



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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March 13, 2025

Ronald Kopf
Tuolumne Utilities Water District Board
17757 Mountain Ridge Drive
Sonora, CA 95370

Re: Your Request for Advice
Our File No. A-25-021

Dear Mr. Kopf:

This letter responds to your request for advice regarding the Political Reform Act (the “Act”) and Government Code Section 1090, et seq.¹ Please note that we are only providing advice under 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), 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 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.” (See Section 1097.1(c)(5).)

QUESTION

If you accept a position on the board of the Tuolumne Utilities District (“TUD”), would Section 1090 prohibit the TUD from making decisions concerning contracts to provide water and sewer service to a pending project (“Valley Vista”) you are currently developing in your private capacity as a builder?

CONCLUSION

No. Although Section 1090 prohibits you from taking part in any contracting process in his official capacity, under the rule of necessity, the TUD may enter into agreements to provide water

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.

and sewer services to the Valley Vista project, so long as you refrain from participating in the decisions. Further, if appointed, you are also prohibited from participating in or attempting to influence the decisions of any TUD official or employee regarding Valley Vista's agreements with TUD under the conflict of interest provisions of the Act. Accordingly, another representative of Valley Vista must make any necessary communications with TUD concerning the identified agreements.

FACTS AS PRESENTED BY REQUESTER

You previously served on the board of the TUD for six years, from 2014 to 2020. One of the members of the TUD board recently resigned, and you are being considered as an appointed replacement. However, you are also a developer with a pending project, for which contracts have already been executed concerning specified utility services located within TUD's service area, and seek advice concerning the application of Section 1090.

The TUD is a Special District located in Tuolumne County, and the largest water and sewer provider in the County. TUD provides water and sewer service based upon established fees, charges, and rates that are set in its Water Rules and Regulations and its Sewer Ordinance. When any project is proposed (i.e. one that requires new infrastructure or upgrades), TUD requires the project proponent to work out an agreement through which the type, timing and extent of the various improvements are agreed upon ("Water and Sewer Agreement"). The costs associated with the project proponent connecting the newly installed or upgraded facilities to TUD existing infrastructure are paid for by the project proponent as dictated by the TUD Rules and Regulations or Water Sewer Regulations and these requirements are included in a Water and Sewer Agreement with the project proponent. The agreement also stipulates current water and sewer Connection Fees and Capacity Charges. Once the improvements are completed by the project proponent and inspected and approved by TUD, the project proponent or the individual homeowners would then be able to connect and pay Connection Fees and Capacity Charges. TUD would then provide ongoing water and sewer services to the new project homeowners and facilities on the same terms that TUD provides to other customers.

The project in question, Valley Vista, will utilize TUD water and sewer services. Valley Vista will consist of 230 homes, a commercial center, and a community center. You have an ownership and source of income interest in the entity, Valley Vista LLC, hold a position of management, and have an interest in the real property being developed.² There is currently a contract in place that defines the scope of work to connect Valley Vista to TUD facilities.³ This includes the construction of water mains and a water tank, as well as wastewater facilities, including sewer pipelines, to serve Valley Vista. There are existing contracts for the provision of water and sewer services for the 72 units of Valley Vista Phase One, and the overall project will be developed in three phases, and there is an existing agreement for the provision of water and sewer service to Phase One. These existing agreements specify that, with the exception of the water tank

² You have also stated that there are multiple other partners and investors with a financial interest in Valley Vista LLC.

³ We note that the existing agreements date to 2024, at which time you were not serving on the TUD Board, your term having ended in 2020.

construction, the developer will be responsible for the cost of all infrastructure. The developer will share the cost for the construction of the water storage tank with TUD. The 500,000-gallon portion (funded by Valley Vista) of the water tank will cover the project in its entirety, and there should not be any need to amend or modify the water tank agreement. The overall water tank is one million gallons and TUD will cover the cost of the additional tank capacity to better service customers outside of the Valley Vista project in their service area.

The water and sewer rates would be uniform for the homeowners once the home is connected. TUD requires all projects (from a simple lot development to a mixed-use infill development like the Valley Vista Project you are involved with) to extend infrastructure at their cost to connect to TUD's existing infrastructure. This could be as simple as extending a pipeline and/or also building water tanks and wastewater lift stations. The TUD format and requirements are the same for all, just the amount of water and/or infrastructure work would vary depending on where the project is located in relation to TUDs existing infrastructure. You also state that you did not request, nor were you granted, anything that any other project proponent could have applied for and received. Here, the anticipated contracts will be for the provision of water and sewer service to Phases Two and Three of the Valley Vista Project.

ANALYSIS

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. 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.)

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.) Any renewal of a lease constitutes the "making" of a contract prohibited under Section 1090. (*City of Imperial Beach v. Bailey* (1996) 103 Cal.App.3d 191, 197.) As a member of the TUD board, you would be a public official subject to Section 1090, and this matter involves a contract between TUD and Valley Vista, your pending devolvement project, for water and sewer services.

As a general rule, when Section 1090 applies to one member of a governing body of a public entity, as here, the prohibition cannot be avoided by having the interested official abstain; the entire governing body is precluded from entering into the contract. (*Thomson, supra*, at pp. 647-649.) However, the Legislature has created various statutory exceptions to Section 1090's prohibition where the interest involved is deemed a "remote interest," as defined in Section 1091 or a "noninterest," as defined in Section 1091.5. If a remote interest is present, the contract may be made if, among other specified conditions, the officer abstains from any participation in the making of the contract. (Section 1091(a).) If a noninterest is present, the officer may participate in the

making of the contract, and the noninterest generally does not require disclosure. (*City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 514-515.)

Rule of Necessity

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.” (*Id.*; see also 88 Ops.Cal.Atty.Gen. 106, 110 (2005).)

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 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 rule of necessity applies only in limited situations. In the *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 member. In the *Lew* Advice Letter, No. A-24-119, we advised that a water district board may purchase property owned by a board member to carry out its essential function of providing safe drinking water to its community, so long as the board member refrained from participating as a board member in this decision. The property would provide a location for a new well, and the purchase reflected an actual necessity after all alternative properties had been explored. As stated above, the “rule of necessity” applies when there is no alternative source for essential services and when necessary to carry out essential duties.

Here, you note that the TUD provides water and sewer services to customers in the County. As an agency, the TUD bears the responsibility of providing these essential services, as well as approving necessary agreements relating to the provision of these services. Based on these facts and consistent with applicable law, we therefore conclude that the rule of necessity applies, and the TUD may enter into the necessary contract for the provision of water and sewer services to Valley Vista. However, you must not make or participate in making, in your capacity as a board member, any decisions relating to the contracts.

The Act

Under Section 87100 of the Act, “[a] public official at any level of state or local government shall not make, participate in making or in any way attempt to use the official’s position to influence a governmental decision in which the official knows or has reason to know the official has a financial interest.” “A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial

effect, distinguishable from its effect on the public generally, on the official, a member of the official's immediate family," or on certain specified economic interests. (Section 87103.)

Among those specified economic interests are:

- Any business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more. (Section 87103(a).)
- Any real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more. (Section 87103(b).)
- 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. (Section 87103(c).)
- Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d).)

You are the Managing Member of Valley Vista LLC. As such, you have an ownership and investment interest in Valley Vista LLC, real property interest in the property being developed, a source of income interest in the business, and an interest in Valley Vista LLC due to your position of management.⁴

Foreseeability and Materiality

Foreseeability standards vary depending on whether an interest is explicitly involved in a governmental decision. Relevant to the facts presented, a financial effect is presumed to be reasonably foreseeable when it is explicitly involved in a decision. Financial interests that are explicitly involved include an interest that is a named party in, or subject of, a government decision. An interest in real property is the subject of the decision and explicitly involved in the decision anytime the decision affects the property as described in Regulation 18702.2(a)(1)-(6). (Regulation 18701(a).) Regulation 18702.1 contains several provisions for determining whether a governmental decision will have a material financial effect on a business entity, such as the matter here, when the business entity is explicitly involved in the decision. Relevant to the decisions concerning the provision of water and sewer services, the reasonably foreseeable financial effect of a governmental decision on an official's financial interest in a business entity is material if the entity is a named party in, or the subject of, the decision, including any decision in which the entity "[i]nitiates the proceeding by filing an application, claim, appeal, or other request for action concerning the entity with the official's agency;" "[a]pplies for a permit, license, grant, tax credit, exception, variance, or other entitlement from the agency;" "[i]s the subject of any inspection, action, or proceeding under the regulatory authority of the agency;" or "[i]s subject to an action taken by the agency that is directed at the entity." (Regulation 18702.1(a)(1)(A), (E)-(G).) You have a disqualifying financial

⁴ You also have a source of income interest in any client that has paid or promised \$500 or more to you within the 12 months preceding the relevant governmental decision. You have not provided any facts regarding any clients, and we do not further analyze this interest.

interest in the decisions to provide water and sewer services to Valley Vista, as Valley Vista is a named party and the subject of these decisions, having initiated the process with TUD to provide these services. Thus, you are precluded from taking part in the decisions.

A public official disqualified from a governmental decision based on a conflict of interest is not merely prohibited from voting on the item. Rather, the official is prohibited from making, participating in making or in any way attempting to use their official position to influence a governmental decision in which they know or have reason to know they have a financial interest. (Section 87100.) “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.” (Regulation 18704(a).) “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.” (Regulation 18704(b).) A public official uses an official position to influence a governmental decision if the official:

- (1) 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
- (2) 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 his or her authority or on behalf of the official’s agency in making the contact.

(Regulation 18704(c).)

Pursuant to the rules above, you are not only prohibited from making decisions regarding the provision of services to Valley Vista but also participating in or attempting to influence the decisions of any TUD official or employee regarding these services to Valley Vista. Thus, the conflict of interest rules prohibit you from making any communications with a member of TUD staff to influence a decision regarding Valley Vista. Thus, in practical terms, should you be appointed to the TUD board, any further communications with any TUD official or employee regarding the provision of services to Valley Vista must be made by another representative of the company. Please note that the recusal requirements for a conflict of interest under the Act include verbally identifying each type of economic interest involved in the decision as well as details of the economic interest on the record of the meeting and immediately prior to the discussion of the item. (See Regulation 18707 for recusal requirements.)

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

Sincerely,

Dave Bainbridge
General Counsel

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By: Zachary W. Norton
Senior Counsel, Legal Division

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