



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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December 08, 2023

Richard Stout
Office of the Colusa County Counsel
605 Jay Street
Colusa, California 95932

Re: Your Request for Advice
Our File No. A-23-167

Dear Mr. Stout:

This letter responds to your request for advice on behalf of Colusa County Board of Supervisors Chairman Kent Boes regarding Government Code Section 1090, et seq.¹ Please note that we are only providing advice under Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest.

Also, note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General's Office and the Colusa County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice "is not admissible in a criminal proceeding against any individual other than the requestor." (See Section 1097.1(c)(5).)

QUESTIONS

1. Does Section 1090 prohibit Colusa County Board of Supervisors Chairman Kent Boes from participating in the Janus Solar Project decision due to his role as a volunteer firefighter for the Williams Fire Protection Authority?

2. Under Section 1090, may he participate in the decision if he resigns from his firefighter position with the Authority?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18104 through 18998 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSIONS

1. Because the Janus Solar Project decision involves the applicant entering into a fire service agreement with the Williams Fire Protection Authority and making an annual payment of \$300,000 to the Authority to ensure fire protection, the County's decision is a contract decision subject to Section 1090. Under Section 1091(b)(13), Chairman Boes has a remote interest in the decision, as a person who receives salary, per diem, or reimbursement for expenses from Williams Fire Protection Authority, a government entity. He may not participate in the decision; however, so long as he recuses himself as detailed below Section 1090 does not prohibit the County Board of Supervisors from making the decision.

2. Under Section 1090, Chairman Boes' good-faith resignation from his position with the Authority would remove his financial interest in the Project decision, and he would not have a disqualifying economic interest under the Act. Accordingly, he would not be prohibited from taking part in the decision. However, should he resign and take part in the decision, he may be subsequently prohibited from acquiring a financial interest in the Project decision by accepting a future position with the Authority that is tied to the Janus Project decision. Under these circumstances, Chairman Boes should seek further advice prior to applying or negotiating for any position potentially funded or tied to the Janus Project decision.

FACTS AS PRESENTED BY REQUESTER

Kent Boes serves as the elected representative of District 3 on the Colusa County ("County") Board of Supervisors and is currently the Chairman of the Board of Supervisors. As an elected member of the Board of Supervisors, Chairman Boes receives a salary and benefits from the County. In addition to being a member of the Board of Supervisors, Chairman Boes is a volunteer firefighter and fire captain for the Williams Fire Protection Authority. Chairman Boes is also a member of the Williams Volunteer Firefighter Association.

The Williams Fire Protection Authority ("Authority") is a Joint Powers Authority ("JPA") between the City of Williams, which is located within the County, and the Williams Fire Protection District. The Williams Fire Protection District is a special district within the unincorporated area of the County whose board is appointed by the County Board of Supervisors. The Authority is governed by a board of directors appointed by the City of Williams, the Williams Fire Protection District, and a fifth member nominated by the Williams Volunteer Firefighter Association and appointed by the Williams Fire Protection District.

Chairman Boes is a volunteer fire captain with the Authority. Chairman Boes's position is as an unpaid volunteer. Although he is not paid for his work within the Authority's response area, he is sometimes called out to participate in a "strike team" to respond to fires in the California Department of Forestry and Fire Protection (CalFire) area of responsibility. When Chairman Boes is called out to provide mutual aid to CalFire as part of a "strike team," CalFire pays for his time fighting fires in the area of responsibility. The Authority serves as a pass-through agency and pays the money received from CalFire for Chairman Boes's time to him through a check. When this occurs, Chairman Boes receives a W-2 form from the Authority for the monies received from CalFire. Chairman Boes also receives certain benefits from the Authority. The Authority pays his premiums for MASA MTS (Medical Air Services Association Medical Transport Solutions) coverage and his membership dues to the California State Firefighters Association. In the past, Chairman Boes received pay from the Authority when he

would cover the shift of a paid firefighter or when he acted as the duty officer, but this has not occurred in over a year. Chairman Boes is not a member of the board of directors for the Authority and does not take part in their decision making actions.

Janus Solar Project

Janus Solar PV, LLC (“Janus”) is attempting to build a solar generating project (“Project”) in the unincorporated area of Colusa County. Under the California Environmental Quality Act (CEQA), the Project requires an environmental impact report (EIR) with Colusa County as the lead agency in the preparation of the EIR. Under the Colusa County General Plan, the Project also requires a conditional use permit in order to proceed.

The land for the Project site is currently part of the Williamson Act. As part of the development of the Project, the land would need to be removed from the Williamson Act, which would increase the property taxes paid on the property. Concerns were raised in the EIR process regarding the use of storage batteries at the Project site. In response to these concerns, the EIR contains mitigation measure PS-1. This mitigation measure requires Janus to enter into a fire service mitigation agreement with the Authority, which would include a \$300,000 annual payment by Janus to the Authority before the County issues a building permit for the project.

In August and September of 2023, Janus presented the project to the County Planning Commission for certification of the EIR and approval of the use permit. The Planning Commission denied the permit and certification, and Janus filed a notice of appeal. Pursuant to County Ordinance, appeals of the decision of the Planning Commission are heard by the Board of Supervisors and are considered de novo. The Project is now coming before the Board of Supervisors for a hearing of the appeal filed by Janus. The matter will be heard by the Board de novo. The Board will be called upon to consider the evidence presented to determine whether to certify the EIR as sufficient, including all mitigation measures, and to consider granting the conditional use permit.

ANALYSIS

Section 1090 generally prohibits a public officer or employee, while acting in their official capacity, from making or participating in the making of a contract in which the officer or employee is financially interested. Section 1090 is intended “not only to strike at actual impropriety, but also to strike at the appearance of impropriety.” (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.) Section 1090 is “concerned with any financial interests, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of” their respective agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.)

A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) An officer is conclusively presumed to be involved in the making of agency contracts when the officer is a member of a board or commission that has the authority to execute the contract at issue. (*Id.* at pp. 645 and 649.) Moreover, when Section 1090 is applicable to one member of the governing body of a public entity, the proscription cannot be avoided by having the interested member abstain; the entire governing body is precluded from entering into the contract. (*Thomson v. Call, supra*, at pp. 647-649; *Stigall v. Taft, supra*, at p. 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).)

A threshold issue is whether the County's decision to certify the Janus Solar Project EIR and approve the conditional use permit is a contract for purposes of Section 1090. In its 1995 opinion, 78 Ops.Cal.Atty.Gen.230, the Attorney General determined that a development agreement executed by a city or county and a land developer is a contract for purposes of Section 1090. In making this determination, the Attorney General looked to the Civil Code's definitions and essential elements of a contract. Civil Code Section 1549 states that "[a] contract is an agreement to do or not to do a certain thing." Civil Code Section 1550 requires the following essential elements: parties capable of contracting, their consent, a lawful object, and sufficient cause or consideration. Applying these requirements to the development agreement, the opinion states:

A development agreement contemplates that both the city or county and the developer will agree to do or not to do certain things. Both parties will mutually consent to terms and conditions allowable under the law. Both will receive consideration. The developer will essentially receive the local agency's assurance that he can complete the project. The local agency in turn will reap the benefit of the development, with all the conditions it might legitimately require, such as streets, parks, and other public improvements or facilities.

(78 Ops.Cal.Atty.Gen.230 at pp.7-8)

The Attorney General also found that whether a development agreement proceeds in steps or is the product of a single, formal development agreement, the prohibitions of Section 1090 apply, noting the court's decision in *Thomson v. Call, supra*. In this matter, the court found that where the developer sought city approval for a development project and the city indicated it would grant its approval if the developer dedicated land for a park overlook, the city's purchase of property for the park obtained by the developer from a city council member was a single, multi-party "contract" for purposes of Section 1090. The court found that the transaction violated Section 1090, and this conclusion was not affected by the city council member's abstention from the decisions regarding his property, his use of the developer as a conduit for the sale of his property to the city, or that the development agreement proceeded in steps. (78 Ops.Cal.Atty.Gen.230 at p.8, citing *Thomson v. Call, supra*.)

Additionally, we have advised that "while many land use decisions are 'regulatory' in nature and not contracts," where the decision involves the project proponent providing a public improvement or similar consideration, the decision is contractual in nature. (See *Ansolabehere* Advice Letter, No. A-17-160A [an architectural review commission's design review of an application for a mixed-use development was not a contractual decision as did not involve negotiated conditions of approval, such that the officer was not prohibited from providing his art for the development] and *Willis* Advice Letter, No. A-18-227 [a rezoning decision is regulatory so long as it was not contingent on the applicant providing a public improvement or facility as consideration].)

Here, the County's decision is whether to certify or reject the EIR for the Project and approve the conditional use permit. The EIR includes a mitigation measure that requires Janus, prior to the issuance of a building permit for the project, to enter into a fire service mitigation agreement with the Authority, which would include a \$300,000 annual payment by Janus to the Authority. This mitigation requirement was added to address concerns about the proposed use of

storage batteries at the Project site. Thus, this decision involves a single multi-party “contract” for purposes of Section 1090, because Janus is agreeing to these terms as a required condition for the County to certify the EIR and issue the conditional use permit. The decision is not regulatory in nature because the decision involves Janus providing payment to the Authority as consideration.

Your request raises the issue of whether Chairman Boes would be “participating in the making of the contract” as the mitigation agreement between Janus and the Authority may only occur if the Project moves forward. However, the “contract” at issue here is the agreement between the County and Janus, which is before the County Board of Supervisors for approval or denial. To elaborate on the determination in the above paragraph, the EIR requires Janus to do a certain thing (mitigate a fire risk to the County by entering into an agreement with the Authority) in order for the County to agree to certify the EIR and approve the conditional use permit; the County and Janus are the parties to this agreement; Janus is offering to make this agreement and pay the annual \$300,000 to the Authority as consideration. Because Chairman Boes is presumed to participate in any contract decision before the Board of Supervisors, he will be participating in the making of the “contract.” Additionally, the decision to certify the EIR and issue the conditional use permit is a multi-step transaction, which must be examined as a whole for purposes of Section 1090.

Next, we examine the type of financial interest Chairman Boes may have in the decision related to his role as a volunteer firefighter and captain with the Authority. We conclude Chairman Boes has a financial interest in the Authority, a government entity, due to his paid membership and health benefits, his potential to earn income “covering” for a paid firefighter or acting as a duty officer, as well as his “strike team” pay, all of which flows from his role as a volunteer firefighter and captain with the Authority. The Project decision would affect whether the Authority receives annual payments from Janus for firefighter services to enhance the Authority’s budget.

Although Section 1090 does not specifically define the term “financial interest,” case law and Attorney General opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (*Thomson v. Call*, supra, at pp. 645, 651-652; see also *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn.5; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).) A financial interest may include a public officer’s prospect of future business opportunities related to the contract or desire to maintain a favorable ongoing relationship with the contracting party. (86 Ops. Cal. Atty. Gen. 187, 189 (2003).)

The Legislature has defined certain financial interests involved in a contract as “remote interests” in Section 1091 or “noninterests” in Section 1091.5. If a remote interest is present, the contract may be made by the agency provided: (1) the officer discloses their financial interest in the contract to the public body; (2) the interest is noted in the body's official records, and; (3) the officer abstains from participating in the making of the contract. (See Section 1091(a).) If a noninterest is present, the public officer may participate in the proceeding, subject to the requirements of the particular noninterest.

Relevant to these facts, Section 1091(b)(13) states that a public officer has a “remote interest” in the contract if the interest is “[t]hat of a person receiving salary, per diem, or reimbursement for expenses from a government entity.” Therefore, Chairman Boes has a remote interest in the Project decision under Section 1091(b)(13) related to his role as a volunteer

firefighter and captain with the Authority.² So long as Chairman Boes discloses his interest and it is noted in the Board of Supervisors' s official record, the Board of Supervisors is not prohibited from making the Project decision pursuant to Section 1091(b)(13).

Termination of the Financial Relationship

You request whether Chairman Boes may eliminate his financial interest by resigning from his firefighter position with the Authority prior to the Project decision. You note that Chairman Boes is dedicated to serving the public and working as a firefighter and that finding volunteer firefighters in a small rural community is extremely difficult. We advise that he may do so, with some important considerations.³

In 86 Ops.Cal.Atty.Gen 187 (2003), the Attorney General found that there is no “reach back period” regarding a financial interest under Section 1090 and “[i]f the person does not have a business relationship with the contracting party while in office and he has no other financial interest in the contract, section 1090 has no application.” (*Id.*, p.192.) However, the opinion assumes the termination of the business relationship will be made in good faith and in keeping with the purposes of Section 1090 and warns that the prohibition of Section 1090 remains in effect if the business relationship is not terminated in a manner that removes the possibility of any personal influence, either directly or indirectly. (*Id.*) Therefore, an official could not relinquish a position in order to vote on a decision and then return to the position that creates the conflict as this would frustrate the intent of Section 1090's prohibition - that a public officer may not make a contract in which the officer has a financial interest. To the extent that Chairman Boes legitimately resigns his position with the Authority, he will not have a financial interest in the Project decision, and his participation would not be barred by Section 1090.

We caution that Chairman Boes may be subsequently prohibited from accepting an employment position with the Authority that is tied to the Project decision should he resign and participate in the Project decision. Where the officer has participated in making the contract, the courts and the Attorney General have rejected a narrow focus on the timing involved and extended the prohibition to the public officer acquiring a financial interest in a contract decision *after* its date of execution. (*Stigall v. Taft, supra* [council member who had participated in the contract planning

² Note: the “noninterest” exception in Section 1091.5(a)(9) is not applicable to these facts because the EIR and conditional permit decision involves the “department” (here, the Authority) that employs Chairman Boes. Section 1091.5(a)(9) defines this noninterest 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 or board at the time of consideration of the contract, and provided further that the interest is noted in its official record.

³ We note that in the event that Chairman Boes resigns in good faith, he would not have a disqualifying financial interest in the decision under the Political Reform Act (“Act”), conflict of interest provisions, due to the fact that his past compensation as a Willaims Fire Protection Authority volunteer would meet the exception from the definition of “income” under the Act for employment-related payments from a local agency. (Section 82030.) Additionally, there would not be an issue of the decision having a “personal financial effect” on his financial interests, so long as he has resigned in good faith. (Section 87103.)

process could not resign from office and enter into the contract with the city in his private capacity], 81 Ops.Cal.Atty.Gen. 317 (1998) [council member could not participate in establishing a loan program and then leave office and apply for a loan]; and 66 Ops.Cal.Atty.Gen. 156 (1983) [county employees could not propose an agreement for consultant services, then resign, and provide such consulting services].) The court in *City Council v. McKinley* (1978)80 Cal.App.3d 204, addressed this concern, stating:

If the date of final execution were the only time at which a conflict might occur, a city councilman could do all the work negotiating and effecting a final contract which would be available only to himself and then present the matter to the council, resigning his office immediately before the contract was executed. He would reap the benefits of his work without being on the council when the final act was completed. This is not the spirit nor the intent of the law which precludes an officer from involving himself in the making of a contract.

(*Id.* at p. 212.)

In the event that Chairman Boes resigns and takes part in the decision, he should seek further advice prior to applying or negotiating for any position potentially funded or tied to the Janus Project decision.

If you have other questions on this matter, please contact me at KHarrison@FPPC.Ca.Gov.

Sincerely,

Dave Bainbridge
General Counsel

L. Karen Harrison

By: L. Karen Harrison
Senior Counsel, Legal Division

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