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OPINION	:	No. 13-303
of	:	October 16, 2014
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THE HONORABLE ANTHONY CANNELLA, MEMBER OF THE STATE SENATE, has requested an opinion on the following question:

May a city purchase products or order services from a glass business in which a city council member has a 50 percent ownership interest without violating the conflict-of-interest prohibition set forth in Government Code section 1090 if that council member disqualifies herself from any influence or participation in the purchasing or ordering decision?

CONCLUSION

Except in instances of actual necessity—which are not apparent here—Government Code section 1090 prohibits a city from purchasing products or ordering services from a glass business in which a city council member has a 50 percent ownership interest, even if the council member disqualifies herself from any influence or participation in the purchasing or ordering decision.

ANALYSIS

A member of a city council owns a 50 percent interest in a business that manufactures and sells glass products and provides installation and other services. We are asked whether the city may lawfully procure products or services from the glass company so long as the financially interested council member completely recuses herself from the council's purchasing or ordering decision. We conclude that, absent conditions constituting an actual necessity (which are not apparent here), Government Code section 1090 prohibits the city from engaging in the proposed transactions.

Government Code section 1090 provides that city officers may 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."[1] This is a codification of the common wisdom that a person "cannot serve two masters simultaneously."[2] Because even well-meaning people may be influenced when their personal economic interests are at stake in an official transaction, section 1090—like conflict-of-interest statutes generally—addresses what *might* happen, as much as what actually does happen, in any given situation where a conflict is present.[3] An important purpose of section 1090 is to avoid even the appearance of impropriety in government transactions.[4] To that end, section 1090 is construed broadly, rather than narrowly and technically.[5]

Here, the proposed contractual transactions[6] fall squarely within the conduct prohibited by section 1090. A city council member is a "city officer" within the meaning of section 1090.[7] The council member in question, as half-owner of a glass business, has

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[1] Gov. Code, § 1090.

[2] *Thomson v. Call* (1985) 38 Cal.3d 633, 637.

[3] *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569; *United States v. Mississippi Valley Co.* (1961) 364 U.S. 520, 549–550.

[4] *People v. Honig* (1996) 48 Cal.App.4th 289, 314.

[5] *Id.* at pp. 314-315.

[6] Whether a given transaction amounts to a "contract" for purposes of section 1090 is determined with reference to traditional contract principles. (84 Ops.Cal.Atty.Gen. 34, 36 (2001).) At the most basic level, "[a] contract is an agreement to do or not to do a certain thing." (Civ. Code, § 1549.) Consequently, the city would enter into a contract with the glass business if the glass business agreed to provide a service to the city. Purchases made from the store would also be contracts, because purchases and sales are considered contracts within the context of section 1090. (63 Ops.Cal.Atty.Gen. 19, 20 (1980).)

[7] Gov. Code, § 36501, subd. (a); 86 Ops.Cal.Atty.Gen. 138, 138-139 (2003) ("City

a financial interest in the glass business's contracts for goods or services. Therefore the council member would be "financially interested" in any contract made between the city council (of which she is a member) and the glass company (of which she is an owner).

We are told that the city's staff routinely makes retail purchase decisions "without consultation with or direction from" the city council. That circumstance, however, is of no legal consequence here. In previous opinions, we have concluded that section 1090's prohibition does not necessarily apply when an *independent entity*, such as a statutorily independent officer or a separate executive body, contracts on behalf of a city or county.[8] But there is no claim here that city staff have any purchasing authority other than that delegated to them by the city council, or that the staff are not subject to the council's control. Absent independent authority, a contract made by the city staff with the city council member's business is prohibited.

Nor does the fact that the council member would abstain from participating in purchasing decisions remove these contracts from the ambit of section 1090. Where an officer is a member of a board that has the power to execute a contract, the member is conclusively presumed as a matter of law to be involved in the making of the board's contracts—regardless whether the member actually participates in making the contract.[9]

We have also considered whether any of the statutory exceptions to section 1090 might apply under these circumstances. Government Code sections 1091 and 1091.5 define certain financial interests as "remote interests" or "noninterests," which do not preclude the making of a contract otherwise prohibited by section 1090. "If a 'remote interest' is present, as defined in section 1091, 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 entity's official records, and (3) the officer abstains from any participation in the making of the contract. [Citations.] If a 'noninterest' is present, as defined in section 1091.5, the contract may be made without the officer's abstention, and

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councils and their members are plainly covered" by section 1090).

[8] See 81 Ops.Cal.Atty.Gen. 274, 278 (1998) (decision to hire county supervisor as housing authority commissioner made by housing authority alone, independent of board of supervisors); 21 Ops.Cal.Atty.Gen. 90, 92 (1953) (city treasurer—not city council—had exclusive control over decision whether to invest city funds in bank partly owned by city council member; "The significant fact . . . is the independent status of the party contracting on behalf of the governmental agency").

[9] *Thomson v. Call*, *supra*, 38 Cal.3d at pp. 645, 649; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 211-212; 89 Ops.Cal.Atty.Gen 49, 50 (2006).

generally a noninterest does not require disclosure. [Citations.]"[10]

We are informed that the glass company has been doing business with the city since at least 2005. The only exception based on duration of a business relationship is found in Government Code section 1091, subdivision (b)(8), which provides that a public officer has only a remote interest in a contract where the officer has been a supplier of goods or services *to the contracting party* for at least five years before his or her most recent election to office.[11] In this provision, "contracting party" refers not to the government agency, but to the party doing business with the government agency.[12] Because the council member here is a co-owner of the contracting party, rather than a mere supplier to the contracting party, the exception does not apply.

Section 1091.5, subdivision (a)(1), provides a noninterest exception for a public officer who holds only a minor interest in a company. If an officer owns less than 3 percent of a business, and if 5 percent or less of the officer's income derives from that business, the officer is considered not to have an interest in a contract made with that business.[13] But here the council member has a 50 percent ownership interest in the glass company, which places her interest outside the boundaries of the exception.[14]

Finally, we have considered whether the common-law "rule of necessity" might apply. The rule of necessity provides that a government agency may acquire "essential" goods or services from a conflict-producing source. The purpose of the rule is to allow essential government functions to be performed even where a conflict of interest exists.[15] The rule is a strict one, applying only in cases of "actual necessity after all possible alternatives have been explored"[16] and "only in cases of real emergency and necessity."[17]

Necessity analyses are heavily fact-dependent.[18] Thus, in a previous opinion, we

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[10] See 89 Ops.Cal.Atty.Gen. 121, 123 (2006).

[11] 85 Ops.Cal.Atty.Gen. 176, 179 (2002).

[12] Gov. Code, § 1091, subd (b)(8).

[13] Gov. Code, § 1091.5(a)(1).

[14] *Fraser-Yamor Agency, Inc. v. County of Del Norte*, *supra*, 68 Cal.App.3d at p. 218 (section 1091.5, subdivision (a)(1) did not apply where county supervisor held 40 percent of corporation's shares).

[15] *Eldridge v. Sierra View Local Hospital Dist.* (1990) 224 Cal.App.3d 311, 321.

[16] 69 Ops.Cal.Atty.Gen. 102, 109, fn.6 (1986).

[17] 4 Ops.Cal.Atty.Gen. 264, 264 (1944).

[18] For example, one opinion concluded that a health care district could advertise on a

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."[19] We 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."[20]

In our view, the rule of necessity does not apply here because there are other businesses in the general vicinity—albeit outside the city limits—that can provide products and services of the sort that the council member's business provides. And, although we have been told that no other business within the city supplies "the same unique retail products," the rule of necessity will not apply as long as the city can locate another business that can supply the products it requires.[21] The fact that contracting with sources farther from the city might result in increased costs does not negate the conflict,[22] nor does the fact that another arrangement might be more convenient.[23]

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local radio station even though a member of the health care district was employed by the station, where: certain physicians and services were available only periodically and were subject to scheduling changes; radio advertising was the only timely and effective way to convey information about these services because there were no local television stations; and the only local newspapers were both weeklies. (88 Ops.Cal.Atty.Gen. 106, 111-112 (2005).) Another opinion concluded that a county could contract with a mortuary whose director was also the county coroner because it was the only mortuary in the county, and there were no alternative locations for holding bodies. (42 Ops.Cal.Atty.Gen. 151, 156 (1963).)

[19] 4 Ops.Cal.Atty.Gen., *supra*, at p. 264.

[20] *Ibid.*

[21] In the event that the council member's business provided a unique product necessary to the city—for instance, if the business supplied a component required to repair a product previously purchased from the business, and the component were not available from other vendors—then the rule of necessity might permit the city to transact business with the council member's company *for that limited purpose*. In such circumstances, the member-owner would have to "refrain from any participation" in the contracting process. (See *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1097; 89 Ops.Cal.Atty.Gen. 217, 221-222 (2006).)

[22] See *Thomson v. Call*, *supra*, 38 Cal.3d at p. 649 ("the fact that the forbidden contract would be more advantageous to the public entity than others" has "no bearing upon the question of its validity").

[23] 4 Ops.Cal.Atty.Gen., *supra*, at p. 264.

We therefore conclude that, except in instances of actual necessity—which are not apparent here—Government Code section 1090 prohibits a city from purchasing products or ordering services from a glass business in which a city council member has a 50 percent ownership interest, even if the council member disqualifies herself from any influence or participation in the purchasing or ordering decision.

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