



BUILDING INDUSTRY ASSOCIATION
OF CENTRAL CALIFORNIA

Serving Mariposa, Merced, Stanislaus and Tuolumne Counties

CORRESPONDENCE NO. 1
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March 24, 2010

The Honorable Jeff Grover
The Honorable Jim DeMartini
The Honorable Richard Montieth
The Honorable Vito Chiesa
The Honorable William O'Brien
Stanislaus County Board of Supervisors
1010 Tenth Street, Suite 6500
Modesto, California 95354

✓ BOARD OF SUPERVISORS
2010 MAR 25 1 P 4: 50

Re: **Political Reform Act and Government Code § 1090 Implications for
Williamson Act Contract Participants**

Dear Chairman Grover and Members of the Board of Supervisors:

As you know, a September 30, 2009 *Modesto Bee* article discussed the potential conflict of interest several members of the Board of Supervisors may have as holders of Williamson Act contracts. Such conflicts, if any, also potentially relate to the participation by certain supervisors in decisions regarding their and other Williamson Act contracts administered by the County of Stanislaus.

You may recall that Supervisor DeMartini was quoted in the Bee article as having requested that your county counsel "provide advice" regarding participation in such matters. As the article indicated, your board had not at that time received any such advice. In order to become better informed about issues such as this when dealing with the County of Stanislaus, staff from the BIACC has researched the California Fair Political Practices Commission (FPPC) website and spoken with a representative of the FPPC. It is our understanding that as of the time this letter was drafted, no such advice has been requested by the County of Stanislaus.

As a matter of necessity the Building Industry Association of Central California and our counterparts in the industry have conducted extensive research related to various conflict of interest requirements under the Political Reform Act. More pertinent to issues related to the administration of Williamson Act contracts, we have also been apprised of the complexities involving the interpretation and enforcement of Government Code § 1090. As you may be aware, there are numerous implications for elected officials and decision makers who participate in Williamson Act decisions as both holders of such contracts and administrators of contracts under the Williamson Act or other agricultural preserve or conservation easement instruments.

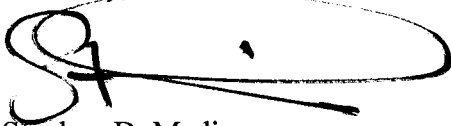
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Stanislaus County Board of Supervisors
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As discussed in the attached legal memorandum, one example of where there is exposure to elected officials and decision makers is not in the granting of contracts for others, but in the adoption of uniform rules and other requirements that affect the conditions of *every* Williamson Act contract.

We would like to pass along the analysis conducted by the Office of County Counsel for the County of Santa Barbara. The legal memorandum references guidance provided by California Deputy Attorney General Ted Prim, as well as it provides relevant citations of case law, code sections and Attorney General Opinions related to conflicts of interest. Mr. Prim is considered the foremost authority in California on conflict of interest and Government Code § 1090 compliance requirements.

We hope that you find this information useful. Please consider that it be distributed to Board of Supervisors members, planning commissioners and members of the Agricultural Advisory Board.

Sincerely,

A handwritten signature in black ink, appearing to be 'S. Madison', enclosed in a large, loopy oval shape.

Stephen D. Madison
Executive Vice President

Attachments: Santa Barbara Independent News Article
11/20/2007 Santa Barbara County Board of Supervisors Agenda Letter
11/07/2007 Santa Barbara County Office of County Counsel
Memorandum

Copies to: County Counsel



Ag Board Members Removed Amidst Conflict-of-Interest Investigation

By Indy Staff

Thursday, October 11, 2007

The Santa Barbara County Supervisors voted unanimously to **temporarily remove** the two agricultural industry representatives from the Agricultural Preserve Advisory Committee for fear that they cannot legally vote on Williamson Act matters as they themselves are Williamson Act contract holders. The issue is slated to return to the Board on 11/20. The County's Agricultural Advisory Committee is expected to propose a plan to remedy **conflict-of-interest** charges.



BOARD OF SUPERVISORS
AGENDA LETTER

Agenda Number:

Clerk of the Board of Supervisors
105 E. Anapamu Street, Suite 407
Santa Barbara, CA 93101
(805) 568-2240

Department Name: County Counsel
Department No.: 07110
For Agenda Of: November 20, 2007
Placement: N/A
Estimated Tme: .5 hours on 11/20/07
Continued Item: Yes (from 10/09/07)
If Yes, date from:
Vote Required: Majority

TO: Board of Supervisors

FROM: **County Counsel** Stephen Shane Stark 568-2950
Contact Info: Mary Parks Slutzky 568-2950

SUBJECT: **Membership and appointments to the Agricultural Preserve Advisory Committee ("APAC")**

County Counsel Concurrence

As to form: Yes

Other Concurrence:

As to form: None required.

Recommended Actions:

- a) Find that the adoption of the resolution reorganizing the APAC and the appointments to the APAC are not a project pursuant to CEQA Guidelines Section 15378(b)(5), organizational or administrative activities of government that will not result in direct or indirect physical changes to the environment.
- b) Adopt a Resolution appointing the membership of the Agricultural Preserve Advisory Committee, Attached as Exhibit A.

Auditor-Controller Concurrence

As to form: N/A

Summary Text:

This item was continued to November 20th at the Board's October 9, 2007 hearing to allow the Agricultural Advisory Committee (AAC) to comment on the membership proposed on October 9, 2007. At the October hearing issues associated with the Political Reform Act and Government Code §1090 were discussed. A memo prepared for the Board by County Counsel Shane Stark to further address these issues is attached as Exhibit B. This memo was provided to the AAC at its November 7, 2007 meeting. The AAC had intended to discuss designating members of the AAC to attend meetings of the APAC in order to express the views of the AAC on individual APAC items. Upon receipt of the memo, however, the AAC realized it needed more time to consider the memo before reaching a decision on the

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designations; it will discuss the memo and the designations at its December 5th meeting. Therefore, the AAC desires the Board continue this item to December 11th or early January.

In anticipation of a decision by the AAC that it is no longer interested in including members from agricultural production, both those in and not in Williamson Act contracts, the resolution establishing the membership of the Committee has been revised to reflect the deletion of these proposed members. If the AAC does not act in this anticipated manner, the resolution will be revised accordingly.

Fiscal and Facilities Impacts: None. Committee members are not reimbursed for expenses.

Fiscal Analysis: N/A

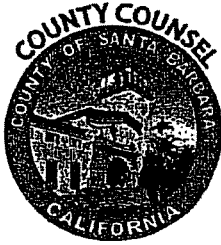
Staffing Impacts: N/A

Special Instructions: N/A

Attachment: Resolution

Authored by: Mary Parks Slutzky

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Office of County Counsel
Memorandum

Stephen Shane Stark
County Counsel

Telephone: (805) 568-2950
FAX: (805) 568-2982

November 7, 2007

To: Board of Supervisors and Interested Public
Subject: Government Code § 1090 and Williamson Act Contract Holders

This memo concerns the application of Government Code § 1090 et seq. to the county's agricultural preserves (Williamson Act) program. At the Board of Supervisors meeting of October 9, the Board continued to November 20 discussion of whether to have representatives of agricultural production, particularly contract holders, on the Agricultural Preserves Advisory Committee (APAC).

This memo addresses three legal issues under the California laws prohibiting self-dealing in contracts.

CONSULTATION WITH ATTORNEY GENERAL

County Counsel talked with Deputy Attorney General Ted Prim on October 10.¹ We asked him about the § 1090 implications of participation by a county supervisor or member of the APAC and Agricultural Advisory Committee (AAC) who holds a Williamson Act contract in a decision to amend Uniform Rules establishing uses compatible with agricultural preserves.²

Mr. Prim advised that a determination of whether § 1090 has been violated is to be made by local District Attorneys. He gave general guidance on the applicable law. He concurred it was unnecessary to request an Attorney General Opinion. Mr. Prim reviewed a draft of this memo and generally concurs with County Counsel's analysis, which follows.

¹ Mr. Prim is the Attorney General's maven on conflict of interest and § 1090 in particular. He is the editor of the Attorney General handbooks on Open Meetings and Conflict of Interest.

² The relevant provisions of the Williamson Act follow. Government Code § 51231 (the board [of supervisors]... shall adopt rules governing the administration of agricultural preserves, including procedures for initiating, filing, and processing requests to establish agricultural preserves. Rules related to compatible uses shall be consistent with the provisions of Section 51238.1 [principles of compatibility]. Those rules shall be applied uniformly throughout the preserve. ... In adopting rules related to compatible uses, the board ... may enumerate those uses... which are to be considered to be compatible uses on contracted lands ...) § 51239 (The board ... may appoint an advisory board, the members of which ... shall advise the board or council on the administration of the agricultural preserves in the county ... and on any matters relating to contracts entered into pursuant to this chapter.) § 51240 (Any ... county may by contract limit the use of agricultural land for the purpose of preserving such land pursuant and subject to the conditions set forth in the contract and in this chapter. A contract may provide for restrictions, terms, and conditions, including payments and fees, more restrictive than or in addition to those required by this chapter.) § 51243 (Every contract shall do both of the following: (a) Provide for the exclusion of uses other than agricultural, and other than those compatible with agricultural uses, for the duration of the contract. (b) Be binding upon, and inure to the benefit of, all successors in interest of the owner.)

Exhibit B

A. WILLIAMSON ACT CONTRACT IS A REMOTE INTEREST REQUIRING DISCLOSURE AND RECUSAL.

California Government Code § 1090 codifies the common law rule that a contract made by a public official that benefits his private financial interest is void. The Legislature has mitigated the harsh effects of this rule³ by adopting a set of statutory "remote interests" (§ 1091) and "non-interests" (§ 1091.5).

- If a member of a public board has a private financial interest in a contract, the contract is void (§ 1090). The interested member may not participate and the board may not approve the contract.
- If a member of a public board has a defined remote interest (§ 1091) he may not participate. He must disclose and note his interest. The remainder of the board may consider and approve the contract.
- If a member of a public board has a defined non-interest (§ 1091.5) he may participate.

Government Code § 1091(b)(9) defines as a "remote interest" "that of a person subject to the provisions of Section 1090 in any contract or agreement entered into pursuant to the provisions of the California Land Conservation Act of 1965 [Williamson Act]."⁴

Thus, if a county supervisor or APAC member faces a decision that affects the use of the contracted property, he may declare the interest, note it in the agency record, and not participate in that decision. The remainder of the board or committee may proceed to consider and adopt the item.⁵

B. RELATION BETWEEN STATUS OF COMMITTEE AS "DECISION-MAKING" OR ADVISORY" AND "PARTICIPATING IN THE MAKING OF A CONTRACT"

The APAC found that over its history its recommendations have been "regularly approved without modification" by the Board of Supervisors. This qualifies the APAC as a "decision-making" body under the Political Reform Act rather than a "solely advisory" body whose members are exempt from the Act.⁶

³ Self dealing in contracts is a crime, prosecuted by district attorneys and the Attorney General. A willful violation of § 1090 is punishable by a fine of not more than one thousand dollars (\$1,000), or by imprisonment in the state prison. The violator is forever disqualified from holding any office in this state (§ 1097). A contract made in violation of § 1090 is void, not merely voidable. *Thomson v. Call* (1985) 38 Cal. 3d 633. The interested official must return all funds received under the void contract even though he earned them. See *Carson Redevelopment Agency v. Padilla* (2005) 140 Cal.App.4th 1323 (where official extorted payment for approving housing assistance to property owners, city could recover any compensation it paid under the tainted contract without restoring any benefits it received). For reasons of public policy, an official who pleads guilty to § 1090 can't sue the lawyer who wrongly advised him for malpractice. *Chapman v. Superior Court* (2005) 130 Cal.App.4th 261.

⁴ The Legislature created this statutory remote interest in 1970. It allows boards of supervisors whose members include contract holders to approve agricultural preserve contracts without the participation of the interested member. Without § 1091(b)(9) any action by a board that includes a contract holder to approve or modify a Williamson Act contract that affects the interested member would be void. See § 1090 "county... 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."

⁵ § 1091(a)"An officer shall not be deemed to be interested in a contract entered into by a body or board of which the officer is a member within the meaning of this article if the officer has only a remote interest in the contract and if the fact of that interest is disclosed to the body or board of which the officer is a member and noted in its official records, and thereafter the body or board authorizes, approves, or ratifies the contract in good faith by a vote of its membership sufficient for the purpose without counting the vote or votes of the officer or member with the remote interest."

⁶ Gov. Code § 82019(b)(1) " 'Designated employee' [subject to the Act] does not include ... any unsalaried member of any board or commission which serves a solely advisory function." *Commission on Govt. Org. & Econ. v. Fair Political Practices Commission* (1977) 75 Cal.App.3d 716 holds that a government watchdog commission was "decision-making" and not "solely advisory" as demonstrated by analysis of its character, function, and track record. FPPC Regulation 2 C.C.R. § 18701 addresses the issue. For purposes of determining if a person is subject to the Act:

Whether members of the APAC are "participating in the making of a contract" for purposes of § 1090 most likely does not depend on whether the committee is deemed decision-making or advisory for purposes of the Political Reform Act. There is no definitive precedent. A finding that the committee's recommendations are regularly followed seems to be presumptive evidence that making a recommendation on a contract is "participation" that could be overcome by a factual showing in an individual case. The same case by case analysis would apply to formal recommendations of the AAC, which we consider a purely advisory body that is not subject to the Political Reform Act.⁷

Cases construing § 1090 hold that the self-dealing statutes and the Political Reform Act are *in pari materia*. *Lexin v. Superior Court* (2007) 154 Cal.App.4th 1425, 1459 (definition of "compensation" under PRA as including retirement benefits applies to "salary exception" of § 1091.5(a)(9))⁸; *People v. Honig* (1996) 48 Cal.App.4th 289, 327 (requirement of PRA that financial interest be foreseeable is not imported into § 1090). When statutes are *in pari materia*, they are considered to cover the same subject matter and are construed as one statute. However, the APAC's status as "decision-making" under the PRA does not resolve whether its members are "participating in the making of a contract" under § 1090 for the following reasons:

- The principle of *in pari materia* is a rule of legislative construction, intended to assist a court in determining the intent of the Legislature when the language of statutes is ambiguous. The definition of "decision-making" is contained in regulations drafted by the Fair Political Practices Commission, not in the Political Reform Act itself. (2 CCR § 18701, see note 6, supra.)
- Whether an interested party is violating § 1090 does not depend on whether he or she is "making a decision." Rather, it depends on whether the person is participating in the making of a contract. Cases interpreting § 1090 hold that "participating in the making of a contract" means not only approving or executing a contract, but also preliminary planning and other steps leading to the contract.⁹

By the same analysis, designating a contract holder who is an advisory committee member as a "liaison" to the APAC will not necessarily immunize him if the APAC or Board of Supervisors approves a contract that benefits his interest.¹⁰ Each case would have to be examined on its facts and circumstances to determine "participation." We believe that a contract holder has a right to participate in a decision at a public meeting as a member of the public and that doing so does not violate § 1090.¹¹ What violates § 1090 is an *official's*

(1) "Member" shall include, but not be limited to, salaried or unsalaried members of committees, boards or commissions with decisionmaking authority. (A) A committee, board or commission possesses decisionmaking authority whenever: ...
(iii) It makes substantive recommendations that are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency....

⁷ The AAC was recently created and does not have a track record of agenda items that have been regularly approved over a number of years. The AAC may make recommendations on the spending of funds in the Agricultural Commissioner's budget, however its members do not "manage investments" so as to qualify as public officials. See 2 CCR § 18701(b).

⁸ Mr. Prim advised that the parties are likely to seek Supreme Court review in *Lexin*, the prosecution for violation of § 1090 of San Diego city officials who as members of the city retirement board voted for actions that increased their retirement benefits.

⁹ See 81 Ops. Cal. Atty. Gen. 317, 320 (1998), quoting *Stigall v. City of Taft* (1962) 58 Cal.2d 565, 571 ("... [We reject] the narrow and technical interpretation of the word 'made' and construe its statutory meaning to encompass the planning, preliminary discussions, compromises, drawing of plans and specifications and solicitations of bids, [that] were, in the broad sense, embodied in the making of the contract.")

¹⁰ The AAC has designated Mr. Chamberlin and Mr. Giorgi to attend APAC meetings and provide input *as members of the public* on the committee's views, as well as their views as experienced agriculturalists. They would thus be removed from the process of making decisions on agricultural preserve contracts and rules.

¹¹ Even § 87200 officials, for whom disclosure, disqualification and leaving the room are mandatory when a decision before their board affects a financial interest, may speak on the issue at a public meeting during the same time as the general public (§ 87105(a)(4)). The Brown Act gives members of the public the right to attend and speak at public meetings of government agencies, subject to reasonable regulations, e.g. limits on time and number of speakers (§ 54954.3).

participation in a public capacity in the making of a contract that affects his private financial interests. Whether prohibited "participation" includes *semi-official* input as a designated liaison to a decision-maker requires analysis of the nature and extent of the activity in the individual case.

C. THE "RECIPIENT OF PUBLIC SERVICES" "NON-INTEREST" EXCEPTION.

Section 1091.5(a)(3) provides that an official whose interest in a contract is that of a "recipient of public services generally provided by the public body or board of which he or she is a member, on the same terms and conditions as if he or she were not a member of the board" is "not interested" for purposes of 1090. If this exception applies, the board member may participate in decisions affecting the "non-interest."

The cases and attorney general opinions interpreting § 1091.5(a)(3) make a distinction. The exception applies to public utility services and rents that are pre-set and generally available to members of the public on fixed terms. It does not apply to government services that require the exercise of judgment or discretion by public officials in individual cases.¹²

Agricultural preserve contracts are available to all who qualify under existing rules.¹³ The contract terms are standard. However, the § 1091.5(a)(3) exception does not appear to fit the Santa Barbara County contract approval process. A land owner submits a proposal for a contract. The proposal must demonstrate that the parcel is of sufficient size, has water, and is devoted to agriculture and compatible uses. The APAC reviews the contracts for technical sufficiency and consistency with the Uniform Rules and makes recommendations to the Board of Supervisors, which actually approves the contracts.¹⁴ The APAC usually tries to work with the farmers to develop a contract that will work rather than recommend denial to the Board.

Amendments to the Uniform Rules for Agricultural Preserves apply to all contracts. There is no "public generally" exception in § 1090 like the one in the Political Reform Act.¹⁵ Each proposed rules change must be analyzed to determine whether a member's financial interests are affected.

The APAC on occasion must interpret the Uniform Rules and apply them to questions of compatible use under the Williamson Act. Section 51238.1 defines "compatibility." It requires that nonagricultural activities not substantially impair or displace agriculture on the subject land and surrounding agriculture. The determination whether parcels and uses qualify, the modification of proposals to achieve consistency,

¹² See *People v. Lexin, supra*, 154 Cal.App.4th at 1462 (providing employee benefits involves discretion – exception does not apply); *City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 514-515 -- providing reclaimed water service at pre-set rates qualifies for exception). The analysis in these cases follows several Attorney General Opinions. See 80 Op. Atty Gen. Cal. 335 (1997) (contract regarding maintenance services not available to general public – exception does not apply); 81 Op. Atty Gen. Cal. 317 (1998) (government loan not generally available – exception does not apply); 88 Op. Atty Gen. Cal. 122 (2005) (sale of advertising space "is not specially tailored or conditioned to meet the individualized needs or circumstances" – exception applies); 89 Op. Atty.Gen. Cal. 121 (2006) (rental of airport hangar on generally available terms – exception applies).

¹³ If there is doubt as to whether the property qualifies as an agricultural preserve, and discretion is involved (e.g., determining whether the property's uses are compatible with agriculture) a decision to approve a contract would not qualify for the exception. The same analysis applies to cancellation, non-renewal and replacement of Williamson Act contracts.

¹⁴ Qualification of a parcel is dependent on more than size – it must be either 100 acres (nonprime soil and capable of grazing) or 40 acres (combined) for prime soil and meeting crop production requirements. Nonagricultural development is limited on other than "superprime" contracts to 3% or a maximum of 2 acres. The Committee would expect a "prime" contract to have either existing producing crops or a business plan that the committee believes to be realistic.

¹⁵ See § 87103 ("A public official has a financial interest in a decision within the meaning of § 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 his or her immediate family, or on [5 categories of interests]..."); 2 C.C.R. § 18707.4(a) (For purposes of the Act's disqualification rule, the "public generally" exception applies to "appointed members of boards... who are appointed to represent a specific economic interest" if findings of necessity for representation are made).

and the adoption, amendment, and interpretation of the Uniform Rules all involve the exercise of judgment or discretion.¹⁶ The "recipient of public services" exception does not apply in these cases.

CONCLUSION

The Board of Supervisors is not prohibited from appointing Williamson Act contract holders to the Agricultural Preserves Advisory Committee. To comply with the Political Reform Act, if the Board decides to designate committee seats for contract holders it should find that their representation and participation on the committee are necessary. (See 2 C.C.R. § 18707.4(a).)

For purposes of Government Code § 1090, the critical question is whether a specific action by the APAC or Board of Supervisors affects a financial interest of a board or committee member. In the ordinary case, where a board or committee member is making a recommendation or determination on a specific contract for another person's property, the member's interest is not affected – the member may participate in the discussion and decision. However, where a decision or interpretation could set a precedent or practice that applies to the member's property, he or she would have a remote interest in the contract under § 1091(b)(9) and could not participate in the decision.¹⁷

We will be available to discuss this further at the continued Board hearing on the composition of the APAC.



¹⁶ Approval of a Williamson Act contract appears to fall somewhere between the rental of a parking space (only criterion is payment of fee and contract terms are fixed) and approving a loan for a public purpose (involves assessment of qualifications and credit). APAC review of contracts can be highly interactive. It is somewhat like a building permit, reviewed and usually granted on a ministerial basis, but in exceptional cases involving the exercise of discretion. See, e.g., *Friends of Westwood v. City of Los Angeles* (1987) 191 Cal. App. 3d 259 (building permit not ministerial for purposes of CEQA -- "the touchstone is whether the approval process involved allows the government to shape the project in any way which could respond to any of the concerns which might be identified in an environmental impact report"). Although there is no definitive precedent, we believe that the test under § 1091.5(b)(3) – "exercise of judgment or discretion" covers a broader range of conduct than "discretionary" (as opposed to "ministerial") permits. That is, the exception can be defeated if the local agency exercises judgment in making a decision, even if the permit granted is deemed ministerial rather than discretionary.

¹⁷ A county supervisor holds a public office under § 87200. Under § 87105 **Disclosure of financial interest; Recusal from discussing and voting on issue(a)** A public official who holds an office specified in § 87200 who has a financial interest in a decision within the meaning of § 87100 shall, upon identifying a conflict of interest or a potential conflict of interest and immediately prior to the consideration of the matter, do all of the following:

- (1) Publicly identify the financial interest that gives rise to the conflict of interest or potential conflict of interest in detail sufficient to be understood by the public, except that disclosure of the exact street address of a residence is not required.
- (2) Recuse himself or herself from discussing and voting on the matter, or otherwise acting in violation of Section 87100.
- (3) Leave the room until after the discussion, vote, and any other disposition of the matter is concluded, unless the matter has been placed on the portion of the agenda reserved for uncontested matters.
- (4) Notwithstanding ¶(3), a public official ... may speak on the issue during the time that the general public speaks on the issue.