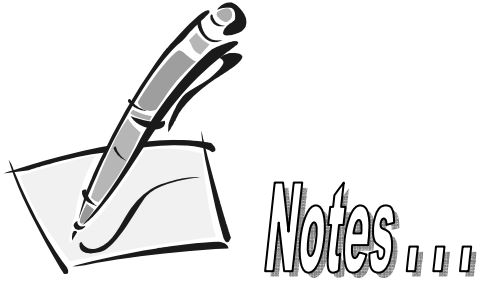




“When In Doubt, Sit It Out”- Gov. Code Section 1090 Update

Wednesday, May 4, 2011 General Session; 3:00 – 4:30 p.m.

Steven Dorsey, City Attorney, Buena Park, Norwalk and San Marino



“When In Doubt, Sit It Out”¹

Government Code Section 1090 Update

FOREWORD

richard richards
(1916–1988)

glenn r. watson
(1917–2010)

harry l. gershon
(1922–2007)

steven l. dorsey
william l. strausz
mitchell e. abbott
gregory w. stepanicich
rochelle browne
quinn m. barrow
carol w. lynch
gregory m. kunert
thomas m. jimbo
robert c. ceccon
steven h. kaufmann
kevin g. ennis
robin d. harris
michael estrada
laurence s. wiener
steven r. orr
b. tilden kim
saskia t. asamura
kayser o. sume
peter m. thorsen
james l. markman
craig a. steele
t. peter pierce
terence r. boga
lisa bond
janet e. coleson
roxanne m. diaz
jim g. grayson
roy a. clarke
william p. curley iii
michael f. yoshiba
regina n. danner
paula gutierrez baeza
bruce w. galloway
diana k. chuang
patrick k. bobko
norman a. dupont
david m. snow
lolly a. Enriquez
kirsten r. bowman
ginetta l. giovino
trisha ortiz
candice k. lee
billy d. dunsmore
amy greyson
deborah r. hakman
d. craig fox
susan e. rusnak
g. nder khalsa
david g. alderson
maricela e. marroquin
gena m. stinnett
jennifer petrusis
steven l. flower
christopher j. diaz
erin l. powers
tousaint s. bailey
serita r. young
shir klimá
diana h. varat
katrina c. gonzales
christopher l. hendricks
julie a. hamill
andrew j. brady

In the late 1970’s I presented a paper to the City Attorney’s Department entitled “Lesser Known Conflict of Interest Laws”. During that presentation I asked the attendees how many of them knew about Government Code Section 1090.² Only about 10 percent raised their hands.

Since then, Ted Prim of the California Attorney General’s office and city attorneys have given many presentations about Government Code Section 1090 at League of Cities conferences. As a result of these presentations, attendance at and presentation of AB 1234 seminars, such well known reported cases as Thomson v. Call³ and People v. Honig⁴ and the more recent prosecutions involving the City of Bell and other Southern California cities, nearly every city attorney is aware of the basic principles of Section 1090.

Based on this general awareness and understanding of Section 1090, and the excellent written materials available analyzing Section 1090⁵, this paper will, after briefly summarizing Section 1090, address in greater detail some of the Section 1090 topics which I have found in my practice to arise most frequently and to present some of the greatest difficulties. Many of these issues, though not all, pertain to application of Section 1090 to situations involving contracts related to the official’s personal employment relationship with his or her public agency or another public agency. Such issues include contracts affecting the official’s salary and benefits, contracts involving another public agency that the official serves, litigation between the official and his or her public agency, employment by a public official’s spouse with the same or a different public agency and participation by the official in public programs offered by the agency. In my experience, these are some of the most

¹ Advice suggested by Max-Gustaf Huntsman, Deputy County District Attorney, Los Angeles County, in a conversation with David Demerjian, Head Deputy District Attorney, Public Integrity Division, Los Angeles County and Steve Dorsey, March 31, 2011.

² All references to “Section” will mean the California Government Code unless otherwise indicated.

³ Thomson v. Call (1985) 38 Cal.3d 633.

⁴ People v. Honig (1996) 48 Cal.App.4th 289 (hereafter Honig).

⁵ See, e.g., Conflicts of Interest Guide, Office of the Attorney General (2010), pp. 55-83 (hereafter Conflicts of Interest); Practicing Ethics: A Handbook for City Attorneys, League of California Cities 2004, pp. 23-28.

of counsel

mark l. lamken
sayre weaver
jim r. karpiaak
teresa ho-urano

san francisco office
telephone 415.421.8484

orange county office
telephone 714.990.0901

*difficult Section 1090 questions to resolve and also can be the most emotional for our clients (and ourselves) as these issues affect their (and our) personal finances. Also, participation in these types of contracts can lead to criminal prosecution.*⁶

I. SUMMARY OF GOVERNMENT CODE SECTION 1090 AND ITS APPLICATION

Section 1090 prohibits public officials from being financially interested “in any contract made by them in their official capacity, or by any body or board of which they are members.” Section 1090 treats contracts in which members of the legislative body are financially interested differently than contracts in which staff members are financially interested.

Contracts in which staff members have a financial interest are valid so long as the staff member does not participate in the making of the contract. Thus, for staff members, Section 1090 works much the same way as the Political Reform Act (“PRA”).⁷

In contrast, the public agency itself is prohibited from entering into contracts in which a member of the legislative body has a financial interest unless a Section 1091 remote interest or Section 1091.5 non-interest applies. Thus, unlike PRA contracts, under Section 1090 it is not always sufficient that members of the legislative body merely abstain from the decision on the contract.

The courts have emphasized that Section 1090 is to be liberally and broadly interpreted.⁸ As the court stated in *People v. Deysher*, “however devious and winding the chain may be which connects the officer with a forbidden contract, if it can be followed and a connection made, the contract is void.”⁹

It is not necessary that the contract provide a personal financial benefit. A financial relationship with the contractor is sufficient. Thus, it is extremely important that city attorneys thoroughly understand all the relevant facts, and especially those that might tie the public official to the contract, before determining whether a public official has a financial interest in a contract for purposes of Section 1090.

Participation in the making of a contract is also defined broadly and includes preliminary discussions, negotiations, compromises, reasoning, planning, drawing of

⁶ See counts 2 and 8 of attachment 1; indictment of former City of Bell City Manager John Rizzo and Assistant City Manager Angela Spaccia.

⁷ Gov. Code, § 81000 *et seq.*

⁸ See, e.g., *Stigal v. City of Taft* (1982) 58 Cal.2d 565.

⁹ *People v. Deysher* (1934) 2 Cal.2d 141, 146.

plans and specifications, and solicitation for bids.¹⁰ Further, once the public official has begun to participate in the making of a contract, the official cannot undo that participation by simply withdrawing from the remainder of the process to avoid invalidating the contract.¹¹

Section 1091 provides various “remote interest” exceptions. Public agencies may enter into contracts in which one of the members of a legislative body has a remote interest so long as the official discloses the financial interest in the record, does not try to influence any other member of the legislative body to enter into the contract and otherwise complies with the requirements of Section 1091.

Section 1091 applies only to members of legislative bodies, as other officials can always abstain in any event. Its provisions do, though, provide guidance as to what will be considered a financial interest for a staff member. If a staff member has one of the listed remote interests, it is clear that the official may not participate in the making of the contract.

Section 1091.5 provides “non-interest” exceptions. Individuals may fully participate in decisions in which they have one of the listed “non-interest” exceptions if they comply with the requirements of that section. This provision applies to staff members and members of legislative bodies alike.

Penalties for violation of Section 1090 are severe. Criminal violations are punishable with a fine of not more than \$1,000 or by imprisonment in the state prison and permanent disqualification from holding any office in California.¹² In addition, Section 1092 provides that any contract entered into in violation of Section 1090 is void. The contracting party can be required to return all income earned under the contract and unjust enrichment does not apply.¹³

II. RELATIONSHIP BETWEEN SECTION 1090 AND THE POLITICAL REFORM ACT

There was some question when the PRA was approved by the electorate in 1974 whether or not the broad conflict of interest provisions of the PRA repealed

¹⁰ *Millbrae Association for Residential Survival v. City of Millbrae* (1986) 262 Cal.App.2d 222, 237; *Stigal v. The City of Taft* (1962) 58 Cal.2d 565, 569.

¹¹ *City Council v. McKinley* (1978) 80 Cal.App.3d 204, 212.

¹² Gov. Code, § 1097.

¹³ See, e.g. *Thompson v. Call* (1985) 38 Cal.3d 633.

Section 1090 by implication. Early on, the California Attorney General opined that Section 1090 remained viable,¹⁴ and this is now settled law.

In 1982, the California Attorney General issued an opinion indicating that it would be appropriate to apply the PRA definition of “financial interest” to define the term “financially interested” in Section 1090.¹⁵ The Attorney General stated “construing the term ‘financially interested’ as used in Section 1090 in a manner that is consistent with the definition of a similar phrase in the PRA’s conflict of interest provisions (§ 87100, *et seq.*) is appropriate in view of the rule that as to statutes dealing with the same subject ‘similar phrases appearing in each should be given like meanings.’”¹⁶

Using the PRA to interpret Section 1090 seems to have been ignored until the case of *People v. Honig*.¹⁷ In *Honig*, State Superintendent of Public Instruction Lewis (Bill) Honig III was convicted of violating Section 1090 by providing a grant to a firm that employed his wife.

Mr. Honig contended that the terms “financially interested” under Section 1090 should have the same meaning as “financial interest” in the PRA.¹⁸ Based on this theory, Mr. Honig requested a jury instruction that the term “financially interested” in Section 1090 should mean “material financial effect,” consistent with Section 87103 of the PRA.¹⁹

The *Honig* court engaged in a long discussion of the theory of “*in pari materia*,” a rule of statutory construction providing a process of interpretation by reference to related statutes. The court ultimately rejected application of the “*in pari materia*” principle to the requested jury instruction on the ground that limiting Section 1090 to material financial effects would eviscerate the statute.²⁰

¹⁴ 59 Ops.Cal.Atty.Gen. 604 (1976). Interestingly, the actual language the Attorney General used in that opinion and repeats in the recent Conflicts of Interest Guide, is somewhat confusing. The Attorney General stated “. . .the PRA [Political Reform Act] will control over Section 1090 *et seq.* where the PRA would prohibit a contract otherwise allowable under Section 1090 *et seq.*” *Id.* at p. 617. However, the Political Reform Act will never prohibit a particular contract. Rather, all contracts are permitted under the PRA so long as no official with a financial interest in the contract participates in the contract.

¹⁵ 65 Ops.Cal.Atty.Gen. 41, 57 (1982).

¹⁶ *Ibid.*

¹⁷ *Honig, supra*, 48 Cal.App.4th 289.

¹⁸ *Id.* at p. 321; 322, 326.

¹⁹ *Id.* at p. 326.

²⁰ *Id.* at p. 324.

The California Supreme Court recently addressed the “*in pari materia*” rule in *Lexin v. Superior Court*.²¹ Citing *Honig* and 65 Ops.Cal.Atty.Gen. 41 (1982), the Supreme Court held that “to the extent their language permits, we will read Section 1090 *et seq.* and the Political Reform Act as consistent.”²²

In *Lexin*, the California Supreme Court applied the Fair Political Practices Commission’s “public generally” regulations²³ to interpret the non-interest exception in Section 1091.5(a)(3), which provides that a public official is not interested in a contract if the official’s interest is “that of a recipient of public services generally provided by the public body or board of which he or she is a member, on the same terms and conditions as if he or she were not a member of the body or board.”²⁴ Relying on Regulation 18707.1, the court held that “public generally” as used in Section 1091.5(a)(3) does not mean the entire public served by the public agency.²⁵ Rather, the court, relying on the regulation, held that the term refers to services that “are broadly available to all others similarly situated, rather than narrowly tailored to specifically favor any official or group of officials, and are provided on substantially the same terms as for any other constituent.”²⁶

The holding in *Lexin* offers a potential tool to use when advising clients on the application of Section 1090. Being able to use definitions in the PRA and Fair Political Practices Commission regulations would help eliminate much of the ambiguity and uncertainty public agency attorneys face when applying Section 1090.

At present, the situations in which this holding can confidently be applied are limited. The term interpreted in *Lexin*, “public generally,” is used in both the PRA and in Section 1090. Until the courts render decisions and the Attorney General issues opinions applying the rule to new fact situations, attorneys are advised to limit its application to situations in which both statutes use the same or very similar terminology. Over time, though, such decisions and opinions might become available. If so, these rulings will provide significant assistance to public agency attorneys and their clients.

²¹ 47 Cal.4th 1050 (hereafter *Lexin*). See page 18 of this paper for a further discussion of *Lexin*’s application of Section 1091.5(a)(3).

²² *Id.* at p. 1091.

²³ Cal. Code Regs., tit. 2, §§ 18707-18707.9.

²⁴ *Lexin, supra*, 47 Cal.4th at p. 1091.

²⁵ *Id.* at p. 1093.

²⁶ *Id.* at p. 1092.

III. RULE OF NECESSITY

The rule of necessity is much more restrictive in the Section 1090 context than under the PRA. Under the PRA, the rule of necessity can be applied whenever it is necessary to obtain sufficient members of the legislative body to act. With Section 1090, though, the rule of necessity generally only applies when the contract involves an essential service, the conflicted member of the legislative body is the only source of the service, and the legislative body is the only entity that can act. This distinction in the rule of necessity derives from the different goals of the two statutory schemes.

The PRA is designed to prevent persons with conflicts from participating in decisions affecting their financial interests, while the purpose of Section 1090 is to prevent public agencies from entering into contracts at all in which a member of the legislative body has a financial interest, even if the official does not participate in the decision. Thus, it follows that the rule of necessity under Section 1090 will be much more restrictive.

Traditionally, application of the rule of necessity under Section 1090 has involved small jurisdictions where a particular service is only available from a business in which a member of the legislative body has a financial interest. Examples include obtaining nighttime services from a service station owned by a member of the city council because the station was the only one in the area open at night²⁷ and obtaining mortuary services from the county coroner who owned the only mortuary in the area.²⁸

In some limited circumstances, the rule of necessity has been applied to city salaries and benefits. For example, the Attorney General decided that a school board could enter into a memorandum of understanding with its employees despite the fact that one of the board members was a teacher in the district.²⁹ In finding that the rule of necessity would permit such a contract, as long as the conflicted board member abstained, the Attorney General reasoned as follows:

“We have based our ‘rule of necessity’ opinions allowing school boards to enter into contracts with their employees [despite the fact a board member was employed by the district] on the grounds that a school board is the only entity empowered to contract on behalf of a school district [and] a district must employ teachers. . .”³⁰

²⁷ 4 Ops.Cal.Atty.Gen. 264 (1944).

²⁸ 76 Ops.Cal.Atty.Gen. 118 (1993).

²⁹ 73 Ops.Cal.Atty.Gen. 191 (1990).

³⁰ *Id.* at p. 195.

The rule has also been applied when the power to act is held by a single individual. Such situations involve a superintendent of instruction who entered into an memorandum of understanding with school employees, despite the fact that he was married to one of the employees.³¹

IV. FINANCIAL INTERESTS ARISING OUT OF PUBLIC EMPLOYMENT

Public agency attorneys are frequently presented with questions in which the financial interest in the contract involves the public official's employment relationship with the same public agency or with another public agency that is entering into the contract. These situations can generally be grouped into the following areas:

- Contracts affecting the public official's personal income or benefits from the same public agency ("single agency contracts").
- Contracts between two public agencies ("two agency contracts").
- Contracts involving the public agency employment of the public official's spouse either with the same or a different public agency.

(A) General Principles

In 1991, the legislature enacted Section 1091.5(a)(9). This provision created a non-interest exception for "compensation for employment with a government agency, other than the government 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."

In 1995, the Attorney General addressed whether Section 1090 prohibited the City of Yucaipa from contracting with the County of San Bernardino for Sheriff's services because one of the members of the city council was the chief deputy sheriff.³² The Attorney General construed the phrase "other than the government agency that employs the officer or employee" in Section 1091.5(a)(9) "as allowing a government employee who serves 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."³³ Here, the councilmember worked for the

³¹ 65 Ops.Cal.Atty.Gen. 305 (1982).

³² 78 Ops.Cal.Atty.Gen. 362 (1995).

³³ *Id.* at p. 370.

county sheriff's department and the contract was for county sheriff's services. Thus, Section 1091.5(a)(9) did not apply to the proposed contract.³⁴

The Attorney General next evaluated whether any of the remote interest exceptions in Section 1091 applied to the proposed contract.³⁵ The Attorney General first considered Subdivision (b)(2), which provides a remote interest exception in certain circumstances if the public official has been an employee with the contracting party for three years prior to assuming public office. The Attorney General rejected application of this remote interest exception, presumably because the councilmember had not been employed by the sheriff's department for the requisite three-year period.³⁶

The Attorney General then turned to Subdivision (b)(1), which provides a remote interest for an "officer or employee of a nonprofit corporation." The Attorney General stated that while cities and other public agencies can be considered to be nonprofit corporations for some purposes, the reasoning was not persuasive in this instance.³⁷

The Attorney General also discussed the rule of necessity, but did not reach a conclusion on this point and merely stated that "it is conceivable that ...the rule of necessity may be applied in the present circumstances."³⁸ Finally, the Attorney General specifically suggested the Legislature clarify the language of Sections 1091 and 1091.5.³⁹

The Legislature addressed this issue four years later by enacting Section 1091(b)(13) (sometimes referred to herein as the "Remote Interest Government Income Exception"), which created a remote interest for "a person receiving salary, per diem or reimbursement for expenses from a government entity." The Legislature also amended Section 1091.5(a)(9) (sometimes referred to herein as the "Non-Interest Government Income Exception") to read as follows:

"(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

³⁴ *Ibid.*

³⁵ *Id.* at p. 371.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Id.* at p. 373.

³⁹ *Id.* at p. 372.

or board at the time of consideration of the contract, and provided further that the interest is noted in its official record.”

In summary, the amendment to Section 1091 created a remote interest that would have permitted the City of Yucaipa to contract with the San Bernardino County Sheriff’s Department. The amendment to Section 1091.5 also clarified the non-interest exception in Subdivision (a)(9) by adopting the Attorney General’s interpretation that the provision permits public officials to participate in contractual decisions involving a public agency which employs the official so long as the contract does not affect the department of that public agency.

The Remote and Non-Interest Government Income Exceptions control application of Section 1090 to most contracts in which a public official has a financial interest arising out of the official’s receipt of income or benefits from a public agency. Sometimes, though, the issue will be resolved by other provisions, such as the rule of necessity⁴⁰ or Section 1091.5(a)(3), a non-interest exception for participation in government programs open to the general public.⁴¹

Section 1090 by its terms only prohibits public officials from being financially interested in contracts “made by them in their official capacity.” Therefore, public officials are not prohibited from participating in their private capacities in contracts with their agency.⁴² The difficulty, as will be discussed later, is how a public official can ensure he or she is participating in their private capacity.⁴³

This principle has been applied to a county physician leasing space to the County of Marin in an office building he owned.⁴⁴ Also, in 80 Ops.Cal.Atty.Gen. 41 (1997), the Attorney General considered whether several firefighters who developed a product on their own time could sell the product to the city for which they worked. The Attorney General determined that no 1090 violation was presented because the firefighters’ duties did not involve purchasing and they did not use their official position to influence the city’s decision to purchase their invention.⁴⁵

In 66 Ops.Cal.Atty.Gen. 376 (1983), a number of officials with the City of Azusa and the Azusa Redevelopment Agency negotiated employment contracts by which their income under the contracts would be determined based on the increase in

⁴⁰ See, e.g., 89 Ops.Cal.Atty.Gen. 215, 222 (2006).

⁴¹ Lexin, *supra*, 47 Cal.4th at p. 1101.

⁴² See *Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533, 539-540; *People v. Gnass* (2002) 101 Cal.App.4th 1271, 1291.

⁴³ See pages 12-13 of this paper for a further discussion of this issue.

⁴⁴ *County of Marin v. Dufficy* (1956) 144 Cal.App.2d 30, at 37.

⁴⁵ 80 Ops.Cal.Atty.Gen. 41, 46 (1997). See page 45 of the Opinion for a list of other Attorney General Opinions discussing this principle.

assessed valuation in the city and in the redevelopment agency project areas.⁴⁶ The Attorney General determined that this arrangement precluded the officials from participating in contracts with developers and others that would increase the assessed valuations because those contracts would affect their personal income and the public officials would be negotiating these contracts in their official capacities.⁴⁷

In *Campagna v. City of Sanger*,⁴⁸ the court applied this principle to a city attorney's employment contract. In this case, the City of Sanger requested the contract city attorney to locate a firm to represent the city in prosecuting chemical companies on a contingency basis. The city attorney found a firm to handle the litigation, and the city attorney and the new firm agreed that the city attorney's firm would receive a "finder's fee" equal to thirty-five percent of the contingency fee.⁴⁹ The city entered into an agreement with the two firms. The agreement explained how the total fee would be calculated, but did not address whether or how the two firms would split the fee.⁵⁰

Mr. Campagna sued the City of Sanger when the city refused to pay his portion of the contingency fee.⁵¹ The court held for the city and concluded the contract was void under Section 1090 because the city attorney used his official position when he negotiated the agreement between the city and the other firm.⁵² As the Court explained, "although [the City Attorney] was entitled to negotiate with [the City] regarding compensation for litigation related services beyond his basic retainer agreement without violating Section 1090 of the Political Reform Act, he negotiated his compensation [with the outside firm] not with [the City]."⁵³

The *Campagna* court held that public officials may negotiate the terms of their employment with the public agency so long as it is clear they are doing so in their private capacity. Here, however, the city attorney had been requested to locate a firm to handle the litigation and, thus, was using his official position when he negotiated the fee splitting agreement with that firm.

(B) Single Agency Contracts.

The Remote Interest Government Income Exception for "salary, benefits and reimbursement for expenses" in Section 1091(b)(13) only applies to contracts

⁴⁶ 66 Ops.Cal.Atty.Gen. 376, 377 (1983).

⁴⁷ *Id.* at p. 376.

⁴⁸ *Campagna, supra*, 42 Cal.App.4th.

⁴⁹ *Id.* at p. 536.

⁵⁰ *Ibid.*

⁵¹ *Campagna, supra*, 42 Cal.App.4th at p. 537.

⁵² *Campagna, supra*, 42 Cal.App.4th at p. 542.

⁵³ *Ibid.*

between two public agencies and not to single agency contracts.⁵⁴ In this regard, the Attorney General concluded that the Remote Interest Government Income Exception would not operate to permit a community college district to increase health benefits for its teachers since one of the members of the governing board was a teacher who would receive the increased benefit.⁵⁵ The Attorney General stated that “the applicability of this exception has not been extended to a situation like the present one, in which the public official has a personal financial interest (albeit indirect in this instance) in the terms of a contract between the governing body and its own employees.”⁵⁶ The *Lexin* court stated that this opinion was “correctly decided.”⁵⁷

Since Section 1091(b)(13) does not apply to single entity contracts, it is necessary to find other exceptions or legal principles to permit legislative bodies to enter into agreements which will affect the salary, benefits or reimbursement for expenses from the government entity of one or more of the board members. In this regard, the Attorney General concluded that the rule of necessity would apply to permit a school board to enter into a memorandum of understanding with its employees despite the fact that a member of the district’s governing body was a teacher in the district.⁵⁸ The Attorney General reached similar conclusions in 89 Ops.Cal.Atty.Gen. 221 (2006). The *Lexin* court upheld the San Diego pension benefit contract involved in that case on the ground that the benefit fell within the non-interest “public generally” exception in Section 1091.5(a)(3).⁵⁹

These principles raise questions concerning participation by members of a legislative body in approving memorandums of understanding with employee organizations containing benefits that also apply to the members of the legislative body. The Attorney General has determined that Section 53208 provides a specific exemption to Section 1090 for contracts affecting the “health and welfare” benefits of members of a legislative body.⁶⁰ Thus, the members of the legislative body can approve benefit changes for the city employees even though the benefits will apply to the members themselves.

⁵⁴ *Lexin, supra*, 47 Cal.4th 1050 at p. 1081.

⁵⁵ 89 Ops.Cal.Atty.Gen. 217 (2006). This specific issue should not arise in general law cities since Government Code 53227 requires local agency employees to resign upon being elected or appointed to the agency’s legislative body.

⁵⁶ *Id.* at p. 221.

⁵⁷ *Lexin, supra*, 47 Cal.4th at p. 1082.

⁵⁸ 73 Ops.Cal.Atty.Gen.191, 195 (1990). See page 6 of this paper for a further discussion of the rule of necessity, in this context.

⁵⁹ *Lexin, supra*, 47 Cal.4th at p. 1082. See pages 18-19 of this paper for a further discussion of *Lexin* and Section 1091.5(a)(3).

⁶⁰ 89 Ops.Cal.Atty.Gen. 221 (2006).

While there appears to be no authority on point, Section 36516, which permits a city council to enact an ordinance establishing a salary for members of the city council, should provide sufficient authority for city councils in general law cities to enact and modify city council salaries without fear of violating Section 1090. Similarly, Section 36514.5 authorizes councilmembers to be reimbursed for their “actual and necessary expenses” and should be sufficient to avoid Section 1090 issues concerning reimbursement for expenses.

Section 53208 does not apply to city managers and other staff members who negotiate benefits for represented employees that will also apply to themselves. This raises a question whether it violates Section 1090 for a city manager to represent the city in negotiations with its employees over changes to CalPERS benefits that will also apply to the city manager.

The city manager is certainly using his or her public office when negotiating these benefits. While the city manager will not be a party to the contract, the CalPERS benefits will affect the city manager. *Lexin* prohibits public officials from using their official position to influence contracts from which they receive a personal financial gain.⁶¹

The city manager will not be part of the memorandum of understanding, and, in most cases, the city manager’s department, if there is one, will also not be a part of the memorandum of understanding. Thus, the contract does not appear to provide the city manager with any direct financial gain nor directly affect the city manager’s employing department. Nevertheless, the financial interests of the city manager and the city attorney to the extent the city attorney is a CalPERS member and participates in these decisions, is apparent.

This situation resembles to a slight degree, the Azusa Attorney General Opinion⁶² and the prohibited fee splitting arrangement in *Campagna*.⁶³ Since the city can always retain an independent labor negotiator for this purpose, the rule of necessity would not likely apply for city managers and others whose duties include negotiating benefits. Until the Attorney General provides a favorable ruling or legislation similar to Section 53208 is enacted, there is no guarantee that public officials who participate in memorandums of understanding and other contracts that affect their own benefits can do so without risking a violation of Section 1090.

Similar questions arise when the city manager or city attorney wants to change his or her personal employment agreement. Here, however, the individuals can

⁶¹ *Lexin, supra*, 47 Cal.4th at p. 1081.

⁶² 66 Ops.Cal.Atty.Gen. 41 (1997).

⁶³ 80 Ops.Cal.Atty.Gen. 41 (1997).

negotiate their contracts with the public agency in their private capacity.⁶⁴ The question is how to ensure that the individual is negotiating in his or her personal, not official, capacity.

One approach that appears to be commonly used is that the official desiring to renegotiate his or her contract writes a letter to the mayor, city council or some other official not subject to the official's supervision using his or her personal stationary and not using any of the city's resources. The letter would clearly state that the official is making this request in his or her individual capacity.

Even though acknowledging that public employees may negotiate their own contracts so long as the employees totally disqualify themselves from any participation in their public capacities, the Attorney General recommends, at least in the case of contract city attorneys, that a contract city attorney desiring an amendment to his or her contract retain another individual to conduct all negotiations.⁶⁵ No authority for this recommendation is offered, and this does not appear to be legally required. So long as the individual makes it clear she or he is making the request in his or her private capacity, there should be no violation of Section 1090. Unfortunately, there appears to be no authority validating any particular procedure, and the Attorney General's recommendation could be seized upon by a court to impose such a requirement.⁶⁶

(C) Two Agency Contracts

As discussed above, until adoption of the legislation that enacted the Remote Interest Government Income Exception in Section 1091(b)(13) and amended Section 1091.5(a)(9), it was questionable whether a city could enter into a contract with another city if a member of the city council of the first city was in the department of the second city that was affected by the contract. Subsequent to the legislation, the situation has become much clearer, although there are still some ambiguities.

In summary, a city may enter into a contract with a governmental entity that employs a member of the city council. The councilmember may even vote on the contract under the Non-Interest Government Income Exception so long as the contract does not involve the department of the public agency from which the councilmember receives compensation.

⁶⁴ *Compagna, supra*, 42 Cal.App.4th at pp. 39-40.

⁶⁵ *Conflicts of Interest, supra*, at pp. 66-67.

⁶⁶ See *Thorpe v. Long Beach Community College District* (2000) 83 Cal.App.4th 655, 662 (hereafter *Thorpe*) and *Lexin, supra*, 47 Cal.4th at fn. 17 for positive references to the Attorney General's Conflict of Interest Guide.

The primary difficulty in applying the Non-Interest Government Income Exception to a contract involving two government entities is defining the departments of the respective public agencies. With some agencies, the answer is quite clear. For example, most counties are divided into well-defined and delineated departments, as is the State of California.⁶⁷ However, other agencies, such as school districts are not generally organized on well-defined department lines. In cases where there is no clear departmental delineation, the safer course of action is to rely on the Section 1091(b)(13) Remote Interest Government Income Exception and for the member of the legislative body with a potential conflict to abstain.

Lexin indicates that contracts between two public agencies that affect the agencies in general are covered by the Non-Interest Government Income Exception.⁶⁸ Here, the Supreme Court held that Section 1091.5(a)(9) allowed city employees serving on the independent City of San Diego pension board to generally vote on contracts between the city and the pension board because “the contract was with the City as a whole.”⁶⁹ The Supreme Court did not consider a contract affecting the public agency that employs the public official as affecting the public agency employees themselves merely because the contract involved the public agency. Thus, a contract that does not uniquely involve any single department of a public agency will be considered as not involving any department rather than as affecting all departments.

It is unclear whether members of a legislative body are members of all departments or of no departments of a city. This issue does not appear to have been addressed in any reported authority to date. *Lexin* did not reach this issue because the contract between the pension board and the City of San Diego did not impact the pension board members in their capacity as members of a legislative body, but as City of San Diego employees. The question, then, is whether members of a legislative body are considered to be members of a legislative department of the agency, all departments of the agency or no department of the agency.

This issue most commonly arises when a public official is on the legislative body of two entities that are contracting with one another. While such cases are

⁶⁷ The Attorney General has concluded that the county counsel is a separate department and that a deputy county counsel serving on a city council can vote on a contract to retain the county to provide sheriff's services, even though it would seem the county counsel's office might provide additional legal services as a result of the contract. 85 Ops.Cal.Atty.Gen. 125 (2002).

⁶⁸ *Lexin, supra*, 47 Cal.4th at p. 1081.

⁶⁹ *Id.* at p. 1085.

infrequent, as these positions normally constitute incompatible offices, these situations do occasionally occur.⁷⁰

Lexin provides that “if the contract involves no direct financial gain, does not directly affect the official’s employing department and is only with the general government entity for which the official works, the interest is a minimal or a non-interest under Section 1091.5(a)(9) and no conflict of interest prohibition applies.”⁷¹ This language seems to support the position that a member of the legislative bodies of two entities entering into a contract with each other may participate in the contract so long as the contract does not uniquely or directly affect the members of either legislative body.

Lexin also points out that members of the San Diego pension board were required to be city employees and that this might have made the Non-Interest Government Income Exception applicable to the contract.⁷² *Lexin*, though, never resolves this issue, finding the contracts valid on other grounds. Thus, greater leeway may exist to permit members of legislative bodies to participate in contracts in which they might have a financial interest if the financial interest arises from a qualification the official must have in order to serve on the legislative body.

Overall, the prudent course of action until further guidance is provided on whether members of a legislative body are considered to be members of a department of a public agency, is for board members faced with contracts between two public agencies on which they serve as a member of both legislative bodies is to abstain from participating in the contract on both sides unless, perhaps, the relevant legislation requires them to be members of the first legislative body in order to serve on the other legislative body.

(D) Spouses

Section 1090 has been interpreted as including the financial interests of a public official’s spouse.⁷³ Thus, both the Remote Interest and Non-Interest Government Income Exceptions in Sections 1091(b)(13) and 1091.5(a)(9) apply to spousal public agency employment.

Spousal relationships are directly addressed in Section 1091.5(a)(6), which provides that a spouse does not have an interest in the other’s employment or office-holding office if it has existed for at least one year prior to his or her election or

⁷⁰ See page 25 of this paper for a discussion about joint powers authorities.

⁷¹ *Lexin, supra*, 47 Cal.4th at p. 1081.

⁷² *Id.* at p. 1097.

⁷³ *Thorpe, supra*, 83 Cal.App.4th 655.

appointment to office. This provision has been construed to prohibit a public agency from hiring the spouse of a member of its legislative body.⁷⁴

In *Thorpe v. Long Beach Community College District* (2000) 83 Cal.App.4th 655, the court held that a spouse could retain her employment with the district that existed for more than one year when the public official was elected, but that the terms of the employment could not change. Thus, spouses of members of a legislative body may not be promoted during the time the official remains a member of the legislative body.

Although there appears to be no authority on point, Section 1091.5(a)(6) does not appear on its face to apply to contracts between two public agencies. Thus, there is nothing prohibiting a public agency from hiring the spouse of a member of another agency's governing body that contracts with the hiring agency.

The Remote Interest and Non-Interest Government Income Exceptions probably apply to contracts with an agency that employs the spouse of a member of the legislative body of the other agency. If so, a member of a legislative body is required to abstain from a contract involving a department of another governmental entity by which the official's spouse is employed, but can participate in the making a contract affecting a different department of that governmental entity. By way of example, a member of a city council may not participate in a contract for law enforcement services with a county if the official's spouse works in the sheriff's department, but can participate in a contract with the county to provide public health services.

V. PUBLIC SERVICES

Questions can arise concerning whether public officials can enter into contracts to receive public services from the agencies which they serve. The Section 1091.5(a)(3) non-interest exception was enacted to address this situation. This provision provides that the following relationship is not a financial interest under Section 1090:

“that of a recipient of public services generally, provided by the public body or board of which he or she is a member, on the same terms and conditions as if he or she were not a member of the body or board.”

The Attorney General traditionally took a restrictive view of this provision, limiting its application to services such as utilities where “the provision of services in accordance with previously adopted rate schedules applicable to all customers.”⁷⁵

⁷⁴ 80 Ops.Cal.Atty.Gen. 320 (1997).

This principal was expanded somewhat when the Attorney General determined that members of a municipal airport commission could lease tie down spaces in the airport that were offered on a first-come, first-serve basis at previously established rates.⁷⁶ It is interesting to note, however, that the Attorney General also concluded that the airport commissioners leasing the spaces could not participate in setting rates for the airport hangars under the PRA, because the rate decisions would have a direct financial effect on the public official.⁷⁷

The Attorney General in an earlier opinion decided not to apply Section 1091.5(a)(3) to an application by a former member of a city council for a commercial loan grant under a program the councilmember had voted to establish during his term on the city council.⁷⁸ The Attorney General determined that helping to create the loan program barred the councilmember from obtaining a loan after leaving office, even though the official had no intention of applying for a loan at the time the program was created.⁷⁹

The Attorney General based this opinion on the fact that each grant application and resulting contract would be unique and would require the exercise of discretion by the public officials.⁸⁰ What the Attorney General failed to discuss in this opinion, however, is the fact that the discretion would only be exercised after the official left office. This opinion also does not discuss *Escondido Lumber Hay and Grain Co. v. Baldwin*, (1906) 2 Cal.App. 606, which held that Section 1090 does not apply to contracts if the official had no financial interest in the contract at the time it was entered into by the agency and had no intention at that time to acquire such a financial interest after that time.

In essence, the Attorney General seems to have based these opinions on the ground that the services must be available to “all members of the public.”⁸¹ For example, in determining that a councilmember could place advertising in a city newsletter, the Attorney General emphasized that the advertising was available to everyone in the city.⁸²

Sometimes public agencies provide services that can be used only by a few members of the public. Such a situation was discussed in *City of Vernon v. Central*

⁷⁵ 89 Ops.Cal.Atty.Gen. 335, 338 (1997).

⁷⁶ 89 Ops.Cal.Atty.Gen. 121 (1997).

⁷⁷ *Id.* at p. 128.

⁷⁸ 81 Ops.Cal.Atty.Gen. 317 (1998).

⁷⁹ *Id.* at p. 320.

⁸⁰ *Id.* at p. 321.

⁸¹ See, e.g. 81 Ops.Cal.Atty.Gen. 317 (1998).

⁸² 88 Ops.Cal.Atty.Gen. 122 (2005).

Basin Municipal Water District.⁸³ In this case, the California Court of Appeal was faced with the applicability of Section 1091.5(a)(3) to the Central Basin Municipal Water District. One of the board members of the district owned a water company that purchased wholesale reclaimed water from the district, and had voted to set the rates for the water his firm and all others were charged for reclaimed water.

The Court held that this contract was valid under the public generally exception in Section 1091.5(a)(3), notwithstanding the fact that only 23 water purveyors purchased reclaimed water from the district and were affected by the rates.⁸⁴ The Court construed the phrase “public services generally provided” to mean only that the services must be available to all of those who would want them.⁸⁵ The services did not have to be used or desired by all persons or entities affected by the district.⁸⁶ So long as reclaimed water was offered to anyone who desired to purchase it and all purchasers paid the same rate, the court was satisfied.⁸⁷

This interpretation of Section 1091.5(a)(3) was expanded even further in *Lexin*. In *Lexin*, the Court held that five of the members of the board administering the city’s retirement system could participate in making a contract with the City of San Diego that would affect their city retirement benefits because the benefits affected most rank and file employees in the same manner. In upholding application of Section 1091(a)(3) to these individuals, the court stated the rule for applying the non-interest exception as follows:

“Thus, so long as the benefit an official receives from a contract is in the nature of a ‘public service [] generally provided’ by the official’s agency, and so long as the benefit is received without special or differential consideration – ‘on the same terms and conditions’ as if the official were not a member of the entity he or she serves – it creates no conflict of interest.”⁸⁸

The Court decided that Section 1091.5(a)(3) did not apply to the single board member who was president of the San Diego City Firefighters union. Under San Diego’s memorandum of understanding, his pension benefits as a union president were different and more generous than those other city employees received. Thus, his pension plan was not generally available to other city employees and was not covered by the Section 1091.5(a)(3) exemption.

⁸³ *City of Vernon v. Central Basin Municipal Water District* (1999) 69 Cal.App.4th 508.

⁸⁴ *Id.* at p. 508.

⁸⁵ *Id.* at p. 515.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Lexin, supra*, 47 Cal.4th at p. 1086.

The Court specifically held that the Section 10915(a)(3) public generally exception is not limited to public utility services such as water, gas and electricity. In reaching this conclusion, as discussed earlier, *Lexin* relied on the public generally exception in the PRA's implementing regulations to interpret the same term under Section 1090. This use of the PRA public generally exception provides substantial assistance in interpreting and applying this non-interest exception.

It is important to recognize the limitations of *Lexin*. The contract was between the pension board and the city. Thus, it was a contract between two public agencies. The opinion is not relevant to the issue of whether individuals can use Section 1091(a)(3) to negotiate pension benefits with their own city, as an agency's own employees likely do not constitute the public served by the agency. It is difficult to imagine that a court would consider pension benefits provided to a city's own employees to be a program generally available to the public.

VI. LITIGATION INVOLVING PUBLIC OFFICIAL'S AGENCY

Public officials sometimes are involved in litigation against the agencies they serve. In other cases, they are defendants in actions brought by third parties based on their actions as public officials.

The first case to discuss settlement of litigation between a member of a legislative body and the same governmental entity was *Santa Clara Valley Water District v. Gross* (1988) 200 Cal.App.3d 1363 (hereafter *Santa Clara*). Here, the water district was condemning property owned by a member of the governing board and his wife. The parties did not enter into the statutorily mandated procedures for settling condemnation matters, which required the condemnee and condemnor to submit final settlement offers to each other.⁸⁹ Condemnees cannot obtain attorney's fees unless this procedure is followed and the court finds that the condemnee's demand was reasonable and that the condemnor's offer was unreasonable.⁹⁰ At the conclusion of the trial, the public official condemnee filed a motion for attorney's fees and contended that Section 1090 precluded him from utilizing the mandated procedure.⁹¹

The water district objected to the request for attorney's fees because the condemnee never made a last and final offer. The court agreed and denied the

⁸⁹ *Santa Clara, supra*, 200 Cal.App.3d at p. 1361 (citing Code Civ. Proc., § 1250.410).

⁹⁰ *Ibid.*

⁹¹ *Id.* at p. 1366.

motion.⁹² The court held that Section 1090 did not prevent the parties from exchanging final settlement offers.⁹³

In reaching its conclusion, the court stated as follows:

“We do not agree that these two statutes are irreconcilable. Section 1090 is a broadly drafted conflict-of-interest statute. It expresses a general policy that public officers and employees are to refrain from entering into transactions which will conflict with the performance of their official duties. (*City of Carmel-by-the-Sea v. Young* (1970) 2 Cal.3d 259, 270 [85 Cal.Rptr. 1, 466 P.2d 225, 37 A.L.R.3d 1313].) Once a condemnation action has been filed, however, the property owner and his agency become adversaries, subject to the rules of court and civil procedure which govern the course of litigation. A settlement achieved pursuant to these rules can be supervised by the court and receive the imprimatur of court confirmation. Government Code Section 1090 is directed at dishonest conduct and at ‘conduct that tempts dishonor’ (*Thomson v. Call* (1985) 38 Cal.3d 633, 648 [214 Cal.Rptr. 139, 699 P.2d 316]); it has no force in the context of a condemnation action where the sale of property is accomplished by operation of law and each side is ordinarily represented by counsel.”⁹⁴

This language can be reasonably interpreted as permitting settlement of cases involving Section 1090 contracts under court supervision. However, the California Attorney General in 86 Cal.Ops.Atty.Gen. 142 (2003) rejected “any suggestion that the execution of a settlement agreement might be permitted under the holding” of *Santa Clara*.⁹⁵ The Attorney General concluded that *Santa Clara* involved a unique set of court supervised settlement procedures and stated that public agencies are generally not permitted to enter into settlement agreements with members of their legislative bodies.⁹⁶ This seems to have been an overly restrictive view of the above-quoted language in *Santa Clara*, and, in fact, the Attorney General relaxed that conclusion when next addressing the issue in 91 Ops.Cal.Atty.Gen. 1 (2008).

The Attorney General in the new opinion first stated that agreements to settle lawsuits are contracts and that stipulated judgments and consent judgments also have the attributes of contracts.⁹⁷ The Attorney General in this opinion acknowledged that

⁹² *Id.* at p. 1374.

⁹³ *Ibid.*

⁹⁴ *Id.* at p. 1369.

⁹⁵ *Ibid.*

⁹⁶ 86 Ops.Cal.Atty.Gen. 142, 145 (2003).

⁹⁷ 91 Ops.Cal.Atty.Gen. 1, 2 (2008).

Santa Clara “does not provide dispositive precedent for purposes of addressing these issues. . . .”⁹⁸ The Attorney General also acknowledged that the courts might find to the contrary and allow settlement agreements “if the facts and circumstances warrant such a distinction.”⁹⁹

The Attorney General finally stated that “reasonable minds may hold that the Legislature did not intend Section 1090 to preclude compromised settlement of the litigation such as is described here, [suits for money damages] and, indeed, legislative clarification may be in order.”¹⁰⁰ The Attorney General concluded as follows:

“. . . under current case law, a court could invalidate as contrary to state law a city’s compromised settlement of a suit for damages that was brought by a City Councilmember. . . because the plaintiff Councilmember’s financial interest in the settlement would be prohibited by Government Code Section 1090.”¹⁰¹

The opinion implicitly recognizes that a city and a member of the legislative body can enter into a court supervised settlement agreement or a stipulated judgment. Ultimately, though, the Attorney General concluded no settlement was permissible in this particular dispute because the case was in federal court.¹⁰² The Attorney General felt that a state court could validate a federal court approved settlement agreement under Section 1090. In other words, while a state court could validate a settlement agreement under Section 1090, a federal court could not.¹⁰³

The language in this opinion offers some support for entering into a settlement agreement or stipulated judgment under supervision by a state court. Certainly, it seems reasonable that a settlement agreement in which a court specifically holds that the settlement does not violate Section 1090 should be safe from challenge under Section 1090.

Following up on the Attorney General’s recommendation, the Legislature enacted Section 1091(b)(15), which provides a method for a public agency to enter into a settlement agreement of litigation involving a member of its legislative body. This section has the following three requirements:

⁹⁸ *Id.* at p. 4.

⁹⁹ *Id.* at p. 5.

¹⁰⁰ *Ibid.*

¹⁰¹ *Id.* at p. 7.

¹⁰² *Id.* at p. 6.

¹⁰³ *Ibid.*

(A) The Agreement is entered into as part of a settlement of litigation in which the body or board is represented by legal counsel.

(B) After review of the merits of the agreement and other relevant facts and circumstances, a court of competent jurisdiction that finds that the agreement serves the public interest.

(C) The interested member has recused himself or herself from all participation, direct or indirect, in the making of the agreement on behalf of the body or board.

This statute seems entirely reasonable and provides an answer to a previously unresolved question under Section 1090.

Still unanswered, though, is whether a public official who is sued by a third party in his or her official capacity can participate in the decision on whether to provide a defense, either as part of a joint defense or separately. In some cases where the defense will be provided by a full time city attorney or by an insurance carrier, the decision might not constitute a contract and might not be subject to Section 1090.

Section 1090 is clearly implicated when a public agency is deciding whether to provide separate counsel to the member of the legislative body. A contract will be involved in almost all cases.¹⁰⁴

As discussed earlier, *Lexin* holds that the Non-Interest Government Income Exception in Section 1091.5(a)(9) does not apply to decisions that directly affect a public official's personal finances.¹⁰⁵ Thus, if providing a defense to a member of a legislative body is considered a "benefit" under this provision, this exception will not permit a member of a legislative body to participate in a decision whether to provide him or her with a defense.

Further, since the Remote Interest Government Income Exception in Section 1091(b)(13) does not apply to single city contracts,¹⁰⁶ it is theoretically possible the agency might not even be permitted to provide a defense at all to a member of the legislative body. It seems virtually certain, though, that a court would not reach this result.

The Fair Political Practices Commission has issued an advice letter that a public official "may make, participate in making, and influence a governmental

¹⁰⁴ 91 Ops.Cal.Atty.Gen 1 (2008).

¹⁰⁵ *Lexin, supra*, 47 Cal.4th at p. 1082, discussed on page 11 of this paper.

¹⁰⁶ See, e.g. 89 Ops.Cal.Atty.Gen 217 (2006), discussed on page 11 of this paper.

decision about whether he or she will be provided with a defense or indemnification for damages where the Agency is obligated to provide a defense and indemnification if the public official was acting within the scope of his or her employment.”¹⁰⁷

The advice letter also provides that the public official may participate in the threshold question of whether or not he or she was acting in the scope of his or her employment, but may not participate in a decision on whether to provide a defense or indemnification for punitive damages. The advice letter is based on the position that the public agency is obligated to provide a defense when the public official is acting within the scope of his or her employment, but not with respect to payment or defense involving punitive damages.

The only guidance on whether or not such a decision implicates Section 1090 is found in footnote 36 in 91 Cal.Ops.Atty.Gen. 1 (2008), where the Attorney General stated as follows:

“Indemnification of employees is an obligation imposed by law (see Gov’t. Code § 995) and accordingly, Section 1090 would not ordinarily be implicated by such indemnification.”

This footnote provides support for applying the rule of necessity and also permitting members of a legislative body to participate in decisions on whether to provide themselves with a defense. Since the PRA and Section 1090 are *in pari materia*, it is possible that the Fair Political Practices Commission advice letter could be used to support participation in a decision on whether to provide a defense. Unfortunately, the language in the PRA and Sections 1090, 1091 and 1091.5 are not nearly as similar in this instance as in the public generally area discussed in *Lexin*.

In summary, cities now have a procedure for settling a litigation involving members of the city council. There is also some support for permitting public officials to participate in decisions of whether or not to provide them a defense in litigation brought against them in their public capacity. Unfortunately, there is no clear authority on the latter issue. Perhaps this issue will be discussed in a future Attorney General Opinion.

VII. REAL PROPERTY

It certainly seems that ownership of real property in the vicinity of property to be acquired by a public agency could be considered a financial interest in the contract to purchase the real property for purposes of Section 1090. Surprisingly, though, there is no authority on this point.

¹⁰⁷ *Cronin Advice Letter*, No. A-97-579, 1998 WL 39384 (2008).

Application of Section 1090 to purchases of real property could severely constrain acquisition of real property by public agencies. It is hard to imagine that a court would go so far as to determine that a city cannot acquire a piece of property for a park merely because a member of the city council owns adjoining property, but this is at least theoretically possible.

A court, relying on *Lexin*, might consider utilizing definitions and regulations contained in the PRA in addressing this issue. If so, councilmembers, in most cases, would be permitted to participate in decisions to acquire property that is located more than 500 feet from their own property, but would be required to abstain from decisions involving the acquisition of real property closer than that distance.¹⁰⁸ More importantly, such contracts would be valid.

Especially in the case of parks, but possibly in the case of all public improvements, it might be possible to apply the rule of necessity on the ground that the city must have parks and other public facilities. The weakness of that argument, of course, is that in many cases the park will not need to be located in a particular location.

In summary, it is likely that at some point the issue of the application of Section 1090 to the acquisition of property near property owned by members of a legislative body will be resolved. Until such time as it is, the best advice is to have any member of the legislative body owning property near to property the agency is acquiring abstain from the decision and for the agency to invoke the rule of necessity and approve the acquisition with the votes of the remaining members of the city council.¹⁰⁹

The same procedure should also be used in the case of development agreements, which are contracts under Section 1090,¹¹⁰ disposition and development agreements and other contracts affecting real property located near to property owned by a member of the legislative body.

VIII. PRACTICE POINTERS

(A) “*When in doubt, sit it out.*” In many cases, it is reasonably clear whether or not a particular contract presents a possible Section 1090 violation. However, given the draconian penalties on a public official who violates Section 1090, it is best to advise a councilmember to abstain from any decision in

¹⁰⁸ See Cal. Code Regs., Tit. 2, §§ 18704.2 and 18705.2.

¹⁰⁹ See page 25 of this paper for a discussion of Section 1092.5, which provides support to validate such a contract in some situations.

¹¹⁰ 78 Ops.Cal.Atty.Gen. 230, 235 (1995).

which there is even a remote chance that the person has a financial interest. In such cases, the member of the legislative body should be protected from criminal prosecution unless the person otherwise attempts to influence the decision. As long as the contracting party understands that there is a possibility the contract would be declared invalid under Section 1090, this approach should permit the city to go forward without risking civil or criminal litigation. As Deputy District Attorney Huntsman stated, “When in doubt, sit it out.”¹¹¹

(B) *Joint Powers Authorities.* In California Attorney General Opinion 83 Ops.Cal.Atty.Gen. 59 (2000), the Attorney General concluded that Section 1090 does not apply to contracts between a joint powers authority and a member city of the joint powers authority even though an individual serves on the legislative bodies of both entities.¹¹² Rather, the Attorney General concluded that when serving on a joint powers authority board the city official is still representing the interests of the city, thus, no divided loyalties occur.¹¹³

(C) *City Attorney Advice.* Receiving advice from the city attorney or other legal representative of the city does not afford protection from criminal or civil violations of Section 1090, *Thompson v. Call, supra*, 38 Cal.3d 633, *Chapman v. Superior Court* (2005) 130 Cal.App.4th 261, *People v. Chacon* (2007) 40 Cal.4th 558.

(D) *Contracts for the sale and purchase of real estate are not always voidable under Section 1090.* Section 1092.5 provides that real estate transactions in which a public official has a financial interest are not void “in derogation of the interest of a good faith lessee, purchaser, or encumbrancer where the lessee, purchaser or encumbrancee paid value and acquired the interest without actual knowledge of a violation of any of the provisions of Section 1090.” It is unclear whether this provision applies only to persons purchasing property from a government or also applies to persons selling property to a government entity.

(E) *Aiding and Abetting.* *D’Amato v. Superior Court* (2008) 167 Cal.App.4th 861 holds that an individual cannot be prosecuted for aiding and abetting a violation of Section 1090 unless the individual has a personal financial interest in

¹¹¹ See footnote 1 of this paper.

¹¹² The situation the Attorney General analyzed in this opinion involved spouses, one of whom served on the city planning commission and the other who served on the joint powers authority board of directors. As discussed earlier on page 15 of this paper, the financial interests of spouses are attributable to each other. Thus, this opinion applies equally to situations in which a single person holds both positions.

¹¹³ This opinion only applies to potential Section 1090 conflicts arising from dual-officeholding. The opinion does not affect any other financial interest the official might have in the contract.

the outcome. This case involves a councilmember who voted to assign a contract to a joint powers authority in which the public works director had a substantial financial interest. The Court of Appeal dismissed the prosecution of the councilmember on the basis that the councilmember had no personal financial interest in the decision. This case should provide comfort to councilmembers and city attorneys who participate in decisions where a city official has a prohibited financial interest.

(F) *Resignation is not usually sufficient to save a contract, but giving up the financial interest can prevent a contract from being void under Section 1090.* Since participation in the making of a contract includes preliminary negotiations or other steps leading to formation or determination of the need for a contract, a public official with a financial interest cannot resign after these preliminary steps have commenced and then receive the benefits of the contract.¹¹⁴ However, a public official may terminate the financial interest in the contract before it is executed.¹¹⁵ Further, a contract entered into prior to the official being elected or appointed is valid through the end of the term of the contract.¹¹⁶ However, the contract cannot be renegotiated or extended while the official serves on the legislative body unless other exceptions apply.¹¹⁷

(G) *Section 1090 applies to independent contractors and consultants.* It was clear for some time that Section 1090 applies to independent contractors, such as city attorneys, who serve in positions frequently held by city employees.¹¹⁸ It was not clear, however, whether Section 1090 applied to consultants. In fact, at least one appellate court strongly hinted that Section 1090 did not include consultants.¹¹⁹ However, the law now seems fairly clear that Section 1090 applies to independent contractors and consultants who have “‘considerable’ influence authority over the contacting decisions of a public agency” are covered by Section 1090.¹²⁰

¹¹⁴ See, e.g., *City Council v. McKinley*, *supra*, 80 Cal.App.3d at p. 212 and 66 Ops.Cal.Atty.Gen. 156 (1983) (county official could not propose agreement for consultant services, then resign, and provide such consulting services).

¹¹⁵ See 86 Ops.Cal.Atty.Gen. 187 (2003) and *City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191.

¹¹⁶ *Beaudry v. Valdez* (1867) 32 Cal. 269; 85 Ops.Cal.Atty.Gen. 34 (2001); 84 Ops.Cal.Atty.Gen. 34 (2001).

¹¹⁷ See *City of Imperial Beach*, *supra*, at 197.

¹¹⁸ See *Campagna*, *supra*, 42 Cal.App.4th 533.

¹¹⁹ *NBS Imaging Systems, Inc. v. State Board of Control* (1997) 60 Cal.App.4th 328, fn. 13.

¹²⁰ *California Housing Finance Agency v. Hanover/California Management & Accounting Center, Inc.* (2007)148 Cal.App.4th 682, 693 (favorably referring to 46 Ops.Cal.Atty.Gen. 74 (1965) in which the Attorney General concluded that Section 1090 applied to a temporary financial consultant).

IX. CONCLUSION

Section 1090 is fraught with ambiguity and uncertainty due to its historic evolution and limited statutory guidance. The section is subject to arcane and illogical rules developed through a patchwork of amendments, cases and Attorney General Opinions. City attorneys and their clients must be vigilant in trying to ascertain every possible financial interest a public official might have in a particular contract and then carefully and conservatively construe the limited exceptions, cases and Attorney General Opinions before reaching a conclusion whether the contract might run afoul of Section 1090.