



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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September 3, 2024

Isra Shah
Best Best & Krieger
P.O. Box 1028
Riverside, CA 92502Re:

Your Request for Advice
Our File No. A-24-089

Dear Ms. Shah:

This letter responds to your request for advice on behalf of Mayor Pro Tem of the City of Palm Desert Jan Harnik regarding the Political Reform Act (“Act”) and 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.

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. Further, the Commission is not authorized and does not provide advice concerning past conduct. (Section 1097.1(c)(2) and Regulation 18329(b)(6)(A).) 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 Riverside 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

May the Palm Deseret City Council enter into an Affordability Restriction and Regulatory Agreement and a related Development Fee Agreement, where Mayor Pro Tem Harnik’s spouse represents Mr. Claudio Bravo, who has a controlling interest in Bravo Gardens LLC, the applicant developer and named party to the Agreements?

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

The City Council may enter into the two agreements under the rule of necessity so long as Mayor Pro Tem Harnik recuses herself from any participation in the decisions.

FACTS AS PRESENTED BY REQUESTER

Mayor Pro Tem Harnik

Jan Harnik was elected to the City Council in 2010 and is currently the Mayor Pro Tem of the City of Palm Desert (“Mayor Pro Tem”). Her spouse is an attorney and practices law through the law corporation Brian S. Harnik, Inc., a member of the Roemer & Harnik LLP law firm. Mr. Harnik has over a 10 percent ownership interest in Roemer & Harnik LLP through Brian S. Harnik, Inc.

The Project

On April 26, 2018, the City Council adopted Resolution No. 2018-18, approving a density bonus, precise plan, conditional use permit, and mitigated negative declaration for the construction of a three hundred eighty-eight (388) unit apartment development on certain property (consisting of a mix of thirteen (13) two-story buildings and three (3) three-story buildings together with a clubhouse, recreational amenities, and roadway improvements) (“Project”). Under the conditions imposed by the City Council in Resolution No. 2018-18, final approval of the Project was contingent on the original applicant, New Cities Investment Partners, LLC, entering into a housing agreement with the City to finalize affordable housing requirements as specified in the Project entitlements. Pursuant to the conditions, the housing agreement must be signed and completed by the City and the developer prior to issuance of a building permit. The Mayor Pro Tem participated in the 2018 approvals with the original developer, as a member of the City Council.

Bravo Gardens As Successor Applicant on the Project

As of October 2021,² Bravo Garden Apartments, LLC (“Bravo Gardens”) is the successor in interest to the original applicant’s property and Project. In response to our request for additional information, you state that Mayor Pro Tem Harnik was a City Council member when Bravo Gardens took over the project. However, there has been no City Council action on the project since Bravo Gardens took over for the original developer, and the Mayor Pro Tem has not participated in any preliminary decisions about the Project since Bravo Gardens took over the Project. Claudio Bravo is the principal of Bravo Gardens. The City understands that Mr. Bravo has the power to control and direct the operations of Bravo Gardens and has a 50 percent or greater ownership interest.

Consistent with the 2018 Conditions of Approval, the City expects to enter into an Affordability Restriction and Regulatory Agreement through which Bravo Gardens agrees to restrict certain units within the Project as affordable housing (“Agreement”). The City also expects to enter into a Development Fee Agreement with Bravo Gardens for the use of housing mitigation

² This is the date that Bravo Gardens first contacted City staff to take over the Project.

fees to reimburse Bravo Gardens for the fees attributable to units restricted for occupancy to qualifying residents who work within the City, which was made part of the Agreement (“Fee Agreement”).

Spouse’s Law Practice

As a member of the Roemer & Harnik LLP law firm, Mr. Harnik represents Mr. Bravo in matters unrelated to the Agreement. Neither Mr. Harnik nor Roemer & Harnik LLP have been formally retained by Bravo Gardens. With the sole exception of the circumstances described below, neither Mr. Harnik nor Roemer & Harnik, LLP have been involved with any matters involving the Agreement or Project.

On May 29, 2024, Mr. Harnik contacted the City Manager on behalf of Mr. Bravo to help expedite the City’s processing of the Agreement.³ The same day, the City Manager informed Mr. Harnik that his inquiry relating to the Agreement may create a conflict of interest for the Mayor Pro Tem. Mr. Harnik responded that he did not intend to create any conflicts and later confirmed that neither he nor his law firm have received or will receive any remuneration, consideration, or commission as a result of the Project or Agreement, including on account of the May 29 communication. In addition, Mr. Harnik reported that he informed Mr. Bravo that he would no longer play any role in the matter, to which Mr. Bravo agreed. In addition to informing Mr. Harnik of the potential conflict of interest issues, following receipt of the e-mail the City Manager did inquire with Planning Department staff regarding the status of the Project and Agreement, but City staff did not make any changes in its existing approach to the Project or Agreement following receipt of the email.

From the time Mr. Bravo asked for Mr. Harnik’s assistance to the time that Mr. Harnik and his firm ceased involvement with the Project, neither the Mayor Pro Tem nor the City Council took any action on the Project or Agreement. The Mayor Pro Tem did not discuss the Project or Agreement with her spouse except as necessary to prepare this request for FPPC advice.

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 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.)

³ You further clarified that “Mr. Harnik reached out to the City Manager via email. In that correspondence, Mr. Harnik indicated that he represented Mr. Bravo and that he was reaching out to the City Manager for the City Manager’s “help and direction” with how to speed up the City’s review process. The basic thrust of the email was to convey a sense of urgency on behalf of Mr. Claudio [Bravo], not to check on the status of the project.”

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.) An officer is conclusively presumed to be involved in the making of agency contracts when the officer is a member of a board or commission that has the authority to execute the contract at issue. (*Id.* at pp. 645 and 649.) Significantly, 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; the entire governing body is precluded from entering into the contract. (*Id.* at pp. 647-649.) Further, an official “makes” a contract if the official participates in any way in the making of the contract, including involvement in matters such as preliminary discussions, negotiations, planning, drawing of plans and specifications. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall v. Taft*, *supra*, 58 Cal.2d at p. 569.)

Financial Interest

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*, *supra*, at pp. 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).) Additionally, an official has an interest in the community and separate property income of his or her spouse. (*Nielsen v. Richards* (1925) 75 Cal.App. 680; *Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal.App.4th 655; 89 Ops.Cal.Atty.Gen. 69 (2006).) Importantly, since the spouse’s property is attributed to the official, exemptions that would be applicable if the official possessed the interest directly also apply to the spouse’s [interest]. (See 78 Ops.Cal.Atty.Gen 230 (1995); 81 Ops.Cal.Atty.Gen. 169 (1998);

The Legislature has defined certain financial interests involved in a contract as “remote interests” under Section 1091 or “noninterests” under Section 1091.5. These two sections provide particular exceptions to the Section 1090 prohibitions on participation.

Pertinent to these facts and noted in your request, Section 1091(b)(6) establishes a remote interest exception where the interest is that of an attorney representing the contracting party *if* the attorney has “not received and will not receive remuneration, consideration, or a commission as a result of the contract and if [the attorney has] an ownership interest of 10 percent or more in the law practice or firm”

The Attorney General has opined that Section 1091(b)(6) does not apply where the attorney representation involves the contract at issue, explaining, “[w]e believe that the phrase ‘an attorney of the contracting party’ pertains to the representation of the client in other, unrelated matters, not in the contract with the city. This conclusion follows the interpretive rule of narrowly construing exceptions to section 1090 to avoid undermining its purpose that public officials discharge their fiduciary duties with undivided allegiance.” (101 Cal.Ops.Atty.Gen. 1, 7 fn.76 (2018).) Accordingly, the Attorney General concluded, “[w]e find that where a council member advocates for a client in a contract with the city, the attorney exceptions do not apply to lift the section-1090 prohibition.” (*Id.* at p. 20.) The Attorney General also wrote, “the outcome would not vary merely because a representation was without compensation. Pro bono representation may still produce

economic gains, goodwill, or prestige for the council member's law practice, amounting to a disqualifying financial interest." (*Id.* at pp. 21-22.)

Interpreting the exceptions to Section 1090 to avoid undermining its purpose, we advise that the Section 1091(b)(6) remote interest exception is not applicable to these facts. Mr. Harnik emailed the City Manager as Mr. Bravo's attorney regarding the Agreement. The facts detail the limited nature of the contact; however, Mr. Harnik's representation involved the contract at issue. The City was made aware of the connection between Mayor Pro Tem Harnik's spouse and his client, Mr. Bravo, and Bravo Gardens. The absence of a fee for this representation does not vary the outcome, as it was for an existing client. Absent an applicable remote or noninterest exception, Mayor Pro Tem Harnik has a disqualifying financial interest in the two agreements.

Rule of Necessity

We next examine whether the rule of necessity will apply to allow the City Council to make the decisions. The rule of necessity acts to allow a government decision even where it would otherwise be prohibited. The rule applies in two types of situations: where the facts indicate the contract is for essential goods or services and no alternative source for the services exists, or where the official or the board is the only entity authorized to act. The rule of necessity is applied in limited situations to ensure that essential government functions are performed even where a conflict of interest exists. (*Eldridge v. Sierra View Local Hospital Dist.* (1990) 224 Cal.App.3d 311, 322.)

Here, the second facet of the rule of necessity is applicable. The facts indicate that the City Council is the only entity authorized to make the Agreement and the Fee Agreement for the Project under the 2018 Conditions of Approval. Finalizing the Project's affordable housing requirements is part of the City's essential government functions. Previously, the Attorney General has applied the "performance of essential duties" exception to allow a school board to enter into a memorandum of understanding with a teachers' association even when a board member is married to a tenured teacher. (69 Ops.Cal.Atty.Gen. 102 (1986).) Also, a community college board could negotiate with its faculty for salary and benefits even though a board member is a retired faculty member whose health benefits are tied to current faculty benefits. (89 Ops.Cal.Atty.Gen. 217 (2006).) Therefore, to the extent that the City is the only entity that can enter into these Agreements with Bravo Gardens, the rule of necessity is applicable and allows the City to make the two Agreements. However, Mayor Pro Tem Harnik must recuse herself from these decisions. The Attorney General has concluded that the "effect of the rule of necessity is to permit the board with an interested member to make a contract, even though the interested board member must disqualify himself or herself from participating in its making."⁴ We note that our advice is relevant to the City and Mayor Pro Tem Harnik's future conduct only. We do not provide advice on conduct that has already occurred.

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

⁴ *Conflicts of Interest*, 2010, California Attorney General's Office, *supra*, "Practical Effect of Utilizing the Rule of Necessity," p. 78.)

“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).) The financial interests that may give rise to an official’s disqualifying conflict of interest under the Act are set forth in Section 87103 and include

- Any business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more or in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.
- Any source of income aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.

The Act’s definition of an “indirect investment” includes any investment or interest owned by the public official’s spouse. (Section 87103.) “Income” includes any community property interest in a spouse’s income. (Section 82030(a).) Additionally, under Section 82030, “income” to an official “also includes a pro rata share of any income of any business entity or trust in which the individual or spouse owns, directly, indirectly or beneficially, a 10-percent interest or greater.”

Mayor Pro Tem Harnik has identified that she has a business entity interest and source of income interest in her spouse’s law corporation, Brian S. Harnik, Inc., and the Roemer & Harnik LLP law firm. Because her spouse has a greater than 10 percent ownership interest in Roemer & Harnik LLP, Mayor Pro Tem Harnik also has a source of income interest in clients of the firm, to the extent that her spouse’s pro rata share of income received from that client exceeds \$500 or more in the 12 months prior to a decision. To the extent that Mr. Bravo is a source of income of \$500 or more to Mayor Pro Tem Harnik - through her community property interest - within 12 months prior to a decision, she will have a financial interest in Mr. Bravo.

Due to our conclusion above, we need not further analyze the official’s financial interests in this matter because Mayor Pro Tem Harnik must disqualify herself from any participation or attempts to influence all future decisions concerning the Project, and the Agreements. In order to satisfy the Act’s recusal requirements, she must leave the room during any discussion or vote. (Regulation 18707.) This recusal will satisfy the requirements of both the Act and Section 1090.

If you have other questions on this matter, please contact me at KHarrison@FPPC.Ca.Gov.

Sincerely,

Dave Bainbridge
General Counsel

L. Karen Harrison

KH:aja

By: L. Karen Harrison
Senior Counsel, Legal Division