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June 23, 2023

VIA EMAIL

Dave Bainbridge
General Counsel
Fair Political Practices Commission
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Re: Request for Written Advice for Director Diamond of Truckee Tahoe
Airport District

Dear Mr. Bainbridge:

This office acts as General Counsel to the Truckee Tahoe Airport District (“TTAD”), including regularly advising on issues related to ethics and conflicts of interest. I am seeking formal written advice from the FPPC on behalf of Director Diamond, with respect to the application of the law and the FPPC’s regulations to the facts set forth below.

FACTS

TTAD is a special district that, among other things, regulates flight noise and safety in the area served by TTAD, and offers owners of locally based aircraft month to month leases for its 227 existing hangars.

TTAD 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), and would like to know whether he may participate in the two above-described actions that the Board will be considering soon, or whether he must recuse himself. This is a request for advice under the Political Reform Act and Government Code section 1090.

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The programs to be considered by the TTAD Board are briefly summarized as follows:

1. “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 TTAD to local pilots with a new, revamped set of incentives. At present, TTAD 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 TTAD 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.

2. Hangar Revitalization Program

This separate Board proposal relates to development of a comprehensive TTAD program to address maintenance needs, tenancy engagement, safety, rate-setting, and communication issues with respect to the existing TTAD 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). 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).

As previously stated, Director Diamond does not now receive any preferential leasing treatment as a result of his service to the Board, nor does he anticipate receiving preferential treatment in connection with either of the above-described proposed Board actions.

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QUESTIONS

1. Assuming Director Diamond pays a set monthly fee to lease an airport hangar from TTAD, which is the same fee paid by other similarly situated monthly renters, may he participate in decisions affecting the hangar facilities, including improvements to the hangars and a rate study to consider updates to the rental fees?

2. Assuming Director Diamond pays a set monthly fee to lease an airport hangar from TTAD, may he participate in decisions pertaining to a new incentive program for local pilots, which might include reduced hangar rental rates for participating in the program?

DISCUSSION

TTAD understands that under the PRA and Section 1090, a public official might be precluded from participating in decisions in which his personal finances are involved, and the Board itself might be precluded from entering into a contract (such as a hangar lease) in which an official has a financial interest.

1. Section 1090

In the Section 1090 context, there is a non-interest exception that TTAD believes would apply here to authorize Director Diamond to continue to contract for leased hangar space. Section 1091.5(a)(3) provides that an official is not deemed to be interested in a contract if his interest is that of a recipient of public services generally provided by the public body of which he is a member, on the same terms and conditions as if he were not a member of the body. Further, a 1998 California Attorney General Opinion expressly opined on the exact situation present in this case: “We have previously determined...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**. 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.” (81 Ops.Cal.Atty.Gen. 317, 320 (1998) (emphasis added).) In 2006, the Attorney General again considered this question and determined that a hangar rental scheme was a non-interest under section 1091.5 where the rentals were available to all potential customers on a first-come, first-served basis, the rental fees were based upon square footage of the hangar space and whether the renter is a resident of non-resident of the area, and airport commissioners received no priority consideration for hangar spaces or preferential rental rates. (89 Ops.Cal.Atty.Gen. 121 (2006).)

Because Director Diamond is receiving a public service that is equally available to all members of the public on a first come, first served basis, it is TTAD’s understanding—subject to confirmation by the FPPC—that Director Diamond can continue to contract with TTAD for hangar rental space so long as he remains subject to the same rate and availability considerations as all other members of the public, and is not given any kind of “preferential treatment” in connection with his service to the Board of Directors.

2. Political Reform Act

Because Director Diamond pays a monthly fee to rent a hangar space, there appears to be an impact to his personal finances in connection with any decisions that could affect the hangar facilities in a manner that would increase or decrease the cost to rent a space. Under the PRA, this impact to his personal finances must be reasonably foreseeable, material, and distinguishable from any effect to the public generally in order to constitute a conflict of interest.

a. *Reasonably Foreseeable*

Although Director Diamond's specific hangar rental is not the explicit subject of a TTAD decision at this point, a financial effect to him may still be reasonably foreseeable if it is a "realistic possibility and more than hypothetical or theoretical."

Because it is a realistic possibility that both the hangar revitalization and safety/noise incentive program could result in changes to the rates charged to all lessees, we believe this element is likely met.

b. *Material Effect*

There are two potential thresholds for materiality in this instance. In cases where a Board decision would directly affect Director Diamond's continued rental of a hangar, TTAD understands that materiality is presumed and Director Diamond should recuse from such decisions. But if his interest is only indirectly involved, the PRA instead requires examination of the established monetary thresholds for determining materiality. When the financial interest at stake is the official's personal finances, as is the case here, the effect on that interest is material if the decision may result in the official or his immediate family receiving a financial benefit or loss of \$500 or more in any 12-month period due to the decision.

Our understanding is that unless any of the Board's decisions described in this letter would directly affect Director Diamond's own hangar rental, the materiality element of the inquiry is only met if the Board's decisions would result in a loss or benefit to Director Diamond of \$500 or more in a calendar year. For example, if the Board's decision to implement the new "fly quiet" incentive program resulted in an annual savings to Director Diamond of \$550, or if the decision to implement the hangar revitalization program resulted in his rental rates going up by \$510 a year (i.e., meeting the dollar threshold for an indirect material effect to his personal finances), we understand that this element of the inquiry would be met.

c. *Distinguishable from Effect on Public Generally*

TTAD understands that the effect of its decisions on Director Diamond's interest is considered distinguishable from the effect on the public generally *unless* Director Diamond can establish that a "significant segment" of the public is affected by the decision, and the effect on his own interest is not unique in comparison. As relevant here, a "significant segment" would be at least 25% of (1) all businesses or nonprofits within TTAD's jurisdiction, (2) all real property within

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TTAD's jurisdiction, or (3) all individuals within the official's jurisdiction. And, the effect to Director Diamond's interest would be unique if it disproportionately impacts his (or his immediate family's) personal finances.

Because there are only 227 available hangars, Board decisions affecting the hangars would *not* affect at least 25% of the above-noted segments of the population, and it does not appear that this exception would apply. Still, because there would only be a material effect to Director Diamond's personal finances if the criteria established above are met, this alone would not preclude him from participating in and voting on matters affecting the hangars.

CONCLUSION

In short, TTAD's opinion—which it seeks to have confirmed by the FPPC—is that Director Diamond will only have a disqualifying conflict in Board decisions where it is (a) a “realistic possibility” that the decision would (b) directly affect his rental of a hangar, or result in him receiving a financial benefit or loss of \$500 or more in a 12-month period, and (c) which effect would be distinguishable from that of the public generally. Further, Section 1090 does not create any issues in this context because Director Diamond is not given preferential rates or special treatment of any kind for his hangar lease in connection with his service to the Board.

We appreciate your attention to this request for advice; if you would like any additional information, please feel free to contact me directly.

Sincerely,

Joshua Nelson
of BEST BEST & KRIEGER LLP

JN:aeb