



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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May 7, 2015

David M. Snow  
Richards Watson Gershon  
355 South Grand Avenue, 40<sup>th</sup> Floor  
Los Angeles, CA 90071-3101

Re: Your Request for Advice  
**Our File No. A-15-067**

Dear Mr. Snow:

This letter responds to your request for advice regarding the conflict of interest provisions under Section 1090.<sup>1</sup> Please note that we do not advise on any other area of law, including Public Contract Code or common law conflicts of interest. We are also 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.

In regard to our advice on Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General's Office and the San Bernardino 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 Councilmember Bob Duncan and the Yucaipa City Council from approving potential contracts between the City and a real estate broker with whom Councilman Duncan is affiliated as a real estate agent?

### CONCLUSION

No. Section 1090 does not prohibit Councilmember Duncan and the Yucaipa City Council from approving potential contracts between the City and a real estate broker with whom Councilman Duncan is affiliated as a real estate agent, as explained below.

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

## FACTS

Councilman Duncan recently began as a real estate agent with a local real estate broker (the “Broker”) that has been providing property management services to the City since prior to this affiliation. Councilman Duncan is not an employee of the Broker or the Broker’s firm, but is affiliated as a real estate agent. The Broker would like to continue providing property management services to the City and possibly serve as a real estate broker on behalf of the City for future sales of excess real property.

In the event that the City and the Broker did enter into a contract for the sale of excess City property or other services, Councilman Duncan would not be involved in any real estate transaction related to any City property, and he would receive no compensation from any such real estate transaction the Broker consummated or other services the Broker provided.

## 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) 103Cal.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.)

We normally employ a six-step analysis to determine whether an official has conflict of interest under Section 1090. Councilmember Duncan is an official subject to Section 1090 (Step One) who would be participating in a decision to approve a contract between the Broker and the City (Steps Two and Three).

### **Steps Four and Five: Does Councilmember Duncan have a financial interest in the potential contracts?**

Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest” (*People v. Honig, supra*, 48 Cal.App.4th at p. 333), and officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*Ibid.*) 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. (*Thomson v. Call, supra*, 38 Cal.3d at pp. 645, 651-652; see also *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; *People v. Darby* (1952) 114 Cal.App.2d 412, 431-432; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

In *Eden Township Healthcare Dist. v. Sutter Health* (2011) 202 Cal.App.4<sup>th</sup> 208, the First District Court of Appeal found that, under Section 1090, “if the contract itself offers no benefit to the official, either directly or indirectly, then the official is not financially interested in the contract. . . .” (*Id.* at p. 228.) In analyzing the “financial interest” element of Section 1090, the court noted that in prior cases where a prohibited conflict was found, “the party who was found to have had a prohibited financial interest received a tangible benefit that arose out of the contract at issue.” (*Id.* at 226.) The court further noted that, although the public official who was alleged to have violated Section 1090 participated in his official capacity in making a contract with his private employer, there was no evidence that the contract would affect the official’s “salary, benefits, or status.” (*Id.* at p. 227.)

Here, consistent with the findings in *Eden*, the main issue distills to whether the potential contracts between the Broker and the City will benefit Councilmember Duncan directly or indirectly in the form of a “tangible benefit” such as impacting his “salary, benefits, or status.” Based on the facts you have provided, we do not believe it will. For example, Councilmember Duncan, who is not even an employee of the Broker, would not be involved in any real estate transaction related to any City property, and he would receive no compensation from any such real estate transaction the Broker consummates or other services the Broker provides. In addition, there is nothing to suggest that the viability of the Broker he is affiliated with is dependent on the securing contracts with the City.

Accordingly, Section 1090 does not prohibit Councilmember Duncan and the Yucaipa City Council from approving contracts between the Broker and the City.<sup>2</sup>

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

Sincerely,

Hyla Wagner  
General Counsel

/s/

By: Jack Woodside  
Senior Counsel, Legal Division

JW:jgl

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<sup>2</sup> Based on this conclusion, we do not address the statutory exceptions to Section 1090. We note, however, that the non-interest exception under Section 1091.5(a)(10) would appear to apply in this matter, providing further support for our conclusion that Councilmember Duncan does not have a prohibitory financial interest under Section 1090.