



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

October 27, 2022

Maricela Marroquin
Highland City Attorney and Housing Authority Attorney
350 South Grand Avenue
37th Floor
Los Angeles, CA 90071-3101

Re: Your Request for Advice
Our File No. A-22-103

Dear Ms. Marroquin:

This letter responds to your request for advice on behalf of the City of Highland (“City”), the Highland Housing Authority (“Authority”), and Mayor Pro Tem and Housing Authority Member Penny Lilburn (“Mayor Pro Tem Lilburn”) regarding the conflict of interest provisions of the Political Reform Act (the “Act”)¹ and Government Code Section 1090, et seq. Please note that we are only providing advice under Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest. Lastly, the Commission does not provide advice with respect to past conduct. (Regulation 18329(b)(6)(A).) Therefore, nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions.

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 Bernardino 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).)

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.

QUESTIONS

1. Under the Act, does Mayor Pro Tem Lilburn have a disqualifying financial interest in decisions involving a 90-unit affordable senior housing project on a currently undeveloped 3.73-acre site due to her ownership of her home located within 529 feet of the boundaries of the project parcel?

2. Under Section 1090, does Mayor Pro Tem Lilburn have an indirect financial interest in the proposed Disposition and Development Agreement (the “DDA”) and ground lease with Wakeland Housing and Development Corporation, Inc. (“Wakeland”) such that the Authority and City are prohibited from entering into those Agreements?

CONCLUSIONS

1. The Act prohibits Mayor Pro Tem Lilburn from taking part in the decisions regarding the affordable housing project and the development of the currently vacant 3.73 acres within 529 feet of her residence because it is reasonably foreseeable that the decisions will have a material financial effect on her real property interest.

2. Based on the facts presented, Section 1090 does not apply to Mayor Pro Tem Lilburn for purposes of decisions involving the Disposition and Development Agreement and ground lease with Wakeland.

FACTS AS PRESENTED BY REQUESTER

Mayor Pro Tem Lilburn owns and lives in a single-family residence located in an area containing the following zoning districts: R-1 (single family), R-4 (multi-family), Planned Development, and Public/Quasi Public. Her residence, which is zoned R-1, is located on a street that has a two and half story police station directly across the street from her residence (to the west) and other single-family residences adjacent to and on the same block as her residence, including a single-family residence that is two-stories in size. To the north of Mayor Pro Tem Lilburn’s property is a two-story apartment complex and a fire station, and to the east and south are single family residences. Behind the single-family residences that are across the street from Mayor Pro Tem Lilburn’s property (to the west), is a senior affordable housing project known as Jeffrey Court. Jeffrey Court is a 185-unit, two-story development comprised of 13 buildings. Adjacent to Jeffrey Court, and approximately 529 feet westerly of Mayor Pro Tem Lilburn’s property, are two vacant lots owned by the Authority. The vacant lots are zoned R-4.

You state that, due to the general proximity between her home and the Property, Mayor Pro Tem Lilburn has recused herself from making any decision, participating in any decision, or using her official position to influence any decision, to enter into any agreement with Wakeland, including the transactions discussed below.

On December 14, 2021, the Authority adopted Resolution 2021-002 pursuant to California Government Code § 54221, declaring the two vacant parcels (San Bernardino County Tax Assessors Parcel Numbers 1192-431-04 and 05) located within a 3.73-acre site along the east side of Central Avenue south of Base Line Road (“Property”) surplus land that are not necessary for the Authority’s use, and finding that such declaration was exempt from environmental review under the California Environmental Quality Act.

In compliance with the Surplus Land Act, the Authority subsequently issued a notice of availability of surplus land (“NOA”) to local public entities within the Property’s jurisdiction, “housing sponsors,” and California’s Department of Housing and Community Development (“HCD”), wherein it was noted that the land could be used “for the purpose of developing low- and moderate-income housing” pursuant to Government Code § 54222. In response to the NOA, the Authority received notices of interest from two responding parties, including Wakeland, a California nonprofit public benefit corporation and experienced affordable housing entity. Wakeland proposed the development of approximately 89 affordable senior housing dwelling units, and one manager’s unit on the Property (“Project”).

On July 6, 2022, the Authority’s Executive Director Joseph Hughes entered into a letter agreement with Wakeland committing to provide a \$4,577,450 grant for the purpose of development of the Property for the Project subject to the parties entering a Disposition and Development Agreement and a Ground Lease for the Property, and subject to the Authority’s approval of these transactions.

On July 12, 2022, Wakeland and the Authority entered into an Exclusive Negotiating Agreement to “establish procedures and standards for the Parties’ negotiations of a Disposition and Development Agreement (the “DDA”) ... for the disposition of the Site and the development of the Project.”² This agreement further stipulated that the DDA “shall include a form of the ground lease for the long-term lease of the Site by the Authority to the Developer, which is to be leased to the Developer for One Dollar (\$1.00) per year (“Ground Lease”).”

The City may also be a party to the DDA if City funds are committed to the construction of the Project. The issue of the commitment of City funds has not been brought before the City Council for consideration.

The boundary of the property on which Mayor Pro Tem Lilburn has her home is located approximately 529 feet from the boundary of the nearest of the two lots included in the Property. The Property is not located on the same block as Mayor Pro Tem Lilburn’s property and is located behind a row of single-family residences that will buffer the Property from Mayor Pro Tem Lilburn’s property. The Project that is proposed to be constructed on the Property will not have direct access to the street where Mayor Pro Tem Lilburn’s residence is located, or any side street that connects to the street where Mayor Pro Tem Lilburn’s residence is located, and is not visible from her property.

ANALYSIS

The Act

The Act’s conflict of interest provisions ensure that public officials will perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them. (Section 81001(b).) Section 87100 prohibits a public official from making, participating in making, or otherwise using his or her official position to

² We note that we do not analyze this agreement for a potential conflict under Section 1090, as it involves conduct that has already occurred.

influence a governmental decision in which the official has a financial interest. Section 87103 provides that a public official has a “financial interest” in a decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official’s interests that is distinguishable from the decision’s effect on the public generally.

Section 87103 also describes the interests from which a conflict of interest may arise under the Act. As pertinent to the facts provided, those economic interests include “[a]ny real property in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more.” (Section 87103(b).) Accordingly, Mayor Pro Tem Lilburn has a potentially disqualifying economic interest in her residential real property.

When a public official’s economic interest is explicitly involved in a governmental decision, Regulation 18701(a) provides that “[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, including any decision affecting a property interest as described in Regulation 18702.2(a)(1)-(6).” (Regulation 18701(a).)

Where the financial interest is not explicitly involved in a decision, the financial effect is reasonably foreseeable if it can be recognized as a realistic possibility, more than hypothetical or theoretical. (Regulation 18701(b).) The decisions at issue involve two vacant lots owned by the Authority. Mayor Pro Tem Lilburn’s real property interest is not explicitly involved in the decision. As such, Mayor Pro Tem Lilburn’s interest is not a named party in, or the subject of, the decision. Under Regulation 18701(b), she will have a financial interest in the proposed decision if there is a realistic possibility that the decision will have a material financial effect on her real property interest.

Regulation 18702.2 provides the materiality standard for real property interests, which varies depending on the proximity of the decision’s impacts to the official’s property interest. Mayor Pro Tem Lilburn’s home is located approximately 529 feet from the boundary of the nearest of the two lots included in the Property. As such, the decision involves property located more than 500 feet, but less than 1,000 feet from Mayor Pro Tem Lilburn’s residence.

The reasonably foreseeable financial effect of a governmental decision on a parcel of real property in which an official has a financial interest, other than a leasehold interest, is also material whenever the governmental decision involves property located more than 500 feet but less than 1,000 feet from the property line of the parcel, and the decision would change the parcel’s:

- (A) Development potential;
- (B) Income producing potential;
- (C) Highest and best use;
- (D) Character by substantially altering traffic levels, intensity of use, parking, view, privacy, noise levels, or air quality; or
- (E) Market value.

(Regulation 18702.2(a)(8).)

Based on the information provided, the Project includes the construction of 90 units, consisting of 89 affordable senior housing units and one manager's unit, just 529 feet from Mayor Pro Tem Lilburn's residence. The fact that the 3.73 acre site is currently vacant and undeveloped is also significant. In this case, a decision to proceed with a 90-unit affordable housing project on the vacant property is a prerequisite and initial decision regarding the future use of the currently undeveloped property that may have significant impacts in the immediate vicinity. These impacts include not just the effect from the proposed project but also the effect resulting from the decision to proceed with developing the property in lieu of leaving it vacant as well as the potential effect of precluding the use of the property for other purposes, which may be more or less favorable.

Accordingly, it is reasonably foreseeable that decisions regarding the project may have a material financial effect on Mayor Pro Tem Lilburn's interest in her property. Based on the facts provided, the decision to proceed with development of 3.73 acres of currently vacant property within only 529 feet of her residence may result in a significant change to the character of the neighborhood, including the intensity of use, and may potentially effect the market value of the residence. Thus, the Act prohibits the Mayor Pro Tem Lilburn from taking part in decisions relating to the Project.

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.) 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.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

Here, the decisions at issue involve a DDA and Ground Lease with Wakeland. In this case, Section 1090 applies to all councilmembers, as the DCAA and lease are clearly contracts. However, the pertinent issue is whether Mayor Pro Tem Lilburn will have a prohibitory financial interest in the DDA and ground lease for purposes of Section 1090.

Previously, for purposes of a highway project, we have found that an official does not have an interest in a contract involving the highway project under Section 1090 merely because the official has a property or a business adjacent to or in close proximity to the project. (*Bordsen* Advice Letter, No. A-17-059.) Likewise, here, the close proximity of Mayor Pro Tem Lilburn's real property to the Property would not alone establish a financial interest under Section 1090 with respect to any contract relating to the future development of the Property. Barring additional facts to

the contrary, Section 1090 does not prohibit the City from entering into agreements relating to the Property. However, as concluded above, Mayor Pro Tem Lilburn is prohibited from taking part in the decisions under the provisions of the Act.

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

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By:

Zachary W. Norton
Senior Counsel, Legal Division

ZWN:aja