



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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January 10, 2018

Barbara Balen
P O Box 934
Columbia, CA 95310

Re: Your Request for Advice
Our File No. A-17-235

Dear Ms. Balen:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act")¹ and Government Code 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 Tuolumne 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

Do you have a conflict of interest under Section 1090 or the Act in future discussions involving the ditch system and reservoirs operated by the Tuolumne Utilities District ("TUD")?

CONCLUSION

You have not presented any pending decisions that would implicate Section 1090. However, the Act prohibits you from taking part in decisions relating to the lining of the Table Mountain Ditch, because those decisions would have a reasonably foreseeable material financial effect on your real property interest. You may be able to participate in certain decisions involving other sections of the ditch system and reservoirs which do not involve sections of the ditch system that run through your property, or can be segmented.

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.

FACTS

You currently serve as an elected member of the TUD Board in Tuolumne County. You previously served two terms on the TUD board between 2003-2012. Your current term began December 2016.

TUD was formed in 1992 and owns and operates over 352,000 linear feet of ditches. TUD uses the ditch system, originally constructed in the 1850s by miners during the gold rush, to move water from one location to another for ultimate use, treatment, or disposal. The gravity-fed ditches, flumes, canals and reservoirs were engineered to work with the existing creeks and to deliver water from the Sierra rivers to the gold fields in the foothills below. The ditches meander through both public and private lands, and in many cases, have begun to mimic natural waterways. The ditch system has been operated and maintained since the 1850s largely by TUD's predecessors. Maintenance activities currently include ditch cleaning, ditch lining with clay, wood, or concrete ("gunite"), and replacing portions of ditch with pipe.

You also note that you are a TUD raw water customer. You live in a rural part of the central Sierra foothills in what the Forest Service and CAL FIRE have designated the Wildland Urban Interface. A portion of the Table Mountain Ditch runs through your property.

In 2014, while a private citizen, you sued TUD, as Legacy Waterways, for lack of CEQA compliance. The lawsuit alleged that "[s]hotcreting [lining] sections of the District's ditches will result in the removal of riparian vegetation and riparian habitat and an increase in fire danger. Shotcreting also interferes with and impacts groundwater recharge along the ditch system."

TUD ultimately decided to settle the lawsuit. In addition to paying attorney's fees, TUD agreed that before it does any future ditch guniting, it will complete an initial study and negative declaration or environmental impact report. The settlement specifically prohibited maintenance on the Table Mountain Ditch, the same ditch that runs through your property.

On August 29, 2017, the TUD board had a public study session on the District's draft Mitigated Negative Declaration ("MND") on the Ditch Maintenance Plan in compliance with the California Environmental Quality Act ("CEQA"). After review of the draft you became concerned with the lack of maintenance alternatives and adequate mitigation measures for loss of habitat. On September 7, 2017, concerns were raised regarding a potential conflict of interest under the Act. You note that you recused yourself from the vote on the MND at the September 12, 2017 TUD board meeting.

ANALYSIS

Government Code Section 1090:

As a member of the TUD Board, you are subject to the provisions of Section 1090, as is the Board itself. 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.) However, you have not presented any pending decisions that would implicate Section 1090.

Conflict of Interest under the Act:

Under Section 87100, the general rule is that a conflict of interest exists whenever a public official makes, participates in making, or uses his or her position to influence a governmental decision which has a reasonably foreseeable material financial effect on one or more of the official's financial interests. You have identified one interest that may result in a conflict of interest; an ownership interest in real property. (Section 87103(b).)

Foreseeability

A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official's interests is material. The standard for foreseeability differs depending on whether an interest is explicitly involved in the decision. Under the facts you have provided, your property is not explicitly involved in any decisions. Thus, Regulation 18701(b) provides: "In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable."

Materiality

As relevant to your facts, the financial effect of the TUD's decisions on the ditch system and reservoirs is material if the decisions:

- Would change the character of the parcel of real property by substantially altering traffic levels or intensity of use, including parking, of property surrounding the official's real property parcel, the view, privacy, noise levels, or air quality, including odors, or any other factors that would affect the market value of the real property parcel in which the official has a financial interest (Regulation 18702.2(a)(10));
- Would consider any decision affecting real property value located within 500 feet of the property line of the official's real property... Notwithstanding this prohibition, the Commission may provide written advice allowing an official to participate under these circumstances if the Commission determines that there are sufficient facts to indicate that there will be no reasonably foreseeable measurable impact on the official's property (Regulation 18702.2(a)(11)); or
- Would cause a reasonably prudent person, using due care and consideration under the circumstances, to believe that the governmental decision was of such a nature that its reasonably foreseeable effect would influence the market value of the official's property (Regulation 18702.2(a)(12).)

You have noted that a portion of the Table Mountain Ditch runs through your property. You have also stated that the lining of ditches will result in the removal of riparian vegetation and riparian habitat and an increase in fire danger, and that it also interferes with and impacts groundwater recharge along the ditch system. Therefore, it appears that you would have a conflict

of interest in any decision involving the lining of the Table Mountain Ditch.² You will be prohibited from participating in any such decisions.

Please note that you may be able to participate in certain decisions involving other sections of the ditch system (those that do not run through or within 500 feet of your property) and reservoirs, which can be segmented from the decisions in which you have a conflict of interest. Regulation 18706 provides the method for segmentation of a governmental decision as follows:

- (a) An agency may segment a decision in which a public official has a financial interest, to allow participation by the official, provided all of the following conditions apply:
- (1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying financial interest;
 - (2) The decision in which the official has a financial interest is segmented from the other decisions;
 - (3) The decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official's participation in any way; and
 - (4) Once the decision in which the official has a financial interest has been made, the disqualified public official's participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified.

For purposes of this regulation, decisions are "inextricably interrelated" when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision. (Regulation 18706(b).)

Exception: Appearance as a Member of the General Public

An official is not making, participating in making or influencing a governmental decision if he or she makes an appearance "as a member of the general public before an agency in the course of its prescribed governmental function to represent himself or herself on matters related solely to the official's personal interest . . ." (Regulation 18704(d)(2).) The exception applies to real property "owned entirely by the official, members of his or her immediate family, or the official and members of his or her immediate family." (Regulation 18704(d)(2)(A).)

This exception is interpreted narrowly and does not allow an official to provide general comments regarding the matter. Care should be taken to clarify that the official is not acting in an

² Regulation 18702.2(c)(1) provides that a financial effect of a decision is not material if the decision "solely concerns repairs, replacement or maintenance of existing streets, water, sewer, storm drainage or similar facilities." However, decisions involving ditch guniting appear to involve more than the maintenance of existing infrastructure.

official capacity. (*McHugh Advice Letter*, No. I-98-324; *Gallagher Advice Letter*, No. I-94-279 and *Larsen Advice Letter*, No. A-87-151.) Thus, the exception does not permit an official to represent any other person's interests or the interests of any group.

To qualify for the exception, an official must follow the procedures set forth in Regulation 18707. The official must publicly identify each type of financial interest involved in the decision that gives rise to the disqualifying conflict of interest. The identification must be made after the announcement of the agenda item to be discussed or voted on, but before the discussion or vote commences. The official must also recuse himself or herself from voting on the matter, speak from the same area as the members of the public, and limit his or her remarks solely to the official's personal interests.

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

Sincerely,

Brian G. Lau
Assistant General Counsel



By: Zachary W. Norton
Senior Counsel, Legal Division

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