



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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March 15, 2019

Krishan Chopra
Senior Assistant City Attorney
Office of the City Attorney
500 Castro Street, PO Box 7540
Mountain View, CA 94039-7540

Re: Your Request for Advice
Our File No. A-19-023

Dear Mr. Chopra:

This letter responds to your request for advice on behalf of Mountain View City Councilmember John McAlister regarding Government Code Section 1090 et seq.¹ Please note that we are only providing advice under Section 1090 and not under any other conflict of interest laws. 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 the question presented should change, you should contact us for additional advice.

In regard to our advice on Section 1090, we are required to forward your request and all pertinent facts relating to it to the Office of the Attorney General and the Santa Clara County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We are also required to specify whether we have received a written response from either entity: we have not. (Section 1097.1(c)(4).) Finally, we are 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." (Section 1097.1(c)(5).)

QUESTION

Does Section 1090 prohibit a Baskin Robbins ice cream store owned and operated by Councilmember McAlister (the "Baskin Robbins") from entering into a standard form agreement with the City to secure advertising space on a baseball scoreboard at a City park?

CONCLUSION

No. Section 1090 does not prohibit the Baskin Robbins from entering into the standard form agreement because the noninterest exception set forth in Section 1091.5(a)(3) would apply to the Councilmember's interest in that potential contract.

¹ All statutory references are to the Government Code, unless otherwise indicated.

FACTS AS PRESENTED BY REQUESTER

You are a Senior Assistant City Attorney for the City of Mountain View and the authorized representative of Mountain View City Councilmember John McAlister (the "Councilmember"). In 2014, the City Council adopted a sponsorship policy (the "Policy") allowing the City to solicit and receive sponsorships of varying levels from businesses and organizations in support of City events and programs. The Councilmember was a member of the City Council that enacted the Policy.

Under the Policy, sponsorship recognition may take the form of advertising or recognition on the City's printed materials, website or any other media, including scoreboards at City parks. According to a City flyer which you provided publicizing the availability of sponsorships for advertising space on scoreboards at a City park, space on those scoreboards is available in two different sizes: a potential sponsor may secure a "full panel" (14 feet by three feet) for a sponsorship of \$12,000, or a half panel (seven feet by three feet) for a sponsorship of \$7,000, for a term of three years or more. The Policy requires each advertising sponsor to enter into a standard form agreement with the City governing the sponsorship.

The Policy does not contain any explicit preferences or conditions which favor any City officials or employees. Sponsorship applications are processed on a first-come, first-served basis. Because advertising space on the scoreboards is limited, once all the space is full, additional applicants are put on a wait list for the next available space. Section 5(b) of the Policy excludes certain businesses (including, among others, firearms, tobacco, or "adult" content businesses) and political and religious organizations from being sponsors.

The City's Community Services Department reviews and approves advertising sponsorship applications and exercises some limited discretion in that review. Section 6(d) of the Policy requires the Department's Recreation Division to review each proposed sponsorship agreement and to provide comments and a recommendation. Section 5(c) authorizes the consideration of the community benefits of a potential sponsorship, and Section 5(d) allows a potential sponsorship to be declined if the applicant's services or products are in direct competition with those of the City. In addition, Section 5(e) authorizes a potential sponsorship to be declined if it would result in a conflict of interest, or the appearance thereof, between the potential sponsor and the City, and Section 6(b) requires the City Attorney's Office to review all sponsorship agreements for potential conflicts of interest.

The Councilmember owns and operates the Baskin Robbins, an ice cream store located within the City, and has inquired whether the Baskin Robbins may purchase advertising space on a baseball scoreboard at a nearby City park. The advertisement would consist of the Baskin Robbins' logo and location, and possibly other information regarding promotions.

ANALYSIS

Section 1090 generally prohibits public officers and employees, while working in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote interests or noninterests, that prevent a public officer or employee from exercising absolute loyalty and undivided allegiance in furthering the best interests of his or her agency. (*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,” and “an official has a financial interest in a contract if he [or she] might profit from it.” (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void, and the prohibition applies 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 City officer, Councilmember McAlister is subject to Section 1090. Decisions relating to advertising sponsorships involve a contract, the standard form agreement between the sponsor and the City. The Councilmember made or participated in the making of those standard form agreements in his public capacity because he was a member of the City Council that adopted the Policy in 2014, and would make or participate in the making of such an agreement between the City and the Baskin Robbins in his private capacity as the owner and operator of the Baskin Robbins. The Councilmember would have an interest in a standard form agreement for an advertising sponsorship between the City and the Baskin Robbins because that potential contract could result in a profit to the Councilmember. Therefore, Section 1090 would prohibit the Councilmember’s Baskin Robbins from entering into a potential standard form agreement for an advertising sponsorship with the City, unless a remote or noninterest exception or the rule of necessity applies.

Noninterest Exception for “Public Services Generally Provided” of Section 1091.5(a)(3)

The Legislature has created various statutory exceptions to Section 1090 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. If a remote interest is present, the contract may be made if: (1) the officer in question discloses his or her financial interest in the contract to the public agency; (2) such interest is noted in the agency’s official records; and (3) the officer abstains from any participation in the making of the contract. (Section 1091(a).) If a noninterest is present, the contract may be made without the officer’s abstention, and a noninterest generally does not require disclosure. (*City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 514-515; 84 Ops.Cal.Atty.Gen. 158, 159-160 (2001).)

The only exception that merits analysis given the facts presented is the noninterest exception set forth in Section 1091.5(a)(3) for “public services generally provided.” That exception provides that an officer or employee “shall not be deemed to be interested” in a public contract if his or her interest in that contract 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 the noninterest exception set forth in Section 1091.5(a)(3) in *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 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.

(*Id.* at 1092.)

With respect to an agency's permissible exercise of discretion in providing a public service generally provided under the exception, the Supreme Court stated as follows:

The presence of discretion in the formation of a contract that section 1091.5(a)(3) purportedly permits is not fatal, unless the discretion can be exercised to permit the special tailoring of benefits to advantage one or more board members over their constituency as a whole. Absent such a risk of favoritism, discretion is unproblematic.

(*Id.* at p. 1100.)

Thus, the noninterest exception set forth in Section 1091.5(a)(3) applies if: (1) the interest arises in the context of the affected official's or employee's role as a constituent of the public agency and recipient of its services; (2) the service at issue is broadly available to all those whom are similarly situated and is not narrowly tailored to specially favor an official or group of officials; and (3) the service at issue is provided on substantially the same terms as for any other constituent.

The Councilmember's interest in a standard form agreement securing space on one of the scoreboards would arise in the context of the Councilmember being a City constituent and a recipient of City services. The advertising space on the scoreboards is broadly available to nearly all businesses and organizations under the Policy, including those similarly situated to the Baskin Robbins, and the Policy is not narrowly tailored to specially favor an official or group of officials. The City processes advertising sponsorship applications on a first-come, first-served basis, and the rates and terms for the advertising space on the scoreboards are the same for the Baskin Robbins as for any other constituent. While the City exercises some discretion in its review of advertising sponsorship applications under the Policy, there is no indication the City's exercise of discretion would provide any advantage to the Councilmember over other City constituents in securing advertising space on a baseball scoreboard at a City park.

Therefore, based on the facts presented, the City's provision of advertising space on its parks' baseball scoreboards pursuant to the Policy is a "public service generally provided" for purposes of the noninterest exception set forth in Section 1091.5(a)(3). Accordingly, Section 1090

does not prohibit the Baskin Robbins from entering into a standard form agreement with the City for advertising space on a baseball scoreboard at the City park because the noninterest exception set forth in Section 1091.5(a)(3) applies to the Councilmember's interest in that potential contract.

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

Sincerely,

Dave Bainbridge
General Counsel



By: Matthew F. Christy
Counsel, Legal Division

MFC:jgl