



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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March 30, 2016

Todd O. Litfin
City Attorney
City of Yorba Linda
Rutan & Tucker, LLP
611 Anton Boulevard, 14th Floor
Costa Mesa, CA 92626

Re: Your Request for Advice
Our File No. A-17-026

Dear Mr. Litfin:

This letter responds to your request for advice on behalf of Councilwoman Tara Campbell regarding the provisions of the Political Reform Act (the "Act")¹ and Section 1090. 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.

In regard to 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 Orange 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

Do the Act's conflict of interest provisions or Section 1090 prohibit Councilwoman Campbell from taking part in discussions or recommendations to Orange County regarding a proposed development adjacent to the City of Yorba Linda in light of her employment with the County and a possible future contract with the County or project developer regarding the annexation of the property into the City?

CONCLUSION

Based upon the facts provided, Councilwoman Campbell is not disqualified from taking part in discussions or recommendations to Orange County regarding the proposed development, including a contract with the County or project developer, under either the Act or Section 1090. However, should a contract be considered, Councilwoman Campbell must disclose her interest in

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.

the County at the time the contract is considered and the interest must be noted in the City's official records.

FACTS

Councilwoman Campbell was recently hired by Orange County Supervisor Andrew Do. Supervisor Do is one of five members on the Orange County Board of Supervisors. As a paid employee of the County, Councilwoman Campbell will primarily serve as Supervisor Do's Communications Director. She will also likely handle some policy issues and community outreach. Although the Board of Supervisors collectively take action on matters, Supervisor Do's specific district from which he was elected does not include the City of Yorba Linda.

There is currently a proposed residential development project located in the unincorporated area of Orange County adjacent to the City of Yorba Linda known as the "Esperanza Hills" project (the "Project"). The Project consists of a proposed 340 single family homes on 469 acres with two access roads that connect to roadways within the City of Yorba Linda. Because the Project is located within the jurisdiction of the County, the County is the agency considering whether to approve various land use entitlements and CEQA documents for the Project. However, because the project impacts the City of Yorba Linda, the County has asked the Yorba Linda City Council for the City's input on the Project.

The Project has engendered a high amount of community discussion. Therefore, the City Council has in the past and plans to continue in the future to discuss and provide the City's input and requests pertaining to the Project to the County. While there is no contract currently proposed between the County and the City of Yorba Linda regarding the Project, you state that the County may require that the project developer enter into a "preannexation agreement" with the City that outlines the terms by which the property will be annexed into the City. Also, there may in the future be a "cooperative agreement" between the City and the County pertaining to the allocation of property taxes and other responsibilities if the property is subsequently annexed into the City.

ANALYSIS

Political Reform Act

Under Section 87100, a public official may not make, participate in making, or use 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 on one or more of the public official's interests. (Section 87103; Regulation 18700(a).) Section 87103 identifies interests from which a conflict of interest may arise and includes:

- An interest in a business entity in which the official has a direct or indirect investment of \$2,000 or more (Section 87103(a)); or in which the official is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d)).

- An interest in real property in which the official has a direct or indirect interest of \$2,000 or more. (Section 87103(b).)
- An interest in a source of income to the official, including promised income, which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c).)
- An interest in a source of gifts to the official if the gifts aggregate to \$470 or more within 12 months prior to the decision. (Section 87103(e).)
- An interest in the official's personal finances, including those of the official's immediate family, also known as the "personal financial effects" rule. (Section 87103.)

Nonetheless, for purposes of the Act, income does not include "[s]alary and reimbursement for expenses or per diem, and social security, disability, or other similar benefit payments received from a state, local, or federal government agency...." (Section 82030(b)(2).) Accordingly, Councilwoman Campbell does not have a potentially disqualifying interest in the County resulting from any income received as an employee of the County. Barring any other interest in the decision, Councilwoman Campbell is not prohibited under the Act from taking part in any discussions regarding the Project or recommendations to the County regarding the project including any future contract between the City of Yorba Linda and the County or project developer.

Section 1090

Generally, Section 1090 prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Under this section, "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, and the prohibition applies 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.)²

However, Section 1091 and 1091.5 establish exceptions to Section 1090 for a financial interest in a contract that is "remote interest" or "noninterest." If an official's interest is a "remote interest," an agency may execute a contract if (1) the officer in question discloses his or her financial interest in the contract to the agency, (2) the interest is noted in the agency's official records, and (3) the officer abstains from any participation in the making of the contract. (Section 1091(a); 88 Ops.Cal.Atty.Gen. 106, 108 (2005); 83 Ops.Cal.Atty.Gen. 246, 248 (2000).) If the official's interest is a "noninterest, an agency may execute the contract and the official is not required to abstain from the decision. Except in limited circumstances, a noninterest does not require any disclosure. (*City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 514-515; 84 Ops.Cal.Atty.Gen. 158, 159-160 (2001).)

² Generally, when Section 1090 applies to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain from the decision. The entire governing body is precluded from entering into the contract. (*Thomson, supra*, at pp. 647-649; *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).)

In this instance, it is not contested that Councilwoman Campbell is a public officer subject to the provisions of Section 1090 and that any agreement between the City of Yorba Linda and the County or project developer regarding the possible annexation of the property into the City is a contract for purposes of Section 1090. Additionally, as a member of the Yorba Linda City Council, Councilwoman Campbell is presumed to be involved in the making of all contracts by the City irrespective of whether she actually participates in the making of the contract. (*Thomson, supra*, at pp. 645, 649.) Thus, the determinative question is whether Councilwoman Campbell has an interest in a contract between the City of Yorba Linda and the County or project developer regarding annexation of the property to the City, and, if so, whether her interest is a “remote interest” or a “noninterest” as defined in Sections 1091 and 1091.5.

Of the statutory exceptions established for a remote interest and noninterest, two exceptions for contracts between government agencies are potentially applicable. First, under Section 1091(b)(13), an agency board member that receives salary, per diem, or reimbursement for expenses from another government entity has a remote interest in a contract between the two agencies. However, under Section 1091.5(a)(9), an officer or employee of a government agency receiving salary, per diem, or reimbursement for expenses from another government entity has a noninterest in a contract between the two agencies “unless the contract directly involves the department of the governmental 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.” (Section 1091.5(a)(9).)


Based upon the facts provided, Councilwoman Campbell has an interest in contracts in question resulting from her salary from the City and County. However, any contract between the City of Yorba Linda and the County or project developer would not directly involve Supervisor Do’s Office. Accordingly, we find that Section 1091.5(a)(9) applies. Barring additional facts, Councilwoman Campbell has a noninterest in any contracts between the City of Yorba Linda and the County or project developer and is not prohibited from taking part in the contracts or discussions regarding the contracts. However, should the City of Yorba Linda consider a contract with the County or project developer, Councilwoman Campbell is required under Section 1091.5(a)(9) to disclose her interest in the County at the time the contract is considered and the interest must be noted in the City’s official records.³

³ Because any preannexation agreement between the City of Yorba Linda and the project developer will be entered into at the direction of the County and as a condition of the County’s approval of the project, we find the County’s involvement in the agreement is sufficient to establish that the County is a party to the agreement requiring disclosure under Section 1091.5(a)(9) as a contract between government entities.

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

Sincerely,

Hyla P. Wagner
General Counsel


By. Brian G. Lau
Senior Counsel, Legal Division

BGL:jgl