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MEMORANDUM

TO: Members, Balboa Reservoir Community Advisory Committee

CC: Emily Lesk
Project Manager, Office of Economic and Workforce Development

FROM: Andrew Shen *AS*
Deputy City Attorney

DATE: September 3, 2015

RE: Conflict of Interest Laws Affecting Members of the Balboa Reservoir Community Advisory Committee

At your request, we write to provide advice regarding conflict of interest laws that may apply to members of the newly created Balboa Reservoir Community Advisory Committee (the "Committee").

Summary

One of the Committee's functions is to provide feedback to City agencies (namely, the Planning Department, the Office of Economic and Workforce Development and the Public Utilities Commission) on development objectives included in the Request for Proposals ("RFP") to be issued by the City for development of the Balboa Reservoir site. *See* Admin. Code § 5.17-5(b). In addition to this specific duty, the Committee may participate in discussions or decisions that lead to other contracting opportunities related to the Balboa Reservoir site. As discussed below, under California Government Code Section 1090 ("Section 1090"), Committee members should not participate in any decisions, or discussions leading up decisions, regarding that RFP or any other contracting decisions related to the Balboa Reservoir project that would implicate their financial interests.

Discussion

A. Background

Earlier this year, the Mayor and the Board of Supervisors approved Ordinance No. 45-15, establishing the Committee. *See* Admin. Code, Ch. 5, Art. XVII. The purpose of the Committee is to provide community input on the development of approximately 18 acres of the western portion of the Balboa Reservoir located near the intersection Ocean and Phelan Avenues in Balboa Park, owned by the San Francisco Public Utilities Commission.

The Committee consists of nine seats, seven of which shall be filled by persons who satisfy the following specific qualifications:

1. The President of the Sunnyside Neighborhood Association or his or her designee.
2. The President of the Westwood Park Neighborhood Association or his or her designee.

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3. A resident of the OMI (Oceanview-Merced-Ingleside) neighborhood, appointed by the Supervisor for District 7.
4. An employee or trustee of City College of San Francisco, appointed by the Supervisor for District 7.
5. A member of the Balboa Park Station Community Advisory Committee, appointed by the Supervisor for District 7.
6. A person who owns a business located on Ocean Avenue in District 7, appointed by the Mayor.
7. A member of the San Francisco Public Utilities Commission Citizens Advisory Committee, appointed by the Mayor.

In addition to these seven members, the Mayor shall appoint two at-large members of the Committee. Admin. Code § 5.17-3(a). The enacting ordinance specifically requires the Committee to “provide feedback on what development objectives should be included in the Request for Proposals to be issued by the City for development of the Site.” Admin. Code § 5.17-5(b).

B. Analysis

Section 1090 prohibits City officers and employees, or any board or commission of which they are members, from “making” any contract in which they have a “financial interest.” Cal. Gov. Code § 1090(a). If a Committee member has a “financial interest” in a contract-related decision before the Committee, the member must be recused from that decision or decision-making process. *See* 82 Ops. Cal. Atty. Gen. 126 (1999).

Even though advisory committee members are not City officers or employees, the California Attorney General’s Office and the California Fair Political Practices Commission (“FPPC”) have advised that Section 1090 applies to members of advisory bodies like the Committee. *See, e.g.,* 82 Ops. Cal. Atty. Gen. 126, 1999 WL 604287 at *3 (Jul. 15, 1999); FPPC McMinn Adv. Ltr., File No. I-14-155 (Oct. 8, 2014).

Section 1090 does not define what constitutes “making” a contract, but courts and administrative agencies have broadly construed this term. “Making” a contract does not simply include final approval of a contract. Courts have held that “making” extends to the planning, preliminary discussion, negotiations, drawing of plans and specifications, and solicitations of bids that lead to the formal making of a contract. *Stigall v. City of Taft*, 58 Cal.2d 565, 569 (1962). To the extent that Committee members are involved in the process of recommending development objectives to be included in the RFP for the Balboa Reservoir site, they would be making or participating in the making of a contract under Section 1090. While a RFP is not itself a contract, it sets out the scope of work for a future contract and is a key step in making a contract.

Section 1090 also does not define what constitutes a “financial interest.” But similarly, courts have broadly interpreted “financial interest” for the purposes of Section 1090, cautioning that the term should not be read in “a restrictive and technical manner.” *See People v. Honig*, 48 Cal. App. 4th 289 (1996). Section 1090 is “concerned with any interest, other than perhaps a

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remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of the [City].” *Id.* at 315.

Despite the lack of any definition, Committee members should assume that “financial interests” at least include the types of financial interests addressed by other conflict of interest statutes, such as the California Political Reform Act, including:

- sources of income and gifts;
- real property interests;
- business entities in which the member has invested or holds a management position; and
- personal finances.

For example, if a Committee member owned a home or business immediately adjacent to the Balboa Reservoir, the Committee member would have such a financial interest. *See* FPPC Ligten Adv. Ltr., File No. A-15-038 (Apr. 16, 2015). Under Section 1090, the Committee member would then need to be recused from any discussions or decisions regarding the development objectives to be incorporated into the RFP, as those development objectives could impact the value of the Committee member’s home. As another example, if a Committee member or a member’s spouse works for a contractor who is likely to bid on a portion of the Balboa Reservoir project, that member would have a financial interest requiring recusal. Because the scope of “financial interest” is so broad, we strongly recommend that you consult with the City Attorney’s Office about whether you have a financial interest in a contracting-related decision before the Committee if you have any concerns or doubts about this issue.

There are some narrow statutory exceptions to Section 1090 that could allow a Committee member to participate in discussions about the RFP despite the existence of a financial interest. *See* Cal. Gov. Code § 1091.5 (listing “non-interest” exceptions). These exceptions are narrow and specific, and you should consult our Office before relying on such an exception that you believe would permit your participation in a Committee decision.

Conclusion

If you have any questions regarding these conflict of interest laws and their potential application to the Committee’s activities, please contact our Office. To ensure that we have sufficient time to analyze and research your questions, please endeavor to contact our Office well in advance of any decision that raises potential conflict of interest issues.

Our Office also publishes the Good Government Guide, available on the Resources page on sfcityattorney.org which provides further information about conflicts of interest and ethics, as well as public meetings and records laws. Another useful resource is the Attorney General Office’s Conflicts of Interest Handbook, available at <http://ag.ca.gov/publications/coi.pdf>.