



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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December 14, 2016

Jennifer M. Lyon
General Counsel
La Mesa Village Plaza
8100 La Mesa Boulevard, Suite 200
La Mesa, CA 91942

Re: Your Request for Advice
Our File No. A-16-239

Dear Ms. Lyon:

This letter responds to your request for advice on behalf of Ramona Municipal Water District (the "District") Board members President Thomas Ace and Director George Foote regarding their duties under the conflict of interest provisions of the Political Reform Act (the "Act")¹ and Section 1090. 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).)

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

QUESTIONS

1. Do the Board members have a financial interest in the decision based on their membership in the San Diego Country Estates Association (the "HOA")?
2. If Section 1090 applies, does the public services noninterest exception in Section 1091.5(a)(3) apply?
3. If Section 1090 applies, does the "rule of necessity" exception apply?
4. If the District can legally enter into an extension or new contract with the HOA, do any provisions of the Political Reform Act apply such that the directors who are also members of the

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

HOA must recuse themselves from any participation in the negotiation or approval of the potential contract?

CONCLUSIONS

1. Owning homes and being members of the HOA constitutes a financial interest in the contract decisions between the District and the HOA.
2. Since the agreements in question and the recycled water are not uniformly provided to all customers the public services noninterest exception in Section 1091.5(a)(3) would not apply.
3. The rule of necessity applies to decision on the disposal of the effluent. However, the members with the conflict of interest must abstain from participation in the decision.
4. Under Section 87100, the members would have a conflict of interest and could not make, participate in making, or influence the decisions.

FACTS

The District is a municipal water district formed under Municipal Water District Law of 1911, Water Code Section 71000 et seq., and it currently provides water, wastewater, recycled water, emergency medical services, fire and park services to the community of Ramona located in the unincorporated area of San Diego County. The District has a five-member Board of Directors that are elected from five different geographical divisions. The District boundaries encompass approximately 45,800 acres in the unincorporated area of San Diego County. The District provides services to approximately 7,000 urban parcels and 3,000 rural parcels with an approximate population of 40,000 people. The District service area encompasses the Santa Maria Valley, the San Vicente Valley and surrounding hills with elevations ranging from 1,300 feet to 2,100 feet mean sea level. Approximately 13 million kilowatts of energy are used to pump water to Ramona each year.

The District has two wastewater services areas: San Vicente and Santa Maria. Your question concerns the San Vicente Wastewater Service Area (the "WSA"). The WSA serves a population of roughly 10,000 people located primarily in the San Vicente Valley. The San Vicente Valley includes several planned communities including the San Diego Country Estates, which was initially developed in the 1970's and includes the San Vicente Resort and Golf Course. Due to the distance from Ramona to the coastline and the geography of the service area, the District does not have access to a regional disposal system that transports effluent to various treatment facilities and then eventually disposes of the treated wastewater into the ocean. Therefore, the District's method of disposal is through the production of recycled water, with approximately 97% of the effluent from the San Vicente Water Reclamation Plant being disposed of as recycled water.

As part of their wastewater program for the San Vicente Water Reclamation Plant, the District entered into an Effluent Disposal Agreement (the "Agreement") with Spangler Peak Ranch and the HOA. Pursuant to the Agreement, the District provides the treated effluent (recycled water) to these two parties for purchase at the same contractual fixed rate of \$35 per acre foot. The HOA uses recycled water to irrigate its golf course and open areas. In years 2011-2018, the District

provided approximately the same amount of recycled water to both the Spangler Peak Ranch and the HOA. The Agreement took effect as of October 1, 2008 and will expire on September 30, 2018; however, the District has been providing treated effluent to Spangler Peak Ranch by a previous written agreement since at least 1996 and to the HOA since at least 1999. The current Agreement does not include an automatic option to extend but can be extended by mutual agreement of the parties.

In September 2015 the District contracted with an independent third party firm, Bartle Wells, to complete a rate and fee study to determine the cost of producing recycled water at the San Vicente Water Reclamation Plant. The study determined the cost of recycled water from the San Vicente Water Reclamation Plant is approximately \$485,000 per year or approximately \$968 per acre foot. The Agreement benefits the District in disposing of treated effluent. Otherwise, the District would have to dispose of the effluent through other means such as spray fields or by transporting it to a location where it may enter a regional system for treatment and disposal into the ocean.

The Agreement provides some security to the District that all treated effluent will be disposed of by the two parties as it provides for “forced deliveries,” at a cost to the District, of the treated effluent when the District determines it is necessary due to production amounts and levels at the District’s storage ponds. The Agreement benefits Spangler Peak Ranch and the HOA because it provides recycled water to be delivered to the parties at a set rate, which is significantly lower than potable water.

Currently, two members of the District Board are also homeowners and members of the HOA, President Ace and Director Foote.² They pay approximately \$98 per month in HOA dues, and those dues cover maintenance and management of the common areas, private streets, and easements under the control of the HOA. The maintenance includes obtaining water for these HOA common areas.

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 noninterests or remote 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) 103 Cal.App.3d 191, 197.)

² Director Foote will leave office as of December 2, 2016.

We typically employ a six-step analysis to determine whether an official has a conflict of interest under Section 1090. However, the first three steps are met under the facts you provided:

(1) Section 1090 applies to the members in question (See e.g., *Santa Clara Valley Water District v. Gross* (1984) 200 Cal.App.3d 1363.)

(2) The decision involves a contract between the District and the HOA; and

(3) The members in question wish to participate in the renewal of the agreement and as Boardmembers would be presumed to have participated in the decision.

Step Four: Do the Members have a financial interest in the contract?

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. Vallergera* (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 (2000).)

Furthermore, case law and statutory exceptions to Section 1090 make clear that the term “financially interested” must be liberally interpreted. (See, e.g., *People v. Deysher* (1934) 2 Cal.2d 141, 146 [“(h)owever devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void”].) The phrase “financially interested” broadly encompasses anything that would tie a public official’s fortunes to the existence of a public contract. (*Carson Redevelopment Agency v. Padilla*, supra, at p. 1334.) “The government’s right to the absolute, undivided allegiance of a public officer is diminished as effectively where the officer acts with a hope of personal financial gain as where he acts with certainty.” (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1298 (citations omitted).)

You noted that under the agreement the HOA benefits because it receives recycled water to be delivered to it at a set rate, which is significantly lower than potable water. Presumably, the loss of that water supply would result in additional costs to the HOA to replace the lost supply, and those additional costs could pass through the HOA to the members, including the Boardmembers. Therefore, the members are financially interested in the contract.³

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

As a general rule, when Section 1090 is applicable to one member of a governing body of a public entity, as here, 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*,

³ You note that the Agreement benefits the District in disposing of treated effluent that otherwise the District would have to dispose of through other means such as spray fields or by transporting the effluent to a location to enter a regional system for treatment and disposal into the ocean. However, Section 1090 is an absolute prohibition and applies regardless of whether the contract is found to be fair and equitable. (*Thomson v. Call* (1985) 38 Cal.3d 633; *People v. Sobel* (1974) 40 Cal.App.3d 1046).

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).) However, the Legislature has created various statutory exceptions to Section 1090's prohibition where the financial interest involved is deemed to be a "noninterest," as defined in Section 1091.5, or a "remote interest," as defined in Section 1091. You asked about the following the "Public Services" Exception in Section 1091.5(a)(3).

Section 1091.5(a)(3) provides "[t]hat an 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 were not a member of the body or board." Attorney General opinions and case law make clear that the exception is intended to apply to services that are uniformly provided to all customers and for which rates and charges have been clearly established, such as public utilities (water, gas, and electricity). (See e.g., 81 Ops.Cal.Atty.Gen. at p. 319; *City of Vernon*, supra, at p. 516.)

You stated that the District allows anyone to seek to use treated effluent/recycled water pursuant to District Legislative Code Chapter 7.44. Recycled water is a standard public service that the District can provide to customers that have the recycled water infrastructure. The District has recently adopted a recycled water study from an independent third party firm, for the San Vicente Water Reclamation Plant, and may consider adopting uniform recycled water rates based on that study. However new development that meets certain landscaping requirements under a San Diego County ordinance will be required to install recycled water if the District provides recycled water to that property.

However, currently, only the Spangler Peak Ranch and the HOA have recycled water infrastructure that provides delivery to their properties, and under the Agreement they receive 100% of the treated effluent/recycled water deliveries.

"While it does not matter that the public constituency for a particular service may be small, it does matter whether the service has been specifically designed to benefit only a select few...."

"[S]ection 1091.5(a)(3) was inapposite to [a] 'unique exchange.'" (*Lexin v. Superior Court* (2010) 47 Cal. 4th 1050, 1087-1088.)

Thus, the exception would not apply under the current facts because of the unique nature of the agreement with Spangler Peak Ranch and the HOA.

Step Six: Does the rule of necessity apply?

The rule of necessity has been applied to permit a public officer to carry out the essential duties of the office despite a conflict of interest where the officer is the only one who may legally act. (65 Ops.Cal.Atty.Gen. 305, 310 (1982).) For example, the rule of necessity has been applied to a city council where members of the council had a conflict of interest that otherwise would have prevented action by the board. (*Federal Construction Co. v. Curd* (1918) 179 Cal. 489, 493.) Even if the rule applies, generally, the member or members with the conflict of interest must abstain from

participation. (88 Ops.Cal.Atty.Gen. 106, 111 (2005); 69 Ops.Cal.Atty.Gen. 102, 112 (1986); 67 Ops.Cal.Atty.Gen. 369, 378 (1984).)

In this case, the District will need to dispose of the effluent whether the HOA agreement is renewed or not. Without the HOA agreement, the District would have to dispose of through other means such as spray fields or by transporting the effluent to a location where it may enter a regional system for treatment and disposal into the ocean. Thus, the rule of necessity applies to the decision on the disposal of the effluent. However, the members with the conflict of interest must abstain from participation in the decision.

Political Reform Act

Since we have concluded that participation of the members at issue is already prohibited based on Section 1090, we need not fully analyze the Act's conflict of interest rules. Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. Section 87103 provides that a public official has a "financial interest" in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's interests as specified in Section 87103. The ultimate consequence of finding that a public official has a conflict of interest in a decision is that the official may not make, participate in making, or influence that decision.

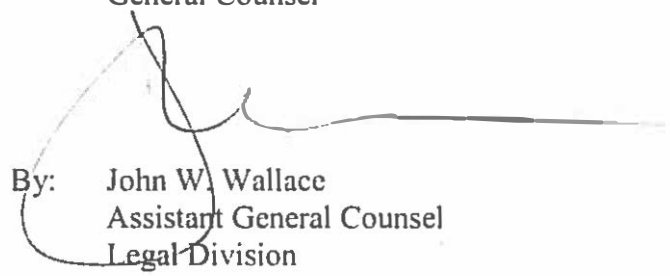
Regulation 18701(b) provides the standard when an official's financial interest is not explicitly involved in a decision. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. A financial effect need not be likely to be considered reasonably foreseeable, but if the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable. With respect to materiality, Regulation 18702.5(a) provides: "A personal financial effect means the financial effect of a governmental decision on the personal finances of a public official or his or her immediate family. The financial effect is material if the official or the official's immediate family member will receive a measurable financial benefit or loss from the decision." While the term "measurable" is not defined, Regulation 18702.2(b) cautions that the financial effect of a governmental decision is not material if it is nominal, inconsequential, or insignificant.

According to your facts, elimination of the recycled water will have a foreseeable financial effect on the HOA, and it is foreseeable that the cost would flow to the Board members as a homeowner in the HOA. Since there is a foreseeable and material financial effect on the members, they would have a conflict of interest in the decision under the Act as well.

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

Sincerely,

Hyla P. Wagner
General Counsel

A handwritten signature in black ink, appearing to read 'John W. Wallace', is written over the typed name and title. The signature is fluid and extends to the right.
By: John W. Wallace
Assistant General Counsel
Legal Division

JWW:jgl

