



FAIR POLITICAL PRACTICES COMMISSION

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January 6, 2015

Aaron C. Harp, City Attorney
City of Newport Beach
100 Civic Center
Newport Beach, CA 92660

Re: Your Request for Informal Assistance
Our File No. I-14-205

Dear Mr. Harp:

This letter responds to your request for advice on behalf of Councilmember Marshall "Duffy" Duffield regarding his duties under the conflict of interest provisions of the Political Reform Act (the "Act").¹ Because the Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), this advice is based solely on the facts presented.

Please note that we are only providing advice under the conflict of interest provisions of the Act and Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest. Because you are asking general questions, we are treating your request as one for informal assistance.²

Because you ask about Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General's Office and your local 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 the following advice is not admissible in a criminal proceeding brought under Section 1090 against any individual other than the requestor. (Section 1097.1(c)(5).)

¹ 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 Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

FACTS

Councilmember Duffield was elected to the Newport Beach City Council at the November 4, 2014 General Election and was sworn into office on or about December 9, 2014.

For the past 45 years, Councilmember Duffield has been building boats in California and is the owner and Chief Executive Officer ("CEO") of Duffield Marine Incorporated, d.b.a. Duffy Electric Boat Company ("Duffy Boats"). Duffy Boats is the leader in the leisure electric boat market, having built over 13,000 electric boats. Over 3,500 electric boats constructed and sold by Duffy Boats are in service in Newport Harbor alone. Duffy Boats' production factory is located in Adelanto, California and it owns an eight acre commercial property in the neighboring city of Costa Mesa located approximately 1,000 feet from the City's boundary.

Duffy Boats' primary business focuses on sales, rentals and service of electric boats. Duffy Boats also provides a monthly maintenance plan to electric boat owners called Duffy Care. For purposes of this request, the Commission should assume that Duffy Boats may receive over \$500 from a client for an individual sale, rental, service, or annual Duffy Care plan.

Duffy Boats leases two properties in the City under long term leases and Councilmember Duffield owns a personal residence within the City: (1) a boat rental and sales facility located at 2001 West Coast Highway, Newport Beach; (2) a boat service facility located at 2439 West Coast Highway, Suite 103, Newport Beach; and (3) Councilmember Duffield's personal residence is located approximately 560 feet from Newport Harbor. Both leased properties are located adjacent to Newport Harbor and depicted on the enclosed aerial maps. Duffy Boats also has an annual commercial pier permit from the City for the boat rental and sales facility located at 2001 West Coast Highway, which allows Duffy Boats to maintain a marina over publicly owned tidelands in Newport Harbor. Duffy Boats' marina is used exclusively by the company and is not subleased to third parties.

Councilmember Duffield's job duties at Duffy Boats are varied. He plays an active role in creating new products for his company and driving the overall direction of the company. As the owner and CEO, Councilmember Duffield has the ability to control, direct and manage all aspects of Duffy Boats' operations.

Duffy Boats' annual revenue, on a company-wide basis is over \$2.5 million but less than the revenues of a business entity that ranks 500 in the Fortune 500 list. As the sole owner, Councilmember Duffield owns 100% of Duffy Boats' privately-held shares. For purposes of this request, the Commission should assume that these shares exceed \$2,000 in value.

ANALYSIS

Conflicts of Interest under the Act

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a “financial interest” in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official’s interests. (Section 87103; Regulation 18700(a).)

The Commission has adopted the following eight-step standard analysis under Regulation 18700(b) for determining whether an individual has a disqualifying conflict of interest in a governmental decision, and provides in pertinent part:

“To determine whether a given individual has a disqualifying conflict of interest under the Political Reform Act, proceed with the following analysis:

“(1) Determine whether the individual is a public official, within the meaning of the Act

“(2) Determine whether the public official will be making, participating in making, or using or attempting to use his/her official position to influence a government decision

“(3) Identify the public official’s economic interests

“(4) For each of the public official’s economic interests, determine whether that interest is directly or indirectly involved in the governmental decision which the public official will be making, participating in making, or using or attempting to use his/her official position to influence

“(5) Determine the applicable materiality standard for each economic interest, based upon the degree of involvement determined pursuant to California Code of Regulations, title 2, section 18704

“(6) Determine whether it is reasonably foreseeable that the governmental decision will have a material financial effect . . . on each economic interest identified

“(7) Determine if the reasonably foreseeable financial effect is distinguishable from the effect on the public generally

“(8) Determine if the public official’s participation is legally required despite the conflict of interest . . .”

It is plain from the facts that Councilmember Duffield is a public official who will be making governmental decisions so we do not address steps one and two of the analysis. In addition, because you have asked several general questions concerning Councilmember Duffield’s arrangement, we answer each question in the context of the particular portion of the conflicts analysis under which it arises.

1. May Councilmember Duffield participate in governmental decisions involving clients of Duffy Boats, in circumstances where the work/service performed by Duffy Boats for the client is in another jurisdiction (i.e., not in the City of Newport Beach)?

No. Section 82030 defines “income” to expressly exclude “income received from any source outside the jurisdiction and not doing business within the jurisdiction, not planning to do business within the jurisdiction, or not having done business within the jurisdiction during the two years prior to the time any statement or other action is required under this title.” Regulation 18230 states “[a] person is ‘doing business in the jurisdiction’ if that person has business contacts on a regular or substantial basis with a person who maintains a physical presence in the jurisdiction of a public official. ‘Business contacts’ include, but are not limited to, manufacturing, distributing, selling, purchasing, or providing services or goods. ‘Business contacts’ do not include marketing via the Internet, telephone, television, radio, or printed media.”

You have not provided any information to indicate whether these specific clients of the Councilmember are otherwise doing business within the jurisdiction. Absent specific facts, we assume that based on the fact that they are appearing before or will be impacted by decisions of the city council, that they are doing business in Newport Beach. Therefore, if the decisions will have a material and foreseeable financial effect on these clients, who are a source of income to Councilmember Duffield, he will have a conflict of interest.

2. May Councilmember Duffield participate in governmental decisions involving clients of Duffy Boats in circumstances where the work/service performed by Duffy Boats for the client is in the City?

No. The same standard explained above also applies here. Thus, if the decisions will have a material and foreseeable financial effect on Councilmember Duffield’s clients, he will have a conflict of interest.

3. May Councilmember Duffield participate in the following governmental decisions?

(a) Setting the rent for commercial tidelands pier permits/leases while Duffy Boats or some of Duffy Boat's clients have residential tidelands pier permits/leases with the City:

No. Regulation 18705.2(b) provides "the reasonably foreseeable financial effects of a governmental decision on any real property in which a governmental official has a leasehold financial interest is material whenever: governmental decision will:

"(1) Change the termination date of the lease;

"(2) Increase or decrease the potential rental value of the property;

"(3) Increase or decrease the rental value of the property, and the official has a right to sublease the property;

"(4) Change the official's actual or legally allowable use of the real property;

"(5) Impact the official's use and enjoyment of the real property."

Because the decision will presumably change the rent charged for the lease, the Councilmember will have a conflict of interest under Regulation 18705.2(b)(2).³

The Councilmember would also have a conflict of interest based on his source of income (clients of Duffy Boats) being the subject of the proceeding concerning the decision before the official or the official's agency where the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the source of income, and there is any financial effect on the source of income. (Regulation 18704.1(a) and 18705.3(a).)

(b) Determining how to allocate or expend tidelands or General Fund revenue in Newport Harbor:

Without additional facts concerning the effects of the allocation or expenditure of funds on the Councilmember or his clients, we cannot advise as to whether he will have a conflict of interest.

(c) Determining the appropriate zoning or use regulations for commercial, marine and residential properties that border upon Newport Harbor:

³ The Councilmember may also have a conflict of interest based on the effect on his business, but having found a material financial effect on his lease, we do not further analyze potential effects on his business.

No. Since Councilmember Duffield is presumably rezoning or changing the use of his own property or that of his clients, he will have a conflict of interest.

(d) Determining the general use, maintenance and improvement of Newport Harbor (e.g., dredging, eel grass mitigation, Balboa Island sea walls repair, water quality measures, etc.):

Without additional facts concerning the general use, maintenance and improvement of Newport Harbor and the effect on the Councilmember or his clients, we cannot advise as to whether he will have a conflict of interest. However, if these decisions will have no financial effect on the Councilmember or his interests, he will not have a conflict of interest. Moreover, depending on the facts, the public generally exception may also apply.

(e) Participating in the approval of certain projects such as dredging the harbor that is near a property owned by a client who is a source of income to Duffy Boats where there may be an impact to the client's use and enjoyment of their property:

As above, without additional facts concerning the dredging project and its effect on the Councilmember's client, we cannot advise as to whether he will have a conflict of interest. Generally, the effect of a decision is material as to an individual who is a source of income to an official if:

- The decision will affect the individual's income, investments, or other tangible or intangible assets or liabilities (other than real property) by \$1,000 or more; or
- The decision will affect the individual's real property interest in a manner that is considered material under Regulation 18705.3.

However, depending on the facts, the public generally exception may apply.

4(a) If the effect of a governmental decision does not meet the thresholds of materiality, does the "nexus rule" found in Regulation 18705.3(c) nevertheless prohibit Councilmember Duffield's participation in the factual circumstances described in questions above?

It depends. Regulation 18705.3(c) provides that a nexus exists if the public official receives or is promised the income to achieve a goal or purpose which would be achieved, defeated, aided, or hindered by the decision. The rationale for the nexus test is that when an employee earns a salary to accomplish a purpose that may be advanced by what he or she does as a public official, we presume that the employer is benefiting from the actions of the employee in his or her official capacity. (*Yarnell* Advice Letter, No. A-00-161.) Typically, a "nexus" is found in situations where the official is also a high-level employee with direct influence and control over his or her employer's management or policy decisions. (*Moser* Advice Letter, No. A-03-147; *Low* Advice Letter, No. A-99-304.)

However, finding that the nexus test is satisfied is not the end of the analysis. A special rule can apply when a conflict of interest exists under the nexus test, but the governmental decision will have no financial effect at all on the public official's outside employer. In this regard, Regulation 18705(c)(1) states in relevant part:

“Although a conflict of interest would otherwise exist under Title 2, California Code of Regulations, sections 18705.1 through 18705.4, inclusive, and 18706, the decision will have no financial effect on the person or business entity who appears before the official, or on the real property.”

This is a fact-dependent decision that will require Councilmember Duffield to consider the circumstances surrounding a specific decision in order to determine whether the nexus test and the exception of Regulation 18705(c) apply.

(b) If the nexus rule would otherwise prohibit participation in the circumstances described above, could Duffy Boats “wall off Councilmember Duffield from participating within Duffy Boats’ organization on those matters as a way to allow his participation in the governmental decisions?”

Considering the Councilmember's relationship to his wholly owned business, it would not be possible to “wall him off” from participating within Duffy Boats’ organization in order to allow him to participate in the decision in his official capacity.

Conflicts of Interest Under Section 1090

You have asked whether Section 1090 would prohibit Councilmember Duffield from entering into a new commercial pier permit or lease with the City to allow Duffy Boats to continue to maintain a marina in Newport Harbor over the publicly owned tidelands located adjacent to 2001 West Coast Highway. 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 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. 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.)

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.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

We employ the following six-step analysis to determine whether the Councilmember has a conflict of interest under Section 1090.

Step One: Is Councilmember Duffield 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.” City Councils and their members are plainly covered by this prohibition. (See, e.g., *Thomson, supra*, at p. 645; *City Council v. McKinley* (1978) 80 Cal.App.3d 204, 213.) Therefore, the Councilmember and the Newport Beach City Council are subject to the provisions of Section 1090.

Step Two: Does the decision at issue involve a contract?

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that “specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’” (*People v. Honig, supra*, at p. 351 citing *Stigall, supra*, at pp. 569, 571.) A lease agreement with the City is a contract as contemplated by Section 1090. (See e.g., *County of San Bernardino v. Walsh* (2007) 158 Cal. App. 4th 533

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

You specifically ask whether the Councilmember may make the contract with the City in his private capacity. When board members have the power to execute contracts, participation is constructive. Thus, where an official is a member of a board or commission that has the power to execute the contract, he or she is conclusively presumed to be involved in the making of his or her agency’s contracts irrespective of whether he or she actually participates in the making of the contract. (*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).)

However, as you are aware, even if the Councilmember will not be participating in the decision as a councilmember, his participation in the matter before the City Council is presumed under Section 1090.

Step Four: Does the Councilmember 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.” (*People v. Honig, supra*, at p. 333.) Officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*Ibid.*) 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. (*People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).) In this case, the Councilmember's contract with the City to maintain a marina in Newport Harbor and operate his business would clearly result in a contract in which he has a financial interest.

Step Five: Does either a remote interest or non-interest exception apply?

As noted above, 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. Instead, the entire governing body is precluded from entering into the contract. (*Thomson, supra*, at pp. 647-649; *Stigall, supra*, at p. 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).)

However, the Legislature has created various statutory exceptions to Section 1090's prohibition where the financial interest involved is deemed a "remote interest," as defined in Section 1091, or a "noninterest," as defined in Section 1091.5. Pertinent here is the "noninterest" specified in Section 1091.5(a)(3), which provides that an officer or employee shall not be deemed to be 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."

In *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, the Supreme Court explored the scope of this exception and focused on two factors to determine that the exception applied. First, with respect to *public services generally provided*, the court stated, "in *Fellows, supra*, 89 Ops.Cal.Atty.Gen. 121 [at p. 124], the Attorney General considered the application of section 1090 to airport commissioners who rented airport hangar space from a city. Concluding such rentals were permitted, the Attorney General 'reject[ed] the suggestion that due to the limited number of airport hangars and would-be renters (i.e., owners of airplanes), these particular 'public services' would not be 'generally provided' within the meaning of section 1091.5, subdivision (a)(3).'" Second, the court stated that "a party asserting section 1091.5(a)(3) as a defense must establish that other constituents of an agency received, or would have received, similar terms. There can be no special tailoring of a contract's terms, no discretion in determining what consideration a particular official must relinquish or may receive." (*Lexin, supra*, 47 Cal.4th at p. 1089.)

Assuming the lease/permit process meets these requirements, the noninterest exception to 1090 would apply. If a "noninterest" is present, the contract may be made without the officer's abstention, and generally, a noninterest does not require disclosure.⁴ (*City of Vernon v.*

⁴ Except as required by the Political Reform Act.

Central Basin Mun. Water Dist. (1999) 69 Cal.App.4th 508, 514-515; 84 Ops.Cal.Atty.Gen. 158, 159-160 (2001).)

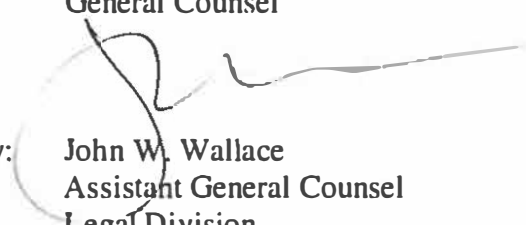
Step Six: Does the Rule of Necessity Apply?

For your information, Section 1090 also recognizes a “rule of necessity” in limited circumstance. (88 Ops.Cal.Atty.Gen. 106, 110 (2005).) Under the rule of necessity, a government board may carry out essential duties of the board despite the existence of a conflict where the board is the only one who may legally act. (See 69 Ops.Cal.Atty.Gen. 102, 109(1986).) However, we note that when the “rule of necessity” applies to an official on a multi-member board or body, the Attorney General has concluded that the interested official must abstain from any participation in the decision. In other words, the rule permits the body to make the contract, so long as the financially interested official does not participate in the body’s decision. (See 89 Ops.Cal.Atty.Gen. 217 (2006); 88 Ops.Cal.Atty.Gen. 106, 112 (2005).)

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: 
John W. Wallace
Assistant General Counsel
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