



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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May 8, 2019

James A. Jackson, Esq.  
Jackson Law Offices  
245 East Laurel Street  
Fort Bragg, CA 95437

Re: Your Request for Advice  
**Our File No. A-19-069**

Dear Mr. Jackson:

This letter responds to your request for advice regarding the conflict of interest provisions of Government Code Section 1090, *et seq.*<sup>1</sup> on behalf of Noyo Harbor District Commissioner Jim Hurst. Please note that we are only providing advice under the conflict of interest provisions Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including Public Contract Code.

Also, note that we are 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. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice. We also do not issue advice regarding past conduct. (Regulation 18329(b)(8)(A).)

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 Mendocino 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).)

### QUESTION

Does Section 1090 prohibit the Noyo Harbor District Commission from renewing Commissioner Jim Hurst's tideland lease?

### CONCLUSION

No. Commissioner Hurst has a noninterest in his tideland lease with the Harbor District Commission under Section 1091.5(a)(3), due to the fact that the Harbor District issues tideland leases as a public service generally provided on the same terms and conditions to all tideland tenants.<sup>2</sup>

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<sup>1</sup> Government Code Sections 1090-1097.5

## FACTS

Among other duties, the Noyo Harbor District Commission manages the tidelands in a local river. Any business owners operating along the river, which include piers extending into the tidelands, are required to enter into a tideland lease with the Harbor District Commission. The leases run for five-year terms, and the cost of a tideland lease is the same for all tenants.

## ANALYSIS

### Section 1090:

Section 1090 codifies the common law prohibition against “self-dealing” with respect to governmental contracts. Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. 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.)

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.) Any renewal of a lease constitutes the “making” of a contract prohibited under Section 1090. (*City of Imperial Beach v. Bailey*, 103 Cal.App.3d 191, 197.)

As a general rule, when Section 1090 applies to one member of a governing body of a public entity, as here, the prohibition cannot be avoided by having the interested official abstain; the entire governing body is precluded from entering into the contract. (*Thomson, supra*, at pp. 647-649.) However, the Legislature has created various statutory exceptions to Section 1090’s prohibition where the interest involved is deemed a “remote interest,” as defined in Section 1091 or a “noninterest,” as defined in Section 1091.5. If a remote interest is present, the contract may be made if: (1) the officer in question discloses his or her financial interest in the contract to the public agency; (2) such interest is noted in the agency’s official records; and (3) the officer abstains from any participation in the making of the contract. (Section 1091(a).) If a noninterest is present, the contract may be made without the officer’s abstention, and a noninterest generally does not require disclosure. (*City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 514-515.)

The only exception that merits analysis given the facts presented is the noninterest exception set forth in Section 1091.5(a)(3) for “public services generally provided.” That exception provides

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<sup>2</sup> Note that Commissioner Hurst is prohibited under the Political Reform Act from taking part in any decision by the District with a reasonably foreseeable and material effect on his interest including his interest in his business. Generally, an effect on an interest in a business is foreseeable and material whenever the business enters into a contract with the official’s agency or applies for a permit or license. (Regulation 18701 and 18702.1(a)(3) and (5).) Accordingly, under the Political Reform Act, Commissioner Hurst may not take part in the decision to extend his lease in his official capacity and must avail himself of the same procedure available to any other member of the public in renewing the lease.

that an officer or employee “shall not be deemed to be interested” in a public contract if his or her interest in that contract 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.”

The California Supreme Court considered the application of the noninterest exception set forth in Section 1091.5(a)(3) in *Lexin v. Superior Court* (2010) 47 Cal.4th 1050 and read the exception to establish the following rule:

If the financial interest arises in the context of the affected official’s or employee’s role as a constituent of his or her public agency and recipient of its services, there is no conflict so long as the services are broadly available to all others similarly situated, rather than narrowly tailored to specially favor any official or group of officials, and are provided on substantially the same terms as for any other constituent.

(*Id.* at 1092.)

With respect to an agency’s permissible exercise of discretion in providing a public service generally provided under the exception, the Supreme Court stated as follows:

The presence of discretion in the formation of a contract that Section 1091.5(a)(3) purportedly permits is not fatal, unless the discretion can be exercised to permit the special tailoring of benefits to advantage one or more board members over their constituency as a whole. Absent such a risk of favoritism, discretion is unproblematic.

(*Id.* at p. 1100.)

Thus, the noninterest exception set forth in Section 1091.5(a)(3) applies if: (1) the interest arises in the context of the affected official’s or employee’s role as a constituent of the public agency and recipient of its services; (2) the service at issue is broadly available to all those whom are similarly situated and is not narrowly tailored to specially favor an official or group of officials; and (3) the service at issue is provided on substantially the same terms as for any other constituent.

Here, you indicated that all business owners operating along the river are required to enter into a tideland lease with the Harbor District Commission. As such, this mandate is broadly available as it applies to every business owner operating adjacent to the river. You also stated that the cost of tideland leases are the same for all tenants. Accordingly, Commissioner Hurst has a noninterest in his tideland lease with the Harbor District under Section 1091.5(a)(3), and Section 1090 does not prohibit the Commissioner’s lease.

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

Sincerely,

Dave Bainbridge  
General Counsel

A handwritten signature in blue ink, appearing to read "Ryan O'Connor / aja".

By: Ryan O'Connor  
Counsel, Legal Division

RPOC:aja