



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

May 30, 2024

Amy S. Ackerman
Corte Madera Town Attorney
350 Sansome Street | Suite 300
San Francisco, CA 94104

Re: Your Request for Advice
Our File No. A-24-039

Dear Ms. Ackerman:

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 Marin 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 either Section 1090 or the Act prohibit Councilmember Charles Lee from taking part in, or the Marin County Sanitary District No. 2 (the “District”) from entering into, a loan agreement with Councilmember Lee under the District’s sewer lateral loan program where Councilmember Lee took part in establishing the loan program?

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

As explained below, while Councilmember Lee would have a prohibitory financial interest under Section 1090 in a loan agreement between the District and himself, Section 1091.5(a)(3) would apply to allow the District to enter into the agreement with him. However, the Act would prohibit Councilmember Lee from taking part in the decision in his official capacity.

FACTS AS PRESENTED BY REQUESTER

You are the Town Attorney for Corte Madera and District Counsel for the District. You provide advice to the Town Council when they serve as both Town Council and the Governing Board of Directors to the District. You seek this advice on behalf of Town Council and District Board member, Charles Lee.

To comply with the State Water Board's Discharge Requirements for Sanitary Sewer Systems, the District is engaging in capital improvements to its aging pipes. In addition, it requires property owners within the District, upon certain "triggering events," to inspect and upgrade private sewer laterals, the pipes and appurtenances that transport the private building's wastewater to the District's collection system. The private sewer laterals must pass a pressure test to ensure they are sufficient to withstand overflows.

By ordinance,² the District requires that a property owner perform a private sewer lateral inspect and test, and make any necessary upgrades, upon the following "triggering" events:

- When a property owner submits a building permit application for improvements valued at \$50,000 or more over a cumulative three-year period, or when the permit improvements involve legalizing or constructing an Accessory Dwelling Unit, changing the size of a water meter or installation of fire sprinklers, changing the fixture count, or upon request of the District manager.
- When a property is sold or has any transfer of property title.
- When a sewage overflow, malfunction or other public health threat occurs at a property as determined by the District's staff.
- When the sewer main is being improved or the road above a resident's sewer lateral is being paved as part of a Capital Improvement Project led by the Town, the District or other government agency.

To assist property owners in making upgrades to their private sewer laterals, the District provides a loan program. The maximum loan is \$25,000 with a payback period not to exceed 10 years at an annual interest rate of three percent. The property owner must enter into a loan agreement providing that the loan repayment amount be added to the property tax as an assessment to the property. The loans are available, on a first-come, first-served basis.

² See Corte Madera Municipal Code section 21.22.020.

To qualify for a loan to finance the sewer lateral work:

- One of the following triggering events must have occurred: a) The property owner must have had a sewage overflow or malfunction on the property; b) The adjacent sewer main is being improved; or c) The roadway on which the property is located is being paved as part of the Capital Improvement Program led by the Town, the District, or other governmental agency.
- The property owner must demonstrate that they are unable to obtain private financing at the annual interest rate of three percent, the rate offered by the District. Specifically, the property owner must provide written documentation from a bona fide financial institution that they do not qualify for private financing at an annual interest rate of three percent or lower, and District staff has no discretion to qualify a property owner who does not satisfy this standard. The written documentation automatically satisfies the criteria. The District Board has no role in approving loan applications. The District Manager (a staff member) reviews and approves the applications for the loan program.

By email dated May 13, 2024, you clarified that to upgrade a sewer lateral, a property owner must obtain a permit (just as a property owner must obtain a building permit to upgrade or rehabilitate property). However, the loan program is separate and distinct from the permit process and requires a separate application. All property owners (regardless of whether they seek a loan from the District or not) must obtain a permit to engage in the sewer lateral work. There are no discretionary criteria to qualify for a loan and no case-by-case determination is made.

The District's Board of Directors adopted the Private Sewer Lateral Loan program by resolution in September of 2020. (Resolution No. 06/2020.) In June of 2022, the Board of Directors adopted unanimously a resolution extending the loan program and allocating additional funding to the program. (Resolution No. 09/2022.) Councilmember Lee participated in both the initial resolution adopting the loan program and the vote to extend the loan program.

In June of 2022, the Town Council authorized the Director of Public Works to advertise for bids and award a construction contract for the Road Resurfacing project. The roads were selected by staff based on engineering judgement and Pavement Condition Index (PCI) reports, without involvement or influence from Councilmembers. The staff reports, which are available to the public on the Town's website, included an attached map highlighting the roads to be resurfaced.

In May 2023, Councilmember Lee and his spouse purchased property in Corte Madera as their primary residence. They have submitted a building permit application for improvements valued at \$50,000 or more, triggering an upgrade to the property's private sewer lateral under the District's ordinance. After the purchase of his property, during the summer of 2023, the Town resurfaced the roadway in front of their property, which rendered them eligible for a loan under the program. Councilmember Lee is seeking guidance on whether he can apply for a loan under the District's program.

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.) Section 1090 is intended “not only to strike at actual impropriety, but also to strike at the appearance of impropriety.” (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.)

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.) When an officer with a proscribed financial interest is a member of the governing body of a public entity, the prohibition of Section 1090 also extends to the entire body, and it applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

Councilmember Lee is a public official subject to Section 1090 and this matter involves a potential contract between the District and Councilmember Lee under its loan program. In addition, Section 1090 casts a wide net to capture those officials who participate in any way in the making of the contract. (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) Therefore, for purposes of Section 1090, participating in making a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing plans and specifications, and solicitations for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall, supra*, at p.569.) Thus, the final execution of a contract, which is the time when the contract is technically made, is not the only time when a conflict of interest may be presented. We must look to whether the official had the opportunity and did participate in the policy decision to create the government program under which the contract would later be executed. (See, e.g., 81 Ops.Cal.Atty.Gen. 317 (1998) [council member could not participate in the establishment of a loan program and then leave office and apply for a loan].)

Since Councilmember Lee has already taken part in previous votes on the District’s loan program, including the initial vote to adopt it, he would be considered to have participated in the making of any loan program contract between the District and himself and would therefore have a prohibitory financial interest in the contract. Therefore, unless an exception applies, Section 1090 would prohibit the District from entering into any such contract with Councilmember Lee.³

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

³ We cannot provide advice as to whether Councilmember Lee has a conflict in the decision to extend the loan program because this involves past conduct, as prior votes authorizing the loan program have already occurred. We address only the question of entering the contract after taking part in decisions regarding the loan program.

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.)

Relevant to the present situation is the noninterest exception set forth in Section 1091.5(a)(3) for "public services generally provided." That exception provides that an officer or employee "shall not be deemed to be interested" in a public contract if his or her interest in that contract 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.)

With respect to an agency's permissible exercise of discretion in providing a public service generally provided under the exception, the Supreme Court stated:

The presence of discretion in the formation of a contract that section 1091.5(a)(3) purportedly permits is not fatal, unless the discretion can be exercised to permit the special tailoring of benefits to advantage one or more board members over their constituency as a whole. Absent such a risk of favoritism, discretion is unproblematic.

(*Id.* at p. 1100.)

Thus, the noninterest exception set forth in Section 1091.5(a)(3) applies if: (1) the interest arises in the context of the affected official's or employee's role as a constituent of the public agency and recipient of its services; (2) the service at issue is broadly available to all those whom are similarly situated and is not narrowly tailored to specially favor an official or group of officials; and (3) the service at issue is provided on substantially the same terms as for any other constituent.

In the *Hentschke* Advice Letter, No. A-14-187, the Commission analyzed whether the exception applied to a turf replacement program generally available to all retail water customers of any of the San Diego Water Authority's member public agencies. The program, which provided monetary incentives to retail water customers who replace existing turf with water efficient

landscaping, was available on a first-come, first-served basis. Each applicant was required to participate in a training course, replace existing turf with qualifying plants, and fill out the standard application form and agree to program terms. Even though the program administrator had some decision-making authority to determine that the replacement met all the program requirements (such as the amount of turf replaced and whether qualifying plants are used), the Commission concluded that the exception applied because the determination did not involve discretion to pick and choose among applicants or to vary benefits from one applicant to the next.

Here, if Councilmember Lee were to submit a loan program application, his interest in the loan would arise in the context of a District constituent and recipient of its services. In addition, the loan program is broadly available to all qualifying District constituents, and not narrowly tailored to specially favor an official or group of officials.⁴ Similar to the situation in *Hentschke*, to avoid favoritism where multiple residents may qualify, the loans are available on a first-come, first-served basis. And there is no suggestion from the facts that District staff has any discretion to make determinations about whether a constituent qualifies for the loan, especially where the property owner must provide written documentation from a bona fide financial institution that they are unable to qualify for private financing at an annual interest rate of three percent or lower.⁵ Finally, the terms of any contract with Councilmember Lee would be provided on substantially the same terms as for any other constituent in that all loans have a payback period not to exceed 10 years at an annual interest rate of three percent, and each property owner must agree that the loan repayment amount be added to the property tax as an assessment to the property.⁶

Accordingly, the noninterest exception under Section 1091.5(a)(3) applies to permit the District to enter into a loan agreement under the loan program with Councilmember Lee.

⁴ We note that Councilmember Lee's property qualifies for a program loan because the roadway in front of his property was resurfaced as part of the Road Resurfacing project he voted for in June of 2022, almost a year before he purchased his property. However, there is no suggestion from the facts that eligibility for the loan program based on road resurfacing specially favored Councilmember Lee, or that the triggering factors in general specially favor the Councilmembers.

⁵ According to the facts, a property owner qualifies for the loan program where 1) there was a sewage overflow or malfunction on the property; 2) an adjacent sewer main is being improved; or 3) the roadway on which the property is located is being paved. While there may be some discretion to determine whether a specific requirement is satisfied (e.g., whether a sewer malfunction exists), on whole they appear to be objectively verifiable.

⁶ The present matter is different from those matters where the exception has been found not to apply because administering officials were required to exercise judgment or discretion in scrutinizing applications. (See *Hodge Advice Letter*, No. C-14-012 [exception does not permit a city councilmember to enter into a Mills Act contract with the city where officials are required to negotiate the terms of each contract, engage in the continued enforcement through periodic inspections to determine compliance with the contract terms, and make determinations concerning contract renewal and imposition of penalties]; see also 92 Ops.Cal.Atty.Gen. 67, 70 (2009) [grants for the purchase or retrofit of certain engines and equipment awarded only after each application individually scrutinized to determine its statutory compliance, and weighed according to such factors as emissions performance, cost-effectiveness and considerations of whether the engine is cleaner than required under the applicable air quality laws. In addition, the evaluation may include a determination that an application is made in good faith and credible].)

The Act

The Act's conflict of interest provisions prohibits a public official from taking part in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the official's financial interests distinguishable from the decision's effect on the public generally. (Sections 87100 and 87103.) An official's financial interests that may give rise to a disqualifying conflict of interest under the Act are identified in Section 87103 and include an interest in any real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more and in their personal finances, including those of their immediate family.⁷ Relevant to your request, Councilmember Lee has a real property interest in his residence.

Foreseeability and Materiality

Regulation 18701(a) provides that a governmental decision's financial effect on an official's financial interest is presumed to be reasonably foreseeable if the official's interest is "explicitly involved" in the decision; an official's interest is "explicitly involved" if the interest is a named party in, or the subject of, the decision; and an interest is the "subject of a proceeding" if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the interest. In addition, an official's real property interest is explicitly involved, as here, in any decision affecting the real property as described in Regulation 18702.2(a)(1)-(6).

Regulation 18702.2 provides materiality standards for determining when a reasonably foreseeable effect on an interest in real property is material, including decisions that "[w]ould impose, repeal, or modify any taxes, fees, or assessments that apply to the parcel." (Regulation 18702.2(a)(3).) A reasonably foreseeable financial effect on an interest in real property is also material if the decision "[i]nvolves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the parcel will receive new or improved services that provide a benefit or detriment disproportionate to other properties receiving the services." (Regulation 18702.2(a)(6).)

According to the facts provided, the purpose of the loan program is to assist property owners in making upgrades to their sewer laterals, and the terms of any contract between the District and Councilmember Lee would require his agreement that the loan repayment amount be added to his property tax as an assessment to the property. Thus, Councilmember Lee's real property interests in his residence would be the "subject" of the loan decisions and, under Regulation 18702.2(a)(3) and (6), it is reasonably foreseeable the decisions would have a material financial effect on his real property interest.

⁷ Regulation 18702.5(c) provides, however, that if the decision would have a reasonably foreseeable financial effect on the official's financial interest in a business entity or real property, any related effect on the official's personal finances is not considered separately. Accordingly, we do not analyze any effect on Councilmember Lee's personal finances further.

Accordingly, Councilmember Lee may not make, participate in making, or use his position to influence the loan decisions.⁸ However, because the application for the loan is available to all qualifying members of the District, Councilmember Lee may contact or appear before District staff as necessary to apply for the loan and provide any necessary information with respect to processing the application. (See, e.g., *Sipes* Advice Letter, No. A-09-124 [an official is not making, participating in making, or influencing a governmental decision in submitting a request and providing necessary information as required for processing the request so long as the official avails himself 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

By: *Jack Woodside*
Jack Woodside
Senior Counsel, Legal Division

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⁸ Note that a public official uses an official position to influence a governmental decision if the official: (1) contacts or appears before any official in the official's agency or in an agency subject to the authority or budgetary control of the official's agency for the purpose of affecting a decision; or (2) contacts or appears before any official in any other government agency for the purpose of affecting a decision, and the public official acts or purports to act within the official's authority or on behalf of the official's agency in making the contact. (Regulation 18704(c).)