



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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November 22, 2019

Tom F. Schroeter, Esq.
City Attorney for City of Tehachapi
254 H Street
Bakersfield, CA 93304

Re: Your Request for Advice
Our File No. A-19-215

Dear Mr. Schroeter:

This letter responds to your request for advice on behalf of the City of Tehachapi regarding 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.

Also, note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71); 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.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General's Office and the Kern 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." (Section 1097.1(c)(5).)

QUESTION

Does Section 1090 prohibit the City from exercising a "right of first refusal" from an existing lease to purchase Hangar 53W on the City's airport land, where the improvements to the land were constructed by the current tenant, Councilmember Kenneth Hetge?

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

No. In performing one of its essential functions, the City may invoke the rule of necessity to determine whether the City should exercise its contractual right to purchase the property. However, Councilmember Hetge has a disqualifying conflict of interest preventing him from participating in the decision. Because the financially interested Councilmember must abstain under Section 1090, we do not further analyze the potential conflict of interest issue under the Political Reform Act but note that the Act would require the Councilmember to announce his interest and leave the room when recusing himself from the decision. (See Regulation 18707.)

FACTS AS PRESENTED BY REQUESTER

The City operates the Tehachapi Municipal Airport. Councilmember Kenneth Hetge leases airport land from the City under seven ground leases, one of which is for Hangar 53W. The lease was executed on November 1, 2007 before Councilmember Hetge joined the City Council and is set to expire on November 1, 2027. The lease includes two successive options to renew for a term of five years each. For many years, Councilmember Hetge has operated a business on airport property that he leases called "Recover Your Cub" and has also rented out other hangars that he has constructed on other ground leases. He now owns seven hangars on land leased from the City. There are a total of approximately 86 hangars/buildings on the Airport property.

The lease grants the City a right of first refusal ("ROFR") to purchase the hangar (and any other improvements) if Councilmember Hetge chooses to sell them. Section 15(a) in the lease includes the ROFR, which is typical of leases between the City and other airport lessees, Councilmember Hetge must give the City written notice "at least thirty (30) days before" any possible sale of the improvements.

On September 30, 2019, the City received a "bill of sale" from Councilmember Hetge indicating that he has executed the bill of sale to sell the hangar identified as #53W to a private party for \$60,000, "refundable if the City of Tehachapi exercises their option of "right of first refusal." The City has interpreted the bill of sale as the lessee notice required by the foregoing section 15(a) of the lease.

ANALYSIS

Section 1090:

Section 1090 codifies the common law prohibition against "self-dealing" with respect to governmental contracts. Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. 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.)

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.)

As a general rule, when Section 1090 is applicable to one member of a 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. Moreover, the statutory prohibition cannot be avoided by having the board member with the proscribed financial interest abstain from participating in the decision-making process. (*Fraser-Yamor Agency, Inc. v. County of Del Norte* (1970) 68 Cal.App.3d 201, 211-212.)

As lessee of airport land owned by the City, Commissioner Hetge has a prohibitory financial interest in any contracts with the City concerning the sale of the lease of Hangar 53W.

The Rule of Necessity:

The rule of necessity permits a board to carry out the essential duties of the office despite a conflict of interest where the board is the only one who may legally act. (See 69 Ops.Cal.Atty.Gen 102, 109 (1986).) For example, a city councilmember who has an interest in a local cable franchise can use the rule of necessity to dispose of his interest where the council is required to approve such disposition. (See 76 Ops.Cal.Atty.Gen. 118, 123-125 (1993); see also *Caminetti v. Pac. Mutual Life Insurance Co.* (1943) 22 Cal.2d 344, 366 [insurance commissioner may act against delinquent insurer in which he holds a policy]; 69 Ops.Cal.Atty.Gen. 102 (1986) [school board may enter into a memorandum of understanding with a teacher's association even though one of the trustees is married to a teacher]; 65 Ops.Cal.Atty.Gen. 305 (1982) [superintendent may enter into a memorandum of understanding with school employees although married to one of the employees].)

When the rule of necessity is applied to a member of a multi-member board, the interested board member must abstain from any participation in the decision. In other words, the effect of the rule of necessity is to permit the board with an interested member to make a contract, even though the interested board member must disqualify himself or herself from participating in its making.

In this instance, Councilmember Hetge owns a business that operates out of airplane hangars on leased land from the City. The Councilmember gave the City a bill of sale indicating his intention to sell the hangar in question – Hangar 53W – to a private party. Under a lease provision Councilmember Hetge and the City entered into before the Councilmember was elected to the City Council, the City has a right of first refusal to purchase Hangar 53W.

You highlighted that the Federal Aviation Administration encourages municipal airports to own the improvements built thereon. This ensures the financial health of municipal airports and allows municipal airports to control operations more closely. As the City was carrying out its essential duty to contract by entering into the lease, it is now the only named contractual party that may legally act on its right of first refusal election. Accordingly, the City Council may invoke the rule of necessity to decide whether the City should exercise its contractual right to purchase the property.

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

Sincerely,

Dave Bainbridge
General Counsel



By: Ryan O'Connor
Counsel, Legal Division

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