



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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June 13, 2018

Marc G. Hynes  
District Counsel  
Cupertino Sanitary District  
5050 El Camino Road, Suite 205  
Los Altos, CA 94022

Re: Your Request for Advice  
**Our File No. A-18-093**

Dear Mr. Hynes:

This letter responds to your request for advice on behalf of William Bosworth, President and Director of the Cupertino Sanitary District Board, regarding the conflict of interest provisions of the Political Reform Act (the "Act")<sup>1</sup> and Government Code Section 1090. 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 Clara 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

Under Section 1090 and the Act, may Board President Bosworth participate in and vote on an Installer's Agreement for the Garrod Farms property given that his spouse is a beneficiary of the Garrod Trust, which owns the property.

### CONCLUSION

No. Under Section 1090, Board President Bosworth has a financial interest in the contract. However, because the rule of necessity applies, the District may enter into the contract with the Garrod Trust, but Board President Bosworth may not make or participate in any decisions involving the contract. Additionally, because the remedy in this situation under the Act would be the same, we do not analyze the conflicts of interest under the Act.

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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 AS PROVIDED BY REQUESTOR

You are legal counsel for the District seeking advice on behalf of Board President Bosworth. Pursuant to its statutory authority under Health and Safety Code section 4766, the District Board adopted an Operations Code. Article 3 of the Operations Code pertains to the construction of sewers by others, including lateral, sub-main or main sewers.

Section 5304<sup>2</sup> of the Operations Code, titled "Installer's Agreement," provides that an installer must enter into an agreement with the District prior to performing any sewer construction work. It further requires that any Installer's Agreement shall contain, among others, a provision for the "[c]onstruction of sewers in accordance with approved Plans, Profiles and Specifications."

You provided a sample Installer's Agreement with all the required provisions, including term number 3, which states "Installer hereby agrees to provide and assure said District and its employees and any person or persons designated by it the right to inspect said sanitary sewer facilities and the plans, materials and work thereof at any reasonable time or times before, during or after such are installed."

The District will be considering an application for an Installer's Agreement to connect the property located at 22647 Garrod Road in Saratoga to the District's sewer system. The property, also known as Garrod Farms, is owned by the Garrod Trust of which the spouse of Board President Bosworth is an approximate 8.7% beneficiary. You also stated that his spouse received income of approximately \$10,000 in the past year from the trust.

## ANALYSIS

### Section 1090

Generally, Section 1090 prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Under this section, "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.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

In this instance, it is not contested that Board President Bosworth is a public officer subject to the provisions of Section 1090 and that any Installer's Agreement between the Garrod Trust and the District constitutes a contract for purposes of Section 1090. Moreover, as Board President, Mr. Bosworth is presumed to be involved in the making of all contracts by the District Board irrespective of whether he actually participates in the making of the contract. (*Thomson, supra*, at pp. 647-649.) Thus, the determinative question is whether Board President Bosworth's financial interest<sup>3</sup> in any contract between the District and the Garrod Trust qualifies for an exception under

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<sup>2</sup> Your letter indicates the provision concerning the Installer's Agreement is found in Section 5205. However, our review of the Operations Code revealed that it is actually found in Section 5304.

<sup>3</sup> District Board President Bosworth's spouse received approximately \$10,000.00 from the Garrod Trust in the past year. Generally, a member of a board or commission always has a financial interest in his or her spouse's source of income for purposes of Section 1090. (See 78 Ops.Cal.Atty.Gen. 230, 235 (1995).)

Section 1090 as a “remote interest” or a “noninterest.”

Here, the only exception warranting analysis is the non-interest exception for the receipt of public services. Under Section 1091.5(a)(3), an officer or employee is deemed not 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.” The phrase “on the same terms and conditions” requires there be no special treatment of an official, either express or implied, because of that person’s status as an official. (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1101.) Accordingly, the public services exception generally will not apply when the provision of the service involves an exercise of discretion by the public body that would allow favoritism toward officials, or occurs on terms tailored to an official’s particular circumstances.<sup>4</sup>

In this case, by entering into an Installer’s Agreement with the Garrod Trust, the District would have the express authority to exercise its judgment and discretion regarding the unique connection of Garrod Farms property to the District’s sewer system. For example, the Installer’s Agreement requires that the “Plans, Profiles and Specifications” for the construction of sewers be approved by the District Engineer and District Board. (See also District Operations Code, § 5304.) Moreover, the Installer’s Agreement provides the “District and its employees and any person or persons designated by it the right to inspect said sanitary sewer facilities and the plans, materials and work thereof at any reasonable time or times before, during or after such are installed.” (See also District Operations Code, § 5203 [“No construction shall be covered until it has been inspected and approved by the District Engineer”].)

It is plain that the exercise of discretion by the District, unique and applicable only to the Garrod Farms property, pursuant to the District Operations Code and the Installer’s Agreement, would allow an opportunity for favoritism toward Board President Bosworth. Thus, the non-interest exception for public services does not apply in relation to the connection of the Garrod Farms property to the District sewer system. This conclusion, however, does not end the analysis.

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); (88 Ops.Cal.Atty.Gen. 106, 110 (2005).) “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, supra*, at p. 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. (69 Ops.Cal.Atty.Gen. 102, 109 (1986).)

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<sup>4</sup> (See *Lexin, supra* at 1088, 1100 at note 28; see also 88 Ops.Cal.Atty.Gen. 122, 128 (2005) [“discretionary or highly customized services” benefitting official would not come within “public services” exception].)

For instance, the “rule of necessity” has been applied to allow a school board to enter into a memorandum of understanding with a teachers’ association even when a board member is married to a tenured teacher and would have a financial interest in the contract. (69 Ops.Cal.Atty.Gen. 102 (1986).) Similarly, a community college board was 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. (89 Ops.Cal.Atty.Gen. 217 (2006).) In addition, a city councilmember who had an interest in a local cable franchise was allowed to use the rule of necessity to dispose of his interest where the city council was required to approve such disposition. (76 Ops.Cal.Atty.Gen. 118, 123-125 (1993).) And finally, in *Caminetti v. Pac. Mutual Life Insurance Co.* (1943) 22 Cal.2d 344, 366, the California Supreme Court held that the Insurance Commissioner may make contracts involving a delinquent insurer in which he holds a policy, despite the prohibitions in the predecessor statute to Section 1090 (former Section 920), since “[n]o other officer is authorized to perform the commissioner’s duties . . . .”

According to its website, the District provides sewer service to over 23,000 customers within the communities of Cupertino and other areas. (<http://www.cupertinosanitarydistrict.org>, as of June 7, 2018.) The stated mission of the District includes protecting “the public health and environment” and providing “for safe and cost-efficient collection of sewage waste within Cupertino Sanitary District.” (*Ibid.*) Assuming the District Board is the only entity authorized to act with respect to entering into the Installer’s Agreement, the District will not have the ability to otherwise provide its important and essential services to the Garrod Farms property if Section 1090 operates to prohibit such action.

Based on these facts, and consistent with applicable law, we therefore conclude that the rule of necessity applies, and the District may enter into the Installer’s Agreement with the Garrod Trust to carry out its essential functions of providing sewer services to properties within its jurisdiction. However, pursuant to the opinions of the Attorney General referenced above, Board President Bosworth must not make or participate in making any decisions involving such contract.<sup>5</sup>

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

Sincerely,

Brian G. Lau  
Acting General Counsel

By:   
Jack Woodside  
Senior Counsel, Legal Division

JW:jgl

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<sup>5</sup> Additionally, because the remedy in this situation is for Board President Bosworth to abstain from any participation in the contract, we do not need to further analyze the conflict of interest issue raised under the Act as his abstention pursuant to the rule of necessity would also satisfy the requirements of the Act.