



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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November 9, 2023

Joshua Nelson
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Sacramento, California 95814

Re: Your Request for Advice
Our File No. A-23-113

Dear Mr. Nelson:

This letter responds to your request for advice on behalf of Truckee Tahoe Airport District (the “District”) Director David Diamond regarding the conflict of interest provisions of the Political Reform Act (the “Act”) and Government Code Section 1090, et seq.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, including Public Contract Code.

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 Nevada 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

May Director Diamond, who pays a set monthly fee to lease an airport hangar from TTAD, which is the same fee paid by other similarly situated monthly renters, participate in decisions pertaining to a new incentive program for local pilots, which would include reduced hangar rental rates for participating in the program? May Director Diamond participate in decisions affecting the hangar facilities, including improvements to the hangars and a rate study to consider updates to the rental fees?

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.

CONCLUSION

So long as the decisions of the District would not allow favoritism toward Director Diamond, and would not occur on terms tailored to the Director's particular circumstances, the noninterest exception set forth in Section 1091.5(a)(3) would apply, and Section 1090 would not prohibit the District from entering subsequent contracts involving the pilot incentive program, hangar improvements, and the rate study. Under the Act, Director Diamond will not have a conflict of interest in decisions involving the pilot incentive program, because, based on the facts presented, it does not appear reasonably foreseeable that the decision will have an effect on his personal finances of \$500 or more in any 12-month period. However, based on the facts provided, Director Diamond will have a conflict of interest in any decisions involving hangar improvements and the rate study as it is reasonably foreseeable that the decision will have an effect on his personal finances of \$500 or more in any 12-month period.

FACTS AS PRESENTED BY REQUESTER

The District is a special district that, among other things, regulates flight noise and safety in the area served by the District, and offers owners of locally based aircraft month-to-month leases for its 227 existing hangars. The District is currently preparing to consider two separate regulatory matters: (1) adoption of a new "fly quiet" incentive program to encourage noise reduction and professional aviation and safety development for local pilots, and (2) a comprehensive program to revitalize the facilities where its hangars are located. Director Diamond currently leases one of the TTAD hangars for his plane (at the same rate as all other hangar lessees, and without any special preference in availability or location),

"Fly Quiet" and Related Incentive Programs

The first action proposed by the Board is to replace an existing set of local preference and noise reduction incentive programs offered by the District to local pilots with a new, revamped set of incentives. At present, the District offers (1) a "home based program" discount of roughly \$42 per month to pilots who register their aircraft at TTAD's aircraft, and (2) a "fly quiet" program that offers tiered discounts on hangar rental charges for pilots who honor two distinct "no-fly" periods for noise reduction. Because the District feels that neither program sufficiently addresses flight safety, and that there is a way to streamline its programs to better target noise reduction concerns, it is proposing to replace the two existing programs with the following: (1) a single "Fly Quiet" incentive program with a discount for honoring noise regulations; (2) a potential discount for pilots who enroll in an external "FAA Wings" safety course offered by the Federal Aviation Administration; and (3) a "touch-and-go" policy to provide potential fuel rebates to pilots who are requested to depart the area at a non-standard time to assuage traffic congestion and/or noise concerns. Each of the proposed incentives would be equally available to all local pilots who met the objective criteria.

Hangar Revitalization Program

This separate Board proposal relates to development of a comprehensive District program to address maintenance needs, tenancy engagement, safety, rate-setting, and communication issues with respect to the existing District hangar facilities. If the Board proceeds with the program, some

of the specific items to be addressed include repairs of specific damage to individual hangars/hangar rows; improving the existing condition of the hangars by sealing the concrete and asphalt and upgrading the light fixtures, among other things; updating existing tenants' lease agreements and transitioning to the "GoCivix" online platform for leasing; clarifying for tenants the allowable uses of hangar facilities, including implementing annual inspection and deficiency correction plans; creating safety zones within each hangar to address hazardous materials, fire suppression, and emergency egress; identifying and correcting non-conforming structures within hangars; and conducting a rental rate study to identify and potentially implement an update to the current rates for hangar leases. Any actions taken or policies implemented as a result of the overall hangar revitalization program would be handled on an objective basis, where any "preference" given would be exclusively tied to the state of the hangars themselves (i.e., hangars in worse shape after the winter storms would be given higher priority for repairs). In a follow up email, you noted that the sequencing of these repairs would be overseen by the District's General Manager, working with contractors. Any updates to the rental rates would be applied evenly across all parties, subject to the incentive programs earlier discussed (which would also be applied fairly and objectively to all qualifying pilots).

In a follow up email, you explained that Director Diamond leases the hangar as an individual; and that there is no business associated with his lease. He pays the same baseline rent, \$.45 cents per square foot; which is the same as any other tenant for a "Standard T-Hangar." He participates in all three incentive programs: Fly Quiet (FQ) 1, FQ 2, and Home Basing. He receives the same discounts as every other tenant who participates in these programs; which are currently calculated based on square footage rented.

As noted above, the proposed changes to programs include the termination of Home Basing, combining FQ1 and FQ2 programs, and the introduction of a "Fly Safe" program. The proposed incentive discounts include a move away from the square foot-based discount to a flat rate discount. You state that the incentive program is targeting flight behaviors, as opposed to offering discounts to market larger sized hangars. The Fly Quiet would be a flat rate incentive of \$360 annually; offered at a \$30 per month discount. The Fly Safe would be a flat rate incentive of \$780 annually; offered at a \$65 per month discount.

The change to flat rate would reduce the incentive discounts for the "Super-T" and "Executive" Hangars. Super-T Hangar Tenants would see a decrease in the incentive discount of approximately a few hundred dollars per year, as there is wide range of square footages in this category. Executive Hangar Tenants would see a decrease in incentive discounts of approximately \$2,000 dollars per year, as some units exceed 3,000 square feet, and their square-foot rent varies by sub-category as well. The proposed incentive programs equate to a \$1,140 discount, which would be a \$40 increase for the Standard T-Hangars, which amount to 80 percent of all hangars, and what Director Diamond rents. However, as to the potential cost of improvements, you cannot determine at this time exactly what the work would entail and whether those cost would ultimately result in an increase of more than \$500 annually for Director Diamond's expenses.

In a follow up email, you also provided a map showing the extent of the District's jurisdiction, which encompasses approximately the eastern third of Nevada County, portions of Placer County bordering Lake Tahoe, and several municipalities, including Truckee, Olympic Valley, Alpine Meadows, Carnelian Bay, and Tahoe 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 any financial interests, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of” their respective 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.)

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. Taft, supra*, at p. 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).) 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.)

Section 1090 casts a wide net to capture those officials who 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* (1968) 262 Cal.App.2d 222, 237; see also *Stigall, supra* at p. 569.)

In this case, Section 1090 applies to all board members, and the lease for hangar space is clearly a contract. According to your facts, decisions affecting the hangar facilities, including improvements to the hangars, a rate study to consider updates to the rental fees, and decisions pertaining to a new incentive program for local pilots, which might include reduced hangar rental rates for participating in the program, would all impact future hangar rental rates.

The Legislature has expressly defined certain financial interests as “remote” or “noninterest” exceptions to Section 1090’s general prohibition. Where a remote interest is present, the contract may be lawfully executed provided (1) the officer discloses his or her financial interest in the contract to the public agency; (2) the interest is noted in the public body’s official records; and (3) the officer completely abstains from any participation in the making of the contract. (Section 1091.) Where a noninterest is present, the contract may be executed without the abstention. (Section 1091.5.) Accordingly, we turn to an examination of the exceptions that may apply to the facts presented.

Non-Interest - Public Services Generally Provided

The Public Services Generally Provided “noninterest” specified in Section 1091.5(a)(3) provides that an officer or employee shall not be deemed to be interested in a contract if his or her interest is “[t]hat of a recipient of public services generally provided by the public body or board of which he or she is a member, on the same terms and conditions as if he or she were not a member of the body or board.”

The California Supreme Court considered the application of this noninterest exception and read the exception to establish the following rule:

If the financial interest arises in the context of the affected official’s or employee’s role as a constituent of his or her public agency and recipient of its services, there is no conflict so long as the services are broadly available to all others similarly situated, rather than narrowly tailored to specially favor any official or group of officials, and are provided on substantially the same terms as for any other constituent.

(Lexin v. Superior Court (2010) 47 Cal.4th 1050, 1092.)

It has been stated that “[t]he phrase ‘public services generally provided’ is not self-defining, nor is there any useful legislative history that might shed light on the Legislature’s intent.” (*Lexin*, *supra*, at p. 1086.) “Public services generally provided” certainly include public utilities such as water, gas, and electricity. But qualifying “public services” are not limited to services provided to the general public or the public at large; “[p]ublic agencies provide many kinds of ‘public services’ that only a limited portion of the public needs or can use.” (92 Ops.Cal.Atty.Gen. 67, 70 (2009).)

The Attorney General has examined the legislative history of the 1961 amendment that added the “public services” exemption to Section 1091.5. The scope of this exemption is not identified therein. The Attorney General has previously determined informally, however, that “public services” would include public utilities such as water, gas, and electricity, and the renting of hangar space in a municipal airport on a first come, first served basis. (81 Ops.Cal.Atty.Gen. 317, 320 (1998).) The furnishing of such public services would not involve the exercise of judgment or discretion by public agency officials. Rather, the rates and charges for the services would be previously established and administered uniformly to all members of the public. (80 Ops.Cal.Atty.Gen. 335, 338 (1997).)

The phrase “on the same terms and conditions” requires there be no special treatment of an official, either express or implied, because of that person’s status as an official. (*Lexin*, *supra*, at p. 1101.) Accordingly, the public services exception generally will not apply when a provision of the service involves an exercise of discretion by the public body that would allow favoritism toward officials, or occurs on terms tailored to an official’s particular circumstances.² So long as the

² *Lexin*, *supra* at 1088, 1100 at note 28; 88 Ops.Cal.Atty.Gen. at 128 (“discretionary or highly customized services” benefitting official would not come within “public services” exception), 92 Ops.Cal.Atty.Gen. at 71.

discretionary decisions of the District in implementing the “fly quiet” and hangar revitalization programs would not allow favoritism toward Director Diamond, and would not occur on terms tailored to the Director’s particular circumstances, the public services exception would apply here, and Section 1090 would not prohibit the District from entering subsequent contracts related to the fly quiet and hangar revitalization programs. Likewise, Section 1090 would not require Director Diamond to abstain from participation in the decisions, but he will be required to recuse himself from airport revitalization decisions under the Act as outlined below.

The Act

The Act’s conflict of interest provisions prohibit any public official from making, participating in making, or otherwise using their 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 an interest in an official’s personal finances, including those of their immediate family. (Section 87103.)³

Foreseeability

Foreseeability standards vary depending on whether an interest is explicitly involved in a governmental decision. A financial effect is presumed to be reasonably foreseeable when it is explicitly involved in a decision. Financial interests that are explicitly involved include an interest that is a named party in, or subject of, a government decision.

Where an official’s economic interest is not explicitly involved in the governmental decision, the applicable standard for determining the foreseeability of a financial effect on the economic interest is found in Regulation 18701(b). That regulation provides, “[a] financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official’s control, it is not reasonably foreseeable.”

Materiality-Personal Finances

Under Regulation 18702.5, a governmental decision’s reasonably foreseeable financial effect on a public official’s financial interest in his or her personal finances or those of immediate family, also referred to as a “personal financial effect,” is material if the decision may result in the

³ As used in the Act, the terms “interest in real property” and “leasehold interest” do not include the interest of a tenant in a periodic tenancy of one month or less. (Regulation 18233.) Accordingly, the hangar rented by Director Diamond on a month-to-month basis is not considered an economic interest in real property for purposes of this analysis.

official or the official's immediate family member receiving a financial benefit or loss of \$500 or more in any 12-month period due to the decision. (Regulation 18702.5(a).) Under Regulation 18702.5, the focus is on whether it is reasonably foreseeable that a decision involving the "fly quiet" and hangar revitalization programs may result in a \$500 change to Director Diamond's own hangar rental fees in any 12-month period related to the decisions.

According to the facts stated above, the proposed incentive programs equate to a \$1,140 annual discount, which would be a \$40 increase as compared to the existing discount program for the Standard T-Hangars, the type Director Diamond rents. As such, the decision would not impact Director Diamond's expenses at the \$500 threshold, and he may participate in decisions concerning the incentive programs.

However, as to the potential cost of improvements, you cannot determine at this time exactly what the work would entail and whether those cost would ultimately result in an increase of more than \$500 annually for Director Diamond's expenses. While the nature and costs of the work has not yet been identified, it appears reasonable foreseeable that these decisions would have some affect Director Diamond's personal expenses that may equal or exceed \$500 or more including but not limited to the hangar rental fees in any 12-month period. Until the nature of the work has been identified, we can only advise that Director Diamond should recuse himself from the decisions. However, he may wish to seek further advice once the nature of the work has been determined.

Public Generally Exception

A governmental decision's financial effect on a public official's financial interest is indistinguishable from its effect on the public generally if the official establishes that a significant segment of the public is affected and the effect on his or her financial interest is not unique compared to the effect on the significant segment. (Regulation 18703(a).) A significant segment of the public is:

- (1) At least 25 percent of:
 - (i) All businesses or non-profit entities within the official's jurisdiction;
 - (ii) All real property, commercial real property, or residential real property within the official's jurisdiction; or
 - (iii) All individuals within the official's jurisdiction.⁴

We note that the District's jurisdiction extends to areas of Nevada and Placer Counties, well beyond the grounds of the airport itself. While the District consists of 227 available hangars, Board decisions affecting the hangars would *not* affect at least 25 percent of the segments outlined in

⁴ We note that "jurisdiction" is defined broadly under the Act. Section 82035, on its face, makes no distinction as to the nature of the jurisdiction exercised by a local governmental agency nor whether its exercise of jurisdiction in a particular area encompasses the full breadth of the agency's jurisdiction or something less. (See *Chapman Advice Letter*, No. A-02-115.)

Regulation 18703(a). Accordingly, you have not established that a significant segment is affected and the public generally exception does not apply in these circumstances.⁵

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

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary W. Norton
Senior Counsel, Legal Division

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⁵ Pursuant to Regulation 18706(a), the District may be able to segment a decision in which Director Diamond has a financial interest, to allow his participation. An agency may be able to segment a decision provided all of the following conditions apply: (1) the decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying financial interest; (2) the decision in which the official has a financial interest is segmented from the other decisions; (3) the decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official's participation in any way; and (4) once the decision in which the official has a financial interest has been made, the disqualified public official's participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified. However, we do not have enough information regarding the decisions to determine whether the segmentation procedure may be applicable.