



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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February 23, 2023

Neysa Hinton
Mayor, City of Sebastopol
7120 Bodega Avenue P.O. Box 1776
Sebastopol, CA 95473

Re: Your Request for Advice
Our File No. A-23-015

Dear Ms. Hinton:

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.

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 Sonoma 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 Section 1090 prohibit the City of Sebastopol from hiring you as the City Manager if you first resign from your current position as the Mayor of the City?

CONCLUSION

Yes. Section 1090 prohibits the City from entering an employment contract with you as the City Manager because the City Council, including you as the Mayor, has already taken action to fill the City Manager position, and you cannot now resign and apply for the position.

¹ All statutory references are to the Government Code, unless otherwise indicated.

FACTS AS PRESENTED BY REQUESTER²

You have been a member of the City Council in Sebastopol since 2016. You were reelected to a four year term in 2020 and, as of the beginning of the year, serve as Mayor based on the rotation schedule used by the City Council. The Sebastopol City Manager will be retiring soon when his contract ends on June 30, and the City Council is starting the process of recruitment to fill his position. You wish to apply to be the City Manager, a paid position.

A few months ago, a closed session was held to make the current City Council aware of the City Manager's expiring contract and it was determined a subcommittee was needed to start recruitment of a City Manager. You then set as an agenda item the creation of a subcommittee to work on the issue prior to the current City Manager's contract expiration in June of 2023. The City Council determined that at least one councilmember from the previous City Council should sit on the committee; you along with a newly elected councilmember were appointed at an open public City Council meeting. To date, the subcommittee has taken no action and no meeting dates have been set.

Your understanding is that the subcommittee will ultimately be tasked with moving forward to make recommendations to the full City Council about hiring a City Manager, and advising whether the City should contract with outside legal counsel for the City Attorney position instead of the current City Manager/City Attorney combination the City has now.³ The subcommittee may also help work with a recruiting company to create a recruitment campaign, qualification brochure, etc. if the City Council expands the subcommittee's scope in the future. There has been no discussion of these details at this time.

After attending a Mayor and Council Members conference in January and reflecting on your own qualifications, you decided that you would like to apply for the job and contacted the City Manager/City Attorney to see if there were any conflicts that would prevent you from applying. He advised that you should immediately resign from the subcommittee, which you did,⁴ and he sought advice from outside legal counsel on the situation. You also called the FPPC and were advised to seek written advice.

All interviews and all candidates will be kept confidential as personnel matters; it is expected that existing City staff would also apply for the open position to fill the City Manager's job. You will not take part in any committees, agenda items or other issues related to recruitment of a new City Manager. You resigned from the subcommittee tasked for creating the recruitment process and believe others assume you are too busy to participate.

² The facts in your original request on January 24 were supplemented with additional information from your emails dated February 3, February 7, February 9 and February 21.

³ The current City Manager also performs the functions of the City Attorney. The subcommittee would be tasked with making recommendations with cost options back to the full City Council for deliberations on how to move forward in this regard. You have never participated in discussions about whether the City should employ outside legal counsel to be the City Attorney.

⁴ At a subsequent City Council meeting that you did not attend, another councilmember was appointed to the subcommittee to replace you.

You intend to apply for the City Manager position without resigning from your current position as Mayor, and plan to keep your application in strict confidence. You believe the full City Council will ultimately select and approve the individual who becomes the next City Manager. If offered the job, you would resign from your current position if you decided to accept the offer.

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. 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.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

Typically, a contract is “made” on mutual assent of the involved parties. (*Stigall, supra*, at p. 569.) In addition, making or participating in making a contract has been broadly construed to include those instances where a public official has influence over the contract or its terms. (See 80 Ops. Cal. Atty. Gen. 41.)

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).)

Here, the City Council has the authority to hire an individual for the City Manager position. Preliminarily, while a member of the City Council, you will not be able to enter into an employment agreement with the City for this position even if you did not participate in the hiring decision because you are “conclusively presumed to be involved in the making of all contracts” by the City Council. Therefore, Section 1090 prohibits you from entering a contract with the City Council for the City Manager position while serving as Mayor of the City.

The next issue is whether you would be able to first resign as Mayor and then be hired by the City for the City Manager position. Section 1090 reaches beyond the officials who actually execute the contract, and courts have broadly interpreted “participation in the making of a contract” to include any act involving the planning, preliminary discussions, negotiations, compromises, reasoning, 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; see also *Stigall v. City of Taft, supra*, at p. 569.)

The *Perdock* Advice Letter, No. A-17-265, is instructive. There, a member of the Clearlake City Council who was the designated mayor intended to apply for the City's Chief of Police position. The mayor did not communicate this intention to the other councilmembers but did advise the city manager who was tasked with direct supervision of the chief of police, including hiring and firing decisions, of his intentions to apply. The mayor stated he would first resign from his position as mayor and then submit his application. The city attorney agreed to present the mayor's resignation to reduce any appearance of impropriety.

The *Perdock* letter then explained the significance of both the lack of any action by the City Council concerning the election of a new Chief of Police and the timing of the mayor's intended resignation:

The Council itself has yet to engage in any of the planning, preliminary discussions, negotiations, compromises, reasoning, drawing of plans and specifications and solicitation for bids that would ordinarily be involved in the making of a contract. While council members are presumed to be participating in any contract before the city, we do not find that this presumption applies when a councilmember resigns prior to actual participation in the making of the contract. Therefore, if you resign from your position on the City Council, which has not yet taken any action concerning the pending vacant chief of police position, the proscription of Section 1090 will not bar consideration of your application for that position.

The present matter is factually distinguishable from *Perdock*. Here, the facts state that the City Council has already taken action on the selection process of the new City Manager during your tenure as Mayor. To begin, it determined at a recent closed session meeting that it was necessary to establish a subcommittee to begin recruitment of a new City Manager – specifically, it would be tasked with reporting back to the full Council about what options the full Council can consider for the recruitment process. As Mayor, you then set the matter as a public agenda item at a subsequent City Council meeting. At that meeting, the City Council decided that at least one councilmember from the previous City Council should sit on the subcommittee; you and a newly elected councilmember were then appointed to be on that subcommittee. Regardless of the fact that you eventually resigned from the subcommittee after determining you wanted to apply for the City Manager position and before the subcommittee had taken any official action, the City Council, including you as the Mayor, has already taken action to fill the position.

Accordingly, Section 1090 prohibits the City from entering a contract with you to be the City Manager even if you first resign from your current position as Mayor.⁵

⁵ We stress that avoiding the perception of impropriety is one of the important public policy goals in underlying Section 1090 (*Thomson, supra*, at p. 648), and also note that this conclusion does not suggest you have any improper motive. Indeed, the Attorney General stated “[t]he ban imposed by section 1090 does not presuppose wrongdoing; rather, the rule operates chiefly as a preventive measure to protect the honor of well-meaning officials and to safeguard the public interests they serve, drawing from general understandings about human nature.” (94 Cal.Op.Atty.Gen. 22 (2011) citing *Stigall, supra*, 58 Cal. 2d at p. 570.)

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

JW:aja