal. Atty. Gen. 158, 161-162 (2001).)

More recently, in *Eden Township Healthcare Dist. v. Sutter Heath* (2011) 202 Cal.App.4th 208, the court of appeal held that “to be prohibited under section 1090, the public official’s financial interest must be related to the contract. . . . The purpose of the prohibition is to prevent a situation where a public official would stand to gain or lose something *with respect to the making of a contract* over which in his official capacity he could exercise some influence.” (*Id.* at p. 225 [emphasis in original; internal citation and quotations omitted].) In analyzing the “financial interest” element of Section 1090, the court noted that in prior cases where a prohibited conflict was found, “the party who was found to have had a prohibited financial interest received a tangible benefit that arose out of the contract at issue.” (*Id.* at 226.) Importantly, the court held that “if the contract itself offers no benefit to the official, either directly or indirectly, then the official is not financially interested in the contract. . . .” (*Id.* at 228.)

In the instant matter, there is no connection between the contracts and any possible financial effect on the spouses. The compensation they are paid by the School District is not affected, whether or not the contracts are made. We have previously said that “we do not think Section 1090 was intended to address the indirect, speculative effects of a contract on matters outside the general subject matter of the contract . . .” (*Calonne Advice Letter*, No A-14-073.) Here, there is not even a speculative effect. Accordingly, on this basis, we find that neither the Council Member nor the Manager are “financially interested” in the contracts. The Council Member and the Manager, as well as the City council, would not violate Section 1090 by making the contracts. Therefore, we need not go through the final steps of the analysis.³

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: 

Valentina Joyce
Counsel, Legal Division

VJ:jgl

³ Based on our conclusion, we do not address your specific questions concerning the remote and non-interest exceptions.

Subject: FW: Request for Government Code Section 1090 Advice

I have not received any response to this request for advice. This subject will be on an agenda in two weeks, and staff needs to begin preparing the staff report this week. Could you please let me know the status of my enquiry?

Thank you,

Steve Dorsey

From: Steven L. Dorsey
Sent: Tuesday, November 04, 2014 3:15 PM
To: 'advice@fppc.ca.gov'
Subject: Request for Government Code Section 1090 Advice

I am requesting advice as the City Attorney for the City of Norwalk on the application of Government Code Section 1090 to the following facts:

The City of Norwalk ("City") currently owns the Norwalk Golf Center located at 13747 Shoemaker Avenue in the City of Norwalk. The City is in the process of transferring the Golf Center to the County of Los Angeles for the establishment of a County Golf Academy. As shown on the attached map, the large property to the north of the Golf Center, at the corner of Shoemaker Avenue and Foster Road, is owned by the Norwalk La Mirada Unified School District ("District"). Just west of the District's property is a drainage channel that curves to the east across the District's property before it stops at the Norwalk Golf Center.

The portion of the drainage channel that is immediately west of the District's property extending from Foster Road until it intersects the District's property is owned by the City. The portion of the drainage channel from the point it intersects the District's property until it terminates at the northern boundary of the Golf Center is owned by the District.

Southwest of the lower portion of the drainage channel, and just north of the golf center, is a small triangular parcel owned by the District separated from the larger school district parcel by the curved portion of the drainage channel. The City has used this triangular parcel for many years to store equipment for the Golf Center. The County recently requested that the City acquire and transfer to the County the triangular District parcel as part of the conveyance of the Golf Center.

In order to facilitate the County's request, the City is considering entering into a property exchange agreement with the District under which the City will convey to the District the portion of the drainage channel owned by the City, and the District will transfer the triangular piece of property to the City. The City would then transfer that parcel to the County along with the Golf Center.

The City also would agree to fill the drainage channel so that the District can utilize this property. If the City and the District cannot negotiate a final property exchange agreement, it is possible, though not currently proposed, that the City would simply purchase the triangular parcel from the District for transfer to the County.

The potential conflict issues arise because a member of the Norwalk City Council and the spouse of the City's Economic Development Manager ("Manager") are both teachers employed by the District. I am requesting advice on whether the Councilmember and the Manager can participate in decisions or negotiations related to the proposed property exchange agreement or possible purchase agreement with the District. While the currently proposed transaction does not involve the City purchasing the parcel and providing funds to the District, I am requesting advice on this latter issue because this transaction needs to be completed quickly and there might not be sufficient time to request a separate opinion on whether the official can participate in a purchase agreement if the property exchange is not successful. In addition, it

might be necessary to analyze the sale option in order to know if the officials can participate in the parcel trade with the County knowing that the transaction with the District might be changed into a sale.

I am comfortable that under the Political Reform Act neither official is prohibited from participating in decisions regarding the exchange of property between the City and the District because the relevant income is from a governmental entity. See Gov. Code Section 82030(b)(2).

I am also comfortable that the City can enter into either a property exchange agreement or a purchase agreement with the District under Section 1091(b) (13) if the officials do not participate in the decision and make the disclosures required under that section. Thus, I do not think that Government Code Section 1090 would prevent the parties from entering into either a property exchange agreement or a purchase agreement.

Nonetheless, I have been unable to determine whether the officials may participate in the making of either a property exchange agreement or a purchase agreement under the "non-interest" exceptions in Section 1091.5(a) (9) and/or 1091.5(a)(6). Section 1091.5 (a) (9) defines the following as a "non-interest":

(9) That of a person receiving salary, per diem, or reimbursement for expenses from a government entity, unless the contract directly involves the department of the government entity that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record.

I am uncertain how to interpret this regulation in the context of a government entity that does not have clearly defined departments. Most of the prior Attorney General opinions interpreting this section address how to apply it in the context of a city or county – for example, concluding that a sheriff's department is a distinct department from the county counsel's department. In the context of a school district, however, it is not clear to me whether a contract would "involve the department ... that employs the officer or employee" where the officer or employee is a teacher and the contract is with the school district in general. We are requesting guidance on how to apply Section 1091.5(a) (9) to these facts.

In addition, I have been unable to resolve whether Section 1091.5(a) (6) would apply in this instance to the Manager. Section 1091.5(a) (6) defines the following as a "non-interest":

(6) That of a spouse of an officer or employee of a public agency in his or her spouse's employment or officeholding if his or her spouse's employment or officeholding has existed for at least one year prior to his or her election or appointment.

As stated above, the Manager's spouse is employed by the District as a teacher. The spouse was employed by the District for more than one year prior to the Manager's appointment to his employment position with the City. Does Section 1091.5(a) (6) apply in this instance to allow the Manager to participate in the making of a contract between the City and the District? Or does this non-interest exemption only apply when the employee/officer and the spouse are employed by the same public agency?

Please let me know if you have any questions or would like any additional information.

Steven L. Dorsey

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