



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3050 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

February 13, 2025

David Griffith
Alpine County District 5 Supervisor
305 Carson View
Markleeville, CA 96120

Re: Your Request for Advice
Our File No. A-25-014

Dear Mr. Griffith:

This letter responds to your request for advice regarding the Political Reform Act (the “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 Alpine 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

If you recuse yourself from any discussion of a County contract with a restaurant in which you have an ownership interest, may the County contract with the restaurant for ongoing services, such as providing meals for seniors or for a one-time purchase of food for County-hosted events or meetings?

CONCLUSION

Under Section 1090, you have a financial interest in a contract with the business in which you have an ownership interest, which generally prohibits the County from entering into contracts

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.

for the purchase of meals. However, you may wish to seek further advice to determine whether any exception might possibly apply to allow the County to enter into a contract with the restaurant once the specific contract has been identified. We also caution that the Act's conflict of interest prohibitions will generally prohibit you from making, participating in making, or otherwise using your official position to influence a governmental decision that will have a material financial effect on any interest you may have including the business, property in which the business has an interest, and sources of income to the business.

FACTS AS PRESENTED BY REQUESTER

You are an Alpine County Supervisor and are considering investing in a restaurant in Alpine County. The restaurant will be called the Cutthroat Tavern, named after the Lahontan Cutthroat trout. Your potential investment would total \$150,000, and you are one of seven investors who are contributing amounts ranging from \$75,000 to \$150,000 each. Total contributions amount to \$850,000. The investors are in the process of forming two California LLCs, one to own the building and one to run the restaurant/tavern business. The reason for the two LLCs is that the investors want to be able to give incentive interests in the business to key employees, while keeping the building separate. You will be a non-manager partner, i.e. a passive investor in both LLCs.

There are no current or planned County contracts with the business. You state that there may be a potential contract to supply senior meals (Meals on Wheels) that is unlikely to be valued at more than \$2,000 per month. Normally, these contracts are decided by staff and do not come before the Board. You also note that there are two other businesses in the community that can also fulfill that need. In addition, you state that the County will also purchase food for County-hosted functions of all-day meetings.

ANALYSIS

Section 1090

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.)

Notably, 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 his or her 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).)

We note that there are specific instances where the contract may be permissible under Section 1090. In limited cases, the “rule of necessity” has been applied to allow the making of a contract that Section 1090 would otherwise prohibit. (*Eldridge v. Sierra View Hospital Dist.* (1990) 224 Cal. App. 3d 311, 322.) The rule has been applied where public policy concerns authorize the contract and “ensures that essential government functions are performed even where a conflict of interest exists.” (*Id.*; see also 88 Ops.Cal.Atty.Gen. 106, 110 (2005).)

In other limited scenarios, contracts otherwise prohibited by Section 1090 have been permissible where the decision maker possessed independent contracting powers to enter government contracts. An Attorney General opinion found a County Supervisor’s ownership in a business did not cause a violation of Section 1090, where a county employee has independent legal authority to approve transactions with the business. In that case, Alpine County wished to obtain towing services and service station supplies from a County Supervisor who *owned* the only service station in a certain area of the County to avoid having to obtain them elsewhere. (57 Ops.Cal.Atty.Gen. 458, 459 (1974).) The County Board of Supervisors had the authority to hire a County Purchasing Agent under Section 25500. (*Ibid.*) Section 25501 set forth the Purchasing Agent’s authority to make such purchases. (*Id. at p. 460.*) The opinion concluded that the County Purchasing Agent had independent authority to contract and thus could execute a contract with the County Supervisor for goods or services without violating Section 1090 because the Board of Supervisors would not be participating in the making of the contract. (*Id. at p. 460-61.*)²

As a general manner, we caution Section 1090 prohibits the County from entering into contracts with the restaurant in which you have an ownership interest. Therefore, any County contracts with the restaurant would be prohibited under Section 1090. Whether a specific exception might apply to allow a contract that is otherwise prohibited under Section 1090 is a fact-specific inquiry made on a decision-by-decision basis. You have not identified any specific contracts, and we, therefore, do not have sufficient information to make a determination regarding these

² While you have also asked whether Section 1090 would prohibit the County from contracting with your restaurant where a department head will make a decision on a contract, specific details on the department head and the contract will be necessary to determine whether an exemption may apply to allow the contract.

exceptions. If you need additional assistance determining whether a specific contact may be permissible, we recommend you seek further advice from the Commission at that time.

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).) 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.
- An interest in real property in which the official has a direct or indirect interest of \$ 2,000 or more (Section 87103(b)), including a pro rata share of interests in real property of any business entity or trust in which the individual or immediate family owns, directly, indirectly, or beneficially, a 10-percent interest or greater (Section 82033).
- 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.

You have identified that you will have a business entity interest, real property interest, and source of income interest in the LLCs operating the Cutthroat Tavern.

The Act's conflict of interest provisions apply when a public official "make[s], participate[s] in making, or in any way attempts to use the public official's official position to influence a governmental decision in which the official knows or has reason to know the official has a financial interest." (Section 87100; Regulation 18700(b)(2).) The Commission has defined "making," "participating in making," and "influencing" a governmental decision in Regulation 18704 as follows:

Making a Governmental Decision: A public official "makes a governmental decision" when the official, "officially authorizes or directs any action, votes, appoints a person, obligates or commits the official's agency to any course of action, or enters into any contractual agreement on behalf of the official's agency." (Section 87100; Regulation 18704(a).)

Participating in Making a Governmental Decision: A public official "participates in a governmental decision if the official provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review." (Section 87100; Regulation 18704(b).)

Influencing a Governmental Decision: Two rules address whether a public official is using or attempting to use an official position to influence a governmental decision. (Section 87100; Regulation 18704(c).)

Under Regulation 18704(c), the first rule applies when the governmental decision is within or before the public official's own agency or an agency subject to the authority or budgetary control of the official's agency. In these cases, if the official "contacts or appears before" or otherwise attempts to influence, any member, officer, employee or consultant of the agency, then the official is attempting to influence a governmental decision. (Regulation 18704(c)(1).)

The second rule applies when the governmental decision is within or before an agency *other* than the public official's own agency, or an agency appointed by or subject to the budgetary control of the public official's agency. (Regulation 18704(c)(2).) Under this rule, the official cannot act or purport "to act within the official's authority or on behalf of the official's agency in making the contact" to influence a decision that will have a material financial effect on the official's economic interests.

In this case, should you invest in the restaurant, you are potentially disqualified from any decision if it is reasonably foreseeable the decision will have a material interest in your interests in the business as entity or source of income. You are also potentially disqualified from decisions involving property in which the business has an interest and certain source of income to the business. However, you have specifically asked about the County entering a contract with the restaurant should you recuse yourself from the decision. While the contract is generally prohibited under Section 1090, the Act does not apply so long as you do not take part in the decisions. However, we caution that should you invest in a restaurant, your involvement in future decisions will need to be examined on a case-by-case basis if there is any indication of a financial effect on the business, property in which the business has an interest, or customers or other sources of income to the business.

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

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary W. Norton
Senior Counsel, Legal Division

ZWN:aja