



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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October 20, 2023

Douglas T. Sloan
City Attorney
City of Santa Monica
1685 Main Street, 3rd Floor
Santa Monica, CA 90401

Re: Your Request for Advice
Our File No. A-23-133

Dear Mr. Sloan:

This letter is in response to your request for advice regarding the Political Reform Act¹ and Section 1090. 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 Los Angeles 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

Is City of Santa Monica Councilmember Negrete prohibited under the Act or Section 1090 from participating in discussions and decisions regarding sale of the Civic Auditorium to the Santa Monica Malibu Unified School District (the District) because she owns the Santa Monica Music Center (the Music Center)?

CONCLUSION

Under Sections 1090 and 1091, Councilmember's Negrete has a "remote" financial interest in the prospective contract, and she is required to recuse herself from the decision, but the City is not prohibited from contracting with the District. Because the remedy under Section 1090 is for

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.

Councilmember Negrete to abstain from any participation in the making of a contract, we do not analyze the conflict of interest under the Act since the remedy under the Act would not differ from the action already required, except that she must leave the room during the consideration of a contract pursuant to the Act's recusal requirements.

FACTS AS PRESENTED BY REQUESTER

Councilmember Lana Negrete has been a Santa Monica Councilmember since her appointment in 2021, followed by her election to a four-year seat in 2022. She currently serves as Mayor Pro Tempore.

Councilmember Negrete owns Santa Monica Music Center (the Music Center) with her father. The business sells and repairs musical instruments and offers services for lessons and recording. The business is structured as a C Corporation, with Negrete and her father splitting ownership 50/50. Councilmember Negrete has been involved with the business since 2014 and has been an owner of the business since 2019. The Music Center has an annual gross revenue of approximately \$2 million.

The Music Center has done business with the District for over 25 years. From April 2021 to February 2023, the District spent \$87,806.60 at the Music Center on musical instruments, supplies, and services; \$42,335.54 of the purchases were related to the purchase of music-specific PPE due to the COVID pandemic. The average annual net profit from the "school bid orders" received from the District is between 5% and 20%, with items often given to the District at cost or donated. Less than 5% of the company's revenue has come from the District.

The City owns the Civic Auditorium and is currently engaging in the surplus land process for its sale. The District is a potential purchaser of the Civic Auditorium. The Music Center does not provide any services at the Civic Auditorium. The potential transaction would not include the City paying any funds to the District. Important considerations include the fact that the District utilizes only certain funds for potential music related purchases, including Measure R, Bergmann funds, and Booster Club funds, all of which the Council does not exercise any discretionary authority to approve. In fact, you are not aware of any funds the Council has had discretionary authority to approve that are used for music related purchases.

ANALYSIS

A. 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. 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.) 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 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.)

Here, the issue is whether Councilmember Negrete has a financial interest in the District and its potential contract with the City for purposes of Section 1090 due to the business relationship between the District and the Music Center. 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).) Moreover, case law and statutory exceptions to Section 1090 state that the term “financially interested” must be liberally interpreted and cannot be interpreted in a restricted and technical manner. (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1298.) The phrase “financially interested” broadly encompasses anything that would tie a public official’s fortunes to the existence of a public contract. (*Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1335.)

Here, based on the facts provided, the District and the Music Center have an ongoing and mutually beneficial business relationship. As owner of the Music Center, Councilmember Negrete has an interest in the business and the income it receives from the District. This ongoing and mutually beneficial relationship affects the income received by the Music Center. In addition, the official in this circumstance could be influenced in the City’s decision to sell the Civic Auditorium to the District by a desire to maintain a favorable ongoing relationship with the District to benefit her business. Thus, Councilmember Negrete, as a co-owner of the Music Center, has a financial interest in the District and its contracts, which may be mutually beneficial to the Music Center.

B. Remote Interest.

When Section 1090 applies 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 the contract. (*Thomson, supra*, at pp. 647-649; *Stigall, supra*, at p. 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).) However, the Legislature has created various statutory exceptions to the Section 1090 prohibition where the financial interest involved is deemed to be a “remote interest,” as defined in Section 1091, or a “noninterest,” as defined in Section 1091.5. Where a remote interest is present, the contract may be lawfully executed provided (1) the officer discloses the 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.)

There are several remote and noninterest that relate to ongoing business relationships, but the only exception that might apply to the facts here is set forth in Section 1091(b)(8), which provides that a public officer has a remote interest in a contract where the officer has been a supplier of goods or services to the contracting party for at least five years before the public officer’s most recent election to office. The “contracting party” refers to the party doing business

with the government agency. Section 1091(b)(8) states that an official will have a remote interest in the contract, where the official's interest is:

That of a supplier of goods or services when those goods or services have been supplied to the contracting party by the officer for at least five years prior to his or her election or appointment to office.

Here, Councilmember Negrete has been a City councilmember since her appointment in 2021, and the Music Center has been doing business with the District for over 25 years. Thus, based on the facts provided, Councilmember Negrete has a "remote interest" in the District under Section 1091(b)(8).

Based on the foregoing, Councilmember Negrete is disqualified from taking part in the City's decision to sell the Civic Auditorium to the District. Under Section 1091(a), she is required to disclose her remote interest in the contract to the City Council, have the remote interest noted in the City Council's records, and abstain from taking part in the decision. Additionally, because the remedy under Section 1090 is for Councilmember Negrete to abstain from any participation in the making of a contract, we do not analyze the conflict of interest under the Act since the remedy under the Act would not differ from the action already required, except to note that she must leave the room during the consideration of a contract pursuant to the Act's recusal requirements.

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

Sincerely,

Dave Bainbridge
General Counsel

/s/ John M. Feser Jr.

By: John M. Feser Jr.
Senior Counsel, Legal Division

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