



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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April 11, 2019

Daniel G. Sodergren, Esq.
City Attorney
P.O. Box 520
Pleasanton, CA 94566

Re: Your Request for Advice
Our File No. A-19-025

Dear Mr. Sodergren:

This letter responds to your request for advice on behalf of the City of Pleasanton Councilmember Julie Testa regarding the conflict of interest provisions of the Political Reform Act (“Act”)¹ and Government Code Section 1090, *et seq.*² Please note, we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions, such as common law conflict of interest or Section 1090.

Also, note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71); 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.

Regarding our advice on Section 1090, we are required to forward your request and all pertinent facts relating to the request to the Attorney General’s Office and the Alameda 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.” (Section 1097.1(c)(5).)

QUESTIONS

Does either the Act or Section 1090 prohibit Councilmember Testa from voting on the City Council’s award of grants under the Housing and Human Services Grant (“HHS”) Program given that National Alliance on Mental Illness (“NAMI”) Tri-Valley has applied for such a grant and Councilmember Testa is an uncompensated board member 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.

² Sections 1090 through 1097.5.

CONCLUSIONS

Conflicts of interest under the Act arise exclusively from those interests enumerated in the Act. Under Section 87103, the Councilmember's non-compensated membership on the board of a nonprofit corporation is not a potentially disqualifying financial interest under the Act's conflict of interest provisions. Regarding Section 1090, the noninterest exception set forth in Section 1091.5(a)(8) would allow Councilmember Testa and the Board to make the funding decisions relating to the NAMI Tri-Valley so long as the Councilmember's interest is noted in the City's official records.³

FACTS AS PRESENTED BY REQUESTER

City of Pleasanton Councilmember Julie Testa is an uncompensated board member of the National Alliance on Mental Illness ("NAMI") Tri-Valley. NAMI Tri-Valley is a California nonprofit public benefit corporation exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code. NAMI Tri-Valley provides resources and support for families and their loved ones living with psychiatric disorders. NAMI Tri-Valley, in collaboration with other community agencies and organizations, is dedicated to improving the quality of life for those whose lives are affected by mental illness by providing support, resource information, education programs, and advocacy. Councilmember Testa serves on the board of directors of NAMI Tri-Valley and receives no compensation.

The City's Housing and Human Services Grant ("HHSG") Program distributes funding from the federal Community Development Block Grant Program, the federal Home Investment Partnership Program, the City's Lower Income Housing Fee Fund, and the City's General Fund. NAMI Tri-Valley applied for a grant from the City in connection with the City's HHSG program.

ANALYSIS

The Act only prohibits financial conflicts of interest in governmental decision-making. Section 87100 provides that no public official may make, participate in making, or in any way attempt to use his or her official position to influence a governmental decision in which the official knows, or has reason to know, that he or she has a financial interest. Section 87103 defines a "financial interest" as follows:

- (a) Any business entity in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more.
- (b) Any real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more.

³ We note that you have also asked if the Act or Section 1090 prohibit Councilmember Testa from voting on policy matters relating to the structure and funding of the HHSG Program while NAMI Tri-Valley is an applicant for such a grant. In regard to this question, as analyzed below, we note that the Councilmember does not have a potentially disqualifying interest under the Act based upon the facts provided. However, we cannot determine whether the policy matters potentially implicate a contract and Section 1090 without identification of the policy matters to be considered. However, to the extent the policy matters do implicate Section 1090, the noninterest exception of Section 1091.1(a)(8) would similarly apply.

(c) Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, 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.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.⁴

(e) Any donor of, or any intermediary or agent for a donor of, a gift or gifts aggregating [\$500]⁵ or more in value provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made.

Because the Act only prohibits the financial conflicts of interest enumerated above, Councilmember Testa does not have a disqualifying conflict of interest solely by the fact that she is an uncompensated director of NAMI Tri-Valley.⁶

Section 1090:

Section 1090 codifies the common law prohibition against “self-dealing” with respect to governmental contracts. Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.)

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.) Employees have been found to have a financial interest in a contract that involves their employer, even where the contract would not result in a change in income or directly involve the employee because an employee has an overall interest in the financial success of the firm and continued employment.

The Legislature, however, has created various statutory exceptions to Section 1090’s prohibition where the interest involved is deemed a “remote interest,” as defined in Section 1091 or a “noninterest,” as defined in Section 1091.5. If a noninterest is present, the public official’s abstention is generally not required, and the contract may be made by the agency.

⁴ Please note that a nonprofit corporation is not a “business entity” as defined by Section 82005.

⁵ The amount of the value of gifts specified by this subdivision shall be adjusted biennially by the Commission to equal the same amount determined by the Commission pursuant to subdivision (f) of Section 89503. The quotation above has been modified with the current figure.

⁶ Section 87103 also references an interest in an official’s personal finances, including those of the official’s immediate family, also known as the “personal financial effects” rule. However, as a volunteer on NAMI-Tri Valley’s board of directors, it does not appear that the Councilmember’s personal finances are implicated by the decisions.

Noncompensated officer of a nonprofit, tax-exempt corporation.

The noninterest exception in Section 1091.5(a)(8) reads as follows:

(8) That of a noncompensated officer of a nonprofit, tax-exempt corporation, which, as one of its primary purposes, supports the functions of the body or board or to which the body or board has a legal obligation to give particular consideration, and provided further that this interest is noted in its official records.

For purposes of this paragraph, an officer is “noncompensated” even though he or she receives reimbursement from the nonprofit, tax-exempt corporation for necessary travel and other actual expenses incurred in performing the duties of his or her office.

You stated that NAMI Tri-Valley is an Internal Revenue Code 501(c)(3) corporation, and Councilmember Testa receives no compensation by serving on its board. Additionally, based upon the description of the services it provides, one of NAMI Tri-Valley’s primary purposes is to support the function of the City of Pleasanton in regard to the care and support of community members with mental illness. Accordingly, if Councilmember Testa notes her interest in the City’s official records during NAMI Tri-Valley’s funding deliberations, the Councilmember and the board are not prohibited under Section 1090 entering into the grant.

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

Sincerely,

Dave Bainbridge
General Counsel



By: Ryan O’Connor
Counsel, Legal Division

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