



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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August 24, 2020

Nicholaus Norvell
BEST & BEST & KRIEGER LLP
Assistant General Counsel
San Diego Community Power
655 West Broadway, 15th Floor
San Diego, CA 92101

Re: Your Request for Advice
Our File No. A-20-087

Dear Mr. Norvell:

This letter responds to your request for advice regarding Government Code Section 1090, et seq.¹ Please note that we are only providing advice under Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including Public Contract Code.

Also, note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General's Office and the San Diego County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice "is not admissible in a criminal proceeding against any individual other than the requestor." (See Section 1097.1(c)(5).)

QUESTIONS

1. Does Section 1090 prohibit San Diego Community Power ("SDCP") from entering an employment contract with Cody Hooven, a City of San Diego employee and SDGP's Interim Executive Officer, as its Chief Executive Officer?
2. Does Section 1090 prohibit SDGP from entering an employment contract with Ms. Hooven for other employment positions?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSIONS

1. Yes. Section 1090 prohibits the SDCP from entering an employment contract with Ms. Hooven because she participated in the making of SDCP contract for the position of Chief Executive Officer.

2. No. Section 1090 does not prohibit SDCP from entering an employment contract with Ms. Hooven for other employment positions.

FACTS AS PRESENTED BY REQUESTER²

Your firm serves as General Counsel to San Diego Community Power (“SDCP”), a California joint powers agency established on October 1, 2019, pursuant to the Joint Exercise of Powers Act (Government Code § 6500, et seq.) and a Joint Powers Agreement among the Cities of San Diego, Chula Vista, La Mesa, Encinitas, and Imperial Beach. The purpose of the JPA agreement was to, among other things, establish SDCP as a separate public agency in order to collectively study, promote, develop, conduct, operate, and manage energy programs, including a community choice aggregation program pursuant to California Public Utilities Code section 366.2.

Background of Cody Hooven

Ms. Hooven currently serves as the City of San Diego’s Chief Sustainability Officer, a position she has held for approximately five (5) years. In or around 2018, her position was elevated from a managerial position to a director-level position. The Sustainability Department operates under the Mayor’s Office and reports to the City’s Deputy Chief Operating Officer, Erik Caldwell. Mr. Caldwell leads the Smart and Sustainable Communities branch of the City which includes several departments. The Sustainability Department has broad responsibility and authority to manage payment of energy bills, implement the City’s Climate Action Plan, and propose, implement, and monitor other innovative policies within the City. The department includes a staff of approximately 28 employees.

Ms. Hooven currently also serves as the Interim Executive Officer of SDCP. This has been done through a temporary arrangement between SDCP and the City of San Diego; Ms. Hooven has no contractual or employment relationship with SDCP itself.

Planning and Formation of SDCP

In 2015, the City adopted a Climate Action Plan that identified community choice aggregation (“CCA”) as one of its potential implementation measures. When the City proposed forming a CCA in 2018, the proposal was directed to Mr. Caldwell and the Sustainability Department for study, adoption, and implementation. A CCA process had been under discussion

² We received a letter from the attorney of Ms. Hooven dated July 27, 2020 that provided largely the same facts as provided by this request. In addition, we incorporated the additional facts that were sent via email dated August 11, 2020, from Gary Schons.

for a few years since adoption of the Climate Action Plan. In or around the fall of 2018, Mr. Caldwell and the Sustainability Department, under Ms. Hooven's leadership, was charged with setting up the structure and implementation of a CCA. More specifically, the Mayor directed Mr. Caldwell and the Sustainability Department to explore a "city-only" CCA, as well as a potential joint powers authority ("JPA") with other cities and local agencies.

Ms. Hooven, her staff, and City consultants identified the structure of each model (city-only and JPA), as directed, and presented the potential structure of each to Mr. Caldwell, and then Mr. Caldwell and Ms. Hooven presented the dual structures to the Mayor's Office for a decision on which structure was preferred. At a certain point, the Mayor's Office expressed preference for a JPA, and the City Council signaled its support for this approach and structure. Mr. Caldwell and the Sustainability Department were then tasked with determining how to structure and implement such a JPA.

Ms. Hooven assigned and supervised one of her staff, A.L., to work on putting together a plan for JPA structure and implementation. A.L. led this effort through to approval of the JPA Agreement by the City. In order to study how other CCA JPAs in the state had been organized, A.L. pulled JPA agreements from two other CCA JPAs in the state, East Bay Community Power and Clean Power Alliance. While there were at least 14 operational CCAs at the time that used a JPA structure, these two were selected as they were formed relatively recently, had based their agreements on previously formed CCAs and they were similar in size to what was being contemplated in San Diego. A.L. used those agreements as templates, and much of the now adopted SDCP JPA agreement is based on those models.

A.L.'s work, including how the JPA was modeled, was based on A.L.'s independent thoughts. A.L. would regularly update Ms. Hooven, and in turn, Ms. Hooven provided regular updates to Mr. Caldwell on all aspects and decisions of the work and sought Mr. Caldwell's concurrence or input before each decision was final.

After preparing a draft JPA agreement that reflected the content of the other CCA JPA agreements with minimal changes, primarily focused on replacing the organizational name and other small details, A.L. then reached out to other San Diego area cities and the County of San Diego in or around December 2018 to determine their interest in the City's CCA concept. A.L. convened about 10–12 local government staff regularly to discuss the proposal. A.L. reported to Ms. Hooven throughout this process and she attended many of the discussion and formation meetings with A.L. Ms. Hooven met with Mr. Caldwell regularly to share progress and determine next steps.

Ms. Hooven did not direct A.L. regarding the JPA. She approved of A.L. reaching out to other entities. And although she does not remember "approving" the agreement, she supported the general concepts within the draft.

As the City's JPA proposal was moving forward with several potential member agencies, the Sustainability Department hired Shawn Marshall from LEAN US in or around spring 2019 to act as a consultant to the department for the implementation of the CCA. The consultant was hired as an expert in CCA start-up processes and to function as lead staff support for all aspects of startup

and provide examples of industry best practices. A.L. and the consultant developed the scope of work and she initially reported to A.L. When A.L. left the City, she reported to Ms. Hooven.

By June 2019, the multi-city group had created a draft JPA term sheet listing the goals, benefits, formation, and structure of a JPA. Included in this term sheet was a provision for “Appointed Officers,” including a CEO for whom the Board would establish qualifications. This provision had its provenance in the JPA agreements from the other CCA JPAs in the state and was initially drafted by Mr. Caldwell. Ms. Hooven was a subordinate to Mr. Caldwell. As such, she did not direct him, and Mr. Caldwell drafted the initial term sheet himself. Ms. Hooven provided background information that Mr. Caldwell requested for his consideration with respect to potential edits to the JPA term sheet. Ms. Hooven does not recall if there were discussions of any alternative management structures for SDCP. Over time, there were many iterations of the term sheet after discussions with other cities without any change to the CEO description. Ms. Hooven reviewed these term sheets at various points in the process and was aware of its provisions.

There were meetings and ongoing discussions among various other potential member agencies concerning the CCA JPA concept and structure. Mr. Caldwell also discussed and exchanged various iterations of the term sheet with other agency employees, elected officials, and attorneys. There were an estimated five or more meetings with other agencies to work on the term sheet. Ms. Hooven was present with Mr. Caldwell and sometimes A.L. at these meetings. Ms. Hooven participated in the discussions, including some with potential member agencies’ staff and counsel from other cities involved in these discussions.

Section 5.5 of a draft JPA agreement prepared on or around June 27, 2019, reflected the input and revisions provided by the various potential member agencies included in discussions up to that point. That draft provided for a CEO, much the same as the other CCA JPAs. The draft JPA agreement provided:

5.5 Chief Executive Officer. The Board shall appoint a Chief Executive Officer for the Authority, who shall be responsible for the day-to-day operation and management of the Authority and the CCA Program. The Board shall appoint a qualified person to act as the Chief Executive Officer, who shall not be a member of the Board. The Chief Executive Officer may exercise all powers of the Authority, except those powers specifically reserved to the Board including but not limited to those set forth in Section 4.5 (Specific Responsibilities of the Board) of this Agreement or the Operating Policies and Procedures, or those powers which by law must be exercised by the Board. The Chief Executive Officer may enter into and execute any Energy Contract, in accordance with criteria and policies established by the Board.

The draft of the JPA agreement continued to go through extensive editing and comments from other agencies involved in the process, including their staff and attorneys. Ms. Hooven does not recall exactly how it came about, except possibly by way of a suggestion from the City Attorney of Chula Vista, but the CEO provision in Section 5.5 underwent a single alteration prior to the final draft and execution of the agreement on October 1, 2019. That change, about which there was little

discussion, provided the CEO position would be “hired through a transparent competitive process.” Ms. Hooven recalls being on the phone when that minor alteration/addition was discussed among the various agency attorneys during a phone call to discuss edits to the JPA agreement. Ms. Hooven recalls that the revision to the CEO provision was incorporated into the draft agreement by the proposing city attorney, as various attorneys would often take responsibility for making edits from these calls. After the edits were offered, the Sustainability Department staff would manage the versions of the draft agreement to ensure they were kept current and that all changes had been incorporated.

The final JPA term sheet and JPA agreement matrix includes the provision for a CEO, unaltered from the original term sheet, but with a reference to Section 5.5 of the draft JPA agreement. The final text of Section 5.5 of the JPA agreement reads as follows:

5.5 Chief Executive Officer. The Board shall appoint a Chief Executive Officer for the Authority, who shall be responsible for the day-to-day operation and management of the Authority and the CCA Program. The Board shall appoint a qualified person, hired through a transparent, competitive process, to act as the Chief Executive Officer; he or she may not be an elected member of the Board or otherwise representing any Party to the Authority. The Chief Executive Officer may exercise all powers of the Authority, except those powers specifically reserved to the Board including but not limited to those set forth in Section 4.6 (Specific Responsibilities of the Board) of this Agreement or the Authority's bylaws, or those powers which by law must be exercised by the Board. The Chief Executive Officer may enter into and execute power purchase agreements and other contracts, in accordance with criteria and policies established by the Board.

Section 5.8 of the final JPA agreement also provides: “The Board shall have the power by resolution to hire employees or appoint or retain such other agents, including officers, loan-out employees, or independent contractors, as may be necessary or desirable to carry-out the purpose of this Agreement, pursuant to terms and conditions adopted by the Board.”

Approval of JPA Agreement and Initial SDCP Formation

On August 26, 2019, the Sustainability Department, as approved by Mr. Caldwell, issued a staff report to the City Council regarding the establishment of a CCA and execution of the JPA agreement. Ms. Hooven was listed as the primary contact and A.L. as the secondary contact on the staff report, which recounted the drafting of the JPA agreement and its key elements. By this time, Ms. Hooven recalls the draft of the JPA agreement itself was in its final stages. Part of the staff report states that staff was requesting direction to continue the City’s support of JPA implementation until such time that financing is secured, a Chief Executive Officer and key staff are hired, and the JPA could stand on its own. The Mayor had supported this pledge of City staff support for the nascent JPA and it was offered by Mayor as part of negotiations with the other potential member agencies. The Council approved this approach. Consistent with that approach, at SDCP’s first meeting on October 31, 2019, the Board of Directors appointed Ms. Hooven as

SDCP's Interim Executive Officer. While serving in this interim role, Ms. Hooven would remain an employee of the City as its Chief Sustainability Officer.

Ms. Hooven did not request to serve as Interim Executive Officer, and the Chair of the Board does not recall the Board considering others. More specifically, the Chair has indicated that the City of San Diego Mayor's offer to use City staff on an interim basis was determinative of the matter.

It is a common practice among newly formed CCAs for the city or county which is the lead sponsor of the CCA to identify one or more staff persons who will be appointed to also serve as JPA staff on an interim basis. This is necessary to ensure an identified person will have authority to sign contracts and take other staff-level actions necessary during the interim period. Ms. Hooven was identified and put forth by her superiors at the City of San Diego for this role. Additionally, the San Diego City Attorney, in the course of providing interim general counsel advice to SDCP, recommended Ms. Hooven be officially appointed as interim staff. Accordingly, the recommendation to appoint Ms. Hooven as the Interim Executive Officer, though not made by Ms. Hooven herself, was included in the staff report for SDCP's first Board meeting. Ms. Hooven recalls that her name was included on the staff reports to the Board by default as the staff point of contact for the Board.

SDCP Implementation Plan

The SDCP CCA Implementation Plan, dated December 9, 2019, was drafted after the JPA agreement became effective and was later submitted to the California Public Utilities Commission. The Implementation Plan was developed by consultants Shawn Marshall of LEAN US and Mark Fulmer of MRW, who presented the final draft of the proposed plan to the SDCP Board on December 9, 2019. Ms. Hooven was aware of the provisions of the Implementation Plan before it was submitted to the SDCP Board of Directors and briefly introduced Ms. Marshall to present the item at the meeting. The plan included a proposed organizational structure for SDCP largely based on the structure of other CCAs, including a permanent CEO. It stated: "The SDCP has identified an Interim Executive Officer and will commence the search for a permanent Chief Executive in the first quarter of 2020. A permanent CEO is expected to be appointed by the Board of Directors once this Implementation Plan is certified by the CPUC and no later than June 2020." This recitation was accompanied by a functional organization chart, reflecting the CEO position, a brief description of the duties and functions of the CEO, and brief mention of other primary staff, including a Chief Operating Officer and Chief Financial Officer.

SDCP Staffing

Also at the December 9, 2019 meeting, Ms. Hooven provided brief comments about the SDCP 2020 staffing plan, which was included in the Board packet and was consistent with the organizational chart in the Implementation Plan. As part of the agenda item, which was drafted by Ms. Marshall, Ms. Hooven also recommended that the Board authorize her to begin the invitation for an executive recruitment firm to assist with the CEO recruitment. As Ms. Hooven is the only interim staff of SDCP, there was no other staff that could be authorized to execute any agreements. The Board directed staff to design an ad hoc subcommittee for CEO selection and authorized Ms. Hooven to begin the invitation process for an executive recruitment firm to assist with the CEO

recruitment. Following Board approval, because she had potential interest in the position and upon the advice of General Counsel, Ms. Hooven requested that Ms. Marshall exclusively handle the executive recruitment effort, including selection of and contracting with an executive recruitment firm. This is the point when SDCP became aware of her interest in the CEO position.

At the Board's next regular meeting on January 30, 2020, Ms. Marshall reported on the recruitment efforts and obtained the Board's authorization for either the Board Chair or Ms. Hooven to execute a contract with an executive recruitment firm in an amount not to exceed \$80,000. In addition, the Board approved the formation of an Ad-hoc Executive Search Subcommittee comprised of the Board Chair and another Board member.

In order to further insulate Ms. Hooven from involvement in the executive recruitment process, the Board Chair executed the contract with Avery & Associates for executive recruitment services. In addition, although Ms. Marshall frequently performs certain consulting tasks at the request of Ms. Hooven as the Interim Executive Officer, Ms. Marshall has been reporting exclusively and directly to the Chair of the Board and the Ad Hoc Subcommittee regarding CEO recruitment.

Regarding CEO recruitment efforts, Ms. Hooven has had no discussions or other role in developing the qualifications for the CEO position or any intra-SDCP discussions or decisions regarding the CEO position, qualifications, or the recruitment effort. The qualifications were developed collaboratively by the Chair of the Board, a second Board member, Avery & Associates (the executive recruiting firm), and Ms. Marshall. The Chair of the Board made final decisions regarding the qualifications and recruitment posting, and actual editing and control of the document was performed by Avery & Associates.

This has been purposeful in order to ensure Ms. Hooven has no involvement in the CEO recruitment process in the event she decided to apply, as she has done. Ms. Hooven does not know how the qualifications were established or approved, and in fact many of the qualifications stated in the recruitment document differ from Ms. Hooven's prior experience. Ms. Hooven's only awareness about the process has been through the final published staff reports included in SDCP's agenda package, which have been prepared by Ms. Marshall, and appropriate communications and interviews with her as an applicant. Ms. Marshall participated in the first of three rounds of interviews of Ms. Hooven. Because Ms. Hooven has been insulated from the CEO search and hiring process, she does not know the extent to which Ms. Marshall has participated in the interviewing of other candidates.

ANALYSIS

Section 1090 generally prohibits a public officer or employee, while acting in his or her official capacity, from making or participating in the making of a contract in which the he or she is financially interested. The California Supreme Court has stated that the purpose of Section 1090 is to make certain that "every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity." (*Thomson v. Call* (1985) 38 Cal.3d 633, 650.) Section 1090 is intended "not only to strike at actual impropriety, but also to strike at the appearance of impropriety." (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.) A contract that violates Section 1090 is void. (*Thomson, supra*, at p. 646.)

Eliminating temptation for public officers and employees, obtaining their undivided loyalty, and avoiding the perception of impropriety are important public policy goals in California. (*Thomson, supra*, at p. 648.) Consequently, Section 1090 applies without regard to whether actual fraud or dishonesty is involved in the contracting process, the contract is fair to the public agency, or the public agency loses money from the contract. (*Id.* at pp. 648-649.)

As your advice request indicates, Ms. Hooven is subject to Section 1090 and any potential SDCP employment agreement would constitute a “contract” under Section 1090. The determinative issue in this matter is whether Section 1090 would prohibit Ms. Hooven from entering an employment agreement with SDCP to be the CEO in that she will be considered to have “made” the agreement through her official actions as a City employee as Chief Sustainability Officer and/or the SDCP Interim Executive Officer.

In *People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, the Supreme Court explained that Section 1090 is to be construed broadly, including the meaning of what constitutes the “making” of a contract:

Recognizing the prophylactic purposes of conflicts statutes, the case law makes clear that section 1090 should be construed broadly to ensure that the public has the official’s “absolute loyalty and undivided allegiance.” (*Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.) The focus is on the substance, not the form, of the challenged transaction, “disregard[ing] the technical relationships of the parties and look[ing] behind the veil which enshrouds their activities.” (*People v. Watson* (1971) 15 Cal.App.3d 28, 37.) To that end, we have held that the “making” of a contract for the purposes of section 1090 includes “planning, preliminary discussions, compromises, drawing of plans and specifications and solicitation of bids,” and not just the moment of signing. (*Stigall*, at p. 571.) Building on *Stigall*, the Courts of Appeal have explained that officials can be liable if they “had the opportunity to, and did, influence execution [of the contract] directly or indirectly to promote [their] personal interests.” (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.)

(*Id.* at p. 239.) Therefore, “the test is whether the officer or employee participated in the making of the contract in (their) official capacity.” (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1292 quoting *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 236-237.)

Importantly, “[i]n considering conflicts of interest [courts] cannot focus upon an isolated ‘contract’ and ignore the transaction as a whole.” (*People v. Honig* (1996) 48 Cal.App.4th 289, 320.) Courts “look [] past the individual contracts in question and consider [] the relationships between all the parties connected with them, either directly or indirectly, to determine if a conflict of interest existed.” (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1294.) “The interest proscribed by Government Code section 1090 is an interest in the contract. The purpose of the prohibition is to prevent a situation where a public official would stand to gain or lose something with respect to the

making of a contract over which in his official capacity he could exercise some influence.” (*People v. Vallerga*, (1977) 67 Cal.App.3d 847, 867, fn. 5)

Here, the facts state that Mr. Caldwell and the Sustainability Department, under Ms. Hooven’s leadership, were charged with setting up the structure and implementation of a CCA JPA. For this project, Ms. Hooven assigned and supervised staff member A.L., who pulled JPA agreements from two similarly sized CCA JPAs and prepared a draft JPA agreement using those agreements, both of which had provisions for a CEO, as a template.

Although you state that Ms. Hooven did not direct A.L. and that his work, including how the JPA was modeled, was based on his independent thoughts, Ms. Hooven nonetheless supervised him, attended several of the discussion and formation meetings that he initiated with staff from other public entities in the San Diego area, and received regular updates from him.

You also state that ultimately a draft JPA term sheet, which included a provision for a CEO for whom the Board would establish qualifications, was drafted only by Mr. Caldwell, and that the CEO provision had its provenance in the JPA agreements that were originally pulled by A.L. Again, however, we note Ms. Hooven supervised A.L. and she would regularly meet with Mr. Caldwell to share progress and determine next steps. Moreover, along with Mr. Caldwell and sometimes A.L., she attended several meetings with other agencies to work on the term sheet. At these meetings, Ms. Hooven participated in the discussions, including some with potential member agencies’ staff and counsel from other cities.

Ultimately, the CEO provision underwent a single minor alteration prior to the final draft and execution of the agreement on October 1, 2019, to state that the position would be “hired through a transparent competitive process,” and Ms. Hooven was on the phone when the alteration was discussed among the various agency attorneys.

These facts indicate that Ms. Hooven, as the head of the Sustainability Department charged with setting up the structure and implementation of a CCA JPA, participated in making the JPA agreement that included a requirement in Section 5.5 that the SDCP Board shall appoint a CEO to be responsible for its day-to-day operation and management.³ Consistent with her role as the leader of the Department charged with setting up a CCA JPA (sometime in the fall of 2018) to October 1, 2019 when SDCP was established, we believe the facts reasonably support the conclusion that Ms. Hooven influenced the decisions concerning the final JPA agreement that included the requirement of a CEO through her participation in the planning, preliminary discussions and negotiations involving SDCP.⁴

³ We note that there is no requirement to show Ms. Hooven had intent to be the CEO during this period. (See 81 Cal.Op.Att’y.Gen. 317 (1998) [it is incorrect to suggest “that Section 1090 may only be violated when at the time the official was instrumental in setting up a government program, they subjectively intended to contract with the agency after leaving office. The statute has never been so rigidly construed”].)

⁴ We stress that avoiding the perception of impropriety is one of the important public policy goals in underlying Section 1090. (*Thomson, supra*, at p. 648.) While we recognize that Ms. Hooven insulated herself from the CEO search and hiring process after expressing an interest in the position, in our view, the fact that Ms. Marshall, who reported to Ms. Hooven as the City’s consultant, participated in developing the CEO position qualifications as well as Ms. Hooven’s three interviews for the position only adds to that perception. We also point out that this conclusion does not suggest improper motive on the part of Ms. Hooven. Indeed, the Attorney General stated “[t]he ban imposed by

This conclusion is consistent with the Commission's advice in the *Houston* Advice Letter, No. A-16-075. There, the City of Los Altos participated in a study of whether a JPA should be formed to implement a CCA program. A councilmember participated in votes by the City Council whether to authorize the implementation of a CCA and whether to approve the corresponding Joint Powers Agreement authorizing the City to become a member. Both decisions were unanimously approved.

The JPA agreement in the *Houston* letter contained a provision (Section 2.5.2) that authorized the Board of Directors to appoint a Chief Executive Officer but did not require the position to be created. The Board had several options on how to administer the SVCEA such as hiring one of the member agencies to administer the SVCEA. However, it was anticipated in the facts that the Board would ultimately decide to hire a full time CEO.

Two cities other than Los Altos had contracted with the JPA to administer the interim period before the JPA Board was sworn in, and one issued an RFQ for an interim CEO position. The councilmember in question applied and interviewed. The interview panel did not consist of nor did the councilmember discuss interest in the position with any prospective JPA Board members.

A primary issue was whether the councilmember had participated in the making of the potential public employment contracts for the JPA's interim CEO position or the anticipated full-time CEO position. The letter states:

Furthermore, while Section 2.5.2 of the SVCEA JPA authorizes the SVCEA Board of Directors to appoint a Chief Executive Officer, it does not require this position to be created. The SVCEA Board has several options on how to administer the SVCEA, including hiring a contract or employee administrator, hiring one of the member agencies to administer the SVCEA, or hiring an outside firm or entity to perform this function. This provision of the SVCEA JPA indicates that the Councilmember did not influence the making of any potential public employment contract between the SVCEA and the Contract CEO or the full-time CEO because the SVCEA Board has the authority to determine how the SVCEA is administered and could implement an administration scheme that does not utilize a Contract CEO or a full-time CEO.

As mentioned, unlike the situation in the *Houston* advice letter where the JPA agreement contained no requirement that a CEO position be created, the JPA agreement in the current situation contains an express requirement that a CEO be appointed by the Board. Accordingly, for all of the

section 1090 does not presuppose wrongdoing; rather, the rule operates chiefly as a preventive measure to protect the honor of well-meaning officials and to safeguard the public interests they serve, drawing from general understandings about human nature.” (94 Cal.Op.Atty.Gen. 22 (2011) citing *Stigall*, *supra*, 58 Cal. 2d at p. 570.)

reasons provided, Section 1090 prohibits Ms. Hooven from now entering an employment contract for the SDCP CEO position that she participated in making.⁵

However, in contrast to the express requirement that the SDCP Board appoint a CEO, Section 5.8 of the JPA agreement provides the Board with the authority to hire employees or appoint officers as it deems necessary, but there is no requirement that it do so. Accordingly, Ms. Hooven is not prohibited under Section 1090 from entering into an employment contract with SDCP for other positions because she would not have been considered to have made an employment contract for any position that is not required in the JPA agreement.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge
General Counsel

By: *Jack Woodside*
Jack Woodside
Senior Counsel, Legal Division

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⁵ We note that the harsh consequences of Section 1090's prohibition have been ameliorated by the Legislature in specified circumstances involving what are termed "remote interests" (§ 1091) and "noninterests" (§ 1091.5). (81 Ops.Cal.Atty.Gen. 169, 172 (1998).) However, no exception to the prohibition appears relevant here.