



STATE OF CALIFORNIA  
**FAIR POLITICAL PRACTICES COMMISSION**  
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May 3, 2017

Paula Deel, Director  
Newberry Community Services District  
P O Box 328  
Newberry Springs, CA 92365

Re: Your Request for Advice  
**Our File No. I-17-030**

Dear Ms. Deel:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act")<sup>1</sup> and Section 1090. Please note that we do not advise on any other area of law, including Public Contract Code or common law conflicts of interest. We are also 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. Although your questions for advice regarding potential resignation to avoid conflicts and Section 1090 are specific enough for us to provide you formal assistance, your question as to the potential for a conflict under the Act is more general in nature, and we are treating this portion of your request as one for informal assistance.<sup>2</sup>

In regard to 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 San Bernardino 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. Would you need to resign from positions you hold with local non-profits to avoid a conflict of interest?
2. Should an item concerning one of the organizations appear on the Newberry Community Services District agenda, how would you avoid conflict of interest or 1090 violation?

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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.

<sup>2</sup> Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

## CONCLUSIONS

1. Even if a person has a conflict of interest under the provisions of the Act, there is no requirement that the person resign from any position occupied at the time the conflict arose. Therefore, the Act does not prohibit you from holding these positions.

2. Both the Act and Section 1090 may limit you from participating in certain decisions, as discussed below.

## FACTS

The Newberry Community Services District (the "District") was formed in 1958, to provide the community of Newberry Springs with the fire, park and recreation, and street lighting services. The District operates the Newberry Springs Fire Department, Community Center & Park, Street Lighting and issues Burn Permits. You are an elected member of the District board.

In addition, you are Treasurer for both the Newberry Springs Chamber of Commerce and the Newberry Springs Economic Development Association. Both are non-profit organizations. You are also one of four people who started a bi-annual newsletter sponsored by these two non-profit organizations. You receive no payment except reimbursement of expenses from any of the above organizations.

You are also a member of the "Barstow Partners Advisory Committee." In a telephone conversation on April 27, 2017, you noted that this is not an incorporated association, and does not provide you with any income or reimbursement for expenses. It is merely a group of residents that makes suggestions to the owners of Barstow Partners, LLC, a business entity that donates funds to organizations in Newberry Springs, as to which organizations should be considered for these donations. You also note that you hold no position with, and receive no money from, Barstow Partners, LLC. In addition, you note that you attend the Newberry Springs Service Association meetings and Newberry Community Church. However, since none are a source of income, and you do not hold any position of management with either, you have no interest in "Barstow Partners Advisory Committee," Newberry Springs Service Association, and Newberry Community Church under Section 1090 or the Act.

These organizations only involvement with the District has been to hold activities at the District building and park or to donate money to the District for community projects. Scheduling for use of the building and park is handled by District staff and does not come before the Board of Directors. In a telephone conversation on April 20, 2017, you noted that community organizations are not charged a fee for the use of District facilities.

## ANALYSIS

Both the Act and Section 1090 contemplate that public officials occasionally will be confronted with decisions that affect matters in which they have financial interests. On these occasions, these sections prohibit officials from participation in those decisions.

This result is consistent with the express purposes of the Act, one of which is to disqualify public officials from acting in situations where their assets and income may be materially affected by their actions. (Section 87100 (c).) Neither the Act nor Section 1090 require public officials to resign from their positions when confronted with financial conflicts.<sup>3</sup>

### **Section 1090**

In addition to the Act, we must also determine whether you have a potentially disqualifying interest in decisions under Section 1090. Generally, Section 1090 prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Under this section, “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 you will have a conflict of interest under Section 1090.

#### **Step One: Is the official 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 an elected member of the board of the Newberry Community Services District, you 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* (1996) 48 Cal.App.4th 289, 351) citing *Stigall v. Taft* (1962) 58 Cal.2d 565.

Typically, a contract is “made” on mutual assent of the involved parties. (*Stigall, supra*, at p. 569.) Decisions concerning agreements for services, development agreements, labor agreements, grants and donations of public funds, and leases all may involve contracts.

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<sup>3</sup> Although an official or employee may resign from his or her position, that resignation may not be sufficient to avoid a Section 1090 violation *when the person has been involved in the contracting process.* (See *Stigall v. City of Taft* (1962) 58 Cal.2d 565.)

**Step Three: Will the official be making or participating in making a contract?**

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, absent an exception (see step 5 below), 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.) This rule would apply to your position on the District Board.

**Step Four: Does the official 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. Vallerger* (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 addition, 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, 146 ["(h)owever devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void"].) Further, "the certainty of financial gain is not necessary to create a conflict of interest . . . (t)he 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).)

You have a financial interest in the entities from which you receive reimbursement of expenses; the Newberry Springs Chamber of Commerce and the Newberry Springs Economic Development Association, which may trigger a 1090 conflict of interest were the District to contract with any of the entities.

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

Generally, when the public official with a financial interest is a member of a public body or board, the prohibition extends to the entire body or board; the entire governing body is precluded from entering into the contract.

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.

### *Remote interest*

With respect to any contract that the District might wish to enter into with the above mentioned nonprofit corporations, the general terms of Section 1090 would apply. 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).)

Subject to an exception not pertinent here, subdivision (b)(1) of Section 1091 specifies as a "remote interest" the interest a public officer has as "an officer or employee of a nonprofit corporation." Here, your financial interests meet the test of a remote interest as set forth in Section 1091, subdivision (b)(1). Accordingly, decisions involving contracts with the above referenced nonprofits may be made as long as you follow the disclosure and other requirements of Section 1091, as outlined above.

### **Political Reform Act**

Under Section 87100, a public official may not make, participate in making, or use 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).)

Section 87103 identifies interests from which a conflict of interest may arise and includes:

- 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).)
- 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).)

- In addition, a public official's personal finances are deemed to be directly involved in a governmental decision that will have any financial effect on his or her personal finances or those of his or her immediate family. (Section 87103.)

### *Source of Income*

Since you are an uncompensated board member of some of the nonprofit organizations you ask about, you will not have an interest in the organizations as a source of income by virtue of salary.

However, in regard to any interest in the aforementioned nonprofits as a source of income, the Act's definition of income expressly includes "reimbursement for expenses" (Section 82030(a).)<sup>4</sup> Therefore, you would have an interest in any of the above nonprofits as a source of income if that income aggregates to \$500 or more within 12 months prior to the decision, and may not make, participate in making, or use your official position to influence a governmental decision in which you have an interest.

### *Foreseeability and Materiality*

A financial effect is presumed reasonably foreseeable if the financial interest is the subject of a governmental decision before the official or the official's agency. (Regulation 18701(a).) A financial interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the financial interest. (Regulation 18701(a).)

Similarly, a reasonably foreseeable financial effect of a governmental decision on an official's financial interest is material if the source is an applicant, contracting party, or is otherwise named or identified as the subject of the proceeding. (Regulation 18702.3).

### *Making, Participating in Making, and Influencing a decision*

An official is making a decision if the official "authorizes or directs any action, votes, appoints a person, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his agency." (Regulation 18704(a).) Participating in a decision occurs when the official "provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review." (Regulation 18704(b).) Lastly, an official uses his or her position to influence a decision if the official contacts or appears before any official in his or her agency for the purpose of affecting a decision. (Regulation 18704(c).) Thus, the consequence of a conflict of interest under the Act (in contrast to Section 1090) is simply that you may not make, participate in making, or influence the decision. The Act does not limit the District's actions if you abstain.

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<sup>4</sup> Moreover, the definition of "income" also excludes "reimbursement for travel expenses and per diem received from a bona fide nonprofit entity exempt from taxation under Section 501(c)(3) of the Internal Revenue Code." (Section 82030(b)(2).) Thus, if the board on which you serve is a nonprofit charitable organization, reimbursement for travel expenses and per diem payments would not be income. If the nonprofit is not exempt from taxation under Section 501(c)(3) but a nonprofit under a different section, these payments would be considered income.

Although you have not identified any specific decisions that may come before the District involving sources of income, you would be prohibited from voting on, directly participating in, or influencing District decisions involving a source of income if that income aggregates to \$500 or more within 12 months prior to the decision.

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

Sincerely,

Hyla P. Wagner  
General Counsel



By: Zachary W. Norton  
Senior Counsel, Legal Division

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