



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

September 8, 2021

Claire Hervey Collins
HansonBridgett
777 S. Figueroa Street, Suite 4200
Los Angeles, CA 90017

Re: Your Request for Advice
Our File No. A-21-118

Dear Ms. Collins:

This letter responds to your request for advice regarding the Political Reform Act (the “Act”) and Government Code Section 1090, et seq.¹ Please note that we are only providing advice under the Act and 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 Orange 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).)

QUESTION

Does either Section 1090 or the Act prohibit Director Stephen Dupodja from participating in, or the Trabuco Canyon Water District (“TCWD”) from entering into, a Cooperative Agreement with the San Juan Basin Authority (“SJBA”) to reimburse the SJBA for its share of the costs for consulting services provided by Director Dupodja’s former employer given his current equity stake in the company?

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 18109 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.

CONCLUSION

Yes. Section 1090 prohibits Director Dupodja from participating in, and the TCWD from entering into, the Cooperative Agreement with the SJBA because Director Dupodja has a prohibitory financial interest in it. However, the “rule of necessity” applies to nonetheless allow the TCWD to enter into the Cooperative Agreement so long as Director Dupodja abstains from any participation in his official capacity.²

FACTS AS PRESENTED BY REQUESTER

You are outside legal counsel for the TCWD seeking advice on behalf of the TCWD as to whether Director Dopudja’s stock from his former employer, West Yost Associates, Inc. (“West Yost”), gives rise to a conflict of interest under the Act or Section 1090.

Director Dopudja

Director Dopudja became a member of the TCWD board in 2012 and on January 1, 2013, he was assigned as the Alternate Representative for the South Orange County Water Agency (“SOCWA”) for the first time. The following year on January 1, 2014, Director Dopudja was assigned as the Primary SOCWA Representative and has served in this role since that time.

He commenced working for West Yost in 2014 in a primary management role and became a shareholder in West Yost in 2016. Effective January 8, 2021, Director Dopudja’s employment relationship with West Yost ended. He currently holds a 3.13% equity stake in West Yost, which is governed by a Restrictive Stock Agreement, and is entitled to be paid out the share value which is worth more than \$2,000. West Yost intends to pay out Director Dopudja over a 10-year period.

An email dated November 23, 2020, from Director Dopudja to Charles Duncan of West Yost that stated as of that date: 1) Director Dopudja was not a member of the West Yost’s Board of Directors; 2) He was not part of West Yost Corporate Management; 3) He was not involved in any of the due diligence regarding the acquisition of WEI, including discussion on any of WEI’s clients and/or contracts; and 4) He was not aware, nor was any other employee of West Yost aware, of the SJBA/SOCWA contractual interests until August 20, 2020. Mr. Duncan confirmed these statements in his email response dated November 25, 2020.

Cooperative Services Agreement & West Yost

In 2014, the SOCWA³ submitted its Salt Nutrient Management Plan (“SNMP”) for the South Orange County Aliso Creek, San Juan Creek, and Portions of Other Basins to the San Diego

² We note, however, that we express no opinion regarding the application of Section 1090 and the validity of the November 10th, 2020 contractual agreement between SJBA and Wildermuth Environmental, Inc. (“WEI”) in light of the previous acquisition of WEI by West Yost and Director Dupodja’s position with the South Orange County Wastewater Authority (“SOCWA”), which has the ultimate authority for its Salt and Nutrient Management Plan (“SNMP”).

³ SOCWA, a Joint Powers Authority working to fulfill the wastewater needs of its agencies, is governed by a ten-member Board of Directors, with one director appointed to represent each member agency. (See <https://www.socwa.com>.)

Regional Water Quality Control Board. The 2014 SNMP identified the implementation of a monitoring and data collection program to improve the existing salt and nutrient monitoring efforts in the San Juan Creek Watershed. SNMPS are required for all groundwater basins in California by the State Water Resources Control Board's Recycled Water Policy.

The SNMP provides regulatory coverage under the Recycled Water Policy to recycled water agencies including the TCWD, and three members of the San Juan Basin Authority (the "SJBA"), a Joint Powers Authority that includes Santa Margarita Water District, Moulton Niguel Water District, and the City of San Juan Capistrano.

While SOCWA, as the recycled water permit holder, is ultimately responsible for reviewing and submitting the SNMP, the SJBA assumed responsibility for the SNMP monitoring program in 2015.⁴ Since that time, the TCWD has been cooperating informally with the SJBA members on the monitoring program with the understanding that a formal cooperative agreement would follow at a later date.

On July 30, 2020, the TCWD received a letter from the SJBA with a draft cooperative agreement ("Cooperative Agreement") for the TCWD's consideration to formalize the historical cooperation on the SNMP monitoring program. The Cooperative Agreement calls for proportional allocation of monitoring program costs among the participants according to annual recycled water sales as reported in SOCWA's Annual Recycled Water Report. Director Dopudja had no input into the terms of the proposed agreement as it was negotiated at the staff level.

Under the Cooperative Agreement, the SJBA is responsible in its sole discretion for overseeing and coordinating activities necessary to develop and implement a monitoring and data collection work plan to enhance the existing salt and nutrient monitoring efforts in the San Juan Creek Watershed.⁵ Additionally, the agencies intend to meet annually to determine what activities are necessary and prudent for the following year, including engaging consultants and/or contractors.

The Cooperative Agreement does not specify which contractors/consultants will perform monitoring services, but the SJBA has an existing contract with WEI to provide the salt and nutrient monitoring services. The SJBA and WEI entered into a contract on November 10, 2020, and the contract expires on June 20, 2022. WEI has since been acquired by West Yost.⁶

⁴ The SJBA administers the monitoring program because three of the four agencies are SJBA members and, because it was already performing extensive watershed monitoring for other purposes, the arrangement saves money for all SNMP partners by eliminating a duplication of efforts. (See the SJBA Memo dated July 30, 2020, from Norris Brandt.)

⁵ In this regard, you state the TCWD does not have control over the selection of contractors by SJBA.

⁶ You do not know the exact date of the acquisition or when the asset purchase agreement was signed, but other sources, including meeting minutes from Borrego Springs Watermaster Board of Directors Meeting indicate that it may have been November 7, 2020. However, this may have only been the date of effect or of the formal public announcement as it is your understanding that the actual date of execution of the asset purchase agreement may have occurred as early as the summer of 2020.

When the matter was first brought to the TCWD for consideration on August 20, 2020, Director Dopudja was aware of the acquisition. West Yost and WEI were also aware of Director Dopudja's roles on the TCWD and SOCWA boards. However, the staff report for the August 20, 2020 meeting sought reimbursement to the SJBA, but did not disclose to the TCWD the name of the consultant.⁷ The matter was tabled from the August 20, 2020 meeting for reasons unrelated to the potential West Yost/WEI conflicts issue. The following day, Director Dopudja was notified by his employer that WEI was the consultant to the SJBA. The matter was brought to the TCWD's board again in September 2020 and was tabled again until potential conflicts could be explored and resolved. The matter has been tabled since September 2020.

The Cooperative Agreement is structured so that each agency reimburses the SJBA for its proportional share of costs incurred by the SJBA to complete this work during the fiscal year. Each agency's share is calculated based on its proportional share of the recycled water used or discharged outdoors in the Mission Viejo Hydrologic Area. The draft Cooperative Agreement requires each party to provide written approval of its proportionate reimbursement of the total cost of implementing the SNMP at specified periods during the duration of the agreement, and provides the total cost includes consultant contracts.⁸

The TCWD's proportionate share of costs incurred by the SJBA is estimated to be around \$20,000 per year for five years, which is less than 5% of West Yost's annual gross revenues. The TCWD anticipates that the majority of these funds would be used to reimburse the SJBA for West Yost's services.

ANALYSIS

Section 1090 generally prohibits a public officer or employee, while acting in his or her official capacity, from making or participating in the making of a contract in which the he or she is financially interested. The California Supreme Court has stated that the purpose of Section 1090 is to make certain 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* (1985) 38 Cal.3d 633, 650.) 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.) A contract that violates Section 1090 is void. (*Thomson, supra*, at p. 646.)

Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest." (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) When an officer with a proscribed financial interest is a member of the governing body of a public entity, the prohibition of Section 1090 also extends to the entire body. (89 Ops.Cal.Atty.Gen. at 50.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson, supra*, at pp. 646-649.)

⁷ The TCWD has never reimbursed SJBA for monitoring services while either WEI or West Yost was providing monitoring services

⁸ See draft Cooperative Agreement, Budget for Work at p. 2.

As a TCWD Board member, Director Dopudja is subject to Section 1090. In addition, if the TCWD Board were to enter the Cooperative Agreement with the SJBA, Director Dopudja would be making the contract for purposes of Section 1090. The initial question is whether Director Dopudja has a financial interest in the Cooperative Agreement.

Under Section 1090, employees have been found to have a financial interest in a contract that involves their employer, even where the contract would not result in a change in income or directly involve the employee, because an employee has an overall interest in the financial success of the firm and continued employment. (84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).) Under the Cooperative Agreement, the TCWD's proportionate share of costs incurred by the SJBA would be approximately \$20,000 each year for five years – the TCWD anticipates that the majority of these funds would be used to reimburse the SJBA for West Yost's services. While Director Dupodja is no longer an employee of West Yost, the fact remains that he continues to hold a 3.13% equity stake in West Yost, which it intends to pay out over a 10-year period to Director Dopudja. Certainly, just like a current employee, he would still have an interest in the continued financial success of the company, and he would thus have a financial interest in the proposed Cooperative Agreement.

Moreover, the California Supreme Court recently reiterated that the provisions of Section 1090 must be given a broad construction. (*People v. Superior Ct. (Sahlolbei)* (2017) 3 Cal.5th 230, 239 [Section 1090 should be construed broadly to ensure an official's absolute loyalty to the public].) With respect to what constitutes a financial interest for purposes of Section 1090, the California Supreme Court held:

“[T]he term ‘financially interested’ in section 1090 cannot be interpreted in a restricted and technical manner.” (*People v. Honig, supra*, 48 Cal.App.4th at p. 315.) The defining characteristic of a prohibited financial interest is whether it has the potential to divide an official's loyalties and compromise the undivided representation of the public interests the official is charged with protecting. (See *Stigall v. City of Taft, supra*, 58 Cal.2d at p. 569.) Thus, that the interest “might be small or indirect is immaterial so long as it is such as deprives the [people] of his overriding fidelity to [them] 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* (1956) 143 Cal. App. 2d 198, 208 [300 P.2d 119]; see also *Thomson v. Call, supra*, 38 Cal.3d at p. 645 [direct and indirect interests are equally prohibited].)

(*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, at p. 1075.)

In addition to the reasons stated above, Director Dupodja is financially interested in the proposed Cooperative Agreement between the SJBA and the TCWD because of real potential it would have to place him in a compromising situation, as both a TCWD Director and current equity holder of West Yost, where he may be influenced by personal considerations instead of the public

interests he is charged with protecting. This is precisely the type of situation Section 1090 intends to preclude.⁹

Accordingly, Section 1090 prohibits Director Dupodja from participating in, and the TCWD from entering into, the proposed Cooperative Agreement unless an exception applies.

Rule of Necessity

In limited circumstances, a “rule of necessity” has been applied to allow the making of a contract that Section 1090 would otherwise prohibit. (88 Ops.Cal.Atty.Gen. 106, 110 (2005).) The rule of necessity has two facets: in procurement situations, it has permitted a government agency to acquire an essential supply or service despite a conflict of interest; in nonprocurement situations, it has permitted a public officer to carry out the essential duties of the office despite a conflict of interest where the officer is the only one who may legally act. (65 Ops.Cal.Atty.Gen. 305, 310 (1982).) In nonprocurement situations, such as the situation here, the rule of necessity ensures that essential government functions are performed even where a conflict of interest exists. (*Ibid.*)

In a nonprocurement situation where the rule of necessity applies to allow a multi-member body to act when it otherwise would have been precluded from doing so due to a member’s conflict of interest, the member with the conflict of interest must abstain from participation. (88 Ops.Cal.Atty.Gen. 106, 111 (2005); 69 Ops.Cal.Atty.Gen. 102, 112 (1986).)

Thus, to determine if the rule of necessity applies, we must examine whether entering into the proposed Cooperative Agreement between the TCWD and the SJBA is an essential duty of the TCWD Board, and whether the Board is the only government entity legally capable of doing so. Ensuring the TCWD’s compliance with the State Water Resources Control Board’s Recycled Water Policy through ongoing performance of the SNMP monitoring program is undoubtedly an essential duty of the TCWD Board. While the SJBA has been solely responsible for overseeing and coordinating activities necessary to develop and implement the monitoring program, including bearing all of the costs, it is reasonable to assume that the Cooperative Agreement, which will allow the TCWD to reimburse the SJBA for its fair share of the monitoring program costs, will more properly ensure the TCWD’s continued regulatory coverage. This is presumably a duty that only the TCWD Board is legally capable of performing.

⁹ The fact that the TCWD does not have a direct contract with West Yost and did not have control over the SJBA’s decision to select WEI/West Yost as a consultant does not change our conclusion that Director Dupodja would have a prohibitory financial interest in the Cooperative Agreement. Importantly, “[i]n considering conflicts of interest [courts] cannot focus upon an isolated ‘contract’ and ignore the transaction as a whole.” (*People v. Honig* (1996) 48 Cal.App.4th 289, 320.) Courts “look [] past the individual contracts in question and consider [] the relationships between all the parties connected with them, either directly or indirectly, to determine if a conflict of interest existed.” (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1294.) Here, as mentioned, the TCWD anticipates a majority of the funds would be used to reimburse the SJBA for West Yost’s services. As a result, under the proposed Cooperative Agreement arrangement, the SJBA could be considered a conduit for the TCWD’s payment to West Yost, whose consulting services are intended to benefit not only the SJBA members, but also the TCWD.

Accordingly, pursuant to the rule of necessity, the TCWD may enter into the Cooperative Agreement with the SJBA. However, Director Dupodja must abstain from any participation¹⁰ in his official capacity.¹¹

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

Sincerely,

Dave Bainbridge
General Counsel

By: *Jack Woodside*
Jack Woodside
Senior Counsel, Legal Division

JW:dkv

¹⁰ We caution that participation in the making of a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237.)

¹¹ Additional analysis under the Act is not necessary with respect to the potential contract at issue here. Provided Director Dupodja recuses himself from the contract decisions under Section 1090, the Act is not implicated and does not prohibit the TCWD from entering the contract.