



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

August 24, 2017

Sarah E. Tobias
Attorney at Law
Goyette & Associates, Inc.
1330 L Street Suite G
Fresno, CA 93721

Re: Your Request for Advice
Our File No. A-17-120

Dear Ms. Tobias:

This letter responds to your request for advice on behalf of Tulare City Councilmember Greg Nunley regarding the conflict of interest provisions of the Act (the "Act")¹ and Section 1090. 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 Tulare County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response connected with your request 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).)

FACTS

Councilmember Nunley was elected to the Tulare City Council in the November 8, 2016 election. Councilmember Nunley is also a business owner, land owner, and property developer in the City of Tulare. Councilmember Nunley currently lists the following business entities and general descriptions of the businesses in his Statement of Economic Interests:

- Great Valley Land Co., LLC (Real Estate- sales and rental income)
- Great Valley Land Company LLC (Real Estate- sales and rental income)
- Del Lago Place LLC (Real Estate- sales income)

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.

- Great Valley Builders Inc. (Real Estate- construction and real estate sales income)
- Swift Homes Inc. (Construction income)
- Quest Equity LLC (Real Estate income)
- Compadres (Restaurant- food sales income)
- La Tula Investments (Real Estate income)
- Great Valley Builders Inc. (Real Property; row interest)
- Quest Equity LLC (Real Property; offer on property)

Councilmember Nunley also lists the following Interests in Real Property:

- 30 Acres around 1969 Hillman and Corvina in Tulare, CA
- 4 Acres near 14 I 8 Bordolino in Tulare, CA
- Tesori Subdivision in Tulare, CA
- Quail Creek Subdivision in Tulare, CA
- Parcel near 1878 Mooney Blvd. in Tulare, CA
- Bella Oaks (6 lots) in Tulare, CA

As a land owner, business owner, and property developer, Councilmember Nunley may be subject to fees such as developer impact fees or subdivision and parcel map fees. There have also been situations in which Councilmember Nunley has been eligible for fee refunds and/or credits with regard to fees already paid.

Pertinent Tulare City Code Section

1. City of Tulare Code Section 8.44.010 provides that the City Council adopts, resolution, subdivision and parcel map fees:

“The City Council of the city may, by resolution, adopt the fees and impose the same upon subdividers and applicants for parcel maps as it may determine to be necessary and convenient to defray the cost of processing subdivision and parcel map proceedings and to defray the city’s cost in the administration, engineering and inspection of improvements that may be required of subdividers and applicants for parcel maps. The fees may be changed from time to time.”

2. City of Tulare Code Section 8.56.030 provides that the City Council adopts, by resolution, development impact fees:

“Development impact fees and the implementation of those fees shall be established by resolution adopted by the City Council. Development impact fees are hereby established and imposed on the issuance of all building permits for development within the city to finance the cost of the following categories of public facilities and improvements required by new development ...”

3. City of Tulare Code Section 8.56.090(A) allows for developers to apply to the City for a reduction, adjustment or waiver of any one or more of the fees:

“A developer of any project subject to the fees described herein may apply to the City Council for a reduction, adjustment, or waiver of anyone or more of the fees, based upon the absence of any reasonable relationship or nexus between the impacts of that development and either the amount of the fee(s) charged or the type of facilities to be financed ...”

4. Finally, City of Tulare Code Section 8.56.110 provides situations in which there will be a refund of fees paid. Two such examples are as follows:

“(A) If a building permit expires without commencement of construction, then the fee payer shall be entitled to a refund, without interest, of the impact fee paid as a condition for its issuance ...

“(B) In the event any fee collected pursuant to this chapter remains unexpended or uncommitted in any fund established pursuant to § 8.56.060 five or more years after deposit of the fee, the city shall make findings once each fiscal year to identify the purpose to which the fee is to be put and to demonstrate a reasonable relationship between the fee and the purpose for which it was charged.

“(C) The unexpended or uncommitted portion of the fee, and any interest accrued thereon, for which need cannot be demonstrated pursuant to division (B) of this section shall be refunded to the then-current record owner or owners of lots or units of the development project or projects on a prorated basis.”

QUESTIONS AND CONCLUSIONS

1. Councilmember Nunley, as part of his development projects, may be entitled to receive fee credits pertaining to fees paid for items such as impact fees or subdivision and parcel maps. Is there a potential conflict of interest if Councilmember Nunley receives any such fee credits pertaining to his development projects?

Section 87100 provides that if a conflict of interest exists the councilmember would be prohibited from making, participating in making, and influencing the decision. The Act would not

stop the official, who does not make, participate in making, or influence the fee decision, from accepting the return of fees mandated by law.

Similarly, Section 1090 would not apply to repayment of unused fees since this is not a contract as contemplated by Section 1090.

2. In the event that the City Council is, by resolution, adopting or changing the fees related to subdivision and parcel maps, must Councilmember Nunley recuse himself from the decisionmaking process to avoid a conflict of interest?

3. Is it a conflict of interest for City Councilmember Nunley to sit on a City committee that discusses and renders decisions pertaining to issues such as developer impact fees or any other issue that may result in a monetary benefit to him?

Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has an interest. The Act's conflict-of-interest provisions apply only to conflicts of interest arising from enumerated interests in Section 87103. The facts you have provided indicate the following interests are implicated by the decisions:

- An interest in any business entity in which the official has invested \$2,000 or more, or in which the official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(a) and (d).)
- A personal financial effect, that is, an effect on the councilmember's personal expenses, income, assets or liabilities, because of possible water rate increases imposed on his property. (Section 87103 (first paragraph).) However, Regulation 18702.5(c) provides that if a governmental decision affects real property in which the official has a financial interest, the "personal financial effect" standard does not apply and materiality is determined under Regulation 18702.1. Thus, we do not further consider effects on the councilmember's personal finances.

Foreseeability and Materiality

To give rise to a conflict of interest under the Act, the effects of decision on a public official's financial interests must be both foreseeable and material. (Section 87103.) Generally, a financial effect is presumed to be reasonably foreseeable and material if the interest is explicitly involved in the decision. Regulation 18701(a) provides:

"A financial effect on a financial interest is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official's agency. A financial interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the financial interest, and includes any governmental decision affecting a

real property financial interest as described in Regulation 18702.2(a)(1)-(6).”²

None of the decisions you describe explicitly involve the councilmember’s business.

In all other cases, the decision’s financial effect is reasonably foreseeable if it can be recognized as a realistic possibility and more than hypothetical or theoretical. A financial effect need not be likely to be considered reasonably foreseeable. (Regulation 18701(b).)

Regulation 18702.1(b) sets forth the materiality standard applicable to the financial effect of a decision on an official’s business interest that is not explicitly involved in the decision is material if a prudent person with sufficient information would find it reasonably foreseeable that it would contribute to a change in the value of the privately-held business entity. Examples of decisions that may be applicable include those that:

“(1) Authorize, prohibit, regulate or otherwise establish conditions for an activity in which the business entity is engaged;

* * *

“(6) Increase or decrease the tax burden, debt, or financial or legal liability of the business entity.”

In the case of the decisions in question, these all relate to the regulation of the development of property. The decisions also impact developers financially. (See e.g., “Subdivision Map Act,” commencing with Section 66410 of the Government Code.)³ You stated that the councilmember is a land owner, business owner, and property developer and is subject to fees such as developer impact fees or subdivision and parcel map fees. Therefore, we conclude that a prudent person would find it reasonably foreseeable that the fee decisions will materially affect the councilmember’s business and he will have a conflict of interest in those decisions.

Note that a public official who holds an office specified in Section 87200 (such as a city councilmember) that has a conflict of interest in a decision to be considered at a noticed public meeting must: (1) publicly identify each financial interest that gives rise to the disqualifying conflict of interest, (2) recuse himself or herself from the decision, and (3) leave the room for the duration of the discussion and/or vote on the item. (Section 87105; Regulation 18707.)

² The standards in Regulation 18702.2(a)(1)-(6) pertain to property owned by a public official. The developers’ fee issue is not a decision concerning real property. These fees are imposed on developers seeking approval for future developments.

³ “It virtually goes without saying that the purpose of subdividing property is to facilitate its use and development. (See Gov. Code, § 66424 [defining “subdivision” for purposes of the Subdivision Map Act (Gov. Code, § 66410 et seq.) as “the division, by any subdivider, of any unit or units of improved or unimproved land, or any portion thereof, shown on the latest equalized county assessment roll as a unit or as contiguous units, for the purpose of sale, lease, or financing, whether immediate or future” (italics added)].) Presumably no one goes to the trouble of subdividing property just for the sake of the process; the goal of subdividing property is to make that property more useable.” (*Rominger v. County of Colusa* (2014) 229 Cal. App. 4th 690.)

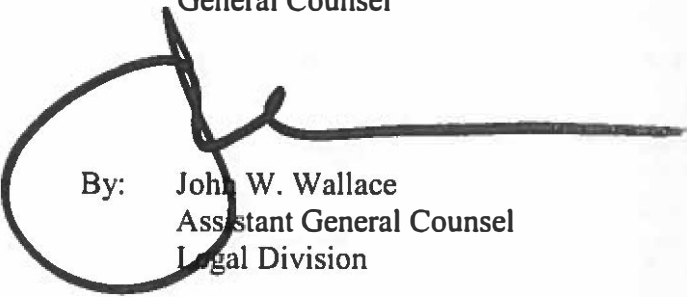
Section 1090

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.) However, your questions do not appear to concern contracts. For example, "A development agreement contains the essential elements of a contract as defined by the Legislature. '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."⁴ (Civ. Code, § 1550.) In contrast, your questions concern generally applicable rules and ordinances that are not contractually based. Therefore, Section 1090 would not apply.

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

Sincerely,

Jack C. Woodside
General Counsel



By: John W. Wallace
Assistant General Counsel
Legal Division

JWW:jgl

⁴ In Question 4 you asked if it was a conflict of interest for City Council Member Nunley to sit on a City committee approving acquisition by the City of a right-of-way that would result in a direct financial benefit to City Council Member Nunley from a prior land sale. However, the question is hypothetical and without further facts we cannot advise with respect to Section 1090.