



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
1102 Q Street • Suite 3000 • Sacramento, CA 95811  
(916) 322-5660 • Fax (916) 322-0886

January 30, 2023

Todd Marker  
President, Marker Broadcasting  
75-153 Merle Drive Suite G  
Palm Desert, CA 92211

Re: Your Request for Advice  
**Our File No. A-23-007**

Dear Mr. Marker

This letter responds to your request for advice on behalf of Rancho Mirage City Councilmember Meg Marker regarding the conflict of interest provisions of the Political Reform Act (the “Act”) and Government Code Section 1090, et seq.<sup>1</sup>

Please note that we are only providing advice under the conflict of interest provisions of the Act and 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 Riverside 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).)

## QUESTIONS

1. Is Councilmember Marker prohibited from participating in decisions regarding the City of Rancho Mirage (“City”) contract with Marker Broadcasting to produce free concerts for the City?

---

<sup>1</sup> 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.

2. Is Councilmember Marker prohibited from participating in decisions regarding the City's contract with Marker Broadcasting to provide advertising?

### CONCLUSIONS

1 and 2. Yes, Councilmember Marker has a financial interest in the above noted contracts under Section 1090 due to her co-ownership of Marker Broadcasting. Section 1090 would prohibit the Councilmember from making or participating in making these contracts, and the City from entering into, extending or renewing either type of contract with Marker Broadcasting. Based on the facts presented, no statutory exception nor the rule of necessity applies to allow such contracts.

### FACTS AS PRESENTED BY REQUESTER

In November 2022, Meg Marker was elected as a City Council member for Rancho Mirage. Councilmember Marker and her spouse own Marker Broadcasting, a business that owns five local radio stations.

Since the City built its theater over five years ago, the City has contracted with Marker Broadcasting to produce multiple free concerts in the City's Theater park ("Theater Park concerts"). This is a joint venture with the City and Marker Broadcasting. As the City contract payments are not enough to produce each show, the company has brought in outside sponsors in the past. You would like advice as to whether Councilmember Marker has a prohibitive financial interest in future City contract decisions for Marker Broadcasting to produce the concerts.

Additionally, the City advertises on Marker Broadcasting's radio group. You seek advice as to whether Councilmember Marker has a prohibitive financial interest in future decisions regarding the City placing advertisements with Marker Broadcasting. In response to our request for additional information you confirmed that the City has contracted for this advertising with Marker Broadcast for over five years. You also note that the City also advertises on other media outlets and Marker Broadcasting is not the only advertising vehicle for the City.

### ANALYSIS

#### *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 financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.) 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.) 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.) An officer is conclusively presumed to be involved in the making of agency contracts when the officer is a member of a board or commission that has the authority to execute the contract at issue. (*Id.* at pp. 645 & 649.) Significantly, 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.) Therefore, the Councilmember's participation in City contracts for the radio advertisement and the Theater Park concerts is presumed. To the extent Section 1090 applies, Councilmember Marker as well as the City, including any City staff, are generally prohibited from entering the contract.

Although Section 1090 does not specifically define the term "financial interest," case law and Attorney General opinions state 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, at pp. 645, 651-652; see also *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).) Furthermore, 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.) We note that services provided pro bono may "still produce economic gains, goodwill, or prestige" for the public official's business. (86 Ops. Cal. Atty. Gen. 138, 138-141 (2003).)

Councilmember Marker, as a co-owner of the business, has a financial interest in Marker Broadcasting and in the business's contracts for services.<sup>2</sup> Thus, she has a financial interest in any City contracts for Marker Broadcasting to provide Theater Park concerts. Similarly, the Councilmember has a financial interest in City contracts for advertisements with Marker Broadcasting.

Although the Legislature has created various statutory exceptions to Section 1090's prohibition where the interest involved is deemed a "remote interest," as defined in Section 1091 or a "noninterest," as defined in Section 1091.5, none of the remote interest or noninterest definitions appear applicable to these facts. The primary remote interest requiring examination is that of Section 1091(b)(8), which relates to the duration of a business relationship. Section 1091(b)(8) states that an official will have a remote interest in the contract, where the official's interest is:

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.

In 2014, the Attorney General's Office directly addressed whether Section 1091(b)(8) applies where the business relationship is between the official's business and the government agency as the "contracting party" and found that it did not. (97 Ops. Cal. Atty. Gen., 70, 74-75

---

<sup>2</sup> Note that the official also has an interest in Marks Broadcasting due to her spouse's ownership interest. Under settled case law, Attorney General's opinions, and Commission advice letters, an officer is *always* financially interested in a source of income to his or her spouse for purposes of Section 1090. (78 Ops.Cal.Atty.Gen. 230 (1995); 81 Ops.Cal.Atty.Gen. 169 (1998).) This is true even if the spouses have agreed that each's own earnings are to be treated as separate property, because each spouse is liable for the necessities of life for the other. (*Reece v. Alcoholic Bev. Etc. Appeals Bd.* (1976) 64 Cal.App.3d 675, 683; *Nielsen v. Richards* (1925) 75 Cal.App. 680, 685-687; 73 Ops.Cal.Atty.Gen. 191, 194-195 (1990); 69 Ops.Cal.Atty.Gen. 102, 106 (1986).)

(2014).) In this matter, the city councilmember and co-owner of a glass manufacturing and installation business had been doing business with the city for over five years but had a prohibitive financial interest in contracts between the city and her business once the owner became a city council member. The opinion states, “[i]n this provision, ‘contracting party’ refers not to the government agency, but to the party doing business with the government agency.” (*Ibid.*) The opinion states, “[b]ecause 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.” (*Ibid.*) Similarly, Councilmember Marks has been a supplier to the City, and the remote interest exception does not apply.

Section 1091.5(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. Here, Councilmember Marks co-owns Marks Broadcasting with her spouse, and the noninterest exception does not apply.

Finally, we consider whether the “rule of necessity” might apply to the two types of contracts for services. 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. (*Eldridge v. Sierra View Local Hospital Dist.* (1990) 224 Cal.App.3d 311, 321.) The rule of necessity will not apply as long as the government agency can locate another business that can supply the goods or services it requires. (97 Ops. Cal. Atty. Gen., *supra*, at pp. 75-76.) There are no facts presented that the City is unable to locate another business to provide the free Theater Park concerts, and the facts indicate that there are other suppliers of radio advertising available to the City. Therefore, the rule of necessity is not applicable to these contracts.

### *The Act*

In addition to Section 1090, the conflict of interest provisions in Section 87100 of the Act prohibit a public official from making, participating in making, or using the official’s position to influence a governmental decision in which the official has an interest. As applied to the facts you have provided, the two contract decisions at issue implicate Councilmember Marker’s potentially disqualifying financial interests in Marker Broadcasting as a business entity and as a source of income. (Section 87103(a), (c) and Regulation 18702.1.) However, due to the finding that Councilmember Marks has a prohibitive financial interest in these two types of contracts under Section 1090, and no exception applies to allow the City to contract with her business for the two services, further advice under the Act is not necessary.

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

Sincerely,

Dave Bainbridge  
General Counsel

**L. Karen Harrison**

By: L. Karen Harrison  
Senior Counsel, Legal Division

LKH:aja