



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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July 31, 2018

Michael C. Ghizzoni  
Santa Barbara County Counsel  
105 E. Anapamu Street, Suite 201  
Santa Barbara, CA 93101

Re: Your Request for Advice  
**Our File No. A-18-048**

Dear Mr. Ghizzoni:

This letter responds to your request for advice on behalf of County Board of Supervisor Peter Adam regarding the conflict of interest provisions of the Political Reform Act (the "Act")<sup>1</sup> and Government Code Section 1090. Please note that we are only providing advice under the conflict of interest provisions of the Act and Section 1090. We are not providing advice under other general conflict of interest prohibitions such as common law conflict of interest, including Public Contract Code.

Also, note that 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. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

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 Santa Barbara 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).)

### QUESTIONS

1. Pursuant to the Act, may Supervisor Adam participate in making County decisions to modify the boundaries of the Santa Maria Groundwater Basin?
2. Pursuant to the Act and Section 1090, may Supervisor Adam participate in the County's decisions to create and enter into a "Santa Maria Fringe Coordination Agreement" with

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<sup>1</sup> 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.

other local governments to manage the non-adjudicated “Fringe Areas” to the Santa Maria Groundwater Basin?

### **CONCLUSIONS**

1. Yes. Supervisor Adam does not have a reasonably foreseeable, material financial interest in the decision on the proposed Basin boundary modification, and may participate in the decision.

2. No. Section 1090 prohibits Supervisor Adam from participating in any decisions related to the Fringe Coordination Agreement. However, it does not prohibit the County from making these decisions because the rule of necessity applies. Supervisor Adam must recuse himself from any decisions involving the Santa Maria Fringe Coordination Agreement.

### **FACTS AS PROVIDED BY REQUESTOR**

Peter Adam represents Santa Barbara County’s Fourth Supervisorial District, and took office in January of 2013. Supervisor Adam has five business interests that either lease or own parcels of land overlying the Santa Maria Groundwater Basin (“Basin”). His 17 owned or leased parcels all use Basin groundwater wells. He has been involved in litigation related to the Basin over his property and business interest’s Basin groundwater rights. None of Supervisor Adam’s business interests are located directly overlying the Fringe Areas.

In 2014, the Legislature enacted the Sustainable Groundwater Management Act (“SGMA”). (Water Code Section 10720, et seq.) SGMA provides a framework for the sustainable management of groundwater supplies by local agencies and requires governments and water agencies of high-priority basins, such as the Basin, to halt overdraft and bring groundwater basins into balanced levels of pumping and recharge.

The Basin, as an “adjudicated basin,” is exempt from most of the requirements of SGMA. However, there are “Fringe Areas” to this basin which are not managed pursuant to the adjudication and subject to the SGMA. These Fringe Areas make up approximately 7,000 acres of the approximately 184,000 acres of the Santa Maria Groundwater Basin. Most of the Fringe Areas are located in San Luis Obispo County. The Fringe Areas within Santa Barbara County represent a very small portion of the Basin’s water use.

Pursuant to SGMA, the Santa Barbara County Board of Supervisors, sitting ex-officio as the Santa Barbara County Water Agency Board of Directors (“Board”), has submitted an initial notification to the California Department of Water Resources (“DWR”) that it will submit a basin boundary modification request to remove the non-adjudicated “Fringe Areas” within Santa Barbara County from the groundwater basin. In the near future, the Board will also decide issues related to creating and entering into a coordination agreement between the Santa Maria Fringe Groundwater Sustainability Agencies (“GSAs”) of Santa Barbara County, San Luis Obispo County, and the City of Arroyo Grande (Santa Maria Fringe Coordination Agreement). In addition, the Board will decide on a Groundwater Sustainability Plan (“GSP”) for sustainable water management of its Santa Maria Fringe GSA.

### *Santa Maria Groundwater Basin*

The Basin is a coastal groundwater basin underlying about 184,248 acres that straddle the line between Santa Barbara and San Luis Obispo Counties. It extends from Santa Barbara County northwest to the cities of Arroyo Grande, Grover Beach, and Pismo Beach, as well as the Oceano Community Services District. The Basin is the principal source of water for thousands of residents and landowners and covers an estimated 2010 population of 201,759. According to the DWR, groundwater satisfies a greater percentage (83 percent) of the agricultural and urban demand in the central coast area than it does in any other part of the State. (DWR Bulletin 118-Update 2003, at p. 115.)

### *Litigation and Stipulation*

In 1997, litigation occurred to identify and prioritize the water rights held by the many users of the Basin's groundwater. The County and, eventually, numerous overlying landowners, including Supervisor Adam, were parties to the litigation.

A stipulated agreement ("Stipulation") was reached in 2005 which settled most of the conflicting water rights claims and allocated the various components of the groundwater among the stipulating parties. It also set up a comprehensive Basin-wide groundwater management program that calls for continuing judicial oversight.

Two groups of landowners, mostly farmers and including Supervisor Adam, did not enter into the 2005 Stipulation and continued their litigation. In 2012, the court decided that the appealing landowners, such as Supervisor Adam, were entitled to (1) a judgment declaring their overlying rights to be prior to all appropriative rights in the native groundwater, less the volume to which Santa Maria and Water Company were entitled pursuant to their prescriptive rights and that (2) the judgment on allocation of return flows and salvaged water required clarification to insure that the Respondent's priority right to the salvaged water does not exceed the amount of water actually saved. (*City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266.) Currently, Supervisor Adam is actively involved in this ongoing litigation surrounding water rights to the Santa Maria Groundwater Basin and has not joined in the Stipulation.

### *Santa Maria Fringe Groundwater Sustainability Agencies (GSAs)*

Pursuant to SGMA requirements, three separate GSAs, collectively referred to as the "Santa Maria Fringe GSAs," have been formed by the County, the City of Arroyo Grande, and San Luis Obispo County to cover each entity's jurisdictional area of the non-adjudicated Fringe Areas of the Basin. A GSP may be carried out by "multiple plans implemented by multiple groundwater sustainability agencies and coordinated pursuant to a single coordination agreement that covers the entire basin." (Water Code Section 10727(b)(3).)

The Santa Barbara County Board of Supervisors is the decision-making authority for its Santa Maria Fringe GSA. The County's Fringe Area GSA is required to develop a Groundwater Sustainability Plan ("GSP") to meet sustainability goals. You state that it is "unclear what preparation of a GSP would accomplish in these areas." You believe that, due to the Fringe

Area's very small portion of the Basin within Santa Barbara County and its water use, it does not appear that the County's management of the non-adjudicated fringe-areas of the Basin would cause any significant increase or decrease in the Basin's overall water supply that would financially affect Supervisor Adam's business entities. However, regarding the cumulative Fringe Area including the area in San Louis Obispo County, you state that because the adjudicated portion of the Basin and the Santa Maria Fringe GSAs are physically connected to one another, the GSP of one could foreseeably affect the sustainability of another.

### *Boundary Modification*

DWR will allow basin modifications for limited reasons. The County Water Agency has proposed several reasons to support the proposed Santa Maria groundwater basin boundary modification. You note that the various reasons for the basin boundary request include:

- *Improperly mapped consolidated materials.* This is based on hydro-geological concerns. You indicate that the original basin boundaries, as determined by DWR, were based on alluvium which does not always take into consideration bedrock, and therefore, there are other geological factors that should be considered when determining the boundaries of the basin and that would reduce the boundaries of the basin.
- *Parcels managed pursuant to the adjudication that are split by the shapefile that the basin water master provided to DWR.* The boundaries of the basin in the court adjudication are not accurately reflected the DWR's basin boundaries. The water masters/managers of the groundwater basin gave DWR shapefiles for the basin boundary but they did not include the full parcel boundaries for parcels that were split by the basin boundaries. The adjudication treated parcels split by the adjudication as fully within the basin. Because these parcels are subject to the adjudication they should be managed by the adjudication and not by a separate groundwater sustainability agency for the fringe areas of the basin.
- *Areas of limited connectivity and limited contribution to the main basin, and/or areas of limited to no groundwater use.* There are a few areas that DWR has included in basin that look like fingers, which the County proposes to remove from the basin boundaries because hydro-geologically those areas are not connected or have limited connection to the basin or there is no groundwater use in those areas.

The Fringe Areas the County has proposed to remove from the boundaries of the Basin are a relatively small portion of the area currently included in the Basin. Additionally, as noted below, none of Supervisor Adam's interests overlie the Fringe Areas.

### *Supervisor Adam's Economic Interests:*

Supervisor Adam is an owner and Vice President of Adam Brothers Farming, Inc. ("Adam Brothers"), located in Santa Barbara County. Adam Brothers plants and harvests year-

round over 1,800 acres of vegetables, including but not limited to broccoli, cauliflower, celery, and lettuce. Adam Brothers has seven leaseholds on land overlying the Basin.

Collectively, Adam Brothers' leaseholds overlie 1,479.6 acres of the Basin and all of these leaseholds utilize groundwater wells. One of these leaseholds is 5.00 acres and located on a large 5,975.79-acre parcel that overlies both the Adjudicated Basin and the Fringe Areas. However, this specific leasehold overlies the Adjudicated Basin, and does not overlie the Fringe Areas. This parcel is designated for agricultural preserves under the Land Conservation (Williamson) Act, Government Code Section 51200, et seq.

Supervisor Adam's other interests are as follows:

- A member and has a 10% or greater ownership interest in PDK Farming, Inc. ("PDK"), which is a farming company. PDK owns and farms on one parcel overlying the Basin, which is 305.94 acres.
- A member of and has a 25% interest in Iceberg Holdings, LLC ("Iceberg"). Iceberg owns 676.79 acres of land overlying the Basin, which are used to farm agriculture and utilize groundwater wells. Iceberg also holds a 75% investment interest in Holly Land & Lime ("HL&L"). (See below.)
- A 10% interest in Red Diamond Cooling, Inc. ("RDC"), a produce cooling business. ROC leases a property over the Basin, which is 5.04 acres and used for packing plants. ROC also has a 25% investment in HL&L. (See below.)
- HL&L is a lessor of real property and participates in retail lime sales operations. HL&L owns a parcel overlying the Basin, which is used for food processing.

## ANALYSIS

### **Political Reform Act: Basin Boundary Modification**

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. A public official has a "financial interest" in a governmental decision, within the meaning of the Act, 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 set forth in Section 87103, which includes:

- A business entity in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d).)

- Real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b).)<sup>2</sup>
- Source of income aggregating \$500 or more in value provided or promised to, received by, the official within 12 months prior to the decision. (Section 87103(c).)

In this case, Supervisor Adam has interests in the aforementioned businesses and source of income interests, as well as interests in the 17 parcels of real property either owned or leased by these businesses.

### **Foreseeability and Materiality**

We must determine whether the financial effect of those decisions on each of the respective interests is both foreseeable and material.

Under the Act, an effect on an interest is presumed foreseeable if the interest is explicitly involved in the decision as a named party in, or subject of, the decision. (Regulation 18701(a).) An interest is the “subject” of a proceeding if the decision involves the any license, permit, or other entitlement to, or contract with, the interest, including a decision affecting real property under Regulation 18702.2(a)(1)-(6).<sup>3</sup> Regulation 18702.2(a)(2) provides that a real property interest, other than a leasehold interest, is the subject of the decision whenever the governmental decision “determines the parcel’s inclusion or exclusion from any city, county, district, or other local government subdivision, or other boundaries... .”

When the interest is not explicitly involved, a financial effect is reasonably foreseeable if it can be recognized as a realistic possibility and more than hypothetical or theoretical. (Regulation 18701(b).)

Regulation 18702.1(b) sets forth the materiality standard applicable to a decision’s financial effect on an official’s interest in a business entity, including real property containing a business entity, that is not explicitly involved in the decision. (See Regulation 18702.2(a)(8).) Under Regulation 18702.1(b), a financial effect is material if a prudent person with sufficient information would find it reasonably foreseeable that the effect would contribute to a change in the value of the business entity. The regulation notes “decisions that may be applicable” to include decisions that:

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

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<sup>2</sup> “Interest in real property” includes any leasehold, except periodic tenancies of one month or less. (Section 82033; Regulation 18233.)

<sup>3</sup> Regulation 18702.2 provides the materiality standard applicable to real property interests. A real property interest, other than a leasehold interest, that meets Regulation 18702.2(a)(1)-(6) satisfy both the foreseeability and materiality standards.

“(2) Increase or decrease the amount of competition in the field in which the business entity is engaged;

“(3) Increase or decrease the need for the products or services that the business entity supplies;

“(4) Make improvements in the surrounding neighborhood such as redevelopment projects, traffic/road improvements, or parking changes that may affect, either temporarily or permanently, the amount of business the business entity receives;

“(5) Decide the location of a major development, entertainment facility, or other project that would increase or decrease the amount of business the entity draws from the location of the project; or

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

The County has requested a Basin boundary modification removing the Fringe Areas located within the County from the Basin, which represent a relatively small portion of the cumulative Fringe Areas. Additionally, this modification will remove areas that all have some combination of the following properties: improperly mapped consolidated materials, parcels managed pursuant to the adjudication that are split by the shapefile that the basin water master provided to DWR, areas of limited connectivity and limited contribution to the main basin, and/or areas of limited to no groundwater use.

Considering that the Fringe Areas within the County are a small portion of the total Fringe Areas and the characteristics areas proposed for removal, it is not reasonably foreseeable that the Basin boundary modification within the County will have a material financial effect on Supervisor Adam’s interests. None of his business entities or their associated properties overlie the fringe portions of the Basin. There are no facts showing that the Basin boundary modification at issue would materially alter Supervisor Adam’s business costs, revenue, competition, or valuation of the entities themselves.

Accordingly, based on the facts you have provided, Supervisor Adam does not have a reasonably foreseeable, material financial interest in the decision on the proposed Basin boundary modification.

### **Government Code Section 1090: Fringe Coordination Agreement**

Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.” (*People v. Honig, supra*, at p. 333.) Officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*Ibid.*) 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. Vallerga* (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).) Similarly, “financial interest” is liberally interpreted and courts look to whether the officer had “the opportunity to, and did, influence execution directly or indirectly to promote his personal interests.” (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.)

In addition, 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) 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”].) Further, “the certainty of financial gain is not necessary to create a conflict of interest . . . (t)he 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).)

Typically, a contract is “made” on mutual assent of the involved parties. (*Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.) In addition, making or participating in making a contract has been broadly construed to include those instances where a public official has influence over the contract or its terms. (See 80 Ops. Cal. Atty. Gen. 41.)

Notably, when members of a public board, commission or similar body have the power to execute contracts, each member is conclusively presumed to be involved in the making of all contracts by his or her agency regardless of whether the member actually participates in the making of the contract. (*Thomson v. Call*, supra at pp. 645 & 649; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201; 89 Ops.Cal.Atty.Gen. 49 (2006).)

#### *The Santa Maria Fringe Coordination Agreement:*

In this case, the members of the Board are officials subject to the provisions of Section 1090, and would be negotiating and entering into a contract: the Santa Maria Fringe Coordination Agreement. The Agreement, will establish a coordinated groundwater stability plan (GSP) that affects the Fringe Areas including the area within San Louis Obispo County. Importantly, however, the facts state that because “the Basin and the Santa Maria Fringe GSAs are physically connected to one another, the GSP of one could foreseeably affect the sustainability of another.” Because of Supervisor Adam’s business interests and real property interests are related to agriculture, the sustainability of the water supply within the Basin may have significant effects on the interests. Accordingly, the Agreement’s GSP may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain, depending on the terms and conditions for Supervisor Adam. Based on the facts provided, Supervisor Adam has a prohibitory financial interest in the Santa Maria Fringe Coordination Agreement.

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).) “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. (See, e.g., 69 Ops.Cal.Atty.Gen. 102, 109 (1986) [“rule of necessity” applied to allow school board to enter into a memorandum of understanding with teachers’ association where a board member, married to a tenured teacher, has a financial interest in the contract]; 89 Ops.Cal.Atty.Gen. 217 (2006) [community college board 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].)

Here, Santa Barbara County, San Luis Obispo County, and the City of Arroyo Grande are required under state law to enter into a coordination agreement together to create a harmonized Santa Maria Fringe GSP. The Santa Barbara County Board of Supervisors is the decision-making authority for its Santa Maria Fringe GSA, and as a result, must be allowed to approve any coordination agreement to carry out its essential functions assuming no other entity has the authority to do so.

Based on these facts, and consistent with applicable law, we therefore conclude that the rule of necessity applies, and the Board of Supervisors may enter into the Santa Maria Fringe Coordination Agreement to fulfill its legal obligations. However, Supervisor Adam must not make or participate in making any decisions related to the Santa Maria Fringe Agreement.<sup>4</sup>

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

Sincerely,

Brian G. Lau  
Acting General Counsel



By: Zachary W. Norton  
Senior Counsel, Legal Division

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<sup>4</sup> In light of our conclusion that Supervisor Adam must recuse himself from participating in the decision under Section 1090, further advice under the Act is not necessary. However, the Act does set forth specific procedures for county supervisors to properly recuse themselves from a governmental decision, which must also be followed. (See Section 87105; Regulation 18704.5.)