



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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August 24, 2018

Kristi J. Smith
Chief Assistant City Attorney
Office of the City Attorney
3900 Main Street
Riverside, CA 92522

Re: Your Request for Advice
Our File No. A-18-126

Dear Ms. Smith:

This letter responds to your request for advice regarding conflict of interest provisions under Government Code section 1090 *et seq.*¹ Please note that we are only providing advice under Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including 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 to the Attorney General's Office and the Riverside County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from the Attorney General's Office, and the Riverside County District Attorney declined to advise on the facts presented (a copy of their written correspondence is enclosed). (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 Section 1090 prohibit the City of Riverside from entering into a right-of-way dedication agreement with an LLC, in which Councilmember Mac Arthur has an ownership interest, where the agreement is required by the Subdivision Map Act and a local land use ordinance?

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

CONCLUSION

No. The remote interest exception in Section 1091.1 exempts contracts in which a public official has a financial interest from the prohibition in Section 1090 where the contract is affected by the Subdivision Map Act or a local ordinance related to land subdivision, the official involved discloses the nature of his or her interest to the applicable legislative body, and does not participate in any matter pertaining to the subdivision.

FACTS AS PROVIDED BY REQUESTOR

You are the Chief Assistant City Attorney for the City of Riverside and an authorized representative for Riverside Councilmember Mac Arthur. The Councilmember has an ownership interest in a “family LLC” that owns a vacant property within the City. The LLC seeks to facilitate the sale of a portion of that property by subdividing it into separate parcels. You indicate that pursuant to the Subdivision Map Act and the Riverside Municipal Code, subdivisions of property must conform to the City’s General Plan (“General Plan”) and be approved by the City Council.

The General Plan includes a Master Plan of Roadways that sets forth width requirements for streets it deems arterial. The street abutting the property in question is designated as arterial, and according to the General Plan, must be 120 feet across. For the subdivision to comply with the General Plan, and thus be eligible for approval, the LLC must enter into a right-of-way dedication agreement with the City extending the street by 5 feet on to the LLC’s property.

ANALYSIS

Generally, Section 1090 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. City of 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.) If a public official is a member of a board that executes the contract in question, he or she is conclusively presumed to be involved in the making of the contract. (*Thomson v. Call* (1985) 38 Cal.3d 633, 645, 649.) When Section 1090 is applicable to one member of the governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain; the entire governing body is precluded from entering into the contract. (*Thomson v. Call*, supra, at pp. 647-649; *Stigall v. City of Taft*, supra, 58 Cal.2d at p. 569; *City of Imperial Beach v. Bailey*, supra, 103 Cal.App.3d at p. 197; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).) A contract that violates Section 1090 is void. (*Thomson v. Call*, supra, 38 Cal.3d at p. 646.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

The Legislature crafted various statutory exceptions to Section 1090's prohibition where the financial interest involved is deemed a "remote interest," as defined in Section 1091. Section 1091.1 provides the following remote interest exception for contracts subdividing real property:

The prohibition against an interest in contracts provided by this article or any other provision of law shall not be deemed to prohibit any public officer or member of any public board or commission from subdividing lands owned by him or in which he has an interest and which subdivision of lands is effected under the provisions of Division 2 (commencing with Section 66410) of Title 7 of the Government Code or any local ordinance concerning subdivisions; provided, that (a) said officer or member of such board or commission shall first fully disclose the nature of his interest in any such lands to the legislative body having jurisdiction over the subdivision thereof, and (b) said officer or member of such board or commission shall not cast his vote upon any matter or contract concerning said subdivision in any manner whatever:

You indicate that the right-of-way dedication agreement between the City and the LLC, which arises out of the proposed subdivision of the LLC's property, is required by both the "Subdivision Map Act" and the Riverside Municipal Code (*See* Section 66473.5; Riverside Mun. Code, § 18.030.030). To the extent that is the case, we find that the right-of-way dedication agreement under consideration here would constitute part of the "subdivision of lands... effected under the [Act]..." within the meaning of section 1091.1, and the remote interest exception exempts the agreement from Section 1090 where the Councilmember abstains from participating in any matter pertaining to the subdivision, and fully discloses the nature of his interest to the City Council.²

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

Sincerely,

Brian G. Lau
Acting General Counsel



for By: Peter Leoni
Legal Clerk Intern, Legal Division

PVL:jgl

² The Political Reform Act of 1974 generally prohibits public officials from participating either directly or indirectly in governmental decisions in which they have a financial interest. Since we conclude here that Councilmember Mac Arthur may not participate, either directly or indirectly, in any matter involving the subdivision due to the requirements of Section 1091.1, we need not further analyze the provisions of this additional statutory scheme.