



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
1102 Q Street • Suite 3000 • Sacramento, CA 95811  
(916) 322-5660 • Fax (916) 322-0886

June 24, 2022

Mayor Scott Matas  
City of Desert Hot Springs  
Riverside County  
65446 Via Del Sol  
Desert Hot Springs, CA 92240

**Re: Your Request for Advice  
Our File No. A-22-065**

Dear Mr. Matas:

This letter responds to your request for advice regarding the conflict of interest provisions under the Political Reform Act (the “Act”) and 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.

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 Riverside 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 you from taking part in a decision to amend a development agreement that is set to expire for a project proposing ten villages given your employer secured the property management business for the first two villages in the project?

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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 18104 through 18998 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.

## CONCLUSION

Yes. As explained below, you have a prohibitive financial interest in an amended agreement between the City and the developer of the project; however, the rule of necessity applies to allow the City Council to amend the agreement so long as you abstain from any participation in your official capacity.

## FACTS AS PRESENTED BY REQUESTER

You serve as Mayor and councilmember for the City of Desert Hot Springs in Riverside County and have been a member of the City Council since 2007. In December of 2020, you were hired by Desert Resort Management, Inc., a company that provides management services to homeowner's associations to be a portfolio manager. In that position, you are prohibited from providing any services to HOAs within the city limits of Desert Hot Springs. Since being employed with Desert Resort Management, you have provided management services to six (6) HOAs in the cities of Palm Springs, Cathedral City, Indian Wells and a community in County of Riverside located in Mountain Center.

Your employer, Desert Resort Management, is the property manager for a homeowner's association that governs a portion of property being developed pursuant to a development agreement. The developer is asking for an amendment to the development agreement that affects property that is not a part of the homeowner's association. The original Development Agreement for Skyborne was entered into in 2005. Under the agreement, the development was divided into 10 different villages. A predecessor to the current master developer developed the first two villages, although not all of the lots in Village 2 were finished. Those are being finished now by Lennar Homes.

Skyborne Ventures, LLC is the current master developer and is working to develop the remaining Villages, Village 3 through 10. Skyborne Ventures has submitted an application to the City seeking a modification of the development agreement, which is set to expire soon. The City and Skyborne Ventures are the current parties to the development agreement. The application would modify obligations of Skyborne Ventures as it relates to only Villages 3 through 10. By its own terms, the development agreement is not applicable to individual lots which have been sold to homeowners once a certificate of occupancy has been issued (Section 2.4.5). This would apply to the lots in Villages 1 and 2.

Skyborne Villages 1 and 2 are governed by a homeowner's association called the Skyborne Community Association, a nonprofit corporation, which is a legal entity separate and distinct from Skyborne Ventures, the master developer. Only homes in Villages 1 and 2 are subject to the Skyborne Community Association. Skyborne Ventures does not own any lots within Villages 1 and 2. Conversely, Villages 3 through 10 are not part of the Skyborne Community Association. They could only become part of the association if Skyborne Ventures annexes them into the association, a decision which is outside the control of the City and outside of the control of Desert Resort Management.

Skyborne Community Association is run by a board of directors which have a fiduciary duty to the individual homeowners who are the members of the association. This board has elected to enter into a management contract with Desert Resort Management which covers Villages 1 and 2,

only. In the event any of Villages 3 through 10 were annexed into the association, the board would have to enter into a new contract with Desert Resort Management in order to cover those additional homes. Negotiation of this contract is also outside the control of the City. As previously mentioned, since Skyborne Community Association is in Desert Hot Springs, you do not participate in its management.

It is your understanding that Desert Resort Management receives approximately \$3,500/month (\$42,000 a year) for services to the Skyborne Community Association. Company-wide, Desert Resort Management grosses approximately \$40M annually so the amount earned from the Skyborne Community Association is a very small percentage, less than one-tenth of one percent, of overall company income.

Neither the Skyborne Community Association nor Desert Resort Management are named applicants before the City Council. The sole applicant before the City Council is Skyborne Ventures. Desert Resort Management has not been engaged by Skyborne Ventures and receives no financial compensation from Skyborne Ventures. Further, it does not have any interest in the real property which comprises the Skyborne project.

You state that if you are not able to participate in the vote on modifications to the development agreement, including extending it, the decision would be made by four council members. If Skyborne Ventures were to present the new agreement with modifications and the council voted it down or it was a split vote, it could stop development for the time being or until a new agreement could be drafted to meet the council's desires. If the current development agreement is not extended by the proposed amendments and Skyborne Ventures chooses not to continue development, then your company would not have more opportunities to manage more villages/communities.

You do not own any of the real property which comprises the Skyborne project, or any property in the vicinity.

## ANALYSIS

### Section 1090

Section 1090 generally prohibits a public officer or employee, while acting in his or her official capacity, from making or participating in the making of a contract in which the he or she is financially interested. The California Supreme Court has stated that the purpose of Section 1090 is to make certain that "every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity." (*Thomson v. Call* (1985) 38 Cal.3d 633, 650.) 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, supra*, at p. 646.)

Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest." (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) When an officer with a proscribed financial interest is a member of the governing body of a public entity, the prohibition of Section 1090 also extends to the entire body. (89 Ops.Cal.Atty.Gen. at 50.) The prohibition applies

regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson, supra*, at pp. 646-649.)

As the Mayor for the City of Desert Hot Springs, you are subject to Section 1090. In addition, if the City Council approved the proposed amendments modifying the current development agreement with Skyborne Ventures, you would be making the contract for purposes of Section 1090.<sup>2</sup> The initial question is whether you have a financial interest in the proposed amendments to the current development agreement, which includes extending the current agreement.

The California Supreme Court recently reiterated that the provisions of Section 1090 must be given a broad construction. (*People v. Superior Ct. (Sahlolbei)* (2017) 3 Cal.5th 230, 239 [Section 1090 should be construed broadly to ensure an official's absolute loyalty to the public].) With respect to what constitutes a financial interest for purposes of Section 1090, the California Supreme Court held:

“[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 p. 1075.)

Moreover, under Section 1090, 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. (84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

According to the facts, Desert Resort Management, your employer, is currently under contract with Skyborne Community Association to be the property manager for Villages 1 and 2 at the Skyborne development. You state that if the City Council does not approve the proposed amendments, including extending the current development agreement between the City and

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<sup>2</sup> A decision to modify, extend, or renegotiate a contract constitutes involvement in the making of a contract under section 1090. (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].)

Skyborne Ventures, and Skyborne Ventures chooses not to continue development, then your employer would not have additional opportunities to manage more villages at the Skyborne project. While Desert Resort Management will not be a named party to the amended agreement, the proposed decision to extend the current development agreement will likely result in more business opportunities for your employer. Put another way, if the current development agreement is not extended by the proposed amendments and Skyborne Ventures chooses not to continue development, then your company would lose those property management opportunities for the remaining villages. Therefore, the decision at issue has the real potential to place you in a compromising situation to be influenced by personal considerations, instead of the public interests you are charged with protecting. This is precisely the type of situation Section 1090 intends to preclude.<sup>3</sup>

Accordingly, Section 1090 prohibits you from participating in, and the City from entering into, any amendment to the development agreement for the Skyborne project unless an exception applies.

#### *Rule of Necessity*

In limited circumstances, a “rule of necessity” has been applied to allow the making of a contract that Section 1090 would otherwise prohibit. (88 Ops.Cal.Atty.Gen. 106, 110 (2005).) The rule of necessity has two facets: in procurement situations, it has permitted a government agency to acquire an essential supply or service despite a conflict of interest; in nonprocurement situations, it has permitted a public officer to carry out the essential duties of the office despite a conflict of interest where the officer is the only one who may legally act. (65 Ops.Cal.Atty.Gen. 305, 310 (1982).) In nonprocurement situations, such as the situation here, the rule of necessity ensures that essential government functions are performed even where a conflict of interest exists. (*Ibid.*)

In a nonprocurement situation 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 a member’s conflict of interest, the member 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).)

Thus, to determine if the rule of necessity applies, we must examine whether amending the current development agreement between the City and the Skyborne Ventures is an essential duty of the City Council and whether the City Council is the only government entity legally capable of doing so. As mentioned, the current development agreement is set to expire and amending the agreement will have the effect of extending it so that Skyborne Ventures can continue to develop the remaining villages in the Skyborne project.

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<sup>3</sup> The fact that Desert Resort Management does not have a direct agreement with the City does not change the conclusion that you would have a prohibitory financial interest in the amended development agreement. Importantly, “[i]n considering conflicts of interest [courts] cannot focus upon an isolated ‘contract’ and ignore the transaction as a whole.” (*People v. Honig* (1996) 48 Cal.App.4th 289, 320.) Courts “look [ ] past the individual contracts in question and consider [ ] the relationships between all the parties connected with them, either directly or indirectly, to determine if a conflict of interest existed.” (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1294.) Here, Desert Resort Management already has the property management contracts for the first two villages so it would appear to be in an advantageous position to obtain more property management contracts at the Skyborne project as they become available.

Ensuring that the current development agreement does not expire so that the Skyborne project can continue without delay is an essential duty of the City Council – a duty that only it is legally capable of performing. Accordingly, pursuant to the rule of necessity, the City Council may amend the City’s current development agreement with Skyborne Ventures. However, you must abstain from any participation in your official capacity.<sup>4</sup>

Government Code Section 87100 of the Act

Additionally, because you must abstain from any participation in the approval of amendments to the development agreement between the City and Skyborne Ventures under Section 1090, we do not need to further analyze the potential conflict of interest issue raised under the Act. Your abstention under Section 1090 would also satisfy the requirements of the Act.

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

Sincerely,

Dave Bainbridge  
General Counsel

By: *Jack Woodside*  
Jack Woodside  
Senior Counsel, Legal Division

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<sup>4</sup> Note that participation in the making of a contract, for purposes of Section 1090, 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.)