



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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April 22, 2021

Mark D. Hensley  
City Attorney  
Hensley Law Group, Torrance Office  
3655 Torrance Blvd., Suite 300  
Torrance, CA 90503

Re: Your Request for Advice  
**Our File No. A-20-159**

Dear Mr. Hensley:

This letter is in response to your request for advice on behalf of the City of Chino Hills (the City) and City Councilmember Ray Marquez regarding Government Code Section 1090, et seq.<sup>1</sup> We are not authorized to provide advice on any other laws that may apply such as common law conflict-of-interests provisions and any advice we provide assumes your facts are complete and accurate. (*In re Oglesby* (1975) 1 FPPC Ops. 71)

Under Section 1090, 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 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. Does Section 1090 prohibit Councilmember Marquez and the City Council from amending or terminating a 2006 agreement that the City entered with Mr. Marquez before he became a member of the City Council (the Agreement)?
2. Does Section 1090 prohibit Councilmember Marquez and the City Council from making a governmental decision about whether the Agreement is enforceable?

### CONCLUSIONS

1. Yes. An amendment to or termination of the Agreement would constitute the making of a contract that would violate Section 1090.

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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.

2. Under the rule of necessity, the City Council may determine the enforceability of the Agreement; Councilmember Marquez has a conflict of interest and must abstain from participating in this determination.<sup>2</sup>

### FACTS AS PRESENTED BY REQUESTER

Prior to becoming a City Councilmember, Mr. Marquez entered into the Agreement with the City in August 2006 which purports to place development restrictions on his property. Councilmember Marquez is considering filing an application to have the City amend the Agreement to remove the restriction or to terminate the Agreement. This application to the City, if filed, would require a vote by the City Council.

City staff is reviewing whether the development restrictions in the Agreement are enforceable. A decision about whether the Agreement is enforceable would also require a vote by the City Council.

### ANALYSIS

#### A. 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 noninterests 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.) 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. (*Id.* at pp. 646-649.) “[S]ection 1090 should be construed broadly to ensure that the public has the official’s absolute loyalty and undivided allegiance.” (*People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, 239, citing *Stigall v. City of Taft, supra*, at p. 571.) An important prophylactic statute such as Section 1090 should be construed broadly to close loopholes and should not be constricted and enfeebled. (*Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1334.)

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<sup>2</sup> We note that the Act further restricts Councilmember Marquez from making, participating in making, or using his official position to influence any decisions that will have a reasonably foreseeable financial effect on his interests, including his interest in real property. Under the Act, Councilmember Marquez must recuse himself from decisions under the recusal requirements outlined in Regulation 18707, which require a public identification of the interest and leaving the room for the duration of the decisions and discussions by the City Council.

**B. Amending or Terminating the Agreement Would Constitute the “Making” of a Contract Under Section 1090.**

In *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, the operator of a concession stand under contract with the city was later elected to become a member of the city council. (*Id.* at p. 194.) A provision of the concession contract provided that on the fifteenth anniversary of the agreement, ownership of the building in which the concession was housed would pass to the city and that “[a]t the end of said fifteen year period City may reasonably adjust the rate of payment to be paid by Operator to City to reflect the fact that City owns the building.” (*Id.*) When the concession contract came up for renewal, the operator was still a member of the city council. The city refused to renew the contract, citing Section 1090, and sought a declaration as to the legality of its refusal.

The *City of Imperial Beach* court held that the renewal would constitute the making of a contract that would violate Section 1090. The court reasoned that adjustment of the rate would require a “negotiation” prohibited by Section 1090, even if the city set the rate unilaterally and even if the conflicted councilmember abstained from voting. (*Id.* at p. 195.) The court held that “the purpose of Government Code section 1090 is not only to strike at actual impropriety, but also to strike at the appearance of impropriety.” (*Id.* at p. 197.) The court further explained:

The public policy supporting this position [Gov. Code, § 1090] stems from the fact a public office is a public trust created in the interest and for the benefit of the people. Public officers are obligated to discharge their responsibilities with integrity and fidelity. The law of this state is that public officers shall not have a personal interest in any contract made in their official capacity. The established policy of this state in this regard was created to remove all indirect as well as direct influence of an interested officer in the discharge of his duties. This is not intended to strike only at fraud or dishonesty and it is conceded none exists in the present case; the object of the enactment is to remove or limit the possibility of any personal influence either directly or indirectly which might bear on an official's decision as well as to void contracts which are actually obtained through fraud or dishonest conduct citations.

(*Id.* at p. 197, citing *City Council v. McKinley* (1978) 80 Cal.App.3d 204, 213.)

In both the present case and in *City of Imperial Beach*, the City entered a contract with an individual who was not a public official, then potential governmental decisions regarding that contract subsequently arose while the individual was a councilmember for the City. Thus, the conclusions and reasoning in *City of Imperial Beach* apply to the City and Councilmember Marquez. An amendment to or termination of the Agreement would constitute the making of a contract that would violate Section 1090. Specifically, such action would require a “negotiation” prohibited by Section 1090, even if Councilmember Marquez abstained from voting.

**C. Under the Rule of Necessity, the City Council May Determine the Enforceability of the Agreement Without Councilmember Marquez’s Participation.**

In limited circumstances, a “rule of necessity” has been applied to allow the making of a contract that Section 1090 would otherwise prohibit. (*Dietrick* Advice Letter, No. A-15-174; 88

Ops.Cal.Atty.Gen. 106, 110 (2005).) The rule of necessity ensures that essential government functions are performed even where a conflict of interest exists. (*Ibid.*)

The rule of necessity has applied to permit a public officer to carry out the essential duties of the office despite a conflict of interest where only that officer may legally act. (65 Ops.Cal.Atty.Gen. 305, 310 (1982).) The rule applied to a city council where its members had a conflict of interest that otherwise would have prevented action by the board. (*Federal Construction Co. v. Curd* (1918) 179 Cal. 489, 493.) Where the rule of necessity applies to allow a multi-member body to act when it otherwise would have been precluded from doing so due to one or more members' conflicts of interest, the member or members with the conflict of interest must abstain from participation. (88 Ops.Cal.Atty.Gen. 106, 111 (2005); 69 Ops.Cal.Atty.Gen. 102, 112 (1986); 67 Ops.Cal.Atty.Gen. 369, 378 (1984).)

To determine whether the rule of necessity applies here, we examine whether a determination of the enforceability of a contract is an essential duty of the City Council and whether the City Council is the only entity capable of making this determination.

The City Council acts as the legislative body to set policy, enter contracts, approve the budget, pass local laws, and gives direction on matters concerning the City. Given its broad authority over the City's policies and contracts, addressing and resolving the enforceability of the City's contracts is an essential duty of the City Council. Like any party to a contract, the City has an interest in operating under legally enforceable contracts to avoid any costs, damages or injuries that may arise for not doing so. Accordingly, we find that the rule of necessity applies to the City Council's determination of the enforceability of the Agreement and that Councilmember Marquez has a conflict of interest and must abstain from participating in this determination.<sup>3</sup>

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

Sincerely,

Dave Bainbridge  
General Counsel

*John M. Feser Jr.*

By: John M. Feser Jr.  
Senior Counsel, Legal Division

JMF:dkv

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<sup>3</sup> If the City finds the Agreement unenforceable and is subsequently required to consider additional decisions regarding the continuation of the Agreement, then the City may wish to seek further assistance regarding the application of the rule of necessity to the decisions. Until the decisions can be identified, we are unable to provide advice regarding the decisions as any advice provided would be purely hypothetical.