



# An Overview of Section 1090 and FPPC Advice

October 2020

## I. Preliminary Matters

Government Code section 1090<sup>1</sup> prohibits an officer or employee from entering into or participating in making contracts in which they have a financial interest:

(a) Members 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 any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.<sup>1</sup>

Section 1090 is a conflict of interest prohibition which has historically been subject to criminal penalties (if the violation is willful). As of January 1, 2014, Assembly Bill 1090 authorized the Fair Political Practices Commission (the “Commission”) to seek and impose Administrative and Civil penalties against a public official who violates this prohibition against being financially interested in a contract, or who causes another person to violate the prohibition, only upon written authorization from the district attorney of the county in which the alleged violation occurred.<sup>2</sup>

Importantly, the Commission is now authorized to issue an opinion or advice to those persons subject to Section 1090.<sup>3</sup> However, it is prohibited from issuing an opinion or advice where it relates to past conduct.<sup>4</sup>

Upon receipt of a request for an opinion or advice, the Commission is required to forward a copy of each request for an opinion or advice to the Attorney General’s office and the appropriate district attorney’s office.<sup>5</sup> The Commission will forward the response, if any, to the requestor or advise that no response was received.<sup>6</sup> The lack of any response does not indicate that those entities concur with the Commission’s advice or opinion.<sup>7</sup>

Any opinion or advice issued by the Commission can be “offered as evidence of good faith conduct by the requester in an enforcement proceeding, if the requester truthfully disclosed all material facts and committed the acts complained of in reliance on the opinion or advice.”<sup>8</sup> The opinion or advice is only admissible as to the requester in a proceeding brought by the Commission pursuant to Section 1097.1.<sup>9</sup>

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

## II. Purpose

In *Thomson v. Call* (1985) 38 Cal.3d 633, the California Supreme Court explained the purpose underlying Section 1090:

[E]xamination of the goals and policy concerns underlying section 1090 convinces us of the logic and reasonableness of the trial court's solution. In *San Diego v. S.D. & L.A.R.R. Co.*, *supra*, 44 Cal. 106, we recognized the conflict-of-interest statutes' origins in the general principle that "no man can faithfully serve two masters whose interests are or may be in conflict": "The law, therefore, will not permit one who acts in a fiduciary capacity to deal with himself in his individual capacity. . . . For even if the honesty of the agency is unquestioned. . . yet the principal has in fact bargained for the exercise of all the skill, ability and industry of the agent, and he is entitled to demand the exertion of all this in his own favor." (44 Cal. at p. 113.) We reiterated this rationale more recently in *Stigall v. City of Taft*, *supra*, 58 Cal.2d 565: "The instant statutes [§ 1090 et seq.] are concerned with *any* interest, other than perhaps a remote or minimal interest, which would prevent the officials from exercising absolute loyalty and undivided allegiance to the best interests of the city." (58 Cal.2d at p. 569.)<sup>10</sup>

Furthermore, Section 1090 is intended "not only to strike at actual impropriety, but also to strike at the appearance of impropriety."<sup>11</sup> A contract that violates Section 1090 is void.<sup>12</sup> The prohibition applies even when the terms of the proposed contract are demonstrably fair and equitable, or are plainly to the public entity's advantage.<sup>13</sup>

Courts have recognized that Section 1090's prohibition must be broadly construed and strictly enforced.<sup>14</sup> "An important, prophylactic statute such as Section 1090 should be construed broadly to close loopholes; it should not be constricted and enfeebled."<sup>15</sup>

Apart from voiding the contract, where a prohibited interest is found, the official who engaged in its making is subject to a host of civil and (if the violation was willful) criminal penalties, including imprisonment and disqualification from holding public office in perpetuity.<sup>16</sup>

## III. Application

### A. Historical and Modern Applications

Section 1090 codified the common law prohibition as to contracts in 1970 and has been broadly interpreted to cover most officials. On the other hand, the Political Reform Act (the “Act”) largely covers people who file Annual Statements of Economic Interests (Form 700). However, both laws are focused on people with influence over making, participating or influencing decisions.

Case law dating back to 1851, and Attorney General Opinions provide guidance as to interpretation of the law under Section 1090. In addition, the California Supreme Court has applied the “*in pari materia*” canon of statutory construction and concluded that Section 1090 should be harmonized with the Act’s conflict of interest provisions when possible.<sup>17</sup>

#### Advice Letters Issued

Since obtaining jurisdiction to provide advice under Section 1090 on January 1, 2014, the Commission has issued over [400](#) advice letters pertaining to Section 1090.

### B. Steps of Analysis

When providing advice, the Commission’s Legal Division generally uses a six-step analysis<sup>2</sup> to determine whether an official has a disqualifying conflict of interest under Section 1090:

1. Is the official subject to the provisions of Section 1090?
2. Does the decision at issue involve a contract?
3. Is the official making or participating in making a contract?
4. Does the official have a financial interest in the contract?
5. Does either a remote-interest or non-interest exception apply?
6. Does the rule of necessity apply?

We will discuss each of these analytical steps in detail below.

#### Step One: Is the official subject to the provisions of Section 1090?

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 any body or board of which they are members.” This means that Section 1090 applies to virtually all state and local officers, employees, and multimember bodies, whether elected or appointed, at both the state and local level. It also applies to certain consultants and independent contractors.

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<sup>2</sup> Typically, however, the analysis will focus on one step that is determinative of whether a prohibitory conflict exists.

Additionally, members of government boards are presumed to have made any contract executed by the board or an agency under its jurisdiction, even if the board member has disqualified themselves from participation in the making of the contract. If a board member is financially interested in the contract, and no exception applies, Section 1090 prohibits the contract from being made with the governmental entity even if the conflicted member recuses himself or herself.

When an employee of an agency, as opposed to a board member, has a financial conflict the employee's agency may enter into the contract as long as the employee plays no role in the contracting process.

### Independent Contractors

The California Supreme Court has affirmed that Section 1090's reference to "officers" applies to "outside advisors [independent contractors, including corporate consultants] with responsibilities for public contracting similar to those belonging to formal officers . . . ."18 In other words, liability extends only to independent contractors who can be said to have been entrusted with "transact[ing] on behalf of the government."19

Occasionally, the Commission receives a request for advice asking whether a public entity that has entered a contract with an independent contractor to perform one phase of a project may enter a second contract with that independent contractor for a subsequent phase of the same project. In these situations, we generally employ a two-step test.

The first step, just discussed, is a determination of whether the independent contractor had responsibilities for public contracting on behalf of the public entity under the initial contract. If the answer is "no," the independent contractor is not subject to Section 1090 and the public entity may enter the subsequent contract with them for the same project. However, if any part of their contractual duties or responsibilities under the first contract involved public contracting, then the independent contractor is subject to Section 1090, and the analysis proceeds to the second step.

Under the second step, the analysis focuses on whether the independent contractor participated in making the subsequent contract for purposes of Section 1090, as discussed below, through its performance of the initial contract. If the answer is "no," the public entity may enter the subsequent contract with them for the same project. However, if the independent contractor is found to have participated in the making of the contract for purposes of Section 1090, the public entity may not enter into the subsequent contract.

### Example 1 (*Webber* Advice Letter, No. A-15-127)

A city had employed a consultant for several years that provided advice and assistance relating to sales and use tax. The consultant was a key source of information for certain sales tax agreements and helped develop one of the city's tax revenue sharing policies. We advised that the consultant performed a public function and exerted a sufficient amount of influence in those areas; therefore, the consultant was an employee of the city and Section 1090 applied to him.

### Example 2 (*Burns* Advice Letter, No. A-14-060)

A contract interim finance manager and a contract treasurer both participated in making governmental decisions and performed the same or substantially the same duties for the agency that would otherwise be performed by an individual holding a position specified in the agency's Conflict of Interest Code. Therefore, both positions were government employees subject to Section 1090.

### Example 3 (*Nakamura* Advice Letter, No. A-20-033)

An independent contractor was subject to Section 1090 where an initial contract required the contractor to provide both the concept design and 60% design documents that would be used as part of the City's design-build Request for Proposals with respect to a building restoration project. However, Section 1090 did not prohibit the City from entering a subsequent contract for design-build services with the independent contractor on the same project because the firm did not have an opportunity to influence the subsequent contract, and therefore did not participate in the making of that contract.

### Example 4 (*Shulz* Advice Letter, No. A-19-054)

The general contractor for a university wanted to hire a subcontractor to provide architectural design services for a project where the subcontractor performed a feasibility study under a previous contract with the university for the same project. Under the initial contract, it had no decision-making authority and had only performed conceptual design work for a new multi-use stadium at the direction of the University, which had been informed by years of internal university analysis and studies. Based on these facts, the subcontractor was not subject to Section 1090 in the first instance because it had no public contracting duties under the initial contract.

## Step Two: Does the decision involve a contract?

To determine whether a contract is involved in a decision, the Section 1090 analysis looks to general principles of contract law<sup>20</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>21</sup> Under general principles of law, a contract is made on the mutual assent of the parties and consideration. If an agency agrees to a purchase, there is mutual assent by the parties and consideration. A basic element of a contract is consideration. If an entity provides a good or service without receiving any compensation, or other consideration, there is no contract.<sup>22</sup>

### Example 1 (*Bettenhausen* Advice Letter, No. A-16-229)

In the *Bettenhausen* Advice Letter, citing Attorney General opinions and case law, we advised that development agreements are contracts:

*A development agreement contemplates that both the city or county and the developer will agree to do or not to do certain things. Both parties will mutually consent to terms and conditions allowable under the law. Both will receive consideration. The developer will essentially receive the local agency’s assurance that he can complete the project. The local agency in turn will reap the benefit of the development, with all the conditions it might legitimately require, such as streets, parks, and other public improvements or facilities. (78 Ops.Cal.Atty.Gen. 230.)*

Also in *Bettenhausen*, we advised that decisions that are regulatory in nature do not necessarily involve contracts subject to Section 1090. For example, a corporation’s certificate of public convenience and necessity issued by the city to operate an ambulance service without a fee upon the service provider was determined to be a license and regulatory permit and therefore, not a contract.<sup>23</sup>

### Example 2 (*Diaz* Advice Letter, No. A-15-235)

A city council decision to adopt an ordinance to allow the city to participate in a community choice aggregation program through a JPA was akin to the certificate of public convenience and necessity described in Attorney General Opinion 84 Ops.Cal.Atty.Gen. 34, cited above. Like the certificate, the ordinance authorized a service provider to provide a service within the municipality’s jurisdiction without the imposition of a fee upon the service provider. Therefore, the ordinance was more like a license or regulatory permit and not a contract for purposes of Section 1090.

### Example 3 (*Hammond* Advice Letter, No. A-15-134)

A member of a Board of Supervisors owned a gas station that county employees used to fill their vehicles. Once a month the receipts were tallied and the county billed. There was no contract with the county for the gas and the price charged was the same for the general public. County employees made the decision to fill their tanks at the station. We advised that this situation did not constitute the type of contractual situation normally covered by Section 1090.

### Example 4 (*Burns* Advice Letter, No. A-16-223)

Like the purchase of a tank of gas, there was no contract between the county and a local bookstore owned by a member of the Board of Supervisors when for approximately 30 years several county department staff had chosen to purchase books from the bookstore. The decision to purchase books was made by staff within each department with no input from the Board of Supervisors. There was no contract between the county and the bookstore for books at a certain rate – nor was either party proposing to negotiate one. And presumably, the series of small purchases occasionally made by county staff, without input from the Board of Supervisors, were made on the same terms and conditions as those made by members of the general public.

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

Section 1090 reaches beyond the officials who participate personally in the actual execution of the contract to capture those officials who participate in any way in the making of the contract:

The decisional law, therefore, has not interpreted section 1090 in a hypertechnical manner, but holds that an official (or a public employee) may be convicted of violation no matter whether he actually participated personally in the execution of the questioned contract, if it is established that he had the opportunity to, and did, influence execution directly or indirectly to promote his personal interests.<sup>24</sup>

Therefore, 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 solicitation for bids.<sup>25</sup> Additionally, resigning from a governmental position may not be sufficient to avoid a violation.<sup>26</sup> Furthermore, individuals in advisory positions can influence the development of a contract during

these early stages of the contracting process even though they have no actual power to execute the final contract.<sup>27</sup>

#### Example 1 (*Chadwick* Advice Letter, No. A-16-090)

Where an independent contractor prepared a city's traffic signal Master Plan, the contractor was prohibited under Section 1090 from entering a subsequent contract with the city to provide as-needed consulting services for a project to implement proposals it developed for the Master Plan. In this regard, the independent contractor participated in the preliminary discussions, negotiations, compromises, reasoning, planning, drawing plans and specifications for the subsequent contract.

#### Example 2 (*Asuncion* Advice Letter, No. A-14-062)

Where the planning commission had no input into the city council's decision-making process at any stage with respect to a specific contract to be made by the city, the planning commission, and each of its members, will not be considered to have participated in the making of the contract. Therefore, Section 1090 would not prohibit the city council from approving a contract between the city and a planning commissioner in his private capacity on behalf of his business.<sup>28</sup>

#### Example 3 (*Webber* Advice Letter, No. A-15-127)

A long-time city consultant advised the city on issues concerning sales and use tax, including the city's economic development incentive program that provides for sales tax sharing. The consultant played an integral role in shaping the policies for city's program. Section 1090 prohibits the city from entering a sales tax sharing agreement with a corporation, contingent on the city also entering a separate agreement with the consultant's company, where such contract would result in financial gain for the consultant as a direct result of the program he helped to create.

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.<sup>29</sup> And when Section 1090 applies to a member of a governing body of a public entity, in most cases, the prohibition cannot be avoided by having the interested board member abstain from the decision. Rather, the entire governing body is precluded from entering the contract.<sup>30</sup> Moreover, a body such as a city council cannot avoid application of Section 1090 by delegating its contracting authority to another individual or body.<sup>31</sup> However, a governmental board may avoid violating Section 1090 when the contract is made by an "independent" government official and that official does not have a conflict of interest.<sup>32</sup>

A decision to modify, extend, or renegotiate a contract constitutes involvement in the making of a contract under section 1090.<sup>33</sup>

#### Example 1 (*Headding* Advice Letter, No. A-16-219)

A City councilmember owned a pharmacy. Without involvement from the city council, staff from the fire department made all decisions regarding the purchase of morphine sulfate and versed. This arrangement was not sufficient to avoid a violation of Section 1090 in a contract between the fire department and pharmacy where the city council, who had the ultimate authority to approve city contracts, had delegated its authority to the fire department.<sup>34</sup>

#### Example 2 ( *Walter* Advice Letter, No. A-15-050)

No violation of Section 1090 occurred where the city manager, who had independent authority to enter contracts for specified professional services on behalf of the city, contracted with a company that employed the spouse of a councilmember.

Conversely, when an employee, rather than a board member, is financially interested in a contract, the employee's agency is prohibited from making the contract by Section 1090 only if the employee was involved in the contract-making process. Therefore, if 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.<sup>35</sup>

### **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," and officials are deemed to have a financial interest in a contract if they might profit from it in any way.<sup>36</sup> Although Section 1090 does not specifically define 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.<sup>37</sup> Therefore, "[h]owever devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void."<sup>38</sup>

Employees have been found to have a financial interest in a contract that involves their employer, even where the contract would not result in a change in income or directly involve the employee, because an employee has an overall interest in the financial success of the firm and continued employment.<sup>39</sup>

### Example 1 (*Gallien* Advice Letter, No. A-16-263)

A board member considered taking an employment position with a company that had current contracts with the board on which the official served. Because the board member could be influenced by a desire to maintain a favorable ongoing relationship and foster the prospect of future business opportunities with his future employer, Section 1090 prohibited both the board member and board from making further contracts or renegotiating existing contracts with the company.

### Example 2 (*Khuu* Advice Letter, No. I-14-107)

A councilmember worked for a firm that provided various consulting services to clients of the firm, some of whom had contracts with the city that would likely need to be renewed during the councilmember's term. Section 1090 prohibited the city council from renewing these contracts, as the councilmember would be influenced by a desire to "maintain favorable ongoing relationships" with not only the firm that employs him or her but also the clients of the firm seeking to renew a contract with the city, especially where the firm provides him a commission based upon clients brought in, and a year-end bonus based upon company-wide profits.

Generally, a member of a board or commission always has a financial interest in his or her spouse's source of income for purposes of Section 1090.<sup>40</sup>

### Example (*Kellner* Advice Letter, No. A-15-021)

Section 1090 prohibited a city councilmember and city council from approving a contract between the city and the firm that employs the councilmember's spouse where the contract could have affected the financial health of the firm and impact, among other things, the spouse's year-end bonus.<sup>41</sup>

## **Step 5: Does a statutory exception apply, such as a remote or noninterest exception?**

To determine whether an official has a "financial interest" in a contract within the meaning of Section 1090, it is appropriate to look to the provisions of the remote and noninterest exceptions contained in sections 1091 and 1091.5, respectively.<sup>42</sup>

The Legislature has created various statutory exceptions to Section 1090's prohibition where the financial interest involved is deemed a "remote interest" under Section 1091 or a "noninterest" under Section 1091.5. 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.<sup>43</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>44</sup>

Below, we discuss some of the most frequently applicable exceptions:

*Remote Interest Exceptions (apply to members of multi-member bodies)*

**Section 1091(b)(1)** provides that an officer shall not be deemed to be interested in a contract if the officer has only a remote interest, which includes “[t]hat of an officer or employee of a . . . nonprofit corporation . . . .”

Example (*Becnel* Advice Letter, No. A-16-097)

A councilmember was executive director of a non-profit, 501(c)(3), which intended to enter into an agreement with the city. Based on the exception under Section 1091(b)(1), the councilmember could abstain and the city could enter into the agreement without her participation.

**Section 1091(b)(2)** provides that there is a “remote interest” when: (1) the private contracting party has 10 or more employees other than the officer; (2) the officer was employed by the private contracting party at least three years prior to initially joining the public body; (3) the officer owns less than 3% of the stock in the private contracting party; (4) the officer is not an officer or director of the private contracting party; and (5) the officer did not directly participate in formulating the bid of the private contracting party.

Example 1 (*Scully* Advice Letter, No. A-16-086)

A director of a board had not been employed by company for at least three years prior to becoming a director so he did not have a remote exception in potential future contracts between the district and the company.<sup>45</sup>

Example 2 (*Kellner* Advice Letter, No. A-15-021)

Although the company employing her spouse had more than 10 employees and the spouse had worked there for more than three years prior to councilmember taking office, the councilmember did not have a remote exception in future contracts between the city and her spouse’s employer because the spouse owned more than 3 percent of the shares of the company’s stock.

**Section 1091(b)(5)** provides that a public official who is a landlord or tenant of a contracting party has a remote interest in the contracts of that party.

Example (*Devaney* Advice Letter, No. A-14-142)

A councilmember owned a cottage that was leased to a tenant. A sewer back up resulted in property damage for the tenant who filed a claim with the city. The city council could approve reimbursement of and settlement with the councilmember's tenant for his property and displacement claims as long as the councilmember disclosed his remote financial interest, the interest was noted in the city council's official records, and the councilmember did not participate in making the agreement.

**Section 1091(b)(8)** provides that an official has a remote interest in a contract entered into by the body or board of which they are a member if he or she is a "supplier of goods or services when those goods or services have been supplied to the contracting party by the officer for at least five years prior to his or her election or appointment to office." Thus, a councilmember would have a financial interest in a contract entered into by the city council if he or she provides services to the party contracting with the city, but only a remote interest if those services were provided for at least five years prior to election to the City Council.

Example (*Khuu* Advice Letter, No. I-14-107)

A councilmember was employed by a firm that provided various services to clients who might enter into contracts with the city in the future. The remote interest under Section 1091(b)(8) did not apply where the councilmember had not been employed by the firm, and thus had not been providing services to the clients, for at least five years prior to his election to the city council.

**Section 1091(b)(15)** provides that an official has a remote interest when he or she is "a party to litigation involving the body or board of which the officer is a member in connection with an agreement in which all of the following apply:

- (A) The agreement is entered into as part of a settlement of litigation in which the body or board is represented by legal counsel.
- (B) After a review of the merits of the agreement and other relevant facts and circumstances, a court of competent jurisdiction finds that the agreement serves the public interest.
- (C) The interested member has recused himself or herself from all participation, direct or indirect, in the making of the agreement on behalf of the body or board.

### Example (*Van Ligten* Advice Letter, No. A-15-038)

A councilmember owned a condo that sat adjacent to and had views of a fairway on a golf course. The golf course sued the city over its deterioration due to the city's significant extraction of water from an aquifer used to water the golf course. The councilmember had only a remote interest in any future settlement agreement so long as the factors set forth in subdivisions (A) - (C) were satisfied. Although the councilmember was not technically a party to the lawsuit, it was clear from the legislative intent that a settlement agreement in which an official has a financial interest should be allowed where the three specified factors are satisfied.

### *Non-Interest Exceptions*

**Section 1091.5(a)(1)** provides that a public officer shall not be deemed to be interested in a contract if his or her interest meets the following criteria:

The ownership of less than 3 percent of the shares of a corporation for profit, provided that the total annual income to him or her from dividends, including the value of stock dividends, from the corporation does not exceed 5 percent of his or her total annual income, and any other payments made to him or her by the corporation do not exceed 5 percent of his or her total annual income.

### Example (*Sodergren* Advice Letter, No. A-16-155)

A mayor had no financial interest under Section 1090 in development-related agreements between the city and Costco where he owned 24 shares of Costco (which met the less than 3 percent threshold), and his total annual income from Costco dividends, or other payments, did not exceed 5 percent of his total annual income.

**Section 1091.5(a)(3)** provides an officer or employee is deemed not interested in a contract if his or her interest is “[t]hat of a recipient of public services generally provided by the public body or board of which he or she is a member, on the same terms and conditions as if he or she were not a member of the body or board.”

The phrase “on the same terms and conditions” requires there be no special treatment of an official, either express or implied, because of that person's status as an official.<sup>46</sup> Accordingly, the public services exception generally will not apply when the provision of the service involves an exercise of discretion by the public body that would allow favoritism toward officials, or occurs on terms tailored to an official's particular circumstances.<sup>47</sup>

### Example 1 (*Hentschke* Advice Letter, No. A-14-187)

Board members had no financial interest in contracts with their agency stemming from a turf replacement program where the program was applied to each applicant in an identical manner. The method of choosing applicants was on a first-come, first-served basis, for as long as the program had funds available. Each applicant was required to be a current retail water customer, participate in a training course, replace existing turf with qualifying plants, and fill out the standard application form and agreement to program terms. While the program administrator did have some decision-making authority to determine that the replacement met all the program requirements (such as the amount of turf replaced and whether qualifying plants are used), the determination was essentially ministerial and did not involve discretion to pick and choose among applicants or to vary benefits from one applicant to the next.

### Example 2 (*Hodge* Advice Letter, No. A-14-012)

The exception to Section 1090 for “public services generally provided” did not apply to permit a councilmember to enter into a property tax savings contract with the city where the program required administering officials to exercise judgment and discretion not only in negotiating the terms of each contract, but also in the continued enforcement of those terms for the duration of the contract.

**Section 1091.5(a)(6)** provides that an officer or employee shall not be deemed to be interest in a contract if his or her interest is “[t]hat of a spouse of an officer or employee of a public agency in his or her spouse’s employment or officeholding if his or her spouse’s employment or officeholding has existed for at least one year prior to his or her election or appointment.”

This exception applies to a spouse who maintains “status quo” employment for over one year, but does not apply to changes in employment status beyond mere restructuring of a current position.

### Example (*Schwab* Advice Letter, No. A-19-193)

A county board of supervisors was prohibited, under Section 1090, from promoting a public officer from Assistant Director to Director of a county agency where that officer was married to one of the members of the county board of supervisors and the employment contract would constitute a change in status quo, such that the employment no longer “existed for at least one year prior to” the board member’s election to office.

**Section 1091.5(a)(8)** provides that an officer or employee shall not be deemed to be interested in a contract if his or her interest is:

That of a noncompensated officer of a nonprofit tax-exempt corporation, which, as one of its primary purposes, supports the functions of the body or board or to which the body or board has a legal obligation to give particular consideration, and provided further that this interest is noted in its official records.

#### Example 1 (*Sullivan* Advice Letter, No. A-15-121)

A vice-mayor, who was an uncompensated officer of a nonprofit, tax-exempt, organization that was determined to support an important function of the city, had a noninterest in a lease agreement between the city and the nonprofit organization.

#### Example 2 (*Parra* Advice Letter, No. A-19-100)

A city councilmember who worked as a non-compensated board member of nonprofit corporation with the objective of providing comprehensive health services to the medically underserved in a region that included the councilmember's city. Given that the nonprofit's primary purpose supported the functions of the city (as the city had an interest in achieving the same objective of maintaining the health of its citizens), the councilmember could permissibly take part in the city's negotiations and sale of property to the non-profit.

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

In limited cases, the "rule of necessity" has been applied to allow the making of a contract that Section 1090 would otherwise prohibit.<sup>48</sup> The rule has been applied where public policy concerns authorize the contract and "ensures that essential government functions are performed even where a conflict of interest exists."<sup>49</sup> The rule of necessity permits a government body to act to carry out its essential functions if no other entity is competent to do so.<sup>50</sup>

The rule of necessity has been applied in at least two specific types of situations:

1. In procurement situations for essential supplies or services when no source other than the one that triggers the conflict is available.
2. In non-procurement situations to carry out essential duties of the office when the official or board is the only one authorized to act.

It is important to note that the rule of necessity has only been applied in very limited situations. A city could obtain emergency nighttime services from a service station owned by a member of the city council, where the town was isolated and the

council member’s station was the only one in the area that was open.<sup>51</sup> A healthcare district in a remote area could advertise its services on a local radio station, even though one of the district’s directors was employed at the station. After exploring other outlets, it was clear that the radio station was the only source that would deliver the necessary information in an efficient, cost-effective, and timely manner.<sup>52</sup> What these situations have in common is the exigency of the circumstances such that delaying action to contract with a non-conflicted source would be to the detriment of the affected people.<sup>53</sup>

It is also important to note that “in the event that disqualifications are so numerous as to preclude attainment of a quorum, special rules may come into play. If a quorum is no longer available, the minimum necessary number of conflicted members may participate, with drawing lots or some other impartial method employed to select them.”<sup>54</sup>

#### Example 1 (*Ramos* Advice Letter, No. A-14-105)

A city was advised that the rule of necessity applied to some purchases made from the mayor’s hardware store in emergency situations. For the purchases, the city made efforts to explore all other avenues in most situations, including purchasing from and contracting with larger hardware stores that were out of the area. In some situations, however, emergencies could arise and the mayor’s hardware store would be the only option. Therefore, we advised the rule of necessity would allow the city to enter into the contracts with the mayor’s hardware store in such emergency situations, but the rule still prevented the mayor from participating in the decisions.

#### Example 2 (*Heading* Advice Letter, No. A-16-219)

A mayor owned a pharmacy that was the city fire department’s only source for purchasing specific quantities of life-saving medications. If the fire department was unable to purchase a specific quantity of the medications the fire department would have had to stop carrying them and lose certain certifications. We advised that the fire department was providing an essential emergency service to the public by carrying those medications - saving lives. Therefore, the “rule of necessity” exception applied to allow the fire department to purchase the medications from the mayor’s pharmacy despite the conflict of interest under Section 1090.

### Example 3 (*Devaney* Advice Letter, No. A-14-142)

A councilmember had a claim against the city for property damage caused by the city's sewer system. Only the city council had the authority to approve claims and settlements for larger amounts. If the city could not approve a settlement the parties would be forced to litigate a claim that could be settled outside of court. The settlement of claims deemed in their best interest is an essential and necessary function of any city. No other body or person was authorized to act. Looking to relevant case law we noted that the Supreme Court had "recognized a century ago that settlement agreements are highly favored as productive of peace and good will in the community, as well as 'reducing the expense and persistency of litigation. The need for settlements is greater than ever before. Without them our system of civil adjudication would quickly break down.'"<sup>55</sup> The rule of necessity applied and the city council could act on the councilmember's claim so long as the councilmember disqualified himself from participating in the decision in his official capacity.

### Example 4 (*Schroeter* Advice Letter, No. A-19-006)

A city council would ordinarily have been prohibited, under Section 1090, from contracting for airport repairs where the repairs would have affected a council member's business that leased property and operated out of the airport. Under the rule of necessity, the city council was permitted to proceed with the contracting process, without the financially interested council member's participation, so that the airport could meet FAA standards and continue to operate safely.

### Example 5 (*Dietrick* Advice Letter, No. A-15-174)

A councilmember had a financial interest in a contract between the city and a co-op involving an eroding hillside owned partially by the co-op and partially by the city. A report on a geotechnical inspection of the hillside concluded that the biggest immediate concern was the potential for falling debris to injure pedestrians or damage parked vehicles. The report noted that "there are several areas where slope failure or rockfall may be imminent" and that "[i]mmediate and decisive action is strongly recommended to avoid potentially serious injury to people and damage to property."

The city charter provided that the city council had the power to undertake all actions appropriate to the general welfare of its inhabitants that are not otherwise prohibited by State law. Because the protection and promotion of the general welfare of the City's inhabitants was an essential duty of the city council, and because the hillside erosion put the general welfare of the city's inhabitants at risk, we concluded that the rule of necessity applied, and the council could enter into one or more contracts with the co-op to stabilize the hillside. However, it was advised that the interested councilmember abstain from participating in the making of the contract or contracts.

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- <sup>1</sup> Gov. Code, § 1090, subd. (a).
- <sup>2</sup> Gov. Code, § 1097.1, subds. (a) & (b).
- <sup>3</sup> Gov. Code, § 1097.1, subd. (c)(2).
- <sup>4</sup> *Ibid.*
- <sup>5</sup> Gov. Code, § 1097.1, subd. (c)(3).
- <sup>6</sup> *Id.* at subd. (c)(4).
- <sup>7</sup> *Ibid.*
- <sup>8</sup> Gov. Code, § 1097.1, subd. (d).
- <sup>9</sup> Gov. Code, § 1097.1, subd. (d).
- <sup>10</sup> *Thomson v. Call* (1985) 38 Cal.3d 633, 647-648.
- <sup>11</sup> *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.
- <sup>12</sup> *Thomson, supra*, 38 Cal.3d at p. 646.
- <sup>13</sup> *Id.* at pp. 646-649.
- <sup>14</sup> *Stigall v. Taft* (1962) 58 Cal.2d 565, 569-571; *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572, 579-580; *City Council v. McKinley* (1978) 80 Cal.App.3d 204, 213.
- <sup>15</sup> *Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1334.
- <sup>16</sup> See Gov. Code, § 1097; *People v. Honig* (1996) 48 Cal.App.4th 289, 317; 89 Ops.Cal.Atty.Gen. 121, 123 (2006).
- <sup>17</sup> *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090-91 (*in pari materia* means “of the same matter” or “on the same subject”).
- <sup>18</sup> *People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, 237-240.
- <sup>19</sup> *Id.* at p. 240.
- <sup>20</sup> 84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995).
- <sup>21</sup> *Honig, supra*, 48 Cal.App.4th at p. 351, citing *Stigall, supra*, 58 Cal.2d at 569, 571; see also *Wilson Advice Letter No. A-16-269*.
- <sup>22</sup> *Webber Advice Letter, No. A-16-007*.
- <sup>23</sup> 84 Ops.Cal.Atty.Gen. 34; see also *Subriar v. City of Bakersfield* (1976) 59 Cal.App.3d 175; *Motor Transit Co. v. Railroad Commission* (1922) 189 Cal. 573, 580; *Copt-Air v. City of San Diego* (1971) 15 Cal.App.3d 984, 987.
- <sup>24</sup> *People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.
- <sup>25</sup> *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237.
- <sup>26</sup> See, e.g., *Stigall, supra*, 58 Cal.2d at pp. 569-571 (city councilmember involved in the making of a contract based on his involvement in the preliminary stages of the planning and negotiating process on the contract, even though he had resigned from the council prior to its vote on the contract); 81 Ops.Cal.Atty.Gen. 317 (1998) (council member could not participate in the establishment of a loan program and then leave office and apply for a loan); 66 Ops.Cal.Atty.Gen. 156, 159 (1983) (county employees could not propose agreement for consultant services, then resign, and provide such consulting services).
- <sup>27</sup> See, e.g., *Schaefer v. Berinstein* (1956) 140 Cal.App.2d 278, 291; *City Council v. McKinley* (1978) 80 Cal.App.3d 204 (member of Park and Recreation Board who owned a landscape architectural firm participated in the making of a contract in violation of Section 1090 where he was also a member of a committee created to advise the Board on the design, architecture, landscaping and technical planning of a Japanese garden).
- <sup>28</sup> See also *Williams Advice Letter, No. A-15-029* (CUSD Board of Trustees has no authority over and provides no input for contracts MiraCosta College enters into. Therefore, CUSD trustee may enter into a contract with MiraCosta in her private capacity as she will not be participating in the making of the contract in her official capacity for purposes of Section 1090).
- <sup>29</sup> *Thomson, supra*, 38 Cal.3d at pp. 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>30</sup> *Thomson, supra*, at pp. 647-649; *Stigall, supra*, 58 Cal.2d at p. 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).
- <sup>31</sup> See 87 Ops.Cal.Atty.Gen. 9 (2004); 88 Ops.Cal.Atty.Gen. 122 (2005).

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- <sup>32</sup> See, e.g., 81 Ops.Cal.Atty.Gen. 274 (1998); 57 Ops.Cal.Atty.Gen. 458 (1974).
- <sup>33</sup> See, e.g., *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191 (exercising a renewal option and adjusting the payment rates is making a contract within the meaning of Section 1090).
- <sup>34</sup> See also *Jernigan* Advice Letter, No. A-14-173 (city councilmember and city council do not avoid a violation of Section 1090 where city staff, upon authority delegated by the city council, makes the determination when to purchase glass from councilmember's business).
- <sup>35</sup> See 80 Ops.Cal.Atty.Gen. 41 (1997) (no Section 1090 violation where two firefighters, in their individual capacities, enter a contract with the city [upon recommendation of the fire chief] for the purchase of protective masks developed entirely on their own time and without the use of city materials).
- <sup>36</sup> *Honig, supra*, 48 Cal. App. 4th at p. 333.
- <sup>37</sup> *Thomson, supra*, 38 Cal.3d at pp. 645, 651-652; *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).
- <sup>38</sup> *People v. Deysher* (1934) 2 Cal.2d 141, 146.
- <sup>39</sup> 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).
- <sup>40</sup> See 78 Ops.Cal.Atty.Gen. 230, 235 (1995).
- <sup>41</sup> *Kellner* Advice Letter, No. A-15-021.
- <sup>42</sup> See, e.g., 85 Ops.Cal.Atty.Gen. 34, 36 (2002).
- <sup>43</sup> Section 1091(a); 88 Ops.Cal.Atty.Gen. 106, 108 (2005); 83 Ops.Cal.Atty.Gen. 246, 248 (2000).
- <sup>44</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).
- <sup>45</sup> *Scully* Advice Letter, No. A-16-086.
- <sup>46</sup> *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1101.
- <sup>47</sup> *Lexin, supra* at 1088, 1100 n.28.
- <sup>48</sup> *Eldridge v. Sierra View Hospital Dist.* (1990) 224 Cal. App. 3d 311, 322.
- <sup>49</sup> *Ibid.*; See also 69 Ops.Cal.Atty.Gen. 102, 109 (1986).
- <sup>50</sup> *Lexin, supra*, at p. 1097.
- <sup>51</sup> 4 Ops.Cal.Atty.Gen. 264 (1944).
- <sup>52</sup> 88 Ops.Cal.Atty.Gen. 106 (2005).
- <sup>53</sup> See *Ramos* Advice Letter, No. A-14-105.
- <sup>54</sup> See 94 Ops. Cal. Atty. Gen. 100 n.43.
- <sup>55</sup> *Salmon Protection & Watershed Network v. County of Marin* (2012) 205 Cal. App. 4th 195, 201.