



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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February 14, 2019

David J. Andres
General Manager
Tuolumne City Sanitary District
P.O. Box 1238
Tuolumne, CA 95379

Re: Your Request for Advice
Our File No. A-18-207

Dear Mr. Andres:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (“Act”)¹ and Government Code Section 1090, *et seq.*² on behalf of Tuolumne City Sanitary District Board Members William Waters and Wren Easter. Please note that we are only providing advice under the conflict of interest provisions of the Act and Section 1090, not under other general conflict of interest prohibitions, such as common law conflict of interest.

Also, note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71); 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.

Regarding 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.” (Section 1097.1(c)(5).)

QUESTION

Are either Tuolumne City Sanitary District Directors William Waters or Wren Easter prohibited under the Act or Section 1090 from participating in decisions regarding the review and modification of a Sanitary District ordinance, given that Director Waters’ spouse and Director Easter are employed by entities affiliated with the organization requesting the review and modification?

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.

² Government Code Sections 1090 through 1097.5.

CONCLUSION

Neither Director Waters nor Director Easter have a disqualifying conflict of interest under Section 1090, as the ordinance in question is regulatory in nature. Director Waters' financial interest does not constitute a disqualifying conflict of interest under the Act due to the ordinance review decisions having an attenuated effect on his spouse's employer. Moreover, despite a potential effect on the financial interest, Director Easter is not prohibited from taking part in the decisions under the public generally exception in Regulation 18703(e)(1).

FACTS

The Tuolumne City Sanitary District is a wastewater district. Its board of directors consists of five members. The members are elected by district-wide voting of registered voters, and directors must reside within the district's boundaries. Director William Waters has served on the Board since 2012; Director Wren Easter has served on the Board since 2017.

The Tuolumne Band of Me-Wuk Indians ("Tribe") own, operate, and employ personnel at the Black Oak Casino Resort and Westside Pavilion within the district. They are a sovereign nation recognized by the Bureau of Indian Affairs. The Tuolumne Economic Development Authority is a not-for-profit organization formed by the Tribe that employs personnel to provide construction, development, training, and economic advancement services on its behalf.

The Economic Development Authority is governed by the Tuolumne Me-Wuk Tribal Council ("Tribal Council"). The Tuolumne Me-Wuk Indian Health Center, Inc. ("Health Center") employs personnel to provide preventative health care, illness and injury treatment, and related medical services to both the public and Tribe members. Their facilities are also located within the district and under the jurisdiction of the Tribal Council.

Director Waters' spouse is employed by the Health Center as a billing specialist. Mrs. Waters' position with the Health Center does not involve discussions or decision making with regards to Sanitary District, Tribe, Health Center, or Economic Development Authority agreements.

Director Easter is employed by the Tribal Council as an account analyst. Director Easter's position with the Tribal Council does not involve discussions or decision-making with regards to Sanitary District or Tribe agreements.

The Economic Development Authority provides construction job training to both Tribal members and the general public who they employ to build various facilities on Tribal lands. The Economic Development Authority constructed an RV Park on behalf of the Tribe, which the Tribe owns and operates it. The RV Park is the only RV park served by the Sanitary District.

Anyone constructing a new building or other facility requiring sewer service is required to pay a "connection fee" to the Sanitary District. Hence, the Sanitary District required payment of the fee during the construction of the RV Park by the Economic Development Authority in order for the Sanitary District to subsidize the cost of District-owned facilities, such as collection system pipelines and the treatment and disposal facilities.

The Economic Development Authority paid the “connection fee” on behalf of the Tribe as it was the entity constructing the facility. Subsequently, they submitted a letter to the Sanitary District to request that the District “contest the .5 [equivalent dwelling unit] per space connection factor the [Sanitary District] ordinance uses for RV parks.” In doing so, the Economic Development Authority asked for the Sanitary District to review and modify its ordinance, in hope that the District will lower its fee.

The Economic Development Authority is not a tenant of the RV Park. Their involvement solely relates to the physical construction of the RV Park and paying the connection fee to the Sanitary District. The rates charged to the tenants of the RV Park are not directly related to the connection fee, as the rates charged to the tenants are more closely related to the Tribe’s on-going operation and maintenance costs of the campground.

You have indicated that the Economic Development Authority likely seeks a reduction of the Sanitary District’s connection fee in order to recoup excess payment of the original fee. You also stated that the Economic Development Authority may be interested in acquiring credits for its original payment for future development projects, such as a community center.

ANALYSIS

Section 1090:

Section 1090 generally prohibits public officials, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than non-interests 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.) Section 1090 is intended “not only to strike at actual impropriety, but also to strike at the appearance of impropriety.” (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.)

In an Attorney General Opinion, the owner of an ambulance service that held a certificate of public convenience and necessity from the city authorizing the ambulance service to operate within the city was elected the mayor of the city. The Attorney General determined that Section 1090 did not prohibit the owner of the ambulance service operating under the certificate from holding the office of mayor of the city. (84 Ops.Cal.Atty.Gen 34, 36 (2001).) The Attorney General also determined that the city’s modification of a rate schedule incorporated as a term of the certificate was a regulatory matter and not a “contract” for purposes of Section 1090.

Similar to the modification in the Attorney General Opinion, review and modification of the Sanitary District’s ordinance and attendant rate schedule is a regulatory matter and not a “contract” in the ordinary sense of the word. Accordingly, Section 1090 does not prohibit the officials from reviewing and potentially modifying the ordinance.

The Act:

The Act's conflict of interest provisions ensure that public officials perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them. (Section 81001(b).) Specifically, Section 87100 prohibits any public official from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest. An 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 official's financial interests. (Section 87103.)

Of the financial interests recognized under Section 87103 of the Act, those implicated by your account of the facts are the following:

- Source of Income – A public official has a financial interest in any person from whom he or she has received income, including commission income and incentive compensation, aggregating \$500 or more within 12 months prior to the time when the relevant governmental decision is made. (Regulation 18700.1(a)(1).) A public official's "income" for conflict of interest purposes includes his or her community property interest in the income of his or her spouse. (Section 82030(a).)

A Native American Tribe is a "government" or a "governmental authority." (See, eg., *United States v. Wheeler* (1978) 435 U.S. 313, 322-323; *Battersby* Advice Letter, No. A-98-176.) According to the Tribe's website, the governing body of the Tribe is a legislative assembly known as the Tribal Council. We have previously stated that income paid by a Tribe of \$500 or more within the 12 months preceding a governmental decision may constitute a disqualifying interest. (*Galante* Advice Letter, No. A-97-469.) Accordingly, Director Easter has a source of income financial interest in the Tribe because her employer, the Tribal Council, will have paid her \$500 or more in compensation in the 12 months preceding the decisions. (Section 87103(c).)

Additionally, Director Waters has a source of income financial interest in the Health Center by virtue of his spouse's income from the Health Center assuming the Director's community property share in the income is \$500 or more in the 12 months preceding the decisions. However, Director Waters does not have a financial interest in the Tribe itself. While an official with a financial interest in a business entity also has an interest in a parent or subsidiary of the business entity or an otherwise related business entity (Regulation 18700.2(c)), the Health Center was formed as a non-profit organization. As a non-profit, the Health Center is not considered a business entity. (Section 82005.)³ Accordingly, the Health Center is considered a separate entity from the Tribe itself.

³ "Business entity" means any organization or enterprise operated for profit, including but not limited to a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation or association

Foreseeability.

A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official's interest is material. (Section 87100.) The standard for foreseeability differs depending on whether an interest is explicitly involved in the decision. (Regulation 18701.) An interest is explicitly involved in a decision if the interest is a named party in, or the subject of, the governmental decision. (Regulation 18701(a).) Under the facts you provided, neither the Health Center nor the Tribal Council are explicitly involved in the decisions. Thus, Regulation 18701(b) provides: "[i]n general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable."⁴

Materiality Standard: Financial Interest is a Source of Income.

Regulation 18702.3 provides the materiality standard for an interest in a source of income including a source that is a non-profit. Under Regulation 18702.3(a)(3), an effect is material if the non-profit organization will receive a measurable financial benefit or loss, or the official knows or has reason to know that the non-profit has an interest in real property that will be financially affected under the standards applied to a financial interest in Regulation 18702.2.

Here, it is not reasonably foreseeable that the Health Center will experience a "measurable financial benefit or loss" arising from the Sanitary District's decisions to review its ordinance, and there is no indication of an effect on property owned by the Health Center. Even assuming that the implications of the Sanitary District's ordinance decisions could materially benefit the Tribe in the form of future development cost, the effect on the Health Center is attenuated. Accordingly, Director Waters does not have a disqualifying conflict of interest under the Act.

Regarding the potential effect on Director Easter's interest in the Tribe, the decisions' effect on the Tribal Council is more evident. For instance, the Tribe employs personnel to provide construction services on its behalf and governs the construction. Thus, lowering the fee could affect future construction costs for the Tribe. However, despite a potentially disqualifying conflict of interest, an official is not disqualified if the decisions' effect on the official's interest is indistinguishable from the effect on the public generally.

Public Generally.

Interpreting the public generally exception, Regulation 18703(e)(1) establishes a decision's effect on an official's interest is indistinguishable from the effect on the public generally if the decision establishes or adjusts assessments, taxes, fees, or rates for water, utility, or other broadly provided public services or facilities that are applied equally, proportionally, or by the same percentage to the official's interest and other businesses, properties, or individuals subject to the assessment, tax, fee, or rate. In this case, the proposed decisions involve the lowering of the connection fee for all RV parks including a potential refund of the previous fee paid by the Economic Development Authority. The Sanitary District's implementation of a connection fee to all RV parks arises from a broadly-provided public service. Moreover, because the refund of the

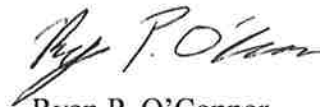
⁴ Regulation 18701(b) also provides a non-exhaustive list of six factors that may be considered in the "reasonably foreseeable" determination.

previous fee will be a refund to the Economic Development Authority, there is no indication the Tribe would be uniquely affected by the decisions. So long as all future developers are subject to the same connection fee if adjusted, Director Easter may take part in the decisions to adjust the connection fee.

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

Sincerely,

Dave Bainbridge
General Counsel



By: Ryan P. O'Connor
Counsel, Legal Division

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