



FAIR POLITICAL PRACTICES COMMISSION

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December 23, 2014

Michael C. Ghizzoni
County Counsel
105 E. Anapamu Street, Suite 201
Santa Barbara, CA 93101

Re: Your Request for Advice
Our File No. A-14-215

Dear Mr. Ghizzoni:

This letter responds to your request for advice regarding the provisions of Government Code Section 1090 ("Section 1090") and the Political Reform Act (the "Act").¹ Please note that we do not advise on any other area of law, including Public Contract Code or common law conflicts of interest. We are also 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.

Regarding our advice on Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General's Office and the Santa Barbara County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. 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

Do either Section 1090 or the Act prohibit Supervisor Carbajal from participating in a decision to approve a new or amended property lease between the County and the Department of Veterans Affairs ("DVA") from which he receives medical benefits?

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.

CONCLUSION

No. As explained below, neither Section 1090 nor the Act prohibits Supervisor Carbajal from participating in a decision to approve a new or amended property lease between the County and the DVA.

FACTS

You are County Counsel for the County of Santa Barbara. You are requesting advice on behalf of County of Santa Barbara Supervisor Salud Carbajal regarding the conflict provisions of both the Act and Section 1090.

The DVA operates a community based outpatient clinic in Santa Barbara and leases space for the clinic from the County of Santa Barbara. You included a lease for the property between the County and the DVA that was executed in 2007 and then amended in 2012 to expire on September 30, 2017. You expect that within the next six months the DVA and the County will pursue either a new lease or amendment of the 2012 First Amended Lease, for a longer period and/or a possible expansion of the existing square footage. Such action would likely need approval from the Board of Supervisors.

Supervisor Carbajal served in the United States Marine Corps Reserve, including being activated for Active Duty during the Gulf War, and was honorably discharged. During 2014, Supervisor Carbajal enrolled in the nationwide system for medical healthcare benefits through the Department of Veterans Affairs and began to receive some of those benefits.

ANALYSIS

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) 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.)

We employ the following six-step analysis to determine whether Supervisor Carbajal has a conflict of interest under Section 1090.

Step One: Is Supervisor Carbajal 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 anybody or board of which they are members.” The Santa Barbara County Board of Supervisors and its members are plainly covered by this prohibition. (See, e.g., *Thomson, supra*, at p. 645; *City Council v. McKinley* (1978) 80 Cal.App.3d 204, 213.)

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); 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.)

Here, the issue centers on a lease of property by the County to the DVA. The facts state that this lease, which was amended in 2012, will likely be replaced by a new lease or amended again for a longer period and/or a possible expansion of the existing square footage. The decision involves a contract and Section 1090 therefore applies.

Step Three: Will Supervisor Carbajal be making or participating in making a contract?

According to your facts, any new or amended contract between the County and the DVA would likely need approval from the Board of Supervisors. Therefore, as a member of the Board, Supervisor Carbajal would be making or participating in making a contract

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

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.) 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 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. (*People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

In *Eden Township Healthcare Dist. v. Sutter Health* (2011) 202 Cal.App.4th 208, the First District Court of Appeal found that, under Section 1090, “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 p. 228.) 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.) The court further noted that, although the public official who was alleged to have violated Section 1090 participated in his official capacity in making a contract with his private employer, there was no evidence that the contract would affect the official’s “salary, benefits, or status.” (*Id.* at p. 227.)

Here, consistent with the findings in *Eden*, the pertinent question is whether a new or amended property lease between the County and the DVA will benefit Supervisor Carbajal directly or indirectly in the form of a “tangible benefit” such as impacting his “salary, benefits, or status.” You have provided no facts to suggest that a new or amended contract will have this type of impact. For example, there is no indication that he will receive enhanced benefits or any other type of benefit that he was not already receiving prior to the new or amended property lease.

Based on the facts provided, we do not believe Supervisor Carbajal has a prohibitory financial interest in the property lease between the County and the DVA. Accordingly, Section 1090 does not prohibit Supervisor Carbajal (or the Board) from approving a new or amended property lease between the County and the DVA.²

The Act

Section 87100 prohibits any state or local public official from making, participating in making, or using his or her official position to influence a government decision in which the official has a financial interest specified in Section 87103. A public official has a “financial interest” in a government 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 public official’s interests. (Section 87103; Regulation 18700(a).)

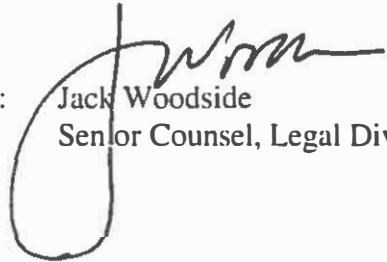
Supervisor Carbajal is subject to the provisions of the Act and will be making a decision regarding a new or amended property lease between the County and the DVA. As a public official, he has a financial interest in any source of income from which he has received \$500 or more in the past 12 months. Under the Act, however, salary or other similar benefit payments from a government agency is not considered “income.” Supervisor Carbajal therefore will not have a financial interest in the decision, and may participate in the decision to approve the new or amended property lease.

² Because we find that Supervisor Carbajal does not have a financial interest in the contract at issue, we do not find it necessary to analyze the statutory exceptions that may potentially apply or the rule of necessity.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By:  Jack Woodside
Senior Counsel, Legal Division

JW:jgl