



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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November 22, 2024

Jeremy Lee Holm
Coachella Valley Water District
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2855 E. Guasti Road, Suite 400
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Re: Your Request for Advice
Our File No. A-24-100

Dear Mr. Holm:

This letter responds to your request for advice on behalf of Coachella Valley Water District Board Director Anthony Bianco regarding the Political Reform Act (“Act”) and Government Code Section 1090, et seq.¹ Please note that we are only providing advice under the Act Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including 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. Further, the Commission is not authorized and does not provide advice concerning past conduct. (Section 1097.1(c)(2) and Regulation 18329(b)(6)(A).) Therefore, nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General’s Office and the Riverside 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

May the Coachella Valley Water District (“CVWD”) Board enter into an easement purchase agreement with Anthony Vineyards, Inc. in order to provide water to a wetland compensatory site (“Garfield Mitigation Site”) through a pipeline crossing Anthony Vineyards’ property, where Board of Director Anthony Bianco has an ownership interest and is employed by Anthony Vineyards, Inc?

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 18104 through 18998 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.

CONCLUSION

Director Bianco has a disqualifying financial interest in the decision under the Act and under Section 1090 and may not participate in the easement purchase agreement. Under the prohibitions in Section 1090, his interest precludes the Board from entering into the agreement as well. However, the Board may use its power of eminent domain to acquire the easement through a court-supervised condemnation proceeding without triggering a Section 1090 violation, so long as Director Bianco recuses himself from any participation in the decisions to initiate the condemnation proceeding as well as the purchase agreement.²

FACTS AS PRESENTED BY REQUESTER

CVWD is a special district that delivers irrigation and domestic drinking water, collects and recycles wastewater, provides regional storm water protection, replenishes the groundwater basin and promotes water conservation. CVWD's service area covers approximately 1,000 square miles from the San Geronio Pass to the Salton Sea, mostly within the Coachella Valley in Riverside County, California.

Director Bianco was elected to CVWD's Board ("Board") in 2020 and is subject to the Act and Section 1090. Director Bianco is a salaried employee of Anthony Vineyards, Inc. ("Anthony Vineyards"), an agricultural grower and shipper with operations in Bakersfield, California, and the Coachella Valley. Director Bianco also holds an ownership interest in Anthony Vineyards, which includes the businesses operated by the corporation and the properties held by the corporation. As detailed below, one of Anthony Vineyards' properties has been identified by CVWD as a location for a 2,900-foot pipeline easement in order to bring a permanent water supply to a selected wetland mitigation site, the "Garfield Mitigation Site," as a part of CVWD's Palm Desert Groundwater Replenishment Project.

Palm Desert Groundwater Replenishment Project & Proposed Wetland Mitigation

CVWD's Palm Desert Groundwater Replenishment Project ("Replenishment Project") is a water supply reliability project set to occur in two phases. Phase 1 has already been completed. Phase 2 of the Replenishment Project includes the construction of three (3) groundwater replenishment ponds within the Whitewater River Stormwater Channel in the city of Palm Desert. The Replenishment Project is designed to replenish up to 15,000 acre-feet per year of groundwater within the West Whitewater River Subbasin Area of Benefit of the Coachella Valley Basin. Permitting for the Replenishment Project started in 2018 and concluded in December 2023 after CVWD received the 404 Permit from the U.S. Army Corps of Engineers ("USACE"), which authorizes the construction and operation of the Replenishment Project within the Waters of the United States.

² We further caution that because of his financial interest in the related Garfield Mitigation Site and easement decisions, Director Bianco should not participate in any Replenishment Project decisions without seeking additional advice.

The Garfield Mitigation Site

Part of obtaining USACE's 404 Permit approval for the Replenishment Project involved CVWD's proposal to implement the "Garfield Mitigation Site," a compensatory wetland site, detailed in CVWD's Replenishment Project Habitat Mitigation and Monitoring Plan ("HMMP"). As background, CVWD had originally planned for the Replenishment Project's mitigation needs to be met through the use of mitigation credits. In March 2022, the Board approved spending \$4,639,733 for "in-lieu fee credits" for this purpose. However, the USACE removed that option in August 2022.

To fulfill its mitigation obligation and receive the 404 Permit, CVWD looked to proposing a 3-acre wetland on the Garfield site to the USACE. You clarified that the Board did not participate in this pivot to the Garfield site for mitigation. In a phone conversation with you and Carrie Oliphant, CVWD's Director of Engineering, held on October 9, 2024 and in follow-up documents, you each explained that due to the Board's March 2022 approval of the fee credits, the CVWD staff did not go back to the Board for an additional authorization specific to the 3.0 acre Garfield Mitigation Site's selection or the authorization to hire a consultant to prepare the HMMP regarding the site. CVWD staff allocated a portion of the previously approved fee credit funds (\$58,348) to hire the consultant, Environmental Science Associates, to prepare a "defined mitigation project which will replace the no-longer available in-lieu fee credits" under "Task Order No. 2." The consultant was tasked with preparing the HMMP for the Garfield site to obtain the necessary 404 Permit. The Task Order No. 2 was authorized by CVWD's General Manager.

You and Ms. Oliphant further explained that the initial facts provided with this request, taken from the HMMP, misstated that there were two sites considered for the mitigation site. CVWD staff only considered the Garfield site.³ Summarizing the facts provided, the Garfield Site was selected because it is available for creating a wetland habitat in the watershed and available for conservation purposes, owned by CVWD, and provides CVWD with the opportunity to combine this project with a larger CVMSHP (Coachella Valley Multi-Species Habitat Conservation Project) mitigation project.

The HMMP proposed an irrigation supply pipeline to bring a permanent source of water to create and maintain the proposed wetland site, using 36 acre-feet of water, per year, supplied by CVWD. The HMMP describes the water being conveyed through the extension of the existing Mid-Valley Pipeline from a CVWD Water Reclamation Plant, No. 10, located immediately adjacent to the project site. The HMMP does not discuss the need for an easement on the Anthony Vineyards property. (See discussion below). It does state that there are possible alternative water sources:

If the primary water source becomes impracticable, two alternate water sources would be available as a contingency. First, as a future planned project, the adjacent CVMSHCP Garfield habitat parcels will receive water supply via a newly built irrigation pipeline from the Coachella canal. This Pipeline will be independently operated by CVWD. The Garfield habitat projects are expected for final agency

³ It appears that the HMMP, and the request, were based on a draft workplan relating to the Garfield site and a second site related to a larger project, the Coachella Valley Multi-Species Habitat Conservation Project ("CVMSHP").

approval in 2023 and will be moving into the design, environmental review permitting, and implementation stages. This supply line will also incorporate long-term water demand for this proposed mitigation site, thereby providing redundancy in CVWD's ability to provide the necessary water supply. A second, alternative water source would be construction of an on-site groundwater well.

(HMMP, Section 4.4, Establishment of Permanent Water Source, p. 25.)

You confirmed by email that the noted alternatives do not require the Anthony Vineyards' easement. However, these alternatives are more expensive than the pipeline/easement option and require further USACE approval. You note that the water source for the larger project (CVMSHCP) is proposed to come off of the Coachella Canal and involves installing a turn-out off of the canal, which is an expensive and large undertaking for this small amount of water (approximately 22 gallons per minute). Further, this alternative is only available if the regulatory agencies approve of the mitigation for the CVMSHP at the Garfield site location, which has not yet occurred. The water source for the larger project (CVMSHCP) does not have an approved Work Plan yet.⁴ The only other source of water that is potentially available is drilling a well. The cost of drilling the well and equipment is approximately \$1.5 Million. The reason for the high costs is that there isn't access to permanent power at the site, so CVWD would have to install and rely on solar power and install a backup generator (2 sources of power for reliability). In addition, CVWD would need to get USACE's concurrence that a well is acceptable for the long-term water commitment. The total cost of installing the proposed pipeline is approximately \$600,000. The pipeline is less expensive overall, less maintenance intensive, and more reliable into perpetuity than the well and power equipment.

As noted above, the HMMP discusses the need for a pipeline to bring water to the Garfield Site but does not discuss the need for a pipeline easement on any private property. You explained that on February 27, 2024, the Board approved a consultant (Stantec) to design the 3-acre Garfield Mitigation Site. In that design process, Stantec determined the need for the pipeline easement. Initially, it was thought that a pipeline could be installed within the public right-of-way running in the north/south direction along Garfield Street and in the east/west direction along 70th Avenue. However, due to the agricultural and rural properties in this area, there are encroachments within the public right-of-way (such as yards, trees, etc.), which didn't leave enough room for the pipeline to be installed. So, for the east/west alignment, it was determined that a more direct route (without encroachments or obstacles) was to use the access road on Anthony Vineyards' private property, resulting in the need for a pipeline easement. In addition, this east/west pipeline alignment allows CVWD to connect to the existing irrigation water pipeline, the source of water for the mitigation site, more efficiently. In the north/south direction within the Garfield Street right-of-way, there is an open channel located in the street. There is not enough public right-of-way on the east side of the channel to install the pipeline. Therefore, this resulted in the need for a pipeline easement in the north/south direction as well.

You confirmed by email that the first communication regarding a potential easement made by staff to Director Bianco occurred on March 29, 2024, following a Study Session discussing

⁴ The Board has not been involved in the discussions related to the water source for the larger project, which is still in the planning stages.

CVWD's Fiscal Year Capital Improvement Plan. At that time, CVWD staff was still unsure if that was the direction that it wished to take regarding the mitigation project. No formal action was taken by CVWD or the Board at the Study Session. On May 10, 2024, CVWD staff determined the need for the easement and communicated this to Director Bianco, in his capacity as a part owner of Anthony Vineyards. The Board was not involved in any manner with the design, appraisal, or negotiations for the pipeline easement. CVWD's Director of Engineering, Carrie Oliphant, authorized her Right-of-Way staff to get the appraisal. You explained that the Board is not involved in these types of decisions until staff has successfully negotiated the easement or property acquisition. The package is then brought to the Board for approval. Negotiations for the easement occurred between CVWD staff and Anthony Vineyards' Chief Financial Officer, with no participation from Director Bianco. On August 13, 2024, this matter was placed on the CVWD's Board of Directors agenda, to "Authorize Agreement for Acquisition of Real Property with Anthony Vineyards, Inc. for the Palm Desert Groundwater Replenishment Facility Garfield Mitigation Project." The CVMD staff recommended the execution of the "Agreement For Acquisition of Real Property (Easement)" signed by Anthony Vineyards' Chief Financial Officer, Paul Loeffel on July 24, 2024, and accompanying documents. The Board was also asked to approve expenditures of \$26,250 for the purchase of the easement, closing costs, and a contingency fee. The packet included a valuation of the proposed total area of the pipeline easement of 1.231 acres and the value of two affected date palm trees. You confirmed that the agenda item was pulled at the beginning of the meeting due to the conflict of interest issue.

You also confirmed that CVWD is unaware of any other entities that are authorized to make the purchase and sale agreement for the easement. From CVWD's perspective, the USACE is issuing the 404 permit to CVWD with the condition that it mitigates the impacts of the project. The Garfield Mitigation Site meets the conditions required by the USACE as long as there is a guaranteed water source in perpetuity. In order to get the water to the mitigation site, CVWD needs to connect a new pipeline to an existing irrigation pipeline (that currently conveys Colorado River Water from the Coachella Canal). Since the existing pipeline is also operated and maintained by CVWD, it has a right to connect to it without additional approvals. The reason that CVWD can guarantee the water source into perpetuity is that CVWD receives a specific allotment of water via the Coachella Canal. Other entities within CVWD's service area do not have those same water rights.

ANALYSIS

The Act

The Act's conflict of interest provisions prohibit any public official from making, participating in making, or otherwise using their official position to influence a governmental decision in which the official has a financial interest. (Section 87100.) 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, distinguishable from its effect on the public generally, on one or more of the public official's interests. (Section 87103; Regulation 18700(a).)

The financial interests that may give rise to an official's disqualifying conflict of interest under the Act are set forth in Section 87103 and include:

- Any business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more or in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.
- Any interest in real property in which the public official has a direct or indirect interest worth \$ 2,000 or more.
- Any source of income aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.⁵

At issue here is Director Bianco's ownership and source of income interest in Anthony Vineyards, which owns the property that is subject to the easement. Regulation 18701(a) states that a financial effect is explicitly involved and the financial effect is presumed to be reasonably foreseeable where the financial interest is a named party in a decision or is the subject of the decision. Under Regulation 18702.1(a)(4), the reasonably foreseeable financial effect of a decision on an official's business entity is material where the entity's real property is a named party to or the subject of the decision under Regulation 18701(a). Therefore, under the Act, Director Bianco has a disqualifying financial interest in CVWD's decisions where Anthony Vineyards' real property is a named party or the subject of the action to be taken by CVWD. He may not "make, participate in making or use his official position to influence" the decisions related to the easement, as those terms are defined below. We caution that Director Bianco should not take part in any Replenishment Project decisions without first seeking additional advice due to his business's explicit involvement in the easement decision, which is part of the larger project.

Regulation 18704(a)-(c) provides the definition of "making, participating in making, or using their official position to influence a governmental decision." A public official "makes a governmental decision" if the official authorizes or directs any action, votes, appoints a person, obligates or commits the official's agency to any course of action, or enters into any contractual agreement on behalf of the official's agency.

A public official "participates in a governmental decision" if the official provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review.

Lastly, a public official "uses their official position to influence a governmental decision" if the official either contacts or appears before any official in the official's agency (or in an agency subject to the authority or budgetary control of the official's agency) for the purpose of affecting a decision; or contacts or appears before any official in any other government agency for the purpose of affecting a decision, and the public official acts or purports to act within the official's authority or on behalf of the official's agency in making the contact.

⁵ Additionally, under Section 82030, "income" to an official "also includes a pro rata share of any income of any business entity or trust in which the individual or spouse owns, directly, indirectly or beneficially, a 10-percent interest or greater." However, the facts do not indicate that this interest is at issue, and we do not analyze it further.

Section 1090

The easement purchase agreement is a contract, and therefore we must also consider the prohibitions under Section 1090, a separate body of law. Under Section 1090, public officials “shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are a member.”

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. 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.) A contract that violates Section 1090 is void, regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.) When Section 1090 is applicable to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain; the entire governing body is precluded from entering into the contract. (*Id.* at pp. 647-649.) Additionally, participation in the making of a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall, supra.*)

An easement purchase agreement between CVWD and Anthony’s Vineyard, Inc., is a contract in which Director Bianco, as a part owner and salaried employee, has a disqualifying financial interest under Section 1090. Accordingly, the Board’s easement purchase agreement with Anthony Vineyards would be prohibited even with Director Bianco’s recusal, unless an exception applies.

The Legislature has created various statutory exceptions to Section 1090’s prohibition where the financial interest involved is deemed to be a “remote interest,” as defined in Section 1091, or a “noninterest,” as defined in Section 1091.5. Of note, Section 1091(b)(15)⁶ defines as a remote interest that of a “party to litigation involving the body or board of which the officer is a member in connection with an agreement,” so long as the agreement is entered into as part of a settlement of litigation in which the board is represented by legal counsel, a court reviews and finds the agreement serves the public interest, and the interested member recuses themselves from all participation in the making of the agreement on behalf of the board. However, Section 1091(b)(15) is not applicable unless the parties are involved in litigation.

In limited circumstances, the rule of necessity has been applied to allow the making of a contract that Section 1090 would otherwise prohibit. (*Dietrick* Advice Letter, No. A-15-174; 88 Ops.Cal.Atty.Gen. 106, 110 (2005).) The California Supreme Court has stated, “[t]he rule of necessity permits a government body to act to carry out its essential functions if no other entity is competent to do so (*Eldridge v. Sierra View Local Hospital Dist., supra*, 224 Cal.App.3d at pp. 321-322; see *Olson v. Cory* (1980) 27 Cal.3d 532, 537 . . .), but it requires all conflicted members to

⁶ Added by Statute 2008, c. 163. This legislation was in response to an Attorney General Opinion that determined a court could invalidate a lawsuit settlement under Section 1090, though the issue, “was not free from doubt.” (See 91 Ops. Cal. Atty, Gen 1 (2008); and the Assembly Floor Analysis, AB2801, stats. 2008, c. 163, p.2.)

refrain from any participation.” (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1097.) However, “the rule of necessity is to reflect actual necessity after all possible alternatives have been explored.” (69 Ops.Cal.Atty.Gen. 102 (1986).) And the “mere fact that a proposed arrangement might be more convenient is not sufficient to involve the rule of necessity.” (4 Ops.Cal.Atty.Gen. 264 (1944).) Here, even though the alternatives are more expensive and less timely for the needs of the Replenishment Project, there are identified alternatives that would allow for a permanent water source to the Garfield Site without the need for the easement. As a result, we do not further consider the rule of necessity.

Nonetheless, Attorney General Opinions indicate that a public entity may use its power of eminent domain to acquire real property in which its officer owns an interest without triggering a Section 1090 violation. The Attorney General Opinion, 69 Ops. Cal.Atty.Gen 102, discusses the rule of necessity in the context of a school board and a member with a financial interest in a collective bargaining agreement. In a footnote, the Opinion states:

We would note that the “rule of necessity” is to reflect actual necessity after all possible alternatives have been explored. ... if a public entity requires real property for its use which is owned by an officer who would fall within the proscription of section 1090 of the Government Code (citation omitted), the entity need not rely upon the ‘rule of necessity.’ It need only exercise its power of eminent domain. (See, e.g. 26 Ops.Cal.Atty.Gen. 5 (1955).)

(69 Ops. Cal. Atty. Gen. 102, fn. 6.)

The 1955 Attorney General Opinion cited above involved a county board of supervisors that was considering two routes for a road relocation, one of which involved the need to acquire land owned by a supervisor. The Opinion states that in the case of acquiring a particular piece of land, “a public agency may have only one source of acquiring what it needs and thus some method of permitting it to do so should be found if the possibility of a conflict between the public and private interest of an officer of the agency can be avoided.” (26 Ops.Cal.Atty.Gen. 5.) The Opinion concludes, “[a] contract for sale by the supervisor to the county ... would be in violation of [Section] 1090. If such a right of way is required, the county should secure it by means of a condemnation proceeding.” (*Id.*) The Opinion states, “[w]e are of the opinion ... the land can be acquired through a condemnation proceeding in which a court, rather than the parties, fixes the consideration.” (*Id.*) The Opinion also states that the official is disqualified from participation in any prior deliberations regarding the road relocation.⁷

This Opinion’s reasoning is in keeping with the court’s statements in *Santa Clara Valley Water Dist. v. Gross* (1988) 200 App.3d 1363, which involved a condemnation proceeding between a water district and its board member who owned the subject property, and whether Section 1090’s

⁷ The 1955 Attorney General Opinion, which pre-dates the Act, finds that the official is disqualified under the common law rule preventing a public official from acting in circumstances in which their public duty conflicts with their substantial private interests. (26 Ops.Cal.Atty.Gen. 5, citing *Noble v. City of Palo Alto* (1928), 89 Cal. App. 47, pp. 51-52.) We do not consider common law conflicts of interest for purposes of this advice, but reach a similar conclusion under the Act.

prohibitions excused the board member from filing a statutorily mandated demand for litigation fees in the proceeding. The court stated that “a settlement achieved [under the rules in a condemnation proceeding] can be supervised by the court and receive the imprimatur of court confirmation. [Section] 1090 ... has no force in the context of a condemnation action where the sale of property is accomplished by operation of law and each side is ordinarily represented by counsel.” This reasoning is also consistent with the remote interest in Section 1091(b)(15), noted above, which allows a board member in litigation with their governing board to reach a settlement agreement that is supervised by a court, so long as the interested board member recuses themselves from all participation in the making of the agreement on behalf of the board.

Therefore, we advise that due to the alternatives available, the rule of necessity does not apply to these circumstances; however, Section 1090 does not prevent the Board from acquiring the easement through the District Board’s exercise of its eminent domain power in a court-supervised proceeding. A court-supervised condemnation proceeding will examine the public purpose and valuation of the easement purchase. Due to the statutory constraints and court supervision, it will not involve negotiations that would cause an appearance of impropriety, thereby removing the conflict of interest concerns. The parties would be permitted to enter into a settlement agreement, to the extent that the factors in Section 1091(b)(15) are met. Due to the courts’ broad interpretation of “making a contract under Section 1090” and the requirements of the Act, Director Bianco must recuse himself from any participation in the Board decisions necessary to initiate the condemnation proceeding before the court. This includes all further decisions involving the Replenishment Project.⁸ His recusal from these decisions will satisfy the requirements of the Act and Section 1090.

If you have other questions on this matter, please contact me at KHarrison@fppc.ca.gov.

Sincerely,

Dave Bainbridge
General Counsel

L. Karen Harrison

By: L. Karen Harrison
Senior Counsel, Legal Division

KH:aja

⁸ Director Bianco should seek additional advice regarding his participation in Replenishment Project decisions once the condemnation proceeding is completed.