



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

October 28, 2022

Michael Guina
City Attorney
City of Burlingame
501 Primrose Road
Burlingame, CA 94010

Re: Your Request for Formal Advice
Our File No. A-22-076

Dear Mr. Guina:

This letter responds to your request for advice regarding the Political Reform Act (the “Act”) and Government Code Section 1090, et seq.¹ Please note that we are only providing advice under the Act and 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), 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.

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 San Mateo 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 Section 1090 and the Act, may Burlingame City Councilmember Emily Beach take part in governmental decisions regarding the development of three offices/life science buildings on 12 acres of land, given that her husband works for the law firm representing the project applicant?

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 18104 through 18998 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

Section 1090 generally prohibits Councilmember Beach from taking part in the development agreement process, including preliminary decisions, between the City and the Applicant based on her husband's employment with the firm representing the Applicant. However, the "rule of necessity" permits the remaining members of the City Council to enter a development agreement, as the City Council is the only government entity with the power to approve such an agreement. Because we conclude that Councilmember Beach is prohibited from taking part in the contracting process under Section 1090, we do not further analyze whether she is also prohibited under the Act.

FACTS AS PRESENTED BY REQUESTER

Councilmember Beach and the City Council

Emily Beach is a member of the City of Burlingame City Council. She was last elected in 2019 and serves a four-year term. Councilmember Beach's husband, David Beach, is a partner at the law firm of Coblentz, Patch, Duffy & Bass (the "Firm"). Mr. Beach is a non-equity partner whose salary is determined annually and is not affected by the Firm's overall financial performance. In setting partner compensation, the Firm relies on traditional quantitative data such as billable hours, personal origination, and supervision of matters. It also considers factors such as feedback from other partners, leadership roles, non-billable contributions such as committee and pro bono work, mentoring associates in their professional development, and other factors generally focused on personal professional and practice development, such as developing a specific expertise, producing high quality work product, and managing client or firm-related projects. The Firm also awards a limited number of annual discretionary bonuses. These are similarly not affected by the Firm's overall financial performance and are based on personal, extraordinary, non-recurring contributions, taking into account similar criteria as the base compensation. Mr. Beach is a member of the Firm's Litigation practice group and not a member of the Firm's Real Estate practice group.

According to the Firm's website, the Firm maintains offices in San Francisco and Napa and employs approximately 107 attorneys. Of those 107 attorneys, 60 attorneys have the title of "partner," while another attorney is the "managing partner" and another has the title of "partner emeritus."

The City of Burlingame Planning Commission considers and takes action on land use applications, zoning determinations, and environmental documents prepared for compliance with the California Environmental Quality Act (CEQA). The City of Burlingame City Council is the appellate body for administrative appeals of decisions made by the Planning Commission.

In addition to hearing appeals from the Planning Commission, the City Council considers and approves agreements which may arise in connection with certain development projects. The City Council approves Development Agreements which may be negotiated between a local agency and a project applicant pursuant to Government Code Section 65865. In addition, pursuant to Water Code Section 10910(g), the City Council considers and approves Water Supply Assessment (WSA) reports for certain development projects. The WSA requires applicants to identify the impacts of water demand for an affected project.

The Divcowest Project

Recently the City has received an application for a commercial development project located at 1200-1340 Bayshore Highway, Burlingame, California (the “Project”). The Project includes redevelopment of a 12-acre site with three new office/life sciences buildings totaling approximately 1.46 million square feet; two new parking structures; and various public improvements. The Project is proposed by Divcowest (the “Applicant”).

The Project will require land use approvals and CEQA clearance from the Planning Commission. Specifically, the land use approvals will include design review and a conditional use permit. The Project is anticipated to require certification of an Environmental Impact Report to comply with CEQA. These Planning Commission approvals are subject to administrative appeal before the City Council.

Given the scope of the Project, the Applicant may also be required to prepare a WSA to identify the impact of the Project’s water demands on the local supply. The WSA, if required, will be considered and approved by the City Council.

In addition, the Project Applicant may request and negotiate a Development Agreement with the City to address certain aspects of Project development including phasing, public improvements, and fees. The Development Agreement will be considered and approved by the City Council. To date, no action has been taken on a Development Agreement with the Applicant.

The Applicant has retained Mr. Beach’s Firm for legal advice and representation in processing the various land use approvals required from the City, as well as negotiating a potential Development Agreement and preparing a WSA if required. Members of the Firm’s Real Estate practice group advise the Applicant regarding the Project. Mr. Beach is not part of the attorney team advising on the Project; does not consult with the attorneys advising on the Project; and does not provide any legal services pertaining to the Project. Mr. Beach’s income or compensation is not reliant upon or affected by the outcome of the City Council’s decisions relating to the various Project approvals or a Development Agreement or WSA. Mr. Beach has not been promised any additional income, compensation, or other benefit if the Project obtains its City approvals, or receives the Council’s approval of a Development Agreement or WSA. The Firm expects that the potential fees for representing the Applicant would be below \$1,000,000 or five percent of the firm’s annual gross revenue.

ANALYSIS

Section 1090

Under Section 1090, public 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 a member.” 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.)

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.) A contract that violates

Section 1090 is void, regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.) A development agreement constitutes a contract for purposes of Section 1090. (78 Cal.Op.Atty.Gen. 230, 235 (1995).) Further, an official “makes” a contract if the official participates 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; see also *Stigall, supra*, 58 Cal.2d at p. 569.)

The Legislature has created various statutory exceptions to Section 1090’s prohibition where the financial interest involved is deemed to be a “remote interest,” as defined in Section 1091, or a “noninterest,” as defined in Section 1091.5. As amended in 1996, Section 1091(b)(6) establishes a remote interest exception where the interest is that of an attorney representing the contracting party “if these individuals have not received and will not receive remuneration, consideration, or a commission as a result of the contract and if these individuals have an ownership interest of *10 percent or more* in the law practice or firm” (Emphasis added.) Similarly, Section 1091.5(a)(10) establishes as a non-interest: “[t]hat of an attorney of the contracting party . . . if these individuals have not received and will not receive remuneration, consideration, or a commission as a result of the contract and if these individuals have an ownership interest of *less than 10 percent* in the law practice or firm” (Emphasis added.)

The Attorney General has opined that Sections 1091(b)(6) and 1091.5(a)(10) do not apply where the attorney representation involves the contract at issue, explaining, “[w]e believe that the phrase ‘an attorney of the contracting party’ pertains to the representation of the client in other, unrelated matters, not in the contract with the city. This conclusion follows the interpretive rule of narrowly construing exceptions to section 1090 to avoid undermining its purpose that public officials discharge their fiduciary duties with undivided allegiance.” (101 Cal.Ops.Atty.Gen. 1, 7 n.76 (2018).) Accordingly, the Attorney General concluded, “[w]e find that where a council member advocates for a client in a contract with the city, the attorney general exceptions do not apply to lift the section-1090 prohibition.” (*Id.* at p. 20.) The Attorney General also wrote, “the outcome would not vary merely because a representation was without compensation. Pro bono representation may still produce economic gains, goodwill, or prestige for the council member’s law practice, amounting to a disqualifying financial interest.” (*Id.* at pp. 21-22.) Based on the Attorney General’s analysis that Sections 1091(b)(6) and 1091.5(a)(10) pertain to the representation of clients in matters *unrelated to* the contract with the government entity, it appears no statutory exception is applicable and Section 1090 prohibits Councilmember Beach from taking part in a contracting process between the City and the Applicant. The City in general would also be prohibited from entering such a contract unless an exception applies.

In addition to the statutory exceptions found in Sections 1091 and 1091.5, a “rule of necessity” has been applied in limited circumstances to allow the making of a contract that Section 1090 would otherwise prohibit. (88 Ops.Cal.Atty.Gen. 106, 110 (2005).) The rule of necessity has two facets: in procurement situations, it has permitted a government agency to acquire an essential supply or service despite a conflict of interest; in nonprocurement situations, it has permitted a public officer to carry out the essential duties of the office despite a conflict of interest where the officer is the only one who may legally act. (65 Ops.Cal.Atty.Gen. 305, 310 (1982).) In nonprocurement situations, the rule of necessity ensures that essential government functions are performed even where a conflict of interest exists. (*Ibid.*) In such a scenario, the rule of necessity

applies to allow a multi-member body to act when it otherwise would have been precluded from doing so due to a member's conflict of interest, but the member with the conflict of interest must abstain from participation. (88 Ops.Cal.Atty.Gen. 106, 111 (2005); 69 Ops.Cal.Atty.Gen. 102, 112 (1986).)


Here, a development agreement would not be a contract for goods or services; rather, it would be a nonprocurement contract between the City and the Applicant. Further, although a conflict exists based on Councilmember Beach's husband's employment with the Firm representing the Applicant, the City is the only government entity with the ultimate authority to consider the application and to subsequently enter an agreement to permit the development upon approval. If the City is unable to exercise this function, all clients of the firm with property within City would be unable to develop their respective properties so long as a councilmember retains an interest in the firm. Accordingly, the rule of necessity applies in this situation and the City may enter a development agreement with the Applicant, as represented by the Firm, but Section 1090 requires that Councilmember Beach recuse herself from taking part in the contracting process. Finally, because Councilmember Beach must recuse herself under Section 1090, we do not further analyze whether she is also prohibited from taking part in the related decisions under the Act. (See, e.g., *Matas* Advice Letter, No. A-22-065.)

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

Sincerely,

Dave Bainbridge
General Counsel

By:


Kevin Cornwall
Counsel, Legal Division

KMC:aja