



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

February 4, 2021

David P. Hale
A Professional Corporation
Attorney at Law
City Attorney
City of Grover Beach
1233 W. Shaw Ave., Ste. 106
Fresno, CA. 93711

Re: Your Request for Advice
Our File No. A-21-001

Dear Mr. Hale:

This letter responds to your request for advice on behalf of Grover Beach City Councilmember Anna Miller and the Grover Beach City Council 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.

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 Luis Obispo 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

Under the Act and Section 1090, may Councilmember Miller take part in the contracting process of the City transferring City-owned real property to a nonprofit organization for the purpose of constructing affordable housing, given that she is a compensated officer of the nonprofit?

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

No, under Section 1090, she has a disqualifying financial interest in the contracting process. Similarly, she is disqualified under the Act because the nonprofit is a source of income that is explicitly involved in the potential contract and it is reasonably foreseeable the financial effect on the nonprofit is material. However, because her interest is considered “remote” under Section 1091, the City may still contract with the nonprofit, as long as Councilmember Miller’s interest is disclosed and noted in the City Council’s records and Councilmember Miller properly recuses herself.²

FACTS AS PRESENTED BY REQUESTER

Prior to the General Election in November 2020, the City of Grover Beach (“City”) submitted a competitive bidding request for proposals (“RFP”) for a potential developer to construct an affordable housing project on a parcel of land currently owned by the City. The process was vetted through a public hearing. Upon conclusion of that process, the City selected a 501(c)(3) non-profit corporation named Peoples Self Help as the potential developer, subject to entering into an Exclusive Negotiating Agreement (“ENA”) and a Disposition and Development Agreement (“DDA”). The City negotiated the ENA prior to the November election and is currently negotiating the DDA with the non-profit.

During the November election, three City Councilmember spots, as well as the position of Mayor, were up for election. One of the City Councilmember spots was filled by Anna Miller, who is the Chief Operating Officer (“COO”) of Peoples Self Help. She is an officer of the corporation and is compensated for that position in an amount in excess of \$150,000. She does not hold any stock in the corporation and was not a participant of the process to submit a proposal to the City for the ENA. She was appointed to the COO position on November 13, 2020. She has been an employee of Peoples Self Help since January 5, 2015.

The DDA has not been negotiated but will most likely result in the City giving the subject property to Peoples Self Help with the obligation that Peoples Self Help construct an affordable housing project. The objective of Peoples Self Help is to construct affordable housing projects. The City does not intend to acquire any proprietary interest in the property or receive any lease payments related to the transaction. The City will give the property to Peoples Self Help with the obligation codified in the DDA that they will build a certain size affordable housing project that will remain affordable housing. The City had an appraisal on the property when the property was zoned as Parks and Recreation and the appraisal valued the property at \$4,500. The property has since been rezoned to Central Business Open Zone with a Planned Development Overlay that restricts the use on the subject property to only affordable housing developments. The City has not done a follow up appraisal on the value of the property after rezoning wherein it was limited to only one special use.

² We note that recusal requirements under the Act are provided in Regulation 18707 and, amongst other requirements, requires Councilmember Miller to step down from the dais and leave the room for the discussion and deliberations.

Councilmember Miller has not been involved in any decision making related to this project, either with Peoples Self Help or with the City Council. Additionally, when the DDA comes to the City Council for approval, Councilmember Miller intends to recuse herself, disclose the conflict, have it noted in the official record, disqualify herself from any vote, and leave the room to not influence any other members of the Council or their votes. She will also, as a City Councilmember, be recused from any communication or discussion related to the project in the future. All financing related to the construction of the affordable housing project would be done through private or public financing by Peoples Self Help completely unrelated to the City of Grover Beach. The City is not participating in any loans for financing of this project other than giving them the subject property.

ANALYSIS

The Act

Under Section 87100 of the Act, “[n]o public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.” “A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family,” or on certain specified economic interests. (Section 87103.) Among those specified economic interests is “[a]ny source of income . . . aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.” (Section 87103(c).) Councilmember Miller has an economic interest in Peoples Self Help as a source of income.

Regulation 18701(a) provides the applicable standard for determining the foreseeability of a financial effect on an economic interest explicitly involved in the governmental decision. It states, “[a] financial effect on a financial interest is presumed to be reasonably foreseeable if the financial interest is a named party in, or the subject of, a governmental decision before the official or the official’s agency. A financial interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the financial interest, and includes any governmental decision affecting a real property financial interest as described in Regulation 18702.2(a)(1)-(6).”

Similarly, the reasonably foreseeable financial effect of a governmental decision on an official’s financial interest in a source of income is material if the source is a named party in, or the subject of, the decision including a claimant, applicant, respondent, or contracting party. (Regulation 18702.3(a)(1).)

Given that Councilmember Miller’s source of income, Peoples Self Help, would be a named party in a contract between the City and the organization for the transfer of real property conditioned on construction of an affordable housing project, the decision would have a reasonably foreseeable, material financial effect on Peoples Self Help. Accordingly, the Act prohibits Councilmember Miller from taking part in the decision.

Section 1090

Section 1090 provides, “M[e]mbers of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.” (Section 1090(a).) 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. Taft* (1962) 58 Cal.2d 565, 569.) 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.)

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), and officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*Ibid.*) Although Section 1090 does not specifically define the term “financial interest,” case law, and Attorney General opinions state that prohibited financial interests may be direct as well as indirect, and may involve financial losses or the possibility of financial losses, as well as the prospect of pecuniary gain. (*Thomson v. Call* (1985) 38 Cal.3d 633, 645, 651-652.) A contract that violates Section 1090 is void, regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 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.)

Section 1091, however, enumerates limited circumstances in which a public official’s economic interest is considered “remote,” such that the governmental body or board may still enter into the contract at issue, as long as the disqualified official’s interest is disclosed to the body or board and noted in its official records, and the disqualified official does not take part in the contracting process. (Section 1091(a).) One of the circumstances in which an official is deemed to have a “remote interest” is when the interest is “[t]hat of an officer or employee of a nonprofit entity exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. Sec. 501(c)(3)), pursuant to Section 501(c)(5) of the Internal Revenue Code (26 U.S.C. Sec. 501(c)(5)), or a nonprofit corporation, except as provided in paragraph (8) of subdivision (a) of Section 1091.5.” (Section 1091(b)(1).)³ Councilmember Miller is an officer of Peoples Self Help, a 501(c)(3) nonprofit organization, and therefore her interest in a contract between the City and Peoples Self Help may be deemed “remote,” such that the contract would not violate Section 1090, as long as Councilmember Miller discloses her interest to the City Council, has her interest noted in the City Council’s official records, and recuses herself from the contracting process.

³ Section 1091.5(a)(8) pertains to noncompensated officers of nonprofits and therefore is inapplicable to the circumstances present here.

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

Sincerely,

Dave Bainbridge
General Counsel



By: Kevin Cornwall
Counsel, Legal Division

KMC:aja