TO BE SAVED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

GEORGE DEUKMEJIAN
Attorney General

| | | |
|---|---|---|
| OPINION | : | No. 81-416 |
| of | : | OCTOBER 29, 1981 |
| GEORGE DEUKMEJIAN<br>Attorney General | : | |
| Clayton P. Roche<br>Deputy Attorney General | : | |

---

THE HONORABLE JAMES E DREMANN, DISTRICT ATTORNEY, SIERRA COUNTY, has requested an opinion on the following question:

Is it a conflict of interest for a county supervisor, who is also a real estate broker, to represent a buyer or seller in a land transaction which is contingent upon county approval such as the issuance of building or use permits, or rezoning of the property?

## CONCLUSION

It is not a conflict of interest for a county supervisor, who is also a real estate broker, to represent a buyer or a seller in a land transaction which is contingent upon county approval such as the issuance of building or use permits, or rezoning of the property.

## ANALYSIS

Our opinion is requested concerning the involvement of a county supervisor who is also a licensed real estate broker in land transactions which require some form of county approval. We are asked whether a conflict of interest would arise or exist if such a supervisor represents either the buyer or seller in a transaction which is contingent upon the issuance of such matters as building or conditional use permits, or upon the rezoning of the property. The question presupposes that the supervisor will in no way participate in or attempt to influence any county officer or employee with respect to the application. It also presupposes that if the matter should come before his own board he will disclose his interest and abstain from any influence or action in the matter.

We conclude that under such circumstances a conflict of interest would not arise or exist assuming that the county approval would not consist of a matter which could be construed as a contract made by the board of supervisors within the meaning of section 1090 of the Government Code.[1] In so concluding, we disapprove prior published and unpublished opinions of this office which have applied the proscriptions of section 1126 of the Government Code to members of elective governing bodies. We do so on the authority of the recent decision, *Mazzola* v. *City and County of San Francisco* (1980) 112 Cal. App. 3d 141, hearing denied by the California Supreme Court on January 21, 1981.

In a recent opinion of this office, issued December 30, 1980, we had the occasion to analyze a somewhat analogous problem with respect to a county supervisor where no conflict of interest in the traditional sense was found to exist either under the statutes or the common law doctrine, assuming complete abstention on the part of the supervisor, but where we believed the proscriptions of section 1126 were still germane. (See 63 Ops. Cal. Atty. Gen. 916 (1980).) In that opinion, we concluded:

> "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

[1]All section references are to the Government Code unless otherwise indicated.

Government Code." (*Id*., at pp. 916–917.)

For a detailed analysis of the traditional conflict of interest code provisions and principles to bridge the gap to section 1126, reference is made to that opinion. Suffice it to say that there we pointed out as we do also herein:

1. That section 87100 of the Political Reform Act of 1974 would be inapplicable since such requires for a conflict of interest to arise that a public official participate in or influence a governmental decision in which he has a financial interest.

2. That section 1090 of the Government Code would be inapplicable since such requires for a conflict of interest to arise that a public officer or employee "make" a contract in his official capacity, or that it be "made" by a board or body of which he is a member;[2] and

3. That the common law doctrine against conflicts of interest, which prohibits public officials from placing themselves in a position where their private, personal interests may conflict with their official duties, may usually be avoided by complete abstention from any official action with respect to or attempt to influence the transaction.

Having disposed of sections 87100, 1090 and the common law rule in its usual context, we now reach the final potentially applicable provision, that is, section 1126. 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 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

[2]For this reason we placed the caveat upon our conclusion that the county approval sought is not the type which could be construed as a contract. See, for example, *Scrutton* v. *County of Sacramento* (1969) 275 Cal. App. 2d 412 (contract zoning), §§ 65864–65869.5 (development agreement).

With respect to section 1090, abstention is not sufficient to permit the remaining members of a board to enter into a contract. The section is an absolute prohibition where one or more members are financially interested in the contract. (See, e.g., *Fraser-Yamor Agency, Inc.* v. *County of Del Norte* (1977) 68 Cal. App. 3d 201, 211–212.)

subdivision (b).

"(b) Each appointing power may determine, subject to approval of the local agency, those outside activities which, for employees under its jurisdiction, are inconsistent with, incompatible to, or in conflict with their duties as local agency officers or employees. An employee's outside employment, activity or enterprise may be prohibited if it. (1) involves the use for private gain or advantage of his local agency time, facilities, equipment and supplies; or the badge, uniform, prestige or influence of his local agency office or employment, or (2) involves receipt or acceptance by the officer or employee of any money or other consideration from anyone other than his local agency for the performance of an act which the officer or employee, if not performing such act, would be required or expected to render in the regular course or hours of his local agency employment or as a part of his duties as a local agency officer or employee or, (3) involves the performance of an act in other than his capacity as a local agency officer or employee which act may later be subject directly or indirectly to the control, inspection, review, audit or enforcement of any other officer or employee or the agency by which he is employed, or (4) involves such time demands as would render performance of his duties as a local agency officer or employee less efficient.

"The local agency may adopt rules governing the application of this section. Such rules shall include provision for notice to employees of the determination of prohibited activities, of disciplinary action to be taken against employees for engaging in prohibited activities, and for appeal by employees from such a determination and from its application to an employee."

With respect to section 1126, this office stated in 59 Ops. Cal. Atty. Gen. 604, 612 (1976), and recently restated in 63 Ops. Cal. Atty. Gen. 916. 921, *supra*, as follows:

"Though section 1125 *et seq*. were obviously intended primarily for subordinate officers and employees of a local agency, this office 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. . . ."

The foregoing approach of this office appeared justified by the fact that subdivision (a) of section 1126 is phrased in language indicating absolute prohibitions, whereas subdivision (b), providing for implementation of the section through incompatibility statements or other rules, is phrased in permissive language. This is to be contrasted with section 19251, the similar section applicable to state civil service employees, and the section which obviously served as the model for section 1126, which states that "[e]ach appointing power *shall* determine . . . those activities which, for employees under his jurisdiction, are inconsistent, incompatible or in conflict with their duties as state officers or employees." (Emphasis added.)

Despite our belief that section 1126, subdivision (a), was to be considered self-executing, the court of appeal in *Mazzola* v. *City and County of San Francisco*, *supra*, 112 Cal. App. 3d 141 held otherwise. In that case the city and county attempted to apply section 1126 to Mr. Mazzola for his activities in support of striking city employees. Mr. Mazzola in private life was a labor leader in San Francisco, but was also at the time of the public employee strike an appointive member of the San Francisco Airport Commission. The city and county also apparently considered section 1126 to be self-executing since Mr. Mazzola had never been given any notice that his activities as a labor leader were in any way incompatible, in conflict with, or inconsistent with his public position.

The court, however, rejected such a self-executing approach to section 1126, holding that subdivisions (a) and (b) thereof must be read together so that (1) the local officer or employee has notice of proscribed activities and (2) the local officer or employee has notice of intended disciplinary action to be taken and appeals procedures therefrom. The court reasoned.

> "We cannot agree, however, with respondents' application of section 1126 in the present case It is true that the first sentence of this statute prohibits a local agency officer or employee from engaging in any employment 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 appointing power or the agency by which he is employed.' But this general 'edict' does not stand alone. It is plainly limited in its application by the following two sentences of the statute: 'Such officer or employee shall not perform any work . . . 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)*. [Italics added.]

'(b) Each appointing power may determine, subject to approval of the local agency, those outside activities which . . . are inconsistent with, incompatible to, or in conflict with their duties as local agency officers or employees

"Construing these sentences together, we think it follows that a public appointee's outside activity which is known to his appointing officer at the time of his appointment, and which is not determined at that time to be an activity in conflict with the appointee's duties as a public official is, by implication, an activity which is 'otherwise approved' and not subject to the statute's proscriptive reach.

"The final paragraph of section 1126 reads: 'The local agency may adopt rules governing the application of this section. Such rules *shall include* provision for notice to employees of the determination of prohibited activities, of disciplinary activities, and for appeal by employees for such a determination and from its application to an employee.' (Italics added.)

"We think the intent of the Legislature is clear. Before a local agency applies this section in charging an employee with its violation, that agency must provide *notice* to the employee that a conflict of interest exists with respect to the employee's outside activities. Notice should also be provided to the employee with regard to the agency's intended disciplinary action, as well as provisions for appeal from the agency's determination. Where an agency has not provided for notice of proscribed activities, employees can only speculate whether or not a particular outside activity they are engaging in will be prohibited. Clearly in the absence of any agency rules providing notice of proscribed activities, a public employee or official who decides to undertake an outside job might be subject at any time and without warning to being charged with a violation of section 1126."

Clearly, the court's approach to and interpretation of section 1126 set forth above is inconsistent with the prior approach taken by this office. Since elective officials have no appointing power other than the electorate, no notice can be given to them of proscribed activities, of intended disciplinary action or of appeals procedures from such disciplinary action. Additionally, no disciplinary action would be applicable to the governing board itself as might be provided by section 3060 for removal from office by accusation by the grand jury or by recall by the electorate.

Thus section 1126, as construed in the *Mazzola* case, would not be applicable to members of an elective governing body. Accordingly, it would in no way be applicable to the issue presented herein with respect to the member of the board of supervisors who is a real estate broker. We, therefore, need not analyze whether the proscriptions set forth in section 1126 might otherwise be applicable if section 1126, subdivision (a), were still to be construed as self-executing.

Furthermore, prior opinions of this office such as 63 Ops. Cal. Atty. Gen. 916, *supra*, and those discussed therein which have applied section 1126 to elective officials such as members of an elective governing board, are hereby disapproved insofar as they are inconsistent with the views expressed herein.

Accordingly, it is concluded that no conflict of interest will arise or exist if a county supervisor, who is also a real estate broker, represents a buyer or seller in a land transaction which is contingent upon county approval such as the issuance of building or use permits, or rezoning of the property.

*****