



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

September 16, 2019

Jeff L. Grubbe
Chairman, Tribal Council
540 Dinah Shore Dr
Palm Springs, CA 92264

Re: Your Request for Advice
Our File No. A-19-120

Dear Mr. Grubbe:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”) and Government Code section 1090 (“Section 1090”).¹ 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), 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.

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 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 you participate in Coachella Valley Association of Governments (“CVAG”) decisions related to the purchase and sale of the land to the Agua Caliente Band of Cahuilla Indians (“Tribe”), where you have a financial interest in the Tribe and you sit on the Executive Council for CVAG?

CONCLUSION

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.

No. You are financially interested in the sale of the property to the Tribe under Section 1090. Under the rule of necessity, CVAG may consider this sale to the Tribe because the circumstances of the sale allows CVAG to carry out its essential functions under the facts presented. You, as an interested CVAG Executive Council member, however, must abstain from any participation in the CVAG decision.

FACTS AS PRESENTED BY REQUESTOR

You are an enrolled member of the Tribe and serve as the elected Chairman of the Agua Caliente Tribal Council. You receive a monthly compensation from the Tribe for your service on the Tribal Council. The Tribe owns and operates the Agua Caliente Casino Rancho Mirage ("Casino"),² which sits on land owned by the federal government for the benefit of the Tribe. As one of 500 members of the Tribe, you receive a per capita net revenue payment from the Tribe's ownership of the Casino and its additional casino operations. The Tribal Council is the decision-making body for the Tribe's casino operations.

The Tribe is a member of the Coachella Valley Association of Governments (CVAG), a joint powers authority formed in 1973. This public agency acts to address area-wide and regional problems, and is empowered to acquire, hold, and dispose of property.³ In your role as Chairman of the Tribe, you serve as a member of the CVAG. The CVAG is governed by a 65-member General Assembly and an Executive Committee.⁴ Recently you were elected Chairman of the General Assembly, and as such, you also serve as the Chairman of the Executive Committee. (The officers of the Executive Committee include the Chairman and Vice-Chairman of the General Assembly.) You state that the Executive Committee is the administrative and management arm of the CVAG General Assembly, with the General Assembly playing a largely ceremonial role.⁵

CVAG owns a 17.2-acre site of undeveloped land located in the City of Rancho Mirage, along the frontage of the Union Pacific Railroad (the "Property"). This Property is adjacent to the Tribe's Casino. CVAG desires to sell the Property to the Tribe, and to do so must have the approval of the Executive Committee, which you chair.

² The Agua Caliente Resort Casino Spa Rancho Mirage is a 16-story resort, with 340 rooms, casino, pools, spa, and concert theater. It is located within seven miles of Palm Springs International Airport. <https://www.hotwatercasino.com/hotel-general-info>

³ CVAG is a public entity separate from each of its members. The current members of CVAG are: County of Riverside, the cities of Coachella, Indio, La Quinta, Indian Wells, Palm Desert, Rancho Mirage, Cathedral City, Palm Springs, Desert Hot Springs, Blythe, the Agua Caliente Band of Cahuilla Indians, and the Cabazon Band of Mission Indians. Each member of CVAG is a "public agency," as that term is defined in Section 6500, established by law with full powers of government in legislative, administrative, financial, and other related fields.

⁴ The General Assembly consists of the CVAG membership with each member entitled to five votes in the General Assembly vested in and to be exercised by a mayor, council member, tribal council member, county supervisor, or their respective appointed delegates.

⁵ The a 17-member Executive Committee is composed of the city mayors, each tribal chair, and the five county supervisors. The Executive Committee also includes the immediate past chairman of CVAG and the CVAG representative to the Southern California Association of Governments ("SCAG"), and city managers as non-voting members.

The Tribe currently lacks any definitive or approved plan to develop the Property, although Tribal staff indicates that the Property would not constitute a “Gaming Facility.”⁶ Staff indicates its use would likely be reserved for the development of additional public infrastructure (such as access roads, electric transmission lines or electric substation, water and sewage lines, retention basin, sidewalks, and parking) and would at most provide an incidental benefit to the Tribe’s gaming operation at the adjacent Agua Caliente Casino.

The Tribe receives revenue from its gaming operations at both Agua Caliente Casino Rancho Mirage and Agua Caliente Casino Palm Springs. The Tribe pays a per capita payment to each of the Tribe’s five hundred members, including you, from the Tribe’s gaming net revenues. Under the Indian Gaming Regulatory Act (“IGRA”)⁷, a tribe’s gaming net revenues must be used for certain purposes and allocated according to a plan approved by the Bureau of Indian Affairs (“BIA”).⁸ The permitted net revenue purposes are: to fund tribal government programs or operations; provide for the general welfare of the tribe and its members; promote tribal economic development; donate to charitable organizations; or to help fund operations of local government agencies.⁹ As a member of the Tribe, you receive a per capita net revenue payment under the BIA approved plan.

ANALYSIS

Section 1090

You seek advice as to whether you may participate as a member of the CVAG’s Executive Committee in the decision to sell the Property to the Tribe. Section 1090 provides that “[m]embers of the Legislature, state, county, district, judicial district, and city officers or employees 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 members.” The prohibition is based on the rationale that a person cannot effectively serve two masters at the same time. (*Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261, 298.)

Section 1090 applies to officials who participate in any way in making of the contract, including involvement in matters such as 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* (1962) 58 Cal.2d 565, 569.) A contract that violates Section 1090 is void, and the prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (See *Thomson v. Call* (1985) 38 Cal.3d 633, 646.)

⁶ As that term is defined in Section 2.12 of the Tribal-State Compact between the State of California and the Agua Caliente Band of Cahuilla Indians.

⁷ 25 U.S.C. §§2701-2721.

⁸ *Id.*, and at §2710 (b)(3); and 25 C.F.R. Part 290.

⁹ *Id.*, § 2710 (b)(2)(B).

Although Section 1090 does not specifically define the term “financial interest,” case law and Attorney General opinions indicate that the term is to be liberally interpreted. The prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. “The defining characteristic of a prohibited financial interest is whether it has the potential to divide an official’s loyalties and compromise the undivided representation of the public interests the official is charged with protecting.” (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1075.)

In your role on the joint powers authority CVAG Executive Committee, you are a public official. Due to your role on the Tribal Council with decision-making authority over the Tribe’s casino operations, and as a recipient of casino-related net revenue payments, you have a financial interest in the CVAG’s decision to enter into a contract for the sale of the Property to the Tribe. The Property is intended to provide additional public infrastructure adjacent to the 340-room Casino facility and will necessarily support the Casino operations. While you note that it is not certain that the Tribe’s purchase of the property from the CVAG will result in a change in the Tribe’s net revenues, case law indicates that the defining characteristic of a prohibited financial interest is whether it “has the potential to divide an official’s loyalties” in regard to the official’s charge in protecting the public interest. (See *Lexin, supra*, at p. 1075.) The decision by the CVAG to sell the Property to the Tribe has the potential to divide your loyalties due to your financial interest in the Tribe.

Thus, you have a financial interest in the proposed land purchase contract between the Tribe and CVAG which prohibits your participation in this decision. Additionally, as a general rule, when Section 1090 is applicable to one member of a governing body of a public entity, the entire governing body is precluded from entering into the contract. (*Stigall, supra*, at p. 569.) Therefore, Section 1090 also acts to prohibit the CVAG from entering the contract unless an exception applies. We note that none of the statutory exceptions to Section 1090 appear to apply to the facts presented and proceed with an analysis of the limited exception under the rule of necessity.

The Rule of Necessity

In limited circumstances, the “rule of necessity” allows a government body to carry out its essential functions if no other entity is competent to do so, with the requirement that a conflicted member must not participate in any manner in the contract decisions. (See *Lexin, supra*, at p. 1097.) CVAG was formed to address area-wide and regional problems for its membership of ten cities, one county and two tribes. To do so, CVAG is empowered to acquire, hold, and dispose of property in furtherance of the local public welfare. Tribe attorney Rahsaan Tilford provided additional information regarding this region and CVAG. He explained the unique historic “checkerboard” land holding whereby the Tribe and other local governments have held jurisdiction over odd and even parcels. Mr. Tilford is not aware of any other entity authorized to sell this Property. Given the unique jurisdictional map in the area, and CVAG’s purpose to allow for regional solutions among the participating local entities, acquiring and disposing of property would appear to be an essential function for CVAG. Accordingly, we find that the rule of necessity applies and permits the CVAG to contract for the sale of the Property to the Tribe, to the extent that the circumstances of the sale

allows CVAG to carry out its essential functions. You, as an interested board member, however, must abstain from any participation in the CVAG decision.

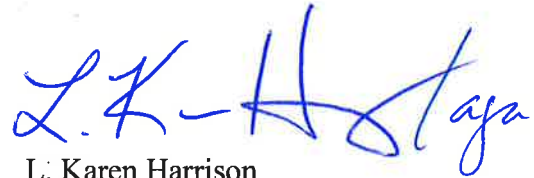
The Political Reform Act

Because the you must abstain from taking part in the CVAG contract decision, we do not need to further analyze the potential conflict of interest issues under the Act. By following the abstention requirements of Section 1090 and additionally leaving the room during the decisions, you will satisfy the Act's recusal provisions set forth in Section 87105 and Regulation 18707. As such, we do not analyze the Act's conflict of interest provisions further.

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

Sincerely,

Dave Bainbridge
General Counsel



By: L. Karen Harrison
Senior Counsel, Legal Division

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