



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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October 18, 2023

Timothy Carmel
Cambria Community Services District
District Counsel
P.O. Box 65
Cambria, CA 93428

Re: Your Request for Advice
Our File No. A-23-148

Dear Mr. Carmel:

This letter responds to your request for advice on behalf of Director Tom Gray regarding the conflict of interest provisions of the Political Reform Act (“Act”) and Government Code Section 1090, et seq.¹ Please note that we are only providing advice under the Act and Section 1090 and 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. Lastly, the Commission does not provide advice with respect to past conduct. Therefore, nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions.

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 Luis Obispo 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 or the Act prohibit Cambria Community Services District (“District”) Board of Directors member, Director Tom Gray, from participating in District decisions regarding the East Ranch public recreation facilities decisions where he and his spouse serve on the Board of Directors for Cambrians for Aquatics, a 501(c)(3) organization seeking to have its pool facility proposal included in the District’s decisions?

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

No. Under Section 1091.5(a)(8), Director Gray has a “noninterest” in the District’s East Ranch recreational facilities decisions because he and his spouse are noncompensated officers of the nonprofit organization and one of its primary purposes, operating and maintaining a community pool facility, supports a function of the District. Under this noninterest exception, Director Gray may participate in the decisions so long as his interests are noted in the District’s official records. Additionally, because there are no facts indicating that the decision would have an effect on Director Gray or his spouse’s personal finances, the Act does not prohibit his participation in the decision.

FACTS AS PRESENTED BY REQUESTER

The District is considering several future public recreation facilities for a property known as the East Ranch. A swimming pool is not currently included as an item for consideration. Tom Gray is a member of the District’s Board.

Cambrians for Aquatics, a 501(c)(3) nonprofit group, seeks to build and operate a year-round community pool facility to serve the Cambrian community. Director Gray and his wife are members of the Cambrians for Aquatics’ board of directors. Neither Director Gray nor his spouse are compensated for their roles.

On September 21, 2023, the Cambrians for Aquatics gave a PowerPoint presentation to the District’s Board of Directors, proposing a pool facility be built on the East Ranch. The agenda item was for a “presentation” only, and no further discussion or consideration by the District Board occurred at that meeting. To date, Cambrians for Aquatics has not submitted a formal proposal; however, a proposal is expected in the near future as a follow-up to their presentation. In response to our request for additional information, you state that Director Gray recused himself from the District Board meeting when the pool project presentation item was introduced, stated that he had a potential conflict of interest and was seeking guidance from this Commission, and that he would not participate in the item until he received that guidance. He left the room for the entirety of the item and returned when the next agenda item was introduced. His spouse also attended the meeting. She did not give the PowerPoint presentation for the proposed pool project but spoke briefly to support the project.

You note that any formal proposal by the group would face many legal impediments and issues. The East Ranch is part of a larger property known as Fiscalini Ranch, which has a conservation easement that limits the uses of the property. In addition, constructing a pool on the East Ranch would require compliance with San Luis Obispo County’s planning process, and a Coastal Development Permit and a subsequent EIR would be necessary for it to be located on that property. Accordingly, no decisions on any proposal by Cambrians for Aquatics are imminent. If a formal proposal is submitted, as expected, District staff may be directed to pursue a Memorandum of Understanding (“MOU”) with Cambrians for Aquatics that addresses the relevant issues (such as financial issues, responsibilities, operation, and maintenance) related to such a facility being located on District Property.

In response to our request for additional information regarding the functions of the District and the primary purposes of the Cambrians for Aquatics, you state that one of the functions of the District is to “manage and provide stewardship of District assets, parks, recreation, and open space in a timely, cost-effective, and environmentally sensitive manner” as stated in the District’s Strategic Plan. As for the nonprofit organization, you understand that its purpose is to build and operate a community pool facility. The group previously approached the local school district for this reason. If the Cambrians for Aquatics entered into the MOU to build and operate a pool at the East Ranch, you note that this would support a function of the District.

ANALYSIS

Section 1090

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 applies to virtually all state and local officers, employees, and multimember bodies, whether elected or appointed, at both the state and local levels. 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.) Section 1090 is intended not only to strike at actual impropriety but also to strike at the appearance of impropriety. (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.)

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.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.) Finally, when Section 1090 applies to one member of a public entity’s governing body, the prohibition cannot be avoided by having the interested board member abstain. Instead, the entire governing body is precluded from entering into the contract. (*Thomson, supra*, at pp. 647-649; *Stigall, supra*, at p. 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).)

At issue here is whether Director Gray has a financial interest in the East Ranch recreation facilities decisions due to his role, or his spouse’s role,² as a noncompensated Cambrians for Aquatics’ board member. 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. (*Thomson v. Call* (1985) 38 Cal.3d 633, 645, 651-652; see also *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn.5; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

² Where a spouse has a financial interest under Section 1090, the officer typically shares the interest. Similarly, where a remote or noninterest would apply if the officer had the described interest, the remote or noninterest would also apply to the spouse’s interest. (See 81 Ops.Cal.Atty.Gen. 169 (1998); 78 Ops.Cal.Atty.Gen. 230 (1995).)

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.

Based on the facts provided, the pertinent question for purposes of this analysis is whether the noninterest in Section 1091.5(a)(8) applies to these facts. Section 1091.5(a)(8) establishes that the public officer has a "noninterest" in the contract if the interest is:

That of a noncompensated officer of a nonprofit, tax-exempt corporation, which, as one of its primary purposes, supports the functions of the body or board or to which the body or board has a legal obligation to give particular consideration, and provided further that this interest is noted in its official records.

For purposes of this paragraph, an officer is "noncompensated" even though he or she receives reimbursement from the nonprofit, tax-exempt corporation for necessary travel and other actual expenses incurred in performing the duties of his or her office.

According to the facts, neither Director Gray nor his spouse receives any compensation as a board member of Cambrians for Aquatics. Further, this nonprofit organization has a primary purpose of building and operating a community pool facility to serve Cambrians, and this purpose includes the funding, building and operations of this type of recreational center on the East Ranch. Therefore, the nonprofit has a primary purpose that supports one of the functions of the District: to manage and provide stewardship of the District's assets, park, and recreation in a cost-effective manner. This finding is consistent with past advice letters, where we have found that the nonprofit may generally support the function of the body or board to meet this noninterest exception. For example in *Cole* Advice Letter, No. A-23-059, we advised that the East County All Star Fundraising nonprofit organization with the primary purpose of paying for children's sports and extracurricular activities for families in need met the 1091.5(a)(8) requirement in regard to supporting a function of the City of Oakley, where more than half of its funding recipients were city families participating in city organizations and its purpose promoted city youth programs. We additionally advised that a Rotary Club's city chapter also met the "supports the function" of the city requirement, where its work included supporting the residents and the city through volunteer services, local business development, local grants, and funding student exchange programs. (*Id.*)

Therefore, Director Gray, and his spouse, would have a noninterest in the District's decisions regarding the East Ranch recreational facilities decisions affecting the Cambrians for Aquatics under Section 1091.5(a)(8). Director Gray may participate on the condition that his interests are noted in the District records.

The Act

Additionally, we examine whether Director Gray has a disqualifying interest in the decision under the Act. The Act's conflict of interest provisions prohibit any public official from making, participating in making, or otherwise using their 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 defines "financial interests" to include an interest in a business entity, a source of income (more than \$500 in the 12 months prior to the decision) and an interest in one's personal finances (including those of an immediate family member). However, none of these types of financial interests are at issue here. A nonprofit organization is not a "business entity" under the Act. (Section 82005.) Director Gray and his spouse do not have a source of income interest in the nonprofit as they are not compensated for their board positions. Also, there are no facts indicating that the decision would have any impact on their personal finances. Therefore, nothing in the facts indicates that Director Gray would be disqualified from taking part in the decision based on the Act's conflict of interest provisions.

If you have other questions on this matter, please contact me at KHarrison@fppc.cagov.

Sincerely,

Dave Bainbridge
General Counsel

L. Karen Harrison

By: L. Karen Harrison
Senior Counsel, Legal Division

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