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OPINION	:	No. 81-707
of	:	JANUARY 21, 1982
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THE HONORABLE JEAN M. MOORHEAD, MEMBER OF THE CALIFORNIA ASSEMBLY, has requested an opinion on the following question:

May a private industry council formed under the federal Comprehensive Employment and Training Act (CETA) contract for services, to be financed by CETA funds, with a profit or a nonprofit corporation if some members of the board of directors of the corporation are also members of the private industry council?

CONCLUSION

To the extent that the transaction comes within the conflict of interest restrictions of CETA or of Government Code section 87100, a private industry council formed under CETA may contract for services, to be financed by CETA funds, with a profit or nonprofit corporation even though some members of the board of directors of the corporation are also members of the private industry council so long as those council members having a "financial interest" in the contract within the meaning of those statutes

refrain from participating in the transaction. However, if such council members are also "financially interested" in the contract within the meaning of Government Code section 1090, the private industry council may not enter into such contract.

ANALYSIS

The question we consider here concerns conflict of interest limitations upon the contracting authority of so-called "private industry councils" established pursuant to the federal Comprehensive Employment and Training Act (CETA). (29 U.S.C. § 801 et seq.)

CETA establishes an elaborate federal grant system to fund job development and training programs to be implemented by state and local agencies. (29 U.S.C. § 801; *Papa* v. *Ravo* (1979) 419 N.Y.S.2d 698, 701.) The basic fund receiving entity under CETA is denominated the "prime sponsor" which may be a state, a "unit of general local government" or a combination of such local governmental entities. (29. U.S.C. § 811; 20 C.F.R. §§ 676.1-676.2 (1981).) The act is divided into eight titles. (See 20 C.F.R. § 675.1 (1981) briefly summarizing the purpose of each of these titles.) The purpose of title VII of the act (subchapter VII, 29 U.S.C. §§ 981-986) under which private industry councils are established is to increase the involvement of the private business sector in the various job opportunity and training programs under CETA. (29 U.S.C. § 981; 20 C.F.R. §§ 675.1(b)(7), 679.1.) CETA requires that any prime sponsor receiving funds under title VII "shall establish a private industry council." (29 U.S.C. § 984(a)(1); 20 C.F.R. § 679.3-1(a).) Members of the private industry council are appointed by the prime sponsor and are to come from business, industry, labor, education, and community organizations, with the business and industry members having a majority on the council. (29 U.S.C. § 984(a)(1); 20 C.F.R. § 679.3-2.)

The function assigned to the private industry council under CETA is.to participate with the prime sponsor in the development and implementation of programs to fulfill the above-noted objective of title VII of CETA to increase private sector participation in job and training projects. (29 U.S.C. § 984(c); 20 C.F.R. § 679.3-7.) Examples of the type of activities contemplated under title VII of CETA are the coordinating of programs to enable persons to work for a private employer while attending a training or education program, directly contracting with private profit or nonprofit organizations to provide training and education programs, development of apprenticeship programs in areas where such programs are absent, etc. (29 U.S.C. § 985(a); 20 C.F.R. § 679.7.)

According to the facts presented to us in connection with this opinion, a private industry council has been established by an agency that is a prime sponsor under

CETA. That prime sponsor agency was created by a city and a county pursuant, to a joint powers agreement.[1]

The facts presented further indicate that the private industry council is considering awarding a contract, involving the payment of $50,000, to a local nonprofit corporation which would carry out job promotion and development activities for the council. However, concern has arisen regarding this proposal because of the fact that three of the members of the private industry council are also members of the board of directors of the corporation which would receive the proposed contract award.

Thus the question we are asked to consider is whether a private industry council may enter into a grant contract with a corporation when some of the members of the council are also serving on the board of directors of that corporation.

In addition to the state statutes restricting conflicts of interest, which will be examined subsequently, this situation is specifically addressed by a provision in CETA itself which provides:

> "No member of *any council* under this chapter [CETA] shall cast a vote on any matter which has a direct bearing on services to be provided by that member (or any organization which that member directly represents) or vote on any matter which would financially benefit the member or the organization which the member represents." (29 U.S.C. § 823(h)(2); emphasis added; see also 20 C.F.R. § 676.62.)

Such restrictions are specifically applied to private industry councils by the Secretary of Labor's implementing regulations[2] which provide:

> "(a) Except for voting on the Title VII Annual Plan Subpart, no member of the PIC [Private Industry Council] may cast a vote on any matter which has a direct bearing on services to be provided by that member or by any organization which such member directly represents on any matter which would financially benefit such member or any organization such member represents.

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[1] See Government Code sections 6500-6516 concerning joint powers agreements and see *id.* sections 6506-6507 authorizing the establishment of a separate public entity under a joint powers agreement.

[2] 29 U.S.C. section 825(g) authorizes the Secretary of Labor to promulgate regulations to assure, among other things, against conflicts of interest in the dispensing of CETA funds.

"(b) Contracts in excess of $10,000 between—the PIC and any private organization with which a PIC member is associated as an officer, member or employee shall be subject to the final written approval of the prime sponsor, prior to execution of he contract or subgrant.

"(c) In addition, the provisions of § 676.62[b) and (c) apply." (20 C.F.R. § 679.3-9.)

Section 676.62(b), referred to in the above regulation provides:

"Each recipient and subrecipient shall avoid organizational conflict of interest, and their personnel shall avoid personal conflict of interest and appearance of conflict of interest in awarding financial assistance, and in the conduct of procurement activities involving funds under the Act, in accordance with the code of conduct requirements for financial assistance programs set forth in 41 CFR 29-70.216-4 . . . ." (20 C.F.R. § 676.62(b). . Subdivision (c), also referred to in the above regulation, is not pertinent to our situation.)

Thus in the awarding of contracts the personnel of the private industry council are to avoid conflicts of interest in accordance with the code of conduct specified in 41 C.F.R. § 29-70.216-4 which provides:

"The recipient shall avoid conflicts of interest by observing the following requirements:

"(a) The recipient shall maintain a written code of standards of conduct which will govern the performance of its officers, employees, or agents in contracting with or otherwise procuring supplies, equipment, construction, or services with Federal funds under a DOL grant or agreement. These standards shall provide that no officer, employee, or agent shall:

". . . . . .

"(2) Participate in the selection, award, or administration of a procurement subject to this section where, to the individual's knowledge, any of the following has a financial or other substantive interest in any organization which may be considered for award—

"(i) The officer, employee, or agent;

"(ii) Any member of his or her immediate family;

"(iii) His or her partner; or

"(iv) A person or organization which employs any of the above or with whom any of the above has an arrangement concerning prospective employment.

"(b) To the extent permissible by State or local law (or related rules or regulations), recipient standards shall provide for penalties, sanctions, or other disciplinary actions (such as suspension, termination, or civil action to recover money damages) to be applied for grant or agreement related violations of law or established standards of conduct by recipient officers, employees, or agents."[3]

Analyzing these CETA conflict of interest constraints in relation to the present question, we note that when a private industry council is considering the awarding of a contract for the performance of service to an organization that has representatives on the council,[4] those council members representing such an organization may not vote on that matter or upon any matter that financially benefits their organization. (29 U.S.C. 823(h)(2); 20 C.F.R. §§ 676.62(a), 679.3-9(a).) There is, furthermore, nothing in this voting restriction which limits its applicability only to profit organizations, nor is it necessary for the council member himself to financially benefit from the transaction. The restriction upon his voting applies so long as the organization he represents would financially benefit from the transaction, or the matter to be voted upon directly involves services to be provided by that organization.

It can also be seen that the above CETA conflict of interest provisions are not confined merely to transactions with organizations that a member represents on the council. A council member is also prohibited from participation in the award of a contract involving a grant to any organization in which he (or his immediate family members, or his partner, employer, or prospective employer) has a "financial or other substantive interest." (41 C.F.R. § 29-70.216-4.) Again, no distinction is made between profit or nonprofit organizations. The restriction on the council member's participation applies so

[3] See 18 U.S.C. section 208(a), the general federal conflict of interest statute, applying similar restrictions to officers and employees of the federal government.

[4] 29 U.S.C. section 984(a) and 20 C.F.R. section 679.3-2 provide that the membership of a private industry council shall consist of "representatives" of industry and business, organized labor, community-based organizations and educational agencies and institutions.

long as he (or the other specified parties) have the requisite interest in the organization with which the council is dealing.

Here we note that not only "financial" interests but other "substantive" interests can constitute the requisite interest under these conflict of interest provisions. (*Id.*, § 29-70.216-4(a)(2).) In the sense relevant here, Webster's Dictionary defines the word "substantive" to mean: "(1): having the character or status of or referring to something that is real rather than apparent: FIRM, SOLID; (2): enduring or permanent as distinguished from transitory . . . ." (Webster's Third New International Dictionary (unab. 1961) p. 2280.) We thus view the term "substantive interest," as used in the conflict of interest regulation, to refer to something of tangible and significant concern to the council member that might not be readily characterized as a "financial interest," but that would be something more than merely the generalized interest in the welfare of an organization that a citizen of a community benefited by such organization might have.

Assessing the relationship of a director to his corporation in light of the term "substantive interest," we note that all actions 'of the corporation are exercised by or under the ultimate direction of its board of directors whether it is a profit corporation (Corp. Code § 300(a)) or nonprofit corporation (Corp. Code §§ 5210, 7210, 9210). In essence, the directors are the corporation. As observed by the Supreme Court in *Signal Oil etc. Co.* v. *Ashland Oil etc. Co.* (1958) 49 Cal.2d 764, 779: "It has long been settled that 'The Directors are the chosen representatives of the corporation, and constitute, . . . to all purposes of dealing with others, the corporation. What they do within the scope of the objects and purposes of the corporation, the corporation does.'" (Court's emphasis.) Further, such directors, whether of a profit corporation (Corp. Code § 309(a)) or a nonprofit corporation (Corp. Code §§ 5231(a), 7231(a), 9241(a)), are obligated to act for the corporation in good faith and with due care and in a manner which the director believes to be in the best interests of the corporation.

Thus whether or not a director is compensated or has any other financial connection with the corporation, the status of director itself generates a pervasive identity with the actions of the corporation and an explicit obligation to act in the best interests of the corporation. This predominating relationship clearly exceeds that resulting from a mere generalized interest in the corporate welfare. It constitutes an interest that amounts to a tangible and significant involvement in the fortunes of the corporation. Such an interest can properly be characterized as "substantive." Consequently, under CETA the fact of a council member's being a director of a corporation, whether it is profit or nonprofit, and whether he is compensated or not, restricts him from participating in the award of a contract to that corporation.

It is important to note, however, that even where the CETA conflict of interest provisions are applicable to a given transaction, such provisions do not preclude the council from consummating the transaction. They merely prohibit the particular council members with the conflicting interests or relationships from participating in the transaction. Thus in the case of the council's awarding a service contract to a corporation, so long as those council members with conflicts refrained from participating in the transaction, the council could award such contract to the corporation even though such council members also served on the corporation's board of directors.[5]

Having reviewed the pertinent federal restrictions, it becomes relevant at this point for us to determine whether the conflict of interest provisions of state law impose greater restrictions upon the actions of private industry councils.[6] The two basic state statutes addressing conflicts of interest are Government Code section 87100[7] (which is part of the Political Reform Act of 1974 (§ 81000 et seq.)) and section 1090. We consider first the provisions of section 87100 and related sections with respect to their pertinence to the actions of private industry councils.

Section 87100 provides:

> "No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest."

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[5] Such contract awards would be subject to the qualification in 20 C.F.R. section 679.3-9(b) set forth above which provides that where the contract is over $10,000 and the council member is associated with the corporation as an officer, member or employee, such contract must first be approved by the prime sponsor.

[6] There is no indication in CETA that Congress intended that its conflict of interest provisions were to be exclusive and that the states were to be precluded from requiring their officials and those of local governments carrying out CETA programs to comply with additional conflict of interest provisions, nor are we aware of anything in the nature of CETA that would prevent compliance with such state provisions.

"Ordinarily a state's exercise of its police power is not deemed superseded under the supermacy clause (U.S. Const., art. VI, cl. 2) unless 'that was the clear and manifest purpose of Congress' [citation omitted], 'compliance with both federal and state regulations is a physical impossibility' [citation omitted], or state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (*Younger* v. *Jensen* (1980) 26 Cal.3d 397, 408; see *James* v.*Valtierra* (1971) 402 U.S. 137, 140.)

[7] Hereafter all section references are to the Government Code unless otherwise indicated.

Thus the restrictions of section 87100 are specifically directed to "public official[s] whose positions are at any level of state or local government." The initial questions, therefore, with respect to the applicability of section 87100 to the actions of private industry councils, are whether its members are such "public officials" and whether the council is a "state or local government" entity. Concerning the status of council members, the phrase "public official" is defined in the Political Reform Act to mean: "every member, officer, employee or consultant of a state or local government agency." (§ 82048.) Elaborating upon this definition, the phrase "public official at any level of state or local government," as used in section 87100, is defined by a regulation of the Fair Political Practices Commission[8] to mean:

> "every natural person who is a member, officer, employee or consultant of a state or local government agency.
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> "(1) 'Member' shall include, but not be limited to, salaried or unsalaried members of boards or commission with decision-making authority. A board or commission possesses decision-making authority whenever:
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> "(A) It may make a final governmental decision;
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> "(B) It may compel a governmental decision; or it may prevent a governmental decision either by reason of an exclusive power to initiate the decision or by reason of a veto which may not be overridden; or
>
> "(C) It makes substantive recommendations which are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or government agency. . . ." (Cal. Admin. Code, tit. 2, § 18900(a).)

As to whether a council member comes within the terms of these definitions, it is noted that a private industry council can be authorized under CETA regulations to, among other things, "administer and directly operate local private sector employment and training programs . . ." This may include "entering into contracts with private firms . . . [and other private and public organizations]" (20 C.F.R. § 679.3-7(c)(3)). CETA also requires that the private industry council concur in the annual plan submitted by the prime sponsor before such plan can be approved for federal funding of title VII activities (29

[8] See section 83112 authorizing the Fair Political Practices Commission to issue regulations implementing the Political Reform Act. Such regulations are set forth in title 2 of the California Administrative Code, sections 18110 et seq.

U.S.C. § 983(b)(6); 20 C.F.R. § 679.5(c)). Thus by directly entering into contracts the council is making a "final" decision (see 20 C.F.R. § 679.3-9(b) requiring prior approval of such contracts by the prime sponsor only in limited circumstances). Also, by virtue of the requirement that the council concur with the prime sponsor in the annual plan as a condition for federal funding, the council may "prevent" a decision. Thus in the terms of the Fair Political Practices Commission regulation a council member is a "member of [a] board[] or commission[] with decision making authority." (Cal. Admin. Code, tit. 2, § 18700(a)(1).) Thus under section 87100 he is a "public official" of that entity. The question remains as to whether that entity of which he is member is a "state or local government agency."

For purposes of the Political Reform Act, the term "local government agency" is defined in section 82041 to mean "a county, city or district of any kind including school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency of these . . . ."

As to whether a private industry council comes within this definition, we again note that such councils, pursuant to CETA, are established by prime sponsors (29 U.S.C. § 984(a)(1)) and that prime sponsors are either state or local governments or combinations of local governments (29 U.S.C. § 911). Illuminating the council's relationship to such government entities is the lucid delineation of the nature of government provided by the New Jersey Supreme Court in *New Jersey Sports & Exposition Auth.* v. *McCrane* (1972) 292 A.2d 545 at p. 556:

> "'Government' is a comprehensive term. It connotes the machinery by which the sovereign power in a State expresses its will and exercises its functions; it is the framework of political institutions by which the executive, judicial, legislative and administrative business of the State is carried on; it is the aggregate of authorities which rule our society and meet its public needs."

This same notion of government as an "aggregate of authorities" is reflected in the observation of the Court of Appeal in *Estate of Hendrix* (1947) 77 Cal.App.2d 647 that:

> "[T]he many . . . agencies, incorporated and unincorporated, and the several departments, branches and subdivisions which go to make up the structure of government . . . all have existence solely as component parts of the government and it is through them that the government functions. The agency in its own authorized field of operations acts as an arm of the government and its acts are those of the government." (*Id.* at p. 651.)

Evaluating the private industry council in light of this composite nature of government, it is significant that not only is a private industry council established and its members appointed by a prime sponsor to participate with it in the fulfillment of its statutory function of implementing job training and development programs (29 U.S.C. § 984), the prime sponsor also is ultimately responsible for the acts of the private industry council. (20 C.F.R. § 679.3-8; see also 1978 U.S. Code Cong. & Admin. News at pp. 4520-4521.) In essence then a private industry council is a "component" or "arm" of the prime sponsor which by express statutory directory is itself a state or local government unit or, as in the present case, an entity created jointly by local government units; viz., a city and a county. (See § 6507 providing that a separate agency created pursuant to a joint powers agreement is a "public entity.") Accordingly, since the private industry council in the present case is a component of a local government unit, or to use the terms of section 82041, a "board" or "commission" of a local . . . political subdivision," such council is a "local government agency" and council members being "public official[s]" at that "level of local government" are subject to the provisions of section 87100. (See Ops.Cal.Atty.Gen., unpub. IL 75-58 (1975) at p. 4 noting that a "council" is a "board" under the conflict of interest provisions of the Political Reform Act.)

Concluding that council members are the type of officials that come within the provisions of section 87100, the issue we consider at this point is whether a decision to award a contract to a corporation is the type of conduct proscribed by section 87100 because some of the council members serve on the corporation's board of directors. Specifically section 87100 prohibits involvement in governmental decisions in which the official has a "financial interest." Thus pursuant to the question presented it must be determined if being on the board of directors of the corporation receiving the contract award results in having a financial interest in the decision to make the award within the meaning of section 87100.

Directly relevant to this issue is section 87103 which provides in pertinent part:

> "An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on:
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> "(a) Any business entity in which the public official has a direct or indirect investment worth more than one thousand dollars ($1,000).
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> ". . . . . .

"(c) Any source of income, other than [specified commercial loans] . . ., aggregating two hundred fifty dollars ($250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

"(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management. . . ."

Applying this delineation of the term "financial interest" to the present situation, if the corporation in question is a profit corporation, the council member's service on its board of directors generates a financial interest, whether or not he is compensated for such service, precluding the council member's participation in council decisions regarding that corporation. This conclusion is required by subdivision (d) of section 87103 which specifies that a financial interest arises from decisions affecting a "business entity in which the public official is a director . . . . . ." Note that the term "business entity," as used in the Political Reform Act, is defined as "any organization or enterprise operated for profit . . . . . ." (§ 82005.)

Likewise the council member would be restricted from participating in decisions having a material financial effect on the corporation[9] if he were paid more than $250 a year for his services as a director whether the corporation was profit or nonprofit since such compensation would constitute a "source of income" as specified in subdivision (c) of section 87103. This provision was similarly construed in *Witt* v. *Morrow* (1977) 70 Cal.App.3d 817 which upheld the disqualification of a city councilman from participating in decisions having a material financial effect on a nonprofit corporation which paid him a $550 per month salary. The court determined that such a salary from the nonprofit corporation constituted a "source of income" within the meaning of section 87103(c). (*Id.*, at pp. 822-823; see also § 82030 defining the term "income" as used in the Political Reform Act.)

However, if the corporation were nonprofit and the council member received no compensation as a director of that corporation, his mere service as such a director would not give rise to a "financial interest" since such service is not an "investment in a business entity" (§ 87103(a)), it does not generate "a source of income" (§ 87103(c)), and such service is not as a director in a "business entity" (§ 87103(d)). Under such circumstances then, sections 87100 and 87103 would not restrict a council member from participating in

[9] In the context of the present situation we assume that a decision to award a contract involving a $50,000.00 payment to a nonprofit corporation will have a "material financial effect" on that corporation within the meaning of section 87103.

decisions having a "material financial effect" on such nonprofit corporation. However, as already noted, the council member would be restricted from such participation by the CETA regulations because the directorship of such a corporation would constitute a "substantive interest" in that corporation. (41 C.F.R. § 29-70.216-4(a)(2).)

It should be emphasized that where the conflict of interest restrictions of section 87100 et seq. do apply, those restrictions (like those of CETA) do not preclude the council from dealing with a particular organization so long as any council member possessing the specified financial interest refrains from participating in or influencing such dealings. (Ops.Cal.Atty.Gen., unpub., *supra*, IL 75-58 at p. 6.)

However, the restrictions of section 87100 et seq. upon an interested member's participation is qualified by section 87101 which provides:

> "Section 87100 does not prevent any public official from making or participating in the making of a governmental decision to the extent his participation is legally required for the action or decision to be made. The fact that an official's vote is needed to break a tie does not make his participation legally required for purposes of this section." (See Cal. Admin. Code, tit. 2, § 18701, elaborating upon his provision.)

Thus with respect to the restrictions of section 87100 et seq. even where a council member might be financially interested in the contract, eh may nonetheless "participate" in the transaction if the council could not otherwise legally act upon the matter. But this provision has been narrowly construed in a prior opinion of this office where it was concluded that such participation must be confined to that presence necessary for a quorum and that it does not extend to affording the interested member the authority to vote on the matter in question. (61 Ops.Cal.Atty.Gen. 243, 250-255 (1978). See also Corp. Code, § 310(c) allowing the presence and the counting of an interested corporate director for purposes of a quorum.) So limiting the scope of participation to mere presence for quorum purposes is consistent with CETA's restriction upon participation by corporate directors.

We now consider the restrictions imposed by the other basic state conflict of interest statute, section 1090. This section provides:

> "Members 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 any body or board of which they are members. Nor shall state, county, district, judicial district,

> and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.
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> "As used in this article, 'district' means any agency of the state formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries."

Thus like section 87100, section 1090 applies to transactions in which the specified official is "financially interested." However, section 1090 is not only applicable to contracts made by the official himself, it is also applicable to those contracts made by the "body or board of which . . . [he is a] member[]." Thus, unlike section 87100 and the conflict of interest provisions under CETA, if the transaction comes within the restrictions of section 1090, *the board itself is not permitted to act even if the interested member refrains from participating in the transaction*. (*City of Imperial Beach* v. *Bailey* (1980) 103 Cal.App.3d 191, 195; *Fraser-Yamor Agency, Inc.* v. *County of Del Norte* (1977) 68 Cal.App.3d 201, 211-212; Ops.Cal.Atty.Gen., unpub., IL 75-58, *supra*, at p. 6; see 63 Ops.Cal.Atty.Gen. 19, *supra* at pp. 22-23.) Consequently whether, in addition to CETA and section 87100, section 1090 is also applicable to the actions of private industry councils is of obvious significance.[10]

In delineating the scope of its applicability the terminology of section 1090 is slightly different from the analogous provision in section 87100. Where section 87100 applies to any "public official at any level of state or local government," section 1090 applies to "state, county, district, judicial district, and city officers or employees" (and also to "[m]embers of the Legislature"). The question is whether this difference in terminology is significant with respect to the applicability of section 1090 to private industry councils. We have already noted that such councils are components of governmental entities. However, a doubt arises because in the particular circumstances of the present situation the council is a component of a combined county and city entity. Thus, literally speaking, an officer of such combined form of governmental entity would not be an officer of a county, or an officer of a city, or an officer of any of the other entities specifically designated in section 1090. Nonetheless it is our view that section 1090 is applicable to such combined

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[10] Although the conflict of interest provisions of the Political Reform Act (§§ 87100-87103) would prevail over section 1090 in the event of a conflict, section 81013 provides that the Political Reform Act does not prevent the Legislature from imposing conflict of interest restrictions *in addition* to those in the Political Reform Act if such additional "requirements do not prevent . . . complying with . . . [the Political Reform Act]." Therefore the more restrictive provisions of section 1090 can be operative even though the particular transaction may also come within the purview of section 87100. (61 Ops.Cal.ATty.Gen. 243, 250 n. 5, 255, *supra*; 59 Ops.Cal.Atty.Gen. 604, 617 (1976); see 63 Ops.Cal.Atty.Gen. 19, 20 n. 8 (1980).)

entities. The state policy embodied in section 1090 is "to remove all indirect as well as direct influence of an interested officer in the discharge of his duties . . . ." [T]he object of the enactment is to remove or limit the possibility of any personal influence either directly or indirectly which might bear on an official's decision . . ." (*City of Imperial Beach* v. *Bailey*, *supra*, 103 Cal.App.3d at p. 197.) It is apparent that this policy could be seriously compromised if the conflict of interest restrictions of section 1090 could be avoided merely because a city or county, otherwise subject to section 1090, acted through an entity not literally specified by that section. In essence, such a construction of section 1090 was rejected by the court in *People* v. *Darby* (1952) 114 Cal.App.2d 412, which declared:

> "If the contention of appellant that officers not specified in section 1090 are thereby excluded, all the trustees and directors of reclamation, flood control, swampland, sanitary and levee districts would have no law to nullify their contracts authorized by the vote of those having an interest. [District officers were not specified in section 1090 at the time of this decision.] Upon no rational hypothesis could the Legislature have intended that a trustee of any of such districts should be privileged to have an interest in a contract to be adopted by the district. Clearly then, such a trustee is *either a state or county officer* and as such is under the ban of section 1090, and if guilty is punishable pursuant to section 1097." (*Id.* at p. 423; emphasis added.)

Similarly, we conclude that an officer of an entity or its component, such as a private industry council established jointly by a city and a county, is, for purposes of section 1090, either a city or a county officer. (See also *People* v. *Elliott* (1953) 115 Cal.App.2d 410, 414, which held that though school board members were not mentioned in section 1090, they were covered by that section because such members were "both city and state officers."

While we conclude that an officer of a private industry council is within the terms of section 1090, a question remains as to whether a member of a private industry council is such an "officer." We have already indicated that the private industry council is a policy-making board with authority to formulate and approve the expenditure of public funds upon, and to enter into contracts in connection with important public programs. (See, e.g., 29 U.S.C. § 983(b)(6); *id.* § 985(a)(11); 20 C.F.R. § 679.1(c); *id.* § 679.5(c); *id.* § 679.3-7(c)(3).) It is contemplated under CETA that such authority will be exercised by the vote of the council's members. (See 29 U.S.C. § 823(h)(2); 20 C.F.R. 679.3-9; *id.* § 679.3-4(c)(3); see also 29 U.S.C. § 984(b).) Consistently members of policy-making boards have been held to be "officers" within the meaning of section 1090. See, for example, *City Council* v. *McKinley* (1978) 80 Cal.App.3d 204 (members of a city park and recreation board); *People* v.*Elliott*, *supra*, 115 Cal.App.2d 410 (members of a board of education); *People* v.*Darby*, *supra*, 114 Cal.App.2d 412 (members of a board of

education). We see no basis for regarding members of private industry councils differently. Such councils are ongoing entities, thus positions on the council are not transient or occasional, and the authority exercised by such councils in the implementation of significant training and employment programs is an exercise of a party of the sovereign functions of government. As stated in *City Council* v. *McKinley*, *supra*, 80 Cal.App.3d at p. 210:

> "It is apparent now there are two requirements for a public office; first, a tenure of office which is not transient, occasional, or incidental but is of such nature that the office itself is an entity in which incumbents succeed one another and which does not cease to exist with the termination of incumbency and, second, the delegation to the officer of some portion of the sovereign functions of government either legislative, executive, or judicial . . ."

Accordingly, we conclude that a member of a private industry council, as an officer of city or county government, is subject to the provisions of section 1090.

We now reach the basic issue with respect to the question presented: whether a contract with a corporation is prohibited by section 1090 because some members are on the corporation's board of directors.

In this regard we first note that section 1090 is significantly qualified by several related sections. One of these, section 1091, describes and specifies the effects of those interests it characterizes as "remote interests." Another qualifying section, section 1091.5, describes those interests deemed not to constitute an interest under section 1090. With respect to "remote interests," section 1091(a) provides:

> "An officer shall not be deemed to be interested in a contract entered into by a body or board of which the officer is a member within the meaning of this article if the officer has only a remote interest in the contract and if the fact of such interest is disclosed to the body of the board of which the officer is a member and noted in its official records, and thereafter the body or board authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for the purpose without counting the vote or votes of the officer or member with the remote interest."

Thus if the interest in question is deemed to be "remote," the council would be authorized to make the contract if the interested member disclosed such interest and his vote was not counted in the making of the contract (see *Fraser-Yamor Agency, Inc.* v. *County of Del Norte, supra,* 68 Cal. App. 3d at p. 215), and if he did not influence or attempt to influence another member to enter into such contract. (§ 1091(c).) Those

interests deemed to be “remote” are specifically enumerated in section 1091(b) which in relevant part provides:

"As used in this article, 'remote interest' means any of the following:

"(1) That of a nonsalaried officer of a nonprofit corporation, except as provided in paragraph (8) of subdivision (a) of Section 1091.5.

"(2) That of an employee or agent of the contracting party, if such contracting party has 10 or more other employees and if the officer was an employee or agent of such contracting party for at least three years prior to the officer initially accepting his or her office.

". . . . . .

"(6) That of a member of a nonprofit corporation formed under the Food and Agricultural Code or a nonprofit corporation formed under the Corporations Code for the sole purpose of engaging in the merchandising of agricultural products or the supplying of water. . . ."

Interests which are deemed *not* to be cognizable under section 1090 are enumerated in section 1091.5 which to the extent pertinent here provides:

"(a) An officer or employee shall not be deemed to be interested in a contract if his or her interest is any of the following:

"(1) The ownership of less than 3 percent of the shares of a corporation for profit, provided the total annual income to him or her from dividends, including the value of stock dividends, from the corporation does not exceed 5 percent of his or her total annual income, and any other payments made to him or her by the corporation do not exceed 5 percent of his or her annual income.

"(2) That of an officer in being reimbursed for his or her actual and necessary expenses incurred in the performance of official duty.

". . . . . .

"(7) That of a nonsalaried member of a nonprofit corporation, provided that such interest is disclosed to the body or board at the time of the

first consideration of the contract, and provided further that such interest is noted in its official records.

"(8) That of a noncompensated officer of a nonprofit, tax-exempt corporation, which, as one of its primary purposes, supports the functions of the body or board or to which the body or board has a legal obligation to give particular consideration, and provided further that such interest is noted in its official records.

"For purposes of this paragraph an officer is 'noncompensated' even though he or she receives reimbursement from the nonprofit, tax-exempt corporation for necessary travel and other actual expenses incurred in performing duties of his or her office. . . ."

Thus to the extent that the interest in question comes within these provisions, section 1090 does not prohibit the interested member from participating in the making of the contract, and only in the case of those interests described in paragraphs (7) and (8) of subdivision (a) does section 1090 require the member to disclose such interests.

It must now be determined if being a member of the board of directors of a corporation is the type of interest specified by section 1090 which precludes the council from making a contract with the corporation, or whether it is a "remote interest" under section 1091 permitting council action if the interested member refrains from participation, or whether it is the type of interest specified in section 1091.5 which is not cognizable under section 1090 and which does not preclude council action even where the interested council member participates in such action.

In this connection it can be seen that two of the pertinent provisions refer to "member[s]" of specified nonprofit corporations (§§ 1091(b)(6) and 1091.5(a)(7) and two others refer to "officer[s]" of specified nonprofit corporations. (§§ 1091(b)(1) and 1095(a)(8).) Here we note that, when used in connection with nonprofit corporations, the term "member" ordinarily refers to a corporate relationship analogous to that of a shareholder (see Corp. Code, §§ 5056-5058; Food & Agr. Code, §§ 54231-54239; *cf.*, Corp. Code, §§ 184, 185, 400, 700, 708; see also 1 Fletcher Cyc. Corp. (perm. ed., 1974 rev.) § 27) which is a status distinct from that of a corporate director. (Corp. Code, § 5056(d)(3).)

Thus a private industry council member's status as a *director* of a nonprofit corporation would not be encompassed by those provisions applicable to corporate "members." But, as noted, there are provisions in sections 1091 and 1091.5 also referring to "officers" of nonprofit corporations. A director of a corporation "is generally held to be

embraced within the term 'officers' as used in statutes." (2 Fletcher Cyc. Corp. (perm. ed. 1969 rev.) § 271; accord, *Cox* v. *First Nat. Bank* (1935) 10 Cal.App.2d 302, 305; *Lynip* v. *Alturas School District* (1915) 29 Cal.App. 158, 161-162; 15 Cal. Jur.3d, Corporations § 190.)[11]

Thus if the council member in the present situation served on the board of directors of a nonprofit corporation without a salary and such nonprofit corporation were of the type specified in section 1091.5(a)(8), the council could, so far as the restrictions of section 1090 are concerned, enter into a contract with the corporation, and the interested member could participate in the making of that contract so long as such interest is noted in the council's records. But, as already noted, the CETA conflict of interest provisions would prohibit the member's participation by virtue of his being a director of the corporation, though such provisions would not prohibit the council from making the contract. If the nonprofit corporation does not come within the specifications of section 1091.5(a)(8), a council member who is a nonsalaried director of such a corporation would be deemed to have a "remote interest" under section 1091(b)(1). Accordingly, while the interested council member could not participate, the council could make a contract with such corporation if the interested member has disclosed his interest.

On the other hand, if a council member were receiving compensation for his service as a corporate director, such compensation would, by definition, constitute a financial interest. (Webster's Third New International Dictionary (unabr. 1966) p. 851, defines "finance" as referring, *inter alia* to "pecuniary . . . resources . . ." See also *Fraser-Yamor* v. *Agency, Inc.* v. *County of Del Norte*, *supra*, 68 Cal.App.3d at p. 212, where the court refers to this definition in connection with its construction of § 1090.) Since the receipt of a salary or compensation is not relegated to the status of a remote interest or noninterest for purposes of section 1090, a private industry council would be prohibited from entering into a contract with a corporation if a council member were compensated for his services as a director of that corporation whether such a corporation were a profit or nonprofit corporation. (See 58 Ops.Cal.Atty.Gen. 670, 677 (1975): receipt of a salary by public official from health care provider constitutes a financial interest within the meaning of section 1090.) We would also note that such an interpretation of the term "financially interested" under section 1090 is consistent with the legislative definition of the term "financial interest" as used in section 87100. As already indicated above, that term is defined to include "any source of income . . . [worth more than $250 a year]" (§ 87103(c)) and that a $550 per month salary paid by a nonprofit corporation was deemed to fall within the meaning of this provision. (*Witt* v. *Morrow*, *supra*, 70 Cal.App.3d at pp. 822-823.)

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[11] Section 1091(b)(2) refers to "an employee or agent." However in the absence of some additional duties or responsibilities one is not an employee or agent of a corporation by mere virtue of the fact that he is a director of the corporation. (Fletcher Cyc. Corp. *supra*, § 266.)

Construing the term "financially interested" as used in section 1090 in a manner that is consistent with the definition of the similar phrase in the Political Reform Act's conflict of interest provisions (§ 87100 et seq.) is appropriate in view of the rule that as to statutes dealing with the same subject "similar phrases appearing in each should be given like meanings." (*People* v. *Caudillo* (1978) 21 Cal.3d 562, 585; accord, *Marriage of Pinto* (1972) 28 Cal.App.3d 86, 89; 63 Ops.Cal.Atty.Gen. 19, 23 n. 4 (1980).)

Finally, there remains the question whether merely being on the board of directors of a profit corporation, without compensation, causes a council member to be "financially interested" in a contract with such profit corporation within the meaning of section 1090. We have already seen that in those provisions enumerating those interests relating to corporate officers upon which section 1090 has only a limited effect (§ 1091: "remote interests"), and those interests upon which section 1090 has no effect (§ 1091.5: noninterests), only officers of nonprofit corporations are specified. The clear implication is that officers of profit corporations were not intended to be excluded from the full effects of section 1090 as were their nonprofit counterparts. (See *Gilbaugh* v. *Bautzer* (1970) 3 Cal.App.3d 793, 796, where the court observed that "[t]he legislative care in expressly limiting the operative period of some sections necessarily implies an intent to give continuing effect to sections not so limited." See also *Valdez* v. *Federal Mut. Ins. Co.* (1969) 272 Cal.App 2d 223, 227: "It is established, as a corollary to the rule of liberal construction to promote the objectives of the Legislature, that any exception or exclusion must be strictly construed.")

The fundamental purpose of conflict of interest statutes such as section 1090 "is to insure absolute loyalty and individual allegiance to the best interests of the municipality they serve and to remove all direct and indirect influence of an interested officer as well as to discourage deliberate dishonesty." (*Fraser-Yamor Agency, Inc.* v. *County of Del Norte*, *supra*, 68 Cal.App 3d at p. 215.)

As has been indicated above, a corporate director is a member of the corporation's ultimate governing body (Corp. Code, § 300) and has a fiduciary relationship to the corporation and its shareholders involving "a duty of the highest good faith to the corporation and its stockholders." (*Kennerson* v. *Burbank Amusement Co.* (1953) 120 Cal.App.2d 157, 171; accord, *Sheppard* v. *Wilcox* (1962) 210 Cal.App.2d 53, 60; Corp. Code, § 309(a).) There is thus an obvious tension of conflicting allegiances and loyalties when a public officer is involved in a transaction with a corporation of which he is a director, whether or not he is compensated as a director. Construing the term "financially interested" so as to place such transactions beyond the restrictions of section 1090 would be inimical to the statute's purpose of ensuring that public officers are insulated from conflicting loyalties in the discharge of their official duties. "[A] restricted meaning should not be given to a word which would circumvent the evident purpose cf the act when a

permissibly broader meaning would carry out that purpose." (*California Coastal Com.* v. *Quanta Investment Corp.* (1980) 113 Cal.App.3d 579, 608; see also *Judson Steel Corp.* v. *Workers' Comp Appeals Bd.* (1978) 22 Cal.3d 658, 669: "the object which a statute seeks to achieve and the evil which it seeks to prevent are of prime consideration in the statute's interpretation . . . .")

Accordingly, it is our opinion that one's service as a director of a profit corporation renders one "financially interested" within the meaning of section 1090 even in the situation where such service is not compensated. (See Corp. Code, § 212(b)(4) re compensation of directors.) This interpretation of the term "financially interested" is afforded confirmation by the fact that, again, it is consistent with the legislative definition of the similar phrase in the Political Reform Act's conflict of interest provisions. As specifically provided in section 87103(d), officials have a "financial interest" if the decision has the requisite effect upon "any business entity in which the public official is a director . . . ."

We therefore conclude that a private industry council is precluded by section 1090 from making a contract with a profit corporation if a member of the council is also serving, with or without compensation, on the board of directors of that corporation.[12]

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[12] This opinion has endeavored to survey the pertinent conflict of interest restrictions under the relevant federal and state statutes and their implementing regulations. However, it is also important to note that under both CETA regulations (41 C.F.R. § 29-70.216-4(a)) and state statutes (§ 87300 et seq.) the affected public agencies are obligated to formulate their own conflict of interest codes. While it is beyond the scope of this opinion to evaluate the codes of individual agencies, such codes, when applicable, must also be consulted in order to determine the propriety of a given transaction.