



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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November 22, 2024

Julia M. Lew  
McCORMICK, KABOT & LEW  
4010 S. Demaree Street  
Visalia, CA 93277

Re: Your Request for Advice  
**Our File No. A-24-119**

Dear Ms. Lew:

This letter responds to your request for advice regarding the Political Reform Act (the “Act”) and Government Code Section 1090, et seq.<sup>1</sup> Please note that we are only providing advice under 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.

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 Tulare 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 Board for Tract 92 Community Services District (“District”) purchase District Board President Monroe Self’s real property parcel for the construction of a new water well within the District community, where the property is the only property determined to meet the requirements set by the state, engineers, and the California Water Service, Visalia District (“Cal Water”) and the project would restore safe drinking water to the community?

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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 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

Under the Act, as the parcel's owner, Board President Self has a disqualifying financial interest in District Board decisions related to purchasing his parcel and he is prohibited from making, participating in making or using his official position to influence the decision. Section 1090 also prohibits Board President Self from taking part in any contracting process in his official capacity. However, under the rule of necessity, the District Board may purchase the property to carry out its essential function of providing safe drinking water to its community, so long as Board President Self refrains from participating as a Board member in this decision.

## FACTS AS PRESENTED BY REQUESTER

The District is currently seeking funding from the State Water Resources Control Board ("SWRCB") Drinking Water State Revolving Fund ("DWSRF") for the abandonment of water wells and the construction of a new well within the District community, as well as to connect and consolidate with California Water Service, Visalia District ("Cal Water"), a publicly traded investor-owned utility ("Project").

The District serves a low-income community in Tulare County with a water system that has experienced repeated instances of contaminated water not safe for consumption. The system's infrastructure is also at the end of its useful life. An engineering analysis was conducted, and the best solution was determined to be a consolidation with Cal Water. The District received technical assistance from Self Help Enterprises ("SHE") to assist in applying for state funding to consolidate with the system owned and operated by Cal Water, which serves the City of Visalia. As already planned, upon completion of the project, the District is dissolving and will no longer provide services to the community, and the Project and all District facilities will be transferred to Cal Water.

SHE identified potential well sites and contacted property owners to see if they would be willing to sell. After 10 years of searching, a vacant unimproved parcel owned by District Board President Monroe Self was the only property determined to meet the requirements set by the state, engineers, and Cal Water. Cal Water conducted an additional site visit to evaluate the property and found it suitable for the project's infrastructural needs based on accessibility, existing structures, and other concerns.

Mr. Self has not participated in any of the District discussions related to the potential use of his property, or any of the technical discussions or analysis. However, the District and other parties are concerned that the District's purchase of the property would violate Section 1090. Given this issue, through technical assistance funding, SHE and the contracted engineers, Provost & Pritchard, conducted an additional investigation of all potentially eligible properties in the area and could not find a willing seller or a property eligible for the project needs. The Self property appears to be the only property with a willing seller while also meeting multiple agencies' requirements necessary for the Project to restore safe drinking water to the community.

You request advice as to whether the District can commence eminent domain proceedings with regard to the property and obtain a court order or judgment ordering the acquisition of and compensation for the property without such actions triggering a Section 1090 violation. In response to our request for additional information on the process involved, you note that initiating a

condemnation action through the District's power of eminent domain requires that the property be identified for the Project, the District must get an appraisal of its value, and make a statutory written offer to purchase based on the appraisal value. If the negotiations are unsuccessful, the District Board may authorize the filing of a condemnation action by adopting a Resolution of Necessity. In making this decision, the District Board must determine whether the public interest and necessity require the Project, that it is planned as most compatible with the greatest public good, and the least private injury, that the property is necessary for the Project, and that an offer supported by the appraisal was provided to the owner. If the District Board adopts the Resolution of Necessity, it can then file a complaint in court to acquire title to the property for payment of the property's fair market value. The agency's right to acquire the property by eminent domain is decided by a judge. The proceeding may go to trial to determine the fair market value of the property, where this may be determined by a judge or jury. You estimate that pursuing an eminent domain action could add six months to the process.

You also request whether a Section 1090 violation can be avoided if the state funding is shifted from the District to Cal Water, with Cal Water purchasing the property instead of the District. As noted above, upon completion of the project, the District is dissolving and will no longer provide services to the community, and the project and all District facilities will be transferred to Cal Water.

## 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, including an interest in real property in which the public official has a direct or indirect interest worth \$ 2,000 or more. (Section 87103; Regulation 18700(a).) Board President Self has a real property interest in his parcel that is the subject of the decision at issue.

A financial effect is presumed reasonably foreseeable where the official's financial interest is explicitly involved as a named party in, or subject to, the decision (Regulation 18701(a)), and the effect is material (Regulation 18702.2(a)(4)) if the decision authorizes the purchase of the real property, as we have here. Therefore, under the Act, Board President Self is disqualified in his official capacity from "making, participating in making or using his official position to influence" any District Board decisions to select his property for purchase and in any other decisions in which

his property is the subject of the action to be taken by the District Board. (See Regulation 18704(a)-(c).)<sup>2</sup> He must recuse himself from those governmental decisions.<sup>3</sup>

In regard to taking part in negotiating and exercising the purchase agreement outside of his official capacity, we note that Section 87100 generally prohibits an interested official from attempting to influence a decision. For a decision before the official's own agency, an attempt to influence a decision includes any attempt to contact or appear before an agency official for the purpose of affecting the decision. (Regulation 18704(c)(1).) However, an interested official is not prohibited from appearing before the official's own agency in the course of its prescribed governmental function in the limited circumstances of an appearance related solely to the official's personal interest in real property owned entirely by the official, the official's immediate family, or the official and the official's immediate family. (Regulation 18704(d)(2)(A).) Accordingly, so long as the property is solely owned by Board President Self or his immediate family members, he is not prohibited from negotiating and exercising an agreement with the City in his individual capacity. For any decision that will go before the District Board at a public meeting, Board President Self may not contact or appear before another member of the District Board outside of the public meeting.

### *Section 1090*

At issue, given Board President Self's disqualification under the Act, is whether the District Board may enter into a purchase agreement with Board President Self in his private capacity, to acquire his parcel for the construction of a new well. 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

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<sup>2</sup> 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. 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.

<sup>3</sup> Regulation 18707(b) states the relevant recusal requirements that a disqualified member of a community services board must follow: the official must not take part in the decision, and the recusal may be accompanied by an oral or written disclosure of the disqualifying financial interest, the official must not be counted toward achieving a quorum, and the official may not be present during a closed board meeting when the decision is considered or knowingly obtain or review any nonpublic information regarding the decision. The agency may also adopt local rules requiring the official to step down from the dais or leave the chambers.

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.) Further, a board may not avoid a Section 1090 conflict by delegating decision-making authority to another individual or body. (87 Ops.Cal.Atty.Gen. 9 (2004); 88 Ops.Cal.Atty.Gen. 122 (2005).)

Section 1090 reaches beyond the officials who actually execute the contract. Officials who participate in any way in the making of the contract are also covered by Section 1090. Participation in the making of a contract has been broadly defined broadly by the courts 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 v. Taft* (*supra*).)

Board President Self has a disqualifying financial interest under Section 1090 in the District's purchase of his parcel for the new well. Accordingly, the District Board would be prohibited from making the purchase agreement, 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. Section 1091(b)(15) 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.<sup>4</sup>

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 refrain from any participation." (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1097.) The Attorney General states that "the rule of necessity is to reflect actual necessity after all possible alternatives have been explored" (69 Ops.Cal.Atty.Gen. 102 (1986), p. 109, fn.6) 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).)

The rule of necessity has been applied in at least two specific types of situations: 1) in procurement situations for essential supplies or services when no source other than the one that

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<sup>4</sup> We note that past Attorney General Opinions indicate that a public entity may use its power of eminent domain to acquire real property from an officer who owns the property in a court-supervised condemnation proceeding without triggering a Section 1090 violation. (See 69 Ops. Cal.Atty.Gen 102, citing 26 Ops.Cal.Atty.Gen. 5 (1955).)

triggers the conflict is available; and 2) in non-procurement situations to carry out essential duties of the office when the official or board is the only one authorized to act. The effect of the rule of necessity is to permit a board with a member who is financially interested to make the contract, even though the interested board member must disqualify themselves from participating in its making. (See “Conflicts of Interest,” California Attorney General’s Office, 2010, p. 78.)

We have considered whether the rule of necessity applied to allow a governing body to acquire property rights where the landowner was a member of that body. In *Schons* Advice Letter, No. A-16-180, we advised a water district that the rule of necessity permitted its board to negotiate a resolution of various easement and related property access claims so that the water district could “properly access its property containing the tank site and the wastewater treatment plant” with the landowner who was also a district board member. We advised that obtaining the access would “unquestionably provide essential services to the community and resolve ongoing easement and related property access claims” with the landowner and board director. Similarly, in *Ennis* Advice Letter, No. A-21-112/113, we advised that the rule of necessity permitted a city council to settle/acquire rights of way and easements by entering into contract with the landowner, the city’s mayor, for a road construction connectivity project, in furtherance of an essential city function of building out the city’s planned roadway system. The city stated that completing the project was the only feasible option and that settling the land rights issues would avoid unnecessary litigation and expense.

Similarly, in this matter, the District Board seeks to purchase the property for the Project to perform its essential function of providing safe drinking water to its community. The property will provide a location for a new well within the District community and meet the needs of the State, the engineers, and the connections needs with Cal Water. The District plans to dissolve and transfer all facilities to Cal Water upon completion of the Project; however, Cal Waters does not have the state funds for the Project and is not yet in control of District facilities. Therefore, the facts indicate that the District is the only agency that is authorized to act and purchase the property. As noted above, the District cannot delegate this authority to another body to avoid a Section 1090 violation. Further, the purchase reflects an actual necessity after all alternative properties have been explored by Cal Water, SHE, and the contracted engineers. Therefore, we advise that under the rule of necessity, the District Board may enter into the purchase of Board President Self’s parcel so long as he refrains from any participation and disqualifies himself from the decision in his official capacity.

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

Sincerely,

Dave Bainbridge  
General Counsel

**L. Karen Harrison**

By: L. Karen Harrison  
Senior Counsel, Legal Division

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