



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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April 25, 2018

Sarah E. Tobias
Attorney at Law
1330 L Street, Suite G
Fresno, CA 93721

Re: Your Request for Advice
Our File No. A-18-031

Dear Ms. Tobias:

This letter responds to your request for advice on behalf of Tulare City Councilmember Greg Nunley regarding the conflict of interest provisions of the Political Reform Act (the "Act")¹ and Government Code Section 1090. Please note that we are only providing advice under the conflict of interest provisions of the Act and Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including Public Contract Code.

Also note, the Commission does not provide advice relating to past conduct and any conclusions contained herein apply only to prospective actions. (Regulation 18329(b)(8)(A).) 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.

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 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).)

QUESTION

Does the Act or Section 1090 prohibit Councilmember Nunley from purchasing land owned by the Tulare Local Healthcare District, doing business as Tulare Regional Medical Center ("TRMC"), where the City Council previously submitted a letter in support of a state audit regarding TRMC?

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

Where TRMC is a separate, special district, not under the authority, control or influence of the City Council, there is no prohibition under the Act or Section 1090 regarding Councilmember Nunley entering a contract in his personal capacity to purchase land from TRMC.

FACTS AS PRESENTED BY THE REQUESTOR

TRMC is under the authority of the Tulare Local Healthcare District, a special district, governed by an elected Board of Directors. TRMC is not under the approval power of the City Council, and is a separate and distinct entity.

Councilmember Nunley, a business owner, land owner, and property developer, was elected to the Tulare City Council in November, 2016. He owns a number of properties and has business interests in the City. The City Council submitted a letter in support of a state audit regarding the Tulare Regional Medical Center's use of hospital bonds in November, 2017.²

In January 2018, Councilmember Nunley placed a bid to purchase land owned by the TRMC for commercial development. TRMC is in bankruptcy proceedings, and the bid was made to the TRMC Board of Directors. The land in question is four acres in size and is located on Prosperity Avenue in Tulare, California. He made an offer of \$2.2 million dollars to purchase this land, and awaits direction from the Commission before agreeing to purchase the land.

ANALYSIS

The Political Reform Act

The Act's conflict of interest provisions ensure that public officials will perform their duties in an impartial manner, free from bias caused by their own interests or the interests of persons who have supported them. (Section 81001(b).) 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 an interest.

Regulation 18704 defines when a public official is making, participating in making, or influencing a governmental decision, along with exceptions to these provisions. "Making or participating in making a decision" involves an official committing his agency to a contract or course of action, or affecting a decision without intervening substantive review. (Regulation 18704(a) and (b).) As relevant to these facts, using one's official position to "influence an action" occurs when a public official contacts or appears before another government agency to affect a decision, and purports to do so on behalf of his agency or within his official authority. (Regulation 18704(c)(2).) Regulation 18704(d) specifically excepts an official's contacts with another agency where those contacts are made as a member of the public and related solely to one's business interests.

² We note that the California State Assembly web site states that only a member of the Legislature or a committee of the Legislature can request an audit from JLAC. (See <http://legaudit.assembly.ca.gov/content/faq>, April 9, 2018.) In January, 2018 a request for audit was made by Senator Jean Fuller.

The government decision at issue here is TRMC's decision to sell its property. TRMC's decision to sell its property is not subject to the authority of the City Council. Therefore, Councilmember Nunley is not in a position as a public official to "make, or participate in making" this decision. Nor do the facts indicate that Councilmember Nunley has made any contacts with the TRMC related to its sale of land, other than as a member of the public in bidding on the property.

Section 1090

Section 1090 provides that public officers, including elected city officials, 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. 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.) "Participation in the making of a contract" is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids.

You wish to know if the City Council's decision to send a letter supporting a state audit of TRMC somehow rises to a participation in TRMC's affairs, such that TRMC's sale of land to Councilmember Nunley would be prohibited under Section 1090. It does not. Relevant to these facts, the Attorney General has stated that where a contract is not subject to a city council's review, approval or monitoring and the city council does not attempt to influence the separate public entity in developing, negotiating, executing or performing a contract, the city council is not "participating" or "influencing" the contract for purposes of Section 1090. (See 85 Ops.Cal.Atty.Gen. 87 (2002).) Similarly, here there is no indication of participation or influence on the part of the City Council related to TRMC's sale of land. TRMC is a separate, special district, and governed by its own elected board. TRMC's decision to enter a contract to sell its land or accept Councilmember Nunley's bid on its land is not subject to the authority or control of the City Council in any manner. No facts suggest involvement or attempts to influence by the City Council in TRMC's sale of land at issue. The City Council's letter of support for a JLAC audit appears to have no bearing on this matter.

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

Sincerely,

Brian G. Lau
Assistant General Counsel



By: L. Karen Harrison
Counsel, Legal Division

LKH:jgl