



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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September 12, 2017

Sarah E. Tobias  
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Goyette & Associates, Inc.  
1330 L Street Suite G  
Fresno, CA 93721

Re: Your Request for Advice  
Our File No. A-17-121

Dear Ms. Tobias:

This letter responds to your request for advice on behalf of Tulare City Councilmember Greg Nunley regarding the conflict of interest provisions of the Act (the "Act")<sup>1</sup> and Section 1090. Please note that we do not advise on any other area of law, including Public Contract Code or common law conflicts of interest. We are also 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.

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 Tulare County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response regarding this request 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).)

### QUESTIONS

1. In the event that land owned or being purchased by Councilmember Nunley is subject to a request for a zoning change or general plan amendment, can he, in his capacity as a private citizen and business owner, submit the formal requests to the City of Tulare without creating a conflict of interest under either the Act or Section 1090?

a. Assuming Councilmember Nunley is permitted to submit zoning change and/or general plan amendment requests, is it sufficient for him to recuse himself from participating in rendering decisions by the City Council on such requests or are there any further steps he would need to take to avoid a conflict of interest?

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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.

b. In the event that Councilmember Nunley is not permitted to submit zoning change and/or general plan amendment requests to the City of Tulare himself, what is the proper procedure for requesting these changes without creating a conflict of interest?

### CONCLUSIONS

1. While the Act prohibits the Councilmember from making, participating in making, or influencing a governmental decision, he may be able to appear in his private capacity (in the same manner as any other private citizen) and submit formal requests to the City of Tulare for zoning changes and general plan amendments applicable to property he wholly owns.

a. A Councilmember with a conflict of interest, absent an exception, is prohibited from making, participating in making or influencing the decision. In addition, the Councilmember, when confronted with the decision at a noticed public meeting is required to: (1) publicly identify each financial interest that gives rise to the disqualifying conflict of interest, (2) recuse himself or herself from the decision, and (3) leave the room for the duration of the discussion and/or vote on the item.

b. We have concluded that Councilmember Nunley may submit a zoning change and/or general plan amendment request to the City of Tulare himself when he wholly owns the property. However, if the business/property is not wholly owned, the Councilmember cannot "influence" the governmental decision by submitting the application. The co-owner would be required to submit the application.

### FACTS

Councilmember Nunley was elected to the Tulare City Council in the November 8, 2016 election. Councilmember Nunley is also a business owner, land owner, and property developer in the City of Tulare. Councilmember Nunley currently lists the following business entities and general descriptions of the businesses in his Statement of Economic Interests:

- Great Valley Land Co., LLC (Real Estate- sales and rental income)
- Great Valley Land Company LLC (Real Estate- sales and rental income)
- Del Lago Place LLC (Real Estate- sales income)
- Great Valley Builders Inc. (Real Estate- construction and real estate sales income)
- Swift Homes Inc. (Construction income)
- Quest Equity LLC (Real Estate income)
- Compadres (Restaurant- food sales income)
- La Tula Investments (Real Estate income)

- Great Valley Builders Inc. (Real Property; row interest)
- Quest Equity LLC (Real Property; offer on property)

Councilmember Nunley also lists the following Interests in Real Property:

- 30 Acres around 1969 Hillman and Corvina in Tulare, CA
- 4 Acres near 14 I 8 Bordolino in Tulare, CA
- Tesori Subdivision in Tulare, CA
- Quail Creek Subdivision in Tulare, CA
- Parcel near 1878 Mooney Blvd. in Tulare, CA
- Bella Oaks (6 lots) in Tulare, CA

As a land owner, business owner, and property developer, Councilmember Nunley may own land (or is interested in purchasing land) that is subject to a zoning change request or general plan amendment. City of Tulare Code Section 10.12.020 provides that:

“The City Council shall be the final authority on zoning ordinance amendments, appeals, general plan and specific plan amendments, development agreements, subdivisions and other permit procedures that may be included in or added to this title ...”

## ANALYSIS

### *Section 87100*

Section 87100 of the Act prohibits a public official from making, participating in the making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. Section 87103 provides that an official has a “financial interest” in a 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 interests identified in that section. Of those interests, the facts presented implicate the following:

- Any business entity in which the public official has a direct or indirect investment worth at least \$2,000 and any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(a) and (d).)
- Real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b).)

*Foreseeability & Materiality*

A financial effect on an official's interest is presumed to be reasonably foreseeable if the interest is a named party in, or the subject of, a decision before the official or the official's agency. (Regulation 18701(a).) An interest is explicitly involved in a decision if the decision involves the issuance, renewal, approval, denial, or revocation of any license, permit, or other entitlement to, or contract with, the interest. (*Ibid.*) Where the Councilmember's company owns the land or is purchasing the land (or intends to purchase the land) and has requested a zoning change or general plan amendment, his interests are explicitly involved in the decision.

Regulation 18702.1 provides in pertinent part that the effect on an official's interest in a business entity is material if the business:

“(1) Initiates the proceeding in which the governmental decision will be made by filing an application, claim, appeal, or request for other government action concerning the business entity;

\* \* \*

“(5) Applies for a permit, license, grant, tax credit, exception, variance, or other entitlement that the official's agency is authorized to issue;

Regulation 18702.2 provides, as pertinent to your facts, that the financial effect on an official's interest in real property is material if the decision:

“(1) Involves the adoption of or amendment to a general (except as provided below) or specific plan, and the parcel is located within the proposed boundaries of the plan;

“(2) Determines the parcel's zoning or rezoning (other than a zoning decision applicable to all properties designated in that category), annexation or de-annexation, or inclusion in or exclusion from any city, county, district, or other local government subdivision, or other boundaries....”

The facts surrounding the decisions you ask about meet these standards and therefore the effect on the Councilmember is material.

*Disqualification pursuant to Section 87105.*

When a public official holds an office specified in Section 87200 (such as a City Councilmember) and has a conflict of interest in a decision that is noticed at a public meeting, he or she must do all of the following:

(1) Immediately prior to the discussion of the item, orally identify each type of interest involved in the decision as well as details of the interest on the record of the meeting.

(2) Recuse himself or herself. Recusal means that the official is prohibited from making, participating in making, or using or attempting to use official position to influence a government decision.<sup>2</sup>

(3) Leave the room for the duration of the discussion and/or vote on the item.

### *Exceptions*

Regulation 18704(d)(2) provides an exception for:

“An appearance by a public official as a member of the general public before an agency in the course of its prescribed governmental function if the official is appearing on matters related solely to the his or her personal interests, including interests in:

“(A) Real property owned entirely by the official, members of his or her immediate family, or the official and members of his or her immediate family;

“(B) A business entity owned entirely by the official, members of his or her immediate family, or the official and members of his or her immediate family;  
or

“(C) A business entity over which the official, members of his or her immediate family, or the official and members of his or her immediate family solely or jointly exercise full direction and control.”

This exception could apply to property wholly owned by the official or his immediate family, or his wholly owned business. In all other cases, such as where property is jointly owned with another person, the exception would not apply. Thus, the Councilmember could not “influence” the governmental decision by submitting the application. The co-owner would be required to submit the application.

We do not have sufficient facts about any specific application in order to more fully apply the exception. You should contact us for further advice should a specific situation arise.

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<sup>2</sup> Regulation 18704(a) - (c) provides that a public official makes a governmental decision if the official authorizes or directs any action, votes, appoints a person, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her 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 his or her official position to influence a governmental decision if he or she: (1) Contacts or appears before any official in his or her agency or in an agency subject to the authority or budgetary control of his or her 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 his or her agency in making the contact.

*Section 1090*

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) Section 1090 applies to city officers or employees including Councilmembers.

The second question in the Section 1090 analysis is whether the decision concerns a contract. In 89 Ops.Cal.Atty.Gen. 258, the Office of the Attorney General stated that in determining whether the subject of a decision was a “contract,” we look to general principles of contract law. For example, in the *Ansolabehere* Advice Letter, No. A-17-160a, we stated:

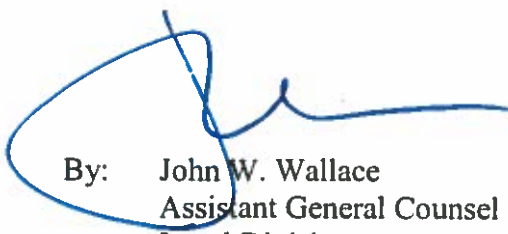
“While many land use decisions are ‘regulatory in nature’ and not contracts, there are some, including development agreements, that are contractual; involving consideration by both the local governmental entity and the project proponent, with the latter typically providing some type of public improvement or facility as a part of this consideration. In determining whether Section 1090 would apply in the context of land use decisions, we must determine whether the decision is purely regulatory, or whether it involves the project proponent providing a public improvement or similar consideration, thus making it contractual in nature.”<sup>3</sup>

Thus, so long as the applications and approvals are regulatory in nature (and not contingent on the applicant providing some type of public improvement or facility as consideration), the Councilmember is not prohibited from submitting the applications for zoning changes and/or general plan amendments by Section 1090. However, as noted above, he will have a conflict of interest under the Act.

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

Sincerely,

Jack C. Woodside  
General Counsel



By: John W. Wallace  
Assistant General Counsel  
Legal Division

JWW:jgl

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<sup>3</sup> Note that the Attorney General’s Office has stated that a development agreement is a contract for purposes of Section 1090 in 78 Ops. Cal. Atty. Gen. 230 (1995).