



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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September 8, 2017

Candice K. Lee  
General Counsel  
Successor Agenc- Covina Redevelopment Agency  
RICHARDS | WATSON | GERSHON  
355 South Grand Avenue, 40th Floor  
Los Angeles, CA 90071-3101

Re: Your Request for Advice  
Our File No. A-17-192

Dear Ms. Lee:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (“Act”)<sup>1</sup> and Section 1090. Please note that we are only providing advice under the conflict of interest provisions of the Act and Section 1090. We are not providing advice under other general conflict of interest prohibitions such as common law conflict of interest or the Public Contract Code. We are also not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71); any advice we provide assumes your facts are complete and accurate.

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 Los Angeles County District Attorney’s Office (Section 1097.1(c)(3).) 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 preclude the Successor Agency to the Covina Redevelopment Agency (“Successor Agency”) from entering an agreement to sell the Successor Agency’s real property to The McIntyre Company (“McIntyre”), where Successor Agency Board Member Victor Linares is promised income from a separate business in which the owners of McIntyre also have partial ownership interest?

2. Does Board Member Linares have a disqualifying conflict of interest under the Act that precludes him from participating in the Successor Agency’s deliberations and decisions regarding an agreement to sell the Successor Agency’s property to McIntyre?

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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.

## CONCLUSIONS

1. No. Section 1090 does not preclude the Successor Agency from entering into an agreement to sell property to McIntyre because he does not have a financial interest in the contract.

2. No. Board Member Linares does not have a disqualifying conflict of interest under the Act that precludes him from participating in the decision regarding the sale of the Successor Agency's property to McIntyre because he has no financial interest (set forth in Section 87103) in McIntyre.

## FACTS

You are General Counsel to the Successor Agency. As such, you represent Board Member Linares.<sup>2</sup>

Board Member Linares has provided the following facts:

Board Member Linares has served as the Chief Marketing Officer of Barley Lodge Brewing, LLC, doing business as Arrow Lodge Brewing ("Brewery") for the past two years. The Brewery has been open for business in the City of Covina for eight months. Board Member Linares has received no compensation from the Brewery to date. Although he has no written agreement, he expects to receive compensation from the Brewery in the future when the Brewery begins to generate a profit. The amount and timing of the compensation is uncertain. He has also not invested any funds into the Brewery.

The ownership of the Brewery is divided between four people based on the following percentages:

1. Carlos Roman owns 50%;
2. William McIntyre owns 22.5%;
3. Andrew McIntyre owns 22.5%; and
4. Linda Logan owns 5%.

Irrespective of the percentages of ownership interest, the owners collectively and equally make all decisions regarding the Brewery. No single owner makes unilateral decisions as to the Brewery, and votes are not weighted based on ownership interest percentages.

William McIntyre and Andrew McIntyre also each own an interest in and serve on the Board of Directors of a privately-held real estate development and property management company called McIntyre. McIntyre does not have an ownership interest in the Brewery, and the two companies are wholly separate and distinct. Board Member Linares is neither employed by nor has an ownership interest in McIntyre.

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<sup>2</sup> Board Member Linares also serves as a Councilmember for the City of Covina. Mr. Linares was sworn into the City Council on April 5, 2017. As a Councilmember, he automatically became a Board Member of the Successor Agency.

The Successor Agency will be asked to consider whether to sell a parcel of Successor Agency real property to McIntyre. Board Member Linares has not participated in any discussions with Successor Agency staff, any Successor Agency board members, any employee or officer of McIntyre, William McIntyre, or Andrew McIntyre regarding the property.

## ANALYSIS

### 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.”

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.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) 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* (4th DCA 1980) 103 Cal.App.3d 191, 197.) Thus, the prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at 646-649.)

We employ a six-step analysis to determine whether Section 1090 precludes the Successor Agency from entering an agreement to sell property to McIntyre.

#### *Step 1: Is Board Member Linares subject to the provisions of Section 1090?*

Section 1090 applies to virtually all state and local officers, employees, and multimember bodies, whether elected or appointed, at both the state and local level. It also applies to certain consultants and independent contractors. Additionally, members of government boards are presumed to have made any contract executed by the board or agency under its jurisdiction, even if the board member has disqualified himself or herself from participation in the making of the contract. If a board member is financially interested in the contract, and no exception applies, Section 1090 prohibits the contract from being made with the governmental entity even if the conflicted member recuses himself or herself.

#### *Step 2: 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])), 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.’” (*Honig*, 48 Cal.App.4th 289, 351 citing *Stigall*, 58 Cal.2d at 569, 571.) You have indicated that the Successor Agency will vote on whether to contract with McIntyre in selling a parcel of the Successor Agency’s real property to McIntyre. As such, a contract is at issue.

*Step 3: Is Board Member Linares making or participating in making a contract?*

Section 1090 casts a wide net to capture those officials who participate in any way in the making of the contract. (See *People v. Sobel* (2d DCA 1974) 40 Cal.App.3d 1046, 1052.) Therefore, for purposes of Section 1090, participating in making a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing plans and specifications, and solicitations for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall*, 58 Cal.2d at 569.)

As a voting board member of the Successor Agency, Mr. Linares would be making a contract if he, as well as his fellow board members, were to vote on behalf of the Successor Agency to contract with McIntyre.

*Step 4: Does Board Member Linares 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* (3d DCA 1996) 48 Cal.App.4th 289, 333.) While Section 1090 does not define “financial interest,” the courts have been instructive in applying this provision. The First District Court of Appeal stated that “[t]he 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.” (*Eden Township Healthcare District v. Sutter Health* (1st DCA 2011) 202 Cal.App.4th 208, 221.)

If an official will not personally derive any financial benefit from a proposed contract, be it direct or indirect, the official will not be considered financially interested in the contract. (See *Eden Township Healthcare District* 202 Cal.App.4th at 208.) In fact, we have explicitly stated that “where a contract would have no direct or indirect effect on or nexus with the public official’s salary, there is no financial interest under Section 1090.” (*Ansolabhere* Advice Letter, No. A-15-180.)

The proposed agreement between the Successor Agency and McIntyre would not have an impact on Board Member Linares because he does not have any interest in McIntyre. His potential future compensation at the Brewery is dependent on whether the Brewery begins to make a profit in future years and is unrelated to McIntyre and its profitability or losses. Therefore, Board Member Linares does not have a financial interest in the decision before the Successor Agency because there is no possibility that he would personally derive any financial benefit from the proposed agreement between the Successor Agency and McIntyre. Because he does not have a financial interest in the agreement, Section 1090 does not prohibit Board Member Linares from participating in or the Successor Agency from entering into the agreement with McIntyre.

Section 87100:

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. Section 87103 provides that an official has a “financial interest” in a

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 official's interests identified in that section.

Section 87103 identifies interests from which a conflict of interest may arise. Most pertinent to the analysis is the following:

- An interest in a business entity in which the official has a direct or indirect investment of \$2,000 or more (Section 87103(a)); or in which the official is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d)).

Given that Board Member Linares is the Chief Marketing Officer at the Brewery, he has a financial interest in that business entity pursuant to Section 87103 by virtue of his employment position.<sup>3</sup> Section 87103 also indicates that an official has a financial interest in his or her personal finances, including those of "his or her immediate family," also known as the "personal financial effects" rule.<sup>4</sup>

*Foreseeability:*

A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official's interests is material. The standard for foreseeability depends on whether an interest is explicitly involved in the decision. Financial interests that are explicitly involved include an interest that is a named party in, or the subject of, a government decision. (Regulation 18701(a).) Under the facts you have provided, the Brewery is not explicitly involved in the decisions before the Successor Agency. Thus, Regulation 18701(b) provides: "[i]n general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable."<sup>5</sup>

*Materiality – Business Entity:*

Regulation 18702.1 provides the materiality standards for a financial effect upon business entities. Under Regulation 18702.1(b), an effect is material if a prudent person with sufficient information would find it reasonably foreseeable that the effect would contribute to a change in the value of the business entity.

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<sup>3</sup> "Promised income" within the meaning of Section 87103(c) may also be a disqualifying financial interest. A public official's income includes income that has been promised to the public official but not yet received by him or her, if he or she has a legally enforceable right to the promised income. (Regulation 18700.1(a)(1).) Also note that in addition to having a financial interest in any business entity from which the official has received income (or promised income) of \$500 or more within 12 months before the relevant governmental decision is made, the official has a source-of-income financial interest in all of the following: (A) any individual owning a 50 percent or greater interest in that business entity and (B) any individual, regardless of the extent of the individual's ownership interest in that entity, who has the power to direct or cause the direction of the management and policies of the business entity. (Regulation 18700.1(a)(2).) However, this does not appear to apply in your facts.

<sup>4</sup> Effects on an official's personal finances are not considered separately from the effect on an official's interest in a business entity. (Regulation 18702.5(c).) Thus, we do not consider the personal financial effects rule further.

<sup>5</sup> Regulation 18701(b) also provides a non-exhaustive list of six factors that may be considered in the "reasonably foreseeable" determination.

You stated that “the proposed [a]greement would have no impact whatsoever on the Brewery, given that the proposed [a]greement would be [solely] with The McIntyre Company, which is completely separate from the Brewery.” Taking your assertion at face value, the Brewery will not experience a material financial effect as a result of the Successor Agency and McIntyre’s proposed agreement. Therefore, Board Member Linares does not have a conflict of interest under the Act and may participate in the upcoming decision.

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

Sincerely,

Jack Woodside  
General Counsel



By: Ryan P. O’Connor  
Counsel, Legal Division

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