STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3050 • Sacramento, CA 95811

July 20, 2026

Maricela E. Marroquín
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350 South Grand Avenue, 37th Floor
Los Angeles, CA 90071

Re: Your Request for Advice
Our File No. A-26-031

Dear Ms. Marroquin:

This letter is in response to your request for advice on behalf of City of Highland (City) Councilmember Jimmy Saldana regarding Government Code Section 1090, *et seq*.[1] Please note that we are only providing advice under Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest. Also, note that we are 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. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General's Office and the San Bernadino 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).)

[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 18104 through 18998 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.

QUESTIONS

1. Does Section 1090 prohibit Councilmember Saldana from taking part in, or the City from entering into, contracts with Showcase Auto Glass, Inc. (Showcase) for auto glass services, where the councilmember is president and 50 percent owner of Showcase?

2. Does Section 1090 prohibit Councilmember Saldana from taking part in, or the City from amending, extending, or renegotiating its existing agreements with Burrtec Waste Industries, Inc. (Burrtec), the County of San Bernardino (the County), the City of Redlands (Redlands), the City of San Bernardino, the East Valley Water District (EVWD), and the City of Fontana (collectively, the Other Entities) if Showcase were to enter into contracts for auto glass services with these entities?

CONCLUSIONS

1. Section 1090 would prohibit the councilmember from taking part in, and the City from entering into, a contract with Showcase. The rule of necessity would not apply to allow the City to enter into the contract because there are alternative sources that the City can use for auto glass services.

2. If Showcase entered a contract with Burrtec, Section 1090 would prohibit the councilmember from participating in, and the City from entering into, decisions and negotiations to amend the Revised and Restated Solid Waste Franchise Agreement between the City and Burrtec (Franchise Agreement), and the rule of necessity would not apply.

If Showcase entered a contract with the County, Section 1090 would prohibit the councilmember from participating, and the City from amending, extending or renegotiating four existing contracts with the County that involve vehicle fleets, identified here as County contracts 1-4. The statutory exceptions under Section 1091.5(a)(9) and Section 1091(b)(13) would not apply because Councilmember Saldana, would not receive a "salary, per diem, or reimbursement" from the government through a contract with Showcase. Additionally, the four existing City-County contracts would directly involve the use of County vehicles that would be serviced by Showcase and thus could provide a financial gain to the councilmember. The rule of necessity would not apply because a public agency cannot claim "necessity" for a situation the official voluntarily chooses to enter.

If Showcase entered a contract with the County or the Other Entities, Section 1090 would not prohibit the councilmember from participating, or the City from amending, extending or renegotiating 14 existing contracts with the County and existing contracts with the Other Entities that do not involve vehicle fleets, identified in the facts here as County contracts 5-18. Section 1090 would not apply to these existing contracts.

FACTS AS PRESENTED BY REQUESTER

Councilmember Saldana serves on the City's five-member City Council. He was appointed to the City Council in February 2025, and his term expires November 2026.

The Councilmember is the president and a 50 percent owner of Showcase, an auto glass repair business in the City. He receives more than $500 in annual income from Showcase, which is the only glass repair shop in the City, and in nearby cities, that is certified by Ford Motor Company to install glass into Ford vehicles.[2] There are several other non-certified Ford auto glass repair businesses in the City and in nearby cities.

In his capacity as co-owner of Showcase, Councilmember Saldana seeks to enter into auto glass repair contracts between Showcase and the following entities:

1. The City of Highland
2. Burrtec Waste Industries, Inc.
3. The County of San Bernardino
4. The City of Redlands
5. The City of San Bernardino
6. East Valley Water District
7. The City of Fontana

Councilmember Saldana contemplates contracts with some or all of the above entities in which Showcase would provide periodic auto glass repair services on an ongoing, on-call, and as needed basis, rather than on a one-time basis. Showcase does not currently have active contracts with any of the listed entities. Councilmember Saldana seeks advice before Showcase enters into contracts with any of the above-referenced entities to ensure that any contract that Showcase establishes does not impact the City's ability to amend or extend existing contracts the City has with the above-referenced entities.

A. The City of Highland.

Councilmember Saldana is interested in establishing an ongoing contract between Showcase and the City for auto glass repair services. Under such a contract, Showcase would repair and replace windshield and other window glass in the City's vehicles. Of the 18 vehicles in the City's fleet, 16 are Ford vehicles.

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[2] You state that you are informed that: (1) if a Ford vehicle owner or operator uses a non-certified auto glass repair shop to replace glass in their Ford vehicle, the warranty on that vehicle will not be void; and (2) using a non-certified auto glass repair shop is not as safe because there is no guarantee the installation will be done properly.

Under Highland Municipal Code Section 2.40.100, the City Council must award any contract over the amount of $50,000. Highland Municipal Code Section 2.40.110 delegates authority to the City Manager to purchase supplies and equipment in the amount of $49,999.99 or less from the lowest responsible bidder. The City Manager does not have independent authority to enter into contracts.

The City has active agreements with Burrtec Waste Industries, Inc. the County of San Bernardino, the City of Redlands, the City of San Bernardino, and the East Valley Water District (entities listed 2-6 above). Each entity, along with any agreements with that entity, is described below. The agreements are described to illustrate the types of contracts under the City Council's authority and the potential governmental decisions that could arise for the City Council's consideration.

B. Burrtec Waste Industries, Inc.

Burrtec holds an exclusive franchise to provide residential and commercial waste collection services for the City. The Franchise Agreement, executed on June 26, 2018, has a term of 20 years. On December 11, 2024, the City and Burrtec entered into a First Amendment to the Franchise Agreement to account for the collection of organic waste. The City expects that the Franchise Agreement may be amended, renegotiated, or extended in the future. Solid waste collection fees imposed on the City's customers are collected by the City through placement of those charges on the County Assessor tax rolls. On an annual basis, in June or July, the City Council establishes the rates for residential and commercial refuse collection for the next fiscal year; payment is collected on the tax roll and the funds are paid to Burrtec.

C. The County of San Bernardino.

The City is located within the County and currently has 18 active agreements with the County. The City may renegotiate, amend or extend these agreements:

1. Law Enforcement Services Contract. The County and the City annually amend this agreement under which the County provides law enforcement services to the City. The current agreement runs through June 30, 2026. The City anticipates continuing to amend the agreement on an annual basis. The agreement provides for the specific personnel and equipment that the County will provide in exchange for payment; in the 2025-26 amendment to this agreement, the County committed 39 vehicles to the City law enforcement service. The agreement states that all vehicle repair and maintenance costs incurred by the County pursuant to the agreement will be billed to, and paid by, the City.

2. Public Works Cooperative Agreement. This agreement provides for the County to maintain and repair the City's streets when requested. The term runs from March 12, 2019 through June 30, 2029 (having been amended from an original end date of June 30, 2024). The

work under this agreement involves the use of equipment resources (e.g., County vehicles used for City work).

3. Cooperative Agreement for Contract Maintenance and Emergency Work. This agreement, which concerns street repairs, maintenance and emergency work in the City, became effective September 10, 2024 and ends September 30, 2029. The work performed under this agreement involves the use of each entity's equipment ("[The City] and [the County] have determined that on occasion, utilizing each other's labor and equipment resources can be the most cost-effective and timely process for maintenance and repair of drainage facilities" within the City).

4. Agreement Between San Bernardino County Department of Public Health and the City. This agreement establishes that the County will provide animal care and control services for the City, which include patrolling for loose dogs, picking up stray animals and other field work that involves use of County vehicles. The agreement term originally ran from July 1, 2024 through June 30, 2025; in 2025, the parties agreed to extend the term through June 30, 2026.

5. Agreement for the Apportionment of Property Taxes to Redevelopment Agencies. This agreement, effective January 11, 2000, provides that the County will distribute property taxes to the Highland Redevelopment Agency (now Successor Agency to the Highland Redevelopment Agency), among other provisions. This agreement does not have an end date.

6. Auditor-Controller/Treasurer/Tax Collector Agreement for Collection of Special Taxes, Fees, and Assessments. The County and the City establish an annual agreement that provides for the County's collection of special taxes, fees and assessments for the City. The current agreement became effective on June 10, 2025. The City anticipates establishing a new agreement for fiscal year 2026-27 and each fiscal year thereafter.

7. Agreement for Automatic Aid and Mutual Aid Between San Bernardino County Fire Protection District and the City. This agreement, which provides for mutual and automatic assistance for emergency response, runs through June 30, 2030. The agreement does not provide for any sharing of equipment, such as emergency response vehicles, and expressly states that neither the County Fire Protection District nor the City shall be obligated to reimburse the other for any damage to equipment in the course of rendering aid.

8. Household Hazardous Waste Collection Agreement Between San Bernardino County Fire Protection District and the City. The agreement term originally ran from July 1, 2021 through June 30, 2026; in 2023, the parties agreed to amend the agreement and extend the term by one year to end on June 30, 2027. The agreement provides for the City's participation in, and financial contribution to, the County-operated hazardous waste collection program. The agreement states that it may be renewed for specified periods.

9. Common Interest, Joint Defense, and Confidentiality Agreement Among Permittees. This agreement, which relates to stormwater management and follows prior related agreements, is between the County, the County's Flood Control District and 16 cities including the City. The agreement became effective on January 1, 2022 and has no end date.

10. Assignment of Memorandum of Understanding Between the San Bernardino County Flood Control District, the Successor Agency to the Highland Redevelopment Agency, and the City. This agreement, which assigns a prior Memorandum of Understanding established in 2008, became effective in 2017 and relates to a real property transaction between the parties.

11. Use Permit. This permit grants the County use of property within the City for a polling place. The agreement runs from March 21, 2022 to February 21, 2026 and is in the process of being extended.

12. Agreement for the Installation and Maintenance of Secure Ballot Drop Boxes with the City. This agreement provides for the installation and maintenance of a ballot drop box in the City. The agreement term originally ran from September 9, 2020 through September 8, 2025; in 2025, the parties agreed to extend the term through September 8, 2035, with the possibility of extension.

13. Memorandum of Understanding for Use of a Site/Facility Between San Bernardino County Department of Public Health, YMCA of the East Valley, and the City. This agreement provides for the use of a YMCA facility for public health purposes. The agreement became effective in 2020 and does not have an end date.

14. Multi-Use Trail Common Use Agreement. This agreement provides for cooperation between the County Flood Control District and the City for a multi-use trail system. The original agreement has been amended twice, with a term that now runs through January 30, 2038.

15. Waste Disposal Agreement. This agreement allows the City to use the County's landfill system. The agreement became effective on July 7, 2001 and is set to end on June 30, 2026, unless it is extended. A 2022 amendment to the agreement capped the waste disposal agreement rate.

16. Agreement Between the County and the City. This agreement, for the implementation and operation of a biometric identification system and DNA services and the City's associated use, has a term from July 1, 2020 through June 30, 2030.

17. Agreement Between the County and the City for Work Release Program. This agreement enables the placement of incarcerated people in the County's Work Release Program in the City's placement settings and runs from July 1, 2025 through June 30, 2030.

18. Lease Agreement Between the City, as Landlord, and the County, as Tenant. This lease governs each party's responsibilities regarding the City Library with a term from May 1, 2008 through April 30, 2028.

Based on your review of the subject matter of each contract, you determined it is unlikely that any money flowing from the City to the County under contracts numbered 5 through 18 would be used by the County to repair windshields, windows, or glass in County-owned vehicles. At this time, the City is unable to conclude that any money paid by the City to the County for contract numbers 1 (Law Enforcement Services), 2 (Public Works Cooperative Agreement), 3 (Cooperative Agreement for Contract Maintenance and Emergency Work, including use of County vehicles), and 4 (Animal Care Services) would not be used to repair windshields, windows, or glass in County vehicles. It is your understanding that over half the County's fleet are Ford vehicles.

D. The City of Redlands.

Redlands shares a border with the City and has two active agreements with the City at this time, which the City may renegotiate or amend:

1. Automatic Aid Agreement Between the City and Redlands. This agreement provides for mutual assistance for emergency response between the two cities. As relevant for the analysis below, the agreement states that each party shall be fully responsible for all repair, replacement, and maintenance of its own equipment while said equipment is used outside of its geographical boundaries. The agreement became effective October 27, 2020 and does not have an end date.

2. Cooperative Agreement Between the City and Redlands for Highland/Redlands Regional Connector Project. Under this agreement, the City is the Implementing Agency for a bikeway/walkway project and in that role is the sole party that contracts with consultants and contractors for construction, design, and other services for the project. Redlands contributes to certain project costs and provides some assistance. The agreement became effective February 14, 2017 and will terminate upon written notice from the City unless specified conditions are satisfied.

E. The City of San Bernardino

San Bernardino shares a border with the City and has two active agreements with the City at this time, which the City may renegotiate or amend:

1. Agreement for Maintenance of Traffic Signals and Street Lights Between San Bernardino and the City. This agreement addresses the division of costs and maintenance responsibilities for traffic signals and street lights located at intersections that are partially within

both cities. The agreement became effective July 7, 1988, and has no end date. The City most recently renegotiated Exhibit B to this agreement in 2021 to reflect changes to its electrical assets and revised division of responsibilities following several revisions to Exhibit B since the agreement first became effective.

2. Cooperative Agreement for Seven Joint Projects Between San Bernardino and the City. This agreement, executed in 2016, provides for the responsibilities of each city related to construction and maintenance of street and sidewalk improvement projects. The agreement has no end date.

F. East Valley Water District

EVWD provides water and wastewater services to the residents of the City. The City and EVWD have three active contracts that the City may renegotiate or extend:

1. Letter Reimbursement Agreement for Median Landscape Restoration on Greenspot Road and Webster Street. This agreement, executed in 2025, provides that EVWD will reimburse the City for the design, construction, construction management, and inspection of a landscape median on Greenspot Road.

2. Agreement Regarding Street Opening Permits and Inspections. This agreement, executed in 1989, provides a process for the City to permit and inspect water and sewer facilities that EVWD constructs within the right-of-way. The agreement has no end date but may be terminated upon 60 days' notice by either party.

3. Amendment No. 5 Reimbursement Agreement Between the City and EVWD for Law Enforcement Services. This agreement, executed in 2025, provides that the City, through its contract with the County, will provide a Sheriff's deputy to patrol EVWD's Sterling Natural Resource Center, and provide law enforcement services to EVWD's 41 sites. EVWD is responsible for reimbursing the City for the full cost of the Sheriff's deputy.

G. The City of Fontana

Fontana is a non-contiguous city to the west of the City. At this time, the City has no active contracts with Fontana. It is possible that a decision or vote could arise within the City Council related to, or concerning an agreement with Fontana.

ANALYSIS

A. 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

any financial interests, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of" their respective agencies. (*Stigall v. City of 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), and officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*Id*.) A contract that violates Section 1090 is void, 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.) 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; the entire governing body is precluded from entering into the contract. (*Id.* at pp. 647-649.)

Section 1090's command is absolute; neither the person with the prohibited financial interest nor any body of which the person is a member may enter into the contract. The prohibition cannot be avoided merely by having the financially interested officer or employee abstain from participating in the contracting process. (85 Ops. Cal. Atty. Gen. 176, 177 (2002) citing *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 211-212; 78 Ops.Cal.Atty.Gen. 362, 368 (1995).) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson*, *supra*, at pp. 646-649.)

Although Section 1090 does not define the term "financial interest," prevailing legal authority states 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. (*Thomson v. Call*, *supra*, 38 Cal.3d at pp. 645, 651-652.) Moreover, case law and statutory exceptions to Section 1090 make clear that the term "financially interested" must be liberally interpreted; it cannot be interpreted in a restricted and technical manner. (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1298.) The phrase "financially interested" broadly encompasses anything that would tie a public official's fortunes to the existence of a public contract. (*Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1335.)

Section 1090 applies to officials who participate in any way in the making of the contract. Participation is defined broadly and includes any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall, supra* at p. 569.) For example, an official may be convicted of a violation of Section 1090 if it is established that the official had the opportunity

to, and did, influence execution of the contract directly or indirectly to promote the official's personal interests. (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.)

1. The City.

As the president and 50 percent owner of Showcase, Councilmember Saldana has a financial interest in any contract between the City and Showcase. Accordingly, Section 1090 prohibits Councilmember Saldana from taking part in, and the City from entering into, contracts with Showcase unless an exception applies.

The Legislature has created various statutory exceptions to the Section 1090 prohibition where the financial interest involved is deemed to be a "remote interest," as defined in Section 1091, or a "noninterest," as defined in Section 1091.5. The circumstances presented here, however, do not fit any category statutorily defined as either a remote interest or noninterest.

In limited circumstances, however, the "rule of necessity" has been applied to allow the making of a contract that Section 1090 would otherwise prohibit. (See, e.g., 88 Ops.Cal.Atty.Gen. 106, 110 (2005).) Under the rule of necessity, a government agency may acquire an essential service, despite the existence of a conflict, when no source other than that which triggers the contract is available; the rule "ensures that essential government functions are performed even where a conflict of interest exists." (*Eldridge v. Sierra View Hospital Dist*., 224 Cal. App. 3d 311, 322 (1990).)

The mere fact that a proposed arrangement might be more convenient than other arrangements is not sufficient to invoke the rule of necessity. The rule may only be applied when all possible alternatives have been explored, and the arrangement serves a real need. (See, e.g., 91 Ops.Cal.Atty.Gen. 08 (2008) [city may pay fee to councilmember for performing drug testing of a city employee who has been involved in a traffic accident where the councilmember is the only certified drug tester in the immediate area available to perform the test, where time is of the essence in performing the test, and where the councilmember is paid the same fee as any other tester operating under the contract]; *Headding* Advice Letter, No. A-16-219 [Fire Department may purchase emergency medications from councilmember who owns the only pharmacy to sell them in amounts small enough for the Fire Department to comply with the legal requirements for maintaining its ALS certification, which provides an essential emergency service to the public].) What these situations have in common is the exigency of the circumstances such that delaying action to contract with a non-conflicted source would be to the detriment of the public.

Necessity analyses are heavily fact dependent. For example, an Attorney General opinion concluded that a city council could contract with a service station owned by one of its council members, which happened to be the only service station open at night, but "only in cases of real emergency and necessity." (4 Ops.Cal.Atty.Gen. 264 (1944).) It cautioned that "[a]n event that

can be reasonably anticipated, such as the repeated failure of a battery or the necessity for periodic service, would not be considered an emergency." (*Ibid*.)

As stated, the "rule of necessity" applies when there is no alternative source for essential services and when necessary to carry out essential duties. Based on the facts provided, the rule of necessity does not apply here because there are other businesses in and near the City that can provide the auto glass services that Showcase would provide. Although Showcase is the only auto glass repair shop in the City's area that is certified by Ford Motor Company to install glass into Ford vehicles, there are several other non-certified Ford auto glass repair businesses in the City and in nearby cities. You state that a non-certified auto glass service will not void the warranty on a Ford vehicle, but that such a service provider cannot guarantee proper installation. However, even if proper installation may not be guaranteed, there are several other non-certified Ford auto glass repair businesses in and near the City that can perform the necessary auto glass services. Accordingly, the City's inability to use Showcase for auto glass services is not the type of "real emergency and necessity" required for the rule of necessity to apply.

We therefore conclude that, except in instances of actual necessity, which are not apparent here, Section 1090 prohibits the City from contracting with a business owned by Councilmember Saldana, even if he disqualifies himself from any participation in the contracting decisions.[3]

2. Burrtec.

Councilmember Saldana is presumed to be involved in the making of all contracts by the City, regardless of whether he actually participates in the making of the contract. (*Thomson, supra*, at pp. 645, 649.) Thus, if Showcase entered into a contract with Burrtec, the primary issue is whether Councilmember Saldana would have a financial interest in the decisions and negotiations to amend the Franchise Agreement between the City and Burrtec.

Councilmember Saldana has a direct financial interest in Showcase as its president and 50 percent owner. If Showcase entered into a contract with Burrtec, the City's decisions regarding the Franchise Agreement with Burrtec could indirectly benefit or harm Showcase. Thus, the councilmember has an indirect financial interest in Burrtec.

In addition, Councilmember Saldana's financial interest in Showcase could prevent him, as a public official, from exercising absolute loyalty and undivided allegiance in furthering the best interests of the City. As indicated above, the courts apply the Section 1090 prohibition where there is an appearance of impropriety (*City of Imperial Beach*, *supra*, at p. 197) and regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson*,

[3] Based on this conclusion, we do not provide any analysis under the Act.

supra, pp. 646-649.) For purposes of Section 1090, we must consider the possibility that Showcase could benefit from the negotiations between the City and Burrtec to amend the Franchise Agreement. This circumstance presents the potential to divide the official's loyalties. Therefore, if Showcase entered into a contract with Burrtec, Section 1090 would prohibit the councilmember from participating in the Franchise Agreement amendment process between the City and Burrtec.

Accordingly, if Showcase entered a contract with Burrtec, Section 1090 would prohibit Councilmember Saldana from taking part in, and the City from entering into, decisions and negotiations to amend the Franchise Agreement between the City and Burrtec.

The "rule of necessity" would not apply to allow the City to enter into decisions and negotiations to amend the Franchise Agreement between the City and Burrtec. As discussed above, the facts provided do not meet the requirements of an unavoidable public need or absence of alternative vendors.[4]

3. The County's existing contracts 1-4.

Under Section 1090, the prohibition applies to contracts made by a public official acting in an official capacity, or by the board or body of which the official is a member. Thus, Section 1090 would not generally prohibit a contract between a city councilmember's private company and a county. However, in *Honig*, *supra*, the court ruled that when analyzing Section 1090 conflicts "we cannot focus upon an isolated 'contract' and ignore the transaction as a whole." (*Honig*, *supra*, at p. 320.) Here, therefore, if the City pays the County for services, and the County's department uses those City funds to pay Showcase, the "transaction as a whole" would connect the councilmember's vote with his private business's profits.

The facts provided state that the City has multiple existing contracts with the County that will be modified, extended or renegotiated. A decision to make changes to existing contracts, including modifications, extensions, or renegotiations, is a "contract" under Section 1090, and requires examination of an official's participation in that contract. (See, e.g., *City of Imperial Beach*, *supra* at p. 193; see also 98 Ops.Cal.Atty.Gen. 102 (2015).) As discussed above, Councilmember Saldana is presumed to be involved in the making of all City contracts. (*Thomson, supra*, at pp. 645, 649.) Thus, the primary issue is whether he would have a financial interest in the negotiations and decisions to renegotiate or amend the current agreements between the City and the County.

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[4] See also *infra*, at Part A.3.b., explaining that a public agency cannot claim "necessity" for a situation the official voluntarily chose to enter.

You assert that the councilmember would not be "financially interested" in existing City contracts with the County or the Other Entities due to a contract with Showcase in accordance with *Eden Township Healthcare Dist. v. Sutter Health* (2011) 202 Cal.App.4th 208. In *Eden*, a district official participated in negotiating public contracts with a nonprofit corporation that employed the official as its president and chief executive officer. (*Id*. at pp. 212-214.) The appellate court found that the official was not financially interested in those contracts because there was no evidence to suggest that the official's compensation would in any way be impacted by those contracts. (*Id.* at p. 227.)

The facts here are distinguishable from the *Eden* decision. Here, the Councilmember is part owner and president of a private for-profit company, not a salaried employee of a nonprofit organization. Under the City's existing contracts 1-4 with the County, the Councilmember would profit from the County's use of on-call auto glass repair service. The Councilmember's ongoing compensation from the County could be impacted by the City Council's decisions to modify, extend, or renegotiate any of the existing contracts. Moreover, even if the facts in *Eden* were not distinguishable, the first four of the existing 18 contracts between the City and the County listed in the facts here would involve the use of County vehicles; these contracts, therefore, would directly impact the County's use of an auto glass repair service. Thus, the *Eden* decision does not apply here.

Councilmember Saldana would therefore have a financial interest in the negotiations and decisions to renegotiate, extend or amend the current agreements 1-4 between the City and the County,[5] unless an exception applies.

a. Remote interest and noninterest exceptions.

The Legislature has created various statutory exceptions to Section 1090's prohibition where the financial interest involved is deemed to be 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 discloses the interest in the contract to the official's public agency; (2) that 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.)

[5] Section 1090 can apply to prohibit contracts between two governmental agencies. (See *People v. Vallerga* (1977) 67 Cal. App. 3d 847, 871.)

The Legislature has addressed the issue of a public officer's involvement in a contract between two government agencies, where the public officer is employed by one agency and serves as a member of a body or board contemplating a contractual relationship, and defined circumstances where the interest may be deemed a "noninterest" or a "remote" interest.

Under Section 1091(b)(13), an agency board member who receives salary, per diem, or reimbursement for expenses from another government entity has a remote interest in a contract between the two agencies. However, an officer or employee of a government agency receiving salary, per diem, or reimbursement for expenses from another government entity has a noninterest in a contract between the two agencies "unless the contract directly involves the department of the governmental entity that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record." (Section 1091.5(a)(9).)

The California Supreme Court examined the application of the two "government employment" sections and found as follows:

> The result is a logical statutory scheme. If a contract an official considers in his or her official capacity is with the official's government employer and involves direct financial gain, the official is prohibited from participating under section 1090. If the contract involves no direct financial gain, but is with or affects the official's own department, the official's interest is a remote interest under section 1091, subdivision (b)(13) and subject to the disclosure and recusal requirements of section 1091. Finally, if the contract involves no direct financial gain, does not directly affect the official's employing department, and is only with the general government entity for which the official works, the interest is a minimal or noninterest under section 1091.5(a)(9) and no conflict of interest prohibition applies.

(*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1081.)

Sections 1091(b)(13) and 1091.5(a)(9) expressly refer to a "person receiving salary, per diem, or reimbursement for expenses from a government entity," which has generally been interpreted to cover such payments to an officer or employee of a government entity. A private business owner, such as Councilmember Saldana, would not receive a "salary, per diem, or reimbursement" from the government through a contract with Showcase. Moreover, the four existing City-County contracts would directly involve the use of County vehicles that would be serviced by Showcase and would involve direct financial gain to the official. Thus, in accordance with *Lexin*, the remote interest and noninterest exceptions do not apply.

b. Rule of Necessity.

When Section 1090 applies to a member of a governing body of a public entity, the prohibition generally cannot be avoided by having the interested board member abstain from the decision. Rather, the entire governing body is precluded from entering the contract. (*Thomson*, *supra*, 38 Cal.3d at pp. 647-649.) As discussed above, the "rule of necessity" has been applied in limited circumstances to allow the making of a contract that Section 1090 would otherwise prohibit. (*Dietrick* Advice Letter, No. A-15-174; 88 Ops.Cal.Atty.Gen. 106, 110 (2005).) The rule of necessity ensures that essential government functions are performed even where a conflict of interest exists. (*Ibid.*)

The rule of necessity has applied to permit a public officer to carry out the essential duties of the office despite a conflict of interest where only that officer may legally act. (65 Ops.Cal.Atty.Gen. 305, 310 (1982).) The rule applied to a city council where its members had a conflict of interest that otherwise would have prevented action by the board. (*Federal Construction Co. v. Curd* (1918) 179 Cal. 489, 493.) Where the rule of necessity applies to allow a multi-member body to act when it otherwise would have been precluded from doing so due to one or more members' conflicts of interest, the member or members with the conflict of interest must abstain from participation. (88 Ops.Cal.Atty.Gen. 106, 111 (2005); 69 Ops.Cal.Atty.Gen. 102, 112 (1986); 67 Ops.Cal.Atty.Gen. 369, 378 (1984).)

In *Thomson*, *supra*, at pp. 647–649, the Court ruled that Section 1090 is a strict, prophylactic statute designed to strip away any personal financial temptation from public duty. "The prophylactic function of [Section 1090] is to prevent conflicts of interest from occurring — not simply to recoup losses or force violators to disgorge profits." (*Id*., at p. 652.) The Court emphasized that the objective is to "remove or limit the possibility of any personal influence, either directly or indirectly" and to avoid even the appearance of impropriety. (*Id*., at p. 649.)

Here, the facts indicate that Showcase has not yet entered into any contracts with the County. Thus, Councilmember Saldana would voluntarily choose to enter a commercial contract with the County which, as discussed above, would create a conflict with the City. A public agency cannot claim "necessity" for a situation the official voluntarily chose to enter. Under *Thomson*, the legal obligation is on the official to forgo the private business relationship or resign from office. Accordingly, the rule of necessity would not apply under these circumstances, and the City may not enter into County contracts 1-4 if Showcase has entered a contract with the County.

4. The County's existing contracts 5-18 and the Other Entities.

Section 1090 prohibits a direct or indirect financial interest in a contract. (*Thomson*, *supra*, at p. 645.) Based on the facts provided, the City's other existing contracts with the County, contracts 5-18, and the City's contracts with the Other Entities, would be unrelated to the use of any vehicles, or any department that uses vehicles. Thus, Councilmember Saldana has no direct or indirect financial interest in these contracts because City funds under these contracts could not flow through the County or the Other Entities to the councilmember's private business. Therefore, Section 1090 would not prohibit the councilmember from taking part in, or the City from entering into, these contracts.

If you have other questions on this matter, please contact me at jfeser@fppc.ca.gov.

Sincerely,

Dave Bainbridge
General Counsel

/s/ John M. Feser Jr.

By: John M. Feser Jr.
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JF:aja