



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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April 21, 2021

Patrick T. Donegan  
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Re: Your Request for Advice  
**Our File No. A-20-131**

Dear Mr. Donegan:

This letter responds to your request for advice on behalf of West Hollywood Planning Commissioner Rogerio Carvalheiro regarding Government Code Section 1090, et seq.<sup>1</sup> Please note that we are only providing advice under Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including Public Contract Code.

Also, note that we are 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. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General's Office and the Los Angeles 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 the City from entering into three development agreements authorizing three billboards in the City where Planning Commissioner Carvalheiro is the architect who designed the billboards that are the subject of the development agreements?

### CONCLUSION

No. So long as Planning Commissioner Carvalheiro abstains from any type of participation, including giving advice related to the decision, Section 1090 does not prohibit the Planning Commission from making recommendations on, or the City Council from voting to approve, these development agreements.

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

## FACTS AS PRESENTED BY REQUESTER

The City, over the past few years, reviewed and passed revisions and amendments concerning billboard development in the Sunset Specific Plan (“SSP”) area. In pertinent part, the City passed design principles in the SSP area for off-site signs such as billboards and digital billboards.<sup>2</sup>

The City describes the project as follows:

In 2019 the City adopted the Sunset Arts & Advertising Program – a groundbreaking effort to reimagine the world’s premier locations for outdoor advertising....After a competitive vetting process, the first 21 projects are set to move forward. These artistic and imaginative installations will re-energize the world-famous Strip and set the new standard for digital outdoor advertising. The selection process for these was hard-fought and based on the merits of design and their compatibility with the boulevard’s culture, history, buildings, and streetscape. These initial projects will kick-start the transformation of the Sunset Strip and set the stage for the Sunset Arts & Advertising Program’s future vetting rounds.

These revisions and design principles contemplated, among other things, an initial application process for new billboards or modifications to existing billboards. These applications would be independently reviewed and scored by the City’s Design Excellence Review Committee. Planning Commissioner Carvalho was not a part of this Committee, played no role in its reviewing or scoring process and the Planning Commission does not exercise any authority or review of this Committee. The Committee was made up of independent design and billboard professionals and did not include any City staff or City officials. The Committee scored each application and the top scoring application concepts are allowed to move forward for entitlements to build and operate the billboards. This means that the selected applicants would then submit their billboard applications to the City and begin the process of negotiating and executing a development agreement for the proposed project. Depending on the type of billboard requested, a development agreement is one of the required entitlements to build and operate the sign.

Per Section 65867, the development agreement application must go before the West Hollywood Planning Commission and the Commission makes a recommendation to the West Hollywood City Council. A development agreement is a contract in which the property owner and local government agree to “freeze” applicable rules, regulations, and policies (including zoning) that are in place at the time of the execution of the agreement. (Section 65866.)

It has come to the attention of the City that three top scoring billboard applications list Planning Commissioner Carvalho as the architect who designed the signs. You state that as the architect on three of the top scoring signs, Commissioner Carvalho will recuse himself under the Political Reform Act (the “Act”) from participating in all of the billboard applications that come before the Planning Commission, not just the three that he designed.

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<sup>2</sup> Information on the Sunset Boulevard billboard program can be found here: <https://www.weho.org/city-government/city-departments/planning-and-developmentservices/billboards-on-the-sunset-strip>

The City has not started negotiating the development agreements for the projects that Commissioner Carvalho designed. Commissioner Carvalho has been hired by and paid by the billboard operator to design three billboards that will be the subject of development agreements. While typically development agreements are between the City and the property owner, it appears in these cases that the billboard operator may also be a signatory to the agreements as the operator appears to have a partial ownership interest in the property and/or signs that would be the subject of the agreements; Commissioner Carvalho will not be a party to the agreement.

#### *West Hollywood Development Agreement Process*

Development agreements are typically negotiated on the City side by staff from the Planning department, City Manager's department and the City Attorney's office. The Planning Commission's only role in the agreement is to review and make a recommendation to the City Council, as required under state law. The Planning Commission is created under the State Planning and Zoning law and has no contracting authority. When considering its recommendation to the City Council, the Planning Commission uses the following findings, required by state law and codified as West Hollywood Municipal Code section 19.66.030:

“1. The development agreement is in the best interests of the city, promoting the public interest and welfare;

2. The development agreement is consistent with all applicable provisions of the General Plan, any applicable specific plan, and this Zoning Ordinance;

3. The development agreement does not:

a. Adversely affect the comfort, health, peace, or welfare, or valuation of property, of persons residing or working in the vicinity of the proposed development; or

b. Endanger, jeopardize, or otherwise constitute a menace to the public convenience, health, interest, safety, or general welfare.

4. The development agreement is in compliance with the conditions, requirements, restrictions, and terms of Sections 19.66.040(A) (Mandatory contents) and 19.66.040(B) (Permissive contents), below.”

The policy decision of whether to enter into the agreement rests with the City Council, as the council is the final decision-maker regarding these development agreements.

#### **ANALYSIS**

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.” Section 1090 applies only when a decision involves a contract. The Attorney General's Office has made clear that a development agreement is a contract, expanding that a “development agreement

contains the essential elements of a contract as defined by the Legislature.” (78 Ops. Cal. Atty. Gen. 230 (1995).)

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. City of Taft* (1962) 58 Cal.2d 565, 569.) 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, regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.) When Section 1090 is applicable to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain; the entire governing body is precluded from entering into the contract. (*Id.* at pp. 647-649.)

Section 1090 applies to all state and local officers, employees, and multi-member bodies, whether elected or appointed, at both state and local levels. Moreover, Section 1090 also applies to individuals in advisory positions to contracting agencies because those individuals 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. (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].) As a member of the West Hollywood Planning Commission, Commissioner Carvalho is subject to Section 1090.

Notably, 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 v. Call*, supra 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).)

Here, we examine whether Commissioner Carvalho has a financial interest in the agreements, and consider whether the Planning Commission can recommend, and the City Council can approve, development agreements authorizing billboards in the City where Commissioner Carvalho is the architect who designed the billboards that are the subject of those agreements.

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. (*Thomson v. Call*, supra, at pp. 645, 651-652; see also *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

Furthermore, case law and statutory exceptions to Section 1090 make clear that the term “financially interested” must be liberally interpreted. (See, e.g., *People v. Deysher* (1934) 2 Cal.2d 141.) The phrase “financially interested” broadly encompasses anything that would tie a public official’s fortunes to the existence of a public contract. (*Carson Redevelopment Agency v. Padilla*,

*supra*, at p. 1334.) “The government’s right to the absolute, undivided allegiance of a public officer is diminished as effectively where the officer acts with a hope of personal financial gain as where he acts with certainty.” (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1298 (citations omitted).)

Under these circumstances, Commissioner Carvalho has a financial interest in the agreements, as they could result in a financial benefit to Commissioner Carvalho as the architect who designed the signs. Accordingly, Section 1090 prohibits Commissioner Carvalho from participating in making any contracts related to the development agreements concerning the billboards.

With respect to the making of 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. (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) Therefore, “participation in the making or forming 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. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237.)

Importantly, the Attorney General stated that neither it nor any court has ever “extended the proscription against making a contract by a board with a financially interested member to the situation of an advisory committee with a financially interested member.” (82 Ops.Cal.Atty.Gen. 126, 130 (1999).) “Rather, an advisory committee may perform its responsibilities as long as the interested member abstains and does not participate in the giving of advice.” (*Ibid.*; see also *Ueda* Advice letter, No. A-16-104.) “They are treated differently from boards responsible for executing the actual contracts under the governing statutes and policy reasons for the prohibition. Abstention by the interested member is allowed for the one, but not for the other.” (*Ibid.*)

The Planning Commission’s only role in the agreements is to review and make a recommendation to the City Council, as required under state law. The Planning Commission is created under the State Planning and Zoning law and has no contracting authority. The ultimate policy decision of whether to enter into the agreements rests with the City Council. As the architect who designed the signs that will be the subject of development agreements, Commissioner Carvalho has an interest for the purposes of Section 1090. So long as he recuses himself from participating in the making of any recommendations concerning development agreements, the Planning Commission is not prohibited from making these recommendations to the City Council.<sup>3</sup> Additionally, the City Council is not prohibited from entering into the contracts.

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

Sincerely,

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<sup>3</sup> We note that we do not analyze the conflict of interest under the Act. While the Act prohibits an official from making, participating in making, or using official position to influence a governmental decision if it is reasonably foreseeable the decision will have a material effect on the official’s economic interests, you state that Commissioner Carvalho will not be taking part in any decisions regarding billboard applications that come before the Planning Commission. However, we note that Commissioner Carvalho must leave the room during the consideration of any such contracts pursuant to the Act’s recusal requirements.

Dave Bainbridge  
General Counsel

*Zachary W. Norton*

By: Zachary W. Norton  
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