TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

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OPINION	:	No. 13-903
of	:	December 23, 2015
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THE HONORABLE CAROL LIU, MEMBER OF THE STATE SENATE, has requested an opinion on the following question:

Under Government Code section 1090, does a city council member who is associated, as an independent contractor, with a public-relations firm that provides services to two nonprofit organizations that have contracts with the city, have a prohibited financial interest in those contracts where the council member performs no services for the two contracting nonprofits and receives no compensation based on the firm's provision of services to those entities?

CONCLUSION

Under Government Code section 1090, a city council member who is associated, as an independent contractor, with a public-relations firm that provides services to two nonprofit organizations that have contracts with the city, does not have a prohibited

financial interest in those contracts where the council member performs no services for the two contracting nonprofits and receives no compensation based on the firm's provision of services to those entities.

ANALYSIS

In this opinion, we are asked to determine whether a Glendale City Council member has or does not have a prohibited financial interest in contracts between a private public-relations firm and two nonprofit corporations that perform work for the City of Glendale (Glendale). In Glendale, as in many other cities, the city council acted as the city's redevelopment agency, and all of the city council members were also redevelopment agency members.[1] In 2012, all redevelopment agencies throughout the state were dissolved by operation of law, and interim successor agencies were created in their place for the purpose of wrapping up the business of the redevelopment agencies.[2] Glendale's successor agency, like its redevelopment agency, is composed of the members of the Glendale City Council.

In 2008, several years before it was dissolved, the Glendale Redevelopment Agency entered into lease and management agreements with a nonprofit corporation called Glendale Arts, to rehabilitate and operate the historic Alex Theatre in Glendale. The terms of Glendale's lease-management agreements with Glendale Arts require Glendale to complete certain work, including expanding the Alex Theatre into an adjacent parking lot. In order to carry out this expansion, the successor agency entered into three additional contracts, including a contract with Glendale for a bridge loan, a contract with a building firm for design and construction work, and a contract with Glendale Arts for mothballing and resetting stage equipment.

In a separate project, in 2012, the Glendale City Council adopted a resolution approving the creation of the Downtown Glendale Community Benefit District. The district provides extra security, sidewalk maintenance, beautification, promotional activities, and other similar benefits to property owners within the district. These benefits are funded through special assessments on real property within the district. To carry out this project, Glendale entered a contract with a nonprofit corporation called the Downtown Glendale Association, to plan and implement the operations of the community benefit district.

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[1] This arrangement was permitted under the Community Redevelopment Law. *See* Health & Saf. Code, § 33200.

[2] *See generally* Assembly Bill 1X 26 (Stats. 2011, 1st Ex. Sess., ch. 5, § 7).

We are informed that an individual serving as a member of the Glendale City Council (and, therefore, as a member of the successor agency) recently established an independent contractor relationship with a public-relations firm.[3] The firm provides media relations services, such as composing and issuing press releases, to Glendale Arts and the Downtown Glendale Association. As a contractor, the council member does not personally provide any services to either Glendale Arts or the Downtown Glendale Association. The council member is not an owner, shareholder, partner, or employee of the public-relations firm. Rather, the council member provides services directly to certain of the firm's clients and is compensated on a per-client, per-project basis. The council member currently provides services to only one client of the firm, a nonprofit social services organization that operates outside Glendale.

Given these circumstances, we have been asked to give our opinion as to whether the council member has a prohibited financial interest in Glendale's contracts with these two nonprofits. We are also asked whether the council member would have a prohibited interest if Glendale were to amend, renew, or extend those contracts. Our analysis follows.

Government Code section 1090

Government Code section 1090 provides in relevant 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." Under section 1090, public officials are prohibited from having a financial interest in contracts made in their official capacities.[4] This statute codifies long-standing common law rules forbidding conflicts of interest on the part of public officials.[5]

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[3] The council member was not on the Glendale City Council (and therefore not on the board of the former redevelopment agency) at the time the redevelopment agency entered into the lease and management agreements with Glendale Arts. The council member was on the council (and therefore was a member of the successor agency) when the successor agency approved the three theater-expansion contracts. The council member was also on the council when it entered the management agreement with the Downtown Glendale Association.

[4] *Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal.App.4th 655, 659; *People v. Honig* (1996) 48 Cal.App.4th 289, 333 (*Honig*).

[5] *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1072 (*Lexin*).

The penalties are harsh when an official is found to have a prohibited interest in a public contract: the contract is deemed void, and the conflicted official may be subject to civil and criminal penalties, as well as disqualification from holding public office in the future.[6] Because the purpose of the rule is broad and prophylactic, it is not to be given a narrow and technical interpretation.[7] To that end, a public official is prohibited not only from formally approving a conflict-producing contract but also from planning, negotiating, or drafting it, and from participating in any of the other steps that may lead to the formal making of the contract."[8]

Existing Contracts

First, we consider whether the council member has a prohibited financial interest in the contracts that Glendale initially made with the two nonprofits (the lease-management agreements and the three theatre-expansion contracts with Glendale Arts, and the management agreement with Downtown Glendale Association). We have no difficulty concluding that she does not. The council member was not on the City Council (or the former redevelopment agency), and had no association with the public relations firm, when the contracts with Glendale Arts were made. And, although the council member was on the City Council (and the successor agency board) when the successor agency made the contract with Downtown Glendale Association, she still had no association with the public relations firm at the time this contract was made. We therefore conclude that the member did not have a prohibited financial interest in the making of these existing contracts.[9]

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[6] *Id.* at p. 1073.

[7] *Honig, supra*, 48 Cal.App.4th at p. 314.

[8] *Honig, supra*, 48 Cal.App.4th at p. 315. "By construing the word 'made' in Government Code section 1090 to encompass preliminary discussions, the law casts a broad net over official conduct that might influence a public contract. [Citation.] Thus, a public official can violate Government Code section 1090 even though he did not participate in the contract's execution. [Citation.]" (*People v. Wong* (2010) 186 Cal.App.4th 1433, 1450 (*Wong*).)

[9] Our conclusion depends on the representation that the council member had no relationship with the public relations firm at the time the contacts were made, and therefore had no connection to or expectation of benefit from the contracts. (Cf. *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 567, 569-571 (*Stigall*).) Our analysis might differ if other facts demonstrated a connection between the council member and the previously-executed contracts.

Future amendments, extensions, or renewals

Next, we turn to the prospective question whether the council member, who is now an independent contractor with the public relations firm, will have a prohibited financial interest in any future changes to the contracts, including any extensions or renewals of the terms of those contracts. A Government Code section 1090 violation exists when: (1) an official participates in the making of a contract in his or her official capacity; (2) the official has a cognizable financial interest in the contract; and (3) that financial interest does not fall within one of the exceptions for "remote" interests or minimal "noninterests" listed in Government Code sections 1091 and 1091.5.[10]

It is well settled that changes to existing contracts are themselves "contracts" under section 1090. It is also well settled that an official's mere membership on the governing board of a public agency suffices to establish that the official participated in the making of the agency's contracts, whether or not the member actually participated in their planning, negotiating, drafting, etc.[11] Thus, as a matter of law, the council member would be deemed to be participating in the making of a contract in her official capacity if Glendale were to amend, extend, or renew any of these contracts. This suffices provisionally to establish element 1, so we must address whether the council member has a cognizable financial interest in those contracts (element 2). If so, we must examine whether a statutory exception (element 3) might apply; but if not, there would be no need to address the third element.

Neither Government Code section 1090 nor its broader statutory scheme[12] specifically defines the term "financially interested." Instead, in view of section 1090's purposes, courts have given the term a broad reading. As explained in *People v. Gnass*, "section 1090 cannot be interpreted in a restricted or technical manner."[13] Rather, section 1090 is "concerned with any interest, 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 the city."[14] Thus, the determination whether an official is "financially interested" in a contract does not depend on the certainty of financial gain, nor on the good intentions of the official, nor on the benefit the contract

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[10] *Lexin, supra,* 47 Cal.4th at p. 1074.

[11] *Thomson v. Call* (1985) 38 Cal.3d 633, 649; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 211 (*Fraser-Yamor*).

[12] Gov. Code, §§ 1090-1097.

[13] *People v. Gnass* (2002) 101 Cal.App.4th 1271, 1298.

[14] *Stigall, supra,* 58 Cal.2d at p. 569; see also *Lexin, supra,* 47 Cal.4th at p. 1075.

may confer on the agency. Rather, the question is whether the financial interest has even the potential to compromise the official's duty to the public because of personal financial considerations. "Government Code section 1090 applies when a public official has a direct financial interest in a contract. And '[e]ven when a public official's financial interest is indirect, section 1090 will still apply unless the interest is too remote and speculative. [Citation.]'"[15]

In this case, we must determine whether the council member's association, as an independent contractor, with a public relations firm that provides *some* media relations services to two nonprofit agencies contracting with Glendale—although the member provides no services for, and receives no compensation from, the nonprofits whatsoever—necessarily confers upon her a prohibited financial interest in Glendale's contracts with the firm. Based on the facts as represented here, we conclude that it does not (although we caution that any change in circumstances might require a different analysis).

The Legislature has expressly defined certain "remote interests"[16] or "noninterests"[17] that do *not* come within Government Code section 1090's general prohibition.[18] In the absence of an express definition of what constitutes a prohibited financial interest, we have found that these statutory exceptions provide some guidance as to what would otherwise be viewed as a proscribed financial interest—i.e., but for the existence of the exception.[19] So, for example, when an official whose financial interest is *generally* described by a statutory exception fails to satisfy *all* of the conditions attached to that exception, we have found the exception inapplicable, and the general prohibition applicable.[20]

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[15] *Wong*, *supra*, 186 Cal.App.4th at p. 1450, quoting *Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1330.

[16] Gov. Code, § 1091. Where a remote interest is present, the contract may be lawfully executed provided (1) the officer discloses his or her financial interest in the contract to the public agency; (2) the interest is noted in the public body's official records; and (3) the officer completely abstains from any participation in the making of the contract.

[17] Gov. Code, § 1091.5. Where a noninterest is present, the contract may be executed without the abstention of the public officer or employee, and generally a noninterest does not require disclosure.

[18] See 85 Ops.Cal.Atty.Gen. 34, 36-37 (2002).

[19] *Id.*

[20] It has been suggested that the Court of Appeal's decision in *Eden Township*

In a 2002 opinion we used this approach to find that a city staff member's spouse (and therefore, due to community-property principles, the city staff member herself)[21] would have a financial interest in a proposed development agreement between the city and a certain land developer because the spouse was a "supplier of services" as described in Government Code section, subdivision 1091(b)(8).[22] That provision classifies as a "remote" interest:

> That of a supplier of goods or services when those goods or services have been supplied to the contracting party by the officer for at least five years prior to his or her election or appointment to office.[23]

In our 2002 opinion, the spouse was employed by a firm that provided outreach services for the developer on a number of projects, including the project that was the subject of the development agreement. The spouse did not have an ownership interest in the firm; he did not personally work on the project that was the subject of the development agreement; and his income would not be affected by the project or the development agreement. Nonetheless, we concluded he was a supplier of services to the developer because he "has provided and will provide outreach services on behalf of the firm to the developer on other projects. Accordingly, due to the language of section 1091, subdivision (b)(8), the financial interest in question must be viewed as the type of financial interest contemplated by the Legislature as being subject to the prohibition of section 1090."[24]

In the final analysis, however, section 1091, subdivision (b)(8), could not render the spouse's financial interest permissible, because that provision, like all the remote interests listed in section 1091, applies only to officers who are members of the board or

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Healthcare District v. Sutter Health (2011) 202 Cal.App.4th 208 would inform our analysis, but the facts presented in that case differ substantially from those presented here. For this reason, we believe that the Glendale city council member's financial interest issue is more readily examined—and resolved—with reference to the types of interests the Legislature has specifically permitted, and implicitly prohibited, in its delineation of the statutory exceptions set forth in Government Code sections 1091 and 1091.5.

[21] See *id.* at p. 36; 84 Ops.Cal.Atty.Gen. 131, 132, fn. 2 (2001); 81 Ops.Cal.Atty.Gen. 169, 171-172 (1998).

[22] 85 Ops.Cal.Atty.Gen., *supra*, at p. 37.

[23] Gov. Code, § 1091, subd. (b)(8).

[24] 85 Ops.Cal.Atty.Gen., *supra*, at p. 37.

body making the contract, and not to city staff members who might participate in the contracting process (or the spouses of such individuals). In other words, the spouse's financial interest was *generally* described by a statutory exception, but failed to satisfy *all* of the conditions attached to that exception, so we found the exception inapplicable, and the general prohibition applicable.

In the same 2002 opinion, we also looked at Government Code section 1091.5, subdivision (a)(10) as a basis for comparison. That provision classifies as a "noninterest":

> That of an attorney of the contracting party or that of an owner, officer, employee, or agent of a firm which renders, or has rendered, service to the contracting party in the capacity of stockbroker, insurance agent, insurance broker, real estate agent, or real estate broker, if these individuals have not received and will not receive remuneration, consideration, or a commission as a result of the contract and if these individuals have an ownership interest of less than 10 percent in the law practice or firm, stock brokerage firm, insurance firm, or real estate firm.[25]

In this connection, we observed that the firm that employed the city staff member's spouse rendered services to a contracting party (the developer), but that the spouse's firm was not one of the specific types enumerated in the exception. We concluded that, because the spouse's employment *generally* resembled—but did not entirely match—this exception, the express terms of the exception "support[ed] characterizing the financial interest in question as one of the types of financial interest contemplated by the Legislature as being subject to the prohibition of section 1090."[26]

Our 2002 opinion provides a useful counterpoint for our analysis in this case. First, unlike the city staff member's spouse in the 2002 opinion, it does not appear that the council member here is a supplier of goods or services to a contracting party. In our earlier opinion, the city staff member's spouse was an employee of the supplying firm and personally supplied services to the contracting party (albeit on other projects).

Here, however, the council member is *not* an employee (nor an owner or director) of the firm that provides services to the two contracting nonprofits, and the council

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[25] Gov. Code, §1091.5, subd. (a)(10); see also Gov. Code, 1091, subd. (b)(6) (describing a similar interest as "remote" when the individual in question has an ownership interest of 10 percent or more in the service providing firm).

[26] *Id.* at pp. 37-38.

member performs *no* services for the contracting nonprofits, nor does she receive any compensation for any services that the firm provides to these entities. Under these circumstances, we believe it would be inaccurate to characterize the council member as a "supplier of goods or services" to a contracting party (who must then meet the specific terms of section 1091, subdivision (b)(8), to avoid a financial conflict).

Carrying on the comparison of the two sets of circumstances by looking to the noninterest exception of section 1091.5, subdivision (a)(10), we once again note the difference between city staff member's spouse situation in our earlier opinion and that of the council member under consideration here. This exception—also relating to suppliers of services—potentially applies to, among others, "an owner, officer, employee, or agent of a firm which renders, or has rendered service to the contracting party" in certain capacities, i.e., attorney, stockbroker, insurance agent/broker, real estate agent/broker.[27] Since the city staff member's spouse and the firm that employed him rendered services to the contracting developer, but the services being provided were not those enumerated in the exception, he was found to have a proscribed financial interest presumed to exist unless the exception were to apply.

Likewise, here, the firm in question provides public relations services, rather than the legal, stockbroker, insurance, or real estate services that are listed in section 1091.5, subdivision (a)(10). But, as mentioned above, unlike the staff member's spouse from our earlier opinion, the council member at issue is *not* an employee of the firm rendering services to the contracting nonprofits. Nor is she an owner or officer of that firm. Nor is she an agent of the firm as we have understood and defined that term for purposes of section 1090 and its related provisions. She has no connection to the two contracting nonprofits, nor does she have any ascertainable role in the firm's dealings with them, and it does not appear from the facts we have been given that she possesses the type of transactional authority with respect to the firm that we have associated with the status of an "agent."[28] Accordingly, her interest (if any) is not the sort envisioned by the Legislature as needing the exemption set forth in section 1091.5, subdivision (a)(10).

We therefore conclude that under Government Code section 1090, a city council

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[27] Gov. Code, § 1091.5, subd. (a)(10).

[28] In this context, we have recognized that an "agent" is a person (or entity), acting under the control of the principal and on its behalf, who is authorized to represent the principal in transactions and dealings with third persons (see 85 Ops.Cal.Atty.Gen. 176, 180 (2002); *Fraser-Yamor*, *supra*, 68 Cal.App.3d at pp. 216-217; see also Civ. Code, § 2295), and has the ability and authority, for example, to bind the principal to contracts he or she makes on the principal's behalf (see *New v. New* (1957) 148 Cal.App.2d 372, 381).

member who is associated—as an independent contractor—with a firm that provides media relations services to two nonprofit organizations that have contracts with the city does not have a prohibited financial interest in those contracts where the council member performs no services for the two contracting nonprofits, and receives no compensation based on the firm's provision of services to these entities.[29]

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[29] Our conclusion is limited to the facts as they have been represented to us here. Any material deviation from these facts would require additional analysis.