STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3050 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

April 12, 2024

Julie McMillan
Ross Town Council
Marin County
E-mail: juliemcmillan@comcast.net

Re: Your Request for Advice
**Our File No. A-23-171**

Dear Ms. McMillan:

This letter is in response 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 we assume your facts are complete and accurate. If this is not the case or if the facts underlying these decisions change, you should contact us for additional advice. Finally, the Commission does not provide advice with respect to past conduct. 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.

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 Marin 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 you, a Councilmember of the Town of Ross (the Town), from participating in decisions regarding partial reimbursement to you for the cost of a property survey that the Town incorrectly required you to obtain?

## CONCLUSION

Yes, Section 1090 prohibits you from participating in the decisions. The facts provided do not indicate the decisions fall under the rule of necessity that would enable the Town to consider entering the agreement for the cost of the survey. If the dispute at issue were being litigated, then the "remote interest" litigation exception under Section 1091(b)(15) would apply and the Town could enter a court-ordered settlement agreement. The rule of necessity does not apply as an

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

alternative exception where the Town seeks to eliminate the threat of litigation without a court-ordered settlement agreement.

## FACTS AS PRESENTED BY REQUESTER

Since December 2017, you have served on the Ross Town Council in Marin County. In 2020, the Town improperly allowed your adjacent neighbors, the owners of 25 Crest Road, to install a generator well within the setback. The Town did not require the neighbors to prove the property boundary with a survey, instead allowing them to submit an incorrect boundary drawing prepared by their architect. You and your and husband commissioned an official property boundary survey to dispute the generator's location. Based on the survey, Town acknowledged the error. In 2022, your husband, Tim Baughman, asked the Town for $13,500 reimbursement for the survey that the Town should have required from the neighbors who applied for the generator permit.

### A. Demand Letter to the Town.

You have provided a letter dated August 2, 2022, sent by e-mail from your husband to the Town's Planning and Building Director (the demand letter), explaining the dispute in detail. In September 2020, your[2] adjacent residential neighbors began to install a gas-powered generator and large supporting wood structure in a location close to your fence and home, directly across from your bedroom. You raised concerns about its location with the Town Manager at the time. For the next eight months, your husband exchanged emails with former Town employee Patrick Streeter, who did not enforce the Town's municipal code and policy. Mr. Streeter accepted the neighbors' document to approve the location of the generator. In June 2021, Mr. Streeter said the Town would need a boundary survey of the property line to reach any conclusion that the generator permit was mistakenly issued but would not require the neighbors to provide a survey.

You and your husband commissioned a survey (the Official Survey), and on July 1, 2022, the County of Marin certified the Official Survey, confirming it meets the requirements of the Professional Land Surveyors' Act, and recorded it. The Official Survey, which you provided in an attachment to the demand letter, shows that the generator is far less than the required 25 foot setback for a Hillside Lot Ordinance property. Your husband, subsequently, asked the Town to require that your neighbors relocate their generator out of the setback, enforce the Town's Operation of Generators Policy that it be in a location least disruptive to neighbors, and ensure that it meets the Town's noise requirement. Your husband also asked the Town to reimburse the cost of the Official Survey that should have been paid by the neighbors, who were the permit applicants.

In the demand letter regarding the Official Survey and setback remedy, your husband stated in relevant part:

> The Town now needs to revoke its approval of the generator permit and require the owners to move the generator out of the setback. Mr. Streeter said Staff would do this "if [the boundary diagrams] evidence that 25 Crest's application materials were fraudulent or invalid." He explained that "where a permit is issued based on erroneous

[2] All references hereinafter to "you" and "your" include both you and your husband, Tim Baughman, unless otherwise indicated.

> information or in violation of the Cal. Mechanical Code or the RMC, the permit is considered a void permit, and the Town may revoke any certificates of approval." Staff also informed the 25 Crest owners that "if a property owner misrepresents a project to the Town, and it is later found to be not code compliant, the property owner is at risk of code enforcement action and remediation of the nonconformity."

Your husband also indicated in the demand letter that the Town should enforce its Operation of Generators Policy requirement that the generator be placed in a location least disruptive to the neighbors, a policy the Town adopted on July 9, 2020. The demand letter also indicated that the generator was installed as close as possible to your home, in a location most disruptive to you, which violates the policy. A diagram showing that 25 Crest is a large property with many other less disruptive alternatives was also provided.

The demand letter further asserts the following:

> The Town should not have accepted a diagram created by an architect, who is not qualified or legally authorized to provide property boundaries. The Professional Land Surveyor's Act requires surveys to be performed only by those licensed as land surveyors to safeguard property and the public welfare. (Cal Business & Professions Code Sections 8700-8805)
>
> Because Staff chose not to ensure information contained in the application was correct and met the legal requirements, while simultaneously rejecting our own site plan, we were forced to commission an Official Survey and perform the Town's and applicants' job. The Town should reimburse the $13,500 Official Survey cost we have incurred, or recover this amount from the 25 Crest owners in a code enforcement action and then reimburse us.

The demand letter concludes in pertinent part: "The generator needs to be relocated outside the setback, to a location least disruptive to us, the sound level requirement must be enforced, and the Town (or the 25 Crest owners) should make us whole for the cost of the Survey."

Regarding prior communications with Town officials, initially you personally expressed concern about the neighbor's generator in September 2020 during a conversation with the Town Manager when you were Mayor. The Town Manager responded to your question by emailing you information from Town staff about the generator, which you forwarded to your husband. Thereafter, beginning in October 2020, all further communications with the Town about the generator were made and received only by your husband.[3] The survey was not commissioned until

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[3] The facts provided indicate initial personal communications with the Town Manager. Under the Act, a public official shall not make, participate in making, or in any way attempt to use the public official's official position to influence a governmental decision in which the official knows or has reason to know the official has a financial interest. (Section 87100.) For a communication with the official's own agency, a public official uses an official position to influence a governmental decision if the official contacts or appears before any official in the agency for the purpose of affecting the decision. (Regulation 18704.) At this time, we do not have sufficient facts to determine if your initial communications were for the purpose of affecting the decision, nor could we make such a determination because it is a matter of past conduct. The Commission cannot provide advice related to past conduct. (Section 1097.1(c)(2) and Regulation 18329(b)(6)(A).) Accordingly, we express no opinion regarding your initial communications and whether these communications violated the conflict-of-interest provisions of the Act.

August 2021. Your husband's first request for reimbursement of the survey cost was in 2022, after he had submitted the survey to the Town.

**B. The Town's Partial Reimbursement Offer.**

The Town required the neighbors to relocate their generator out of the setback and has recently indicated that it is willing to partially reimburse you $10,000 for the survey. You would like to receive the partial reimbursement proceeds from the Town, but you do not want to accept it if it violates Section 1090. Neither you nor your husband have initiated a formal claim or action to recover the cost of the survey. The Town would not require you or your husband to execute a settlement agreement, release of claims or any other formal contract in exchange for the proposed partial reimbursement.

The Town Council must make the decision whether to authorize partial reimbursement. You have taken no action or participated in any discussions or decisions in your official capacity as a Town Councilmember regarding the reimbursement.

## 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.)

Section 1090 reaches beyond the officials who execute contracts. Section 1090 casts a wide net to capture those officials who participate in any way in the making of the contract. Typically, a contract is "made" on mutual assent of the involved parties. (*Stigall v. City of Taft*, *supra*, at p. 569.) In addition, making or participating in making a contract has been broadly construed to include those instances where a public official has influence over the contract or its terms. (See 80 Ops. Cal. Atty. Gen. 41 (1997).)

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 v. Call*, *supra*, at pp. 647-649; *Stigall v. City of Taft*, *supra*, at p. 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).)

**A. Partial Reimbursement Would Constitute a Contract Under Section 1090.**

You have asked whether you, as a Town Councilmember, may accept, and whether the Town may provide, a potential partial reimbursement to you for the cost of the survey. Section 1090

applies only to a decision that involves a contract. Thus, in this case, the first question is whether partial reimbursement for the cost of the survey would constitute a contract under Section 1090.

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that "specific rules applicable to Section 1090 require that we view the transactions in a broad manner and avoid narrow and technical definitions of 'contract.'" (*People v. Honig*, *supra*, at p. 351, citing *Stigall v. City of Taft*, *supra*, at p. 571.)

"A contract is an agreement to do or not to do a certain thing." (Civ. Code, § 1549.) "It is essential to a contract that there should be: 1. Parties capable of contracting; 2. Their consent; 3. A lawful object; and 4. A sufficient cause or consideration." (Civ. Code, § 1550.)[4]

Here, the facts provided indicate that you have not filed a formal claim or action to recover the cost of the survey, and the Town would not require you to execute a formal settlement, release, or other agreement in exchange for partial reimbursement. Technically, therefore, partial reimbursement for the survey would not require a settlement agreement.

However, the elements necessary to form a contract exist in the facts provided. The demand letter to the Town indicates that several discussions and negotiations occurred prior to the Town's offer of partial reimbursement. Moreover, the fact that the Town has offered partial payment of $10,000, not the full $13,500 cost of the survey, indicates a compromise between the parties. Therefore, in accordance with the prevailing legal requirement to view transactions broadly and avoid narrow and technical definitions of a "contract," we find that the Town's agreement to provide partial reimbursement for the survey would constitute a contract under Section 1090 despite the lack of a formal written contract.

**B. Financial Interest in the Contract.**

Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest," and officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*People v. Honig*, *supra*, at p. 333.) 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).)

In this case, the Town's partial reimbursement would financially benefit you directly. Thus, you would have a financial interest in the contract.

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[4] The Attorney General cited to these contracting principles when determining whether a development agreement constituted a contract for purposes of Section 1090. (See 78 Ops.Cal.Atty.Gen. 230, 233 (1995).)

**C. Making or Participating in Making a Contract.**

Section 1090 applies to officials who participate in any way in the making of the contract, including involvement in matters such as 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; see also *Stigall v. City of Taft*, *supra*, at p. 569.) Notably, in relation to a public body such as a Town Council, when members of a public board, commission or similar body have the power to execute contracts, each member is deemed involved in the making of all contracts by the body 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).)

Therefore, the entire Town Council is prohibited from making the contract even if you disqualify yourself from participation in making the contract, unless an exception applies.

**D. 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. (*Dietrick* Advice Letter, No. A-15-174; 88 Ops.Cal.Atty.Gen. 106, 110 (2005).) The rule of necessity ensures that essential government functions are performed even where a conflict of interest exists. (*Eldridge v. Sierra View Local Hospital Dist.* (1990) 224 Cal.App.3d 311, 321; see *Gonsalves v. City of Dairy Valley* (1968) 265 Cal.App.2d 400, 404 [stating that "[t]he rule is well settled that where an administrative body has a duty to act upon a matter which is before it and is the only entity capable to act in the matter, the fact that the members may have a personal interest in the result of the action taken does not disqualify them to perform their duty."]

Here, according to the facts provided, neither you nor your husband have initiated a formal claim or action to recover the cost of the survey. Thus, there is no pending litigation. Moreover, the Town would not require you or your husband to execute a settlement agreement, release of claims or any other formal contract in exchange for the proposed partial reimbursement. However, settlement formalities notwithstanding, reimbursement would eliminate the threat of litigation to the Town over this dispute. For the rule of necessity to apply, therefore, the question is whether the Town's reimbursement to eliminate the threat of litigation constitutes an essential government function to allow the making of a contract that Section 1090 would otherwise prohibit.

Although not applicable here, the "remote interest" litigation exception under Section 1091(b)(15) is relevant to the question at issue. Under this exception, a public official has a remote interest in a settlement agreement where the official is "a party to litigation involving the body or board of which the officer is a member in connection with an agreement" and the following requirements are met:

> (A) The agreement is entered into as part of a settlement of litigation in which the body or board is represented by legal counsel.

(B) After a review of the merits of the agreement and other relevant facts and circumstances, a court of competent jurisdiction finds that the agreement serves the public interest.

(C) The interested member has recused himself or herself from all participation

(Section 1091(b)(15).)

In this case, there is no pending litigation but rather the threat of litigation. Applying the rule of necessity to the facts here would supersede and thwart the litigation exception, as well as the additional public safeguards set forth in the exception, such as the involvement of an attorney on behalf of the public agency and a court-approved settlement agreement finding that it serves the public interest. Reimbursement in this instance, therefore, is not an essential government function because the official is not a party to litigation and the proposed reimbursement is not part of a court-ordered settlement. Until litigation is initiated, there is no necessary decision that must be made; thus, the rule of necessity does not apply, nor does the remote interest litigation exception.[5]

If you decide to file a lawsuit, then you may need to seek additional advice under the Act regarding communications or appearances you may make individually after the lawsuit is filed.

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

Sincerely,

Dave Bainbridge
General Counsel

/s/ John M. Feser Jr.

By: John M. Feser Jr.
Senior Counsel, Legal Division

JF:aja

[5] We understand it may be in the Town's best interest to settle prior to litigation. However, allowing an agency to invoke the rule of necessity for the mere threat of litigation by a member of the governing body would render the litigation exception and its public safeguards meaningless. Well-established rules of statutory construction generally preclude judicial construction that renders part of a statute "meaningless or inoperative." (See *Hassan v. Mercy Am. River Hosp.* (2003) 31 Cal.4th 709, 715–16.)