

**Office of  
The City Attorney  
City of San Diego**

**MEMORANDUM  
MS 59**

**(619) 533-5800**

**DATE:** January 29, 2014

**TO:** Interim Mayor and City Councilmembers

**FROM:** City Attorney

**SUBJECT:** Appointment of a Hotelier as a Director on the San Diego Convention Center Corporation Board of Directors

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**INTRODUCTION**

The issue has been raised on several occasions as to whether a hotelier may legally be appointed to the San Diego Convention Center Corporation Board of Directors (Convention Center Corporation Board). This Office has analyzed the question in the past with respect to specific individuals and provided advice on a confidential basis. However, in light of upcoming vacancies and recent questions on the subject, this general opinion may be useful and is published without reference to any particular nominee.

**QUESTION**

Is the City legally prohibited from appointing a hotelier to serve as a director on the Convention Center Corporation Board?

**SHORT ANSWER**

No. There is no legal prohibition *per se* to the City's appointment of a hotelier to the Convention Center Corporation Board, but such an appointment would raise potentially serious issues under conflict of interest laws that apply to directors of the Board, and could legally prevent action by the Board as a whole. The issue is whether a specific appointee has financial interests that would

preclude his or her ability to act with undivided loyalty and in the best interests of the corporation, as required by California law. This is analyzed on a case-by-case basis looking at the specific facts about the financial interests of a proposed director.

Here, where events held or not held at the Convention Center directly affect local hotel business for hotel rooms, event rooms, and food and beverage services, many of the decisions made by the Convention Center Corporation Board will directly or indirectly impact hotel business. If a nominee has financial interests, either direct or indirect, in the hotel business, the ability of that individual to serve in light of applicable conflict of interest laws is doubtful. A director of a corporation must be able to act in the best interests of the corporation, and not act with loyalties divided between the corporation and other interests.

The fiduciary duty of a director to act in the best interests of the corporation is underscored by California Government Code section 1090, which applies to the Convention Center Corporation Board. Section 1090 prohibits a government official from having a financial interest in contracts made by the official in his or her official capacity, or by any board or body of which he or she is a member, and is intended to prevent financial conflicts of interest that might impair an officer or employee from acting with undivided loyalty to the public entity they serve. If a director has a potential section 1090 conflict, the corporation will be precluded from entering into a contract, even if the director abstains from voting on the matter.

## **DISCUSSION**

The San Diego Convention Center Corporation was incorporated as a non-profit California corporation in 1984, with the City of San Diego, a municipal corporation, as its sole member, in order to operate and manage the San Diego Convention Center. The existing Convention Center was built by the City and Port as an economic driver for the hotel and tourism industries in San Diego. The Convention Center Corporation's FY13 Year-End Performance Overview Report to the City measured performance in terms of "estimated contracted room nights produced" in conjunction with events held at the Center. The Report states that the overriding mission of the Corporation's sales and marketing plan is to maximize hotel room night production. Other key objectives affect what types of events are booked at the Center, when those bookings take place, and how much is charged. The work of the Convention Center Corporation in attracting, booking, and managing the events at the Center directly impacts hotel revenues from room nights, event rooms, restaurant traffic, and food and beverage services. For example, an effort by the Convention Center Corporation to capture smaller events when space allows might impact a hotel that might otherwise have booked its meeting rooms with that event.

Given the economic relationship between the Convention Center and the hotel industry, individuals working in or with financial interests in the hotel industry have expressed interest in serving on the Convention Center Corporation Board. The difficulty becomes whether such an individual can act in the best interests of the Convention Center Corporation and without a loyalty divided between the Corporation and the individual's financial interests. That question is

answered by analyzing the specific facts pertaining to that individual in light of the laws, regulations, and policies discussed herein.

The laws, regulations, and policies that apply to conflicts of interest for Convention Center Corporation directors include: California Nonprofit Corporation Law and related case law, the Political Reform Act of 1974 (Cal. Govt. Code §§ 81000, *et seq.*) and its regulations (Cal. Code Regs. title 2, §§ 18110, *et seq.*), California Government Code section 1090, San Diego Charter section 94, and City Council Policy 000-04. All of these laws, regulations, and policies underscore the basic duties of a director of a corporation to be loyal to, and act in the best interests of, the corporation and avoid any conflicts that might affect the director's ability to carry out those duties. These laws are designed to protect against actual conflicts (or the appearance of conflicts) and self-benefit by public officials, and may be violated if appointees participate in certain business or votes before a board or commission.

If the City seeks to appoint an individual who is economically interested in hotels, the City and the individual need to consider whether such an individual would be exercising divided loyalties and could, consistent with the conflict of interest laws, act in the best interests of the Convention Center Corporation. The City could conduct a pre-appointment review for the potential appointee, examining all of the known facts. (Absent those facts, this Office cannot provide a "blanket" opinion as to whether a particular appointee would be unable to participate in future governmental decisions.) If appointed, the director would need to assess potential conflicts with every vote he or she might potentially cast, including investments in business entities, interests in real property, income, positions in business entities, and gifts. The director's interests would also be disclosed on the appointee's Statement of Economic Interests (Form 700) after the appointment is confirmed and will help identify future conflicts of interest.

The following is a brief summary of laws that apply to Convention Center Board members.

**A. California Nonprofit Corporation Law**

Directors of nonprofit corporations are fiduciaries with duties of obedience, diligence and loyalty that must perform their duties in good faith and in the best interests of the corporation. *Raven's Cove Townhomes, Inc. v. Knuppe Development Company, Inc.*, 114 Cal. App. 3d 783, 799 (1981); *Prof. Hockey Corp. v. World Hockey Assn.*, 143 Cal. App. 3d 410, 414 (1983); Cal. Corp. Code § 5231(a). The duty of loyalty requires the directors/trustees not to act in their own self interest when the interest of the corporation will be damaged thereby.

**B. Political Reform Act**

Convention Center Corporation directors are public officials subject to the Political Reform Act. Cal. Code of Regs. title 2, § 18701(a)(1). The Act requires that public officials be disqualified from participating in governmental decisions in which they have a financial interest. Cal. Gov't. Code § 87100. Whether or not the official is disqualified depends on the effect the decision will have on the official's financial interests. Each potential conflict of interest requires a multi-step

analysis based on the particular facts. Cal. Code Regs. title 2, § 18700. Financial interests under the Political Reform Act include business interests and investments, interests in real property, sources of income, sources of gifts, positions with business organizations, and the personal finances of the official and the official's immediate family. Cal. Gov't. Code § 87103 (a)-(e). A director is prohibited from voting on or participating in the making of a decision if the director has such a qualifying economic interest that is directly involved in the matter before the board or, if indirectly involved, is material. For example, the executive director of an organization who advocates a particular position on behalf of his organization could not participate in any decisions in his capacity as a board member that would advance or inhibit the accomplishment of the organization's goals. (*Best Advice Letter*, FPPC No. A-81-032.)

### **C. California Government Code Section 1090**

California Government Code section 1090 prohibits a government official from having a financial interest in contracts made by the official in his or her official capacity, or by any board or body of which he or she is a member, and is intended to prevent financial conflicts of interest that might impair an officer or employee from acting with undivided loyalty to the public entity they serve. Under section 1090 and the cases interpreting it, the Convention Center Corporation directors are covered by its provisions.

The purpose of section 1090 is to ensure public officers are guided solely by the public interest, and not by personal interest, when acting in an official capacity. The policy behind the law is to prevent not only actual corruption, but the appearance of corruption. Because of that, exceptions to the law are narrowly drawn and narrowly interpreted, and remedies and penalties for violations are severe.

"Financial interest" includes both direct and indirect financial interests, and has been defined to include a conflict in loyalties and allegiances. *Fraser-Yamor Agency, Inc. v. County of Del Norte*, 68 Cal. App. 3d 201, 212 (1977). Section 1090 is "concerned with 'any interest' other than a remote or minimal interest which prevents the official from exercising absolute loyalty and undivided allegiance to the best interests of the government body." *Id. see* 65 Op. Cal. Att'y Gen. 41 (1982) (service as a director of a corporation is a financial interest whether or not such service is compensated). If a public official with a direct or indirect financial interest participates in the making of a contract, then the contract is void and the public official may be subject to civil and criminal fines and penalties. If the public official has a "remote interest" (as defined in the Code), the public official can fully disclose that interest to the board and abstain from voting.

A "financial interest" is broadly defined under section 1090. Under that broad definition, an individual who is a member of another corporate board, with a mission competing or in conflict with that of the Convention Center Corporation, would have a conflict. Moreover, if a director has a potential section 1090 conflict, the corporation will be precluded from entering into a contract, even if the director abstains from voting on the matter. This Office cautions that, in the case of a section 1090 conflict, the Convention Center Corporation Board could be precluded – in its entirety – from acting on a contract or the contract could be void, even if the conflicted director abstains from voting on the contract. It is only when the potential for the conflict can be

classified as “remote” that a director can disclose the conflict and abstain from voting. If there is more than one individual on the board with foreseeable conflicts, the problem will be compounded.

**D. San Diego Charter Section 94**

This Office has advised in the past that San Diego Charter section 94 applies to Convention Center Corporation directors with respect to contracts relating to the corporation. *See* 1988 City Att’y Report 1062 (88-14; Mar. 16, 1988). The Charter provision provides, in pertinent part, that no officer “shall be or become directly or indirectly interested in, or in the performance of, any contract with or for The City of San Diego.” This language is consistent with the state law restrictions discussed above.

**E. Council Policy No. 000-04**

The City’s Code of Ethics policy prohibits any “appointee” from engaging in any business or transaction or having any direct or indirect financial “or other personal interest” “which is incompatible with the proper discharge of his or her official duties or would tend to impair his or her independence or judgment or action in the performance of such duties.” This Office has also previously advised that this policy applies to Convention Center Corporation directors. 1988 City Att’y Report 1062 (88-14; Mar. 16, 1988). As a policy, this prohibition does not carry the force of law, and this Office has previously advised that it is within the official’s discretion to determine whether he or she is in compliance with it. *See, e.g.*, 2004 City Att’y MOL 85 (04-03; Feb. 12, 2004). However, where the official has not yet been appointed, this policy should be taken into consideration by the Mayor and City Council in making that appointment.

**CONCLUSION**

There is no legal prohibition *per se* to the City’s appointment of a hotelier to the Convention Center Corporation Board, but such an appointment would raise serious issues under various conflict of interest laws. The question is whether a specific nominee has financial interests that will prevent him or her from acting with undivided loyalty to the corporation, and in the best interests of the corporation, as required by California law.

As set forth above, a director of a corporation must be able to act in the best interests of the corporation, and not with a divided loyalty between the corporation and other interests. This concept is especially critical if the City is being asked to appoint individuals who are economically interested in hotels, given the economic relationship between the Convention Center and the hotel industry. If the City seeks to appoint such individuals to the board, the City and individuals need to assess whether they could serve without divided loyalties, and whether they could, consistent with the laws cited above, act in the best interests of the corporation.

As noted above, if a director has a potential conflict under California Government Code section 1090, the corporation will be precluded from entering into a contract, even if the director abstains from voting on the matter. This potentially could affect the corporation’s work. It is only

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By     /s/    

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