



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

September 23, 2019

Ruthann G. Ziegler
Attorney at Law
3308 El Camino Avenue, Suite 300, #427
Sacramento, CA 95821

Re: Your Request for Advice
Our File No. A-19-046

Dear Ms. Ziegler:

This letter responds to your request for advice on behalf of the City of Citrus Heights and Councilmember Porsche Middleton regarding the conflict of interest provisions of the Political Reform Act (the “Act”)¹ and Government Code Section 1090. Please note that we are only providing advice under the conflict of interest provisions of the Act and 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.

In regard to 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 Sacramento 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. Under the Act and Section 1090, may Councilmember Middleton make, participate in making, or influence future agreements and related grant funding between Sacramento Self-Help Housing (“SSHH”) and the City?
2. May Councilmember Middleton make, participate in making, or influence future agreements between the City and other applicants to the City for grant funds, including approving the final City budget?

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. No. Under Section 1090, Councilmember Middleton may not participate in the making of future agreements and related funding between SSHH and the City, including how much money from the general fund is set aside for Community Support (“CS”) and Economic Development (“ED”) funding. However, Section 1090 does not prohibit the City from entering into future agreements with SSHH if Councilmember Middleton recuses herself from the decision because a remote interest exception applies.

2. Yes. So long as they may be segmented pursuant to Regulation 18706, Councilmember Middleton may take part in the decisions involving other applicants for grant funds as long as they would not have a financial effect on SSHH. Additionally, under Regulation 18706(c) Councilmember Middleton may participate in the final vote to adopt or reject the final City budget.

FACTS AS PRESENTED BY REQUESTOR

Councilmember Middleton took the oath of office as a City councilmember on December 13, 2018. During January 2019, she began employment as the deputy director of SSHH, a nonprofit 501(c)(3) entity that seeks to assist persons who are homeless or at risk of becoming homeless to find and retain stable and affordable housing. It has approximately twenty-five community “partners,” which include several cities (one of which is Citrus Heights), and approximately twenty-six corporate “partners.” These entities are not “partners” in the legal sense. SSHH’s governing board consists of various members of the public; no City councilmember or City staff serve on SSHH’s governing board.

Currently, the City has two contracts with SSHH by which the City pays SSHH to provide housing counseling and navigator services (“Navigator Contract”) and, through a third party, a “renter’s helpline” for housing advice, dispute resolution and fair housing-related services (“Renter’s Hotline Contract”). The City Council approved each contract prior to Councilmember Middleton assuming office; however, it is highly likely that the City and SSHH will enter into similar agreements in 2019 and thereafter. It is also likely that some portion of the two current and future agreements will be used to fund SSHH overhead and administrative costs which, in turn, may affect Councilmember Middleton’s income as SSHH deputy director.

Funding for the Navigator Contract comes from federal Community Development Block Grant (“CDBG”) funds, as well as from CS and ED set-asides from the City’s general fund. The Renter’s Hotline Contract is funded solely by CDBG monies.

The City has no control over the amount of CDBG funds it receives. In contrast, the City has discretion as to how much money from the general fund is set aside for CS and ED funding. The usual process is that staff makes recommendations, which go either to the Quality of Life Committee (CDBG funds) or to the Finance Committee (CS and ED funds), each of which is a standing committee consisting of two council members. Each committee then makes a recommendation to the full Council, which then adopts the amount of funding as part of the City’s overall budget process.

Various organizations apply to the City for CDBG, CS, and ED funds. Generally, the amount requested for each of these funds is greater than the amount of money available. The Council decides the amount of funds which each applicant receives from CDBG and CS funds. For ED funds, the decision on how much each applicant receives is sometimes made by the Council and sometimes made by the City Manager.

ANALYSIS

Section 1090

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.) Grants are generally considered contracts for purposes of Section 1090. (*People v. Honig*, *supra*, at p. 351.)

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.)

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, participating in making a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing 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.569.) Accordingly, because funding from the agreements with the City may affect Councilmember Middleton’s income as SSHH deputy director, she may not participate in the making of future agreements between SSHH and the City, including how much money from the general fund is set aside for CS and ED funding.

However, the Legislature 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 remote interest is present, the contract may be made by the agency provided: (1) the officer discloses his or her financial interest in the contract to

the public body; (2) the interest is noted in the body's official records, and; (3) the officer abstains from participating in the making of the contract. (84 Ops.Cal.Atty.Gen 158, 159 (2001).)

Officer or Employee of a Nonprofit Corporation or 501(c)(3) Entity.

Section 1091(b)(1) sets forth a remote interest exception and provides in pertinent part as follows:

“(b) As used in this article, “remote interest” means any of the following: ...

“(1) That 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.”

Councilmember Middleton is an employee of SSHH, an Internal Revenue Code 501(c)(3) nonprofit organization. Therefore, we find that she has a remote interest in potential agreements between the City and SSHH pursuant to Section 1091(b)(1). Because she has a remote interest in the potential agreements, the City may enter into those agreements that require approval of the City Council only if: (1) she discloses her financial interest in the agreements to the City; (2) her interest is noted in the City's official records; and (3) she abstains from any participation in the making of the agreements. (Section 1091(a); *Brunner* Advice Letter, No. A-16-168; 88 Ops.Cal.Atty.Gen. 106, 108 (2005).)

Because we conclude that Councilmember Middleton will have a “remote interest” in future contracts between the City and SSHH, we do not analyze this issue further under Section 1090. Additionally, because the remedy in this situation is for her to abstain from any participation in the approval of such contracts (see Section 1091(a)), 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 Middleton must leave the room during the consideration of any such contracts pursuant to the Act's recusal requirements.

Segmentation

The final issue to be determined is whether the decisions relating to the CDBG, CS, and ED funds may be segmented pursuant to Regulation 18706. As stated, various organizations (including SSHH) apply to the City for these funds and normally the amount requested for each of these funds is greater than the amount of money available. Regulation 18706(a) provides that an agency may segment a decision in which a public official has a financial interest, to allow participation by the official, provided all of the following conditions apply:

- (1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated² to the decision in which the official has a disqualifying financial interest;

² Under Regulation 18706(b), decisions are “inextricably interrelated” when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision.

- (2) The decision in which the official has a financial interest is segmented from the other decisions;
- (3) The decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official's participation in any way; and
- (4) Once the decision in which the official has a financial interest has been made, the disqualified public official's participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified.

Based upon the facts provided, the ultimate selection of the various organizations that apply will be limited by the available funding. Therefore, if the SSHH is a competing applicant, Councilmember Middleton may take part in decisions regarding funding for other organizations only to the extent that the decisions are properly segmented. Consequently, any procedure used must ensure that a decision on funding for SSHH is considered first and a final decision is reached by the City Council without Councilmember Middleton's participation in any way. Additionally, under Regulation 18706(c) Councilmember Middleton may participate in the final vote to adopt or reject the final City budget if all separate decisions related to the budget have been finalized.

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

Sincerely,

Dave Bainbridge
General Counsel



By: Zachary W. Norton
Senior Counsel, Legal Division

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