STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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November 25, 2024

Yolanda M. Summerhill
Assistant City Attorney
City of Newport Beach
100 Civic Center Dr
Newport Beach, CA 92660

Re: Your Request for Advice
Our File No. A-24-128

Dear Ms. Summerhill:

This letter responds to your request for advice on behalf of City of Newport Beach ("City") Councilmember Lauren Kleiman regarding the conflict of interest provisions of the Political Reform Act (the "Act") and Government Code Section 1090.[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 Orange County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) Other than the Orange County District Attorney's Office acknowledgment, 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

1. Does City Councilmember Kleiman have a disqualifying financial interest under the Act or Section 1090 in the City's decision to approve a reimbursement agreement with her homeowner's

[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 18104 through 18998 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.

association ("HOA") for the installation of landscaping and irrigation improvements along the perimeter wall of private property that abuts the Pacific Coast Highway?

2. If the official has a disqualifying interest under Section 1090, may the City Council approve the reimbursement agreement under a remote interest or rule of necessity exception, so long as the official does not participate in the decision?

CONCLUSION

1. Councilmember Kleiman has a disqualifying financial interest under Section 1090 and she may not participate in the decision.

2. Yes, based on the facts provided, the City will be performing an essential duty by protecting public infrastructure, aesthetics and public safety in entering into the reimbursement agreement with the HOA. The rule of necessity permits the City Council to enter into the agreement so long as Councilmember Kleiman does not participate in the decision.

FACTS AS PRESENTED BY REQUESTER

In 1991, an approximately 11-foot 6-inch retaining wall ("Retaining Wall") with a tempered glass windscreen was constructed along twelve contiguous residential properties that back up to Pacific Coast Highway. The placement of the Retaining Wall created an area of resident-owned land approximately 5 to 6 feet in width between the Retaining Wall and the Highway that would typically be considered a City parkway strip. The area is not usable by the property owners because the Retaining Wall effectively cuts off access to the area from their individual parcels and the area runs along the Pacific Coast Highway. This portion of Pacific Coast Highway is heavily used, with an estimated 32,000 vehicle trips per day. It is also an area used throughout the year by walkers, bikers, hikers, given its proximity to Crystal Cove State Park (approximately 550 feet away), and is considered a gateway to the City.

In 2017, a section of the Retaining Wall began to bow, a gap formed between the rows of keystones, some keystones became dislodged, and some keystones began to bulge. The City inspected the wall dilapidation, and based on the inspection, issued a Notice of Violation to one property owner. In November 2017, the City commissioned a geotechnical report ("Geotechnical Report") to evaluate the Retaining Wall dilapidation. The Geotechnical Report determined that the main cause of the Retaining Wall dilapidation was due to poor drainage. After several years of seeking voluntary compliance by the property owner, the City determined in 2020 that the Retaining Wall was at risk of total collapse. Ultimately, in 2023, the Retaining Wall was repaired.

The HOA now wishes to install irrigation that safeguards the Retaining Wall from future erosion while also improving the landscaping along Pacific Coast Highway. The Declaration of Restrictions ("CC&Rs") recorded against the HOA homeowners' properties generally require maintenance of the exterior of the dwelling, including landscaping, to be performed by the homeowners. However, in this case, where each individual homeowner's portion of the Retaining Wall backs up to Pacific Coast Hwy, there is some ambiguity as to who is responsible. An additional Declaration of Restrictions specific to the Retaining Wall ("Retaining Wall CC&Rs") is recorded against the twelve contiguous residential properties. While the Retaining Wall CC&Rs

make clear that each homeowner is responsible for their portion of the Retaining Wall, the Retaining Wall CC&Rs are silent as to whether the residential properties are responsible for the landscaping between the Retaining Wall and Pacific Coast Highway.

The cost estimate is approximately $190,000 to install the irrigation and landscape improvements. The City is considering entering into a reimbursement agreement with the HOA to reimburse the HOA for the installation of the irrigation and landscape improvements with the requirement that the HOA would agree to maintain the landscaping and irrigation.

Both the City staff and HOA are considering this agreement as there are benefits to all parties. Under the reimbursement agreement, the City does not have to manage (aside from the cost of initial installment of the landscaping and irrigation improvements) the project or the ongoing maintenance responsibilities. The HOA will have control over the ongoing maintenance of the area to meet the residents' aesthetic expectations and ensure the area will be landscaped and irrigated in a way that protects the integrity of the Retaining Wall and those that traverse the Pacific Coast Highway along that area. Further, maintaining the status quo, where each individual homeowner whose property backs to the Retaining Wall would be held responsible for maintaining the landscaping and irrigation along the highway, is not an efficient or effective way to maintain that area.

In a telephone conversation held on November 15, 2024 and a follow-up email, you elaborated that the City has concerns about the area remaining either as it is, or with twelve separate landowners compelled to attempt irrigation and landscaping in this sensitive, heavily trafficked area that serves as a gateway to the City. You describe the area as in need of beautification and note it is an area eligible for Scenic Highway 1 designation. In the past, the City has responded to complaints and performed weed abatement for the area due to the fire risk. Additionally, there is a water transmission line beneath the area. The City states that entering into the reimbursement agreement will ensure that one contractor, rather than twelve individual contractors, is installing and then regularly maintaining the irrigation system and landscaping. The City believes this will best protect public aesthetics, public safety, and public infrastructure. For this reason, the City does not consider code enforcement actions against each property owner as a viable option. Nor is the City seeking an easement or property right over the area.

Further, you note that there are multiple instances where the City maintains the medians and parkways on behalf of the owner as a part of its functions. You provide the example of multiple medians and parkways on the Pacific Coast Highway owned by Caltrans and maintained by the City (parkway fronting the Seashore Mobile Home Park and the median in Newport Beach between the Santa Ana River to Jamboree Road; and large segments of Old Newport Road, including the parkway along Old Newport Road between Hospital Road to Industrial Way and the loop as one exits Old Newport Road onto Pacific Coast Highway.) Another example includes HOA parkways and medians in Newport Coast that are maintained by the City. And finally, the Cameo HOA (that is the subject of this letter) maintains another parkway segment along Pacific Coast Highway that is owned by the City.

Councilmember Kleiman owns a home and resides within HOA community. Her ownership interest in the home is burdened by the CC&Rs recorded against the homeowners' properties. Councilmember Kleiman does not own one of the twelve homes that include the Retaining Wall.

Her home is located across the Pacific Coast Highway and the nearest distance of her residence to the landscaping and irrigation improvements is approximately 220 feet. The HOA is comprised of approximately 150 homes north of the Pacific Coast Highway and 170 homes south of the Pacific Coast Highway. Although she was previously an officer of the HOA without compensation, she no longer serves on the HOA Board. You additionally provided by email that it is not anticipated that the HOA will see a change in dues due to the reimbursement agreement with the City.

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. 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.)

First, we examine if Councilmember Kleiman has a "financial interest" in the decision for purposes of Section 1090. 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 and cannot be interpreted in a restricted and technical manner. (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1298.)

Previously, we have advised that an official who is also a HOA member has a financial interest in contract decisions between the agency and the official's HOA for enhanced services or contracts that may result in increased or decreased expenditures for the HOA and its members. (See *Lyon* Advice Letter, A-16-239, [district agreement to dispose of treated wastewater with HOA for its use watering golf course as a mutual benefit to both parties]; and *Walter* Advice Letter, No. A-20-034 [see discussion below.] Similarly, here, the City's proposal to reimburse the HOA $190,000 for the irrigation and landscaping infrastructure costs will be a cost savings and benefit to the HOA, and obligate the HOA for the responsibility and costs of ongoing maintenance. Due to these benefits and obligations, Councilmember Klieman has a financial interest as a member of the HOA in the reimbursement agreement with the City and may not participate in the decision under Section 1090 unless an exception applies.

The Legislature has created various statutory exceptions to Section 1090's prohibition where the financial interest involved is deemed to be a "remote interest," as defined in Section 1091, or a "noninterest," as defined in Section 1091.5. Upon review, we advise that none of the exceptions are applicable to these facts.[2]

Next, we must determine whether the City Council is precluded from entering into the agreement due to its member's interest in the agreement.

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 (citations omitted), but it requires all conflicted members to refrain from any participation." (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1097.).

The rule of necessity has been applied in at least two specific types of situations: 1) in procurement situations for essential supplies or services when no source other than the one that triggers the conflict is available; and 2) in non-procurement situations to carry out essential duties of the office when the official or board is the only one authorized to act.

The facts in this matter are similar to the *Walter Advice Letter*, *supra* involving a city councilmember who was a member of an HOA. In this matter the city wished to agree to make $900,000 in repairs and deferred maintenance to privacy walls built on private HOA residential properties where the responsibility for care of the walls was unresolved, the wall abutted a city right-of-way, and the HOA agreed to assume the ongoing maintenance costs of $50,000 a year. We advised that the rule of necessity allowed the city agreement with the HOA stating:

> 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.

In this matter, we similarly have a disputed area between the Retaining Wall and the Pacific Coast Highway where the City is willing to reimburse the HOA for the installation of irrigation and landscaping as a part of its essential function of providing public safety, public aesthetics, and protecting public infrastructure to this area. It does not appear there is a viable alternative means for the City to ensure the area will be adequately landscaped, irrigated and maintained. Further, the

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[2] An official has a noninterest in the receipt of public services provided by the official's agency or board as long as the official receives them in the same manner as if the official were not a public official. (Section 1091.5, subd. (a)(3).) However, this agreement involves obligations on the part of the HOA as well as "services" (funding) provided by the City.

facts indicate that the City is involved in ensuring adequate landscaping and maintenance in other areas of the City for the public benefit. Therefore, we advise that the rule of necessity applies to allow the City to enter into the reimbursement agreement and so long as Councilmember Kleiman does not have any participation in the agreement.

Because the remedy in this situation is for the official to abstain from any participation in the approval of the reimbursement agreement, we do not further analyze whether the official has a 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 Kleiman must leave the room during the consideration of this decision pursuant to the Act's recusal requirements.

If you have other questions on this matter, please contact me at KHarrison@fppc.ca.gov.

Sincerely,

Dave Bainbridge
General Counsel

L. Karen Harrison

By: L. Karen Harrison
Counsel, Legal Division

KH:aja