MEMORANDUM OF LAW

DATE: February 1, 2000

TO: Michael T. Uberuaga, City Manager

FROM: City Attorney

SUBJECT: Effect of 1999 Amendments to California Government Code Sections 1090 –1098 on the Ability of the City to Enter Contracts with the Redevelopment Agency and Other Government Agencies

BACKGROUND

In 1999, the California legislature adopted Senate Bill [SB] 689, which amended California Government Code sections 1091 and 1091.5. Cal. Stats. 1999, c. 349. This statute became effective on January 1, 2000. Government Code sections 1091 and 1091.5 are part of a statutory scheme governing conflicts of interest in government contracts. Cal. Gov't Code 1090–1098. [1]

California Government Code section 1090 prohibits government officers and employees from being financially interested in contracts made by them in their official capacity and entered into by their respective government agencies. Violation of Government Code section 1090 renders the contract void, not voidable.[2] *Thomson v. Call*, 38 Cal. 3d 633 (1985), *cert. denied,* 474 U.S. 1057 (1986). An officer who willfully violates the statute may pay a fine of up to $1000, may be sent to state prison, and may be disqualified from holding any office in this state. Cal. Gov't Code 1097. *See, e.g., People v. Honig*, 48 Cal. App. 4th 289 (1996). If, however, a government officer has either only a "remote [financial] interest" or a "non-interest" in a contract, as defined by California Government Code sections 1091 and 1091.5, respectively, the contract may be made if certain procedural steps are followed.

SB 689 added a definition to the term "remote interest" in Government Code section 1091 and modified an existing definition of a "non-interest" in Government Code section 1091.5. Both changes address contracts between two government agencies and interests in the contracts that arise from government employment. The scope and application of those amendments are the subject of this memorandum.

QUESTIONS PRESENTED

In light of the 1999 amendments to California Government Code sections 1091 and 1091.5 governing contractual conflicts arising from contracts between two government agencies:

1. May the City enter into contracts with the Redevelopment Agency?

2. May the City enter into contracts with its wholly owned nonprofit public benefit corporations on whose board some City officials sit as full voting or ex-officio members?

3. May the City enter into contracts with joint powers authorities in which the City is a member and on whose boards some City officials sit?

SHORT ANSWERS

1. Yes. Special legislation governing conflicts of interest in Redevelopment Agency matters controls over the more general statutes in Government Code sections 1091 and 1091.5. Potential conflicts of interest in formation of contracts between the City and Redevelopment Agency should be analyzed under California Health and Safety Code section 33130(a), not California Government Code sections 1090 through 1098.

2. Yes. Special legislation governing conflicts of interest in nonprofit public benefit corporations matters controls over the more general statutes in Government Code sections 1091 and 1091.5. Potential conflicts of interest in formation of contracts between the City and Redevelopment Agency should be analyzed under California Corporations Code sections 5233 through 5236, not California Government Code sections 1090 through 1098.

3. Yes, but some City officials may be required to abstain from participating in making, or voting on, contracts between the City and the joint powers authority, when the officials are acting in their capacity as board members of the joint powers authority. The fact that the official has a "remote interest" or "non-interest" in the contract by virtue of the official's employment with the City must also be disclosed and noted in the joint powers authority board's official records.

ANALYSIS

I. Effect of Government Code Sections 1090 – 1098 on Ability of City to Enter Contracts with Another Governmental Agency When a City Officer or Employee Sits on Board of That Other Agency

California Government Code section[3] 1090 reads in relevant part: "[C]ity 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." As pointed out by the California Attorney General, the "prohibition is directed at the governing board as well as the member having the prohibited interest, so abstention by such member does not remove the prohibition." 78 Op. Cal. Att'y Gen. 362, 368 (1995). The long-standing purpose of section 1090 is to make certain that "every public officer be guided solely by the public interest, rather than by *personal*

interest, when dealing with contracts in an official capacity." *Thomson v. Call,* 38 Cal. 3d 633, 650 (1985) *cert. denied*, 474 U.S. 1057 (1986) (emphasis added).

The term "financial interest" is not expressly defined in the statute. Even though section 1090 does not define "financial interest," a court found that the term was not unconstitutionally vague, uncertain, or indefinite. *People v. Watson,* 15 Cal. App 3d 28 (1971). And even though the term "financial interest" is not expressly defined in section 1090, clues to its meaning exist in case law, neighboring statutes, and legislative history. The focus of this memorandum's inquiry is on a person's financial interest in a contract between two government agencies arising from that person's receipt of money from one of the two contracting governments, since that is the subject matter of the 1999 amendments.

A. Case Law

A review of case law published prior to the 1999 amendments to sections 1091 and 1091.5 reveals no inclination on the part of the courts to apply the concept of "financial interest" to situations where a government employee sits on the board of another government agency. Rather, when the term "financial interest" is analyzed in a conflict of interest context it is almost invariably connected with a government employee's *personal* interests which exist outside of that person's role as a public servant. Such cases focus on the public interest in preventing public servants from using their position for personal gain. "The duties of public office demand the absolute loyalty and undivided, uncompromised allegiance of the individual that holds the office." *People v. Honig*, 48 Cal. App. 4th 289, 290 (1996). Yet, "an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government." *Stigall v. City of Taft*, 58 Cal. 2d 565, 570 (1962). A public official "cannot be permitted to place himself in any situation where his personal interest will conflict with the faithful performance of his duty as a trustee." *Moody v. Shuffleton*, 203 Cal. 100, 105 (1928).

Thomson v. Call, 38 Cal. 3d 633 (1985), *cert. denied*, 474 U.S. 1057 (1986), is a leading case in the area of conflicts of interest in government contracts. In this taxpayer's lawsuit, a city councilmember sold land to the city via a conduit. Despite disclosing his personal interest in the transaction, the councilmember was found to have violated section 1090. The contract was void and the councilmember forfeited the land and the money he received in the sale plus interest. The *Thomson* court acknowledged that the remedy in this case was harsh, but entirely consistent with the law. A later court also found that the *Thomson* decision was "consistent with California law and the primary policy concern that every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity." *Campagna v. City of Sanger*, 42 Cal. App. 4th 533, 539 (1996).

Similar opinions have been expressed by the California Attorney General. *See* 81 Op. Cal. Att'y Gen. 317 (1998) (city councilmember is prohibited from obtaining a loan under a business assistance loan he helped to create); 81 Op. Cal. Att'y Gen. 327 (1998) (school board is prohibited by section 1090 from employing teacher who is the spouse of board member); 79 Op. Cal. Att'y Gen 1 (1996) (local public agency may not invest retirement funds in credit union that has on its board a member of the agency's legislative body).

B. Related Code Sections Prior to the 1999 Amendments

1. Remote Interests (Government Code section 1091)

As a matter of policy, the legislature for many years has set forth several exceptions to the "financial interests" provisions of section 1090 and called them "remote interests." Cal. Gov't Code 1091. If certain procedural steps set out in section 1091 are followed[4], then a contract may be entered into even though the public official must abstain from participating in the contract. Presumably, if these procedural steps are not followed, the "remote interest" becomes a prohibited "financial interest" and the contract is once again void, not voidable, and the offending official with the financial interest can go to prison. "Remote interest" is defined in section 1091 through a list of specific and identifiable private financial interests. Until the adoption of the amendments in 1999, this section did not expressly list a salary or reimbursement from a government as a remote financial interest.

2. Non-interests (Government Code section 1091.5)

The legislature for many years has also set forth another type of exception to section 1090 financial interests. This exception is commonly referred to as a "non-interest." With one exception spelled out in section 1091.5(a)(9), there are no procedural steps to be followed to ensure that a non-interest does not become a financial interest.[5] Again, subject to the one exception under 1091.5(a)(9), if a potential financial interest falls within one of the definitions of a "non-interest," then the official and the official's body or board may safely enter into the contract.

The exception spelled out in section 1091.5(a)(9) is one of two sections at issue in this memorandum. In 1991, the legislature made key amendments to section 1091.5 that have a bearing on the 1999 amendments and resolution of the issues in this memorandum. In 1991, the legislature amended 1091.5 by adding subsection 1091.5(a)(9)[6], which defined compensation a public officer receives from a non-employing government agency as a "non-interest." However, under the 1991 amendments, this type of compensation was considered a "non-interest" only if certain procedural steps were followed.

C. The Amendments to Sections 1091 and 1091.5 made by SB 689 in 1999

SB 689 added a new item to the definition of "remote interest" in section 1091. To understand the addition, it must be read in context with the beginning portion of section 1091, as follows:

> 1091 "Remote interest" in contract
>
> > (a) 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 that interest is disclosed to the body or 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.

(b) As used in this article, "remote interest" means the following:

. . .

(13) That of a person receiving salary, per diem, or reimbursement or expenses from a government entity.

[Language added by SB 689 is in italics.]

SB 689 also modified section 1091.5(a)(9) governing "non-interests" arising from receipt of a salary or reimbursement from a government agency. Again, the modification can be understood only in context and therefore must be spelled out with the beginning portion of section 1091.5, as follows:

1091.5 Interest in contract; Quantity and quality of interest; Relation to contracting party

(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:

. . .

(9) That of a person receiving salary, per diem, or reimbursement for expenses from a government entity, unless the contract directly involves the department of the government entity that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record. ~~That of compensation for employment with a governmental agency, other than the governmental agency that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record.~~

[Language added by SB 689 is in italics. Language deleted by SB 689 is stricken out.]

Section 1091.5(a)(9) on its face appears to apply to both employees and officers of a government entity. The term "officers" in section 1091(a) undoubtedly includes elected officials. It may also include high level government officials such as city managers, city attorneys, and auditors if these persons do not qualify as employees. They are certainly one or the other. This fact is important when we get to the point of analyzing to what extent this section applies to contracts between the city and other government agencies such as joint powers authorities or public corporations for which the city manager, city attorney, or auditor sit on the board. The term "person" in section 1091.5(a)(9) does not narrow the scope. Presumably, it refers to "officers and employees" mentioned in section 1091(a).

Leaving aside for the moment the procedural requirements of the SB 689 definition in section 1091.5(a)(9), the "non-interest" is described as a "salary, per diem, or reimbursement for expenses from a government entity, unless the contract directly involves the department of the government entity that employs the officer or employee . . . ." The rest of the definition operates much like the procedural steps in the "remote interests" section and much like its predecessor section from the 1991 amendments. Presumably, if the procedural steps are not followed, the "non-interest" described in section 1091.5(a)(9) will become a disqualifying financial interest, thereby placing both the official and the contract in jeopardy.

D. Legislative History of SB 689

The legislative history of SB 689 sheds some light on the meaning of the amendments. When SB 689 was introduced on February 24, 1999, it related to the administration of state government, not to contractual conflicts of interest or to Government Code sections 1090–1098. It was amended in the Assembly on June 21, 1999, to amend Government Code section 1091 by adding another item to the list of "remote interests." Specifically, it added the following language to section 1091(b): "(13) That of a person receiving compensation for employment with a governmental agency."[7]

On June 30, 1999, the bill was again amended in the Assembly. The Assembly changed the wording in new section 1091(b)(13) to read: "That of a person receiving salary, per diem, or reimbursement for expenses from a government entity."

On June 30, 1999, the Assembly also changed existing section 1091.5(a)(9) to read:

> That of a person receiving salary, per diem, or reimbursement for expenses from a government entity, unless the contract directly involves the department of the government entity that employs the officer or employee, the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record.

There are no comments in the legislative record about why the changes were made on June 30, 1999.

At the July 7, 1999, hearing held by the Assembly Committee on Local Government, the Committee considered the bill as amended on June 30th. Comments made by a legislative analyst to that Assembly Committee also shed some light (though dimly) on the intent of SB 689:

> According to the sponsor, the California Attorney General's Office, the problem addressed by this legislation arises when two factors are present: First, two government entities seek to enter into a contract with one another. Second, when one entity is a board or commission, and a member of the board or commission is employed by the other governmental entity.

> It should be noted that since California is a community property state, any interest of one spouse in a marital relationship is attributable to the other spouse. Therefore the rules created under this bill would apply to the public official if his or her spouse is employed by the contracting public agency.
>
> According to the California State Association of Counties (CSAC), the need for this bill arises during implementation of the California Children and Families First Act. There have been questions as to whether county employees who serve as county children and families first commissioners can participate in decisions which could impact funds for county programs. CSAC asserts that this language clarifies that county employees can participate without a violation of conflict of interest provisions.

The analyst also suggested that the Committee consider asking for clarification of the word "department" in the amendment to section 1091.5(a)(13). The analyst said:

> The committee may wish to consider the meaning of the word "department." It seems clear that the author's intent is to define as a "remote interest" a situation where the contact is with the specific unit that employs the official which does not result in any direct financial gain to that official. However what is a department? Within the State of California there are large departments and within them smaller units or divisions. Does the author intend an agency the size of the Department of Transportation or Fish and Game to create a "remote interest" or smaller units? Another example is the University of California. UC may contract with public entities to provide services. How would a department be defined within the University of California?
>
> The committee may wish to have the language of the bill clarify the term "department."

There is nothing in the legislative record to show whether the Committee, other legislative committees, the full Assembly, or Senate ever asked for or received clarification of the term "department." In any event, without further changes, the bill passed the Assembly on August 18, 1999; passed the Senate on August 23, 1999; was approved by the Governor on September 7, 1999; and became effective on January 1, 2000. California Legislative Bill Information - SB 689 Senate Bill (visited Jan.26,2000)<http://www.leginfo.ca.gov/ pub/bill/ sen/sb_0651-0700/sb_689_bill_19990907_chaptered.html>.

The precise wording and the legislative history of the 1999 amendments, especially the amendments to Section 1091.5 made on June 30, 1999, hint that the legislature was aware of previous interpretations of the law especially as they pertain to contracts between two government agencies. In particular, the phrasing of the amendments to section 1091.5(a)(9) indicate the legislature was aware of the California Attorney General's interpretation of that section.

In a 1995 opinion, the California Attorney General interpreted section 1091.5(a)(9), as amended in 1991. 78 Op. Cal. Att'y Gen. 362 (1995). In that opinion, the Attorney General examined whether a city council was able to enter into a contract with the county sheriff to provide law enforcement services to the city where the sheriff's deputy chief served on the city council. In addition to examining the question under other laws, the Attorney General discussed at length whether sections 1090, 1091, or 1091.5 applied to the question. The Attorney General stated that if the proposed contract for sheriff services were with a private entity, the contract would clearly be prohibited under section 1090. But the answer was less clear because the contract was between two public agencies.

Section 1091.5 as amended in 1991 was critical to the Attorney General's analysis. As the Attorney General pointed out, even before the 1999 amendments, section 1091.5(a)(9) dealt expressly with contracts between two public agencies. Because the 1991 amendments were themselves ambiguous, the Attorney General examined the legislative history of the 1991 amendments to determine the scope of application. The Attorney General concluded that, as amended in 1991, section 1091.5(a)(9) allowed a government employee who served on the board of another public agency to vote on a contract between the agency and his government employer, except when the contract involves his particular employing unit. The Attorney General reaffirmed this analysis in *Conflicts of Interest*, California Attorney General (1998) at 64.

Although not crystal clear, the 1999 amendments to section 1091.5 appear to be an attempt to codify the 1995 California Attorney General's opinion. That opinion construed both sections 1091 and 1091.5 and concluded that a contract between two government agencies may be executed even though a board member of one agency is financially interested by being an employee of the other agency, as long as he or she does not participate in the decision and as long as the procedural steps outlined in section 1091 are followed. The 1995 Attorney General Opinion fairly cried out for the legislature to clarify its intent about whether and to what extent contracts between government agencies are subject to sections 1090–1098. SB 689 appears to be an answer to the Attorney General's plea.

E. Conclusion

It is clear that at least some, but not all, contracts between local government agencies are covered by sections 1090 through 1098. A contract will be called into question if an employee of one public agency sits on the board of another public agency and the two public agencies intend to contract with one another. It is less clear about the ability of one governmental agency's ability to contract with another when an elected official of the first public agency sits on the board of the second.

Assuming the person in question is an employee of one government agency (Agency A) and that employee sits on the board of the second agency (Agency B), two rules emerge:

Fact Situation No. 1: If the contract is between that employee's government department (or employing unit?)(Agency A) and the other governmental agency on whose board the employee sits (Agency B), then the contract is governed by section 1091.

Rule No. 1: The result is that the employee should disclose his or her "remote interest" to Agency B, that disclosure should appear on the Agency B's official records, and the employee should *abstain* from voting on the contract when he or she is sitting on Agency B's board.

Recommended Course of Action in Fact Situation No. 1:

When sitting on Agency B's board as it is considering entering into a contract with the City, the employee *must abstain* from participating in making or voting on the contract. Additionally, the employee should disclose the fact that he or she has a remote interest in the contract by virtue of the fact that he or she is employed by the City. That disclosure should be noted in Agency B's official records.

Fact situation No. 2: If the contract is between Agency A, and the employee does not work for the department in Agency A which is making the contract, and Agency B on whose board the employee sits, then section 1091.5 applies.

Rule No. 2: The result is that in order for that officer to vote on the contract while sitting on Agency B's board, the officer's non-interest in the contract arising from his or her employment with Agency A should be disclosed to Agency B, and that disclosure should be noted in the agency's official records.

Recommended Course of Action in Fact Situation No. 2:

Unless special legislation renders section 1091.5 inapplicable (discussion below), to satisfy section 1091.5(a)(9)'s procedural requirements in a situation similar to fact pattern number one, we recommend substantially the following notices be placed on the agendas of the City Council and the other contracting government agency, as appropriate:

Proposal for both regular and special meeting agendas of the City Council (to appear near the Brown Act Public Comment notices):

Notice and Disclosure of Non-Interest in Contracts under Government Code section 1091.5:
The Mayor and City Council receive compensation from the City of San Diego by virtue of their being elected officials of this City. The City Council from time to time approves contracts with other government agencies on whose boards or governing bodies the Mayor or one or more members of the Council sit. The fact that the Mayor and Council receive compensation from the City for their public service may cause them to have "non-interests" in contracts with other government agencies. This notice shall appear in the

official records of the City Council.

> Proposal for Agency B's agenda (for both regular and special meetings (to appear near Brown Act Public Comment notices):
>
> **Notice and Disclosure of Non-Interest in Contracts under Government Code section 1091.5:**
> Agency B is made up of individuals who are also the elected Mayor of the City of San Diego and elected City Councilmembers. The fact that the Mayor and Councilmembers receive compensation from the City for their public service may cause them to have "non-interests" in contracts formed between Agency B and the City. This notice shall appear in the official records of Agency B.

It is not clear how section 1091 or 1091.5 will apply to intergovernmental agreements when:

1. Agency A is the City acting through the City Council and Agency B is another government agency whose board consists entirely of elected officials (e.g., the Redevelopment Agency Board) (*but see* special discussion below pertaining to redevelopment agencies),

2. Agency A is the City acting through the City Council and Agency B is a joint powers authority and its board consists of the City Manager and a high level official from another government agency,

3. Agency A is the City acting through the City Council and Agency B is a non- profit public corporation which is wholly owned by the City and on whose board sit two or three high level City officials, or

4. Agency A is the City acting through the City Council and Agency B is a joint powers authority with high level city officials making up a majority of its board.

We recommend that the City seek legislation to clarify the applicability of sections 1091 and 1091.5 in these situations.

II. Effect of Special Legislation on Applicability of Sections 1090 through 1098

Special statutes governing potential conflicts of interest may alter or eliminate the general rule set forth in sections 1090–1098.

> It is well settled . . . that a general provision is controlled by one that is special, the latter being treated as an exception to the former. A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates.

Rose v. State of California, 19 Cal. 2d 713, 723-24 (1942).

In 1967, this principle was applied in a conflicts case involving redevelopment. *See Old Town Dev. Corp. v. Urban Renewal Agency*, 249 Cal. App. 2d 313 (1967). The California Attorney General has also advised that "when the organic act under which a particular commission had been formed contains a very specific conflict of interest rule, neither general statutes not the common law need be consulted." 51 Ops. Cal. Atty. Gen. 30 (1968).

A. Special Statutes Governing Conflicts of Interest for the Redevelopment Agency Board

As an alternative to appointing members of a redevelopment agency board, the City Council may choose to serve as the Redevelopment Agency Board. Cal. Health & Safety Code 33200(a). This City Council has chosen this alternative, and the Mayor and each Councilmember is a member of the City of San Diego's Redevelopment Agency Board.

Individuals who sit on the board of a redevelopment agency are subject to special statutes governing potential conflicts of interest arising out of such membership. California Health and Safety Code section 33130 provides conflicts of interest regulations specific to members of redevelopment agencies. It states the following:

> No agency or community officer or employee who in the course of his or her duties is required to participate in the formulation of, or to approve plans or policies for, the redevelopment of a project area shall acquire any interest in any property included within a project area within the community. If any such officer or employee owns or has any direct or indirect financial interest in property included within a project area, that officer or employee shall immediately make a written disclosure of that financial interest to the agency and the legislative body and the disclosure shall be entered on the minutes of the agency and the legislative body. Failure to make the disclosure required by this subdivision constitutes misconduct in office.

Cal. Health & Safety Code 33130(a).

The foregoing Health and Safety Code section provides a specific statutory scheme applicable to individuals sitting on a board of a redevelopment agency. It may, therefore, be presumed to govern such individuals notwithstanding the language contained in recently amended sections 1091 and 1091.5. Section 33130 of the Health and Safety Code does not identify as a conflict a board member's employment by a public agency. Rather, it limits conflicts to situations where a board member has an interest in property located within the redevelopment area. Absent such a property interest, no conflict appears to be present.

B. Statutes Governing Nonprofit Public Benefit Corporations

Nonprofit public benefit corporations may be formed under authority of California Corporations Code sections 5510 through 6910. This City has formed nonprofit public benefit corporations pursuant to this authority, including the San Diego Data Processing Corporation and the San Diego Convention Center Corporation, among others. The City is the sole shareholder. For the most part, the City Council has appointed non-City officials to serve as members of the board of directors of these corporations. But from time to time, the Council has appointed City officials to serve as full voting or ex-officio members of these boards.

In the absence of special legislation governing the boards of directors of these corporations, the general rules in sections 1090 through 1098 would govern contractual conflicts of interest faced by members of these boards. However, California Corporations Code sections 5233 through 5236 specifically deals with conflicts of interest faced by board members of nonprofit public benefit corporations. Therefore, under the principle discussed above that special legislation controls over general legislation, neither voting nor ex-officio board members of these corporations will be subject to sections 1090 through 1098.

C. No Special Statutes Governing Conflicts of Interest for Board Members of Joint Powers Authorities

The general authority for forming a joint powers authority in this state is California Government Code sections 6500 through 6527. There are no special statutes governing conflicts of interest faced by board members of a joint powers authority. Therefore, contractual conflicts of interest for joint powers authorities should be analyzed under sections 1090 through 1098, discussed above.

If sections 1091 and 1091.5 make it impossible for the board members of a joint powers authority to take action on a contract with the City because there are too many abstentions, the board may still be able to take action on the contract if the limited "rule of necessity" available under sections 1090 through 1098 can be applied in the particular circumstances. This rule is discussed in the next section.

III. Rule of Necessity

The rule of necessity developed from a common law interest in preventing important governmental processes from being halted by officials with potential conflicts of interest. *Kunec v. Brea Redevelopment Agency*, 55 Cal. App. 4th 511, 520 (1997). When a governing body needs a certain number of votes to pass or defeat a particular piece of legislation, and that number cannot be reached by unconflicted legislators, the rule of necessity allows the necessary number of conflicted legislators to vote.

> With respect to contractual conflicts of interest, the "rule of necessity" may be said to have two facets. The first . . . arises to permit a governmental agency to acquire an essential supply or service despite a conflict of interest. The contracting officer, or a public board upon which he serves, would be the sole source of supply of such essential supply or service, and also would be the only official or board permitted by law to execute the contract. Public policy would authorize the contract despite this conflict of interest. The second facet of the doctrine . . . arises in nonprocurement situations and permits a public officer to carry out the essential duties of his office despite a conflict of interest where he is the only one who may legally act.

65 Op. Cal. Att'y Gen. 305, 310 (1982) (citations omitted).

Without invoking the rule of necessity, no decision could be made when such conflicts are present.

> There is a strong public policy "that members of public legislative bodies take a position, and vote, on issues brought before them. This policy has been expressed as 'the duty of members of a city council to vote and they ought "not by inaction, prevent action . . . ."'"

Kunec, 55 Cal. App. 4th at 520. (citations omitted).

The rule of necessity can be applied when a councilmember subject to section 1090 prohibitions must vote in order for the council to take action on a matter essential to the public interest. Such a situation was at issue in 76 Op. Cal. Att'y Gen. 118 (1993). In that opinion, the holder of a cable franchise was elected to the city council. When it came time for the franchise to be renewed, questions were raised regarding whether renewing the sale of the franchise would be in violation of section 1090. As discussed earlier in this memorandum, whenever section 1090 is applicable to one member of the governing body of a public entity, the entire governing body is precluded from entering into the contract. The California Attorney General noted that a conflict clearly existed. The opinion looked beyond the conflict, however, and applied the rule of necessity, quoting from *Eldridge v. Sierra View Local Hospital District*, 224 Cal. App. 3d 311, 321 (1990):

> The rule of necessity provides that a governmental agency may acquire essential goods or services despite a conflict of interest, and in nonprocurement situations it permits a public officer to carry out the essential duties of his/her office despite a conflict of interest where he/she is the only one who may legally act. The rule ensures that essential government functions are performed even where a conflict of interest exists.

The California Attorney General found that cable television services could be considered "essential" to the city and its inhabitants. Acknowledging that the application of the rule of necessity depends on factual determinations, the Attorney General opined that this rule may indeed apply in circumstances otherwise subject to the prohibitions of sections 1090 through 1098.

The Political Reform Act also recognizes that the desire to have unbiased decisionmakers is balanced by the need for action, even when conflicts exist. Government Code section 87100 states that "[n]o 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," while Government Code section 87101 follows with the provision that: "[s]ection 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."

As applied to the boards, agencies, and commissions discussed in this memorandum, the rule of necessity requires that City officers and employees serving on such entities, and potentially subject to section 1090 prohibitions, may nevertheless vote on matters of vital public interest when their failure to vote would prevent action on such matters.

CONCLUSION

This memorandum analyzes the effect of 1999 amendments to Government Code sections 1091 and 1091.5, both of which deal with contractual conflicts of interest for government officials and their agencies. These two sections are part of a statutory scheme that prohibits government officials from having financial interests in contracts they make on behalf of their agencies. Section 1091 deals with an official's "remote" financial interests in contracts; section 1091.5 deals with an official's "non-interests" in contracts. Penalties for violation of some portions of the law are harsh: violation of Government Code section 1090 renders a contract void, not voidable, and the offending public official may go to prison and be barred from public office.

The 1999 amendments create a form of conflict of interest that arises when an official working for one government agency sits on the board of another government agency and the two government agencies want to

enter into a contract. If the official is paid by a governmental department and that department wants to contract with another government agency on whose board the official sits, the official has a "remote" financial interest in the contract and, therefore, he or she must *abstain* from taking action on the contract when acting in his or her capacity on the board. In addition, the fact of the official's "remote" interest must be disclosed to the board, and the disclosure must be placed on the board's official records. If the official is not paid by the governmental department that wants to contract with another government agency on whose board the official sits, the official has only a "non-interest" in the contract. In this instance, the official is not required to abstain from taking action on the contract when acting in his or her capacity on the board. However, the fact of the official's "non-interest" must still be disclosed at the time the contract is made and the disclosure must be noted in the board's official records.

The potential effect of these 1999 amendments on the City's ability to enter into contracts with the Redevelopment Agency, the City's various nonprofit public benefit corporations, and joint powers authorities of which the City is a member, is analyzed in this memorandum. We conclude that special legislation governing conflicts of interest in the organic legislation permitting formation of redevelopment agencies and nonprofit public benefit corporations controls over the general provisions appearing in Government Code sections 1090–1098. Therefore, the City may continue to do business with the Redevelopment Agency and the City's various nonprofit public benefit corporations as it has in the past. However, the new amendments may affect the City's ability to enter contracts with various joint powers authorities of which it is a member. Each case will have to be analyzed separately to determine whether a particular contract may be affected by a City official's potential remote or non-interest in the contract. In some instances, it may be necessary to apply the limited "rule of necessity" to determine whether the City and the joint powers authority in question may enter into a particular contract.

CASEY GWINN, City Attorney

/ S /

By
Cristie C. McGuire
Deputy City Attorney

CCM:jrl(x043.2)
cc Mayor
City Councilmembers
City Clerk
ML-2000-03