STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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November 19, 2020

Christopher J. Diaz
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Town of Colma
2001 N. Main Street 390, Walnut Creek, CA 94596

Re: Your Request for Advice
Our File No. A-20-080

Dear Mr. Diaz:

This letter responds to your request for advice 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 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).)

QUESTIONS

1. Are there any provisions of the Act that would apply in determining whether a member of the Colma City Council is prohibited from becoming a tenant in the Town-owned Creekside Villas (the "Complex") within one year after leaving office?

2. Assuming former members of the City Council have a prohibitory financial interest under Section 1090 in a lease for the Complex, would Section 1091.5(a)(3) nonetheless apply to allow them to become tenants in the Complex?

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[1] All statutory references are to the Government Code, unless otherwise indicated.

CONCLUSIONS

1. No. There are no provisions under the Act that would prohibit a member of the Colma City Council from becoming a tenant in the Complex within one year after leaving office.

2. Yes. As explained below, assuming former members of the City Council have a prohibitory financial interest under Section 1090 in a lease for the Complex, Section 1091.5(a)(3) would apply to allow them to become tenants in the Complex.

FACTS AS PRESENTED BY REQUESTER

Your law firm serves as City Attorney to the Town of Colma and you seek advice on behalf of the Colma City Council. Colma is a general law City located in San Mateo County. Colma owns a senior housing complex, known as Creekside Villas (the "Complex"). In 2005, the Colma City Council adopted certain rental policies "to enhance the quality of life for senior residents and give a limited preference to Colma residents for residency at [the Complex]." (Colma Administrative Code ("CAC"), § 2.02.010.)

The policies include eligibility rules and restrictions governing Colma's ability to rent, lease, or permit occupancy of a unit at the Complex. A person applying for tenancy in the Complex must be 62 years or older at the commencement of the tenancy, must not have a recurring need for supportive care and must not require the availability of continuous skilled nursing care, and must be financially able to pay the rent. (CAC, § 2.02.030(a).) There are also procedures for determining priority for residents based on prior residency and when a rental application is completed. (CAC, § 2.02.050.)

The City Manager has some decision-making authority to waive the age requirement or the priority for residents for a tenant who is employed by the Complex's property manager to provide substantial maintenance and management services for the Complex. (CAC, § 2.02.030(d).) The policies further provide that the following individuals, by virtue of their position or relationship, are ineligible to become a tenant in the Complex:

- All employees and officials of the Town who, by virtue of their position, have policy-making authority or influence over the implementation of the housing program;

- All former employees and officials of the Town who, by virtue of their position or relationship, for one year prior to the date of application for tenancy, had policy-making authority or influence over the implementation of the housing program.

In addition, the Town's policies require an annual rent adjustment for inflation using a formula based on changes in the consumer price index. (CAC, § 2.02.060.) From time to time, the City Council makes decisions regarding the annual rent adjustment for the Complex, which includes suspending or increasing rent.

You provided a document titled "Hildebrand Real Estate Group Application Process for Creekside Villas Colma," which states there is a Town policy requiring that any vacancy must be kept for interested residents of the Town of Colma for 60 days after becoming available. If multiple

Town residents express interest within the 60-day period, the names of each interested resident are drawn via lottery at the 60th day and applications are accepted in the order of the lottery draw. There is no pre-qualification of applicants prior to the lottery. If the first applicant does not qualify, then the next name drawn in the lottery submits their application and this continues until a qualified applicant has been selected. If no Town residents express interest, then individuals residing outside the Town may be considered.

The Application Process document then explains the qualifying process:

> Qualifications: Hildebrand Real Estate Group confirms the Town of Colma resident by verifying their residency either with the resident card or driver's license along with verifying that the applicant(s) meet the age requirement. A credit check is run on the applicant(s). Generally, the applicant(s) should gross 2 ½ to 3 times the monthly rent. For instance, if the rent is $902.00, the applicant should gross at least $2,255.00. If the applicant(s) has a credit score of less than 700 and/or negative credit and/or insufficient income, then a co-signer may be required. The co-signer must submit an application and their credit is checked. The same credit criteria are required of the co-signer and the co-signer must show sufficient income to assist the tenant in paying rent if the tenant becomes unable to pay. Hildebrand Real Estate Group considers any negative credit on the credit check and may overlook negative credit due to medical bills. The same income and credit check qualification method is used for all of Hildebrand Real Estate Group tenant applicants for all properties managed or owned by Hildebrand Real Estate Group.

According to the property manager (Hildebrand Real Estate Group), they do not have authority to change any of the lease terms – the Town makes use of the standard California Association of Realtor form lease agreements that are fairly standard with set terms.

ANALYSIS

The Act

Specified local governmental officials, including city councilmembers, who leave governmental service are subject to the Act's one-year ban for local officials in Section 87406.3, also known as the local "one-year ban."

The local "one-year ban" prohibits certain former local officials from communicating with their former agencies, for compensation and in representation of another person, for the purpose of influencing any legislative or administrative actions, including quasi-legislative and quasi-judicial actions, or any discretionary actions involving the issuance, amendment, awarding, or revocation of a permit, license, grant or contract, or the sale or purchase of goods or property. (Section 87406.3.)

The local one-year ban would not apply to a former councilmember seeking to become a tenant in the Complex within one year of leaving office because the councilmember would not be

communicating with his or her former agency, for compensation and in representation of another person. Accordingly, no provisions of the Act would apply to prohibit a former councilmember from becoming a tenant in the Complex within one year of leaving office.[2]

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 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.) 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, and it applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

As mentioned, the Town has already established that officials (including councilmembers), under the circumstances described, are prohibited from becoming a tenant at the Complex. Your request centers on whether Section 1090 would prohibit a councilmember, after leaving office, from becoming a tenant where the councilmember: 1) participated in both the establishment of the housing program and decisions regarding the annual rent adjustment for the Complex; or 2) did not participate in the establishment of the housing program, but participated in decisions regarding the annual rent adjustment for the Complex. Assuming Section 1090 potentially applies to a former councilmember under these circumstances, the determinative issue is whether any exception to Section 1090's prohibition would nonetheless permit a councilmember to apply for tenancy after leaving office.

The Legislature has expressly defined certain financial interests as "remote" or "noninterest" exceptions to Section 1090's general prohibition. Where a remote interest is present, the contract may be lawfully executed provided (1) the officer discloses his or her financial interest in the contract to the public agency; (2) the interest is noted in the public body's official records; and (3) the officer completely abstains from any participation in the making of the contract. (Section 1091.) Where a noninterest is present, the contract may be executed without the abstention. (Section 1091.5.)

Relevant to the present situation is the noninterest exception set forth in Section 1091.5(a)(3) for "public services generally provided." That exception provides that an officer or employee "shall not be deemed to be interested" in a public contract if his or her interest in that

[2] As your letter suggests, Section 87406.3(c) does not preclude a local governmental agency from adopting its own ordinance or policy restricting the activities of former agency officials so long as the ordinance or policy is more restrictive than Section 87406.3.

contract is "[t]hat of a recipient of public services generally provided by the public body or board of which he or she is a member, on the same terms and conditions as if he or she were not a member of the body or board."

The California Supreme Court considered the application of this noninterest exception and read the exception to establish the following rule:

> If the financial interest arises in the context of the affected official's or employee's role as a constituent of his or her public agency and recipient of its services, there is no conflict so long as the services are broadly available to all others similarly situated, rather than narrowly tailored to specially favor any official or group of officials, and are provided on substantially the same terms as for any other constituent.

(*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1092.)

With respect to an agency's permissible exercise of discretion in providing a public service generally provided under the exception, the Supreme Court stated:

> The presence of discretion in the formation of a contract that section 1091.5(a)(3) purportedly permits is not fatal, unless the discretion can be exercised to permit the special tailoring of benefits to advantage one or more board members over their constituency as a whole. Absent such a risk of favoritism, discretion is unproblematic.

(*Id*. at p. 1100.)

Thus, the noninterest exception set forth in Section 1091.5(a)(3) applies if: (1) the interest arises in the context of the affected official's or employee's role as a constituent of the public agency and recipient of its services; (2) the service at issue is broadly available to all those whom are similarly situated and is not narrowly tailored to specially favor an official or group of officials; and (3) the service at issue is provided on substantially the same terms as for any other constituent.

In the *Hentschke* Advice Letter, No. A-14-187, the Commission analyzed whether the exception applied to a turf replacement program generally available to all retail water customers of any of the San Diego Water Authority's member public agencies. The program, which provided monetary incentives to retail water customers who replace existing turf with water efficient landscaping, was available on a first-come, first-served basis. Each applicant was required to participate in a training course, replace existing turf with qualifying plants, and fill out the standard application form and agree to program terms. Even though the program administrator had some decision-making authority to determine that the replacement met all the program requirements (such as the amount of turf replaced and whether qualifying plants are used), the Commission concluded that the exception applied because the determination did not involve discretion to pick and choose among applicants or to vary benefits from one applicant to the next.

Here, if a former councilmember were to submit an application for tenancy at the Complex, his or her interest in the lease would arise in the context of the former councilmember being a Town constituent and a recipient of Town services. In addition, leasing a residence in the Complex is broadly available to all Town residents 62 years of age or older,[3] and not narrowly tailored to specially favor an official or group of officials. Similar to the situation in *Hentschke*, to avoid favoritism where multiple residents are interested, the names of each interested resident are drawn via lottery and applications are accepted in the order of the lottery draw. And although the property manager does have some decision-making authority to determine if an applicant qualifies (generally ensuring rent-to-income ratio and credit score meets specified level), those determinations appear relatively ministerial in nature and do not involve discretion to pick and choose among applicants. Finally, the terms of any lease for a former councilmember would be provided on substantially the same terms as for any other constituent because the property manager does not have authority to change any terms of the lease, which is based on the standard California Association of Realtor form lease agreements that are fairly standard with set terms.[4]

Accordingly, assuming a former councilmember has a prohibitory financial interest in a lease for the Complex under Section 1090, the noninterest exception under Section 1091.5(a)(3) applies to permit the councilmember to lease a residence at the Complex.

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

Sincerely,

Dave Bainbridge
General Counsel

By: Jack Woodside
Jack Woodside
Senior Counsel, Legal Division

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[3] The exception is still applicable even where program services are available to a relatively small number of applicants because "[p]ublic agencies provide many kinds of 'public services' that only a limited portion of the public needs or can use." (92 Ops.Cal.Atty.Gen. 67, 70 (2009).)

[4] The present matter is different from those matters where the exception has been found not to apply because administering officials were required to exercise judgment or discretion in scrutinizing applications. (See *Hodge* Advice Letter, No. C-14-012 [exception does not permit a city councilmember to enter into a Mills Act contract with the city where officials are required to negotiate the terms of each contract, engage in the continued enforcement through periodic inspections to determine compliance with the contract terms, and make determinations concerning contract renewal and imposition of penalties]; see also 92 Ops.Cal.Atty.Gen. 67, 70 (2009) [grants for the purchase or retrofit of certain engines and equipment awarded only after each application individually scrutinized to determine its statutory compliance, and weighed according to such factors as emissions performance, cost-effectiveness and considerations of whether the engine is cleaner than required under the applicable air quality laws. In addition, the evaluation may include a determination that an application is made in good faith and credible].)