



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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December 1, 2023

Nicole C. Wright
Senior Assistant City Attorney
City of Mountain View
500 Castro Street, P.O. Box 7540
Mountain View, CA 94039-7540

Re: Your Request for Advice
Our File No. A-23-141

Dear Ms. Wright:

This letter responds to your request for advice on behalf of Ellen Kamei 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, 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.

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 Santa Clara 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

Under the Act and Section 1090, may City of Mountainview Councilmember Ellen Kamei participate in decisions regarding a contract with Alta Housing that includes a provision providing public funds for the specific purpose of compensating AT&T to finish and inspect the undergrounding AT&T's existing infrastructure in light of the fact that Councilmember Kamei is

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.

employed as an External Affairs Area Manager for AT&T? If Councilmember Kamei is prohibited from participating in the contract, may the City Council still enter the contract if she abstains?

CONCLUSION

Under Section 1090, Councilmember Kamei has a financial interest in the contract between the City and Alta Housing due to her employment with AT&T that would generally prohibit both her and the City Council from participating in the contract. However, in order to perform essential government functions, the City may still enter the contract with Alta Housing under the rule of necessity so long as Councilmember Kamei recuses herself from the proceedings. Because the remedy under Section 1090 is for Councilmember Kamei to abstain from any participation in the making of a contract, we do not analyze the conflict of interest under the Act since the remedy under the Act would not differ from the action already required, except that she must leave the room during the consideration of a contract pursuant to the Act's recusal requirements.

FACTS AS PRESENTED BY REQUESTER

You are the City Attorney for the City of Mountain View ("City") and are seeking advice on behalf of City Councilmember Ellen Kamei under the Act and Section 1090.

Alta Housing is seeking to enter a contract ("Funding Agreement") with the City that would pay Alta Housing for its costs (an estimated \$1,000,000) to trench and underground utilities located at the site of its affordable housing development project. The City will consider authorization to execute the Funding Agreement with Alta Housing, the funding would include undergrounding utilities for PG&E, Comcast. AT&T's utilities, however, would likely be identified at AT&T's in the Funding Agreement.

The City will issue excavation permits to Alta Housing's contractor to construct the joint trench, install conduit, and perform related work for the undergrounding located in the City's right-of-way. A joint utility pole, currently in use by AT&T, would be removed and replaced by a joint utility trench. The utility companies, including AT&T, will charge fees to cover their costs that will be paid by Alta Housing from the \$1,000,000 provided to Alta Housing by the City for the utility companies' inspections and fiber/cable/wire installation. Whether AT&T could deny permission or approval for the undergrounding is not known to the City, although based on prior experience, no utilities have objected to being moved into a joint trench. Alta Housing is not required to underground utilities at this location as the City Code only requires undergrounding when a property is subdivided, which is not the case here.

Any financial benefit or additional expense to AT&T resulting from having its telecommunications utilities undergrounded in a joint trench is not information available to the City. However, the amount of the \$1,000,000 of public funds paid to Alta Housing is the estimated amount for the total undergrounding work to be performed. While most of this cost relates to construction of the joint trench and does not change if all three utilities are included in the joint trench or only one, approximately 5-10% of the \$1,000,000 is estimated for the utilities to pull their fiber/cable/wires through the conduits and cutover utility service to the new trench. The utilities companies cost, including AT&T's, will be paid to the utility companies by Alta Housing from these funds.

As it relates to AT&T, this project would underground approximately 500 feet of AT&T's telecommunication utility in an existing service location. Other than the estimated payments to AT&T for their work to underground their infrastructure, the City cannot ascertain whether there is any other benefits to AT&T from this work. While undergrounding may provide some protection to utilities from fire and weathering, it may also result in greater expense for all utilities to perform maintenance. Repair and maintenance work on underground utilities would require digging up the utilities to evaluate and perform any needed repairs, followed by restoration of pavement/sidewalk/landscaping when completed.

Councilmember Kamei is employed by AT&T as an External Affairs Manager. She accepted employment at AT&T after taking office as a City Councilmember. Her job duties include advocating on behalf of AT&T, establishing and maintaining relationships with local elected officials and key stakeholders to support AT&T objectives, collaborating on and contributing to state legislative efforts and policy objectives, collaborating and communicating with internal business units regarding the impact of pending local ordinances and legislation, promoting AT&T's policy agency during public hearings and before third party organizations and key audiences within the region, and serving as spokesperson for AT&T at public hearings and community events. Councilmember Kamei does not hold any stock as part of this position and is compensated by salary only, which exceeds \$500 in a calendar year. Along with all other AT&T employees, she is eligible for an annual bonus based on overall business performance in the prior year. Councilmember Kamei's salary, bonus, employee benefits or status as an employee are not tied to agreements with the City or any other local agency. In her role as an External Affairs Manager for AT&T, Councilmember Kamei does not conduct any work with, or in, the City.

ANALYSIS

Section 1090

Under Section 1090, city officers "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 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is "concerned with any financial interests, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of" their respective 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.)

Section 1090 prohibits the use of a public position for self-dealing. (See *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1124 [independent contractor leveraged his public position for access to city officials and influenced them for his pecuniary benefit]; *California Housing Finance Agency v. Hanover* (2007) 148 Cal.App.4th 682, 690 ["Section 1090 places responsibility for acts of self-dealing on the public servant where he or she exercises sufficient control over the public entity, i.e., where the agent is in a position to contract in his or her official capacity"]; *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090 [The purpose of Section 1090 is to prohibit self-dealing, not representation of the interests of others].)

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. (*Id.* at pp. 647-649.)

Here, Councilmember Kamei is a public official subject to Section 1090's conflict of interest provisions and would be making a contract if the City Council entered into a contract with Alta Housing that included a provision requiring Alta Housing to pay AT&T for its work in completing the undergrounding of AT&T's existing infrastructure from funds provided by the City. The primary question in this case is whether Councilmember Kamei has a financial interest in the contract between the City and Alta Housing due to her employment with AT&T and, if so, whether any exception to Section 1090 would allow the City to enter the contract with Alta Housing.

Financial Interest.

"Financial interest" under Section 1090 is given a broad analysis and includes grants or contracts that may directly or indirectly benefit the officer. The California Supreme Court has explained what constitutes a financial interest under Section 1090:

[T]he term "financially interested" in section 1090 cannot be interpreted in a restricted and technical manner. (*People v. Honig, supra*, 48 Cal.App.4th at p. 315.) The defining characteristic of a prohibited financial interest is whether it has the potential to divide an official's loyalties and compromise the undivided representation of the public interests the official is charged with protecting. (See *Stigall v. City of Taft, supra*, 58 Cal.2d at p. 569.) Thus, that the interest "might be small or indirect is immaterial so long as it is such as deprives the [people] of his overriding fidelity to [them] and places him in the compromising situation where, in the exercise of his official judgment or discretion, he may be influenced by personal considerations rather than the public good." (*Terry v. Bender* (1956) 143 Cal. App. 2d 198, 208 [300 P.2d 119]; see also *Thomson v. Call, supra*, 38 Cal.3d at p. 645 [direct and indirect interests are equally prohibited].)

(*Lexin v. Superior Court* (2010) 47 Cal. 4th 1050, at p. 1075.)

In this case, Councilmember Kamei has a financial interest in her salary with AT&T. Alta Housing is the specifically involved party in the potential contract before the City, not AT&T. However, AT&T will be named in the contract as a utility provider and will be impacted by the contract as the contract will specifically include funding for AT&T to finish the undergrounding of AT&T's existing infrastructure. As provided in the facts, the utility companies, including AT&T, will receive 5-10% of the \$1,000,000 provided for in the contract to perform work undergrounding the utilities in question. While other benefits or costs to AT&T resulting from undergrounding the utilities are not certain at this time, the proposed contract will specifically require the payment of funds provided by the City for work performed by AT&T. Moreover, there are likely to be at least some future impacts as noted in your request. For example, undergrounding may provide some protection for the utility lines but would also make the lines more expensive to repair.

Based upon these facts, the contract in question is going to have a financial impact on Councilmember Kamei's employer through the initial payments to AT&T to complete the work as well as any future costs or benefits. Therefore Councilmember Kamei has a financial interest and she and the City would be prohibited from entering the contract absent an exception.

Remote Interest

Statutory exceptions to Section 1090 exist where the financial interest involved is a “remote interest.” The exception that may apply under the facts provided here is the remote interest set forth in Section 1091(b)(2).

Section 1091(a) provides:

An officer shall not be deemed to be interested in a contract entered into by a body or board of which the officer is a member within the meaning of this article if the officer has only a remote interest in the contract and if the fact of that interest is disclosed to the body or board of which the officer is a member and noted in its official records, and thereafter the body or board authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for the purpose without counting the vote or votes of the officer or member with the remote interest.

Section 1091(b)(2) defines a “remote interest” to include in relevant part:

That of an employee or agent of the contracting party, if the contracting party has 10 or more other employees and if the officer was an employee or agent of that contracting party for at least three years prior to the officer initially accepting his or her office and the officer owns less than 3 percent of the shares of stock of the contracting party; and the employee or agent is not an officer or director of the contracting party and did not directly participate in formulating the bid of the contracting party.

Here, while the Councilmember does not own stock in AT&T and is not an officer or director of the company, Councilmember Kamei had not been working for AT&T for at least three years prior to accepting office, therefore the remote interest exception will not apply.

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 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 non-procurement situations, it has permitted a public officer to carry out the essential duties of the office despite a conflict of interest where the office is the only one who may legally act. (65 Ops.Cal.Atty.Gen. 305, 310 (1982).) In non-procurement situations, such as the situation here, the rule of necessity ensures that essential government functions are performed, even where a conflict of interest exists.

Previously, the rule of necessity has been applied in a non-procurement situation to a city council where members of the council have a conflict of interest that otherwise would have prevented action by the board. (*Federal Construction Co. v. Curd* (1918) 179 Cal. 489, 493.) In a non-procurement situation where 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 one or more members’ conflict of interest, the member or members 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); 67 Ops.Cal.Atty.Gen. 369, 378 (1984).)

Thus, to determine if the rule of necessity applies, we must examine whether entering a contract with Alta Housing to fund its project is an essential duty of the City Council and whether the City Council is the only government entity legally capable of entering the contract.

Here, Alta Housing provides a much-needed service of affordable housing, and disqualifying the City from a contract with the company because of the utility that Alta Housing is using, especially considering a general lack of options for utilities would be incongruous with the goal of ensuring essential government functions are performed. Moreover, as the final decisionmaker in decisions involving public utilities, it is essential that the City have the ability to manage the City's existing infrastructure as necessary to ensure the utilities meets the City's needs. Accordingly, negotiating and entering the proposed contract is an essential function of the City Council and an action only the City can effectuate. Based upon the facts provided, the rule of necessity applies and the City may enter the contract with Alta Housing but Councilmember Kamei must recuse herself from the proceedings. Additionally, because the remedy under Section 1090 is for Councilmember Kamei to abstain from any participation in the making of a contract, we do not analyze the conflict of interest under the Act since the remedy under the Act would not differ from the action already required, except to note that she must leave the room during the consideration of a contract pursuant to the Act's recusal requirements.

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

Sincerely,

Dave Bainbridge
General Counsel

By: 
Valerie Nuding
Counsel, Legal Division

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