



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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August 7, 2023

Marco A. Martinez
City Attorney
City of Shafter
2855 E. Guasti Road, Suite 400
Ontario, California 91761

Re: Your Request for Advice
Our File No. A-23-033

Dear Mr. Martinez:

This letter is in response to your request for advice regarding conflict-of-interest provisions of the Political Reform Act¹ (the Act) and Section 1090, et seq. Please note that we are not providing advice under any 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, then 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." (See Section 1097.1(c)(5).)

QUESTIONS

1. Does Mayor Chad Givens have a conflict of interest under the Act or Section 1090 that prohibits him from participating in the City of Shafter's (the City) decision to sell or lease City property to his employer?
2. Does Mayor Givens have a conflict of interest under Section 1090 that prohibits the City Council from selling or leasing City property to his employer?

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.

CONCLUSIONS

1. Yes, Mayor Givens has conflicts of interest under the Act and Section 1090 that prohibit him from participating in the City of Shafter's decision to sell or lease City property to his employer.
2. Yes, Mayor Givens' conflict of interest under Section 1090 prohibits the City Council from selling or leasing City property to his employer because an exception does not apply.

FACTS AS PRESENTED BY REQUESTER

The Wonderful Company (Wonderful) is a privately held \$5 billion company that employs 10,000 worldwide employees and exercises control over multiple limited liability companies, including a separate real estate division. Wonderful owns several hundred acres adjacent to property owned by the City. The City's property includes a rail terminal and storage container yard with access to BNSF railway lines (the City Property).

The City Property has been vacant for several years and other than Wonderful, the City has not to this point received any interest from parties looking to lease or purchase the City Property. The City also recognizes that the parcel is relatively small, 4 acres, and without acquiring additional adjacent land (which is all owned by Wonderful, who is not interested in selling) the City, a third party purchaser, or a rail operations consultant hired by the City would be unable to use the land for its most economically beneficial use. The small size of the City's parcel is infeasible for rail operations as-is because it cannot accommodate the volume of rail containers necessary to run a rail terminal and storage operation. In other words, the City believes that if it does not lease the City Property to Wonderful, it will be extremely difficult to find a purchaser or lessor for the City Property because of the unique circumstances of Wonderful owning all surrounding land and the relatively small size of the parcel. The City's strong preference would therefore be to sell the City Property to Wonderful so that the parcels can be under common ownership and used as an inland port to bring valuable commodities into and out of the City.

A City consultant, with specialty in short-rail operations, has advised the City that the most economically beneficial use of the City Property is to lease it to Wonderful, which would like access to the BNSF railway lines to streamline its logistic center operations. Leasing the City Property to Wonderful will promote environmental and economic efficiencies, as it will allow loaded rail cars to be brought from the local port and loaded cars to be returned to the port (i.e., treating the property as a true inland port), rather than returning empty cars to the port to be refilled and sent back out. Wonderful's real estate division would be the LLC responsible for negotiating any lease with the City.

Mayor Givens currently works for a Wonderful LLC that is unrelated to its real estate division (the Capital Projects division). He has not participated in any discussions relating to the lease of the City Property. Mayor Givens joined the City Council in December 2016 and was elected mayor in January 2017, his employment with Wonderful began on January 21, 2019.

ANALYSIS

A. The Act.

The Act's conflict of interest provisions prohibit any public official from making, participating in making, or otherwise using an official position to influence a governmental decision in which the official has a financial interest. (Section 87100.) A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on one or more of the public official's interests. (Section 87103; Regulation 18700(a).)

Section 87103 of the Act lists several types of financial interests that can give rise to a conflict of interest, including:

- An economic interest in a business entity in which an official has a direct or indirect investment of \$2,000 or more (Section 87103(a); Regulation 18702.1); or in which an official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d).)
- An economic interest in real property in which an official has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18702.2.)
- An economic interest in any source of income, including promised income, aggregating \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18702.3.)
- An economic interest in any source of gifts to an official if the gifts aggregate to \$500 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18702.4.)
- An economic interest in the official's personal finances, including those of an official's immediate family. (Section 87103; Regulation 18702.5.)

Based on the facts provided, Mayor Givens has interests in Wonderful as an employee of the business entity and as a source of income. At issue is whether it is reasonably foreseeable that the City decision to lease the City Property to Wonderful will result in a material financial impact on Mayor Givens' interests in Wonderful.

A financial effect is presumed reasonably foreseeable where the official's financial interest is explicitly involved as a named party in, or subject of, the decision. (Regulation 18701(a).) The reasonably foreseeable financial effect of a governmental decision on an official's financial interest in a business entity, including a source of income, is also material if the source is a named party in, or the subject of, the decision including a claimant, applicant, respondent, or contracting party. (Regulation 18702.1(a)(1) and 18702.3(a)(1).)

Based on the facts provided, Mayor Givens' financial interest would be explicitly involved in the City's decision to sell or lease the City Property to Wonderful, which is a named party and subject of the governmental decisions at issue. It is reasonably foreseeable, therefore, that the decision would have a material financial effect on Mayor Givens' interests Wonderful. Accordingly, under the Act, Mayor Givens, has a disqualifying conflict of interest and is prohibited from taking part in the decision under the Act. However, as analyzed below, we note that the City is

also prohibited from selling or leasing the property pursuant to Section 1090 and therefore it is unnecessary to further consider disqualification under the Act.

B. Section 1090.

Under Section 1090, public “officers or employees 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.) The making of a contract not only includes the execution of the contract, but also “the negotiations, discussions, reasoning, planning and give and take which goes beforehand . . .” (*Stigall, supra*, 58 Cal.2d at p. 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. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) When an officer with a proscribed financial interest is a member of the governing body of a public entity, the prohibition of Section 1090 also extends to the entire body. (89 Ops.Cal.Atty.Gen. at 50.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson, supra*, at pp. 646-649.)

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that “specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’” (*People v. Honig, supra*, at p. 351 citing *Stigall, supra*, at pp. 569, 571.) A contract is “made” on mutual assent of the involved parties. (*Stigall, supra*, at p. 569.) No contract is “made” and no duties attach until one party has offered and another has accepted and consideration is exchanged. But before this, there are “negotiations, discussions, reasoning, planning, and give and take,” all of which are instrumental in “making” the agreement. (*Id.* at p. 569.)

In this case, as Mayor of the City, Mayor Givens is a public official and is thus subject to Section 1090. Moreover, selling or leasing the property to Wonderful would require a contract under section 1090.

The next question is whether Mayor Givens has a financial interest in the proposed lease agreement between the City and Wonderful. Under Section 1090, employees have been found to have a financial interest in a contract that involves their employer, even where the contract would not result in a change in income or directly involve the employee, because an employee has an overall interest in the financial success of the firm and continued employment. (84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

Here, Mayor Givens receives income from Wonderful which is a named party in the prospective lease agreement. Therefore, he would be financially interested in the lease agreement.

Accordingly, Section 1090 prohibits the Mayor from making or participating in the making of, and the City from entering into, the lease agreement with Wonderful, unless an exception applies.

Statutory exceptions to Section 1090 exist where the financial interest involved is a “remote interest” or a “noninterest.” As you indicate in your request, there are no statutory exceptions to Section 1090 that apply to the facts here. The “remote interest” exception under Section 1091(b)(2) does not apply because Mayor Givens’ position with the City predates his employment with Wonderful; he joined the City Council in December 2016, he was elected mayor in January 2017, and his employment with Wonderful began on January 21, 2019.

C. Rule of Necessity.

In limited circumstances, a “rule of necessity” has been applied to allow the making of a contract that Section 1090 would otherwise prohibit. (*Dietrick* Advice Letter, No. A-15-174; 88 Ops.Cal.Atty.Gen. 106, 110 (2005).) The rule of necessity ensures that essential government functions are performed even where a conflict of interest exists. (*Eldridge v. Sierra View Local Hospital Dist.* (1990) 224 Cal.App.3d 311, 321; see *Gonsalves v. City of Dairy Valley* (1968) 265 Cal.App.2d 400, 404 [stating that “[t]he rule is well settled that where an administrative body has a duty to act upon a matter which is before it and is the only entity capable to act in the matter, the fact that the members may have a personal interest in the result of the action taken does not disqualify them to perform their duty.”])

You have specifically inquired whether the “rule of necessity” might apply to allow the making of the contract with Wonderful. Facts relevant to this point include: Wonderful owns several hundred acres adjacent to property; the City’s property includes a rail terminal and storage container yard with access to BNSF railway lines; the property has been vacant for several years; other than Wonderful, the City has not to this point received any interest from parties seeking to lease or purchase it; the property consists of a small 4-acre parcel and its use by the City or a purchaser other than Wonderful is limited without acquiring additional adjacent land; Wonderful is not interested in selling its adjacent land; and the property cannot be used for rail operations as-is because it cannot accommodate the volume of rail containers necessary to run a rail terminal and storage operation.

Based on the facts provided, the “rule of necessity” does not apply to allow the making of the contract with Wonderful. Section 1090 is strictly construed. (See *Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal.App.4th 655, 663-664.) As discussed above, Section 1090 prohibits the City from entering the contract with Wonderful; the fact that such a contract may be the best option does not make it a necessity.

In *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, the operator of a concession stand under contract with the city was later elected to become a member of the city council. (*Id.* at p. 194.) A provision of the concession contract provided that on the fifteenth anniversary of the agreement, ownership of the building in which the concession was housed would pass to the city and that “[a]t the end of said fifteen year period City may reasonably adjust the rate of payment to be paid by Operator to City to reflect the fact that City owns the building.” (*Id.*) When the concession contract came up for renewal, the operator was still a member of the city council. The

city refused to renew the contract, citing Section 1090, and sought a declaration as to the legality of its refusal.

The *City of Imperial Beach* court held that the renewal would constitute the making of a contract that would violate Section 1090. The court reasoned that adjustment of the rate would require a “negotiation” prohibited by Section 1090, even if the city set the rate unilaterally and even if the conflicted councilmember abstained from voting. (*Id.* at p. 195.) The court held that “the purpose of Government Code section 1090 is not only to strike at actual impropriety, but also to strike at the appearance of impropriety.” (*Id.* at p. 197.) The court further explained:

The public policy supporting this position [Gov. Code, § 1090] stems from the fact a public office is a public trust created in the interest and for the benefit of the people. Public officers are obligated to discharge their responsibilities with integrity and fidelity. The law of this state is that public officers shall not have a personal interest in any contract made in their official capacity. The established policy of this state in this regard was created to remove all indirect as well as direct influence of an interested officer in the discharge of his duties. This is not intended to strike only at fraud or dishonesty and it is conceded none exists in the present case; the object of the enactment is to remove or limit the possibility of any personal influence either directly or indirectly which might bear on an official's decision as well as to void contracts which are actually obtained through fraud or dishonest conduct citations.

(*Id.* at p. 197, citing *City Council v. McKinley* (1978) 80 Cal.App.3d 204, 213.)

In *City of Imperial Beach*, continuing the existing lease was likely the best option, but the court found the official would have to resign from office or relinquish ownership of the concession stand. (*City of Imperial Beach, supra*, 103 Cal.App.3d at p. 198.) Similarly, in this case, the likely best option is to lease the property to Wonderful. The fact that a contract otherwise prohibited by Section 1090 is the best option does not make it a necessity. Accordingly, the “rule of necessity” does not apply to allow the making of the contract with Wonderful.

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

Sincerely,

Dave Bainbridge
General Counsel

/s/ John M. Feser Jr.

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