STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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August 21, 2020

Jeffrey A. Walter
Walter & Pistole
670 W. Napa Street, Suite F
Sonoma, CA 95476

Re: Your Request for Advice
Our File No. A-20-034

Dear Mr. Walter:

This letter responds to your request for advice on behalf of Novato City Councilmember Amy Peele, regarding the conflict of interest provisions of the Political Reform Act (the "Act") and Government Code Section 1090, et seq.[1] Please note that we are only providing advice under the Act and Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including the 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 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).)

QUESTION

Does Councilmember Peele, a member of the home owner's association, Hamilton Fields of Marin Association ("HOA"), a non-profit corporation, have a disqualifying conflict of interest under either the Act or Section 1090 that prohibits her from participating in a City Council decision to approve a contract with the HOA for the maintenance of perimeter walls? If she has a prohibitive interest under Section 1090, may the City enter into the maintenance contract with the HOA?

[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.

CONCLUSION

Councilmember Peele has a prohibited financial interest under Section 1090 in the maintenance contract as a homeowner and member of the HOA. However, based on the facts provided including the longstanding failure to maintain the walls, the current state of disrepair, and the settlement of claims of damage resulting from adjacent City maintained trees, the rule of necessity permits the City to enter the contract with the HOA.

FACTS AS PRESENTED BY REQUESTER

Councilmember Peele owns a home which is her principal residence located in Novato, within the former Hamilton Army Air Base. Her ownership interest in her home is burdened by the Hamilton Declaration of Restrictions ("CC&Rs") recorded against her and other Hamilton homeowners' properties. The CC&Rs provide for the creation of the HOA, a non-profit mutual benefit corporation. The HOA is vested with certain obligations to maintain the common areas located within the HOA, including maintaining improvements located on those common areas.

As an owner of a lot and home governed by the CC&Rs, Councilmember Peele and her husband automatically became members of the HOA, subject to its governance and assessment powers, upon the purchase of their home. Although a member of the HOA, Councilmember Peele is not an officer of the HOA. She has been paid nothing by the HOA. In an email, you also note that, in addition to the HOA, a Mello-Roos Community Facilities District ("CFD") was established a number of years ago to maintain and pay for the maintenance of certain improvements located in the former Hamilton Army Air Base. Councilmember Peele's property is assessed by the CFD to pay for the maintenance of those improvements.

The City and the HOA Board of Directors are currently discussing the possibility of the HOA and the City entering into a contract regarding the maintenance of some of the improvements in the common areas owned by the HOA. In an email, you also note that the focus of the discussions between the City staff and HOA board of directors' representatives has been the maintenance of walls located in the former Hamilton Army Air Base. However, neither the walls nor the maintenance of the walls is identified or called-out, respectively, in either the HOA documents (including the CC&R's) or the CFD documents. The perimeter walls within the Hamilton community appear to be constructed on the property lines of the individual residential parcels where they abut the City right-of-way, much like privacy fences are often installed in the back yards of homes that back to roadways. Because of this, the City staff has taken the position that the responsibility for maintaining the walls lies with each homeowner whose property backs to the walls. Councilmember Peele's property is not one of those that backs to the walls; it is located at least 126 feet from the nearest portion of the walls in question, separated by another home and street.

In your email, you also note that the proposed City agreement would be with the Hamilton Field HOA, which encompasses a majority of the developments within Hamilton. The Hamilton Field HOA (and its members) are envisioned to be the organization obligated to maintain the walls under this proposed agreement. The specific maintenance work would include structural and cosmetic repairs to damage caused by adjacent street-trees, vegetation growing on the walls, and

ground settlement. The work will also include pressure washing to remove dirt/stains, graffiti abatement, and repainting approximately every ten years.

The costs associated with performing the deferred maintenance (no entity has ever maintained/repaired the walls) are estimated to be approximately $900,000. During preliminary conversations, a portion of these funds would be paid to the Hamilton Field HOA from the Hamilton CFD as a settlement for damage to the walls caused by adjacent CFD-maintained street trees. The exact amount of this settlement was not determined as the conversations with the Hamilton Field HOA Board representatives were conceptual in nature. The remainder of the funds needed to perform the initial repairs and maintenance would be borne by the Hamilton Field HOA. Ongoing annual maintenance costs after the deferred maintenance is addressed would be assumed by the Hamilton Field HOA and are estimated to be $50,000 per year.

The maintenance contract is being considered because the maintenance responsibilities for the walls are not defined, and no one has maintained them since they were built in the late 1990s or early 2000s. The Hamilton-area residents are very concerned about the neglected appearance of the walls and would like to see the area beautified. Both the City staff and Hamilton Field HOA Board representatives are considering this agreement as there are benefits to all parties. These benefits are described as follows: a) The City does not have to accept responsibility for the management or costs (aside from a potential initial settlement amount mentioned above) of the large initial deferred-maintenance project or the ongoing maintenance responsibilities; b) The HOA will have control over the level of investment its board decides to put into the on-going maintenance of the walls to meet the residents' aesthetic expectations; c) The agreement would resolve the unclear maintenance responsibilities to address the longstanding conflict between the City and the HOA; and d) Maintaining the status quo, where each individual homeowner whose property backs to the walls (there are hundreds) is responsible for repairing and maintaining his/her piece of the wall, is not an efficient or effective way to maintain these linear features that are prominent throughout the area. It is unknown whether or not the contract, were it entered into, would result in any impact on the annual assessments levied against the HOA's members, including Councilmember Peele.

ANALYSIS

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. City of Taft* (1962) 58 Cal.2d 565, 569.) Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest." (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void, regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.) When Section 1090 is applicable to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain; the entire governing body is precluded from entering into the contract. (*Id*. at pp. 647-649.)

With respect to the making of a contract, Section 1090 reaches beyond the officials who participate personally in the actual execution of the contract 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, 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 solicitation for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237.)

Although Section 1090 does not specifically define the term "financial interest," case law and Attorney General opinions state that prohibited financial interests may be indirect as well as direct, and may involve financial losses, or the possibility of losses, as well as the prospect of pecuniary gain. (*Thomson v. Call*, supra, at pp. 645, 651-652; see also *People v. Vallerga* (1977) 67 Cal.App.3d 847, 867, fn. 5; 85 Ops.Cal.Atty.Gen. 34, 36-38 (2002); 84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).) Furthermore, case law and statutory exceptions to Section 1090 make clear that the term "financially interested" must be liberally interpreted. It cannot be interpreted in a restricted and technical manner. (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1298.) Where an HOA member may experience increased or decreased HOA costs or the benefit of enhanced services as a result of a contract, the members of the HOA have a financial interest in the contract. Thus, for purposes of Section 1090, owning homes and being members of the HOA constitutes a financial interest in the contract decisions between the City and the HOA. (See *Lyon* Advice Letter, A-16-239.)

The HOA owns and is obligated to maintain improvements located in common areas. All members of the HOA must pay assessments levied by the HOA, including annual assessments. You state that it is unknown whether the contract regarding the maintenance of some of the improvements in the common areas owned by the HOA would result in any impact on the annual assessments levied against the HOA's members, including Councilmember Peele. However, you also note that ongoing annual maintenance costs estimated to be $50,000 per year would be assumed by the Hamilton Field HOA. Presumably, any such contract would result in either additional costs to the HOA, or savings to the HOA, and those additional costs or savings could pass through the HOA to the members, including Councilmember Peele. Section 1090, therefore, prohibits Councilmember Peele from taking part in the City's decision to contract with the HOA. Next, we must determine if the City Council is precluded from entering into the contract with the HOA for regarding the maintenance of improvements in the common areas of the HOA.

Rule of Necessity

In limited circumstances, the rule of necessity has been applied to allow a contract to be formed that Section 1090 would otherwise prohibit. (88 Ops.Cal.Atty.Gen. 106, 111 (2005). The California Supreme Court has stated, "[t]he rule of necessity permits a government body to act to carry out its essential functions if no other entity is competent to do so (*Eldridge v. Sierra View Local Hospital Dist., supra*, 224 Cal.App.3d at pp. 321-322; see *Olson v. Cory* (1980) 27 Cal.3d 532, 537 . . .), but it requires all conflicted members to refrain from any participation. If a quorum is no longer available, the minimum necessary number of conflicted members may participate, with drawing lots or some other impartial method employed to select them. (*Eldridge*, at pp. 322-323.)" (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1097.)

Based on the facts provided, the perimeter walls within the Hamilton community require maintenance work that includes structural and cosmetic repairs to damage caused by adjacent street-trees, vegetation growing on the walls, and ground settlement. The walls also require pressure

washing, graffiti abatement, and repainting. Neither the walls nor the maintenance of the walls is identified or called-out, respectively, in either the HOA documents or the CFD documents. The perimeter walls within the Hamilton community appear to be constructed on the property lines of the individual residential parcels where they abut the City right-of-way, and City staff has taken the position that the responsibility for maintaining the walls lies with each homeowner whose property backs to the walls. The facts also indicate that some of the damage to the walls are the result of adjacent trees currently maintained by the City through the CFD.

In this case, the facts indicate that a contract for the maintenance of the walls between the City and the HOA is necessary. The walls have not been maintained for approximately 20 years and now require deferred maintenance estimated at $900,000. In light of the failure of all parties to maintain the walls, it is now necessary for the City and HOA to reach an agreement to ensure the proper maintenance of the walls. Moreover, the proposed agreement would also settle any dispute arising from damage to the walls caused by adjacent trees maintained by the CFD.

Based on these facts, no other entities can reach an agreement on this issue, as the City and the HOA are the two parties to the contract, and the allocation of responsibility for the delayed maintenance work is essential. Without the agreement, responsibility for the repair and maintenance of the walls would remain in its current state, with neither the City nor the HOA assuming any responsibility for this work. Therefore, it is an essential duty and necessary for the City to make decisions regarding the HOA wall maintenance contract. Thus, the rule of necessity applies to the decision on the maintenance contract, and the City may enter this contract. However, Councilmember Peele must abstain from participation in the decision due to her financial interest in the contract.

Additionally, because the remedy in this situation is for her to abstain from any participation in the approval of such contract, we do not analyze the conflict of interest under the Act as the remedy for conflicts under the Act would not differ from the action already required, except to note that Councilmember Peele must leave the room during the consideration of any such contracts pursuant to the Act's recusal requirements.

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

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary W. Norton
Senior Counsel, Legal Division

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