



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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September 15, 2015

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Re: Your Request for Advice  
**Our File No. A-15-059**

Dear Mr. Lindgren:

This letter responds to your request for advice on behalf of the City of Rancho Cordova and Councilmember Donald Terry regarding the conflict of interest provisions of the Political Reform Act (the “Act”)<sup>1</sup> and Section 1090.

Please note that nothing in this letter should be construed to evaluate any conduct that may have already taken place. In addition, this letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as the finder of fact in providing advice.<sup>2</sup>

Pursuant to Section 1097.1(c)(4), we have forwarded your request to the Attorney General’s Office and the Sacramento 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, the following advice is not admissible in a criminal proceeding against any individual other than the requestor.<sup>3</sup>

### QUESTIONS

1. Under the Act, may Councilmember Terry make, participate in making, or influence City budget or funding decisions involving his wife’s employer, Capital Airshow Group (“CAG”)?

2. Under Section 1090, may Councilmember Terry participate in the City’s contracts with CAG?

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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).

## CONCLUSIONS

1. No. The Act prohibits Councilmember Terry from participating in decisions involving CAG, because he has a financial interest in his spouse's employer, CAG, and it is reasonably foreseeable that the decisions will have a material financial effect on the nonprofit entity.

2. No. However, Councilmember Terry's financial interest in his wife's employer, CAG, qualifies as a "remote interest" under Section 1091(b). Therefore, the City Council may consider decisions regarding CAG, so long as councilmember Terry discloses to the City Council his financial interest in the contract, the interest is noted in the City Council's official records, and Councilmember Terry abstains from participating in making any contract with CAG.

## FACTS

Councilmember Terry was elected to the City Council on December 2012. Angela Terry, Councilmember Terry's spouse, is currently employed with CAG, a nonprofit 501(c)(3) organization. As its Development Director, Mrs. Terry holds a salaried, non-commissioned position. The development director's primary responsibility is to oversee or implement fundraising strategies. CAG has no more than three employees.

The CAG's purpose is to host the annual California Capital Airshow held at Mather Field Airport, and to promote aviation by awarding scholarships to students interested in science and technology related fields.

Since CAG's inception in 2005, the City has provided significant support to the organization. The City's financial support of the CAG is integral to its ability to operate year-round. The majority of the City's support has been through in-kind contributions, such as staff time and resources, and technical support. For example, City staff dedicates work time to CAG projects in preparation for the annual airshow. City staff contributes time to graphic design work, information technology services, administrative support, traffic management, and crowd control.

CAG generates revenues through admission tickets, contributions from sponsors, grants, and membership fees. In 2011, the prior City Manager authorized a \$100,000 loan to CAG. The term of the loan agreement was for three (3) years. In the fall of 2014, the current City Manager authorized an extension of that loan agreement as a line of credit for an amount not to exceed \$100,000 for an additional five years. The line of credit is set to expire on December 31, 2019.

The City Council's decisions regarding CAG take two forms: (1) agenda items to provide direct financial support to CAG, such as the line of credit or sponsoring the KidZone Exhibit at the Airshow or (2) budgetary decisions about staffing levels for departments that assist CAG, such as the Information Technology Department and Public Works Department.

You stated that decisions regarding the City's funding of CAG or budgetary determinations for City Departments that assist CAG are "decisions that would impact the organization's finances, including Mrs. Terry's income as an employee of the CAG." You also stated that the financial effect of a City Council decision involving the CAG would have a distinguishable effect on Councilmember

Terry because of the limited number of paid staff CAG employs and the noticeably disproportionate effect the decision will have on his financial interest compared to its effect on the public generally.

You have advised Councilmember Terry that he will have to abstain from any decisions on agenda items involving CAG.

With respect to budgetary decisions about department staffing levels, City staff has informed you that line items for staff resources dedicated to the Airshow can be segregated. The funding levels of both types of support will be captured and the City Council (without Councilmember Terry's participation) will be asked to vote to include those items in the final budget. Councilmember Terry would later participate in decisions to approve the overall budget.

You ask whether Councilmember Terry can participate in decisions involving CAG and whether the City can enter into contracts with CAG.

## 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 a financial interest.

Financial interests include:

- Any real property in which the public official has a direct or indirect interest of at least \$2,000. (Section 87103(b).)
- Any business entity in which the public official has a direct or indirect investment worth at least \$2,000 and any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(a) and (d).)
- Any source of income, such as a business entity, from which the official has received income of \$500 or more within 12 months before the decision. This also includes income from any client of the business entity of at least \$500, provided to and received by the public official within 12 months before the decision is made. (Section 87103(c).)
- Any donor of gift(s) amounting to a total of at least \$460 within 12 months before a decision is made. (Section 87103(e).)
- A public official's own personal finances, or those of a member of his or her immediate family. (Section 87103.)

As an elected member of the Rancho Cordova City Council, Councilmember Terry is a public official. He has a financial interest in his own personal finances and those of his immediate family, including his spouse. Councilmember Terry also has a community property interest in his

spouse's income from CAG, if the income totaled \$500 or more within twelve months prior to any governmental decision.

We focus on the Councilmember's financial interest in CAG as his wife's employer and source of income.

Please note that our analysis applies only to prospective decisions and we decline to provide advice with regard to past conduct in your request.<sup>4</sup>

### 1. Foreseeability and Materiality

A financial effect is presumed reasonably foreseeable if the financial interest is the subject of a governmental decision before the official or the official's agency. (Regulation 18701(a).) A financial 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 financial interest. (Regulation 18701(a).)

Similarly, a reasonably foreseeable financial effect of a governmental decision on an official's financial interest is material if the source is an applicant, contracting party, or is otherwise named or identified as the subject of the proceeding. (Regulation 18702.3).

Here, the City Council would be making decisions regarding the City's contribution to CAG's budget and funding. CAG would be the subject of the proceeding and any financial effect of the decision is presumed to be reasonably foreseeable and material.

Therefore, Councilmember Terry would have a disqualifying financial interest in budgetary, funding, and other decisions involving CAG. Therefore, he is prohibited from voting on, directly participating in, or influencing City Council decisions involving CAG.<sup>5</sup>

### 2. Disqualification

Because Councilmember Terry has a disqualifying financial interest, he is prohibited from voting on, directly participating in, or influencing City Council decisions involving CAG.

An official is making a decision if the official "authorizes or directs any action, votes, appoints a person, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his agency." (Regulation 18704(a).) Participating in a decision occurs when the official "provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review." (Regulation 18704(b).)

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<sup>4</sup> Regulation 18329(b)(8)(A).

<sup>5</sup> A public official is prohibited from making, participating in making, or influencing governmental decisions if the reasonably foreseeable material financial effect is distinguishable from the public generally. (Regulation 18703.) You indicate that the "financial effect of a City Council decision involving the CAG will have a distinguishable effect on Councilmember Terry because of the limited number of paid staff CAG employs and the noticeably disproportionate effect on his financial interest the decision will have compared to its effect on the public generally." Therefore, the exception does not apply.

Lastly, an official uses his or her position to influence a decision if the official contacts or appears before any official in his or her agency for the purpose of affecting a decision. (Regulation 18704(c).)

In addition, Section 87105 and Regulation 18707 require Councilmember Terry to identify publicly each type of financial interest involved that gives rise to the disqualifying conflict of interest. The identification must be made after the announcement of the agenda item to be discussed or voted upon, but before the discussion or vote commences. Councilmember Terry must also recuse himself and leave the room after identifying the forms of conflict.

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

Section 1090 codifies the common law prohibition against “self-dealing” with respect to contracts. 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 the official subject to the provisions of Section 1090?*

Section 1090 applies to virtually all state and local officers, employees, and multi-member bodies, whether elected or appointed. As member of the Rancho Cordova City Council, Mr. Terry is 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>8</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>9</sup>

Here, the decisions at issue involve contracts between the City and CAG. Loans and lines of credit generally involve “contracts.” Accordingly, loans and budget decisions involving the City and CAG are contracts under Section 1090.

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

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

<sup>8</sup> 84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995).

<sup>9</sup> *People v. Honig* (1996) 48 Cal.App.4th 289, at p. 351 citing *Stigall, supra*, at pp. 569, 571.

*Step Three: Is the official making or participating in making a contract?*

Councilmember Terry would be making or participating in making a contract if he votes or participates in contract decisions between the City and CAG. As a city councilmember, his participation in awarding financial support and executing contracts is presumed under Section 1090, regardless of whether he actually participates in the decisions.<sup>10</sup> If a board member is financially interested in the contract, and no exception applies, Section 1090 prohibits the contract from being made.

*Step Four: Does the official 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>11</sup> As used in Section 1090, this means any financial interest that might interfere with a city officer’s unqualified devotion to his public duty. Officials are deemed to have a financial interest in a contract if they might profit from it in any way.<sup>12</sup> In addition, an official also has an interest in the community and separate property income of his or her spouse,<sup>13</sup> and the reach of this financial interest is broad.<sup>14</sup>

While Section 1090 does not define “financial interest,” the courts have issued decisions applying this provision. In a recent case, an appellate court stated, “[t]he defining characteristic 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>15</sup>

“The certainty of financial gain is not necessary to create a conflict of interest . . . . The government’s right to the absolute, undivided allegiance of a public officer is diminished as effectively where the officer acts with a hope of personal financial gain as where he acts with certainty.”<sup>16</sup>

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<sup>10</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 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>11</sup> *People v. Honig, supra*, at p. 333.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Nielsen v. Richards* (1925) 75 Cal.App. 680; *Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal.App.4th 655; 89 Ops.Cal.Atty.Gen. 69 (2006).

<sup>14</sup> 75 Ops.Cal.Atty.Gen. 20 (1992) [concluding the payment of expenses for a boardmember’s spouse to accompany the board member to a conference was a financial interest covered by section 1090].

<sup>15</sup> *Eden Township Healthcare District v. Sutter Health* (2011) 202 Cal.App.4th 208, 221.

<sup>16</sup> *People v. Gnass* (2002) 101 Cal.App.4th 1271, 1298 (citations omitted).

Councilmember Terry is a city councilmember whose spouse works for and receives income from CAG, which is seeking to obtain loans and other financial support from the City. The City provides significant support to the organization. The City's financial support of the CAG is integral to its ability to operate year-round. These contract decisions would affect the organization's finances, including Mrs. Terry's income as an employee of the CAG.

Under Section 1090, Councilmember Terry is financially interested in contracts between the City and CAG, his wife's employer. Therefore, he is prohibited from participating in decisions regarding any future contracts (or renewals, modifications etc.) the City enters into with CAG, unless an exception applies.

*Step Five: Does either a remote interest or a non-interest exception apply?*

Generally, when the public official with a financial interest is a member of a public body or board, the prohibition extends to the entire body or board; the entire governing body is precluded from entering into the contract.<sup>17</sup>

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.

Section 1091(b) specifies that a public officer has a "remote interest" as "an officer or employee of a nonprofit entity exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. Sec. 501(c)(3)) or a nonprofit corporation, except as provided in paragraph (8) of subdivision (a) of Section 1091.5."<sup>18</sup>

If there is a "remote interest," a 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.<sup>19</sup> If a "noninterest" is present, the contract may be made without the officer's abstention, and generally, a noninterest does not require disclosure.<sup>20</sup>

Councilmember Terry would have a remote interest in any contract between the City of Rancho Cordova and CAG if he were an officer or employee of the nonprofit 501(c)(3)

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<sup>17</sup> *Thomson, supra*, at pp. 647-649; *Stigall, supra*, at p. 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).

<sup>18</sup> 89 Ops.Cal.Atty. Gen. 258 (2006), applying the remote interest exception in Section 1091(b) to a case involving the donation of city funds to nonprofit entity whose executive director was spouse of a member of city council.

<sup>19</sup> Section 1091(a); 88 Ops.Cal.Atty.Gen. 106, 108 (2005); 83 Ops.Cal.Atty.Gen. 246, 248 (2000).

<sup>20</sup> *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).

organization. However, it is Councilmember Terry's spouse that is the employee of CAG so we focus on whether the "remote interest" exception under Section 1091(b)(1) would also apply to the councilmember. We believe that it does.

Here, the City councilmember would have a financial interest in proposed contracts between the City and his wife's employer, CAG, which hopes to obtain loans and other financial support from the City. In this case, the councilmember "stands in the shoes of his spouse" for purposes of Section 1090.<sup>21</sup> Therefore, he must be considered an "employee" of CAG in the described circumstances.

Nevertheless, Councilmember Terry's financial interest in his wife's nonprofit 501(c)(3) employer qualifies as a "remote interest" under Section 1091(b). Therefore, the city council may consider decisions regarding CAG, if Councilmember Terry abstains from participating in making any contract with CAG.

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

Sincerely,

Hyla P. Wagner  
General Counsel

/s/

By: Emelyn Rodriguez  
Senior Counsel, Legal Division

ER:jgl

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<sup>21</sup> *Thorpe v. Long Beach Community College* (2000) 83 Cal.App.4th 655, 659; *Nielsen v. Richards* (1925) 75 Cal.App. 680; 89 Ops. Cal. Atty. Gen. 258 (2006).