

February 24, 2015

James D. Maynard  
Partner, City Attorney for the City of Ione  
Silver & Wright LLP  
1501 28th Street  
Sacramento, CA 95816

Re: Your Request for Advice  
**Our File No. A-14-203**

Dear Mr. Maynard:

This letter responds to your request for advice on behalf of Ione City councilmember Dominic Atlan regarding the conflict of interest provisions of the Political Reform Act (the “Act”)<sup>1</sup> and Section 1090. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance.<sup>2</sup> This letter is based on the facts presented.

Pursuant to Section 1097.1(c)(4), we have forwarded your request to the Attorney General’s Office and the Amador County District Attorney’s Office concerning potential issues raised under Section 1090 and we did not receive a written response from either entity.

Please note that our advice is based solely on the provisions of the Act and Section 1090. We therefore offer no opinion on the application, if any, of other conflict of interest laws such as common law conflict of interest. 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.<sup>3</sup>

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<sup>1</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. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

<sup>2</sup> *In re Oglesby* (1975) 1 FPPC Ops. 71.

<sup>3</sup> Section 1097.1(c)(5).

## QUESTIONS

1. Under the Act, may Councilmember Atlan participate in decisions regarding renewal of a contract with his employer, Castle Oaks Golf Course (“Golf Course”) to maintain landscaping to the entrance to the Golf Course and an adjoining planned housing community?

2. Under Section 1090, may the City Council consider renewing the Golf Course maintenance agreement?

## CONCLUSION

1. No. Councilmember Atlan will have a conflict of interest in the contract and may make, or participate in making decisions involving the Golf Course’s contract with the City for landscaping and maintenance of the entrance to the Golf Course and an adjoining planned housing community. Because Councilmember Atlan is a “public official” under Section 87200 of the Act, he must publicly identify his financial interest, disqualify himself from participating in the matter, and leave the room during any discussion of the matter.

2. Yes. The City Council may consider renewing the Golf Course maintenance agreement because Councilmember Atlan has no financial interest in the contract under Section 1090.

## FACTS

Councilmember Atlan is an employee of the Golf Course, which employs about 30 people. Mr. Atlan has been employed at the Golf Course for more than 15 years. His position is that of “Director of Golf Operations,” and he is one of three department heads at the Golf Course. As an at-will employee, Mr. Atlan does not own stock in the corporation, nor is he a director or officer of the business. He does not participate in the making of any contracts or bids of the Golf Course. He is a salaried employee and his compensation does not vary based on the Golf Course’s financial performance or by any contracts entered into by the company.

The City owns the land underlying the Golf Course and surrounding areas. The City has an agreement with the Golf Course and other parties governing the disposal and use of recycled wastewater for irrigation of the course. This agreement was in place prior to Councilmember Atlan’s election to the city council and will not expire during his term. However, the Golf Course has several existing contracts with the City, some of which may need amendment in the near future.

In 2016, the City will be considering a renewal of an existing maintenance agreement with the Golf Course to upkeep grounds and landscaping to the entrance to the Golf Course and an adjoining planned housing development. You wish to know whether Councilmember Atlan may participate in renewing this contract.

## ANALYSIS

### **Conflict of Interest under the Act:**

Section 87100 prohibits any state or local public official from making, participating in making, or using his or her official position to influence a government decision in which the official has an interest specified in Section 87103. A public official has a “financial interest” in a government decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official’s interests.<sup>4</sup>

In our telephone call of February 3, 2015, you indicated that the city councilmember is a public official who is asking whether he may make or participate in the making of governmental decisions regarding the City’s maintenance and landscaping contract with his employer, the Golf Course. Given these facts, we need not analyze the initial steps of the standard analysis. We address only your questions concerning foreseeability and materiality.

### *Materiality and Foreseeability*

Regulation 18705.1(a), as amended by the Commission at its November 2014 meeting, provides that the reasonably foreseeable financial effect of a governmental decision on a business entity in which an official has a financial interest is material whenever the business entity:

“(1) *Initiates the proceeding* in which the governmental decision will be made *by filing an application, claim, appeal, or request for other government action* concerning the business entity;

“(2) Offers to make a sale of a service or a product to the official’s agency;

“(3) *Bids on or enters into a written contract* with the official’s agency;

“(4) Is the named manufacturer in a purchase order of any product purchased by the official’s agency or the sales provider of any products to the official’s agency that aggregates to \$1,000 or more in any 12-month period;

“(5) *Applies for a permit, license, grant, tax credit, exception, variance, or other entitlement* that the official’s agency is authorized to issue;

“(6) Is the subject of any inspection, action, or proceeding subject to the regulatory authority of the official’s agency; or

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<sup>4</sup> Section 87103; Regulation 18700(a).

“(7) Is otherwise subject to an action taken by the official’s agency, the effect of which is directed solely at the business entity in which the official has an interest.” (Emphasis added.)

Your facts indicate that in 2016, the City will consider the renewal of a landscaping and maintenance contract with Councilmember Atlan’s employer, the Golf Course. Because the City anticipates it will enter into a written contract with the Golf Course at that time, it is reasonably foreseeable that the financial effect on the business entity will be material.

Accordingly, Councilmember Atlan will have a conflict of interest in the contract and may not make, or participate in making decisions involving the Golf Course’s landscaping and maintenance agreement with the City.

#### *Manner of Disqualification*

Because Councilmember Atlan is a member of the City Council, a “public official” under Sections 87200 and 87105 of the Act, and would have a conflict of interest in a decision noticed at a public meeting, he must publicly identify his financial interest, disqualify himself from participating in the matter, and leave the room during any discussion of the matter.<sup>5</sup>

#### **Government Code Section 1090:**

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties.<sup>6</sup> 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.<sup>7</sup>

We employ a six-step analysis to determine whether an official has a disqualifying conflict of interest under Section 1090.

#### *Step One: Is Councilmember Atlan 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.”

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<sup>5</sup> Section 87105; Regulation 18702.5.

<sup>6</sup> *Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.

<sup>7</sup> *Stigall v. Taft* (1962) 58 Cal.2d 565, 569.

City Councils and their members are plainly covered by this prohibition.<sup>8</sup> Therefore, Mr. Atlan and the Ione City Council are subject to the provisions of Section 1090.

*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,<sup>9</sup> 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.’”<sup>10</sup>

Here, the decision at issue involves a written contract between the Golf Course and the City for landscaping and maintenance of the entrance to the Golf Course and an adjoining planned housing development. This agreement is a “contract” under Section 1090.

*Step Three: Is Councilmember Atlan making or participating in making a contract?*

Councilmember Atlan would be making or participating in making a contract if he votes or participates in the matter involving the Golf Course maintenance agreement before the City Council. As a City Councilmember, his participation in the matter before the City Council is presumed under Section 1090, regardless of whether he actually participates in the decision.<sup>11</sup> The Ione City Council’s decision to approve or renew the maintenance agreement involves the making or participation in the making of a contract.

*Step Four: Does Councilmember Atlan have a financial interest in the contract?*

Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.”<sup>12</sup> Officials are deemed to have a financial interest in a contract if they might profit from it in any way.<sup>13</sup>

While Section 1090 does not define “financial interest,” the courts have been instructive in applying this provision. In a recent case, an appellate court stated: “The defining characteristic

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<sup>8</sup> *Thomson, supra*, at p. 645; *City Council v. McKinley* (1978) 80 Cal.App.3d 204, 213.

<sup>9</sup> 84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995).

<sup>10</sup> *People v. Honig, supra*, at p. 351 citing *Stigall, supra*, at pp. 569, 571.

<sup>11</sup> When board members have the power to execute contracts, participation is constructive. Thus, where an official is a member of a board or commission that has the power to execute the contract, he or she is conclusively presumed to be involved in the making of his or her agency’s contracts irrespective of whether he or she actually participates in the making of the contract. (*Thomson v. Call* (1985) 38 Cal.3d 633, 645 & 649; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201; 89 Ops.Cal.Atty.Gen 49 (2006).)

<sup>12</sup> *People v. Honig, supra*, at p. 333.

<sup>13</sup> *Ibid.*

of a prohibited financial interest is whether it has the potential to divide an official's loyalties and compromise the undivided representation of the public interests the official is charged with protecting."<sup>14</sup> The court found that although an employee has a financial interest in his salary, where a contract would have no direct or indirect effect on or nexus with the public official's salary, there is no financial interest under Section 1090.<sup>15</sup>

In the current situation, the councilmember would not have a financial interest in the contract as an employee of the Golf Course, the contracting party. Councilmember Atlan's salary is not affected by the City Council's contract with the Golf Course and he does not gain a commission on the contract. Therefore, Section 1090 does not prohibit the City Council from contracting with the Golf Course.

Accordingly, the City Council may consider renewing the Golf Course maintenance agreement in 2016.

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

Sincerely,

John W. Wallace  
Assistant General Counsel

By: Emelyn Rodriguez  
Counsel, Legal Division

ER:jgl

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<sup>14</sup> *Eden Township Healthcare District v. Sutter Health* (2011) 202 Cal. App. 4th 208, 221.

<sup>15</sup> *Ibid.*