STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

September 26, 2022

Scott C. Navé
Nave Law Office, P.C.
30721 Russell Ranch Rd., Suite 140
Westlake Village, CA 91362

Re: Your Request for Advice
Our File No. A-22-097

Dear Mr. Navé:

This letter responds to your request for advice on behalf of the Mojave Air and Space Port, a California Airport District, 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.

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).)

QUESTION

Does an exception to Section 1090 apply, so that District Director Charles Coleman may enter into, and that District Board may approve, a sublease agreement for a general aviation hangar at the Airport?

---

[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

Yes. Section 1090 does not prohibit the District from approving the sublease agreement for a general aviation hangar. In consideration of the fact that the noninterest exception set forth in Section 1091.5(a)(3) would apply to allow Director Coleman to lease a hangar directly from the District, the rule of necessity would further allow the District to approve the sublease between the current aviation tenant and Director Coleman. However, while Director Coleman may submit the information needed for the District to make its determination, he may not take part in the decision regarding the sublease in his public capacity.

FACTS AS PRESENTED BY REQUESTER

The District owns and operates Mojave Airport and Mojave Spaceport. 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 or 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. (Certain legacy leases, not at issue here, do not require District approval for subleases.) If the lease was approved by the Board of Directors, a sublease or assignment must also be approved by the Board.

A member of the District's Board of Directors desires to enter into a sublease for a general aviation hangar at the Airport. The lease at issue requires the District to approve subleases, and since this particular lease was approved by the Board of Directors, the sublease must also be approved by the Board.

In a follow-up email explaining more about the level of discretion involved in the Board approval of subleases, you explained that it is entirely within the Board's discretion whether to give consent to a sublease. However, as a practical matter, only once since 2000 have you seen the Board decline a consent, and this involved a tenant who had been evicted for a variety of reasons who was trying to "sneak" back on the airport under a sublease. The main consideration for the Board is whether the subtenant intends to use the property for aeronautical purposes, since that is a condition of the FAA grants the District receives.

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 case, Section 1090 applies to all board members and the lease is clearly a contract.

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.) Accordingly, we turn to an examination of the exceptions that may apply to the facts presented.

Non-Interest - Public Services Generally Provided

The Public Services Generally Provided "noninterest" specified in Section 1091.5(a)(3) provides that an officer or employee shall not be deemed to be interested in a contract if his or her interest 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.)

It has been stated that "[t]he phrase 'public services generally provided' is not self-defining, nor is there any useful legislative history that might shed light on the Legislature's intent." (*Lexin , supra*, at p. 1086.) "Public services generally provided" certainly include public utilities such as water, gas, and electricity. But qualifying "public services" are not limited to services provided to the general public or the public at large; "[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).)

The Attorney General has examined the legislative history of the 1961 amendment that added the "public services" exemption to Section 1091.5. The scope of this exemption is not identified therein. The Attorney General has previously determined informally, however, that "public services" would include public utilities such as water, gas, and electricity, and the renting of hangar space in a municipal airport on a first come, first served basis. (81 Ops. Cal. Atty. Gen. 317, 320 (1998).) The furnishing of such public services would not involve the exercise of judgment or discretion by public agency officials. Rather, the rates and charges for the services would be previously established and administered uniformly to all members of the public. (80 Ops.Cal.Atty.Gen. 335, 338 (1997).)

The phrase "on the same terms and conditions" requires there be no special treatment of an official, either express or implied, because of that person's status as an official. (*Lexin, supra*, at p. 1101.) Accordingly, the public services exception generally will *not* apply when provision of the service involves an exercise of discretion by the public body that would allow favoritism toward officials, or occurs on terms tailored to an official's particular circumstances.[2]

Under the public services generally provided exception, Director Coleman would not be precluded from leasing a hanger directly from the District. However, because the decision at issue involves the approval of a sublease for the hanger, where the District has reserved through the initial lease the power to approve any sublease at its discretion, the public services exception does not necessarily apply because the approval of the sublease provides discretion that may require the additional consideration of Director Coleman's qualifications.

Rule of Necessity

In limited circumstances, a "rule of necessity" has been applied to allow the making of a contract that Section 1090 would otherwise prohibit. (88 Ops.Cal.Atty.Gen. 106, 110 (2005).) The rule of necessity has two facets: in procurement situations, it has permitted a government agency to acquire an essential supply or service despite a conflict of interest; in nonprocurement situations, it has permitted a public officer to carry out the essential duties of the office despite a conflict of interest where the officer is the only one who may legally act. (65 Ops.Cal.Atty.Gen. 305, 310 (1982).) In nonprocurement situations, such as the situation here, the rule of necessity ensures that essential government functions are performed even where a conflict of interest exists. (*Ibid*.)

In a nonprocurement situation where the rule of necessity applies to allow a multi-member body to act when it otherwise would have been precluded from doing so due to a member's conflict of interest, the member with the conflict of interest must abstain from participation. (88 Ops.Cal.Atty.Gen. 106, 111 (2005); 69 Ops.Cal.Atty.Gen. 102, 112 (1986).)

Under these circumstances Director Coleman is not barred from leasing a hangar directly from the District under Section 1090. Moreover, the initial lease requires the District's approval of the sublease and the District is the only power left to make this determination.

Thus, to determine if the rule of necessity applies, we must examine whether approval of the sublease between the current aviation tenant and Director Coleman is an essential duty of the District and whether the District is the only government entity legally capable of doing so. As mentioned, the District owns and operates Mojave Airport and Mojave Spaceport, and is responsible for the lease of hangars located within the airport to commercial and general aviation tenants. The leases are discretionary, and may be approved by the Board or CEO, as specified in District policy. The lease at issue requires the District to approve subleases, and since this particular lease was approved by the Board of Directors, the sublease must also be approved by the Board.

Based on these facts, the approval of subleases of aviation hangars located on District property is an essential duty of the District – a duty that only it is legally capable of performing.

---

[2] *Lexin, supra* at 1088, 1100 at note 28; 88 Ops.Cal.Atty.Gen. at 128 ("discretionary or highly customized services" benefitting official would not come within "public services" exception), 92 Ops.Cal.Atty.Gen. at 71.

Accordingly, pursuant to the rule of necessity, the District may approve the sublease between the current aviation tenant and Director Coleman. However, Director Coleman must abstain from any participation in his official capacity.

Note, however, that participation in the making of a contract, for purposes of Section 1090, is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*Millbrae Assn. for Residential Survival v. City of* Millbrae (1968) 262 Cal.App.2d 222, 237.) Accordingly, Director Coleman's is strictly limited to the submission of the information in his private capacity as required by the District to consider the sublease. Moreover, to the extent that he recuses himself from the decision and avails himself of the same procedure available to the public in submitting information in his private capacity as required by the District to consider the sublease, the provisions of the Political Reform Act are not implicated. (See *Sipes* Advice Letter, No. A-09-124 [an official is not making, participating in making, or influencing a governmental decision in submitting a request as a member of the public and providing necessary information as required for processing the request so long the official avails themself of the same procedure typically available to any member of the public and is not granted special access to city officials or employees].)

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

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary W. Norton
Senior Counsel, Legal Division

ZWN:aja