



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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June 8, 2018

Dwight L. Moore
Paradise Town Attorney
5555 Skyway
Paradise, CA 95969-4913

Re: Your Request for Advice
Our File No. A-18-070

Dear Mr. Moore:

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

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 Butte 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 the Act and Section 1090, may a business, of which Councilmember Bolin is a managing partner, purchase a property from a court-appointed receiver given that the Town Council may submit a legal brief weighing-in on the court's decision to approve such a purchase?

CONCLUSION

Yes. Under the Act, Councilmember Bolin's business may purchase a property from the receiver provided that Councilmember Bolin does not make, participate in the making, or influence

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.

a governmental decision. Additionally, Section 1090 does not prohibit Councilmember Bolin's business from purchasing the property so long as Councilmember Bolin acts only in his private capacity.

FACTS AS PROVIDED BY THE REQUESTOR

The Paradise Town Council authorized the filing of litigation to abate numerous public nuisances at the property known as 6066 Lucky John Road. As a result of the litigation, the court appointed a receiver for the property (the "Receiver"). The Receiver is offering the Property for sale to the public.

By e-mail on April 26, 2018, you confirmed that should the property be sold, the Receiver must receive approval from the court. Although the Receiver will notify the Council of the property's sale, the Council has no authority to approve or deny the sale. The Council may, however, submit a legal brief regarding the sale to the court, but the decision to approve or deny the property's sale is ultimately one for the court.

Councilmember Bolin is a managing member of the Ponderosa Professional Center, LLC ("Ponderosa LLC"). Ponderosa LLC owns an office complex located within a 500-foot radius of the property. The office complex is a business entity, in which Councilmember Bolin has an interest worth more than \$2,000. Due to the proximity of Ponderosa LLC's office complex to the property, Councilmember Bolin has recused himself from participating in any Council discussions, determinations, or actions concerning the property or the related lawsuit.

Councilmember Bolin is also a managing member of Cornerstone Development Group, LLC ("Cornerstone LLC"), which is interested in purchasing the Lucky John Road property from the Receiver for a residential project.

ANALYSIS

The Act

Section 87100 prohibits any public official from making, participating in making, or using 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 if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's interests set forth in Section 87103. Pertinent to the provided facts, the following interests are relevant to your request for advice:

- 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 officer has a direct or indirect interest of \$2,000 or more. (Section 87103(b).)

- An interest in any source of income aggregating \$500 or more to the official within 12 months prior to the decision. (Section 87103(c).)
- An interest in your personal finances and those of immediate family members. (See Section 87103.) An official always has an interest in his or her personal finances.

Under the provided facts, Councilmember Bolin has business interests in both Ponderosa LLC and Cornerstone LLC. Additionally, he has a real property interest in the office complex owned by Ponderosa LLC.² Further, he has source of income interests from the businesses and customers of each business, assuming he received \$500 or more in income from those sources within the 12 months prior to the decision.³

Making, Participating in Making, and Influencing a Governmental Decision

Regulation 18704(a) establishes that a public official “makes a governmental decision” if he or she authorizes or directs any action, votes, appoints a person, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. Assuming Councilmember Bolin continues to recuse himself from Council decisions concerning the property or the related litigation, he is not directing or otherwise committing the Council to a course of action.

Participation in a governmental decision is defined in Regulation 18704(b), which provides that a public official “participates in making a governmental decision” if the official provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review. In this case, the Council has the option to participate by submitting a brief to the approving court for the purpose of affecting the court’s decision. So long as Councilmember Bolin continues to recuse himself in relation to any Council decision concerning the property, including whether to submit a brief, he would not be “participating” in making the decision for purposes of Regulation 18704(b).

Further, Regulation 18704(c)(2) provides that a public official is prohibited from “influencing” a governmental decision. For a decision not before the official’s agency, an official “attempts to use his or her official position to influence a decision” if he or she “contacts or appears before any official in any other government agency for the purpose of affecting a decision, and . . . acts or purports to act within his or her authority or on behalf of his or her agency in making the contact.” So long as Councilmember Bolin continues to recuse himself from any decision before the Council, he would not be prohibited from seeking to purchase the property from the Receiver

² “For purposes of this section, indirect investment or interest means any investment or interest owned . . . by a business entity or trust in which the official, . . . own directly, indirectly, or beneficially a 10-percent interest or greater.” (Section 87103.)

³ An effect on an official’s interest in his or her personal finances or those of immediate family members is not considered separately if the decision also affects the official’s interest in a business entity or real property (Regulation 18702.5(c).) Because the decision may affect your real property or business interests, we do not analyze your interest in your personal finances.

through his business entity provided that he does not act or purport to act on behalf of, or as a representative of, the Town or the Council.⁴

Section 1090

Generally, Section 1090 prohibits public officers, while acting in their official capacities, from making contracts in which they have a financial interest. The purpose of Section 1090 is to make certain that “every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity.” (*Thomson v. Call* (1985) 38 Cal.3d 633, 650.) Participation in the making of a contract is defined very broadly and applies to officials who participate in any way in the making of the contract, including involvement in matters such as preliminary discussions, negotiations, planning, drawing of plans, and specifications. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237.) For example, an official (or a public employee) may be convicted of a Section 1090 violation if it is established that he or she had the opportunity to, and did, influence execution of the contract directly or indirectly to promote his or her personal interests. (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) Where an official is a member of a board or commission that has the power to execute the contract, he or she is conclusively presumed to be involved in the making of his or her agency’s contracts, regardless of actual participation. (*Thomson v. Call, supra*, at pp. 645, 649.)

However, where the contract is not under the jurisdiction of the official’s agency, the making of the contract is not automatically prohibited by Section 1090. (See 81 Ops.Cal.Atty.Gen. 274 (1998).) In this case, the Town is not a party to the contract, and the Council does not have authority over the Receiver’s contracts or over the court’s approval. Rather, the Council’s role is limited to “participating in making the contract” by providing a brief to the court for its consideration. Because the Council does not have the power to execute the contract, the Council’s limited ability to weigh-in on the court’s determination does not automatically prohibit Councilmember Bolin from making a contract with the Receiver to purchase the property.

In order to violate Section 1090, a public official making a contract “as an individual” must “participate in the making of the contract in his official capacity.” (*Millbrae Assn. for Residential Survival v. City of Millbrae, supra*, at pp. 236-237.) The Attorney General has held in numerous opinions that an official may contract with his or her public agency or another public agency if the official acts solely in his or her private capacity.⁵

Accordingly, for purposes of the Act and Section 1090, Councilmember Bolin may enter into a contract to purchase the property in his private capacity provided he continues to recuse himself from any Council decisions concerning the property and acts solely in his private capacity.

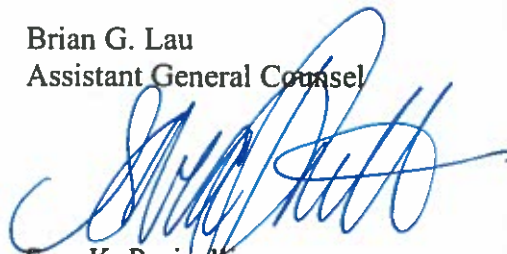
⁴ For example, none of Councilmember Bolin’s written communications with the court or the Receiver may use stationery with the Council’s letterhead or be sent from his Council e-mail address.

⁵ The Attorney General has determined that: firefighters were permitted to sell a product, which they invented in their private capacity, to their fire department so long as they did not participate in the sale in their official capacities (80 Ops.Cal.Atty.Gen. 41 (1997)); county officers were permitted to bid on the county’s surplus property at a public auction so long as they did not participate or influence the decisions pertaining to the sale, or the purchase of the property, in their official capacities (63 Ops.Cal.Atty.Gen. 19 (1980)); and a California Youth Authority board member was permitted to obtain surplus property from the Department of Water Resources because the member did not participate in either the sale or purchase in his official capacity (53 Ops.Cal.Atty.Gen. 163 (1970)).

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

Sincerely,

Brian G. Lau
Assistant General Counsel



By: Sara K. Puricelli
Counsel, Legal Division

SKP:jgl