



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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June 30, 2015

Ryan O. Hodge  
Assistant City Attorney  
City of Santa Ana  
20 Civic Center Plaza M-29  
Santa Ana, CA 92702

Re: Your Request for Advice  
**Our File No. A-15-068**

Dear Mr. Hodge:

This letter responds to your request for advice on behalf of Planning Commissioners Eric Alderete and Bruce Bauer regarding Government Code Section 1090.<sup>1</sup> Please note that we do not advise on other areas of law, such as Public Contracts 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.

We have forwarded your request to the Attorney General's Office and the Orange County District Attorney's Office and 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).)

### QUESTIONS

1. Is Planning Commissioner Alderete prohibited under Section 1090 from entering into a Mills Act contract?
2. Is Planning Commissioner Bruce Bauer, who also sits by designation on the Historic Resources Commission, prohibited under Section 1090 from entering into a Mills Act contract?

### CONCLUSIONS

1. No. Planning Commissioner Alderete may apply for a Mills Act contract.
2. Yes. Planning Commissioner Bauer may not submit a Mills Act contract because the Historic Resources Commission must approve the Mills Act applications.

### FACTS

You are the assistant city attorney for the city of Santa Ana and you write on behalf of Planning Commissioner Alderete as well as Planning Commissioner Bauer, who also sits by designation on the Historic Resources Commission.

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

California legislators adopted the Mills Act in 1972. The Mills Act permits cities to enter into a contract with the owner of a qualified historical property who agrees to rehabilitate, restore, preserve, and maintain the property in exchange for property tax reductions. The amount of tax savings varies.

The City of Santa Ana is a local government participant in the program and enters into Mills Act Agreements with qualified historical property owners. An owner of a qualified historical property who wants to participate in the Mills Act Program must submit an application to the City of Santa Ana, which is then reviewed and must be approved by the City of Santa Ana Historic Resources Commission and City Council. The Planning Commission does not review or take any action on the applications. An approved application results in the formation of a Historic Property Preservation Agreement, which remains in effect for a minimum of ten years. The Mills Act Agreement establishes different preservation conditions depending on the property's needs, but all contracts must contain certain statutorily specified terms.

The two Planning Commissioners, one of whom is also appointed as the Planning Commission representative to the City's Historic Resources Commission, own historical properties that may qualify for the City's Mills Act program.

## 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.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

We have previously had occasion to opine on Mills Act contracts regarding public officials who are subject to Section 1090 and whose public position requires them to review and approve Mills Act applications as well as public officials whose offices are not involved.

In the first letter, written to your office last year, we found that a city council member who was involved in approving Mills Act applications had a prohibitive conflict of interest in the contract under Section 1090 and no exception applied. (See *Hodge* Advice letter, C-14-012, enclosed.)

In the second, we found that in a similar factual situation, the public official was not barred from participation under Section 1090 because her office did not "in any way" participate in the

review and approval process of the Mills Act contract. (See *Reynolds* Advice Letter, A-14-180, enclosed.) As we discussed in *Hodge, supra*, neither a remote interest nor a non-interest exception applies, nor does the rule of necessity.

Our analysis has not changed, and given the existence of similar facts, we do not repeat it here. Planning Commissioner Alderete does not act on the Mills Act contracts in his official capacity and may submit an application. Planning Commissioner Bauer, who also sits on the Historic Resources Commission, is barred from applying under the Mills Act because that Commission must approve the application before submitting it to the City Council.

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

Sincerely,

Hyla P. Wagner  
General Counsel

/s/

By: Heather M. Rowan  
Senior Counsel, Legal Division

HMR:jgl