



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

March 30, 2022

Sarah Lang
Bell, McAndrews & Hiltachk LLP
455 Capitol Mall, Ste 600
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-21-167

Dear Ms. Lang:

This letter responds to your request for advice on behalf of City of St. Helena City (the City) Councilmember Eric Hall regarding the conflict-of-interest provisions of the Political Reform Act (the Act)¹ and Section 1090. Please note that we provide advice under the Act and Section 1090 only, not under any other body of law. We are not a finder of fact when rendering advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Our advice is based solely on the facts provided. Thus, our advice is as complete and accurate as the facts provided by the requester. If the facts relevant to your request for advice change, then 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 Napa 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 City Councilmember Hall have a conflict of interest under the Act or Section 1090 that prohibits him from participating in decisions involving approval of the Hunter Subdivision site plan when his wife is Chief Operating Officer of Upper Valley Disposal Services (UVDS), the company that would provide waste management services to residents at the Hunter Subdivision if it were built?

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 the Act and applicable regulations, it is not reasonably foreseeable that the site plan decisions regarding the Hunter Subdivision will have a material financial effect on Councilmember Hall's financial interest in UVDS. Under Section 1090, the site plan decisions are regulatory in nature and thus would not result in a contract. Therefore, Councilmember Hall would not have an interest in a contract in which he is financially interested that would prohibit him from participating in a decision regarding the Hunter Subdivision site plan.

FACTS AS PRESENTED BY REQUESTER

An applicant has filed with the City's Planning & Building Department seeking approval on a subdivision map for a potential future residential development in town. The Hunter Subdivision site plan calls for 51 single family home sites, including 11 accessory dwelling units (ADUs) on those same sites, plus 25 affordable townhomes, for a total of 87 units. The applicant presently is not seeking a building permit and has not presented any plans to the City, other than the desired map for the site plan.

Councilmember Hall was sworn in as a City Councilmember in December 2020. His wife is the Chief Operating Officer of Upper Valley Disposal Services (UVDS) and a member of the UVDS board. Her position is salaried, and she holds no ownership interest in UVDS. Her salary does not increase or decrease when customers are added or dropped from UVDS services. Councilmember Hall has no other economic interests involved in this analysis.

There is no development agreement for the Hunter Subdivision project. The Hunter Subdivision applicant will be seeking two approvals: certification of a Final Environmental Impact Report (EIR) and approval of a tentative subdivision map which is regulated by the City's subdivision ordinance. Both the Final EIR and the tentative map will be considered by the Planning Commission, which will make a recommendation to the City Council, which is the final decision-making body. To approve a tentative map, specific findings of consistency with the General Plan, zoning and other factors are required to be analyzed in the staff report and resolution.

If the site plan is approved and this potential development works its way through entitlements, through permitting, and is built, it is estimated that UVDS will provide service to 87 new accounts. After expenses and operating costs, UVDS estimates it would gain an incremental \$3,371 in annual profit from the Hunter Subdivision; its annual gross revenues are estimated at about \$32,000, or 0.2 percent, of the company's annual gross revenues.

A. UVDS and the JPA.

UVDS is an area waste hauler that operates under a long-term hauling contract with the Upper Valley Waste Management Agency, a joint exercise of powers authority (the JPA). The JPA represents three cities – St. Helena, Calistoga and Yountville – as well as the unincorporated county in Upper Napa Valley. UVDS is an investor-owned private corporation in good standing in California. It provides collection, processing and transportation of solid waste, recyclable materials, construction and demolition debris, and organic materials.

UVDS holds a 17-year franchise agreement for waste, recycling and organics residential and commercial collection through the JPA. The JPA was formed for the purpose of providing coordination of economical, regional waste management services, and meeting the requirements of the California Integrated Waste Management Act of 1989; specifically, to reduce the amount of “waste” currently being landfilled and instead keep valuable materials and resources within the economic cycle.

UVDS’s franchise agreement is not with the City. The JPA is a joint exercise of powers authority organized and operating under the Joint Exercise of Powers Act, California Government Code section 6500 et. seq. It is a separate and distinct entity from its member agencies, which include the City, County of Napa, City of Calistoga, and Town of Yountville. The JPA itself is governed by a 5-member board, consisting of representatives from each of the jurisdictions served by the JPA: one member each from the cities of St. Helena and Calistoga, one member from the Town of Yountville and two members from County of Napa Board of Supervisors.

B. Providing Waste Management Services to a New Subdivision.

No company or entity other than UVDS could provide waste hauler services to the Hunter subdivision. Pursuant to California Public Resources Code section 40059(a)(2), the JPA determined that the public health, safety, well-being and approval and maintenance of reasonable customer rates required that an exclusive right was awarded to UVDS to provide the collection, processing and transportation of solid waste, recyclable materials, construction demolition debris and organic materials in meeting the integrated waste management goals of the JPA and its members.

The City would have no direct involvement in waste management administration of the Hunter subdivision. These duties would fall under the JPA’s jurisdiction. Services in the City are not mandatory; customers may choose to self-haul their waste to the landfill. However, customers must comply with state regulations including organics diversion, recycling mandates and waste reduction. In 2024, the implementation phase of SB1383 will begin and JPA members, including the City, will be required by the State to enforce SB1383 mandates and assist with “ticketing” and fining customers not properly separating their organics within the collection program.

The City has no decision-making authority regarding UVDS services to new subdivision developments. As explained above, customers not properly complying with SB1383 would be referred to the JPA by UVDS, not the City.

UVDS does not and will not contract directly with the City for the Hunter Subdivision if the site plan is approved. Moreover, the City’s decisions regarding waste management administration of the Hunter subdivision, if any, would be ministerial. The JPA, not the City, mandates that UVDS provide services to all customers within its collection service area if requested by a customer. UVDS, not the City, would commence collecting all solid waste within one week of a request by a customer requesting collection. Customers subscribe by calling UVDS directly, not the City. Customers who reside in the subdivision, not the City, determine who receives UVDS services.

The City does not participate in decisions by the JPA regarding UVDS services to new subdivision developments. Neither the City nor the JPA decides whether to accept or decline new customers within the collecting service area. The JPA is required by State law to service any and all customers who request service within the JPA’s jurisdiction. UVDS services to new subdivision

developments provide no individual benefit to the subdivision that is not also provided to the public within the JPA's jurisdiction.

Only one councilmember from each participating member jurisdiction may preside on the JPA's five-member board on a two-year term. The JPA may meet and confer with UVDS to establish any additional services or modifications to existing services provided under the JPA Agreement. In such cases, UVDS would prepare a written proposal regarding how it would provide the additional or modified services, and then the JPA and UVDS would meet and confer to negotiate the proposed operating revisions, including revisions to costs and rates. Such service changes apply to all customers, or one broad category of customers such as residential or commercial. No decisions are made regarding customer acceptance of services.

Councilmember Hall is not a member of the JPA on the City's behalf and is not a decisionmaker for the JPA on matters involving the provision of UVDS services to new subdivision developments. In abundance of caution, he routinely recuses himself on matters before the City Council that pertain to waste management.

ANALYSIS

A. The Act.

The Act's conflict of interest provisions prohibit any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. (Section 87100.) 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, distinguishable from its effect on the public generally, on one or more of the public official's interests. (Section 87103; Regulation 18700(a).) Relevant to the facts provided, Section 87103 defines a financial interest to include:

- (a) Any business entity in which the public official has a direct or indirect investment worth \$2,000 or more; or is a director, officer, partner, trustee, employee, or holds any position of management.
- (b) Any source of income, aggregating \$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.

Based on the facts provided, Councilmember Hall has a business interest and a source of income interest in UVDS due to his spouse's employment with the company. At issue is whether it is reasonably foreseeable that the City decisions related to approval of the Hunter Subdivision site map will result in a material financial impact on his interest in UVDS.

A financial effect is presumed reasonably foreseeable where the official's financial interest is explicitly involved as a named party in, or subject of, the decision. (Regulation 18701(a).) 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, including any decision affecting a property interest as described in Regulation 18702.2(a)(1)-(6). (Regulation 18701(a).)

Based on the facts provided, UVDS is not explicitly involved in the City's decisions regarding the Hunter Subdivision site map. Where the financial interest is not explicitly involved in the decision, the financial effect is reasonably foreseeable if it can be recognized as a realistic possibility, more than hypothetical or theoretical. (Regulation 18701(b).)

Regulation 18702.1 provides, in relevant part, that the reasonably foreseeable financial effect of a governmental decision on an official's financial interest in a business entity, including a business entity that is a source of income to the official, is material where the decision may result in an increase or decrease of the entity's annual gross revenues, or the value of the entity's assets or liabilities, in an amount equal to or greater than \$1,000,000, or five percent of the entity's annual gross revenues and at least \$10,000. (Regulations 18702.1(a)(2)(A) and (B), 18702.3(a)(4).) The reasonably foreseeable financial effect of a governmental decision on an official's business entity interest is also material where the decision may cause the entity to incur, avoid, reduce, or eliminate expenses equal to or greater than \$250,000, or one percent of the entity's annual gross revenues and at least \$2,500. (Regulation 18702.1(a)(3)(B).)

The facts provided here state that it is estimated that the Hunter Subdivision would result in UVDS providing service to 87 new accounts, which UVDS estimates would result in an incremental gain of \$3,371 in annual profit. The increase in annual gross revenues for UVDS are estimated at about \$32,000, or 0.2 percent of annual company gross revenues. UVDS's anticipated revenues from this site are less than five percent. Thus, under the Act, it is not reasonably foreseeable the decisions will have a material financial effect on Councilmember Hall's interests, and he does not have a prohibitive financial interest in the City's decisions regarding the Hunter Subdivision site plan due to his interest in his spouse's employment with UVDS.

B. Section 1090.

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 concerns 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.) "[A]n official has a financial interest in a contract if he might profit from it." (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) 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.)

Section 1090 applies only when a decision involves a contract. To determine whether a contract is involved in the decision, we 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*, supra, at p. 351 citing *Stigall*, supra, at pp. 569, 571.)

Decisions involving the adoption of generally applicable laws or policies are generally not contractual in nature and Section 1090 would not apply. Likewise, routine or administrative approvals of permits, subdivisions, or design and site plans, without negotiated conditions of

approval, are not generally contractual in nature. However, the Attorney General's Office has consistently stated that development agreements, subdivision improvement agreements and reimbursement agreements executed during the subdivision map approval process constitute "contracts" for purposes of Section 1090. (See 78 Ops. Cal. Atty. Gen. 230 (1995); 89 Ops. Cal. Atty. Gen. 278 (2006).)

While many land use decisions are "regulatory in nature" and not contracts, there are some, including development agreements, that are contractual because they involve consideration by both the local governmental entity and the project proponent, with the latter typically providing some type of public improvement or facility as a part of this consideration. In determining whether Section 1090 applies to land use decisions, we must determine whether the decision is purely regulatory, or whether it involves the project applicant providing a public improvement or similar consideration, thus making it contractual in nature.

The decisions at issue here are the City's approval of the Hunter Subdivision applicant's certification of a Final Environmental Impact Report (EIR) and approval of a tentative subdivision map. Specifically, the City will be reviewing the project to ensure that it complies with the subdivision ordinance and is consistent with the General Plan, zoning and other factors. This is similar to participating in decisions that involve "routine or administrative approvals of permits, subdivisions, or design and site plans, without negotiated conditions of approval," which are not generally contractual in nature. This process does not involve the essential elements of a contract or the applicant agreeing to provide public improvements common to development agreements. The decision at issue is not a contract and does not fall within the scope of Section 1090. Thus, Councilmember Hall would not have an interest in a contract in which he is financially interested that would prohibit him from participating in decisions regarding the Hunter Subdivision site plan.

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

Sincerely,

Dave Bainbridge
General Counsel

/s/ John M. Feser Jr.

By: John M. Feser Jr.
Senior Counsel, Legal Division