

May 8, 2014

Joshua E. Morrison  
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Re: Your Request for Advice  
**Our File No. A-14-056**

Dear Mr. Morrison:

This letter responds to your request for advice on behalf of Jim Cartmill, a member of the Board of Trustees (the “Board”) of the Sweetwater Union High School District (the “District”), regarding the conflict of interest provisions under Government Code Section 1090 et seq.<sup>1</sup> Because the Fair Political Practices Commission (“the Commission”) does not act as a finder of fact when it renders advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), this letter is based on the facts presented.

Please note that after forwarding your request to the Attorney General’s Office and the San Diego County District Attorney’s Office, we did not receive a written response from either entity. (See Section 1097.1(c)(4).) Finally, we are required to advise you that 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 Mr. Cartmill, as a Board member, from participating in decisions regarding a lease for District offices between the District and the landlord of real property located 517.5 feet from property owned and leased out by Mr. Cartmill?

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<sup>1</sup> All further statutory references are to the Government Code, unless otherwise indicated.

## CONCLUSION

No. Under Section 1090, Mr. Cartmill does not have a “financial interest” in the lease.

## FACTS

Mr. Cartmill owns a parcel of real property consisting of three commercial office suites and adjacent parking. The parcel is on the southwest corner of a commercial park located at 2411 Fenton Street, Chula Vista, CA 91914. Mr. Cartmill utilizes two of the office suites for his business, a wholly owned corporation (“Let’s Talk Health”), which makes and sells nutritional supplements. Mr. Cartmill rents out the remaining suite to an insurance agency. Mr. Cartmill’s suites are located in a low-rise office park consisting of his business, an insurance agency, pet hospital, party supply shop, four realty offices, security offices and the Mexican American Opportunity Center. There are no high volume retail or food establishments in the office park. The nearby shopping center, a quarter mile to the west, has numerous restaurants and fast food outlets where people go to eat and shop.

The District is considering relocating its offices to a large office building located at 860 Harold Place, Chula Vista, CA 91914 (the “Proposed Offices”.) The edge of the parcel containing the Proposed Offices is exactly 517.1 feet from the closest edge of the parcel owned by Mr. Cartmill. You state that while it is theoretically possible that the relocation of the District’s offices to the Proposed Offices could increase the value of Mr. Cartmill’s property, there are no known facts suggesting that the proposed relocation would have any effect on the value of nearby commercial properties, such as Mr. Cartmill’s.

There are approximately 138 commercial properties with a combined total of 3.5 million square feet in the vicinity of the building in which the Proposed Offices is located (the “Building”). For purposes of this analysis, you have identified the vicinity as the quadrant northeast of SR 125 and Otay Lakes Boulevard, out to the Design Center. The Building has 103,000 square feet, or less than 3 percent of the total commercial inventory in this area. The Building is multi-story and can house up to 500 occupants. The District would occupy the majority of the Building.

The Chief Facilities Executive of the District has stated his belief that it is likely that there would be little or no effect, whether an increase or a reduction, on the value of Mr. Cartmill’s property if the District were to relocate its offices to the Proposed Offices.

## 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.) 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. (89 Ops.Cal.Atty.Gen. 49, 50 (2006).) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson, supra*, at pp. 646-649.)

We employ the following six-step analysis to determine whether Mr. Cartmill has a disqualifying conflict of interest under Section 1090.

### **Step One: Is Mr. Cartmill subject to the provisions of Section 1090?**

Section 1090 provides, in part, that “[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.” School districts and their board members are plainly covered by this prohibition.

### **Step Two: Does the decision at issue involve a contract?**

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001);<sup>2</sup> 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that “specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’” (*People v. Honig, supra*, at p. 351 citing *Stigall, supra*, at pp. 569, 571.)

Here, the District will be entering into a lease with the owner of the Building. A real property lease constitutes a “contract.” (See 88 Ops. Cal. Atty. Gen. 32, 36 (2005).) Therefore, a contract is involved.

### **Step Three: Is Mr. Cartmill making or participating in making a contract?**

As a member of the Board, which must approve the lease, Mr. Cartmill would be participating in the making of a contract.

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<sup>2</sup> It is noteworthy to point out that opinions issued by the Attorney General’s Office are entitled to considerable weight (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17), especially where, as here, it has regularly provided advice concerning a particular area of law. (*Thorpe v. Long Beach Community College Dist.*, (2000) 83 Cal.App.4th 655, 662; *Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 829.)

**Step Four: Is Mr. Cartmill financially interested in the contract?**

Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest” and officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*People v. Honig, supra*, at p. 333). Although Section 1090 nowhere specifically defines 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. (See e.g., *Thomson, supra*, at pp. 645, 651-652; see also *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5.) Prohibited “financial interests” extend to expectations of economic benefit. (*People v. Honig, supra*, at p. 315.) In determining a Section 1090 financial interest, courts “generally focus on whether the contract in question could confer some type of pecuniary advantage to the target of a Section 1090 inquiry.” (See *Eden Township Healthcare District v. Sutter Health* (2011) 202 Cal.App.4th 208, 225.)

Mr. Cartmill has three potential financial interests: the office suites he owns, the lease payments he receives from his tenants and his nutritional supplements business.

Several factors evidence that there will be no gain or loss that would affect Mr. Cartmill or his property, lease income, or business. For example, it is unlikely that the amount of rent the District would pay per square foot, the standard for setting the total rent of commercial property, and the corresponding effect on the property’s value, would have any effect on Mr. Cartmill’s property. The characteristics of the property are such that the owners do not compete for the same tenants. The building in which the Proposed Offices is located is a multi-story building that can house up to 500 occupants. The business park in which Mr. Cartmill’s offices are located is comprised of small low-rise offices suitable for individual small business and not for the larger renters that would occupy the Proposed Offices.

Additionally, you state that there are no known facts suggesting that the proposed relocation would have any effect on the value of nearby commercial properties, such as Mr. Cartmill’s. The Proposed Offices make up less than 3% of the total commercial inventory in the immediate area. Thus, it is highly unlikely that the contract would affect any of these commercial properties.

Accordingly, under Section 1090, Mr. Cartmill is not financially interested in the proposed lease.

Supporting this conclusion are the conflict of interest provisions of the Political Reform Act (the “Act”),<sup>3</sup> which are instructive in defining financial interests for purposes of Section 1090. We are guided by *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090-91, wherein the

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<sup>3</sup> 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 18110 through 18997 of Title 2 of the California Code of Regulations.

court applies the “*in pari materia*” canon of statutory construction in determining that Section 1090 should be harmonized with the Act when possible.

The Act’s conflict of interest provisions ensure that public officials will “perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them.” (Section 81001(b).) Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. In our previous advice letter to Mr. Brand on this same matter (*Brand* Advice Letter, No. I-14-021a), we said that under these same facts, it was not reasonably foreseeable that the District’s relocation would have a material financial effect on Mr. Cartmill’s interests. This result is consistent with our analysis under Section 1090 above.

**Steps Five and Six: Does either a remote interest or non-interest exception apply? Does the rule of necessity apply?**

Our determination that Mr. Cartmill does not have a financial interest in the lease obviates the need to address these questions.

Accordingly, Section 1090 does not prohibit Mr. Cartmill from participating in Board decisions regarding the District’s leasing of the Proposed Offices.

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

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Valentina Joyce  
Counsel, Legal Division

VJ:jgl