



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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January 17, 2017

Sonia R. Carvalho  
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Re: Your Request for Advice  
**Our File No. A-16-265**

Dear Ms. Carvalho:

This letter responds to your request for advice on behalf of David Benavides, a City Councilmember for the City of Santa Ana, regarding the conflict-of-interest provisions of the Political Reform Act (the "Act") and Section 1090.<sup>1</sup> Because the Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders assistance (*In re Oglesby* (1975) 1 FPPC Ops. 71), this letter is based on the facts presented.

Regarding our advice on Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General's Office and the Orange 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." (Section 1097.1(c)(5).)

### QUESTIONS

1. Does Section 1090 prohibit the City from:
  - A. Granting permits, variances, contracts for services, development agreements, labor agreements and other agreements to parties who have made donations at the Councilmember's behest to KidWorks, a non-profit 501(c)(3) organization that employs him?
  - B. Awarding grants or contracts to KidWorks?

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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. All further 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. Do the Act's conflict of interest provisions prohibit Councilmember Benavides from participating in City Council decisions?:
  - A. To grant permits, variances, contracts for services, development agreements, labor agreements and other agreements to such donors?
  - B. To award grants or contracts to KidWorks?

### CONCLUSIONS

1. A. No. Councilmember Benavides does not have a financial interest in the contracts. Also, Section 1090 does not apply to permits, variances, or licenses because they are not contracts.  
  
B. No. Under the "remote interest" exception for officers and employees of certain non-profit entities in Section 1091(b)(1), the City may award grants and contracts to KidWorks so long as Councilmember Benavides discloses his financial interest in the contract to the City Council, his interest is noted in the City's official records, and he abstains from participating in the making of the grant or contract.
2. A. No. Councilmember Benavides does not have a financial interest in these decisions.  
  
B. Yes. It is reasonably foreseeable that these decisions will have a material financial effect on KidWorks, a source of income to the Councilmember.

### FACTS

Councilmember Benavides has served on the City Council for the City of Santa Ana since 2006. In 2015, he became Executive Director of KidWorks, a non-profit organization that has provided adults and children in at-risk neighborhoods with education enrichment and leadership development programs since 1993. Donors of KidWorks include companies, labor unions, developers, individuals, and non-profits that partner with KidWorks. A key part of Councilmember Benavides' duties at KidWorks is fundraising. In this role, he seeks donations and grant funds from a broad spectrum of donors, including people and organizations doing business in or with the City of Santa Ana. Donations may be monetary or in the form of services.

Donors to KidWorks may, from time to time, come before the City Council for permits, variances, contracts for services, development agreements, labor agreements and other agreements. Some of the applicants may have made donations to KidWorks in response to solicitations.

In addition, the City has awarded grants to KidWorks derived from both Community Development Block Grants and the City's General Fund. Councilmember Benavides has not participated in, considered or approved such grants or any City contracts with KidWorks.

## ANALYSIS

### *Conflicts of Interest under 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 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. The prohibition applies 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.)

We employ the following analysis to determine whether an official has a disqualifying conflict of interest under Section 1090:

#### *Is Councilmember Benavides 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.”

As a member of the City Council, Councilmember Benavides is a public officer subject to Section 1090.

#### *Do the decisions at issue involve a contract or contracts?*

Generally, one may look to general principles of contract law to determine whether a contract is involved in the decision (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 569, 571.) In interpreting the definition of contract for purposes of Section 1090, the Attorney General’s office has opined that a decision amending a “license” or “regulatory permit” was a “regulatory matter and not a ‘contract’ in the ordinary sense of the word.” (84 Ops.Cal.Atty.Gen., *supra*, at p. 36; see also *Diaz* Advice Letter, No. A-15-229 and *Miller* Advice Letter, No. A-15-236.) Therefore, the permits and variances issued to the donors to KidWorks are not contracts under Section 1090.

Nonetheless, decisions concerning contracts for services, development agreements, labor agreements and other contracts all involve contracts.

*Is Councilmember Benavides participating in contract decisions?*

Making or participating in making a contract has been broadly construed to include those instances where a public official has influence over the contract or its terms. (See 80 Ops. Cal. Atty. Gen. 41.) Where an official is a member of a board or commission that has the power to execute the contract at issue, 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*, at 633, 649; *Stigall, supra*, at 570-571.)

*Does Councilmember Benavides have a financial interest in the subject contracts?*

### **Contracts with Donors**

Councilmember Benavides receives income from KidWorks which is in an organization that operates on donations. The contract decisions affecting the donors to KidWorks would appear to affect KidWorks' finances. However, under similar circumstances, the courts and the Commission have found that the official had no financial interest in the decisions concerning donors to the official's non-profit employer. (*O'Connell* Advice Letter, No. A-15-243 and *Torres v. City of Montebello* (2015) 234 Cal. App. 4th 382.)

In *Torres*, it was alleged that a councilmember (Salazar) had a Section 1090 conflict of interest in a decision to contract with a company, Athens. At the time of the decision, the Councilmember was the chief executive director of MELA Counseling Services Center (MELA). The Councilmember and her husband founded MELA (a non-profit drug counseling organization) in 1993 and the Councilmember received an annual salary of \$75,000 from MELA. MELA received its funding from county contracts, grants, and private donations. The allegation was that the councilmember was financially interested in the Athens contract because Athens had donated money in the past to MELA. The Court of Appeal disagreed:

“Had the vote concerned a contract with MELA, or had Athens conditioned future contributions to MELA on approval of the Contract, then Salazar, as a MELA officer, would have been subject to section 1091's disclosure and abstention requirements. But MELA was not a party to the Contract and the trial court specifically found, based on the evidence, that ‘Salazar did not receive any promises from Athens for her vote.’ MELA simply had no financial interest in the Contract. And, because MELA had no financial interest in the Contract, it follows that Salazar had no remote interest by virtue of her employment as a MELA officer.”

The facts here fall squarely within *Torres*. Accordingly, Councilmember Benavides does not have a financial interest in the City's contracts with donors to KidWorks and Section 1090 does not apply.

## **Awarding Grants and Contracts to KidWorks**

The general terms of Section 1090 would apply to grants and contracts that the City may award to KidWorks.<sup>2</sup> However, the Legislature has provided exemptions from section 1090's prohibition that allow certain agreements to be executed. If a "remote interest" is present, as defined in Section 1091, the contract may be made provided: (1) the officer discloses his or her financial interest in the contract to the public body; (2) the interest is noted in the body's official records; and (3) the officer abstains from participating in the making of the contract. (See 84 Ops.Cal.Atty.Gen. 158, 159 (2001); 81 Ops.Cal.Atty.Gen. 169, 172 (1998); 65 Ops.Cal.Atty.Gen. 305, 307 (1982).)

The "remote interest" exception for officers and employees of certain non-profit entities is found in Section 1091(b)(1) and states, in pertinent part:

"(b) As used in this article, "remote interest" means any of the following: . . .

"(1) That of an officer or employee of a non-profit entity exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. Sec. 501(c)(3)), pursuant to Section 501(c)(5) of the Internal Revenue Code (26 U.S.C. Sec. 501(c)(5)), or a non-profit corporation."

Councilmember Benavides is an employee of KidWorks, a 501(c)(3) non-profit entity. Thus, his financial interest meets the test of a remote interest as set forth in Section 1091(b)(1). Accordingly, grants and contracts awarded by the City to KidWorks are permitted so long as Councilmember Benavides follows the disclosure and other requirements of Section 1091.

## ***Conflicts of Interest under the Act***

Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. The Act's conflict-of-interest provisions only apply to conflicts of interests based on the following:

- Any business entity in which the public official has a direct or indirect investment worth \$2,000 or more. (Section 87103(a).)
- Any real property in which the public official has a direct or indirect interest worth \$2,000 or more. (Section 87103(b).)
- Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating \$500 or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made. (Section 87103(c).)

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<sup>2</sup> Grants and donations generally are contracts within the meaning of Section 1090. (See *People v. Honig* (1996) 48 Cal.App.4th 289; 89 Ops.Cal.Atty.Gen. 258 (2006); 85 Ops.Cal.Atty.Gen. 176 (2002).)

- Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d).)
- Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating \$470 or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made. (Section 87103(e).)
- His or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is commonly referred to as the “personal financial effects” rule. (Section 87103.)

### **Permits, Variances, Contracts for Services, Development Agreements, Labor Agreements and Other Contracts with Donors**

You ask about the donors to KidWorks and whether these donations form the basis for a conflict of interest. While gifts to the Councilmember would be potentially disqualifying, under the facts here, the donors would not be making a gift to him. A “gift” is defined under Section 82028(a) as “any payment that confers a personal benefit on the recipient, to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public without regard to official status.” Fundraising on behalf of a non-profit organization, however, is not prohibited and does not implicate these provisions so long as the official receives no personal benefit. However, when elected officials fundraise for charitable purposes, they may have to file behested payments reports.<sup>3</sup>

### **Awarding Grants and Contracts to KidWorks**

As Councilmember Benavides’ employer, KidWorks, a 501(c)(3) organization, is a source of income to him. (Section 87103(c).) The next step in the conflict of interest analysis is to determine if the specific governmental decision will have a foreseeable and material financial effect on the source of income.

*Foreseeability:* A financial effect on an interest is presumed to be reasonably foreseeable if the interest is explicitly involved in the decision, and an interest is “explicitly involved” if the interest is a named party in, or subject of, the decision. (Regulation 18701(a).) KidWorks is explicitly involved in decisions to award grants and contracts and therefore any financial effect of these decisions is foreseeable.

*Materiality:* Under the applicable materiality rule, a decision’s effect on a source of income is material if “the source is a non-profit that will receive a measureable financial benefit or loss . . .” (Regulation 18702.3(a)(3).) While the term “measureable” is not defined, Regulation 18702(b) provides that the financial effect of a governmental decision is not material if it is nominal, inconsequential, or insignificant. You have not provided facts suggesting that any future

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<sup>3</sup> Section 82015 requires elected officers to report payments made at their behest that would not otherwise be reported as contributions or gifts and are not made principally for a personal purpose. See Regulation 18215.3.

grants will be merely nominal, inconsequential or insignificant to KidWorks. Therefore, based on the facts you have provided, we find that the reasonably foreseeable financial effects of City Council decisions to award grants to KidWorks are material and Councilmember Benavides may not take part in these decisions.

However, by following the abstention requirements of Section 1090, as discussed above, and additionally leaving the room during the decision, Councilmember Benavides will satisfy the Act's recusal provisions set forth in Section 87105 and Regulation 18707.

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

Sincerely,

Hyla P. Wagner  
General Counsel



By: Valentina Joyce  
Counsel, Legal Division

VJ:jgl