

August 21, 2017

SDEC Informal Advice Letter No. IA17-01

Advice Provided To:  
Felipe Monroig, Deputy Chief of Staff  
Office of the Mayor  
202 C St., 11th Floor  
San Diego, CA 92101

Re: Request for Advice Regarding Hotelier Appointments to the San Diego Convention Center Corporation Board of Directors

Dear Mr. Monroig:

This advice letter has been prepared in response to your request to the City of San Diego Ethics Commission for guidance regarding the application of the Ethics Ordinance's conflict of interest rules to the appointment of individuals working in the hotel industry to the Board of Directors [Board] for the San Diego Convention Center Corporation [SDCCC]. Because you have not identified any specific individuals under considered for appointment to the Board, or any particular SDCCC decisions, we are treating your inquiry as a request for informal advice.

### **QUESTION**

What legal concerns would be raised under the City's Ethics Ordinance if a hotelier<sup>1</sup> is appointed to the SDCCC Board?

### **SHORT ANSWER**

Under the Ethics Ordinance, any person appointed to the SDCCC Board will generally be precluded from participating in SDCCC decisions that are reasonably foreseeable to have a material financial effect on the person's economic interests. A hotelier has an economic interest in his or her hotel, and would therefore be precluded from participating in any SDCCC decisions that have a realistic possibility of financially impacting the hotel. Moreover, under certain circumstances, the Board itself would be unable to enter contracts, even with the hotelier's recusal, if the hotelier has a prohibited financial interest in that contract by virtue of his or her employment with the hotel.

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<sup>1</sup> For purposes of this letter, a "hotelier" is someone who is currently an officer, director, or employee of a hotel. It does not refer to a person who has retired from the lodging industry, nor does it refer to any person whose financial relationship with a hotel is based solely on owning shares of stock in the hotel; such persons are subject to a different analysis.

## BACKGROUND

According to its bylaws, SDCCC is a non-profit public benefit corporation created by the City of San Diego to operate and manage the San Diego Convention Center. It is governed by a seven-member Board appointed by the Mayor and Council. Board members are considered “City Officials” under the City’s Ethics Ordinance. San Diego Municipal Code [SDMC] § 27.3503. As such, they are subject to the conflict of interest provisions contained in the Ethics Ordinance.

Legal issues surrounding the appointment of a hotelier to the Board were the focus of a January 29, 2014, City Attorney Memorandum (MS-2014-2) to the Mayor and Council. This memorandum concluded that “[t]here 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.” Our office is in agreement with the conclusions reached in the City Attorney memorandum (attached), and is supplementing these conclusions with the discussion contained herein.

SDCCC’s main goal in operating the Convention Center is to maximize hotel room night bookings. The more events it books at the Convention Center, the greater the need for hotel rooms to accommodate event attendees. While maximizing hotel room bookings provides a corollary financial benefit to the City (e.g., increasing the patronage of nearby restaurants and tourist destinations, boosting the collection of the transient occupancy tax), the most relevant benefit for purposes of this analysis is the increased revenue received by hotels that sell rooms to individuals and groups attending Convention Center events.

SDCCC staff handles all contract negotiations relating to events booked at the facility. SDCCC staff also markets the Convention Center for events taking place within eighteen months. All other events at the facility are marketed through the San Diego Tourism Authority [Tourism Authority], which is a private, non-profit, mutual benefit corporation composed of tourism-related member organizations (including the lodging industry) that work to promote and market the San Diego region as a vacation and meeting destination. The Tourism Authority essentially acts as a sales broker for SDCCC, bringing various parties together with SDCCC staff to negotiate event bookings. It also brings those parties together with hotel representatives to negotiate the sale of hotel room blocks.

The Tourism Authority is authorized to provide marketing services for the Convention Center through a Sales and Marketing Services Contract [Sales Contract] executed by it and SDCCC. The terms of the Sales Contract will be subject to renewal from time to time. The Board must approve any amendments or extensions<sup>2</sup> to the Sales Contract; it will eventually have to decide whether it will continue SDCCC’s relationship with the Tourism Authority beyond the current contract.

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<sup>2</sup> Any act relating to making a new or renewed Sales Contract, including amending, extending, renewing, or negotiating the terms of this contract constitute the making of a contract for purposes of these laws; these terms are intended to be treated interchangeably for purposes of the conflict rules discussed in this letter.

Although hotels are not a party to the Sales Contract, any hotel interested in providing room blocks to parties attending Convention Center events will derive a financial benefit from the Tourism Authority's marketing efforts. A hotelier employed by such a hotel will, therefore, have a financial interest in ensuring the success of these marketing efforts.

Because a hotelier occupying a position on the Board may have divided loyalties (the interests of SDCCC on one hand, and the interests of his or her hotel on the other), this advice letter is intended to provide the parties involved in the appointment process with an understanding of the applicable conflicts of interest rules.

## ANALYSIS

### *A. Appointments to the Board*

Any person may be a Board member, but the appointment of persons with particular backgrounds are preferred. Per SDCCC's bylaws, "Directors shall include, but not be limited to, individuals having experience in the hospitality, business, labor, or legal profession." SDCCC Bylaws, art. 7, § 2. Thus, there is a stated interest in the Board containing members with a background in the hospitality (e.g., lodging) industry. A hotelier can be expected to bring to the Board a wealth of relevant knowledge and experience. Appointing a hotelier to the Board may also, however, increase the potential for conflicts of interest if the hotelier's employer will be financially impacted by actions of SDCCC and its Board.

### *B. General Disqualification Rules*

The Ethics Ordinance's disqualification provisions apply to all City Officials, including members of SDCCC's Board. SDMC section 27.3561 prohibits such individuals from influencing a municipal decision if it is reasonably foreseeable that the municipal decision will have a material financial effect on any of their economic interests, unless the effect is indistinguishable from the effect on the public generally. The term "municipal decision" encompasses all decisions made by the SDCCC Board. SDMC § 27.3503.

An economic interest includes any business entity in which the Board member has invested \$2,000 or more; any business entity for which the Board member is a director, officer, partner, trustee, employee, or holds any position of management; and any entity from which a Board member has received \$500 or more in income within the past twelve months.<sup>3</sup> SDMC § 27.3561(b). For purposes of this letter, we assume that any hotelier appointed to the Board will have an economic interest in the hotel with which he or she is employed, based on one or more of the above criteria.

In practical terms, this means that if a Board member works for a particular hotel, he or she may not participate in a Board decision if there is a realistic possibility that the decision will have a

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<sup>3</sup> There are additional financial interests not discussed in this letter, including interests based on real property and gifts, and interests held by members of the official's immediate family.

material financial impact on that hotel.<sup>4</sup> Because there are no specific hoteliers or SDCCC decisions at issue, we are not in a position to evaluate the potential impact of any particular SDCCC decision on any particular hotel. Nevertheless, we can generally say that if a hotelier appointed to the Board has a conflict of interest concerning a SDCCC decision, the Board will be able to discuss and act on the matter without the participation or vote of that hotelier. This option, however, will not necessarily be available when the decision involves the making of a contract.

### *C. Rules Regarding Contracts*

When a Board decision involves a contract, additional conflict of interest rules apply. SDMC section 27.3560(a) states that “it is unlawful for any City Official to be financially interested in any contract made by them in their official capacity.” This provision of the Ethics Ordinance extends to the Board as a whole. A contract may not be made by the Board “if any individual member of the body has a financial interest in the contract.” SDMC § 27.3560(b). In other words, unless an exception applies, the SDCCC Board may not enter into a contract (including amending or extending an existing contract) if one of its members has a financial interest in that contract, even if the conflicted member refrains from all Board discussions and does not vote on the contract.

These conflict of interest rules are derived from California Government Code section 1090, *et seq.* Accordingly, we interpret these rules to be consistent with those set forth at the state level. The purpose of section 1090 is to ensure 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). A violation of section 1090 does not require that an official intend to defraud the government or otherwise profit from his or her official participation in a contract. Instead, section 1090 is intended to achieve “the goals of eliminating temptation, avoiding the appearance of impropriety, and assuring the city of the officer’s undivided and uncompromised allegiance.” *Id.* at 648. The purpose of these prohibitions against “self-dealing” is to “remove or limit the possibility of any personal influence, either directly or indirectly, which might bear upon an official’s decision.” *Stigall v. City of Taft*, 58 Cal. 2d 565, 569 (1962). A contract made in violation of these rules is deemed void. *Thomson v. Call*, 38 Cal.3d at 646.

#### 1. The Sales Contract

As discussed above, the Tourism Authority provides marketing services for the Convention Center through a Sales Contract. In order for the Tourism Authority to provide marketing services beyond the current terms of the contract, the Board will have to approve a new or extended contract. Because of the restrictions contained in SDMC section 27.3560 and Government Code section 1090, however, the Board may not approve a new or extended contract if any member of the Board has a financial interest in the contract (other than a “remote interest” in the contract, as discussed below). More particularly, if a hotelier sits on the Board, then the Board may not renew the Sales

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<sup>4</sup> A Board decision affecting a particular hotel will be entitled to the “public generally” exception if the financial impact on the hotel is essentially the same as it is on at least 25% of all other business entities located in the City of San Diego.

Contract with the Tourism Authority if that hotelier has a prohibited financial interest in the contract, even if the hotelier refrains from participating in any aspect of renewing the contract.

Although no hotel is a party to the Sales Contract, some hotels will clearly obtain a financial benefit from the performance of the contract. Under the terms of the contract, SDCCC pays the Tourism Authority for sales and marketing services that generate event bookings at the Convention Center and room bookings at nearby hotels. These hotels benefit economically from the Sales Contract, and hoteliers who work for such hotels will correspondingly have a financial interest in the Sales Contract. “Prohibited financial interests are not limited to express agreements for benefit and need not be proven by direct evidence. Rather, forbidden interests extend to expectations of benefit by express or implied agreement and may be inferred from the circumstances.” *People v. Honig*, 48 Cal. App. 4th 289, 315 (1996). Moreover, the fact that a Board member’s interest “might be small or indirect is immaterial so long as it is such as deprives the [City] of his overriding fidelity to it and places him in the compromising situation where, in the exercise of his official judgment or discretion, he may be influenced by personal considerations rather than the public good.” *Terry v. Bender*, 143 Cal. App. 2d 198, 207-08 (1956).

Accordingly, the prohibitions in SDMC section 27.3560 and Government Code section 1090 will apply to the Sales Contract even though SDCCC is not contracting directly with the hotels benefiting from its terms. The individuals tasked with considering the appointment of a particular hotelier, therefore, should ascertain whether the prospective appointee has a financial interest in the Sales Contract. This determination must be made on a case-by-case basis as it depends on whether or not the hotelier in question works for a hotel that can be expected to financially benefit from the Sales Contract.

## 2. The Sales Contract – Affected Hotels

The Sales Contract authorizes the Tourism Authority to market the Convention Center to parties that will require hotel rooms for its attendees. The Tourism Authority’s efforts under the Sales Contract will provide the greatest financial benefit to hotels located closest to the Convention Center, with a diminishing impact on hotels located farther and farther away. Ultimately, a hotelier serving on the Board will have a financial interest in the Sales Contract if there is a realistic opportunity for his or her hotel to provide rooms to parties targeted by the Tourism Authority in its efforts to market the Convention Center.

For example, if a Board member is a hotelier employed by a hotel adjacent to the Convention Center, he or she will be financially interested in the Sales Contract because that hotel will naturally want to provide hotel room blocks to parties that the Tourism Authority targets for Convention Center events. A hotelier employed by that hotel has a financial interest in the Sales Contract and therefore may not participate in amending or renegotiating that contract. Whether the Board may amend or renegotiate the Sales Contract without the involvement of the hotelier depends on whether an exception applies, as discussed in the next section.

On the other hand, a hotelier will not be financially interested in the Sales Contract if the hotelier’s hotel will not be financially affected by the contract. A hotel located many miles from the

Convention Center will not be financially impacted by the Sales Contract if there is no reasonable expectation that it will offer room blocks to parties holding events at the Convention Center. For example, if a Board member is a hotelier employed by a hotel operating in Rancho Bernardo that does not provide rooms in connection with Convention Center events, then the hotelier will not have a financial interest in the Sales Contract; he or she may lawfully participate in the Board's decision to amend or renegotiate the Sales Contract.

Developing a list of specific hotels that are financially impacted by the Sales Contract is beyond the scope of this advice letter. Based on general conflict of interest principles, however, one may reasonably rely on whether or not there is a realistic possibility that a particular hotel will benefit from the Tourism Authority's marketing efforts, i.e., arranging room blocks or otherwise recommending the hotel to parties planning an event at the Convention Center. Reviewing a list of hotels involved in marketing efforts by the Tourism Authority in conjunction with Convention Center events over the past few years would provide a reasonable basis for determining whether a hotel will be financially impacted by an amended or renewed Sales Contract. For a new hotel, it would be prudent to evaluate its size, location, and overall characteristics in comparison with hotels that have a history of providing room blocks to parties booking Convention Center events.

### 3. The Sales Contract – Remote Interest Exception

The guidelines in this section assume that the Board member is a hotelier employed by a hotel that will be financially impacted by the Sales Contract, i.e., a hotel that has a history of providing room blocks in connection with Convention Center events. Even if a Board member has a financial interest in the Sales Contract, there are circumstances under which the Board may amend or extend the contract without the participation of the conflicted Board member. This will be the case if the Board member's financial interest is only a "remote interest." In order for a hotelier Board member to have only a "remote interest" in the Sales Contract, he or she:

- a. must not be an officer or director<sup>5</sup> of the hotel;
- b. must have worked for the hotel for at least three years prior to joining the Board;
- c. must own less than 3% of the shares of stock of the hotel;
- d. must not have worked on the Sales Contract on behalf of the hotel or the Tourism Authority; and,
- e. the hotel must have ten or more employees.

Cal Gov't Code § 1091(b)(2).

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<sup>5</sup> The term "officer or director" refers to individuals officially identified as such in the hotel's bylaws, articles, or enactments. It does not include lower level employees, even those at a managerial level. 89 Ops. Atty Gen 49 (2006).

If, for example, a Board member is a long-term employee (not an officer or director) of a large hotel located near the Convention Center and owns less than 3% of the outstanding shares of the hotel's stock, he or she will have a "remote interest" in the Sales Contract. As a result, the Board may amend or renegotiate the terms of the contract without his or her involvement.

By contrast, a person similarly situated but hired by the hotel less than three years ago will not meet all of the criteria set forth above. If such a person is appointed to the Board, his or her financial interest in the Sales Contract will be more than a "remote interest." In this example, the Board may not engage in any action to amend the Sales Contract so long as this person remains on the Board.

#### 4. The Sales Contract - Timing Considerations

Based on the above, a hotelier with a prohibited financial interest in the Sales Contract (other than a "remote interest") may serve on the Board, but only until the Board begins the process of amending or extending the Sales Contract. The Board may not commence that process until the conflicted hotelier has terminated his or her position on the Board. Alternatively, that hotelier may join the Board after a new Sales Contract has been negotiated and executed. On the other hand, a hotelier with only a "remote interest" in the Sales Contract could serve on the Board while the Sales Contract is being amended or extended, but would be precluded from participating in the process. And finally, a hotelier with no financial interest in the Sales Contract (e.g., an employee of a hotel that does not serve Convention Center event attendees) could participate in the Board's amendment or extension of the Sales Contract.

#### 5. Other SDCCC Contracts

As mentioned above, SDCCC staff handles event bookings without the involvement of the Board. As such, it is unlikely that a Board member who is a hotelier would be asked to participate in a decision relating to a Convention Center booking, including a booking by a party that is also seeking a block of rooms at the hotelier's hotel. Nevertheless, for purposes of this analysis, it should be noted that a hotelier would be legally precluded from participating in any Board decisions that will financially impact the hotel with which he or she is employed. Moreover, if the Board was asked to intervene in any aspect of making or amending a Convention Center booking contract, the Board would legally be unable to do so if there was a reasonable expectation that the party to the contract would obtain rooms from the hotelier's hotel. In such circumstances, unless the hotelier had only a "remote interest" in the booking contract, the hotelier would have a prohibited financial interest in the contract that would preclude the Board from any involvement in making or amending the contract.

For example, if a Board member is the CEO of a hotel adjacent to the Convention Center and there is a dispute involving a party's contract for an event at the Convention Center, the Board may not be involved in amending or renegotiating that contract, even if the Board member has been recused. The Board member has a prohibited financial interest in any contract between the Convention Center and a party seeking to book rooms at the Board member's hotel. Convention Center staff would have to resolve the matter without the involvement of the Board.

## CONCLUSION

The Ethics Ordinance does not preclude a hotelier from serving on the Board, but such an appointment would raise conflict of interest concerns. A hotelier Board member would be prohibited from participating in Board decisions that are reasonable foreseeable to financially impact his or her hotel. Moreover, if a hotelier has a financial interest in the Sales Contract stemming from the Tourism Authority's marketing efforts and related hotel bookings, he or she would be unable to serve on the Board while contract negotiations regarding the Sales Contract are underway. On the other hand, a hotelier with only a "remote interest" in the Sales Contract may serve on the Board during contract negotiations, but would have to be recused from Board discussions and decisions concerning the contract. And finally, a hotelier will have no financial interest in the Sales Contract if there is no reasonable expectation that the Tourism Authority will direct parties to his or her hotel for room bookings connected to Convention Center events (e.g., the hotel is located far away from the Convention Center).

Please note that this advice letter is being issued by the Ethics Commission solely as technical assistance from a regulatory agency as provided by SDMC section 26.0414(b). It is not to be construed as legal advice to a client. Moreover, the advice contained in this letter is not binding on any other governmental or law enforcement agency.

If you have any additional questions, please do not hesitate to contact our office.

Sincerely,

Stephen Ross  
Program Manager-Technical Assistance

**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

