



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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February 23, 2021

Larry Byrd
Modesto Irrigation District (MID)
Stanislaus County
2100 Tim Bell Road
Waterford, CA 95386

Re: Your Request for Advice
Our File No. A-20-134

Dear Mr. Byrd:

This letter responds to your request for advice on behalf of Modesto Irrigation District (“MID”) Board Member Larry Byrd 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, including Public Contract Code.

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. Lastly, the Commission does not provide advice with respect to past conduct. (Regulation 18329(b)(6)(A).) Therefore, nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions.

In regard to our advice on Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General’s Office and the Stanislaus 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 Board Member Byrd from taking part in, and the MID from entering into, any contract with AB La Grange to participate in a groundwater replenishment program?²

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

² We cannot provide advice as to whether Board Member Byrd has a conflict in the decision to renew the GWP because this involves past conduct, as prior votes authorizing the program have already occurred. We address only the question of entering the contract after taking part in decision regarding the program.

CONCLUSION

Section 1090 would prohibit Board Member Byrd from taking part in, and the MID from entering into, any contract with AB La Grange involving the GRP because of his prohibitory financial interest in any such contract.

FACTS AS PRESENTED BY REQUESTER

Larry Byrd serves as one of the five Directors of the Modesto Irrigation District (“MID”), a public entity that provides electrical power and water in portions of Stanislaus County, California. In 2017, 2018 and 2019, the MID Board (including board member Byrd) voted for a groundwater replenishment program (“GRP”) to allow farms consisting of at least 10 acres within the MID sphere of influence and the Modesto Groundwater Sub-Basin but outside MID’s irrigation boundaries (about 41,764 total acres) to purchase water from the MID to substitute for groundwater pumping. Approximately 400 farms meet those criteria. In a subsequent email, you explain that the 10-acre minimum requirement for participation in the groundwater replenishment program was recommended by staff and adopted by the Board because Stanislaus County established 10 acres as the minimum acre requirement for enrollment of prime farmland into a Williamson Act contract. Stanislaus County considers 10 acres the minimum parcel size that is large enough to sustain agricultural uses. 89 parcels totaling 278 acres within the area that is covered by the program (within MID’s sphere of influence, within the Modesto Groundwater Sub-Basin, but outside MID’s annexed area) do not meet this criterion.

The purpose of the program is to replenish the Modesto Sub-Basin aquifer by shutting off groundwater pumping and apply MID water to qualified lands. Participation in this program is voluntary and requires the submission of an Application and Agreement (“Agreement”) along with a \$100 non-refundable application fee. Landowners who are approved to participate in the GRP must pay to MID \$60 for each acre-foot of water delivered under the program and comply with all terms and conditions set forth in the Agreement.

Receipt and use of replenishment water through the GRP is limited to use upon the Applicable Land specified in this Application and Agreement, all of which must be currently developed agricultural lands solely reliant upon groundwater from the Modesto Sub-basin. The receipt and use of replenishment water must be for agricultural irrigation purposes only, and the Landowner must warrant that the water received is put to reasonable and beneficial uses at all times. Non-beneficial uses include, but are not limited to, water used for lawns, pasture without livestock benefit, hunting and/or wildlife habitat, recreational ponds, and other uses or practices as determined solely by MID. Water must not be used directly or indirectly for any domestic, commercial or industrial purposes.

Board Member Byrd is a general partner in AB La Grange, a California general partnership, which farms almonds in Stanislaus County. Tyler C. Angle Business Ventures, LP, (“Angle”) as well as Tim Byrd are the other general partners in AB La Grange. Board Member Byrd does not

have any interest in Angle, which owns and operates other farming enterprises. AB La Grange did not participate in the GRP because of board member Byrd's role as an MID board member.

ANALYSIS

Section 1090

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.) 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.)

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, and it applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

MID Directors are public officials subject to Section 1090. Additionally, this matter involves a contract between the MID and applicants who qualify for participation in the GRP. Under Section 1090, transactions are viewed in a broad manner to avoid narrow or technical definitions of a contract. (*People v. Honig, supra*, at p. 351 citing *Stigall, supra*, at pp. 569, 571.) Further, when members of a public board, commission or similar body have the power to execute contracts, each member is conclusively presumed to be involved in the making of all contracts by his or her agency regardless of whether the member actually participates in the making of the contract. (*Thomson v. Call, supra* at pp. 645 & 649; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201; 89 Ops.Cal.Atty.Gen. 49 (2006).)

Section 1090 casts a wide net to capture those officials who participate in any way in the making of the contract. (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) Therefore, for purposes of Section 1090, participating in making a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing plans and specifications, and solicitations for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall, supra*, at p.569.) Thus, the final execution of a contract, which is the time when the contract is technically made, is not the only time when a conflict of interest may be presented. We must look to whether the official had the opportunity and did participate in the policy decision to create the government program under which the contract would later be executed. (See, e.g., 81 Ops.Cal.Atty.Gen. 317 (1998) [council member could not participate in the establishment of a loan program and then leave office and apply for a loan].)

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), and officials are deemed to

have a financial interest in a contract if they might profit from it in any way. (*Ibid.*) Although Section 1090 nowhere specifically defines 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. (See, e.g., *Thomson, supra*, at pp. 645, 651-652.)

Since Board Member Byrd has already taken part in previous votes on the GRP, he would have a prohibitory financial interest in any contract between MID and AB La Grange involving the GRP and Section 1090 would prohibit him from taking part in, and the MID from entering into, any such contract.³

The Legislature has created various statutory exceptions to Section 1090's prohibition where the financial interest involved is deemed to be a “remote interest,” as defined in Section 1091, or a “noninterest,” as defined in Section 1091.5. However, none of the statutory exceptions to Section 1090 are relevant here. Section 1091.5(a)(3) states that “[a]n officer or employee shall not be deemed to be interested in a contract if his or her interest is ... “[t]hat of a recipient of public services generally provided by the public body or board of which he or she is a member, on the same terms and conditions as if he or she was not a member of the body or board.” Attorney General opinions and case law make clear that the exception is intended to apply only to services that are uniformly provided to all customers and for which rates and charges have been clearly established, such as public utilities (such as water, gas, and electricity), and the renting of hangar space in a municipal airport on a first come, first served basis. (See, e.g., 81 Ops.Cal.Atty.Gen. at p. 319).

In contrast, where administering officials are required to exercise judgment or discretion, the exception has been found not to apply. While the application form for participation in the GRP contains standardized terms and conditions, including a standard rate per acre-foot of water delivered, there are also various limiting criteria approved by the Board when it established the GRP. Namely, qualifying properties must be at least 10 acres in size, located within the MID sphere of influence and the Modesto Groundwater Sub-Basin but outside MID's irrigation boundaries, and the water must be used for agricultural irrigation purposes only. On balance, we conclude that the GRP does not fit within the parameters of Section 1091.5(a)(3), and the exception does not apply.

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

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

³ We note that Section 1090 would not preclude Board Member Byrd from taking part in, and the MID from entering into, a contract with any other entity involving the GRP (such as Angle) where Board Member Byrd does not have a financial interest in the contracting party.