



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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August 8, 2018

Brent Weaver
Redding City Councilor
777 Cypress Avenue
Third Floor
Redding, CA 96001

Re: Your Request for Advice
Our File No. A-18-147

Dear Mr. Weaver:

This letter responds to your request for advice regarding the conflict of interest provisions of Government Code section 1090.¹ 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.

For 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 Shasta 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 advice "is not admissible in a criminal proceeding brought against any individual other than the requestor." (Section 1097.1(c)(5).)

QUESTION

Does Section 1090 prohibit the City, the secondary lender, from executing a subordination agreement for a loan provided to you, prior to taking office, so that you may refinance the primary loan from private lender?

CONCLUSION

City staff may execute the subordination agreement. The rule of necessity exception to Section 1090 applies. The City's ability to manage its loans is an essential function of government. City officials must be allowed to act accordingly as the subordination agreement is in the City's best interest.

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

FACTS

You are currently serving as a City Councilor for the City of Redding (the City). Prior to your public service, you built a commercial mixed use property within City limits. Part of the project's funding came from Redevelopment Agency funding. You borrowed approximately \$1,200,000 from a local community bank, the primary lender, and borrowed another \$800,000 from the Redevelopment Agency, the second lender. As part of the agreement, the redevelopment funding was subject to a subordination agreement to the bank's loan.

After making those loans, and before you became a City Councilor, the City Council became the board of directors for the Former Redevelopment Agency. Now, seven years after constructing the building, you seek to refinance the loan with a different bank. To accomplish this, you require the "Former Redevelopment Agency" to execute the new subordination agreement with the new bank.

The City Council would not need to vote on the new subordination agreement because there is no change of action. The City has already signed a subordination agreement on the existing loan and would merely be signing the same subordination agreement for the new loan. Also, the original agreement gives authority to City staff to sign the subordination agreement at their discretion.

ANALYSIS

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) 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; 86 Ops.Cal.Atty.Gen. 138, 139 (2003).) 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.)

As a City Councilor, you are subject to Section 1090 and because the current matter involves a subordination agreement, it falls within the ambit of Section 1090. With respect to whether you as a City Councilor, and thus the entire City Council, will make a decision on this matter, we note that City staff has the authority to sign the subordination agreement at their discretion. However, we also note that City Council is the board of directors for the Former Redevelopment Agency. Therefore, the ultimate power to execute the subordination agreement rests

in the City Council and you will be considered to have participated in the instant decision regardless of whether City staff signs the subordination agreement.

The determinative question therefore is whether the rule of necessity applies to allow City staff to execute the subordination agreement despite the prohibition under Section 1090. In limited cases, the “rule of necessity” has been applied to allow the making of a contract that Section 1090 would otherwise prohibit. (*Eldridge v. Sierra View Hospital Dist.* (1990) 224 Cal. App. 3d 311, 322.) The rule has been applied where public policy concerns authorize the contract and “ensures that essential government functions are performed even where a conflict of interest exists.” (*Id.*; see also 88 Ops.Cal.Atty.Gen. 106, 110 (2005).) “The rule of necessity permits a government body to act to carry out its essential functions if no other entity is competent to do so . . .” (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1097.)

Under this rule, a contract can be executed even though it would otherwise violate the terms of Section 1090. The “rule of necessity” has been applied where the official or board is the only one authorized to act. (69 Ops.Cal.Atty.Gen. 102, 109 (1986).)

For instance, the “rule of necessity” has been applied to allow a school board to enter into a memorandum of understanding with a teachers’ association even when a board member is married to a tenured teacher and would have a financial interest in the contract. (69 Ops.Cal.Atty.Gen. 102 (1986).) Similarly, the rule allowed a community college board to negotiate with its faculty for salary and benefits even though a board member was a retired faculty member whose health benefits were tied to current faculty benefits. (89 Ops.Cal.Atty.Gen. 217 (2006).) In addition, a city councilmember who had an interest in a local cable franchise was allowed to use the rule of necessity to dispose of his interest where the city council was required to approve such disposition. (76 Ops.Cal.Atty.Gen. 118, 123-125 (1993).) And finally, in *Caminetti v. Pac. Mutual Life Insurance Co.* (1943) 22 Cal.2d 344, 366, the California Supreme Court held that the Insurance Commissioner may make contracts involving a delinquent insurer in which he holds a policy, despite the prohibitions in the predecessor statute to Section 1090 (former Section 920), since “[n]o other officer is authorized to perform the Commissioner’s duties . . .”

In this case, the City is the only entity capable of executing the subordination agreement. The Redevelopment Agency no longer exists, and the City is responsible for managing the loans made under that former agency. There is no detriment to allowing the City to manage its loans, and the subordination agreement is in the best interest of the City as the refinancing of the private first mortgage under more favorable terms helps to protect the City’s interest in the repayment of the City’s secondary loan. We also note that you made the original loans with the Former Redevelopment Agency before becoming a City Councilor and the decision regarding the loan refinance will ultimately be made by City officials, not the City Council.

Based on these facts, and consistent with applicable law, we therefore conclude that the rule of necessity applies and that the City may execute a subordination agreement so that you may refinance the primary loan with a private lender.

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

Sincerely,

Brian G. Lau
Acting General Counsel



By: John M. Feser Jr.
Senior Counsel, Legal Division

JMF:jgl