



## FAIR POLITICAL PRACTICES COMMISSION

428 J Street • Suite 620 • Sacramento, CA 95814-2329

(916) 322-5660 • Fax (916) 322-0886

February 25, 2015

Jesse W. Barton  
Gallery & Barton  
A Professional Law Corporation  
1112 I Street, Suite 240  
Sacramento, CA 95814-2865

Re: Your Request for Informal Assistance  
**Our File No. I-15-007**

Dear Mr. Barton:

This letter responds to your request for informal assistance regarding the duties of Tuolumne Utilities District Director Ron Kopf under the conflict of interest provisions of the Political Reform Act (the "Act")<sup>1</sup> and Section 1090. We are also 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.

Because you do not name particular clients or decisions as is necessary for formal advice and your questions are general in nature and not limited to a specific governmental decision, we are treating your request as one for informal assistance.<sup>2</sup>

Additionally, we are only providing advice under the conflict of interest provisions of the Act and Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest.

---

<sup>1</sup> 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 18110 through 18997 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.

<sup>2</sup> While the Act requires the Commission to provide written advice to a person whose duties under the Act are in question (Section 83114(b); Regulation 18329(a)), the Commission may decline to provide advice if a response relates to past conduct or if the facts presented are insufficient or too vague to render specific informal assistance. (Regulation 18329(b)(8)(A) and (c)(4)(A) and (F)). In this instance, we have elected to provide general guidelines rather than declining your request for advice. Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

## FACTS

You represent the Tuolumne Utilities District ("TUD"), a county water district located in Tuolumne County. TUD is the largest water and sewer provider in the County. TUD provides water and sewer service based upon established fees, charges, and rates that are set in its Water Rules and Regulations and its Sewer Ordinance. When a large project is proposed (i.e. one that requires new infrastructure or upgrades), TUD requires the project proponent to work out an agreement through which the type, timing and extent of the various improvements are agreed upon ("Water and Sewer Agreement"). The costs associated with TUD connecting to these newly installed or upgraded facilities are fixed by the TUD Rules and Regulations or Sewer Ordinance and these costs are included in the Water and Sewer Agreement. These costs are referred to as Connection Fees and Capacity Charges. Once the improvements are completed, the Connection Fees and Capacity Charges are paid by the developer, and TUD connects to the improved system, water and sewer is provided to the new project on the same terms that TUD provides to other customers.

TUD is governed by a board of five directors. Mr. Kopf has several business interests in the County.

- Mr. Kopf is the sole owner and operator of a consulting business, RDK Development. Mr. Kopf's services include assisting business owners and developers obtain the various permits and other entitlements necessary to develop property within the County. The gross income of the consulting business over the past year was in excess of \$100,000.
- Mr. Kopf is also the Executive Director of the Tuolumne County Business Council (the "Council"). The Council is a membership organization that has a number of Tuolumne County businesses as members. The Council provides a forum for local business owners and other interested persons to discuss matters and policies they believe either support or discourage business and to communicate any concerns to local government. Mr. Kopf is paid in excess of \$10,000 per year for his position as Executive Director. Some members of the Council develop property for themselves or others and when necessary they may meet with TUD staff and may also appear before the TUD Board. Clients B and D, discussed below, as well as TUD, are members of the Council. The General Manager of TUD will frequently update members of the Council on important issues related to water supply.
- Mr. Kopf is also a 10% partner in a partnership that seeks to develop a thirty-acre parcel of land within the County. Mr. Kopf's 10% interest is valued at approximately \$150,000.

Many of the projects that Mr. Kopf works on require a water and/or sewer supply from TUD. There are five projects in particular that are expected to come before the TUD Board or TUD staff while Mr. Kopf is on the Board.

- A. Client A is a current consulting client who plans to develop a 100-acre mixed-use project with 305 units. Mr. Kopf has collected approximately \$6,000 in fees from this client in the past year. In his role as consultant, and prior to being elected to the Board, Mr. Kopf met several times with TUD staff to discuss project water supply. While water is available to supply the project, a Water and Sewer Agreement has not been executed between Client A and TUD.
- B. Client B is a consulting client that is seeking to expand a hospital. Mr. Kopf has collected in excess of \$10,000 in consulting fees from this client this past year. This project will require that the hospital upgrade various water delivery facilities before the project can be served with water or sewer. These upgrades will require that the hospital enter into a Water and Sewer Agreement with TUD. Client B is also a member of the Council.
- C. Client C is a consulting client seeking to develop several parcels into an apartment facility and a commercial center. Mr. Kopf has collected no fees from this client this past year, but he expects to collect in excess of \$500 this coming year. Similar to Client B, this project will require that the developer enter into a Water and Sewer Agreement with TUD.
- D. Client D (a member of the Council) is a consulting client seeking to build 19 homes that will receive water from TUD, but sewer service will be provided by another public entity. The water service will require that Client D enter into only a Water Agreement with TUD. Client D is also a member of the Council.
- E. Mr. Kopf's partnership desires to develop a 30-acre parcel of land into 63 home sites. Mr. Kopf's interest in the partnership is 10% with a value of approximately \$150,000. This project will require both water and sewer from TUD, and will require a Water and Sewer Agreement with TUD, similar to Clients A, B and C.

Mr. Kopf has also been involved with projects in the past that he no longer consults on, but which clients may still come before the Board.

- F. Mr. Kopf used to provide consulting services for a planned community but has had no involvement with the planned community in six years. The planned community currently uses raw water from TUD to irrigate a golf course, but will eventually need a treated water supply from TUD for their home and commercial development, and possibly an agreement with TUD to operate a waste water treatment facility, but when that will occur is uncertain.
- G. Mr. Kopf used to consult for an Indian Tribe but has not done any work for the Tribe in a year and a half. The Tribe does come before the Board on occasion, but on issues unrelated to Mr. Kopf's past work for the Tribe.

- H. Mr. Kopf has a paid position as a member of the Council. Members of the Council frequently appear before the TUD Board, or frequently meet with TUD staff over concerns of importance to that member.

### QUESTIONS, ANALYSIS AND CONCLUSIONS

- 1) *May Mr. Kopf continue to provide consulting services to Clients A, B, C and D? If Mr. Kopf may not meet with TUD staff, may Mr. Kopf separately advise his client, and then may his client meet with TUD staff to negotiate the terms of an agreement?*

Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. The Act does not restrict Mr. Kopf from representing clients in his private capacity.

Mr. Kopf has a financial interest in any source of income aggregating to \$500 or more within 12 months prior to a decision. (Section 87103(c).)<sup>3</sup> Regarding all of his clients that have actually provided income (or promised income) to Mr. Kopf within the 12 months before a decision, Mr. Kopf has a financial interest in each of those clients (A, B and C). Since each of the clients (A, B, C and D) has real property that is involved in governmental decisions before TUD and the decisions will have a reasonably foreseeable financial effect value on their real property, Kopf may not make, participate in making, or influence the related governmental decisions.

Advising clients is not considered making, participating in making or influencing a decision under the Act and is not prohibited. Moreover, the conduct of private persons is not regulated by the Act.

- 2) *May the partnership of which Mr. Kopf is a partner seek a Water and Sewer Agreement with TUD while Mr. Kopf is on the Board? If the partnership may do so, would Mr. Kopf be prohibited from participating in any meeting between the partnership and TUD staff and also prohibited from voting on any agreement that comes before the TUD Board?*

Similarly, Mr. Kopf has an interest in the real property that the partnership in which he has a 10% interest owns. Decisions regarding the contract to supply water and utilities to the property so that it may be developed are reasonably foreseeable to have a material financial effect on that property. (See Regulation 18705.2(a)(6)-(7).) Mr. Kopf therefore may not participate in decisions related to the property.

---

<sup>3</sup> A public official's income includes income which has been promised to the public official but not yet received by him or her, if he or she has a legally enforceable right to the promised income. (Regulation 18703.3(a)(1).) Assuming Client C has promised income, Client C is also a potentially disqualifying interest.

- 3) *If the planned community or the Tribe that Mr. Kopf used to provide services seeks an agreement or services from TUD Board or staff, may Mr. Kopf vote, participate, or attempt to influence any decision regarding that agreement or services being sought?*

Yes, provided that Mr. Kopf has no source of income or no other financial interest in the planned community or Tribe in the last 12 months.

- 4) *May Mr. Kopf vote, participate, or attempt to influence any decision that involves a member of the Council, whether that decision is before the TUD Board or TUD staff?*

Mr. Kopf has a financial interest in his income from the Council and the Council as a business entity. He does not have a financial interest giving rise to a conflict of interest related to any member of the Council (who is not also Mr. Kopf's client) and is not prohibited from participating in related decisions.

*Making, Participating in Making and Influencing a Decision*

You have asked specifically whether Mr. Kopf can participate in TUD decisions involving clients who are before the TUD and whether he can contact TUD staff on behalf of clients on TUD projects. Initially, a public official may not *make* decisions that are reasonably foreseeable to have a material financial effect on his financial interests. An official "makes" a decision when he, among other actions, votes on a matter in his official capacity. (See Regulation 18702.1(a).) When the decisions you describe come before the TUD, any vote or consensus on the matters would constitute making a decision for purposes of the Act.

Mr. Kopf may not *participate* in a governmental decision in which he has a conflict of interest. The Act defines participating to including negotiating without significant substantive review, or advising or making recommendations to the decision-makers. (See Regulation 18702.2, copy enclosed.) Based on your facts, Mr. Kopf may or may not be "participating" in a decision in the ways listed above. This is a fact-specific inquiry that depends on the contact the public official makes.

Finally, Mr. Kopf is prohibited from *influencing* a governmental decision. The Act defines influencing as: contacting, appearing before, or otherwise attempting to influence any member, officer, employee, or consultant of the TUD. Regarding your question whether Mr. Kopf may interact with TUD staff on behalf of his clients, any such contact would be considered influencing a decision and is prohibited.

- 5) *Does Section 1090 prevent Mr. Kopf from participating in the contracts at issue or prevent the TUD from entering the contracts?*

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from

exercising absolute loyalty and undivided allegiance in furthering the best interests of their 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.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

We have already determined under the Act that Mr. Kopf cannot make, participate in making, or influence the TUD's decisions that involve his clients. Section 1090's consequences, however, are more severe. If there is a Section 1090 conflict, the TUD is prohibited from entering the contract.

Mr. Kopf is subject to Section 1090 by virtue of his position on the TUD board and the Board will be entering contracts for water and/or utilities. Additionally, we have found that Mr. Kopf has several financial interests as outlined above. Mr. Kopf would be "financially interested" in the contract by virtue of his representation of his clients and as a landowner. Section 1090 applies in these situations.

Absent an exception, the contracts would be void and unenforceable.

The question is therefore whether a remote interest (Section 1091) or a non-interest (Section 1091.5) applies. In our reading, the remote interests do not apply. The following non-interest exception, however, applies and Mr. Kopf is deemed not to be interested in a contract if the interest is:

That of a party to a contract for public services entered into by a special district that requires a person to be a landowner or a representative of a landowner to serve on the board of which the officer or employee is a member, on the same terms and conditions as if he or she were not a member of the body or board. For purposes of this paragraph, "public services" includes the powers and purposes generally provided pursuant to provisions of the Water Code relating to irrigation districts, California water districts, water storage districts, or reclamation districts. (Section 1091.5(a)(14).)

This exception applies to a board member for a water, irrigation, or similar district, who must be a landowner to hold a position on the board, is contracting for public services, and the contract terms are fixed. TUD candidates must be a registered voter in the jurisdiction, but are not required to own land. Even so, each of the other facets of the exception are met:

- While not a party to the contract, Mr. Kopf is an agent to the parties. Given the courts' view that purpose of Section 1090 is to ensure that public officials exercise absolute loyalty and undivided allegiance to their public position,

equating the representative of the party to the contract with the actual party accomplishes that purpose here.

- The contract terms are fixed by the TUD Rules and Regulations or Sewer Ordinance (the terms are not adjustable).
- The TUD is a water and utilities district, similar to those listed in the exception.

While no court or agency has applied this exception as yet, we find that the purpose of the exception above seems to be satisfied with the applicable material facts. Consequently, the exception above creates a “non-interest” and Mr. Kopf is deemed not to be interested in the contracts. The TUD is therefore able to enter the contracts under Section 1090, but because of the restrictions under the Act, Mr. Kopf may not make, participate in making or influence any related decision.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

John W. Wallace  
Assistant General Counsel

  
By: Heather M. Rowan  
Senior Counsel, Legal Division

HMR:jgl