



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

December 2, 2016

Gary W. Schons, Esq
Best Best & Krieger LLP
655 West Broadway, 15th Floor
San Diego, CA 92101

Re: Your Request for Advice
Our File No. A-16-180

Dear Mr. Schons:

This letter responds to your request for advice regarding the conflict of interest provisions under Government Code section 1090 et seq.¹ Please note that we do not advise on any other area of law, including Public Contract Code or common law conflicts of interest. We are also 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.

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 Lake 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).)

You represent the Clearlake Oaks County Water District ("District") and have been directed by its Board of Directors to request advice from the Commission concerning the conflict of interest provisions under Section 1090. The Board would like to negotiate a resolution of various easement and related property access claims with landowner Richard Kuehn, a current member of the Board.

Director Kuehn was appointed to the Board in 2014 and continues to serve as a Director after being elected to the position in 2015. Sometime prior to 2003, Director Kuehn acquired an ownership interest in two sizeable tracts of property, subject to all existing easements and dedications, in what is known as the Orchard Shores subdivision area in Lake County.

Director Kuehn's property adjoins property owned and operated by the District that contains a tank site and a Waste Water Treatment Plant ("WWTP"). Prior to his membership on the Board, his property ownership put him at odds with the District over various easement rights and related claims of the District, including the District's asserted right to road access and responsibility for road maintenance. Many of these disputed issues have yet to be resolved.

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

You attached a Google map of the area where the subject property is located and provided information about the history of the present dispute. The following is taken verbatim from your letter:

Mr. Kuehn owns nearly all the property north or above Jensen Road and on both sides of Orchard Shores Drive ("OSDr."). He claims the roads are private and that he owns the roads, themselves. The District's WWTP is in the left-center of the shot south or below Jensen Road. The District's plant property is landlocked and access can be obtained only via OSDr., which runs through the adjacent Orchard Shores Homeowners Association residential area to the north and then connects 10 Highway 20, or Jensen Road, which connects to Sulphur Bank Road (County Road 216) to the east and then to Highway 20 to the north. Mr. Kuehn also owns property traversed by Round Mountain Road ("RMRd.") and Sanns Court to the north or above Hwy. 20. In the extreme upper or north portion of the shot in the middle between those two roadways is the District's tank site.

Orchard Shores was a sub-division approved in 1926, which, among other things, provided that the developers would build and dedicate public roads and provide sewer and storm drain easements to the County. One such road was OSDr. which connected with Hwy. 20, and Jensen Road, which connects to Sulphur Bank Road ("SBRd.") to the east and leads to a marina to the west. These were all unlimited public access dedicated public roads from 1974-2015. The District utilized OSDr. and later Jensen Road for access to its land at WWTP in the Orchard Shores subdivision area.

Jensen Road was established at the far end of SBRd. after approval the 1926 subdivision map for the Orchard Shores property. Without the road, most of the lots would be landlocked. The road has been in continuous open and public use for at least 70 years.

The District acquired land to build a larger WWTP in 1966. The District built the plant and used Jensen Road to SBRd. to Hwy. 20 for access to the plant. In 1997, a roadway and public utility easement 4.5' wide from SBRd. to the edge of the WWTP was offered for dedication by the then property owners, two families. The easement was duly recorded. The road passes over land now owned by Director Kuehn.

Additionally, in June 1973 the then owners of a parcel of the land north of Hwy. 20 and traversed by RMRd. and later acquired by Mr. Kuehn, deeded to the District a 10' easement, across their property, for installation and maintenance of water pipes. The consideration was a single water hook up from the District. Later in 1973, the District built a water tank on land locked property. Access to the tank site for District

trucks was over RMRd. which had been used by prior owners of the tank site for many years.

In 1987-88, the then owner of the subdivision property wanted to improve the dirt passage from the end of OSDr. to Jensen Road and the back gate of the WWTP because of the level of use, and to improve Orchard Shores' water quality. As a result, the property owner and District entered into an agreement that provided a deeded easement to the District across the property to Jensen Road and to access the back gate of the WWTP. For its part, the District agreed to grade and hard surface the roadway, extend an existing 4" water main that came into the property from Sulphur Bank Road down to Jensen Road and loop it with the 6" water pipe near the end of the OSDr. extension. This agreement resulted in improved water quality for the subdivision and a maintained roadway to Jensen Road and the marina. The District was to obtain deeded access (easement) across the property to Jensen Road and the back gate of WWTP. However, that deed of easement was not recorded. The roadway the District maintained was open for use by the District and the public.

In 2003, after he acquired his property interests in Orchard Shores area, Mr. Kuehn "obstructed and interfered" with the District's "enjoyment" of its deeded and prescriptive easements by installing a gate to block access to RMRd, the district's access to its tank site. The County, in turn, required Mr. Kuehn to unlock the gate to permit access by the District.

In 2004, Mr. Kuehn further "obstructed and interfered" with the District's deeded and prescriptive easements by building a series of berms across RMRd., thus blocking the District's trucks access to the deeded easement and tank site. Mr. Kuehn cut a new access path across his property from a dedicated County road, Sanns Court, to the tanks site and directed the District to use this pathway for access to the deeded easement and tank site. The District did this for several months, but in September 2004 demanded access to the RMRd. prescriptive easement.

In 2006, the District learned that the County had forbidden Mr. Kuehn from maintaining the Sanns Court access pathway because it had been constructed without permits. In 2007 the County brought suit against Mr. Kuehn and the Court ordered Mr. Kuehn to apply for a use permit for the Sanns Court access pathway.

In January 2007, the District brought suit to quiet title to its prescriptive easement over RDRd. (As to the RMRd. easement, itself: the District asserted claims of easement by necessity, prescriptive easement, implied dedication.) From all appearances, the matter was to settle and the District moved to dismiss its suit in May 2008, which was granted

without prejudice on May 7, 2008. However, for unexplained reasons, there was no settlement agreement and no recording securing the District's asserted easement rights.

In early 2015, the Orchard Shores Association ("OSA"), which represents the homeowners in the subdivision, and Mr. Kuehn complained to the District about District truck traffic over what they claimed were OSA roadways, claiming the roads were never dedicated and thus were private. OSA then worked with Mr. Kuehn, to erect a gate "obstructing and interfering" with the District's use of what the District considered a public roadway and the easement acquired in the 1988 agreement with the then subdivision owner. (County records confirm the roadways were dedicated to the public.)

You state that the District would like to negotiate some type of agreement, short of a potentially time-consuming and costly lawsuit, with Director Kuehn to settle this ongoing dispute. And your letter assumes that Director Kuehn, and the entire District Board, will have a prohibitory conflict of interest in any such agreement. You have therefore asked the Commission to focus on two potential exceptions: the remote interest exception under Section 1091 (b)(15) and the rule of necessity. However, because there is no pending lawsuit between the District and Director Kuehn, the litigation exception under Section 1091(b)(15) does not currently have any application to these facts. We thus turn to the rule of necessity.

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.)

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 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. . .” Finally, we recently advised that, despite a conflict of interest under Section 1090, a public utility district could execute a land sale to help offset construction costs of planned water facilities to carry out its essential functions where it was the only entity authorized to execute the sale. (*Schons Advice Letter*, No. A-16-114.)

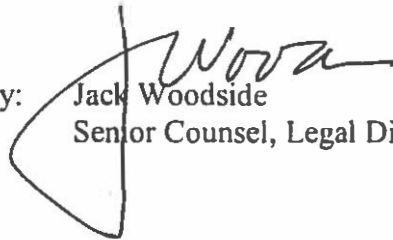
In the present matter, in order to properly access its property containing the tank site and the waste water treatment plant, which unquestionably provide essential services to the community, the District must resolve ongoing easement and related property access claims with Director Kuehn. As the owner of the property on which all of these access issues are occurring, Director Kuehn is the source triggering the conflict and the only person able to negotiate a potential agreement with the District to resolve the dispute over access to important District property.

Accordingly, based on these facts and consistent with the law, we find that the rule of necessity applies to allow the District to enter into an agreement with Director Kuehn to resolve all property-related issues concerning access to its land. Of course, Director Kuehn must abstain from any participation in the making of the agreement *in his official capacity* as a member of the District board.²

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

² We note that should litigation ensue, the remote interest exception under Section 1091(b)(15) would apply so long as the requirements set forth in Section 1091(b)(15)(A)-(C) are satisfied.