



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

May 30, 2018

Charles Lester  
4545 Cherryvale Avenue  
Soquel, CA 95073

Re: Your Request for Advice  
**Our File No. A-18-060**

Dear Mr. Lester:

This letter responds to your request for advice regarding the post-government employment provisions of the Political Reform Act (the "Act") and Government Code Section 1090.<sup>1</sup> Please note that we are only providing advice under these provisions and not under other general conflict of interest prohibitions, such as common law conflict of interest, or the 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 San Mateo 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

As the former North Central Coast District Director of the California Coastal Commission, are you prohibited by the permanent ban or Section 1090 from working for the City of Half Moon Bay on the implementation of a lot retirement program ("Program") where you participated in the settlement agreement and the permit amendment proceedings which necessitated the Program?

### CONCLUSION

No. Because the implementation of the Program is a separate proceeding, the permanent ban does not prohibit your work for the City. Nor are you prohibited under Section 1090, where the

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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.

facts do not indicate that you had an influence over the Program in the earlier proceedings to “promote your personal interests” with respect to this future implementation contract.

### **FACTS AS PRESENTED BY REQUESTOR**

You were employed with the California Coastal Commission (“Commission”) from June 2, 1997 until your retirement from state service on September 14, 2016. You worked in the Commission’s Santa Cruz district office, as District Director of the North Central Coast District (2002-2011), the Executive Director of the Commission (2011 to February 2016), and as the Commission’s Climate Change Program Manager (March to September 2016). You now work as a private consultant.

You wish to work for the City of Half Moon Bay as an independent contractor on the implementation of the Program. The City must develop and implement the Program as a condition of the Commission’s 2008 Permit Amendment approving “Pacific Ridge,” a residential subdivision project in the City (“Project”). The Permit Amendment lot retirement program condition is consistent with a 2004 settlement agreement and subsequent modified development proposal for the Project.

#### *Background*

The Pacific Ridge Project raised traffic congestion concerns relating to Highways 1 and 92. In its initial decision on the permit application, the Commission required direct lot retirement to mitigate traffic concerns. This approach could have impacted development rights throughout San Mateo County to offset traffic congestion. Litigation ensued between the Commission, the City and the developer on a number of permit issues.

In 2004, the parties reached a settlement agreement. Relevant to traffic mitigation and lot retirement, the developer proposed an in-lieu fee of \$45,000 per lot, to be paid to the City on a payment schedule. Full payment of the in-lieu fees would discharge the developer of its responsibility to mitigate the Project’s traffic impacts. The City agreed to amend its Local Coastal Program (“LCP”) to include a lot retirement program and to use the fees to acquire and retire development rights on existing legal parcels in the City.

In the 2008 Permit Amendment, the Commission approved the in-lieu fee/lot retirement term in the settlement agreement and adopted it as “Special Condition 7.” In doing so the Commission found that the in-lieu fee proposed by the developer was adequate to mitigate the Project; and that the lot retirement program condition would offset the significant adverse cumulative traffic impacts resulting from the creation of new lots. There are no directions or details in either the settlement agreement or the Permit Amendment for determining which development rights to retire (size, location, characteristics, traffic generation, etc.) or how the City is to implement the Program.

You began your position as North Central Coast District Director in 2002, after the Commission’s initial decision on the Project, which led to the litigation. In your role of District Director, you participated in the settlement negotiations and subsequent permit process by

overseeing the case and supervising the lead staff directly involved. You state that you were “generally aware” of the developer’s in-lieu fee proposal. You do not recall any details about the lot retirement condition other than your understanding that the developer preferred to pay a fee and complete the obligation. The Executive Director was charged with the final decision to recommend the settlement with an in-lieu fee to the Commission. You do not believe that you were involved in the Project in any substantial way after the 2008 Commission approval of the Permit Amendment.<sup>2</sup>

The in-lieu fee/lot retirement condition was recently triggered in December of 2017, when the City provided final subdivision approvals and acted to accept the initial funds for lot retirement. You anticipate that your duties in designing an effective Program would include meetings with the City as to scope of the Program; identification and analysis of potential vacant lots for development-right retirement; establishing criteria for lot retirement; and establishing program parameters, policies and procedures. It would also involve drafting a LCP amendment for the Program. You note that future issues of traffic mitigation through lot retirement can be raised to the Commission in the development permit appeal process.

### ANALYSIS

The permanent ban prohibits a former state employee from “switching sides” and participating for compensation in certain proceedings involving the State of California and other specific parties, if the proceeding is one in which the former state employee participated while employed by the state. (Sections 87401 and 87402; Regulation 18741.1.)

The permanent ban is a lifetime ban and applies to any formal or informal appearance or any oral or written communication made with the intent to influence a judicial, quasi-judicial, or other proceeding in which you participated while serving as a state administrative official. (Section 87401.)

An official is considered to have “participated” in a proceeding if he or she took part in the proceeding “personally, and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation, or use of confidential information . . .” (Section 87400(d).) A supervisor is deemed to have participated personally and substantially in any proceeding that was pending before the agency under his or her direct supervisory authority. (Regulation 18741.1(a)(4).)

The 2004 settlement agreement and the 2008 permit proceeding each meet the definition of a “judicial, quasi-judicial or other proceeding.” (Section 87400(c).) You were involved in each proceeding in your capacity of overseeing the case and supervising the lead staff directly involved in the case work. In that role, you reviewed, discussed and authorized actions in these proceedings.

The permanent ban does not apply to “new” proceedings even in cases where the new proceeding is related to, or grows out of, a prior proceeding in which the official had participated.

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<sup>2</sup> You note that there was an appeal to the Coastal Commission of a project on the subdivision site in 2013 when you were the Executive Director. However, this project was unrelated to the lot retirement program in question, and the Commission did not take jurisdiction.

The application, drafting, and awarding of a contract, license, or approval is considered a proceeding separate from the monitoring and performance of the contract, license, or approval. (*Starovoytov* Advice Letter, No. A-14-149 citing *Anderson* Advice Letter No. A-98-159 and *Blonien* Advice Letter, No. A-89-463.) The “performance” or “implementation” proceeding is narrowly construed and limited to the execution of the existing terms of an existing contract. (*Lujan* Advice Letter, No. 14-009.)

The work you seek to perform, developing the Program and drafting the LCP amendment, falls in the category of implementation of the earlier settlement agreement and Permit Amendment proceedings. As such, it is a new proceeding, and the permanent ban would not bar your participation on behalf of the City in implementing the Program under the terms of the Permit Amendment.

### *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 remote or minimal 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.)

Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.” (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) Participation in the “making of a contract” is defined broadly and includes “the planning, preliminary discussions, compromises, drawing of plans and specifications and solicitation of bids ....” (*Stigall v. City of Taft, supra*, at pp. 569-571; see also *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237.) 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 this matter, you participated in the formation of the settlement agreement and the Permit Amendment. However, neither proceeding included specifications as to the Program, other than naming it as a condition and stating its purpose. Additionally, due to actions by the City and the developer, this condition has only now come into play 10 years after the execution of the Permit Amendment. During this time, you proceeded to the position of Executive Director for the Commission, and left the position to seek consultant work in 2016. These facts do not support a finding that you had influence over the formation of the Program condition such that it would “promote your personal interests” with respect to a future implementation contract. Accordingly, Section 1090 does not prohibit you from working on this Program.

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

Sincerely,

Brian G. Lau  
Assistant General Counsel

A handwritten signature in black ink, appearing to read "L. K. Harrison". The signature is stylized with a large initial "L" and a long horizontal stroke at the end.

By: L. Karen Harrison  
Counsel, Legal Division

LKH:jgl