



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
428 J Street • Suite 620 • Sacramento, CA 95814-2329  
(916) 322-5660 • Fax (916) 322-0886

July 6, 2016

Gary W. Schons  
City Attorney  
Best Best & Krieger, LLP  
655 West Broadway, 15<sup>th</sup> Floor  
San Diego, CA 92101

Re: Your Request for Advice  
**Our File No. A-16-114**

Dear Mr. Schons:

This letter responds to your request for advice regarding the conflict of interest provisions under Government Code section 1090, et seq.<sup>1</sup> Please note 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.

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

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 San Diego 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 Fallbrook Public Utility District ("District") and a member of its Board of Directors, Al Gebhart, from entering into a land purchase agreement with the Western Rivers Conservancy to sell land known as the Santa Margarita River Property ("SMR Property")?

### CONCLUSION

No. As explained below, although Section 1090 prohibits Director Gebhart from participating in the making of the land purchase agreement, the "rule of necessity" applies to allow the District to enter into the agreement with the Western Rivers Conservancy.

---

<sup>1</sup> All further statutory references are to the Government Code unless otherwise specified.

## FACTS

You are seeking this advice on behalf of the District, the current owner of the SMR Property, which consists of 1,389.69 acres in Fallbrook, California, an unincorporated community in San Diego County.

The District acquired the crescent-shaped property in the 1950's intending to construct a dam on the land to resolve its long-standing water rights dispute concerning the Santa Margarita River watershed with the neighboring Marine Corps at Camp Pendleton. Instead of a dam, the two parties agreed on a development project, the Santa Margarita Conjunctive Use Project, to store water in aquifers on the Marine Base, which secured additional local water supplies for the District and provided the Marines with an undeveloped "buffer" property adjacent to its base.

As part of that project, the District intends to sell the SMR Property to a conservation agency and utilize the funds to help off-set construction costs of the water facilities contemplated in the project. The District has reached a tentative sales understanding with the Western Rivers Conservancy to sell the SMR Property for \$9,975,000 (95% of the appraised value of the property). The sale would require that the Conservancy preserve and maintain the property as open space in perpetuity and continue to provide public access to the trail system which already exists on the property for recreational hiking and equestrian use.

The "SMR Property" is mainly raw land that extends along the Santa Margarita River. The majority of the property contains diverse native vegetation and the topography ranges from level to steeply sloped. A small portion of the property is farmed with two older single-family homes. The majority of the property is zoned S80 (Open Space – intended for recreation areas or areas with severe environmental constraints), excluding one parcel zoned A70 (Limited Agricultural - intended for crop or animal agriculture). Residential use is permitted in both zones. The entire property is designated Public Agency Lands in the County General Plan.

A member of the Board of Directors of the District, Al Gebhart, owns a personal residence at 1609 Santa Margarita Drive. The property is 972 feet from the closest boundary of the SMR Property and only a small portion of the SMR Property is visible from the residence. Along with approximately 20 other landowners in the area, Director Gebhart holds an easement that provides pedestrian and equestrian access to the SMR Property itself. The easement extends from the rear of his property approximately 1,000 feet north to the SMR Property where it eventually joins an existing main trail system to the floor of the valley. The residents holding the easement pay a small maintenance fee.

You retained an independent appraiser, Robert Caringella of Jones, Roach & Caringella, to analyze the potential impact of the proposed sale of the SMR Property on the value of Director Gebhart's residence. You specifically requested that he consider "the conditions of that sale, most specifically the 'ongoing access' condition, including permanent public equestrian use over the property, and 'long term conservation easement' restricting uses and development of River Property in perpetuity. Although the present request for advice is limited to an analysis under Section 1090, you requested that Mr. Caringella also consider whether the potential impact of the proposed sale

would have a “reasonably foreseeable material financial effect” on Director Gebhart’s real property interest, the standard used to determine a disqualifying conflict of interest pursuant to the Political Reform Act.

You provided us with Mr. Caringella’s report dated May 26, 2016. The report describes Director Gebhart’s real property and notes that it has a four-stall barn and a corral/turn-out, while stating that the “property can be characterized as a rural residential, equestrian property.” It then describes the equestrian trail easement that extends from the rear of his property about 1000 feet north where it connects with the SMR Property, eventually joining an existing main trail at the valley floor.

With respect to the SMR Property, Mr. Caringella states that it is mainly used for “hiking, biking and horseback riding along the edge of the river channel through an interim agreement (revocable) with a local land conservancy.” Additionally, it has various potential uses including residential development, and “could be fenced and the public excluded.” He notes however that one of the intents underlying the proposed sale is to “conserve the property as permanent open space,” and that “[a] restricted use easement (conservation easement) would be placed on the property to prevent any type of future development or subdivision.” In addition, he elaborates on the Long Term Steward Agreement that would be required:

A condition of the sale is a Long Term Steward Agreement to be created to manage the property. As part of the agreement, “Ongoing Access” would be permitted for non-motorized multi-use recreational access, including equestrian access. This would preserve the existing basic trail system for use by the public. The likely effect of the decision will be to create a permanent open space park with access to the public. The decision would prevent development of homes, prevent agricultural uses, and prevent other uses (sand mining, etc.) that may occur along a riverbed.

Turning to the likely effects of the sale of the SMR Property, Mr. Caringella initially states that the governmental decision concerns the sale of the SMR Property “with certain terms and conditions, including ongoing public access.” But the exact location and scope of the public access is not specified in the proposed agreement as those are issues that will be determined at a later date. In addition, the proposed agreement is silent as to whether access to the SMR Property by way of the easement through the rear of Director Gebhart’s property will continue to be allowed.

Mr. Caringella then states that “[g]iven the equestrian character of the Gebhart property, coupled with the easement access, suggests that the property is uniquely suited to enjoy the River Property if the River Property were preserved as an open space park with ongoing access.” He further states that “[w]hile there is already ‘interim’ use of the River Property available for hiking and equestrian use (albeit informal, not an easement on FPUD property), the governmental decision could establish this use as permanent by preventing any and all development of the River Property and ensuring legitimate ongoing access.” The report then suggests that “any impact on value from ongoing access is likely to be very small,” and concludes that the sale of the SMR Property will “not materially influence the market value of this property.”

## 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. 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.) If a public official is a member of a board that executes the contract in question, he or she is conclusively presumed to be involved in the making of the contract. (*Thomson v. Call* (1985) 38 Cal.3d 633, 645, 649.) When section 1090 is applicable to one member of the governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain; 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*, 58 Cal.2d at p. 569; *City of Imperial Beach v. Bailey, supra*, 103 Cal.App.3d at p. 197; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).) A contract that violates section 1090 is void. (*Thomson v. Call, supra*, 38 Cal.3d at p. 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 employ the following six-step analysis to determine whether Director Gebhart has a conflict of interest under Section 1090.

### **Steps One, Two, and Three: Is Director Gebhart subject to the provisions of Section 1090 and is there a contract at issue in which he will participate in making?**

As a member of the Board of Directors for the Fallbrook Public Utility District, Director Gebhart is subject to the provisions of Section 1090, as is the board of directors itself. (See Section 1090.) Section 1090 applies to contracts subject to the general principles of contract law and is applied broadly to encompass many related transactions. (*People v. Honig, supra*, at p. 351 citing *Stigall, supra*, at pp. 569, 571.) Here, the decision at issue involves a potential contract for the sale of the SMR Property between the District and the Western Rivers Conservancy. A contract is therefore involved in the decision at issue.

Finally, any agreement between the District and Western Rivers Conservancy would need approval from the District Board of Directors. As such, Director Gebhart would participate in the making of a contract.

### **Step Four: Does Director Gebhart have a financial interest in the contract?**

Section 1090 prohibits a public official from making a contract in which he or she has a financial interest. An official is deemed to have a financial interest in a contract if he or she might

profit from it in any way. 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. (*People v. Vallergera* (1977) 67 Cal.App.3d 847, 867, fn. 5; *Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).)

Prohibited “financial interests” extend to expectations of economic benefit (*People v. Honig, supra*, 48 Cal.App.4th at p. 315); “a financial interest within the meaning of section 1090 may be direct or indirect and includes the contingent possibility of monetary or proprietary benefits.” (*Id.* at p. 325; see *People v. Gnass* (2002) 101 Cal.App.4th 1271, 1298-1301; *People v. Vallergera* (1977) 67 Cal App.3d 847, 865; *People v. Darby* (1952) 114 Cal.App.2nd 412, 433, fn. 4.) The fact that the officer’s interest “might be small or indirect is immaterial so long as it is such as deprives the [District] of his overriding fidelity to it 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, 207-208.) All the circumstances of the transaction as a whole must be considered in determining whether a proscribed financial interest would be present in the contract. (*Thomson v. Call, supra*, 38 Cal.3d at p. 645.)

In the present situation, Director Gebhart owns a residence in Fallbrook that has a four-stall barn and has been characterized as “equestrian property.” Director Gebhart’s residence is a mere 1,000 feet from the SMR Property, which consists of almost 1,400 acres and is mainly used for recreational activities such as hiking, biking and horseback riding along the Santa Margarita River. Although Director Gebhart and the public currently enjoy use of the SMR property, such use is only possible by means of a revocable interim agreement with a local land conservancy. In fact, the SMR Property has other potential uses, including residential development where it is possible the land could be fenced and the public excluded, but the terms of the proposed sale would prevent that by prohibiting all development and ensuring ongoing public access. However, the scope of the ongoing public access as well as Director Gebhart’s continued enjoyment of access to the SMR Property from the easement on his residence are not determined by the proposed purchase agreement.

Taking these facts into consideration, Mr. Caringella’s report noted that the impact of ongoing access to the SMR Property on the value of Director Gebhart’s property would likely be “very small.” But even a very small impact in value is enough to trigger the prohibition under Section 1090 where there is a possibility the decision will place Director Gebhart in a “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, supra*, at pp. 207-208; see also *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1075 [(“t)he 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”].)

It is difficult, if not impossible, to imagine how a contract that contains a Long Term Steward Agreement that ensures ongoing public access to the SMR Property will not, to some degree, influence Director Gebhart’s vote, especially when considering his property is “uniquely suited to enjoy the River Property if the River Property were preserved as an open space park with

ongoing access.” And this is true even though the proposed agreement does not determine the specifics of the ongoing public access or whether residents, including Director Gebhart, will continue to have access to the SMR Property from the easement running through their properties.

To be sure, even though alleged to be minimal, Director Gebhart stands to personally profit from the proposed contract. And because even a small impact in value is sufficient to create a prohibitory conflict of interest under Section 1090, Mr. Caringella’s conclusion that the sale of the SMR Property will “not materially influence the market value of this [Director Gebhart’s] property” is irrelevant. Indeed, that is a standard employed under the Political Reform Act’s conflict of interest provisions, which are not at issue in the current matter.

The courts have recognized that section 1090’s prohibition must be broadly construed and strictly enforced. (See, e.g., *Stigall v. City of Taft*, *supra*, 58 Cal.2d at pp. 569-571; *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572, 579-580; *City Council v. McKinley*, (1978) 80 Cal.App.3d 204, 213.) Accordingly, when considering all of the surrounding circumstances, assuming Director Gebhart remains on the District Board, we conclude that the District and Director Gebhart may not enter into the proposed land purchase agreement with the Western Rivers Conservancy.

#### **Step Five: Does either a remote interest or noninterest exception apply?**

As mentioned, 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).)

However, the Legislature has created various statutory exceptions to Section 1090’s prohibition where the financial interest involved is deemed a “remote interest,” as defined in Section 1091, or a “noninterest,” as defined in Section 1091.5.

If a “remote interest” is present, the contract may be made if (1) the officer in question discloses his or her financial interest in the contract to the public agency, (2) such interest is noted in the entity’s official records, and (3) the officer abstains from any participation in the making of the contract. (Section 1091(a); 88 Ops.Cal.Atty.Gen. 106, 108 (2005); 83 Ops.Cal.Atty.Gen. 246, 248 (2000).) If a “noninterest” is present, the contract may be made without the officer’s abstention, and generally, a noninterest does not require disclosure. (*City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 514-515; 84 Ops.Cal.Atty.Gen. 158, 159-160 (2001).)

You have provided no facts suggesting that any statutory exceptions apply to the current matter.

#### **Step Six: Does the rule of necessity apply?**

In limited cases, the “rule of necessity” has been applied to allow the making of a contract that Section 1090 would otherwise prohibit. (*Eldridge v. Sierra View Hospital Dist.* (1990) 224 Cal. App. 3d 311, 322.) The rule has been applied where public policy concerns authorize the contract

and “ensures that essential government functions are performed even where a conflict of interest exists.” (*Ibid.*; See also 69 Ops.Cal.Atty.Gen. 102, 109 (1986); (88 Ops.Cal.Atty.Gen. 106, 110 (2005).) “The rule of necessity permits a government body to act to carry out its essential functions if no other entity is competent to do so . . .” (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1097.)

Under this rule, a contract can be executed even though it would otherwise violate the terms of Section 1090. The “rule of necessity” has been applied in at least two specific types of situations: where the contract is for essential services and no source other than the one that triggers the conflict is available; and where the official or board is the only one authorized to act. (69 Ops.Cal.Atty.Gen. 102, 109 (1986).)

For instance, the “rule of necessity” has been applied to allow a school board to enter into a memorandum of understanding with a teachers’ association even when a board member is married to a tenured teacher and would have a financial interest in the contract. (69 Ops.Cal.Atty.Gen. 102 (1986).) Similarly, a community college board was allowed under the rule to negotiate with its faculty for salary and benefits even though a board member was a retired faculty member whose health benefits were tied to current faculty benefits. (89 Ops.Cal.Atty.Gen. 217 (2006).) In addition, a city councilmember who had an interest in a local cable franchise was allowed to use the rule of necessity to dispose of his interest where the city council was required to approve such disposition. (76 Ops.Cal.Atty.Gen. 118, 123-125 (1993).) And finally, in *Caminetti v. Pac. Mutual Life Insurance Co.* (1943) 22 Cal.2d 344, 366, the California Supreme Court held that the Insurance Commissioner may make contracts involving a delinquent insurer in which he holds a policy, despite the prohibitions in the predecessor statute to Section 1090 (former Section 920), since “[n]o other officer is authorized to perform the Commissioner’s duties . . .”

According to its website, the District operates as a public agency under the California Public Utility District Act, and was originally formed to provide water to the community of Fallbrook. (<https://www.fpud.com>.) The District intends to utilize funds from the sale of the SMR Property to help off-set construction costs of the water facilities contemplated by the Santa Margarita Conjunctive Use Project. And as the owner of the SMR Property, the District is the only public entity authorized to execute the land sale.<sup>2</sup>

Based on these facts, and consistent with applicable law, we therefore conclude that the rule of necessity applies, and the District may enter into the subject land agreement with the Western Rivers Conservancy to carry out its essential functions. However, pursuant to the opinions of the Attorney General referenced above, Director Gebhart should abstain from any participation in the making of that contract.

---

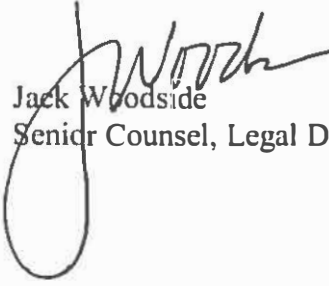
<sup>2</sup> This fact was confirmed in an email dated July 5, 2016 by Paula de Sousa Mills of your firm.

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

Sincerely,

Hyla P. Wagner  
General Counsel

By:

  
Jack Woodside  
Senior Counsel, Legal Division

JW:jgl