

August 12 , 2014

Philip D. Kohn  
Laguna Beach City Attorney  
611 Anton Blvd., Suite 1400  
Costa Mesa, CA 92626

Re: Your Request for Advice  
**Our File No. A-14-136**

Dear Mr. Kohn:

This letter responds to your request for advice on behalf of City Manager John Pietig regarding the conflict of interest provisions of the Political Reform Act (the “Act”)<sup>1</sup> and Government Code Section 1090 (“Section 1090”). Because the Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance (*In re Oglesby* (1975) 1 FPPC Ops. 71), this letter is based on the facts presented.

Please note that after forwarding your request to the Attorney General’s Office and the Orange District Attorney’s Office, we did not receive a written response from either entity. (See Section 1097.1(c)(4).) Finally, we are required to advise you that the following advice is not admissible in a criminal proceeding against any individual other than the requestor. (See Section 1097.1(c)(5).)

### **QUESTION**

Is a City Manager or the City prohibited from approving and executing a loan agreement regarding his or her home, where the City will become the lender?

### **CONCLUSION**

No. As long as the City Manager has no input or participation in the contract in his role as a city employee, neither the Act nor Section 1090 prohibits the contract.

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<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 18110 through 18997 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.

## FACTS

You are the City Attorney for the City of Laguna Beach and you write on behalf of the City as well as City Manager, John Pietig. In 2000, the Laguna Beach City Council established the “Essential Employee Housing Assistance” Program (the “Program”). The City saw a need to provide financial incentives to certain employees who have emergency response duties to live in the City so as to be immediately available in case of emergency. Based on the rising cost of housing in Laguna Beach, the City developed the Program to make it feasible for those employees to obtain housing.

The Program contemplated two options for financial assistance. The first was a direct loan to the employee at an interest rate slightly higher than the rate of return on the City’s investment portfolio at the time. The second involved an equity sharing arrangement, whereby the City would pay a portion of the purchase price in exchange for a corresponding ownership interest in the property. In either instance, the City would benefit financially, although the benefit in the case of equity sharing would be contingent on continued increases in home prices. Any proposed agreement pursuant to the Program required the approval of the City Council.

In 2001, the City Council authorized then City Manager, Kenneth Frank, to negotiate two agreements: one with a Battalion Chief in the Fire Department, and one with John Pietig, then-Assistant City Manager. Mr. Pietig’s agreement incorporated the equity-sharing model. The parties entered into the agreement on December 18, 2001 and amended it on December 7, 2010.<sup>2</sup>

The equity-sharing model has recently generated an unforeseen issue — the inability of employees to refinance mortgages because of new and more restrictive lending requirements resulting from the fall-out from the financial crises. In short, lenders now will not consider refinance applications of properties affected by equity-sharing agreement because the parcels have dual ownership. In an attempt to address and correct this inequity, the City Council is prepared to consider a “take-out” of the existing financing and assume the position of lender under a first trust deed. The interest rate would have a floor and ceiling consistent with the commercial lending rates generally available to homeowners with good credit and taking into consideration the amount of the loan. Two current housing assistance agreements — the one with Mr. Pietig, and one with Tom Christopher, a Battalion Chief in the Fire Department — would be eligible for this modification.

Because Mr. Pietig has been promoted to City Manager since he entered the housing agreement, he now has contracting authority with the City. Regarding his own agreement with the City, however, Mr. Pietig would not be at all involved in preparing the loan agreement on behalf of the City, nor would he be signing the loan agreement on behalf of the City in his official capacity. Mr. Pietig’s interest in the matter would be disclosed and noted in the official record of the City Council’s proceedings at the time the loan agreement would be presented for consideration and action. Mr Pietig has stated that he would leave the room and not participate

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<sup>2</sup> The City has since approved three other similar agreements for city employees with emergency response duties.

in the presentation to or deliberations of the City Council at the public meeting, and Mr. Pietig would not undertake to use his official position in an attempt to influence members of the City Council as to the matter.

## 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. Taft* (1962) 58 Cal.2d 565, 569.) Section 1090 is intended “not only to strike at actual impropriety, but also to strike at the appearance of impropriety.” (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.)

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. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) When an officer with a proscribed financial interest is a member of the governing body of a public entity, the prohibition of section 1090 also extends to the entire body. (89 Ops.Cal.Atty.Gen. at 50.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson, supra*, at pp. 646-649.)

We typically employ a six-step analysis to determine whether a public official has a disqualifying conflict of interest under Section 1090.

### **Step One: Is the City Manager subject to the provisions of Section 1090?**

Section 1090 provides, in 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.” The City Manager is therefore covered under this prohibition as a city employee.

### **Step Two: Does the decision at issue involve a contract?**

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001);<sup>3</sup> 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that “specific rules applicable to Sections 1090 and 1097 require

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<sup>3</sup> We note that opinions issued by the Attorney General’s Office are entitled to considerable weight (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17), especially where, as here, it has regularly provided advice concerning a particular area of law. (*Thorpe v. Long Beach Community College Dist.*, (2000) 83 Cal.App.4th 655, 662; *Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821, 829.)

that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’” (*People v. Honig, supra*, at p. 351 citing *Stigall, supra*, at pp. 569, 571.) Here, the City will be entering a lending agreement with the City Manager. A contract is involved in the decision.

### **Step Three: Is the City Manager making or participating in making a contract?**

Typically, a contract is “made” on mutual assent of the involved parties. (*Stigall, supra*, at p. 569.) In addition, making or participating in making a contract has been broadly construed to include those instances where a public official has influence over the contract or its terms. (See 80 Ops. Cal. Atty. Gen. 41 (1997).) No contract is “made” and no duties attach until one party has offered and another has accepted and consideration is exchanged. But before this, there are “negotiations, discussions, reasoning, planning, and give and take,” all of which are instrumental in “making” the agreement. (*Stigall, supra*, at p. 569.)

Here, the City Manager and the City are co-owners of a house that they would like to refinance. To do so, they will enter into a contract in which the City is the lender and the City Manager remains the owner, with the City maintaining an equity interest in the house. While the City Manager typically oversees, approves, and sometimes drafts contracts on behalf of the City, most of which must be approved by the City Council, he will not have any input or oversight on this contract. He will not participate in his official capacity on any level.

We have previously found that a planning commissioner who enters into a contract in her private capacity on behalf of her business and had no input on the contract from her public role was not “making” a contract under Section 1090. (See *Asuncion* Advice Letter, 14-062.) Similarly, the Attorney General has found that city firefighters who developed a firefighting protective mask and sought to sell the mask to their own city’s fire department were not “making” a contract. (80 Ops. Cal. Atty. Gen. 41 (1997).) There, the firefighters formed a private company and pitched their product to the fire chief. (*Ibid.*) The Attorney General found that the firefighters would not be involved as city employees if the contract moved forward beyond the fire chief to the city council, the body that would actually be making the decision. (*Ibid.*) Because the firefighters would not be making the contract, “including its embodiments,” and had no input into the procurement process, the Attorney General opinion concluded that there would be no Section 1090 violation. (*Ibid.*; see also 63 Ops. Cal. Atty. Gen. 868 (1980) [finding that a real estate appraiser could purchase property within the county at a tax-deeded land sale where he did not participate in or influence the appraisal].)

Provided the City Manager recuses himself from any decision related to the contract and has no input into the preliminary discussion, negotiations, and execution of the contract, he is not prohibited by Section 1090 from entering the contract in his private capacity. (See, e.g., 82 Ops. Cal. Atty. Gen. 126 (1999) [a person in an advisory position to a contracting agency (who is not a board or commission member) can avoid a conflict in limited factual situations by disqualifying him- or herself from any participation in connection with the contract].)

Because we conclude that the City Manager will not be “making a contract in his official capacity,” we do not apply the remaining steps in the analysis.

### **Political Reform Act**

The Act’s conflict of interest provisions ensure that public officials will “perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them.” (Section 81001(b).) Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

The general rule is that a conflict of interest exists whenever a public official makes a governmental decision that has a reasonably foreseeable material financial effect on one or more of his or her financial interests.

#### ***Is the City Manager a public official under the Act?***

The Act’s conflict of interest provisions apply only to “public officials.” (Sections 87100, 87103; Regulation 18701.) “Public Official” is defined by the Act to include “every member, officer, employee or consultant of a state or local government agency,” with some exceptions not relevant here. (Section 82048.) “Local government agency” means a county, city, or district of any kind, including a school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency of the foregoing.” (Section 82041.) Consequently, the City Manager is a public official for purposes of the Act.

#### ***Is the City Manager making, participating in making, or influencing a governmental decision?***

Under Regulation 18702.1, an official “makes” a government decision when he or she, among other things, votes on a matter, enters into a contract on behalf of his or her agency, or obligates or commits his or her agency to any course of action. (Regulation 18702.1(a).) Under Regulation 18702.2, an official “participates” in a government decision when, generally, he or she negotiates, without significant substantive review, regarding a government decision, or advises or makes recommendations to the decisionmaker directly or without significant substantive review. (Regulation 18702.1(a) and (b).) Under Regulation 18702.3, an official “uses his or her official position to influence” a government decision when he or she contacts, appears before or otherwise attempts to influence a member, officer, employee or consultant of the official’s own agency or, when appearing before another government agency, the official acts or purports to act on behalf of his or her own agency. (Regulation 18702.3(a) and (b).)

Mr. Pietig will be entering into a contract with the City to refinance his home loan. Based on the recusal requirement under Section 1090, Mr. Pietig will not be making or participating in making decisions related to the contract. While he is not, as discussed above,

entering into a contract in his official capacity, the application for refinancing and discussing the terms and agreement could be considered “influencing” the City under the definition above.

Even so, there is an exception that applies in certain circumstances when an official would otherwise be considered to be influencing a decision. Regulation 18402.4(b) states in relevant part, that an official is not attempting to use his official position to influence a decision if the official:

“(1) Appears in the same manner as any other member of the general public before an agency in the course of its prescribed governmental function solely to represent himself or herself on a matter which is related to his or her personal interests. An official's “personal interests” include, but are not limited to:

“(A) An interest in real property which is wholly owned by the official or members of his or her immediate family.”

The purpose of this exception seems to be to allow a public official to represent his or her own interests when there is no other party to represent that interest. If there were a private co-owner on the property (other than Mr. Pietig’s immediate family), the exception would not apply because the public official’s interest could be represented by another.

In this case, technically Mr. Pietig does not currently “wholly own” his residence because the City is also on the title. Once the refinancing is complete, even though Mr. Pietig will be the sole owner, the City will still have an equity interest in the property. There is technically a co-owner on the property, but there is no other entity to represent Mr. Pietig’s interests with regard to this property consistent with the purposes of the exception. Both the existing contract (in which the city co-owns a portion of the property) and the new contract (which will take a more traditional form of the city acting as a mortgagor to finance the property) are merely a financing mechanisms, similar to the financing of a purchase of property by a commercial lender or bank. In addition, with respect to the new contract, the City will be acting in its own interests. No one but Mr. Pietig can represent his interests with respect to the contract.

Consequently, under this unique set of facts, the exception above applies to allow Mr. Pietig to appear in the same manner as any other member of the general public in similar circumstances to represent his own interests. In this case, the Mr. Pietig can appear to represent his personal interest in the property and home loan and can enter into the agreement on his own behalf.

Because the City Manager is not making, participating, or attempting to influence a governmental decision, we need not address the remaining steps of the conflict of interest analysis.

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

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Heather M. Rowan  
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HMR:jgl