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OFFICE OF THE ATTORNEY GENERAL  
State of California

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OPINION	:	No. 80-814
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of	:	<u>December 30, 1980</u>
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SUBJECT: AIR POLLUTION CONSULTING. SERVICES—It would not be a conflict of interest for a county supervisor of a county which is included within the Mountain Counties Air Basin to contract with the air basin to provide it with air pollution consulting services if the supervisor does not participate in any transaction or decision of his own board relating to air pollution.

The Honorable John F. Hahn, County Counsel, Amador County, has requested an opinion on the following question:

Would it be a conflict of interest for a county supervisor of a county which is included within the Mountain Counties Air Basin to contract with the air basin to provide it with air pollution consulting services if the supervisor does not participate in any transaction or decision of his own board relating to air pollution?

CONCLUSION

It would not be a conflict of interest for a county supervisor of a county which is included within the Mountain Counties Air Basin to contract with the air basin to provide

it with air pollution consulting services if the supervisor does not participate in any transaction or decision as either supervisor or consultant which would further his “financial interests” within the meaning of section 87100 of the Government Code or which would further other “personal” interests within the common law doctrine concerning such conflicts. However, such contract could, and very well may be “incompatible” with his duties as an ex officio county air pollution control district board member under the proscriptions of section 1126 of the Government Code.

## ANALYSIS

In Division 26 (commencing with section 39000) of the Health and Safety Code, the California Legislature has provided for an integrated system of state and local control of air pollution. The Legislature has placed the primary responsibility for the control of nonvehicular air pollution control upon local and regional authorities. (Health & Saf. Code, §§ 39002, 40000.)

The State Air Resources Board is charged with the duty of dividing the state into “air basins” to fulfill the purposes of Division 26 of the Health and Safety Code, giving consideration to political boundaries where practicable. (Health & Saf. Code, § 39606.) The law establishes a county air pollution control district in each county’ which is not included in the bay district, the south coast district, a regional district, or a unified district. (Health & Saf. Code, § 40002.) Additionally, the law establishes a “basinwide air pollution control council” in each air basin which consists of two or more air pollution control districts.

The county board of supervisors is ex officio the governing board of a county air pollution control district, an entity separate from the county. (Health & Saf. Code §§ 39205, 40100, 40700.) The day-to-day enforcement of non-vehicular air pollution control standards is placed upon each air pollution control district, including county districts. Such enforcement will be predicated upon an admixture of state, basinwide and district plans, rules and regulations. See, e.g., Health & Safety Code, §§ 40700–40865 (district hearing boards); §§ 41700–41962 (state established non-vehicular emission limitations); §§ 42300–42708 (district “permits”); § 39606 (state adopted standards for each air basin); §§ 41600–41693 (basinwide air pollution control plans); § 40702 (district adopted rules and regulations). See also, generally, *People v. A-1 Roofing Service, Inc.* (1978) 87 Cal. App. 3d Supp. 1; 56 Ops. Cal. Atty. Gen. 531 (1973).

The Mountain Counties Air Basin consists of nine counties beginning with Mariposa County in the south and ending with Plumas County in the north. The statutory duties of its control council, as with other basinwide air pollution control councils established pursuant to section 40900 of the Health and Safety Code, are found in sections

41600–41603 of that code. Thus, a reading of those sections demonstrates that its duties include the adoption of a basinwide air pollution control plan, which is to include rules and regulations to achieve and maintain the state ambient air quality standards within a reasonable time, and which is to provide for the prevention and abatement within its component districts of deleterious air pollution episodes. Each *district* within the air basin is statutorily required to adopt a program which will implement the basin-wide plan. (Health & Saf. Code, § 41603.) The Mountain Counties Air Basin also provides for its duties in its bylaws, including the review of implementation plans, approval of subvention applications, and as matters may dictate, the review of state and local legislation.

The question presented is whether it would be a conflict of interest for a county supervisor of one of the component counties to contract with the Mountain Counties Air Pollution Control Council to provide the council with consulting services.<sup>1</sup> The particular supervisor represents that he will not participate in any matters involving air pollution control which come before his own board of supervisors. As will be seen, however, such blanket abstention, if required, would render the contract “incompatible” with his duties as a county air pollution control district board member.

Whether the member of the board of supervisors would be guilty of a conflict of interest requires an analysis of the facts in the context of sections 1090, 1126 and 87100 of the Government Code, as well as the common law doctrine against such conflicts.<sup>2</sup> The starting point in a conflict of interest analysis is section 87100, the main conflicts provision of the Political Reform Act of 1974. This is so since that act’s provisions control any conflicting legislation. (§ 81013.) Section 87100 provides:

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<sup>1</sup> The essence of the “services” are found in the following contract language:

“Consultant agrees to give his personal attention to the performance of the Basin Engineering Service in a supervisory and technical area, including but not limited to the reviewing of air pollution control equipment construction, to the performance of duties of Administrative Assistant to the Basin Control Council and the Basin Technical Advisory Committee, and to perform such other duties as may be prescribed from time to time by the Basin Control Council.”

We also note that we are not dealing with the question or whether the county supervisor would be holding two incompatible “offices” since his employment by the air basin does not rise to the level of an office. (See e.g., 63 Ops. Cal. Atty. Gen. 624, 627 (1980); 58 Ops. Cal. Atty. Gen. 109 (1975).

<sup>2</sup> These are the general provisions and doctrines. This statement presumes that there is no special conflict of interest provision applicable to the particular official’s duties or transactions. We are aware of no special provision which would apply herein.

All further section references will be to the Government Code, unless otherwise indicated.

“No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.”

“*Public official*’ means every member, officer, employee or *consultant* of a state or local government agency.” (§ 82048; emphasis added.)

It is seen that section 87100 places the question of whether a conflict of interest arises on a transactional basis. Thus, whether a conflict of interest would arise with respect to the supervisor as either an air pollution control district board member or a consultant to the air basin would depend upon whether a particular decision he made would affect a ‘financial interest’ as contemplated by that section. For purposes thereof, financial interest is defined in section 87103.<sup>3</sup> Looking at the supervisor’s “Statement of Economic

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<sup>3</sup> Section 857103 provides:

“An 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:

(a) Any business entity in which the public official has a direct or indirect investment worth more than one thousand dollars (\$1,000):

(b) Any real property in which the public official has a direct or indirect interest worth more than one thousand dollars (\$1,000):

(c) Any source of income, other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official 12 months prior to the time when the decision is made: or

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, by any business entity controlled by the public official or by a trust in which he has a substantial interest. A business entity s controlled by a public official if the public official, his agents, spouse and dependent children hold more than 50 percent of the ownership interest in the entity. A public official has a substantial interest in a trust wen the official, his spouse and dependent children have a present or future interest worth more than one thousand dollars (\$1000).”

This section is amended somewhat by Stats. 1980, Ch. 183, effective January 1, 1981.

See also the regulations or the Fair Political Practice Commission in Cal. Admin. Code, tit. 2, section 187011 *et seq.* for pertinent definitions and explanations of the meaning of the terms used

Interests” filed pursuant to the Political Reform Act of 1974 we note that the supervisor conducts a sole proprietorship known as the Mountain Counties Air Basin Engineering Service, which is engaged in the business of air pollution consulting. We further note that he holds a partnership interest in Sierra Tech Associates, which is a civil engineering firm. Conceivably, situations could arise whereby his duties to the county district or his contractual duties to the air basin would affect his business interests or other “sources of income” within the meaning of sections 87100 and 87103. This is something which would have to be analyzed on each individual factual situation. However, since section 87103 predicates conflicts of interests on a transactional basis, and also permits a public official to disqualify himself when a conflicting situation arises, no conflict of interest would arise by the mere signing of the consulting contract.

We now move to a consideration of section 1090. That section 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.

“As used in this article, ‘district’ means any agency of the state formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries.” (Emphasis added.)

Section 1090 presents no impediment to the consulting contract between the supervisor and the air basin since the supervisor does not make such contract in any “official capacity,” but only in his individual capacity. (See *County of Marin v. Dufficy* (1956) 144 Cal. App. 2d 30, 37; 53 Ops. Cal. Atty. Gen. 163.) Accordingly, no conflict of interest would arise under section 1090.

We now consider the final statute in this analysis, that is, section 1126. As material to our consideration herein, that section provides:

“(a) A local agency officer or employee shall not engage in any employment, activity, or enterprise for compensation which is inconsistent, incompatible, in conflict with, or inimical to his duties as a local agency officer or employee or with the duties, functions or responsibilities of his

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in section 87100.

appointing power or the agency by which he is employed. Such officer or employee shall not perform any work., service or counsel for compensation outside of his local agency employment where any part of his efforts will be subject to approval by any other officer, employee, board or commission of his employing body, unless otherwise approved in the manner prescribed by subdivision (b) . . . .”<sup>4</sup>

“‘Local agency,’ . . . means a county, city, city and county, political subdivision, *district*, or municipal corporation.” (§ 1125; emphasis added.)

“Though section 1125 *et seq.* were obviously intended primarily for subordinate officers and employees of a local agency, this office has held that section 1126(a) is self-executing and is broad enough to encompass the governing body of the local agency. See 58 Ops. Cal. Atty. Gen. 109, 113 (1975); 57 Ops. Cal. Atty. Gen. 252, 260 (1974) N. 5; 56 Ops. Cal. Atty. Gen. 556 (1973); I.L. 74–227. We have additionally held it to be applicable to outside *public* employment for compensation. 58 Ops. Cal. Atty. Gen., *supra*, at 109. I.L. 74–227 . . . .”

Thus section 1126 is potentially applicable to the supervisor in question in his status as a member of the county air pollution control district board.

Unlike sections 87100 and 87103, section 1126 does not require a *personal* conflict of interest. A conflict of duties would suffice between an officer or employee’s outside activities and his duties to his local agency. An examination of the supervisor’s contractual duties to the air basin (see note 1, *supra*) as essentially the “engineer” for the air basin control council indicates to us the potential for incompatibility between those duties and his duties as a district board member. As a county supervisor the individual concerned is *ex officio* a member of the governing board of the county air pollution control district. In such position he would of necessity be county oriented. However, as the air basin “engineer” he would be required to think and act regionally, subordinating any insular county orientation to the best interests of the region. We cannot say from a mere reading of the consulting contract how much the individual may be involved in policy or other matters which might impact differently upon the county than on the air basin. However, in a number of opinions, both published and unpublished, this office has recognized that it

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<sup>4</sup> Subdivision (b) then provides that each “appointing power” *may* determine, subject to the approval of the local agency, those outside activities which are inconsistent, incompatible, in conflict with, or inimical to their duties as local agency officers and employees. Criteria for such determinations are also set forth.

With respect to section 1126, this office stated in 59 Ops. Cal. Atty. Gen. 604, 612 (1976):

could be incompatible for an individual to hold both a local office and a regional or statewide *office* concurrently. Thus in 30 Ops. Cal. Atty. Gen. 184 (1970) we concluded that the offices of county supervisor or mayor of a city within the territory of the Bay Area Rapid Transit District (BART) were incompatible with the office of BART director. We noted a number of instances where regional and local interests could collide. Likewise, in 58 Ops. Cal. Atty. Gen. 808 (1975) we concluded that an individual who was a “public member” of a regional coastal commission could no longer hold that office upon becoming a county supervisor. We noted, *inter alia*:

“Clearly it is possible, and perhaps likely, that a county supervisor may have an entirely different responsibility in reviewing a county project on behalf of the county than in acting upon that project as a member of a regional coastal commission. Thus, it is concluded that the two offices are incompatible.”

See also Attorney General’s Unpublished Opinions I.L. 77–71 (City Planning Commissioner-County Air Pollution Control District Appeals Board Member); I.L. 76–196 (Member, California Highway Commission-Statutory Attorney, Santa Barbara Metropolitan Transit District); I.L. 74–223 (Member, California Highway Commission-City Planning Commissioner). As we noted in the last cited unpublished opinion with respect to overlapping planning duties: “What is best for the State in highway location may differ significantly as to what the planning commission may consider is best for the citizens of the city itself.” Our unpublished opinion, I.L. 76–196, *supra*, is particularly germane herein since in that case we found incompatibility with respect to an attorney, who would be at most in an advisory position.<sup>5</sup>

However, with regard to the question of possible incompatibility between the duties of two positions, section 1126 differs significantly from the common law doctrine proscribing the holding of incompatible *offices* in the following respect. When two public *offices* are involved, any significant *potential* clash of duties or loyalties will prohibit the dual office holding. (See, e.g., 63 Ops. Cal. Atty. Gen. 623 (1980) *supra*.) However, as explained in detail in 59 Ops. Cal. Atty. Gen. 604, 611–613 (1976) *supra*, “It is the current belief of this office that the analogy between section 112 5 *et seq.* of the Government Code

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<sup>5</sup> We note that the fact that section 40900 of the Health and Safety Code provides that the air basin control council ‘shall consist of an elected official’ of each component district does not militate against the fact that such offices would be incompatible under the common law doctrine prohibiting the holding of incompatible offices. The Legislature may, and often does, abrogate the rule with respect to certain offices. (See *McClain v. County of Alameda* (1962) 209 Cal. App. 2d 73, 79.) Accordingly, the composition of the control council does not militate against our finding of possible incompatibility.

and the common law doctrine concerning incompatible offices cannot be fully applied so as to require resignation where incompatibility may inhere in some of the functions of the two positions” and that,

“It is therefore concluded that section 1125 *et seq.* do not require a resignation of one office or employment if an incompatibility is found within the meaning of section 1126, but that abstention will be permitted on a transactional basis. . . . We do not mean to hold, however, that if the incompatibility is of such a continuing and pervasive nature that a public officer or employee may constantly abstain from performing his duties because of personal conflict. In such a situation, resignation from the public office or employment or cessation of the conflicting private activity would appear to be required. . . .”

The supervisor in question has already agreed that he will abstain from participation in any matter coming before the board of supervisors with respect to air pollution control matters. However, as noted, section 1126 does not permit a local agency officer to abdicate his responsibilities to that agency in favor of his outside activities. The agreement to abstain from participation in all air pollution matters which would come before the board of supervisors would amount to just that, an abdication of his duties to the district, *an entity separate from the county*. Whether such abstention would in fact be required as to all or a major portion of those duties we cannot say. This would require an analysis of the duties actually assigned to the individual pursuant to the air basin contract contrasted with his duties as a *district* board member. However, his agreement to abstain would indicate to us that there would be tremendous difficulty in attempting to walk a “fine line” and perform the duties of both positions. Permitted abstention under section 1126 is the exception, not the rule.

Finally, we discuss the common law doctrine. As we noted in 59 Ops. Cal. Atty. Gen. 604, 613, *supra*:

“In a recent letter opinion of this office it was stated as follows: regarding the common law doctrine concerning conflicts of interests:

‘One further point requires discussion. Prior to the enactment of the Political Reform Act of 1974, this office predicated decisions on noncontractual conflict of interest questions on the common law rule against conflicts. We have assumed the continuing viability of the rule as a cumulative test despite the 1974 initiative measure which covers both contractual and noncontractual matters. See 58 Ops. Cal. Atty. Gen. 345, 354–356 (1975). Such doctrine “. . . strictly requires public [officers and



employees] to avoid placing themselves in a position in which personal interest may come into conflict with their duty to the public.” 46 Ops. Cal. Atty. Gen. 74, 86 (1965). See generally 26 Ops. Cal. Atty. Gen. 5 (1955).

‘Though one might urge that the Political Reform Act of 1974 has now preempted the common law doctrine against conflict of interests, and therefore that which is not specifically prohibited is now permitted, we would caution against such a conclusion for the reasons (1) that the courts have traditionally predicated their decisions on the dual basis of the statutes and the common law rule, see 58 Ops. Cal. Atty. Gen. 345, 354–356, *supra*, and (2) were a violation of the common law rule found to exist, such could form the basis of an allegation of willful misconduct in office within the meaning of section 3060 *et seq.*’ I.L. 76–69, at pp. 5–6.”

Both in his position as county supervisor and as air basin consultant, that individual involved herein should be aware of this doctrine which also operates on a transactional basis and requires abstention if a situation arises which is not otherwise prohibited by statute where his “personal interest may come into conflict with . . . [his] duty to the public.”

In summary, we conclude that there is no statute or common law doctrine which would absolutely prohibit the county supervisor from entering into the subject consulting contract with the Mountain Counties Air Basin. However, sections 1126, 87100 and the common law doctrine on conflicts of interest could still apply on a transactional basis. Whether there would be no such conflicts, or few or many would depend upon the actual duties assigned to him under the contract considered in relation to both his personal interests and his duties to the county air pollution control district. Under section 1126 the supervisor may not abdicate the duties he owes to the district. If abstention at the county air pollution control district level would be required in all or a major portion of the matters coming before the supervisors as district board, the consulting contract would be incompatible with the supervisor’s duties owed to that “local agency.”

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