



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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July 20, 2015

John Driscoll  
City of Placerville  
Attn: City Attorney  
3101 Center Street  
Placerville, CA 95667

Re: Your Request for Advice  
**Our File No. A-15-088**

Dear Mr. Driscoll:

This letter responds to your request for advice on behalf of Placerville City Councilmember Wendy Thomas regarding Government Code Section 1090 and the provisions of the Political Reform Act (the “Act”).<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.

For 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 El Dorado County District Attorney’s Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. We are also required to advise you that, for purposes of Section 1090, the advice “is not admissible in a criminal proceeding brought against any individual other than the requestor.” (Section 1097.1(c)(5).)

## QUESTIONS

1. Is it a violation of Section 1090 for the City of Placerville to lease a city-owned parcel to a councilmember’s limited partnership or the partnership’s tenant and is there still a violation if the councilmember recuses herself from the decision?
2. Does it make a difference if the new lease contains exactly the same terms as a preexisting lease with the councilmember’s former tenant?
3. Can the City of Placerville consent to the assignment of the existing lease to the limited partnership or a new tenant if the councilmember recuses herself from the decision?

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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.

4. Can the City of Placerville continue to accept rent payments, assuming the limited partnership is making the payments, until the expiration of the existing lease?

5. If the lease terminates or expires, can the City of Placerville grant a license or encroachment permit to either the limited partnership or a new tenant for a sign on the parcel advertising the business if the councilmember recuses herself from the decision?

### **CONCLUSIONS**

1. Section 1090 prohibits the City of Placerville from leasing the parking lot to the limited partnership, even if the councilmember recuses herself from the decision. However, the City may lease the property to the new tenant so long as the councilmember discloses her financial interest and abstains from the decision.

2. The terms of the new lease are not relevant to our analysis under Section 1090.

3. While the City of Placerville may not assign the existing lease to the limited partnership, it may assign the lease to a new tenant so long as the councilmember discloses her financial interest and abstains from the decision.

4. Section 1090 does not preclude the City of Placerville from accepting rent payments until the expiration of the existing lease regardless of the source.

5. The City of Placerville may not grant a license or permit to the partnership, but may grant a license or permit to a new tenant so long as the councilmember discloses her financial interest and abstains from the decision.

### **FACTS**

In May of 2014, the California Department of Transportation (“Caltrans”) relinquished an interest in a parcel of real property (“parking lot”) to the City of Placerville (“City”). The parking lot is a small-improved parking lot, which includes a sign for an adjacent Carrows restaurant. Carrows leases the adjacent property upon which the restaurant is located (“restaurant property”) from a limited partnership (“Partnership”).

Approximately 3 years ago, before relinquishing the parking lot to the City, Caltrans leased the parcel to Carrows. The term of the lease is for 5 years and 7 months from January 1, 2011 until July 9, 2016. Caltrans also assigned its lease rights to the City when Caltrans relinquished the parking lot.

Carrows has recently closed the restaurant located next to the parking lot. However, the City is continuing to receive the rental payments for the parking lot and the rent is current. It appears the Partnership, which owns the restaurant property, is currently paying the rent. The Partnership has expressed an interest in having the City lease the parking lot either to the Partnership or to a possible new tenant on the restaurant property. However, City Councilmember Wendy Thomas is one of the Partnership’s limited partners.

## 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 employ the following six-step analysis to determine whether the Councilmember Thomas will have a conflict of interest under Section 1090.

### **Step One: Will the provisions of Section 1090 apply?**

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 anybody or board of which they are members.”

### **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 (84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), 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.’” (*People v. Honig, supra*, at p. 351 citing *Stigall, supra*, at pp. 569, 571.)

### **Step Three: Will the public employee or official be making or participating in making a contract?**

Typically, a contract is “made” on mutual assent of the involved parties. (*Stigall, supra*, at p. 569.) In addition, making or participating in making a contract has been broadly construed to include those instances where a public official has influence over the contract or its terms. (See 80 Ops. Cal. Atty. Gen. 41.) Notably, in relation to a public body, when members of a public board, commission or similar body have the power to execute contracts, each member is conclusively presumed to be involved in the making of all contracts by his or her agency regardless of whether the member actually participates in the making of the contract. (*Thomson, supra* at pp. 645 & 649; *Fraser-Yamor Agency, Inc. v. County of DelNorte* (1977) 68 Cal.App.3d 201; 89 Ops.Cal.Atty.Gen. 49 (2006).)

**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” (*People v. Honig, supra*, 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. (See e.g., *Thomson, supra*, at pp. 645, 651-652; see also *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5.)

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

As a general rule, when Section 1090 applies to one member of a governing body of a public entity, as here, the prohibition cannot be avoided by having the interested board member abstain; the entire governing body is precluded from entering into the contract. (*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).) The Legislature has created various statutory exceptions to Section 1090’s prohibition including certain exceptions for “remote interests” and “non-interests.”

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).)

**Step Six: Does the rule of necessity apply?**

In limited circumstances, the “rule of necessity” has been applied to allow the making of a contract that Section 1090 would otherwise prohibit. (88 Ops.Cal.Atty.Gen. 106, 110 (2005).) Under the rule of necessity, a government agency may acquire an essential service, despite the existence of a conflict, when no source other than that which triggers the contract is available; the rule “ensures that essential government functions are performed even where a conflict of interest exists.” (*Eldridge v. Sierra View Hospital Dist.* (1990) 224 Cal. App. 3d 311, 322.)

*1. Is it a violation of Section 1090 for the City of Placerville to lease a city-owned parcel to a councilmember’s limited partnership or the partnership’s tenant and is there still a violation if the councilmember recuses herself from the decision?*

In this case, Section 1090 applies to all councilmembers and the lease is clearly a contract. Moreover, Councilmember Thomas will have a financial interest in any lease involving the parking lot and is conclusively presumed to be involved in the making of the lease regardless of whether she actually participates in the making of the contract. Because there is no indication that the rule of

necessity may apply, Section 1090 precludes the City from entering into the lease unless a remote interest or non-interest exception applies.

For a new lease involving the parking lot, the only remote interest and non-interest exceptions that warrant further discussion are the exceptions for tenants and landlords. Under 1091(b)(5), an official has a remote interest in a contract where his or her relationship is “[t]hat of a landlord or tenant of the contracting party.” Under Section 1091.5(a)(4), an official is deemed not interested in the subject contract if his or her interest constitutes:

“That of a landlord or tenant of the contracting party if the contracting party is ... any county or city of this state ... unless the subject matter of the contract is the property in which the officer or employee has the interest as landlord or tenant in which event his or her interest shall be deemed a remote interest within the meaning of, and subject to, the provisions of Section 1091.

Interpreting these exceptions, we have advised that the “contracting party” is never the city that the councilmember represents, but “the party who is attempting to contract with the city of the financially interested councilmember.” (*Russell* Advice Letter, No. C-14-033.)

For purposes of any future contract with the Partnership, the contracting party is the Partnership and neither of these exceptions is applicable. Accordingly, Section 1090 prohibits the City from leasing the parking lot to the Partnership even if Councilmember Thomas recuses herself from the decision.

Nonetheless, if the Partnership leases the property to a new tenant and the City leases the parking lot to the tenant, the tenant is the contracting party for purposes of the parking lot lease. Accordingly, as the tenant’s landlord, Councilmember Thomas will only have a remote interest in the tenant’s parking lot lease and the City may lease the property to the new tenant so long as Councilmember Thomas discloses her financial interest and abstains from the decision as specified in Step 5 above.

*2. Does it make a difference if the new lease contains exactly the same terms as a preexisting lease with the councilmember’s former tenant?*

The terms of the new lease are not relevant to our analysis under Section 1090. Any renewal of a lease constitutes the “making” of a contract prohibited under Section 1090. (See *City of Imperial Beach, supra*, at p. 197.)

*3. Can the City of Placerville consent to the assignment of the existing lease to the limited partnership or a new tenant if the councilmember recuses herself from the decision?*

The analysis of the assignment of the existing lease is same as the analysis of a new lease under Question 1 above. While the City may not assign the existing lease to the Partnership, the City may assign the lease to a new tenant so long as Councilmember Thomas discloses her financial interest and abstains from the decision.

*4. Can the City of Placerville continue to accept rent payments, assuming the limited partnership is making the payments, until the expiration of the existing lease?*

Generally, Section 1090 prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. For purposes of the existing lease, Section 1090 does not preclude the City from accepting rent payments until the expiration of the lease regardless of the source.

*5. If the lease terminates or expires, can the City of Placerville grant a license or encroachment permit to either the limited partnership or a new tenant for a sign on the parcel advertising the business if the councilmember recuses herself from the decision.*

Based upon the facts provided, we cannot distinguish an agreement allowing the Partnership or a new tenant the use of the parking lot for purposes of a sign advertising the business from a new contract merely because the agreement takes a different form. Accordingly, the City may not grant a license or permit to the Partnership, but may grant a license or permit to a new tenant so long as Councilmember Thomas discloses her financial interest and abstains from the decision.

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

Sincerely,

Hyla P. Wagner  
General Counsel

/s/

By: Brian G. Lau  
Senior Counsel, Legal Division

BGL:jgl