KAUFMAN LEGAL GROUP
A PROFESSIONAL CORPORATION

MEMORANDUM

To: Board of Port Commissioners
San Diego Unified Port District

From: Gary S. Winuk [redacted]
Stephen J. Kaufman
Stacey J. Shin

Re: Conflict of Interest Advice – Commissioner Sandy Naranjo

Date: December 8, 2021

You have requested independent advice regarding potential conflicts of interest involving San Diego Unified Port District ("District") Commissioner Sandy Naranjo regarding a past decision made by the District and upcoming projects being contemplated by the District.

Background

The Port of San Diego is a specially created public district. It manages San Diego Bay and 34 miles of waterfront. The Port was established in 1962 and has five member cities: Chula Vista, Coronado, Imperial Beach, National City and San Diego. Management of the Port District is entrusted to a Board of seven appointed commissioners. One commissioner is appointed by each of the city councils of Chula Vista, Coronado, Imperial Beach and National City, and three commissioners are appointed by the San Diego City Council. The Board establishes policies under which the Port's staff — supervised by the President and Chief Executive Officer — conducts its daily operations.

Commissioner Sandy Naranjo was appointed by the City of National City in January 2021 to serve as a Port Commissioner. Commissioner Naranjo is employed by The Organizing Center, a nonprofit corporation based in Philadelphia, Pennsylvania. The Organizing Center provides services to labor unions and other entities to assist with training, coaching and support to assist in achieving goals related to social justice issues. The Organizing Center does not have any clients in California. Commissioner Naranjo does not perform any work for The Organizing Center that involves any California entity and is not paid to -- nor is she seeking to acquire -- new clients for The Organizing Center in California. Commissioner Naranjo has been employed by The Organizing Center since February 2021. Since becoming a Port Commissioner, she has not had any other sources of income to her and has not held any business positions with any other corporations, other than the business she created with her husband described below.

Commissioner Naranjo's husband, Andrew McKercher, is an employee of Baker Electric. That is his only source of income. As such, he is a dues-paying member of IBEW Local 569. Mr. McKercher does not hold any business or management positions in any union or other entity. Although Mr. McKercher sought a position with the San Diego Building Trades Council in 2021, he was not selected for the position.

Commissioner Naranjo and her husband formed a corporation in January 2021, Common Wealth Action Consulting Inc., in order to enable them to provide consulting services to unions in California regarding their organizing efforts. Although Commissioner Naranjo and her husband had discussions with several San Diego unions regarding utilizing their consulting services, no contracts were ever entered into, and no income was ever received by the business. The most substantive of these conversations was with United Association of Plumbers, Steamfitters, Refrigeration & HVAC Technicians Local 230, but these discussions again did not result in any contract, income or promised income to Commissioner Naranjo, her husband, or their consulting business. The consulting business is currently in the process of dissolution and no future activity is planned.

The District is currently considering development projects collectively known as the Chula Vista Bayfront Project ("Project"). The Project has already been the subject of a vote by the District on June 15, 2021. The June 15 vote allowed the District to provide infrastructure and utilities to support a hotel and convention center for the Project. Further votes on various aspects of the Project, including the potential issuance of bonds to finance components of the Project, are anticipated in the near future.

The current developer of the Project is the RIDA Development Corporation ("RIDA"). As part of the Project, a project labor agreement (PLA) may be utilized by RIDA or another developer to help secure the needed labor for construction of the Project.

A PLA is a collective bargaining agreement between building trade unions and contractors for a specific project. The PLA governs the terms and conditions of employment for all craft workers—union and nonunion—on a construction project. Imposition of the requirement that a developer utilize a PLA on the Project is not currently contemplated by the District but may be pursued by RIDA or another developer separately from any direction or requirement from the District.

Process to Determine Our Independent Opinion

Our firm was tasked with conducting a fully independent review of the facts and law related to the question presented. In conducting this independent review, we had only minimal contact with the San Diego Port's general counsel and staff attorneys. Such contact was generally limited to the logistics of the retention of our firm for the review and a basic overview of the work product desired by the Port and the timeframe in which it was required.

The review included an independent determination of relevant facts. Commissioner Naranjo made herself fully available to provide any relevant information and answer any questions presented to her and to her separate counsel. The facts she provided were consistent with her prior statements made to previous outside counsel for the Port, who developed an initial opinion on these conflict of interest issues. The factual information we obtained was also consistent with the civil validation case filed by the Port, which resulted in no party challenging the proposed Port actions based on a potential or actual conflict of interest.

Our firm also conducted an independent legal analysis of the potential conflict of interest issues. Although we received and reviewed a prior memorandum addressing these issues prepared by the Port's previous outside counsel, we performed independent legal research and conducted our own independent analysis. We did not have any discussion with the Port's general counsel or staff attorneys regarding our analysis of the legal issues presented or the conclusions we reached.

This memorandum reflects our factual findings and legal conclusions and recommendations based on the independent review, research and analysis that we conducted.

Questions Presented

Did Commissioner Naranjo have any conflicts of interest in the June 15, 2021 District decisions regarding the Project? Does she have any conflicts of interest in any future District decisions regarding the Project, including any decision in which a PLA is present in the Project?

Short Answer

There are two statutory types of conflicts of interest: general conflicts of interest under Government Code Section 87100 and conflicts of interest in contracts under Government Code Section 1090. Under either section, a public official only has a conflict of interest if he or she has a financial interest in the decision, and the public official makes, participates in making, or influences a governmental decision that will have a material financial effect on his/her financial interest.

Here, Commissioner Naranjo did not have any financial interest in the June 15 District decision regarding the Project. Further, she will not have a financial interest in future decisions regarding the Project if her current financial interests remain the same. This is because she does not have a financial interest in any individual or entity involved, either directly or indirectly, in a decision regarding the Project. Neither she nor her husband receives income, has a business position, or has any other financial interest in any of the named parties involved in the government decisions. Further, neither she nor her husband have any interest in any "indirect" parties to the decisions, including any local unions who may be part of the Project either through a PLA or other means. This is, again, because they receive no income from and hold no business positions with any of the unions or other entities that may be part of the Project. Therefore, Commissioner Naranjo may fully participate in any decisions regarding the Project.

However, although we were not tasked with the analysis of a potential conflict of interest regarding Mr. McKercher's employment with Baker Electric, if Baker Electric is included in any work with the Project or any other project, the District should consult the advice letter that was recently obtained from the California Fair Political Practices Commission ("FPPC") to ensure no conflict of interest is present.

Lastly, even if Commissioner Naranjo, or any other Commissioner, were to have a financial interest in one of the local unions, and that union participated in a PLA regarding the Project, it would likely not create a conflict of interest under either section 87100 or 1090. Based on our review of FPPC advice letters, Attorney General opinions, and relevant case law, the interest would be too remote to constitute a financial interest and, thus, create a conflict. If this situation were to arise, we recommend seeking formal advice from the FPPC to provide certainty on the issue.

Detailed Analysis

Conflicts of Interest Under the Political Reform Act

The Political Reform Act ("the Act"), in Government Code Section 87100, prohibits public officials from influencing any decision in which it is reasonably foreseeable that there will be a material effect on one of their financial interests. A public official at any level of state or local government has a prohibited conflict of interest and may not make, participate in making, or in any way use or attempt to use his or her official position to influence a governmental decision when he or she knows or has reason to know he/she has a disqualifying financial interest. A public official has a disqualifying financial interest if the decision will have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, directly on the official, or his/her immediate family.

Here, the Commissioner is clearly a public official who makes decisions for the District in conjunction with the other Commissioners. However, Commissioner Naranjo does not have a financial interest in the Project. 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 his or her immediate family, or on any of the following:

> (a) Any business entity in which the public official has a direct or indirect investment worth two thousand dollars ($2,000) or more.
> (b) Any real property in which the public official has a direct or indirect interest worth two thousand dollars ($2,000) or more.
> (c) 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.
> (d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.
> (e) Any donor of, a gift aggregating five hundred dollars ($500) or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made.
>
> (Government Code Section 87103)

Also, the FPPC has a "nexus" test for financial interest materiality where the decision will affect the public official's personal finances. Specifically, any reasonably foreseeable financial effect upon an official's financial interests is material if the decision will achieve, defeat, aid, or hinder a purpose or goal of the financial interest and they receive or are promised the income for achieving the purpose or goal. An example of this would be if, for example, pay from a union was linked to goals that were impacted by District decisions.

Based on the facts we obtained through our interview with Commissioner Naranjo, she does not have any of the financial interests articulated in Government Code Section 87103 with regard to the Project or under the "nexus" test. Therefore, she does not have a conflict of interest under Section 87100 in the Project. Even if she did, however, she could fully recuse herself from the decision as provided in Government Code Section 87105, and the District could continue to make decisions regarding the Project.

Conflicts of Interest Under Government Code Section 1090

In addition to the conflict of interest provisions in the Political Reform Act under Section 87100, the Government Code also prohibits conflicts of interest in contracts. Specifically, State and local officers and employees, including District Commissioners, 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. (Government Code §1090.)

Where there is a conflict of interest under Section 1090, and the agency enters into the contract, the public official who has the conflict of interest can be charged criminally or be subject to an administrative enforcement action. Further, the contract is deemed void and neither party may enjoy the benefits of it. If the 1090 conflict is identified prior to the contract decision, it prohibits the contract from being entered into. Unless an exception applies, this is true regardless of whether or not the public official recuses himself or herself.

With regard to the analysis under Government Code Section 1090, the following six-step analysis is used to determine if a conflict exists:

1. Is the official subject to the provisions of Section 1090?
2. Does the decision at issue involve a contract?
3. Is the official making or participating in making a contract?
4. Does the official have a financial interest in the contract?
5. Does either a remote-interest or non-interest exception apply?
6. Does the rule of necessity apply?

Commissioner Naranjo is a public official, thereby satisfying the first step in the analysis. As for the remaining elements, the FPPC and California courts have generally taken a broad view of the scope of section 1090.Indeed, the term "contract" is to be interpreted broadly and includes a grant. Similarly, a public official may have a "financial interest" in a contracting party even though he or she will not derive a personal benefit. An official is deemed to have a "financial

interest" in a contract if he or she might profit from it in any way. Although Section 1090 does not specifically define the term "financial interest," case law and Attorney General opinions state that 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. 85 Ops.Cal.Atty.Gen 34, 36-38 (2002).

Prohibited "financial interests" extend to expectations of economic benefit. (*People v. Honig* 48 Cal.App.4th at p. 315.) "[A] financial interest within the meaning of section 1090 may be direct or indirect and includes the contingent possibility of monetary or proprietary benefits." (*Id.* at p.325 see *People v. Gnass* (2002) 101 Cal.App.4th 1271, 1298-1301; *People v. Vallerga* (1977) 67 Cal.App.3d 847, 865.) The fact that the officer's interest "might be small or indirect is immaterial so long as it is such as deprives the [District] of his overriding fidelity to it and places him in the compromising situation where, in the exercise of his official judgment or discretion, he may be influenced by personal considerations rather than the public good." (*Terry v. Bender* (1956) 143 Cal.App.2d 198, 207-208.) All the circumstances of the transaction as a whole must be considered in determining whether a proscribed financial interest would be present in the contract. (*Thomson v. Call*, (1985) 38 Cal.App.3d 633, 645.) The courts have also articulated that section 1090's prohibition must be broadly construed and strictly enforced. (See, e.g., *Stigall v. City of Taft* (1962) 58 Cal.App. 2d 565, 569-571.)

Here, again, the information we obtained indicates that Commissioner Naranjo has no financial interest in the June 15 decision regarding the Project, and no future financial interests in decisions regarding the Project as long as her financial interests remain the same. Commissioner Naranjo has articulated that she does not have plans to do consulting work with any of the local unions that either may be involved in the Project or may be part of a PLA within the Project.

Even if Commissioner Naranjo, or any other Commissioner, were to receive income from a union that was a participant in a PLA for the Project, the financial relationship between the Commissioner and the union's participation in the contract would likely be deemed "too remote" to constitute a prohibited financial interest under Section 1090. Although there is no specific Attorney General opinion, FPPC advice letter, or case that addresses this exact factual situation, the closest analogous opinions and cases lead to the conclusion that the income from a union that is a participant in the Project PLA would not be a prohibitive financial interest under 1090.

This opinion, that income from a union participating in a PLA would not be a prohibitive financial interest, is based on specific facts. Specifically, this presumes that the District would have a contract with RIDA or another developer. RIDA would then enter into the PLA with local unions. Under the PLA, RIDA would employ union members to work on the Project, and those union members would, in turn, pay dues to the union.

Under this factual scenario, there are analogous cases, Attorney General opinions and FPPC advice letters that each indicate that the financial interest would be too remote or distanced from the decision to create a conflict. In the FPPC's *Gallien* Advice Letter (2017) A-17-145, a San Diego City Representative to the San Diego Water Authority wanted to provide paid consulting

services to a labor council that had as one of its members a labor union that was engaged in negotiations with the Water Authority. The FPPC found that, "because it did not find evidence that he would experience any change in his factual circumstances, nor in that of his employer's status, nor his continued employment related to the decisions at issue," the interest was not sufficient to trigger the prohibitions of Section 1090.

The Attorney General's office considered a similar issue in 2015. *See* 98 Ops.Cal.Atty.Gen 102. In this Opinion the Attorney General found no 1090 prohibition where a local elected official provided services as an independent contractor to a public relations firm that provided services to a non-profit that had contracts with the elected official's agency. The public official also did not do any work on the non-profit's contracts with the public agency.

Case law also provides an analogous example. In *Hotchkiss v Moran* (1930) 109 Cal.App.321, 323, the Court considered a situation where a shareholder of the business in which an elected public official was the manager sought a contract with the elected public official's agency. The Court found no prohibitive financial interest due to the financial interest being "too remote." Although Hotchkiss was decided before Section 1090 had been codified, the concept was extended to Section 1090 in *BreakZone Billiards v. City of Torrance (2000)* 81 Cal. App. 4th 1205.

Although these analogous opinions and court cases would likely lead to regulatory agencies such as the FPPC concluding that income received from a union that was part of a PLA on a project subject to a contract with the District is not a prohibitive financial interest under Section 1090, we recommend seeking formal advice from the FPPC or the Attorney General's office if this situation arises. This would ensure certainty going forward in the District's actions.

If it were determined that Commissioner Naranjo, or any other Commissioner, had a financial interest in a contract decision involving the Project, the next question would be whether a remote interest or non-interest exception applies. Government Code Section 1091.5 contains multiple exceptions to section 1090, known as "non-interests." These are areas in which the Legislature has sought to curb the broad impact of section 1090 in instances where, despite the existence of a financial interest, an official's judgment would not likely be impaired. This would allow the District to enter into the proposed contract and the affected Commissioner to fully participate in that decision. However, based on our reading of the statute, none of the "non-interest" exceptions would appear to apply to a situation in which a Commissioner is receiving income from a union that is participating in the Project via a PLA or other means.

If, under the proposed scenario, the "non-interest" exceptions do not apply, a Commissioner could still recuse himself or herself from a decision regarding the Project if a "remote interest" were to exist under Government Code Section 1091. This would also allow the District to enter into the proposed contract. Here, if the financial interest was a nonprofit corporation, as many unions are, Section 1091(b)(1) provides a remote interest exception for employees of nonprofits. Although this would require specific facts to provide a full analysis of the issue, the exception may apply to the circumstance where a union was a source of income to a Commissioner who

was an employee of the union. Since the term "employee" includes contractors in some circumstances, if the issue were to arise in the future, this is another potential avenue to allow the contract to proceed under Section 1090. That analysis, however, would have to be conducted based on the facts known at the time. If the exception were to apply, the Commissioner would have to fully recuse himself/herself from any contract decision regarding the financial interest, but the District would not be prohibited from entering into the contract.

Common Law Conflicts of Interest

Although the common law conflict of interest principles have largely been codified in Government Code Sections 87100 and 1090, some remnants of the common law prohibition on conflicts of interest remain. Generally, when a public official is sitting in a quasi-judicial capacity, there is a duty to avoid actual bias in their decisions. (*Petrovich Development Co., LLC v. City of Sacramento*, 48 Cal. App. 5th 963, 973.) The term quasi- judicial capacity includes situations such as the approval of permits and other entitlements commonly considered by local government entities.

A common situation is where the losing bidder on a contract challenges the award of the contract due to alleged bias on the part of one of the local government elected or appointed officials. The standard required to invalidate a contract award is high. (*Petrovich* at 973.)

Since Commissioner Naranjo has no financial interest in any of the parties to the Project, there is no common law conflict of interest. If new facts emerge regarding the financial interests of her or any Commissioner, a fact-specific analysis should be conducted.

Conclusion

Based on the facts obtained in our independent investigation, Commissioner Naranjo does not have a financial interest that would have created a conflict of interest under either common or statutory law in the June 15, 2021 District action regarding the Project. Nor does she have a financial interest in future decisions regarding the Project under current facts. Therefore, she may fully participate in any decisions regarding the Project.

Further, even if Commissioner Naranjo or any other Commissioner had a financial interest in a union that was a participant in a PLA as part of the Project, it is likely that this interest would be too remote or distanced to create a prohibitive conflict of interest. If such a situation arises, we recommend seeking a formal opinion from the FPPC or the Attorney General to bring certainty to the District's actions.

Please let us know if you have questions or require further direction on these issues.