

# Arnold & Porter

Innovative. Integrated. Industry-Focused.

## SECTION 1090 UPDATE: *DAVIS v. FRESNO*, FPPC OPINIONS AND OTHER DEVELOPMENTS

Sean M. SeLegue  
Arnold & Porter  
San Francisco

© Arnold & Porter Kaye Scholer LLP 2022 All Rights Reserved.

1

### Government Code § 1090

“Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.”

2

Arnold & Porter

2

## Key Points About Section 1090

---

- “Making” a contract construed broadly: participating or influencing
- Courts say the statute protects not only from actual dishonor but also from temptation to be dishonorable
- If a member of governing board is barred by Section 1090 from a transaction, then the entire entity may be as well
- Violation of Section 1090:
  - Voids the contract
  - Can be a crime

3

Arnold&amp;Porter

3

## CONTRACTOR PROVIDING SERVICES IN DIFFERENT PHASES OF PROJECT

---

4

4

***Davis v. Fresno Unified School District (2015)***  
**237 Cal.App.4th 261**

---

- Contractor provided preconstruction services for a school
- Contractor allegedly “had a hand in designing and developing plans and specifications”
- Issue: did preconstruction contract make contractor an “officer” or “employee” of district?

5

Arnold&amp;Porter

5

***People v. Superior Court (Sahlolbei) (2017)***  
**3 Cal.5th 230**

---

- Doctor served on hospital’s medical executive committee
- Aggressively pushed for another doctor to be hired
- Advocated for increased compensation
- Secretly took a share of the other doctor’s compensation
- Are outside consultants in all cases not “employees”?

6

Arnold&amp;Porter

6

## **California Taxpayers Action Network v. Taber Constr., Inc. (2019)** **42 Cal.App.5th 824**

---

- School preconstruction contract similar to *Davis*
- Providing services “on behalf of” v. “to” the Government
- Ruling:
  - Preconstruction services did not entrust the contractor with transacting on behalf of district
  - There was in substance one contract because district intended to hire contractor to construct the school

7

Arnold&amp;Porter

7

## **FPPC Letter Opinion A-20-059** **June 2, 2020**

---

- Engineering firm that had provided conceptual design work could build the project as long as the firm had not “served as the primary final designer” *on that project*
- Firm was not entrusted with contracting responsibility
- Oversight was provided

8

Arnold&amp;Porter

8

## **FPPC Letter Opinion A-20-033**

### **May 13, 2020**

---

- Architecture firm that worked on initial designs could bid for design-build contract
- Project was to restore an historic building
- Accordingly, firm's influence was limited:
  - Tracking original 1915 plans
  - City supervised the firm's work

9

Arnold &amp; Porter

9

## **FPPC Letter Opinion A-19-004**

### **March 20, 2019**

---

#### Unfair Advantage As A Factor

- Engineering firm provided 30% design services
- Firm's work used for RFP
- City maintained control
- Because no unfair advantage, no 1090 bar to firm working on next phase of project

10

Arnold &amp; Porter

10

## **FPPC Letter Opinion A-19-004**

### **March 20, 2019**

---

#### Unfair Advantage As A Factor

- Distinguished situation in which “contractor had advised the city, worked closely with city staff and the project manager, and ultimately designed and developed the plan that later became the RFP, which was specific on exactly how the project was to be completed.”

11

Arnold&amp;Porter

11

## **FPPC Letter Opinion A-20-143**

### **Dec. 18, 2020**

---

#### One Contract Concept

- City proposed to hire a company to develop an energy efficiency program and then to install items that the city approved in its “sole authority to include or exclude any of the specific options.”
- The contract would have to be amended at the end of the first phase to reflect the city’s choices.
- A contract amendment is considered a contract subject to Section 1090.
- Because “the scope of work in the subsequent amended contract would be established through services performed under the initial contract,” Section 1090 would bar the amended contract.

12

Arnold&amp;Porter

12

## **FPPC Letter Opinion A-21-021**

### **May 5, 2021**

---

#### Compensation Structure

- FPPC approved a contract in which an outside contractor would act as a project manager, overseen by the city manager and community development director.
- Contractor to be paid hourly, subject to a cap.
- The fact that the contractor’s advice on project scope could increase his paid hours did not mean the contract—a single contract—violated Section 1090.
- “[T]here is no indication of self-dealing” because of “the hourly cap, oversight by city officials and a requirement that final decisions be approved by city staff or the city council”
- The FPPC distinguished a situation in which a contract city attorney’s compensation for bond counsel work was to be determined based on a percentage of the city bond’s issuances. That would impermissibly give the contract city attorney a financial interest in the size of the bond issuances

13

Arnold&amp;Porter

13

## **Pending Supreme Court case (*Davis II*).**

---

“Is a lease-leaseback arrangement in which construction is financed through bond proceeds, rather than by or through the builder, a ‘contract’ within the meaning of Government Code section 53511?”

14

Arnold&amp;Porter

14

## DEALINGS WITH BOARD/COUNCIL MEMBERS

---

15

15

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

---

- Developer wanted to transform 36-acre parcel into a 2,500-unit residential complex
- Developer agreed with city to spend \$600,000 to create a park
- Developer arranged a plan to buy three parcels adjacent to the developer's land for that purpose
- Call, a member of the city council, owned one of the parcels
- Call agreed to sell his parcel to the developer for \$258,000, knowing about the developer's plan.

16

Arnold &amp; Porter

16



### ***Thomson v. Call* (1985) 38 Cal.3d 633 (cont'd)**

- The sale constituted an indirect transaction between Call and the city that used the developer “as a conduit.”
- Possible solutions:
  - resign from office
  - divest the property interest causing the conflict
  - abstain from the transaction and allow city to acquire the parcel through eminent domain

17

Arnold &amp; Porter

17

### ***Santa Clara Valley Water District v. Gross* (1988) 200 Cal.App.3d 1363**

- Water district had condemned a parcel owned by own of its directors, Gross
- Under Section 1250.410(a) of the Code of Civil Procedure, both sides were required 30 days prior to trial to state either a final offer of, or final demand for, compensation.
- If, after entry of judgment, the court finds *both* that the defendant’s offer was reasonable *and* that the plaintiff’s offer was *unreasonable*, the defendant is entitled to recover litigation expenses.
- Both sides refrained from participating in statutory procedure but director sought expenses anyway

18

Arnold &amp; Porter

18

### ***Santa Clara Valley Water District v. Gross (1988) 200 Cal.App.3d 1363 (cont'd)***

---

- Held: Director could not recover litigation expenses because he had not followed the statutory procedure required to do so
- Section 1090 did not bar compliance with the statutory demand/offer procedure

19

Arnold &amp; Porter

19

### **Transactions Section 1090 Did Not Prohibit (per FPPC)**

---

- Council member bidding at auction to which city was not a party but city could provide input by filing brief
- Roadway dedication could be considered part of subdivision process and therefore subject to statutory exemption (complicated facts)
- Council member's land donation to city (vague facts)

[Citations to FPPC letter opinions in accompanying paper]

20

Arnold &amp; Porter

20

## RULE OF NECESSITY

---

21

21

### **FPPC Letter Opinion A-21-112/113** **Aug. 27, 2021**

---

- City needed to extend a four-lane highway for about a mile to accommodate a large volume of traffic
- City's Mayor Pro Tem owned land that would be affected by the project
- The project had been planned for a long time—*i.e.* was long delayed—and “careful[] study” failed to produce a feasible alternative alignment
- The rule of necessity permitted the city to proceed with project so long as the Mayor Pro Tem did not participate in relevant decisions.

[Other examples in accompanying paper]

22

Arnold &amp; Porter

22

**Arnold & Porter**

Innovative. Integrated. Industry-Focused.

---

**SECTION 1090 UPDATE:  
*DAVIS v. FRESNO*, FPPC OPINIONS  
AND OTHER DEVELOPMENTS**

Sean M. SeLegue  
Arnold & Porter  
San Francisco



© Arnold & Porter Kaye Scholer LLP 2022 All Rights Reserved.