



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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April 24, 2023

Scott C. Nave
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Re: Your Request for Advice
Our File No. A-23-053

Dear Mr. Nave:

This letter responds to your request for advice regarding the Political Reform Act and Government Code Section 1090, et seq.¹ Please note that we are only providing advice under the Act and Section 1090, 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.

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 Section 1090 prohibit the Mojave Air and Space Port Airport District ("District") Board from exercising its authority to approve the assignment of its land lease to District's Board member, Director Charles Coleman as a part of a third-party sale transaction between the owner of a hangar and Director Coleman and which will result in a lease agreement between the District and Director Coleman?

2. Does the Act prohibit Director Coleman's participation in the decision?

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

1. No, the noninterest exception for “public services generally provided” (Section 1091.5(a)(3)) is applicable to the lease assignment to the extent that the District’s assignment of the lease is in keeping with a leasing scheme that is applicable to all potential aviation-purposed applicants, available on a first-come, first serve basis, the rental fees are based upon the square footage of the hangar space, Board members receive no priority to the hangar space and receive no preferential rental rate, and the Board’s discretion in its approval does not allow for “special tailoring” of Director Coleman’s lease to advantage him over other aviation-purposed potential tenants.

2. Yes. Because it is reasonably foreseeable that the lease assignment decision would have a material effect on Director Coleman’s real property financial interest, he may not participate in the decision under the Act.

FACTS AS PRESENTED BY REQUESTER

The District owns and operates Mojave Airport and Mojave Spaceport, a California Airport District. The District leases unimproved land, buildings, and hangars to commercial and general aviation tenants. The leases are discretionary and may be approved by the Board of Directors or the District’s CEO, as specified in District policy, depending on the type of lease. The District’s leases contain a provision that subleases and assignments must be approved by the District. If the lease was approved by the Board of Directors, a sublease or assignment must also be approved by the Board.

This matter involves a general aviation hangar land lease that requires Board approval for a sublease or an assignment. Previously we issued the *Nave Advice Letter*, No. A-22-097, advising that Director Chuck Coleman may enter into, and the Board may approve, the sublease for the hangar under the rule of necessity as the Board was the only entity that could make the decision to approve the sublease. We noted that the Director would not have been barred from leasing a hangar directly from the District under Section 1091.5(a)(3), the noninterest exception for public services generally provided. The sublease process was treated differently in part because of concerns about the level of discretion retained by the Board and the fact that the sublease was with a third party.

Since then, the District’s tenant and owner of the hangar has decided to sell the hangar. In response to our request for additional information you clarified that the sale of a hangar is not a fee simple transaction. It requires the current tenant/owner to reach a sale agreement with a prospective buyer. To complete the transaction, the owner then provides a bill of sale for the hangar to District and seeks its approval for the land lease assignment to the new owner.

You further clarified that the Board retains total discretion to approve or disapprove such an assignment because of its obligations under the Federal Aviation Administration (“FAA”) grant funding it receives. Under the FAA requirements, the premises have to be used for an aeronautically related purposes. You stated that if someone just wanted it for storage, the Board would not approve the lease assignment due to the FAA restrictions. You noted that the Board cannot discriminate against potential tenants, and so as long as the new tenant is using the property for

aeronautical purposes, the Board would approve the assignment. The District policies regarding the process for assigning the lease are the same as for approving a lease or a sublease. The Board's level of discretion to approve a sublease, assignment, or lease is the same. You are aware of one instance where the Board did not approve a sublease for an applicant who had previously been evicted for a variety of reasons. Additionally, the rent for general aviation hangars is a fixed rate per square foot.

Director Coleman would like to purchase the hangar for which he currently has a sublease. This will require the Board to approve the land lease assignment to him, to complete the transaction. The assignment would result in a landlord tenant contract between the District and Director Coleman.

You provided further that Director Coleman's situation involves a private hangar and the District's only role is approving the assignment of the land lease. For private hangars, the person first enters into a lease with the District and then constructs the hangar which they own. There is currently no wait list for this hangar. However, there is a wait list for other hangars that are owned by the District. And, at the expiration of this particular lease the hangar will automatically become the District's property without further action or payment.

ANALYSIS

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. 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.) 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.)

In this matter, Section 1090 applies to all District Board members and the assignment of the land lease will result in a direct lease contract between the purchaser and the District. Director Charles Coleman, the sublessor and prospective purchaser, has a financial interest in the Board's approval of the assignment of the lease to complete the sale transaction.

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.)

Non-Interest - Public Services Generally Provided

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 the interest in the 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.” As distinguished from the previous *Nave* Advice Letter, *supra*, we have requested and you have provided additional facts regarding the District’s procedure for the assignment of the lease that allows for a more detailed examination of the public services generally provided exception.

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.)

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.

The Attorney General has concluded that an airport hangar rental scheme that meets the following criteria is a “public service generally provided” under Section 1091.5(a)(3): the rental is applicable to all potential customers, available on a first-come, first serve basis, the rental fees are based upon the square footage of the hangar space and residential status of the renter, and the airport commissioners receive no priority to the hangar space and receive no preferential rental rate. (89 Ops.Cal.Atty.Gen. 121, 124 (2006), and 81 Ops.Cal.Atty.Gen. 317, 320 (1998).)

The facts indicate that the District’s rental scheme is applicable to all potential customers in that the Board may not discriminate against potential tenants so as long as the tenant will be using the property for aeronautical purpose pursuant to FAA requirements. The rental fees are based on a fixed rate per square foot. At issue is whether the Board’s discretion to approve the lease assignment in this transaction is a permissible exercise under the requirements of Section 1091.5(a)(3).

The Court in *Lexin, supra*, rejected the argument that “where an element of discretion is involved [S]ection 1091.5(a)(3) necessarily does not apply.” (*Ibid.*, p. 1099.) With respect to an agency’s permissible exercise of discretion involved in 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.

(*Lexin, supra*, at p. 1100.)

The Court further stated:

Special tailoring is forbidden; discretion in the allocation of a benefit raises the specter that such special tailoring might have occurred. It is for this reason the Attorney General correctly concluded the former council member in *Thomson, supra*, 81 Ops.Cal.Atty.Gen. 317, could not avail himself of a city loan program: receipt of, and the amount of, a loan depended on a discretionary decision concerning the individual business's creditworthiness. In contrast, benefits available on a nondiscretionary basis—e.g., use of the hangar spaces on a first-come, first-served basis in *Fellows, supra*, 89 Ops.Cal.Atty.Gen. 121—pose no special tailoring problems.

(*Id.*)

The facts indicate that the District Board's discretion in the assignment of a hangar lease in this third-party transaction is limited. There is currently no waiting list of applicant's for this hangar lease. The private parties have negotiated a sale agreement and the District's only role is to approve the land lease assignment. In exercising its approval discretion, the District must not discriminate against potential tenants so as long as the tenant will be using the property for aeronautical purposes pursuant to FAA requirements. While you note one instance where the Board did not approve a sublease because of the applicant's prior problematic history at the airport, this discretion does not appear to negate that the leases are broadly available to potential aviation tenants and that the Board may not discriminate against such applicants. The facts do not indicate that the Board's discretion reaches so far as to permit special treatment of Director Coleman, although we caution that "it raises the specter" that special tailoring could occur. Therefore, to the extent that the Board's discretion is limited and does not allow for "special tailoring" of Director Coleman's lease that would advantage him over other aviation tenant applicants, the noninterest exception for public services generally provided is applicable to the lease assignment.

Because the Section 1091.5(a)(3) noninterest exception allows that the contract may be executed without the abstention of the official, we further examine whether Director Coleman is prohibited from participation in the decision under the Act.

The Act

The Act's conflict of interest provisions prohibits a public official from taking part in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the official's financial interests distinguishable from the decision's effect on the public generally. (Sections 87100 and 87103.) An official's financial interests that may give

rise to a disqualifying conflict of interest under the Act are identified in Section 87103 and include an interest in any real property in which the official has a direct or indirect interest worth \$ 2,000 or more, and an official's economic interest in their personal finances, including those of their immediate family (Section 87103.) An interest in real property, "includes any leasehold, beneficial or ownership interest, or an option to acquire such an interest..." (Section 82023.) Director Coleman is currently subleasing the property and therefore has a real property interest in this leasehold. He also has a personal financial interest in the hangar lease assignment decision.²

Foreseeability and Materiality

Regulation 18701(a) provides that a governmental decision's financial effect on an official's financial interest is presumed to be reasonably foreseeable if the official's interest is "explicitly involved" in the decision; an official's interest is "explicitly involved" if the interest is a named party in, or the subject of, the decision; and an interest is the "subject of a proceeding" if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the interest.

Relevant to Director Coleman's interests, Regulation 18702.2(c) provides the materiality standards applicable to a decision's effect on an official's real property interest as a lessee as follows:

(c) Leasehold Interests. The reasonably foreseeable financial effects of a governmental decision on any real property in which a governmental official has a leasehold interest as the lessee of the property is material only if the governmental decision will:

- (1) Change the termination date of the lease;
- (2) Increase or decrease the potential rental value of the property;
- (3) Change the official's actual or legally allowable use of the property; or
- (4) Impact the official's use and enjoyment of the property

The decision to assign the hangar lease explicitly involves Director Coleman's real property interest in the sublease and would change his legal status to lessee. Therefore, it is reasonably foreseeable that the decision would have a material financial effect on his financial interest³ and Director Coleman may not participate in the decision.

² The sale of the hangar must be for the fair market price, or it will result in a "gift" to the official and be subject to the gift limit of \$590. (Section 82028(a), Regulation 18940.2.) Director Coleman is prohibited from accepting gifts from any single source in a calendar year in excess of the gift limit. (Section 89503.)

³ Note: this transaction involves the sale of personal property in addition to the transfer of the lease. However, we need not further consider a related effect on an official's personal finances, where the decision would have a reasonably foreseeable financial effect on the official's real property interest. (Regulation 18702.5(c).)

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

Sincerely,

Dave Bainbridge
General Counsel

L. Karen Harrison

By: L. Karen Harrison
Senior Counsel, Legal Division

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