



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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November 1, 2021

Greg Gillott
County Counsel
810 Court Street
Jackson, CA 95642

Re: Your Request for Advice
Our File No. A-21-139

Dear Mr. Gillott:

This letter responds to your request for advice 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 Amador 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 Section 1090 prohibit the County of Amador from entering into a contract with a nonprofit corporation concerning federal Covid-19 relief funding given Supervisor Jeff Brown is a member who receives services from the nonprofit, currently serves as a board member of the nonprofit and receives a benefit with a value of \$630 per year for his service on the board?

CONCLUSION

No. While Supervisor Brown has a prohibitory financial interest in any contracts between the County and the nonprofit corporation, the remote interest exceptions under Section 1091(b)(1) and Section 1091(b)(7) apply to allow the County to enter such contracts as long as his interest is

¹ All statutory references are to the Government Code, unless otherwise indicated.

disclosed to the board of supervisors, noted in its official records, and he does not take part in the contracting process.

FACTS AS PRESENTED BY REQUESTER

You are County Counsel for the County of Amador seeking advice on behalf of Jeff Brown who currently sits on the Board of Supervisors.

The County has received approximately \$7.7 million from the Coronavirus Local Fiscal Recovery Fund established under the American Rescue Plan Act (“ARPA”). The overall purpose of ARPA was to provide a substantial infusion of resources to help turn the tide on the pandemic, address its economic fallout, and lay the foundation for a strong and equitable recovery. Among many other allowable expenditures, the funds can be used to make necessary investments in water and sewer infrastructure. (See ARPA, Sections 602(c)(1)(D), 603(c)(1)(D).)

By permitting the funds to be used for water and sewer infrastructure, Congress recognized the critical role that clean drinking water plays in protecting public health: “Understanding that State, local, and Tribal governments have a broad range of water and sewer infrastructure need, the interim final rule provides these governments with wide latitude to identify investments in water and sewer infrastructure that are of the highest priority for their own communities, which may include projects on privately-owned infrastructure.” (Treasury Dept. Interim Final Rule)²

At some point in the future, as the Board of Supervisors takes up consideration of how to allocate the County’s ARPA funding, it may determine that there are water infrastructure needs that should be addressed. Within the county, public water infrastructure is primarily owned and operated by various public and private entities; the County generally does not own or operate any public water related infrastructure. In connection with any award of ARPA funding to a noncounty entity, each entity would be required to enter into a contract/agreement with the County regarding the use of those funds.

In the event the County allocates any funding for water infrastructure improvements, one of the entities that could be eligible to apply for and receive funds is the First Mace Meadows Water Association, Inc. (the “Association”). The Association is a mutual water company founded in 1963 as a non-profit corporation pursuant to Corporations Code section 14300, et seq. The purpose of the corporation is “to develop, acquire, store, treat, distribute, supply and deliver water for domestic and commercial uses to its members, at actual cost plus necessary expenses.” (Association Bylaws at p. 1, subd. 1.3; see also Association Articles of Incorporation at p. 2, subd. B.)

The Association distributes potable water to 502 parcels. Owners of property within the Association’s service area pay a fixed water service charge (base rate) of \$105 bimonthly, which allows up to 11,220 gallons bimonthly. Property owners must pay for any usage in excess of the base allocation at rates established by the Association.

Supervisor Brown resides within the Association’s boundaries, is one of the directors on its 5-member board and is currently serving as its president. In addition, as a First Mace Meadows board member, Supervisor Brown receives his bi-monthly water allocation at no charge, which

² (See <https://www.govinfo.gov/content/pkg/FR-2021-05-17/pdf/2021-10283.pdf>.)

amounts to \$630 per year. If Supervisor Brown was to exceed that base bi-monthly allocation, he would be responsible for paying for any excess water usage at the same rate as all other members of the Association.

ANALYSIS

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. City of Taft* (1962) 58 Cal.2d 565, 569.) 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) 103Cal.App.3d 191, 197.)

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.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.) Finally, when Section 1090 applies to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain. Instead, the entire governing body is precluded from entering into the contract. (*Thomson, supra*, at pp. 647-649; *Stigall, supra*, at p. 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).)

Section 1091, however, enumerates limited circumstances in which a public official's economic interest is considered "remote," such that the governmental body or board may still enter into the contract at issue, as long as the disqualified official's interest is disclosed to the body or board and noted in its official records, and the disqualified official does not take part in the contracting process. (Section 1091(a).) Two remote interest exceptions appear relevant to the current situation. First, under Section 1091(b)(1), an official is deemed to have a "remote interest" when the interest is "[t]hat of an officer or employee of . . . a nonprofit corporation, except as provided in paragraph (8) of subdivision (a) of Section 1091.5." (Section 1091(b)(1).)³ Second, under Section 1091(b)(7), an official's interest is deemed remote when it is "[t]hat of a member of a nonprofit corporation . . . formed under the Corporations Code for the sole purpose of engaging in . . . the supplying of water."

Because Supervisor Brown is an officer of the Association, a nonprofit corporation, and also a member of the Association, which was formed under the Corporations Code for the sole purpose of supplying water to its members, both remote interest exceptions apply. Therefore, his interest in any contract between the County and the Association related to the federal Covid-19 relief funding may be deemed "remote," such that the contract would not violate Section 1090, as long as he

³ Section 1091.5(a)(8) pertains to noncompensated officers of nonprofits and therefore is inapplicable to the circumstances present here because Supervisor Brown receives a monetary benefit worth \$630 per year for his service on the Association's board.

discloses his interest to the Board of Supervisors, has his interest noted in its official records, and recuses himself from the contracting process.

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