

# MEMORANDUM

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A Professional Corporation

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**DATE:** October 8, 2015

**TO:** Fort Ord Reuse Authority (“FORA”)

**FROM:** Authority Counsel

**RE:** Conflicts of Interest in Service on FORA Board and Monterey County Board of Supervisors

## I. ISSUE

Does simultaneously occupying the offices of board member of the Fort Ord Reuse Authority (“FORA”) and member of the Monterey County Board of Supervisors, or performing activities in those capacities, offend the Brown Act, California law which regulates incompatible activities, employment, enterprises, and offices, or the Political Reform Act?

*Short answer: No. The Brown Act expressly allows the attendance of legislators (such as Monterey County supervisors) at an open and noticed meeting of another board (such as FORA), provided that they only discuss openly, and not “among themselves,” business of a specific nature that is within the subject matter of the first board (Monterey County.) Further, even assuming for the sake of argument that the activities and offices of the two offices (FORA Board and the Monterey County Board of Supervisors) are incompatible, the Fort Ord Reuse Authority Act expressly allows board members to engage in incompatible activities, employment, and enterprises, and implicitly allows board members to occupy incompatible offices. Finally, the Political Reform Act does not apply because there is no apparent personal financial benefit arising from the facts presented.*

## II. FACTS

### A. Concurrent Service of Board Members

The Honorable Jane Parker, Dave Potter, and John Phillips serve on the Monterey County Board of Supervisors. They also serve on FORA’s board.

### B. FORA’s Composition and Relationship with Monterey County

The Fort Ord Reuse Authority Act (“FORA Act”)<sup>1</sup> authorizes certain local jurisdictions encompassing and surrounding the former Fort Ord, including Monterey County, to establish FORA. (Gov. Code, § 67656.) Those jurisdictions appoint the members of FORA’s board, including “three members appointed by Monterey County.” (Gov. Code, § 67660, subd. (a)(9).)

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<sup>1</sup> Government Code section 67650, et seq.

But once established, FORA constituted “a public corporation of the State of California that is independent of the agencies from which its board is appointed.” (Gov. Code, § 67657.)

**C. Marina Coast Water District (“MCWD”)**

MCWD is a water district and political subdivision of the State of California, organized under Division 12 of the Water Code, commencing at section 30000. It entered into a contract, the Water/Wastewater Facilities Agreement (“Facilities Agreement”), with FORA on March 13, 1998. Under the Facilities Agreement, FORA has the authority to approve or withhold approval of MCWD’s budgets.

**D. Dispute with MCWD over the Regional Desal Project**

MCWD is engaged in active litigation with California American Water (“Cal-Am”) and the Monterey County Water Resources Agency (“MCWRA”), MCWD’s former contractual partners in a water desalinization plan (“Regional Desal Project”). MCWRA and Cal-Am sued MCWD for hiring Steve Collins, then a county water board member, as a paid consultant for the project while he was a county worker, thus voiding the contract.

FORA ex officio board member Peter Le, who was appointed by MCWD, questions whether FORA board members who also sit on the Monterey County Board of Supervisors violated the Brown Act or conflict of interest laws by voting to restrict MCWD’s legal defense budget related to the failed regional desalinization project (in their capacity as FORA board members), and by subsequently voting to sue MCWD (in their capacity as Monterey County Supervisors).

**III. ANALYSIS**

This memorandum analyzes four laws potentially applicable to the issue: (A) The Brown Act (Gov. Code, § 54950 et seq.); (B) the Incompatible Employment, Activities, and Enterprises Statute (Gov. Code, § 1126); (C) the Incompatible Offices Statute (Gov. Code, § 1099); and (D) the Political Reform Act (Gov. Code, § 87100 et seq.; 2 Cal. Code Regs, § 18700 et seq.).

**A. The Brown Act**

Government Code section 54952.2, subdivision (b)(1), part of the Brown Act, provides that:

A majority of the members of a legislative body shall not, outside a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body.

(Gov. Code, § 54952.2, subd. (b)(1).) Three persons do not constitute a “majority” of either the FORA board or the Monterey County Board of Supervisors. And even if it did, subdivision (c) of that same section provides that:

Nothing in this section shall impose the requirements of this chapter upon any of the following:

...

- (4) The attendance of a majority of the members of a legislative body at an open and noticed meeting of another body of the local agency, or at an open and noticed meeting of a legislative body of another local agency, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled meeting, business of a specific nature that is within the subject matter jurisdiction of the legislative body of the local agency.

(Gov. Code, § 54952.2, subd. (c).)

Accordingly, the Brown Act does not prohibit open and noticed discussion at FORA board meetings of matters that may affect business of Monterey County affairs, and vice versa.

#### **B. Incompatible Employment, Activities, or Enterprises**

Government Code section 1126 provides, in part:

[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 or her duties as a local agency officer or employee or with the duties, functions, or responsibilities of his or her appointing power or the agency by which he or she was employed.

However, the statute creating FORA – the Fort Ord Reuse Authority Act (“FORA Act”) at Government Code section 67650 et seq. – , expressly creates an exception to Government Code section 1126’s general proscription against incompatible employment, activities, or enterprises. The FORA Act provides, at section 67665:

Notwithstanding the provisions of Article 4.7 (commencing with Section 1125) of Chapter 1 of Division 4 of Title 1, any member or ex officio member of the board who is also a member of another public agency, a county supervisor, or a city council person, and who has in that designated capacity voted or acted upon a particular matter, may vote or otherwise act upon or participate in the discussion of that matter as a member of the board.

(Gov. Code, § 67665.)

Pursuant to the FORA Act at section 67665, Monterey County supervisors may occupy that office and serve on FORA’s board.

**C. Incompatible Offices**

**1. Government Code section 1099**

Section 1099 of the Government Code provides:

- (a) A public officer, including, but not limited to, an appointed or elected member of a governmental board, commission, committee, or other body, shall not simultaneously hold two public offices that are incompatible. Offices are incompatible when any of the following circumstances are present, unless simultaneous holding of the particular offices is compelled or expressly authorized by law:
  - (1) Either of the offices may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over the other office or body.
  - (2) Based on the powers and jurisdiction of the offices, there is a possibility of a significant clash of duties or loyalties between the offices.
  - (3) Public body considerations make it improper for one person to hold both offices.
- (b) When two public offices are incompatible, a public officer shall be deemed to have forfeited the first office upon acceding to the second. This provision is enforceable pursuant to Section 803 of the Code of Civil Procedure.
- (c) This section does not apply to a position of employment, including a civil service position.
- (d) This section shall not apply to a governmental body that has only advisory powers.
- (e) For purposes of paragraph (1) of subdivision (a), a member of a multi-member body holds an office that may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over another office when the body has any of these powers over the other office or over a multimember body that includes that other office.
- (f) This section codifies the common law rule prohibiting an individual from holding incompatible public offices.

(Gov. Code, § 1099 (underlining added).)

**2. FORA Act's Government Code section 67665**

**a. Argument that the FORA Act Expressly Allows a Person to Occupy Incompatible Offices, Employment, and Enterprises**

As discussed above in the context of “incompatible activities,” the FORA Act expressly permits “any member ... of the board *who is also a member of another public agency ... and who has in that designated capacity voted or acted upon a particular matter*” to “vote or otherwise act upon or participate in the discussion of that matter as a member of the board.” (Gov. Code, § 67665 (underlining added).) Such language appears to also encompass “incompatible offices.” (Gov. Code, § 1099, subd. (a) [“unless simultaneous holding of the particular offices is expressly ... authorized by law”].) Indeed, the FORA Act's Government Code section 67665 assumes that the member of the board engaged in the vote on, action on, or discussion of the particular matter is also “a member of another public agency” and has been “designated” in that “capacity.” It would be incongruous that the FORA Act, through section 67665, would expressly authorize “incompatible acts” by dual officers that section 1126 would otherwise regulate, but not authorize those dual officers from occupying offices deemed incompatible under section 1099. Further, Government Code section 1099 recognizes that if the “simultaneous holding of the particular offices is compelled or expressly authorized by law,” then the public offices are compatible. (Gov. Code, § 1099, subd. (a).)

Government Code section 67665 appears to provide not only an exception to section 1126's proscription against incompatible activities, but also an exception to section 1099's proscription against holding incompatible offices. There is, however, a contrary argument, as discussed next.

**b. Argument that the FORA Act Does Not Expressly Allow a Person to Occupy Incompatible Offices, Employment, and Enterprises**

Government Code section 67665 does not necessarily contemplate that the “[o]ther public agency” is an *incompatible* office. That is, a person may serve both FORA and another public agency and may even perform incompatible acts that section 1126 would otherwise prohibit, provided that the person serving or engaging in those acts does not occupy incompatible offices under section 1099. The fact that Government Code section 67775 expressly mentions section 1126 as not applying, but does not similarly mention section 1099, suggests that the Legislature may have intended for section 1099 to remain applicable to some extent. (*Dyna-Med, Inc. v. Fair Employment & Housing Comm.* (1987) 43 Cal.3d 1379, 1391, fn. 13 [“the expression of certain things in a statute necessarily involves exclusion of other things not expressed”]; see also *United Farm Workers v. Agricultural Lab. Rel. Board* (1995) 41 Cal.App.4<sup>th</sup> 303, 316 [grant of power to commission to prosecute certain code violations impliedly excluded commission from prosecuting violation of other code sections].)

The effect of this would be that one may perform *acts* as a FORA official and as an official of another agency that would otherwise be incompatible, provided that those *offices* are not incompatible. However, Authority Counsel concludes that this interpretation is unsound. By

specifying that a FORA board member “*who is also a member of another public agency*” may engage in *activities, employment, and enterprises* that would otherwise be considered “incompatible” under section 1126, section 67665 also appears to apply to section 1099’s proscription against incompatible *offices*. Otherwise, section 67665 would have very little, if any, practical effect. Therefore, Authority Counsel concludes that, by operation of section 67665 of the FORA Act, officiating as a FORA board member and as a Monterey County supervisor is not incompatible.

#### **D. Political Reform Act**

The Political Reform Act prohibits a public official from making, participating in, or in any way attempting to use their official position to influence a governmental decision in which the official has a financial interest. (Gov. Code, § 87100 et seq.; 2 Cal. Code Regs.) An official has a conflicting financial interest “if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effects on the public generally, on the official. (Gov. Code, § 87103.) Here, there is no apparent financial benefit personally to those members who serve FORA and Monterey County. The Political Reform Act does not appear to be applicable.

#### **IV. CONCLUSION**

The opinion of Authority Counsel is that none of the foregoing laws prohibit individuals from representing both the FORA board and Monterey County, or from specifically voting on matters which affect them.