



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

February 13, 2023

Sky Woodruff  
City Attorney, El Cerrito  
1999 Harrison Street, 9th Floor  
Oakland, California 94612

Re: Your Request for Advice  
**Our File No. A-22-121**

Dear Mr. Woodruff:

This letter responds to your request for advice on behalf of El Cerrito City Mayor Lisa Motoyama regarding the conflict of interest provisions of the Political Reform Act (the “Act”) and Government Code Section 1090, *et seq.*<sup>1</sup> 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 Contra Costa 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. May Mayor Motoyama participate in City Council decisions involving requests to the Bay Area Rapid Transit District (“BART”) Board of Directors to alter the El Cerrito Plaza BART station (the “Plaza BART Project” or “Project”) or request that the Development Team engage with the City to achieve outcomes listed in the Goals and Objectives for the Plaza BART Project (“Goals and Objectives”)?
2. May Mayor Motoyama participate in City Council decisions involving the City’s on-street parking program?

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<sup>1</sup> 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.

3. May Mayor Motoyama participate in City Council decisions involving inclusion of a new City library in one of the affordable housing buildings that will be part of the Plaza BART Project, including decisions related to the formation of an enhanced infrastructure finance district that will be used to finance the City library as well as other City infrastructure?

4. May Mayor Motoyama participate in City Council decisions involving the conveyance of ownership of the City Properties to BART or leasing or otherwise allowing long-term use of the City Properties by a member of the Development Team?

5. May Mayor Motoyama participate in City Council decisions to make a Predevelopment Loan to Related California?

### **CONCLUSION**

1-5. Under Section 1091(b)(1), Mayor Motoyama has a financial interest in contracts related to the Plaza BART Project resulting from her remote interest in her nonprofit employer, when a client of her nonprofit firm is also a member of BART's Development Team. Accordingly, she is prohibited from participating in contracts with BART or members of BART's Development Team related to the Plaza BART Project, including the agreements identified in your request for advice. However, the City Council may still make decisions regarding the Plaza BART Project so long as Mayor Motoyama's interest is disclosed and noted in the City Council's records, and she properly recuses herself from the proceedings.

### **FACTS AS PRESENTED BY REQUESTER**

Mayor Motoyama was first elected to the Council in 2020. She is employed by and receives a salary from Community Economics, Inc. ("CEI"), a nonprofit corporation<sup>2</sup> located in Oakland, California with approximately six employees. Her current title is Senior Affordable Housing Finance Consultant, which is not an executive or officer position in the organization.

CEI's services include technical assistance to nonprofit developers in the development and financing of affordable housing projects. Developers enter into a separate agreement with CEI for each project and are generally charged a flat fee for each project. CEI bills hourly on each project until the point that the project obtains construction financing. At that point, it bills the remaining balance of the flat fee. CEI does not adjust the fee amount in a contract.

Satellite Affordable Housing Associates ("SAHA") is a client of CEI. Over the last five years, payments by SAHA to CEI for services have never accounted for more than 4% of CEI's gross receipts. In a follow-up email, you provided more detailed information on how much revenue CEI actually received from SAHA, as well as the number of total projects where CEI provided work for SAHA, over the past five years. The revenue received and number of projects are as follows: \$60,898.75 and 15 projects in 2022; \$50,420.00 and 11 projects in 2021; \$33,012.50 and 8 projects in 2020; \$29,000.00 and 11 in 2019, and \$32,000.00 and 10 projects in 2018.

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<sup>2</sup> In a follow-up email, you confirmed that CEI is 501(c)(3) nonprofit under the Internal Revenue Code and a nonprofit public benefit corporation under California law.

You have also provided the scope of work from the CEI standard contract, which offers a general description of the services that CEI provided to SAHA:

- CEI will perform the following services related to the syndication of the project:
- Perform a preliminary analysis to estimate the amount that can be raised through the use of Federal and, if applicable, California Low-Income Housing Tax Credits, in combination with other resources such as local and state loan programs, conventional and tax exempt debt.
- Work with Sponsor to determine the best method of combining non-tax credit resources with tax credit proceeds. Complete the proposed structuring of the transaction including the structuring of the syndication.
- Advise Sponsor in creating a process for identifying and choosing the investor or the investor representative.
- Prepare the spread-sheets necessary for presentation to potential investors and for inclusion in a private placement memorandum, if one is required.
- Manage the process for soliciting investor proposals.
- Evaluate alternative investor proposals including advantages and disadvantages of timing differences, guarantees, and back end terms.
- Coordinate with the law firm who will be preparing the partnership documents, the tax opinion, and the private placement memorandum.
- Monitor the performance of the investment advisor/broker dealer, should one be involved.
- Advise Sponsor in other aspects of the syndication including the responsibilities of each party over time.
- Assist in closing the sale of the limited partnership interests.
- Review 8609 forms, first year tax returns and prepare final economic projections.

You have also confirmed that Mayor Motoyama's title is Senior Affordable Housing Finance Consultant. For 2023, she will be working 80 percent time to allow for her mayoral responsibilities. You also provided the following summary of SAHA projects on which Mayor Motoyama has worked in the last five years:

- 2018- Started at Community Economics in May 2018, no SAHA projects.
- 2019- Worked very briefly on Blake St., Berkeley while colleague was out on vacation.
- 2020- Began work on Beth Asher, Oakland
- 2021- Worked on Beth Asher, Oakland
- 2022- Worked on Beth Asher, Oakland and 811 San Pablo Ave, Pinole for one financing application while colleague was out sick.
- 2023 -Will work on any ancillary matters (i.e. not much) for Beth Asher, Oakland while it is under construction.

Further, you state that Mayor Motoyama played no role in forming CEI. CEI was formed in 1976. She began working for CEI in 2018.

BART has selected SAHA as a member of the affordable housing developer team for the Plaza BART Project. Although CEI has contracts with SAHA for developments in other cities, CEI has no business relationship with SAHA as to the Plaza BART Project. In a follow up email, you stated that CEI will not accept a contract from SAHA for the Plaza BART Project because of the

potential conflict of interest issues. You have also stated that the affordable housing development team for the Plaza BART Project is preparing to seek State financial assistance for the Project. The development team has shared that information with the City as part of the request for the predevelopment loan. Applications for the State funding will be due in spring 2023. Councilmember Motoyama noted that, in light of the timeline for submitting the State funding application, the development team must already be working with a different company that does the same work as CEI.

### *El Cerrito Plaza BART Project Background and Applicable Legal Framework for Entitlement*

In 2019, BART began a series of community engagement and City Council meetings to solicit input to discuss transit oriented development (“TOD”) of the El Cerrito Plaza BART station. In 2020, BART selected a development team to advance the development of the Plaza BART Project. This development team includes Holliday Development, Related California, and SAHA (collectively, the “Development Team”). The Plaza BART Project as currently envisioned will include affordable and market rate housing, public open space and art, multimodal transportation infrastructure improvements, and potentially a new City library in one of the affordable housing buildings. SAHA would be involved with the development of the affordable housing component.

In 2014, the City adopted the San Pablo Avenue Specific Plan (the “Plan”). Three of the four parcels that comprise the El Cerrito Plaza BART station are within the Plan area. The fourth is on the border of the Plan area and is zoned transit-oriented mixed-use development. The Plan encourages high-density, mixed use multi-family affordable and market rate housing projects. A stated goal of the Plan is to maximize TOD potential at the two BART stations located within El Cerrito.

Because final decisions on entitlements must be approved ministerially and without discretionary review, and will be exempt from the California Environmental Quality Act (“CEQA”), the City and Development Team have tentatively agreed to a process in which the Planning Commission and Design Review Board would review the Project, including the parcel outside the Plan area, for consistency with the objective design standards of the Plan and El Cerrito Municipal Code, but the Zoning Administrator would issue the final approvals for the Project. Decisions of the Zoning Administrator would not be appealable to the Design Review Board, Planning Commission, or City Council. City staff and the Development Team intend to enter into a memorandum of understanding (“MOU”) to memorialize their agreement about how the Project will be processed and considered for approval.

### *Goals and Objectives for the Plaza BART Project*

In 2019, BART Board of Directors approved a set of Goals and Objectives for the Plaza BART Project. The City provided comments on the draft Goals and Objects regarding its desires for the Project. Many of the BART commitments in the Goals and Objectives are of particular interest to the City, including city management of the area parking- with BART’s support, integrating a public library into the TOD in partnership with City, participation in future area-wide financing efforts to capture value changes resulting from TOD to support community amenities and other investments, and minimizing the need for BART patron parking replacement in an on-site garage by exploring and developing other parking and access options for patrons who do not live near the

station, and by maximizing the use of existing available parking capacity in close proximity to the station. As negotiations between BART and the Development Team progress and the details of the Project are finalized, the manner in which items listed in the Goals and Objectives will be effectuated will become better known.

#### *El Cerrito On-Street Parking Program*

El Cerrito currently has three residential parking permit zones, one of which includes streets within a one-half mile radius of the El Cerrito Plaza BART station. Within the zone near the El Cerrito Plaza BART station, street parking is restricted to four hours between 7:00 a.m. and 6:00 p.m. on weekdays.

The current El Cerrito Plaza BART station includes large surface parking lots with approximately 740 parking spaces. It is currently anticipated that the Project will include no more than 150 parking spaces for BART riders. Because BART patrons will continue to park on City streets, the City plans to update its residential parking program to include managing demand for street parking around the station.

A parking demand management program around the Plaza BART station will likely be incorporated into the city-wide parking program and require changes to the program as a whole. Development of an on-street parking management program will require City Council consideration and approval. The new parking program would potentially implement new systems for managing street parking in the vicinity of the El Cerrito Plaza station. To the extent that the City's parking management program might provide access to BART patrons above what can be accommodated on the Project site, there might be currently unquantifiable financial benefits to BART, the Development Team, or both.

#### *New El Cerrito Library*

In 2018, the City entered into an MOU with BART whereby BART and the City would together study the feasibility of including a new City library on the site of any potential development of the El Cerrito Plaza station. In 2019, the City passed a resolution requesting that BART include evaluation of a potential new library in the Request for Qualification issued by BART to identify a development team for the Plaza BART Project. Related California is the member of the affordable housing development team responsible for the design and ultimate development of the affordable housing portion of the Project. Related California's site plans for the affordable housing portion of the project currently include a library space in one of the proposed buildings. Although SAHA is part of the development team, it does not presently have a role in the development of a City library as part of the affordable housing portion of the Project.

#### *Inclusion of City-owned Property in Plaza BART Project*

The City owns two small pieces of land ("City Properties") immediately adjacent to two BART-owned parcels that are part of the Plaza BART Project. The City has leased the City Properties to BART since 1987. BART and the Development Team have approached the City about including the City Properties in the Plaza BART Project, including conveying ownership to BART or leasing them to a member of the Development for long-term use. Any sale or lease of the City

Properties would have to be approved by the City Council. Although SAHA is part of the Development Team, it does not presently have a role in discussions about the City Properties, and there has been no suggestion of leasing the City Properties to SAHA.

#### *Pre-development loan from the City to Related California*

Related California has requested that the City provide them with a pre-development loan of the City's Housing Trust Funds ("Pre-development Loan"). The loan would assist in financing costs related to the Project prior to the start of construction. Although SAHA is part of the Development Team, it does not presently have a role in discussions about the Pre-development Loan.

### ANALYSIS

#### *Section 1090*

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Therefore, "the test is whether the officer or employee participated in the making of the contract in (their) official capacity." (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1292 quoting *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 236-237.) The prohibition applies even when the terms of the proposed contract are demonstrably fair and equitable, or are plainly to the public entity's advantage. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.) 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.) A contract that violates Section 1090 is void. (*Thomson, supra*, at p. 646.)

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen. 34, 36 (2001); 78 Ops.Cal.Atty.Gen. 230, 234 (1995).) However, "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* (1996) 48 Cal.App.4th 289, 351 citing *Stigall, supra*, at pp. 569, 571.) The above identified decisions involve agreements between the City the BART regarding BART's development of the Plaza BART station, which would constitute contracts for purposes of Section 1090.<sup>3</sup>

As a general rule, 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. (*Thomson v. Call, supra*, at pp. 647-649; *Stigall v. City of Taft, supra*, at p. 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).) Section 1090 casts a wide net to capture those officials who

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<sup>3</sup> While we cannot fully analyze the on-street parking program based on the facts provided, our conclusion regarding the application of Section 1090 applies to the on-street parking program provided the City enters into discussion with BART regarding the scope of the program as an element of the Plaza BART station development. To the extent that the on-street parking is considered separately by the City outside of any discussion with BART regarding the development, they may wish to seek further advice once the parameters of the decision are identified.

participate in any way in the making of the contract. (*People v. Sobel* (1974) 40 Cal.App.3d 1046, 1052.) Participation is defined broadly and includes any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae, supra*, at pp. 237; see also *Stigall, supra* at p. 569.)

Although Section 1090 does not specifically define the term “financial interest,” case law, and Attorney General opinions state that prohibited financial interests may be direct as well as indirect, and may involve financial losses or the possibility of financial losses, as well as the prospect of pecuniary gain. (*Thomson v. Call* (1985) 38 Cal.3d 633, 645, 651-652.) Case law and statutory exceptions to Section 1090 make clear that the term “financially interested” must be liberally interpreted, and “the certainty of financial gain is not necessary to create a conflict of interest . . . (t)he government’s right to the absolute, undivided allegiance of a public officer is diminished as effectively where the officer acts with a hope of personal financial gain as where he acts with certainty.” (*People v. Gnass* (2002) 101 Cal.App.4th 1271, 1298 (citations omitted).)

With these principles as a backdrop, we turn to the issue concerning the potential conflict of interest presented by this matter. In a 2003 Attorney General Opinion, the board of a redevelopment agency anticipated entering into contracts with business firms intending to locate or expand their offices in a certain redevelopment project area. (86 Ops.Cal.Atty.Gen. 187 (2003).) Several of those businesses were clients of one of the board member’s promotional products company. (*Ibid.*) In determining that the board member would have a financial interest in any contracts between the redevelopment agency and those businesses, the Opinion stated:

The board member would have a “financial interest” in the contracts due to his business relationship with the contracting parties as a supplier of goods or services. (See 85 Ops.Cal.Atty.Gen. 176, 177-179 (2002); 85 Ops.Cal.Atty.Gen. 34, 35-37 (2002).) In this regard, the board member could be influenced by the prospect of future business opportunities directly related to the contracts or by a desire to maintain favorable ongoing relationships with the contracting parties. The Legislature has made clear that ongoing business relationships may represent financial interests for purposes of section 1090. (See, e.g., § 1091, subd. (b)(5), (b)(6), (b)(8).) The purpose of section 1090 “is to remove or limit the possibility of any personal influence, either directly or indirectly, which might bear upon an official's decision. . . .” (*Stigall v. City of Taft* (1962) 58 Cal.2d 656, 569; *Finnegan v. Schrader* (2001) 91 Cal.App.4th 572, 579-580; *Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal.App.4th 655, 659; *Frazer-Yamor Agency, Inc. v. County of Del Norte* (1977) 68 Cal.App.3d 201, 215.)

(86 Ops.Cal.Atty.Gen. at p. 188.)

Here, Mayor Motoyama serves as Senior Affordable Housing Finance Consultant with a small, six-person nonprofit firm that provides technical assistance to nonprofit developers in the development and financing of affordable housing projects. She has worked for CEI in this capacity since 2018. Although CEI is not working on the BART Plaza Project, SAHA is a client of CEI, and CEI has, and continues to perform, work for SAHA on other projects. SAHA has been selected and hired by BART as a part of the development team for the Plaza BART Project. Similar to the situation just described, there is a practical concern that she could be influenced by a desire to

“maintain ongoing relationships” with SAHA. This is the type of indirect interest Section 1090 attempts to thwart. (See, e.g., 88 Ops.Cal.Atty.Gen. 106, 107 (2005) citing *Frazer-Yamor Agency, supra*, 68 Cal.App.3d at pp. 214-215 [California courts strictly enforce Section 1090, and have consistently voided contracts where they find the public officer has an indirect interest in the contract; indeed, even though an officer may not directly benefit from the terms of the contract, it is significant that the contract will contribute to the financial health of the contracting party with which the officer is associated].)

Based on the facts provided, Mayor Motoyama would have a conflict of interest under Section 1090 involving contractual agreements between the City and BART, where a client of the firm is serving on BART’s development team. Consequently, the City is prohibited by Section 1090 from entering into contractual agreements with BART unless an exception applies.

Section 1091, however, enumerates limited circumstances in which a public official’s economic interest is considered “remote,” such that the governmental body or board may still enter into the contract at issue, as long as the disqualified official’s interest is disclosed to the body or board and noted in its official records, and the disqualified official does not take part in the contracting process. (Section 1091(a).) Applicable to these facts, an official is deemed to have a “remote interest” where the official is an employee of a Section 501(c)(3) nonprofit entity. Section 1091(b)(1) states:

(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, except as provided in paragraph (8) of subdivision (a) of Section 1091.5.

This remote exception is applicable to Mayor Motoyama and she has only a remote financial interest in CEI. While she may not participate in decisions on the Plaza BART Project, the City’s actions regarding these decisions would not violate Section 1090 as long as Mayor Motoyama discloses her interest to the City Council, has her interest noted in the Council’s official records, and recuses herself from decisions involving the Plaza BART Project.

Because Section 1090 already prohibits Mayor Motoyama from taking part in decisions regarding the Plaza BART Project, no further analysis under the Act is necessary provided Mayor Motoyama properly recuses herself from the decisions.



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

Sincerely,

Dave Bainbridge  
General Counsel

**Zachary W. Norton**

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By: Zachary W. Norton  
Senior Counsel, Legal Division