

March 23, 2014

Grace Arupo-Rodriguez  
Deputy Director of Legal Affairs  
Governor's Office of Business and  
Economic Development (GO-Biz)  
1325 J Street, 18th Floor  
Sacramento, California 95814

Re: Your Request for Advice  
**Our File No. A-14-153**

Dear Ms. Arupo-Rodriguez:

This letter responds to your request for advice on behalf of members of the California Travel and Tourism Commission ("Visit California") regarding the potential application of certain statutory exceptions under Government Code Section 1090.<sup>1</sup> Please note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), meaning that any advice we provide assumes the facts the requester provides to us are complete and accurate. If this is not the case, then our advice could be different.

Regarding our advice on Section 1090, we are required to forward your request and all pertinent facts to the Attorney General's Office and the Sacramento 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).)

Visit California is a non-profit corporation formed under Section 501(c)(6) of the Internal Revenue Code to promote California as a travel destination. It was formed in 1998 pursuant to the California Tourism Marketing Act. Visit California is governed by a 37-member commission and employs staff.

Visit California holds periodic commission meetings throughout California to conduct its business. These meetings are held at hotels – Visit California staff selects and contracts with the hotels without involvement by any of the agency's commissioners. Many of Visit California's

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

commissioners own stock in or receive income as members, officers or employees of hotel chains, some of whose hotels may be selected and contracted to hold commission meetings.

On February 27, 2015, you provided us with a spreadsheet that lists the names of the commissioners and includes, among other information, the company each is affiliated with, their titles, the size of each company, and the commissioners' percentage of shares owned in their respective companies. Based on the information provided in the spreadsheet, you asked that we provide you with an opinion concerning the Section 1090 exceptions that potentially apply to the commissioners listed.<sup>2</sup> Although we cannot conclude with certainty using the information we have whether certain exceptions apply to the commissioners, the information below should allow each commissioner to make that determination based on his or her specific situation.<sup>3</sup>

Under the current law, when Section 1090 applies to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain. Instead, the entire governing body is precluded from entering into the contract. (*Thomson v. Call* (1985) 38 Cal.3d 633, 647-649; *Stigall v. Taft* (1962) 58 Cal.2d 565, 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).) However, the Legislature has created various statutory exceptions to Section 1090's prohibition where the financial interest involved is deemed a "remote interest," as defined in Section 1091, or a "noninterest," as defined in Section 1091.5.

If a "remote interest" is present, the contract may be made if (1) the officer in question discloses his or her financial interest in the contract to the public agency, (2) such interest is noted in the entity's official records, and (3) the officer abstains from any participation in the making of the contract. (Section 1091(a); 88 Ops.Cal.Atty.Gen. 106, 108 (2005); 83 Ops.Cal.Atty.Gen. 246, 248 (2000).) If a "noninterest" is present, the contract may be made without the officer's abstention, and generally, a noninterest does not require disclosure. (*City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 514-515; 84 Ops.Cal.Atty.Gen. 158, 159-160 (2001).)

Looking to the exceptions, it does appear that at least two "remote interest" exceptions, identified below, may apply to commissioners who own less than 3% of the shares in their companies. However, it does not appear that any of the remote or noninterest exceptions will apply to those commissioners who own 3% or more of the shares in their companies.

The first exception is found in Section 1091(b)(2), which provides that there is a "remote interest" when: (1) the private contracting party has 10 or more employees other than the officer;

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<sup>2</sup> Typically, we employ a six-step analysis for Section 1090 advice. However, because the focus of this letter is the potential applicability of Section 1090 exceptions (Step 5) to the commissioners, we do not address the other Steps in the analysis.

<sup>3</sup> Of course, whenever possible, we urge you to request formal written advice regarding Section 1090 in those situations where Visit California may consider entering a contract with a commissioner's company so that we can thoroughly analyze the specific facts of each situation.

(2) the officer was employed by the private contracting party at least three years prior to initially joining the public body; (3) the officer owns less than 3% of the stock in the private contracting party; (4) the officer is not an officer or director of the private contracting party; and (5) the officer did not directly participate in formulating the bid of the private contracting party.

The second exception is found in Section 1091(b)(14), which provides that there is a “remote interest” when: (1) the officer owns less than 3% of the shares in his or her company; (2) the company is a for-profit corporation; and (3) the officer’s ownership of those shares derived from his or her employment with the company.

Both exceptions thus require that a commissioner own less than 3% of the shares in his or her company. Looking to the spreadsheet, there are 17 commissioners who meet this requirement.<sup>4</sup> However, the exception in Section 1091(b)(2) would likely exclude most of those commissioners based on their status as an officer or director of their respective companies.

The exception under Section 1091(b)(14) is the “remote interest” that appears most likely to apply to the commissioners who own less than 3% of the shares in their company. That exception would apply to those who are employed by a for-profit corporation and derived ownership of those shares through employment with their company. Assuming this is the case, Section 1090 would not prohibit contracts with those specific officials’ employers.

As mentioned, when a “remote interest” applies to a commissioner, he or she must comply with the requirements set forth in Section 1091(a). In addition to those requirements, he or she must not attempt to influence other Visit California commissioners, including staff, regarding the proposed contract. (Section 1091(c).)

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

Sincerely,

John W. Wallace  
Assistant General Counsel

By: Jack Woodside  
Counsel, Legal Division

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<sup>4</sup> The spreadsheet shows the following commissioners own less than 3% of the shares in their companies: Paula Beck, James Bermingham, Jim Burba, Ian Carter, Michael Colgazier, Kevin Fat, Jim Kaufmann, Joseph Knight, Aaron Medina, Doug Meyers, Robert “Cody” Plott, Jr., Jeff Senior (except for the Claremont in Berkeley), Xiomara Wiley, Will Withington and Gillian Zucker.