



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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August 1, 2016

Jane James  
Planning Manager  
P O Box 190  
Huntington Beach CA 92648-2702

Re: Your Request for Advice  
**Our File No. A-16-138**

Dear Ms. James:

This letter responds to your request for advice regarding your duties as a Planning Manager of the Huntington Beach Community Development Department under the conflict of interest provisions of the Political Reform Act (the “Act”)<sup>1</sup> and Section 1090. 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 Orange 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).)

### QUESTIONS

1. Can your spouse accept employment as an engineer to Lilley Planning Group, Inc. (“Lilley”), as an employee or independent contractor, without creating a conflict of interest for you?
2. If your spouse accepts the position with Lilley, may you manage the contract between the City and Lilley?
3. If your spouse accepts the position with Lilley, may you negotiate a new contract with Lilley in the future?

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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.

## CONCLUSIONS

1. If your spouse accepts employment with Lilley, you will have a financial interest in Lilley and pursuant to Section 87100 you may not make, participate in making, or influence any decision that will financially affect Lilley. Moreover, Section 1090 would require you to abstain from any modification, extension or renegotiation of the existing contract, and any new contract with Lilley.

2. Pursuant to Section 87100, you may not make, participate in making or influence any decision affecting Lilley. This would prohibit you from administering the Lilley contract.

3. Both Section 87100 and Section 1090 would prohibit you from negotiating a new contract with Lilley.

## FACTS

You are the Planning Manager of the Huntington Beach Community Development Department. In that position, you file a Form 700. Your spouse is also employed by the City employee as a City planner.

In March 2016, the City entered into a contract with Lilley to provide professional planning services on an as-needed basis, not to exceed \$200,000 per year.<sup>2</sup> You did not sign the contract. However, along with two other staff members, you participated in a review of all the responses to the City's Request for Proposals, and you and the other staff members collectively recommended approval of the contract to the City Council. As Planning Manager, you are also in charge of administering the contract, overseeing planning staff work for the City under the contract, and approving invoices.

Neither you nor your spouse have any ownership interest in Lilley. However, your spouse may be offered an opportunity to work for Lilley as an employee or independent contractor. The work your spouse would perform for Lilley would not be performed for the City, but he will work for other municipalities through Lilley. Your spouse will not perform any work under any contract you administer on behalf of the City.

## ANALYSIS

### Section 87100

Section 87100 prohibits a public official<sup>3</sup> from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which he or she has a financial interest. An official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the official's economic interests. (Section 87103; Regulation 18700(a).)

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<sup>2</sup> The city had a previous contract with Lilley for \$135,000 that expired in January 2016.

<sup>3</sup> The Act's conflict-of-interest provisions apply to "public officials." Section 82048 defines "public official" to mean every member, officer, employee or consultant of a state or local government agency.

Of the financial interests recognized under Section 87103 of the Act, those implicated by your account of the facts are the following:

- Sources of Income -- A public official has an economic interest in any source of income which aggregates to \$500 or more within 12 months prior to the decision. (Section 87103(c).) "Income" is defined to include any community property interest in the income of a spouse and a pro rata share of the income of any business entity or trust in which the official (or his or her spouse) owns directly, indirectly, or beneficially, a 10-percent or greater interest. (Section 82030(a).)
- A public official always has an interest in his or her personal finances. A decision has a personal financial effect on a public official if the decision will result in the personal expenses, income, assets, or liabilities of the official (or the official's immediate family) increasing or decreasing. (Section 87103.)

If your spouse accepts employment with Lilley, you will have a potentially disqualifying financial interest in Lilley (pursuant to Section 87103(c)) and in your spouse's salary from Lilley under Section 87103.<sup>4</sup>

### **Foreseeability and Materiality**

You ask specifically about the current and future contracts between the City and Lilley. Generally, a financial effect is presumed to be reasonably foreseeable if the interest is a named party in, or the subject of, a governmental decision before the official or the official's agency. (Regulation 18701(a).) If the interest is "not explicitly involved" in the decision, a financial effect is reasonably foreseeable if the effect can be recognized as a realistic possibility and more than hypothetical or theoretical.

1. *Sources of Income*: Because you will have an interest in Lilley, you must disqualify yourself from making, participating in making, or influencing any governmental decision where it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on Lilley. 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).) 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).)

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<sup>4</sup> You asked whether there was a distinction between your spouse accepting employment as a salaried employee of Lilley or accepting an independent contractor position with Lilley. The nature of the employment would not affect the application of Section 87100 since it is the same whether your spouse is an employee or an independent contractor.

2. *Personal Finances*: Since we have concluded the conflict of interest exists with respect to Lilley as a source of income, we do not fully analyze potential personal financial effects except to note that none of the decisions you describe appear to have any financial effect on your personal finances.

## **Section 1090**

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 non-interests or remote interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. City of 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.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.)

### ***Step One: Is the Councilmember 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. We have concluded that public agency employees are subject to Section 1090. (*Kohn* Advice Letter, No. A-14-136; See also, *People v. Vallerga* (1977) 67 Cal.App.3d 847.) Because you are an employee of Huntington Beach Community Development Department, you would be subject to Section 1090.

### ***Step Two: Does the decision at issue involve a contract or contracts?***

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 Section 1090 require that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’” (*People v. Honig* (1996) 48 Cal.App.4th 289, 351 citing *Stigall v. City of Taft*, supra, at p. 571.) There is no dispute that the City and Lilley are connected by a contract currently, and a contract will be the subject of the future decisions you describe.

### ***Step Three: Is the Councilmember making or participating in making a contract or contracts?***

Section 1090 reaches beyond the officials who actually execute the contract. Section 1090 casts a wide net to capture those officials who participate in any way in the making of the contract. (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) Therefore, for purposes of Section 1090, participation in the making of a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitations for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *People v. Honig*, supra, at p. 329; *Stigall v. City of Taft*, supra, at p. 569.)

You stated that as Planning Manager of the Huntington Beach Community Development Department you participated in review of all the responses to the City's Request for Proposals along with the two other staff members you collectively recommended approval of the contract in the City Council. This would be participation in the contract for purposes of Section 1090.

As Planning Manager, you are also in charge of administering the contract, overseeing planning staff work for the City under the contract, and approving invoices. These would not be participating in the "making" of a contract unless it involves a decision to modify, extend, or renegotiate the contract which also constitutes involvement in the making of a contract under Section 1090. (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.) However, as noted above this conduct would be prohibited by Section 87100.

We continue with the analysis assuming you wish to participate in the contract proceedings. Note that the Office of the Attorney General has stated that Section 1090 does not apply to an employee (in contrast to members of multimember boards where participation is presumed) absent actual participation.

"When an employee, rather than a board member, is financially interested in a contract, the employee's agency is prohibited from making the contract only if the employee was involved in the contract-making process. Therefore, as long as the employee plays no role whatsoever in the contracting process (either because such participation is outside the scope of the employee's duties or because the employee disqualifies himself or herself from all such participation), the employee's agency is not prohibited from contracting with the employee or the business entity in which the employee is interested." (Conflicts of interest (2010), p. 62.)

Therefore, if you are financially interested, so long as you abstain from any participation in the contract, the agency may make the contract.

***Step Four: Would you have a financial interest in potential future contracts between the City and Lilley if your spouse were employed by Lilley?***

"[T]he term 'financially interested' in section 1090 cannot be interpreted in a restricted and technical manner." (*People v. Honig*, supra, 48 Cal.App.4th at p. 315.) The 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. (See *Stigall v. City of Taft*, supra, 58 Cal.2d at p. 569.) Thus, that the interest "might be small or indirect is immaterial so long as it is such as deprives the [people] of his overriding fidelity to [them] and places him in the compromising situation where, in the exercise of his official judgment or discretion, he may be influenced by personal considerations rather than the public good." (*Terry v. Bender* (1956) 143 Cal. App. 2d 198, 208 [300 P.2d 119]; see also *Thomson v. Call*, supra, 38 Cal.3d at p. 645 [direct and indirect interests are equally prohibited].)" *Lexin v. Superior Court* (2010) 47 Cal. 4th 1050, at 1075.)

As a City employee, you have a financial interest in your spouse's private sector employment because his continued employment and compensation from Lilley could be impacted by the decisions.<sup>5</sup> (85 Ops.Cal.Atty.Gen. 34 (2002).) Thus, Section 1090 would prohibit you participating in a contract with Lilley.

***Step Five: Does either a non-interest exception or the rule of necessity apply?***

There are two statutory exceptions to the prohibition in Section 1090 that could apply to you:

1. None of the non-interest exceptions in Section 1091.5 appear to apply to your facts.
2. Additionally, the "rule of necessity" occasionally applies to allow a body to enter into a contract in which a member has a prohibitive conflict of interest and there is no alternate source for the contract. However, since you are an employee, the agency is not prohibited from making the contract so long as you do not participate. Thus, this exception would be inapplicable as well.

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

Sincerely,

Hyla P. Wagner  
General Counsel

/s/

By: John W. Wallace  
Assistant General Counsel  
Legal Division

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<sup>5</sup>In *Eden Township Healthcare Dist. v. Sutter Health* (2011) 202 Cal.App.4th 208, the court found that, under limited circumstances, if the official may not benefit either directly or indirectly from a contract, the official may not be financially interested in the contract . . ." However, since Section 87100 requires your disqualification regarding decisions financially affecting Lilley irrespective of the application of Section 1090, we do not further analyze the possible application of *Eden* to your facts.