



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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June 6, 2024

James J. Atencio
Senior Assistant City Attorney
City of Richmond
450 Civic Center Plaza
Richmond, CA 94804-1630

Re: Your Request for Advice
Our File No. A-24-033

Dear Mr. Atencio:

This letter responds to your request for advice 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, 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 Contra Costa 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 the Act or Section 1090 prohibit City of Richmond ("City") Councilmember Doria Robinson from participating in governmental decisions regarding contracts and grant funding provided to Councilmember Robinson's employer Urban Tilth, a 501(c)(3) organization? Further, if Councilmember Robinson is prohibited from taking part in the decisions under Section 1090, does the "remote interest" exception apply and allow City Council to still take part in any such 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

Under Section 1090 Councilmember Robinson is prohibited from participating in contracts between Urban Tilth and City Council because her employment at Urban Tilth as an Executive Director creates a financial interest in the contracts. However, if Councilmember Robinson discloses her interest to the City Council, the interest is noted in the City Council's official records, and Councilmember Robinson abstains from the contracting process in both her governmental and professional capacities, the City may still enter contracts with Urban Tilth as Councilmember Robinson's interest would qualify as a remote interest under Section 1091(b)(1).

FACTS AS PRESENTED BY REQUESTER

Richmond City Councilmember Doria Robinson is the Executive Director of Urban Tilth, an organization that regularly applies for and enters into grant agreements with the City and you seek advice as to whether this is a conflict under the Act or Section 1090.

Urban Tilth is a 501(c)(3) nonprofit corporation that is involved in various programs and is a party to grant applications and grant agreements with the City of Richmond. Urban Tilth is a co-applicant with the City for a State grant of approximately \$35 million dollars that was awarded to the City and co-applicants by the California Strategic Growth Council ("SGC") for several projects termed "Richmond Rising." The City is the lead grantee and Urban Tilth is one of five co-applicants to the grant. The City recently began implementing the grant-funded projects by entering contracts with its co-applicants and other entities. The Grant Master Agreement entered between the City and SGC provides for program regulations that continue to be refined and the grantees are expected to sign agreements and amendments to implement program regulations on an ongoing basis as the projects are implemented.

Councilmember Robinson is a salaried employee of Urban Tilth in the role of Executive Director and seeks formal advice as to whether she should recuse herself from decisions surrounding contracts and/or amendments made by the City with Urban Tilth and further, if she does recuse, whether the City may still enter such contracts. We note that you state in your request that Councilmember Robinson has already recused herself from decisions on contracts involving the City and Urban Tilth and any matter involving the City and the Richmond Rising Grant. Additionally, Urban Tilth has secured a grant that will directly fund Councilmember Robinson's position that is not tied to Richmond Rising or any other City grant funding. Furthermore, Councilmember Robinson is not involved in any decision-making process on behalf of Urban Tilth that relates to the use of Richmond Rising or any other City grant. We cannot provide advice on any past conduct therefore the advice in this letter is provided solely for future decisions regarding contracts between the City and Urban Tilth.

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.) 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.)

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. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

Officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) 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. (*People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn.5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; 85 Ops.Cal.Atty.Gen. 34, 36.:38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).) In addition, case law and statutory exceptions to Section 1090 make clear that the term “financially interested” must be liberally interpreted. (See, e.g., *People v. Deysher* (1934) 2 Cal.2d 141, 146.) Further, “the certainty of financial gain is not necessary to create a conflict of interest... (t)he government’s right to the absolute, undivided allegiance of a public officer is diminished as effectively where the officer acts with a hope of personal financial gain as where he acts with certainty.” (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1298 (citations omitted).)

Generally, employees have been found to have a financial interest in a contract that involves their employer, even where the contract would not result in a change in income or directly involve the employee, because an employee has an overall interest in the financial success of the firm and continued employment. (84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

Here, Councilmember Robinson has an interest in the success of Urban Tilth as the Executive Director of the organization regardless of whether the contract with the City will specifically impact her salary. Under Section 1090, Councilmember Robinson will have an interest in any contract with the City that benefits or harms Urban Tilth. The grant funding in this case is clearly a benefit to Urban Tilth as an organization. For those reasons, under Section 1090, Councilmember Robinson has a conflict and she must recuse herself from any decisions surrounding contracts between Urban Tilth and the City. Further, absent an exception, City Council would be prohibited from contracting with Urban Tilth as conflicts under Section 1090 extended to the agency at large.

The Legislature has created various statutory exceptions to Section 1090’s prohibition where the financial interest is deemed to be a “noninterest,” as defined in Section 1091.5, or a “remote interest,” as defined in Section 1091.

If a noninterest is present, the contract may be made without the officer’s abstention, and a noninterest generally does not require disclosure. (*City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 514-515.) If a remote interest is present the contract may be made if: (1) the officer discloses the interest in the contract to his or her public agency; (2) that interest is

noted in the agency's official records; and (3) the officer abstains from any participation in the making of the contract. (Section 1091(a); Section 1091(c).)

There is no indication that a noninterest exception applies to the facts presented. Turning to the remote interest exceptions, Section 1091(b)(1) provides that a governmental officer has a remote interest if their interest is one as an officer or employee of a nonprofit entity exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. Sec. 501(c)(3)). Under this exception, the officer may not influence or attempt to influence any member of the board to enter the contract. (Section 1091(c).)

Here, Councilmember Robinson is the Executive Director of a 501(c)(3) nonprofit organization, Urban Tilth. Thus, the remote interest exception in 1091(c) applies. Under the exception, Councilmember Robinson must disclose her interest to the City Council, ensure her interest is noted in the City's official records, and recuse herself from decisions surrounding contracts between City Council and Urban Tilth, after which the City Council may still enter such contracts. Again, however, even in her capacity as Executive Director of Urban Tilth, rather than in her capacity as City Councilmember, Councilmember Robinson is prohibited from influencing or attempting to influence a member of the City Council regarding the contract. Therefore, Councilmember Robinson must abstain from the contracting process in both her governmental and professional capacities.

The Act

Because Councilmember Robinson must abstain from any participation in decisions surrounding contracts between the City and Urban Tilth under Section 1090, we do not need to further analyze the potential conflict of interest issue raised under the Act. Her abstention under Section 1090 would also satisfy the requirements of the Act. However, we note that she must additionally publicly identify her financial interest prior to the consideration of the decision at any public meeting of the city council and leave the room for the duration of the discussion and decision under Act's disqualification requirements. (See Regulation 18707.)

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

Sincerely,

Dave Bainbridge
General Counsel

By: 
Valerie Nuding
Counsel, Legal Division

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