



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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February 27, 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-23-014

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.¹

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”) decision to hire a concert producer (“Concert Producer”) who is also the

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18104 through 18998 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

host of a syndicated radio show carried on one of the radio stations owned by Marker Broadcasting, of which the Councilmember is a co-owner?

2. Is the City prohibited from entering the contract?

CONCLUSIONS

1. Yes. Under Section 1090, Councilmember Marker has a prohibitive financial interest in the Concert Producer, due to her business's ongoing business relationship and interest in income received by the radio station resulting from the continued success of the Concert Producer, as a radio host, on the Councilmember's radio station. No exception applies that would allow her participation.

2. Based on the facts presented no remote or noninterest exceptions are applicable that would allow the City to make this contract. The rule of necessity is also not applicable as this is a contract for foreseeable services, there is no indication that the services are urgent, or that no other source is available for this service. Accordingly, the City is prohibited from entering the contract.

FACTS AS PRESENTED BY REQUESTER

In November 2022, Meg Marker was elected as a City Council member for the City of Rancho Mirage. Councilmember Marker and her spouse own Marker Broadcasting, a business that owns five local radio stations. Marker Broadcasting carries a syndicated radio show that airs Saturday mornings on one of the radio stations. It has carried this show for one year.

The City is considering hiring the syndicated radio show's host ("Concert Producer") to produce a few concerts for the City's 50th anniversary.

In his role as the host of the show, the Concert Producer is on many other stations around the country. Marker Broadcasting does not pay the Concert Producer in his host capacity. The cost to carry his syndicated show is two minutes per hour, which you state is a normal rate in the industry. The company that syndicates this show sells the two minutes of airtime and keeps the revenue proceeds. Marker Broadcasting sells the remaining airtime just like for other shows. You provided the following explanation of the syndication agreement: think of it as if it were a TV station and they carry the Seinfeld show on the local NBC affiliate. The TV station does not pay cash for the rights to carry the show; they give the syndicator of the show a few minutes inside the show as compensation.

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 and 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.)

At issue is whether Councilmember Marker has a financial interest in the Concert Producer and his potential contract with the City for purposes of Section 1090 due to the business relationship between the Concert Producer and Marker Broadcasting.² 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.)

Based on the facts presented, the Concert Producer and Marker Broadcasting have an ongoing and mutually beneficial business relationship. As the owner of Marker Broadcasting, Councilmember Marker has an interest in the business’s radio stations and the income received by the radio stations.³ As a result of this ongoing and mutually beneficial relationship, the continued success of the Concert Producer, as a radio host, on the Councilmember’s radio station, has an inevitable effect on the income received by Marker Broadcasting in that the Concert Producer’s show creates marketable airtime that is sold by Marker Broadcasting. Thus, Councilmember Marker, as a co-owner of Marker Broadcasting, has a financial interest in the Concert Producer and contracts by the Concert Producer, which may be mutually beneficial to Marker Broadcasting. Moreover, the official could be influenced in the City decision to hire the Concert Producer by a

² While the facts indicate that the Concert Producer is the host of a radio show that is syndicated by a company, following the Seinfeld show example provided, we recognize that the Concert Producer, as the name host of the show, is an integral part of this business relationship. Our focus is on the relationship between Marker Broadcasting and the Concert Producer in his role as the radio show host.

³ Note that the official also has an interest in Marker 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).)

desire to maintain a favorable ongoing relationship with the Concert Producer or the potential for increased local interest in the syndicated radio show benefitting her business.

As a general rule, when Section 1090 is applicable to one member of a governing body of a public entity, as here, the prohibition cannot be avoided by having the interested board member abstain; the entire governing body is precluded from entering into the contract. (*Thomson, supra*, at pp. 647-649; *Stigall, supra*, at p. 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).) However, the Legislature has created various statutory exceptions to Section 1090's prohibition where the financial interest involved is deemed to be a "remote interest," as defined in Section 1091, or a "noninterest," as defined in Section 1091.5. 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. (Section 1091.) Where a noninterest is present, the contract may be executed without the abstention. (Section 1091.5.)

Although there are several remote and noninterest that relate to ongoing business relationships, we note that none are applicable to these facts. The primary remote interest requiring examination is that of Section 1091(b)(8), which relates to an official's five year duration of a business relationship as a supplier of goods and services to a contracting party. 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.

This remote interest is not applicable to the facts in this matter. Marker Broadcasting has only carried this syndicated show for one year, and we need not further examine this remote interest exception.

Similarly, the remote interest exception for particular business relationships under Section 1091(b)(6) is not applicable, as the relationship here does not involve one of the enumerated types of services. Section 1091(b)(6) applies in circumstances involving "service to the contracting party in the capacity of stockbroker, insurance agent, insurance broker, real estate agent, or real estate broker," among other requirements.

Finally, we consider whether the "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. (*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 source for 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 source to produce the City events. Therefore, the rule of necessity is not applicable to this decision.

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 contract decision 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.)⁴ However, due to the finding that Councilmember Marker has a prohibitive financial interest in this contract decision under Section 1090, and no exception applies, 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

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⁴ Please note that under Section 82030, "income" to an official" also includes a pro rata share of any income of any business entity or trust in which the individual or spouse owns, directly, indirectly or beneficially, a 10-percent interest or greater." Councilmember Marker will have an interest in clients of Marker Broadcasting as a source of income, to the extent that her pro rata share of income received by Marker Broadcasting amounts to \$500 or more in the 12 months prior to a decision.