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OPINION	:	No. 79-908
	:	
of	:	<u>January 10, 1980</u>
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SUBJECT: SURPLUS COUNTY PROPERTY—The officers, employees and elected officials of a county may not bid on surplus county property at a public auction conducted by the county if in their official capacity they in any way influenced the sale of such property or if in purchasing such property, the county officer or employee has placed himself in a position where his own private interests came before his public duty.

The Honorable Christopher W. Smith, District Attorney of Alpine County, has requested an opinion on the following question:

May the officers, employees and elected officials of a county bid on surplus county property at a public auction conducted by the county?

CONCLUSION

The officers, employees and elected officials of a county may not bid on surplus county property at a public auction conducted by the county if in their official capacity they participated in or influenced the official determinations involved in the sale of such

property, or if in purchasing such property, the county officer or employee has placed himself in a position where he might be tempted to disregard his duty to act in the best interest of the public in favor of his own private interests.

ANALYSIS

Initially relevant to the present question concerning a county's sale of its surplus property at auction is Government Code section 25363¹ which sets forth the basic procedures for such sales. This section provides:

“The board of supervisors may sell or lease at public auction, and convey to the highest bidder, for cash, any property belonging to the county not required for public use. The sale or lease may be made at the courthouse door or at such other place within the county as the board orders by a four-fifths vote. Notice of the sale or lease shall be given for five days prior thereto either by publication in a newspaper published in the county or by posting in three public places in the county. The proceeds shall be paid into the county treasury for the use of the county. If in the unanimous judgment of the board, the property does not exceed in value the sum of five hundred dollars (\$500), or the monthly rental value thereof is less than seventy-five dollars (\$75), or if it is the product of the county farm, it may be sold or leased at private sale without advertising by any member of the board authorized by a majority vote of the board. The sale or lease shall be reported to and confirmed by the board”²

The question of whether county officials may purchase for themselves surplus county property at such auction sales requires a consideration of the subject of conflicts of interest.

A basic rule governing the conduct of public officials is that a public official cannot place himself in a position where he might be tempted by his own private interests to disregard the best interests of the public. (*Noble v. City of Palo Alto* (1928) 89 Cal. App. 47, 51; *People v. Darby* (1952) 114 Cal. App. 2d 412, 425; 40 Ops. Cal. Atty. Gen. 210, 212 (1962). See also section 81001(b). This rule constitutes the so-called common law doctrine against conflicts of interest. (59 Ops. Cal. Atty. Gen. 604, 613 (1976); 58 Ops. Cal. Atty. Gen. 345, 354 (1975).)

¹ Hereafter all section references are to the Government Code unless otherwise indicated.

² See section 25520 *et seq.* which provides an alternative procedure for the county's sale of real property. (35 Ops. Cal. Atty. Gen. 38 (1961).)

The subject of conflicts of interest is the concern of extensive legislation in California. (See 59 Ops. Cal. Atty. Gets. 314 (1976); 59 Ops. Cal. Atty. Gen. 604, *supra*.)

Specifically applicable to the present situation involving a county official's purchase of county property are the provisions of sections 1090 *et seq.*³ A Section 1090 provides:

“Members 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. Nor *shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity*” (Emphasis added.)

Thus aside from prohibiting public officials from making *contracts* in which they have a financial interest, section 1090 also expressly prohibits public officials from buying property at any sale “made by them in their official capacity” (i.e., the statute prohibits “self-dealing.” 53 Ops. Cal. Atty. Gen. 163, 164 (1970)). However, within the context of section 1090 *et seq.*, a sale is a contract. (*People ex rel. State of California v. Drinkhouse* (1970) 4 Cal. App. 3d 931, 935. See also *Salada Beach etc., Dist. v. Anderson* (1942) 50 Cal. App. 2d 306, 309.) Therefore the cases construing section 1090 in relation to the making of contracts are applicable to our present inquiry involving sales.

In the factual situation presented with the present opinion request the county board of supervisors declared the property to be surplus prior to its sales at auction and set the minimum bids for such property. A county building inspector, with the approval of the board of supervisors, consultant and a county department head, acted as auctioneer.

³ The predominate statute in the field of conflicts of interest is the Political Reform Act of 1974 (§§ 81000–91014), an initiative measure approved by the voters on June 4, 1974. Among other things, this statute prohibits any public official from making a governmental decision which has a material financial effect upon specified property or economic interests which he might possess at the time he makes the decision. (§§ 87100, 87103.)

Since we have not been provided with any facts on this print, we are assuming for purposes of this opinion that the pertinent county officials do not possess those interests necessary to make the Political Reform Act of 1974 applicable to their purchase of county surplus property. However, see 59 Ops. Cal. Atty. Gen. 604, *supra*, at p. 617, concluding that the Political Reform Act of 1974 does not repeal the provisions of section 1090 *et seq.* (but is controlling in cases where the statute might be in conflict).

Under these circumstances the question that initially arises is whether a county official has actually “made a contract” or a “sale” in his “official capacity” as specified by section 1090 if in such official capacity he participated only in the making of the preliminary determinations preceding the sale of the property at auction and was involved in the sale itself only in the capacity of a private purchaser; i.e., he did not in his “official capacity” participate in the ultimate execution of the contract.

This question was resolved by the Supreme Court in *Stigall v. City of Taft* (1962) 58 Cal. 2d 565 where, in construing section 1090, it stated:

“ . . . we are not here concerned with the technical terms and rules applicable to the making of contracts. The Legislature instead seeks to establish rules governing the conduct of governmental officials. In this sense, is an act done or an agreement ‘made’ only when the final, objective affirmation is communicated? It is true that no rights and duties accrue and no contract is technically made until such time, but the negotiations, discussions, reasoning, planning and give and take which goes beforehand in the making of the decision to commit oneself must all be deemed to be a part of the making of an agreement in the broad sense.” (*Id.* at p. 569.)

The court then concluded:

“ . . . we are persuaded, if not compelled, to reject in the case at bar 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 solicitation of bids”

(*Id.* at p. 571; see also *Millbrae Assn. of or Residential Survival* (1968) 262 Cal. App. 2d 222, 237.) Also pertinent to this issue is *People v. Sobel* (1974) 40 Cal. App. 3d 1046, where, after rejecting the contention that section 1090 “only applies to those persons who actually have the legal authority to execute contracts . . .”, the court concluded that:

“The decisional law, therefore, has not interpreted section 1090 in a hypertechnical manner, but holds that an official (or a public employee) may be convicted of violation no matter whether he actually participated personally in the execution of the questioned contract, if it is established that he had the opportunity to, and did, influence execution directly or indirectly to promote his personal interests.” (*Id.* 40 Cal. App. 3d at p. 1052.)

Thus, if a county official participated in or influenced the decision involving the selection of property to be auctioned and in the decisions which affected the selling price, such official participated in the “making” of a contract in his “official capacity” even though he may not have actually executed the contract or had the authority to do so. And since the official was in a position to realize personal economic benefit from his public decision involved in the “making” of the contract, he would be “financially interested” in that contract as prohibited by section 1090, if he purchased the property which was sold within the context of those official decisions. As stated in *People v. Darby, supra*, 114 Cal. App. 2d at p. 425:

“It does not require the member to acquire a transferable interest in the forbidden contract before he may be amenable to the inhibition of the statute, but if the member is for any reason placed in such position that he prefers the execution of a proposed contract more than he desires the public good to be served, then he is interested. And when the board authorizes the contract, such member violates sections 1090 and 1097.”

(See also *Fraser-Yam or Agency, Inc. v. County of Del Norte* (1977) 68 Cal. App. 3d 201, 212, and *People v. Watson* (1971) 15 Cal. App. 3d 28, 34 38–39. These cases also concluded that the “interest” in question had to be “financial” in nature as a result of a 1963 amendment to section 1090.)

We would note here that the same policy and reasoning which lead to the conclusion that participating in the preliminary steps constitute “making” a contract under section 1090 is precisely applicable to the provisions in section 1090 which prohibit public officials from privately purchasing property which they are *selling* in their official capacity. Therefore even though the public official does not, in his official capacity, “actually participated personally in the execution of” the sale (see *People v. Sobel, supra*, 40 Cal. App. 3d 1046, 1052), it would appear that such official would be deemed to have “made” the sale as that term is used in section 1090, if he participated in or influenced the preliminary steps leading to the “sale.” (See 53 Ops. Cal. Atty. Gen. 163, 166 (1970), noting the tendency of the courts to liberally construe the term “made.” Thus even if the sale of county property at an auction were not to be deemed a contract, the proscriptions of section 1090 which extend to sales as well as contracts, would still be applicable in the situation being considered here.

At this point the distinction under section 1090 between public officials who are “members” of the “body or board” making the contract in question and those public officers and employees who are not such “members” should be recognized. As noted, section 1090 prohibits a public official from having financial interest in either those contracts he makes or in those contracts made by a body or board of which he is a member. Accordingly, as

pointed out in *Fraser-Yamor Agency, Inc. v. County of Del Norte*, *supra*, 68 Cal. App. 3d at p. 211:

“An employee or officer making such a contract as an individual *must participate* in the making of the contract in his official capacity. On the other hand, where the contract is entered into by the body or board of which the employee or officer is a member, the element of participation is present by the mere fact of such *membership irrespective of whether the employee or officer personally abstains* from engaging in any of the embodiments resulting in the making of the contract. (Emphasis added.)

Thus in the present situation since the board of supervisors participated in the making of the contract by selecting the property and setting the minimum bid price, all members of the board would be precluded by section 1090 from bidding on the property regardless of whether they individually took part in the contract making process. But, as indicated, the restrictions on “nonmember” public officials is less comprehensive. Therefore only those nonmember county officers and employees (such as the auctioneer and the county officers under whose approval he acted) who personally participated in or “influenced” the contract making process, i.e., the process resulting in the sale of the property, would be required to refrain from bidding on the property. See *People v. Sobel*, *supra*, 40 Cal. App. 3d at p. 1052.

However, if a county officer or employee was in a position where he did not participate in or influence such process, section 1090 would not restrict him from bidding on the property even though he was employed by the county selling the property since no “self-dealing” would be involved. (See 53 Ops. Cal. Atty. Gen. 163, *supra*, at pp. 164–167.)⁴

⁴ Similar to the provision in section 1090, which prohibits public officials from making contracts in which they have a financial interest, is the provision in the Political Reform Act of 1974 (see footnote 3, *supra*) stating that “no public official . . . shall make, participate in the making or in any way attempt to use his official position to influence a governmental decision in which . . . he has a financial interest.” (§ 87100.)

The Fair Political Practices Commission has construed this provision by setting forth in title 21, California Administrative Code, section 18700, example or what it regards as “mak[ing]” or “participat[ing] in the making” or “influenc[ing]” governmental decisions within the meaning of section 87100.

These examples should be helpful in determining, in specific factual settings when one makes or participates or influences the making of a contract or sale within the meaning of section 1090.

“It is an established rule of statutory construction that similar statutes should be construed in light of one another . . . and that when statutes are in *pari materia* similar phrases appearing in

Finally, we would acknowledge the “continuing viability” of the common law doctrine against conflicts of interest, noted above, even in light of the extensive legislation in the field. (59 Ops. Cal. Atty. Gen. 604, *supra*, at pp. 613–614; 58 Ops. Cal. Atty. Gen. 345, *supra*, at pp. 353–355; see also 53 Ops. Cal. Atty. Gen. 163, *supra*, at pp. 165–166.) Thus while in a particular situation, a county officer or employee’s relationship to the contract making process might be too indirect to regard him as having “made” a contract within the meaning of section 1090, his purchase of county property would still be precluded under that common law doctrine if by such purchase he has placed himself in a position where he might be tempted to subordinate his public duties to his private interests. (E.g., see 40 Ops. Cal. Atty. Gen. 210, *supra*.)

each should be given like meanings.” (*People v. Caudillo* (1978) 21 Cal. 3d 562, 585.)