



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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March 5, 2024

Scott C. Nave
Nave Law Office
30721 Russell Ranch Rd., Suite 140
Westlake Village, CA 91362

Re: Your Request for Advice
Our File No. A-24-012

Dear Mr. Nave:

This letter responds to your request for advice on behalf of Kern Valley Healthcare District (“District”) Director Fred Clark 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 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).)

QUESTION

Does Section 1090 prohibit the Kern Valley Healthcare District (“District”) from contracting for future advertising with a local newspaper, where the District had previously entered into contract for advertising, given that one of the District Directors, Director Clark, recently acquired an interest in an LLC that purchased the newspaper?

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

Director Clark has a financial interest in the newspaper, and Section 1090 prohibits the renewal of the prior contract or new contracts for future advertising by the District.

FACTS AS PRESENTED BY REQUESTER

You represent the Kern Valley Healthcare District, a special district that provides a variety of healthcare services in rural Kern County. The District Board consists of five members, including Director Fred Clark, who was elected to the District Board in 2020.

The District advertises its services, flu and covid shots, and other health-related events on the one radio station and in the one local, weekly newspaper.

In January 2023, the District entered into an agreement with the *KV Sun*, a local newspaper, for advertising services. The terms are not in a written agreement, but were specified in an email between the newspaper and District in January 2023. The language contained in the email is as follows:

Twice a month ¼ page story with a ¼ page advertisement at \$350.00 per publication

Banner ad on the webpage at \$95.00 per week (matching the banner ad on the printed front page)

Banner ad on the front page of the *KV Sun* (replacing Harry Thal) at \$125.00 per week (commitment for one year)

The banner ad will switch off between Kern Valley Hospital, Kern Valley Skilled Nursing, Mountain View Health Center, and Mesa Pharmacy. With changes to advertise special events such as Heart Walk, Houchin Blood Drive, Diabetic Cooking Classes, River Rhythms, etc.

This will include working with *KV Sun* on creating stories and content can be used on our website and/or other marketing platforms as we deem appropriate.

This is outside of the Medical Business Directory we will be working on the next two months.

In a follow up email, you provided additional detail concerning the rate agreement outlined in the email. You stated that District stopped doing two stories a month last October. You also stated that Deborah Hess, who handles Public Affairs/Marketing for the District was involved in negotiating the arrangement, but it was approved by the CEO because it fell within his authority.

In January 2024, the director became a member of an LLC that purchased the newspaper. The District seeks to continue publishing in the newspaper to provide healthcare-related information to the community, along with information on the radio. You state that the terms

negotiated in 2023 have not changed, and the District would continue to publish at the same rates going forward.

In a follow up email, you provided additional information regarding Director Clark and his interest in the newspaper. You state that Director Clark is one of three founders who formed KRValley Media, LLC in December 2023 and completed the purchase of the *KV Sun* in January 2024, when the previous owner was about to shut-down the newspaper. The LLC was formed solely to own and operate the *KV Sun*. Director Clark has a one-third interest in the company.

ANALYSIS

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 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. 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.)

Although Section 1090 does not specifically define the term “financial interest,” case law and Attorney General opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (See e.g., *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002).)

“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.” (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1075.) “Thus, that the interest ‘might be small or indirect is immaterial so long as it is such as deprives the [people] of [the official’s] overriding fidelity to [them] and places [the official] in the compromising situation where, in the exercise of his official judgment or discretion, [the official] may be influenced by personal considerations rather than the public good.” (*Ibid.* quoting *Terry v. Bender* (1956) 143 Cal.App.2d 198, 208.)

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 v. Taft, supra*, at p., 571.) Under general principles of law, a contract is made on the mutual assent of the parties and consideration. If an agency agrees to a purchase, there is mutual assent by the parties and consideration. All the circumstances of the transaction as a whole must be considered in determining whether a proscribed financial interest would be present in the contract. (*Thomson v. Call, supra*, at p. 645.)

To the extent that the District entered into an agreement with the *KV Sun*, as evidenced by the email from January 2023, the District opted to cease running two stories a month last October, and the one-year commitment for the banner on the front page has expired.² As such, there is no current contractual arrangement obligating the District to further advertising. In this instance, were the District to agree to purchase any future advertising from the *KV Sun*, there would be mutual assent by both parties, as well as consideration – in exchange for the *KV Sun*'s services, the District would pay for those services. Any proposed agreement for the *KV Sun* to provide these services to the District would be a new contract for purposes of Section 1090. (*People v. Honig*, supra, at p. 351.) Instructive on this issue are two matters discussed below.

In *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, the city sought declaratory relief as to whether the city council could renew or extend an existing contract with a beach concession operator who was also a councilmember. (*Id.* at p. 193.) The contract, which had been in effect prior to the councilmember's election, involved the operation of a concession stand to sell bait, fishing tackle and refreshments on a municipal pier. (*Id.* at p. 194.) After her election to the city council, the councilmember sought to exercise the option to renew the contract, but the city refused on the ground that it was prohibited by Section 1090. (*Ibid.*)

The *Imperial Beach* Court held, in part, that the exercise of the option to renew would constitute the "making" of a contract in violation of Section 1090 as long as the concession holder was a member of the city council. (*Id.* at p. 197.) In doing so, it emphasized that although the councilmember's integrity was above reproach and she would have to decide whether to remain on the city council or as owner of the concession, the purpose of Section 1090 is "not only to strike at actual impropriety, but also to strike at the appearance of impropriety." (*Ibid.*; *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.)

In another matter, a general partnership had a real property lease and water purchase agreement with a city. (81 Ops.Cal.Atty.Gen. 134 (1998).) The lease required renegotiation of the rental rate and water fees every five years in accordance with guidelines specified in the agreement. (*Ibid.*) After entering the agreement but before the mandatory deadline for renegotiation, one of the general partners was elected to the city council. (*Ibid.*) The opinion addressed the effects Section 1090 had on the ability of the city council to renegotiate a contract executed prior to the election of a city councilmember with a financial interest. (*Ibid.*)

The opinion stated that the circumstances were similar to those in the *Imperial Beach* matter and concluded, in part, that where one of the general partners was a councilmember, Section 1090 prohibited the city council from approving a new rental rate and fees because that would constitute the making of a contract:

The court's reasoning in *Imperial Beach* is applicable to the specified renegotiation of the contract between the city and the partnership. Even though the original contract contains guidelines for establishing the

² When members of a public board, commission or similar body have the power to execute contracts, each member is conclusively presumed to be involved in the making of all contracts by their agency regardless of whether the member actually participates in the making of the contract. (*Thomson v. Call*, supra at pp. 645 & 649; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201; 89 Ops.Cal.Atty.Gen. 49 (2006).)

rental rates and water fees for each subsequent five-year period, negotiation of the actual amounts would both constitute the “making” of a contract and present, at the least, the appearance of a conflict of interest that section 1090 prohibits. Hence, such renegotiation would be impermissible under the statute.

(*Id.* at p. 137.)

The present matter is very similar to the *Imperial Beach* matter and the Attorney General opinion just described. As discussed above, the District would like to modify or extend its prior agreement with the *KV Sun*, in which Director Clark is financially interested, that was initially entered into prior to his acquisition of an ownership interest in the newspaper and involve the District advertising in the *KV Sun*. As explained above, this is exactly the type of action prohibited by Section 1090, and Section 1090 would prohibit the District from advertising with the *KV Sun* now that Director Clark is financially interested in any such agreements.

If you have other questions on this matter, please contact me by email at znorton@fppc.ca.gov.

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary W. Norton
Senior Counsel, Legal Division

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