



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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October 5, 2015

J. Christine Dietrick
City Attorney
990 Palm Street
San Luis Obispo, CA 93401

Re: Your Request for Advice
Our File No. A-15-174

Dear Ms. Dietrick:

This letter responds to your request for advice on behalf of San Luis Obispo City Councilmember Carlyn Christianson regarding the conflict of interest provisions of the Political Reform Act (the “Act”)¹ and Section 1090.

Please note that our advice is based solely on the provisions of the Act and Section 1090, and we offer no opinion on the application, if any, of other conflict of interest laws, such as Public Contract Code or common law conflicts of interest. Please also note that this letter is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

When a request for advice involves potential issues raised under Section 1090, the Commission is required to forward a copy of the request to the Attorney General’s Office and the local district attorney prior to proceeding with the advice. (Section 1097.1(c)(3).) Accordingly, we have forwarded your request to the Attorney General’s Office and the San Luis Obispo County District Attorney’s Office. We did not receive a written response from either entity. (Section 1097.1(c)(4).)

Please note that the following advice is not admissible in a criminal proceeding against any individual other than the requestor. (Section 1097.1(c)(5).)

QUESTIONS

1. Does the Act prohibit Councilmember Christianson from taking part in the governmental decision on whether to enter one or more contracts with a housing stock cooperative (the “co-op”) partially owned by the Councilmember to stabilize a hillside undergoing severe erosion?

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.

2. Does Section 1090 prohibit the Councilmember from participating in the making of or the City Council from entering into one or more contracts with the co-op to stabilize the hillside?

CONCLUSIONS

1. Yes. The Act prohibits the Councilmember from taking part in the governmental decision on whether to enter one or more contracts with the co-op to stabilize the hillside because of the reasonably foreseeable material financial effects of the decision on her financial interests.²

2. Although Section 1090 applies, the City Council may enter into one or more contracts with the co-op to stabilize the hillside pursuant to the rule of necessity. However, the Councilmember should abstain from participating in the making of the contract or contracts.

FACTS

You are the City Attorney for the City of San Luis Obispo. Councilmember Christianson is a member of the City Council. You are the authorized representative of the Councilmember. The Councilmember is a partial owner and resident of the co-op, having purchased shares in the co-op and taken up residence in her unit there in the spring of 2007. The co-op is a for-profit corporation, but the Councilmember does not receive income as a result of her ownership interest. The Councilmember pays property taxes on her interest in the co-op.

The co-op owns the real property located at 1415 Morro Street (the “co-op property”), which is on a hilltop at the intersection of Morro and Pismo Streets near the City’s downtown. The Pismo Street frontage of the co-op property sits above and immediately adjacent to a steep hillside that slopes down to the City sidewalk along Pismo Street. A property-line survey of the hillside has confirmed that the upper portion of the hillside is on co-op property and the lower portion is on City property.

The hillside has been undergoing significant erosion for years. In 2008, representatives of the co-op approached the City and had a series of discussions about the hillside erosion. Co-op residents were concerned about slope failure and other potential adverse impacts, and the City was concerned about the safety of pedestrians on the sidewalk and potential damage to parked vehicles. Soon thereafter, the City closed the sidewalk and restricted parking below the hillside. Earth Systems Pacific conducted a geotechnical inspection of the hillside in June 2008.

The report on the geotechnical inspection concluded that a “major portion” of the 160-foot length of the slope is characterized by conditions that could result in slope failure and that “there are several areas where slope failure or rockfall may be imminent.” The report noted that the hillside’s instability is primarily caused by its over-steepened slope configuration, exacerbated by unfavorable geologic conditions, and that slope failure could be triggered by weather, erosion, a

² When a public official who holds an office specified in Section 87200 (including members of city councils) has a conflict of interest in a decision noticed at a public meeting, he or she must: (1) immediately prior to the discussion of the item, orally identify each type of interest involved in the decision as well as details of the interest as discussed in Regulation 18707(a), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item.

seismic event, expansion or contraction of the rock, water infiltration and percolation into fractures of the rock, or by any combination of these factors. The report recommended the ongoing prohibition of pedestrian traffic in the area, posting of appropriate warnings, scaling of the slope, and construction of a retaining wall or use of a rock net, among other actions. The report provided that “[i]mmediate and decisive action is strongly recommended to avoid potentially serious injury to people and damage to property.”

The stability of the hillside is an ongoing concern. City staff anticipates stabilizing the hillside would cost several hundred thousand dollars and would require the negotiation and execution of cost sharing, right of entry, hold harmless, and/or indemnification agreements between the City and the co-op.

ANALYSIS

The Act

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a “financial interest” in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official’s financial interests set forth in Section 87103, which include among others:

- A business entity in which he or she has a direct or indirect investment of \$2,000 or more. (Section 87103(a).)
- Real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b).)
- His or her personal finances, including those of his or her immediate family. (See Section 87103.)

The Councilmember’s interest in the co-op is a financial interest in a business entity in which she has a direct or indirect investment of \$2,000 or more because the co-op is a for-profit corporation, and although your facts are silent as to the value of the Councilmember’s interest in the co-op property, sale prices of comparable residential units within the City are well beyond \$2,000. Her interest in the co-op property is a financial interest in real property in which she has a direct interest of \$2,000 or more because she pays property taxes on the interest and sales prices of comparable residential units within the City are well beyond \$2,000. And her interest in the co-op is a financial interest in her personal finances because the value of her shares in the co-op affects her personal finances. Thus, your question implicates financial effects on the Councilmember’s financial interests in a business entity, real property, and her personal finances.³

³ However, where a decision affects an interest in a business entity or real property, an effect on the official’s personal finances need not be considered under Regulation 18702.5(c). Accordingly, we do not address the potential effect on the Councilmember’s personal finances further.

Foreseeability and Materiality:

Generally, a financial effect is presumed to be reasonably foreseeable if the interest is a named party in, or the subject of, a governmental decision before the official or the official's agency. An interest is "the subject of a proceeding" when "the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the financial interest" including "any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6)." (Regulation 18701(a).)

The governmental decision here is whether to enter into one or more contracts with the co-op to stabilize the hillside. The co-op is explicitly involved in the decision, and the Councilmember has an interest in the co-op as a business entity, as real property, and with respect to her personal finances. Accordingly, the financial effects of the decision at issue on the Councilmember's financial interests are reasonably foreseeable pursuant to Regulation 18701(a).

Business Entity

Regulation 18702.1(a)(3) provides that the reasonably foreseeable financial effect of a governmental decision on a business entity in which an official has a direct or indirect investment of \$2,000 or more is material whenever the business entity enters into a written contract with the official's agency.

Therefore, if the City decides to enter into a written contract or contracts with the co-op to stabilize the hillside, the reasonably foreseeable financial effect of that governmental decision on the co-op as a business entity would be material pursuant to Regulation 18702(a)(3).

Real Property

Regulation 18702.2(a)(6) provides that a reasonably foreseeable financial effect of a governmental decision on a parcel of real property in which an official has a financial interest is material whenever the decision involves construction of or improvements to streets, water, sewer, storm drainage, or similar facilities, and the official will receive a disproportionate benefit or detriment by the decision.

The governmental decision at issue here involves the construction of or improvements to facilities to shore up the hillside's stability. The Councilmember will receive a disproportionate benefit or detriment from the decision because the value of her interest in the co-op is likely to rise or fall depending upon the outcome of that decision; if the City enters a contract or contracts with the co-op to stabilize the hillside the value of her interest is likely to go up due to the reduction or removal of the risk of slope failure to the co-op property; and if the City does not the value of her interest is likely to go down because of the ongoing, unaddressed risk of slope failure to the co-op property. Therefore, the reasonably foreseeable financial effect of the decision on the Councilmember's financial interest in the real property at issue is material pursuant to Regulation 18702.2(a)(6).

For these reasons, we conclude that the Act prohibits the Councilmember from taking part in the decision on whether to enter one or more contracts with the co-op to stabilize the hillside.

Section 1090

We employ the following six-step analysis to determine whether an official has a conflict of interest under Section 1090.

Step One: Is the Councilmember subject to the provisions of Section 1090?

Section 1090 applies to virtually all state and local officers, employees, and multi-member bodies, whether elected or appointed. A City Council is a multi-member body, and a Councilmember is a local officer. Therefore, the Councilmember is subject to Section 1090.

Step Two: Does the decision at issue involve a contract?

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that “specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’” (*People v. Honig* (1996) 48 Cal.App.4th 289, 351 citing *Stigall v. Taft* (1962) 58 Cal.2d 565, 571).

The decision at issue here is whether the City may enter into one or more contracts with the co-op to stabilize the hillside. This decision involves one or more contracts.

Step Three: Is the Councilmember making or participating in making a contract?

It is important to note that Section 1090 reaches beyond the officials who actually execute the contract. Section 1090 casts a wide net to capture those officials who participate in any way in the making of the contract. (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) Therefore, for purposes of Section 1090, participation in the making of a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitations for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall, supra*, at p. 579.) Additionally, when members of a public board, commission or similar body (such as the City Council) have the power to execute contracts, each member is conclusively presumed to be involved in the making of all contracts by his or her agency regardless of whether the member actually participates in the making of the contract. (*Thomson v. Call* (1985) 38 Cal.3d 633, 645 & 649; *Fraser-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201; 89 Ops.Cal.Atty.Gen. 49 (2006).)

Because the City Council has the power to execute a contract or contracts with the co-op to stabilize the hillside, the Councilmember is conclusively presumed to be involved in the making of the contract or contracts for purposes of Section 1090.

Step Four: Does the Councilmember have a financial interest in the contract?

Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest” (*People v. Honig, supra*, at p. 333), and officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*Ibid.*) In addition, case law and statutory exceptions to Section 1090 make clear that the term “financially interested” must be liberally interpreted. (See, e.g., *People v. Deysher* (1934) 2 Cal.2d 141, 146 [“(h)owever devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void”].) Further, “the certainty of financial gain is not necessary to create a conflict of interest . . . (t)he government’s right to the absolute, undivided allegiance of a public officer is diminished as effectively where the officer acts with a hope of personal financial gain as where he acts with certainty.” (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1298 (citations omitted).)

The Councilmember owns shares in the co-op and resides in a unit on the co-op property. The co-op property faces the threat of slope failure or other potential adverse impacts as a result of the ongoing hillside erosion. The hillside erosion is a factor in the value of the co-op property. If the City and the co-op entered into one or more contracts to stabilize the hillside, the threat of potential adverse impacts of the hillside erosion to the co-op property would be abated, and the value of the co-op property might increase as a result. Accordingly, the Councilmember has a financial interest in the potential contract or contracts between the City and the co-op to stabilize the hillside.

Because the Councilmember has a financial interest in the potential contracts between the City and the co-op to stabilize the hillside, Section 1090 prohibits the Councilmember from making or participating in making and the City from entering into those contracts.

Step Five: Does either a remote or noninterest exception apply?

The Legislature has created various statutory exceptions to Section 1090's prohibition where the financial interest involved is deemed to be a “remote interest,” as defined in Section 1091, or a “noninterest,” as defined in Section 1091.5. If a “remote interest” is present, the contract may be made if (1) the officer in question discloses his or her financial interest in the contract to the public agency, (2) such interest is noted in the entity's official records, and (3) the officer abstains from any participation in the making of the contract. (Section 1091(a); 88 Ops.Cal.Atty.Gen. 106, 108 (2005); 83 Ops.Cal.Atty.Gen. 246, 248 (2000).) If a “noninterest” is present, the contract may be made without the officer’s abstention, and generally a noninterest does not require disclosure. (*City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 514-515; 84 Ops.Cal.Atty.Gen. 158, 159-160 (2001).)

None of the remote or noninterest exceptions to Section 1090’s prohibition are applicable to the present situation.

Step Six: Does the rule of necessity apply?

In limited circumstances, a “rule of necessity” has been applied to allow the making of a contract that Section 1090 would otherwise prohibit. (88 Ops.Cal.Atty.Gen. 106, 110 (2005).)

The rule of necessity has two facets: in procurement situations, it has permitted a government agency to acquire an essential supply or service despite a conflict of interest; in nonprocurement situations, it has permitted a public officer to carry out the essential duties of the office despite a conflict of interest where the officer is the only one who may legally act. (65 Ops.Cal.Atty.Gen. 305, 310 (1982).)⁴ In nonprocurement situations, such as the situation here, the rule of necessity ensures that essential government functions are performed even where a conflict of interest exists. (*Ibid.*)

Previously, the rule of necessity has been applied in a nonprocurement situation to a city council where members of the council had a conflict of interest that otherwise would have prevented action by the board. (*Federal Construction Co. v. Curd*, 179 Cal. 489, 493 (1918)). In a nonprocurement situation where the rule of necessity applies to allow a multi-member body to act when it otherwise would have been precluded from doing so due to one or more members' conflict of interest, the member or members with the conflict of interest should abstain from participation. (89 Ops.Cal.Atty.Gen. 217, 222 (2006); 88 Ops.Cal.Atty.Gen. 106, 112 (2005); 69 Ops.Cal.Atty.Gen. 102, 111 (1986)).

Section 501 of the Charter of the City of San Luis Obispo provides that the City Council has the power to undertake all actions appropriate to the general welfare of its inhabitants that are not otherwise prohibited by State law. As an indication of the relative importance of this duty of the Council, it is worth noting that this provision is the first under the Article of the Charter that enumerates the powers and procedures of the Council. Accordingly, the protection and promotion of the general welfare of the City's inhabitants may be considered an essential duty of the Council for purposes of this analysis of the applicability of the rule of necessity.

In this case, the hillside has been undergoing significant erosion for years, and the safety of the City's inhabitants is at risk. As a result of the hillside erosion, the City closed the sidewalk and restricted parking below the hillside. A report on a geotechnical inspection of the hillside conducted in June of 2008 concluded that the biggest immediate concern was the potential for falling debris to injure pedestrians or damage parked vehicles. The report noted that "there are several areas where slope failure or rockfall may be imminent" and that "[i]mmediate and decisive action is strongly recommended to avoid potentially serious injury to people and damage to property." The report recommended the ongoing prohibition of pedestrian traffic in the area, posting of appropriate warnings, scaling of the slope, and construction of a retaining wall or use of a rock net, among other actions.

Because the protection and promotion of the general welfare of the City's inhabitants is an essential duty of the City Council, and because the hillside erosion puts the general welfare of the City's inhabitants at risk, we conclude that the rule of necessity applies, and the Council may enter into one or more contracts with the co-op to stabilize the hillside. However, pursuant to the opinions of the Attorney General referenced above, the Councilmember should abstain from participating in the making of the contract or contracts.

⁴ However, the rule of necessity only applies in cases of real emergency and necessity, after all possible alternatives have been explored. (88 Ops.Cal.Atty.Gen. 106, 111 (2005); 69 Ops.Cal.Atty.Gen. 102, 109 (1986)).

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

Sincerely,

Hyla P. Wagner
General Counsel

/s/

By: Matthew F. Christy
Counsel, Legal Division

MFC:jgl