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OPINION	:	No. 08-307
	:	
of	:	December 29, 2009
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THE HONORABLE WILLIAM JAMES MURPHY, TEHAMA COUNTY COUNSEL, requests an opinion on the following question:

Does the exception to Government Code section 1090 for “public services generally provided” permit a County Air Pollution Control District to provide grant funding under the Carl Moyer Memorial Air Quality Standards Attainment Program to an applicant who is a member of the District’s Board of Directors?

CONCLUSION

The exception to Government Code section 1090 for “public services generally provided” does not permit a County Air Pollution Control District to provide grant funding under the Carl Moyer Memorial Air Quality Standards Attainment Program to an applicant who is a member of the District’s Board of Directors.

ANALYSIS

County Air Pollution Control Districts (APCDs) are established under the Health and Safety Code.¹ APCDs are special-purpose public agencies that have primary responsibility for the control of air pollution from stationary (*i.e.*, non-vehicular) sources within a county.² Each district is governed by a board of directors selected in accordance with Health and Safety Code sections 40100 through 40100.7. (In Tehama County, the Tehama County Board of Supervisors is *ex officio* the Board of Directors of the Tehama County Air Pollution Control District.)

The Carl Moyer³ Air Quality Standards Attainment Program⁴ “is a grant program that funds the incremental cost of cleaner-than-required engines, equipment, and other sources of air pollution.”⁵ The enacting legislation describes the Carl Moyer Program as “an incentive program that will substantially reduce emissions of oxides of nitrogen and fine particulate in California,” and states that it is intended to be “a key component of California’s plan to comply with federal Clean Air Act requirements.”⁶ Under this program, the California Air Resources Board provides funds to local air-quality districts (including APCDs) each year. The districts, in turn, make grants to public and private entities and individuals for the purchase or retrofit of engines and equipment that are cleaner (that is, they emit less air contaminants) than otherwise required by the applicable air quality regulations.⁷ The Health and Safety Code establishes basic grant eligibility requirements, and authorizes the California Air Resources Board to establish more

¹ See Health & Safety Code § 40100 *et seq.*

² See *id.* at §§ 40100, 40701; see also *W. Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.*, 49 Cal. 3d 408, 417-418 (1989); *People v. A-1 Roofing Serv., Inc.*, 87 Cal. App. 3d Supp. 1, 11-12 (1978).

³ Section 1 of 1999 Cal. Stat., ch. 923 (AB 1571), provides at subd. (h): “The Legislature . . . finds and declares that because of the extraordinary leadership and dedication shown by the late Dr. Carl Moyer in conceiving and developing the program embodied in this act, it is appropriate to recognize his vision and contributions to the public interest by dedicating the program to his memory.”

⁴ Health & Safety Code § 44275 *et seq.*

⁵ The Carl Moyer Program Guidelines, Approved Revision 2005, Part I at I-1. (Cal. Air Resources Bd., Jan. 6, 2006) (hereinafter, 2005 Guidelines).

⁶ 1999 Cal. Stat. ch. 923, § 1(i).

⁷ See Health & Safety Code §§ 44280(b), 44286 (b), 44299 *et seq.* See also 2005 Guidelines, Part I at I-2.

detailed grant criteria and related guidelines.⁸ The 2005 Guidelines set forth the current operative criteria adopted.

The Health and Safety Code provides that, “Any individual, company, or public agency that owns one or more covered vehicles that operate primarily within California or otherwise contribute substantially to the Nox, PM or ROG emissions inventory in California” may apply for a Carl Moyer grant.⁹ When an application is submitted to a local district, the district reviews the proposed project to determine whether it meets all eligibility requirements set forth in the Health and Safety Code, the 2005 Guidelines, and the district’s own policies and procedures.¹⁰ For these purposes, the district must evaluate the characteristics of each engine proposed for purchase or retrofit, its emissions performance, and the project’s cost-effectiveness (*i.e.*, projected emissions reduction per dollar of cost), and must also consider whether the proposed engine is cleaner than required under the applicable air quality laws.¹¹

We are asked to determine whether an APCD may award a Carl Moyer grant to a member of its own board of directors. For the following reasons, we believe that it may not do so.

Our first focus is on the general conflict-of-interest prohibition set forth in Government Code Section 1090:

Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity.

As used in this article, “district” means any agency of the state formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries.

⁸ Health & Safety Code §§ 44282, 44286(a), 44287(a).

⁹ *Id.* at § 44281(d).

¹⁰ *Id.* at § 44288(a); 2005 Guidelines, Part I at II-24 to II-27.

¹¹ Health & Safety Code §§ 44281, 44282; 2005 Guidelines, Part I at II-26. *See also, e.g.*, 2005 Guidelines, Part II at V-8 to V-11.

The Supreme Court of California has held that the purpose of section 1090's conflict-of-interest prohibition "is to remove or limit the possibility of any personal influence, either directly or indirectly, which might bear on an official's decision, as well as to void contracts which are actually obtained through fraud or dishonest conduct."¹² The statutory goal is "not only to strike at actual impropriety, but also to strike at the appearance of impropriety."¹³ For these reasons, the prohibitions embodied in section 1090 apply regardless of whether a proposed contract is fair and equitable,¹⁴ or whether the official abstains from all participation in the contract-making process.¹⁵

Further, the term 'financially interested' in section 1090 cannot be interpreted in a restricted and technical manner.¹⁶ The law does not require that a public officer acquire a transferable interest or profit directly from a contract in order to have a prohibited interest in it.¹⁷ In this case, the interest happens to be quite direct: the APCD proposes to award a grant directly to one of its board members, who is otherwise qualified to receive it. Such a transaction would clearly be proscribed under the terms of section 1090. The question here is whether it is saved by any of the recognized exceptions to section 1090.¹⁸

Despite section 1090's sweeping prohibitions, exceptions to its provisions have been made for certain "remote interests" and "non-interests,"¹⁹ which are defined by

¹² *Stigall v. City of Taft*, 58 Cal. 2d 565, 569 (1962).

¹³ *City of Imperial Beach v. Bailey*, 103 Cal. App. 3d 191, 197 (1980).

¹⁴ *Thomson v. Call*, 38 Cal. 3d 633, 646-649 (1985); *see also Stockton Plumbing & Supply Co. v. Wheeler*, 68 Cal. App. 592, 603 (1924) ("[T]he statutory provisions emphasizing the general or common-law rule as to such contracts remove all grounds for equitable considerations in such cases.")

¹⁵ *Fraser-Yamor Agency, Inc. v. Co. of Del Norte*, 68 Cal. App. 3d 201, 211-212 (1977).

¹⁶ *D'Amato v. Super. Ct.*, 167 Cal. App. 4th 861, 868-869 (2008); *see People v. Honig*, 48 Cal. App. 4th 289, 315 (1996).

¹⁷ *People v. Honig*, 48 Cal. App. 4th at 315.

¹⁸ "The proscribed interest certainly includes any direct interest, such as that involved when an officer enters directly into a contract with the body of which he is a member." *Thomson v. Call*, 38 Cal. 3d at 645.

¹⁹ Govt. Code §§ 1091, 1091.5. *See also Citizen Advocates, Inc. v. Bd. of Supervisors*, 146 Cal. App. 3d 171, 178-179 (1983); *Fraser-Yamor Agency, Inc.*, 68 Cal.

statute. In addition, a “rule of necessity” has been inferred under certain circumstances to permit the making of a contract that would otherwise be prohibited.²⁰

The “rule of necessity” doctrine is inapplicable here. Under that rule, an officer otherwise disqualified from acting may nevertheless act if his inability to do so would necessarily result in a failure of justice. Such circumstances arise where no other officer is authorized to perform the public official’s duties and, if he cannot act, his agents and deputies would be similarly disqualified.²¹ Those circumstances are not present here. There is no possibility of the board being unable to fulfill its obligations as a result of the disqualification of a board member receiving a Carl Moyer grant.

The exceptions for “remote interests” are also inapplicable. Government Code section 1091 provides that an officer will not be deemed to be interested in a contract if the officer has only a “remote interest” in the contract; the interest is disclosed to the board of which the officer is a member; and the board authorizes the contract without the vote of the officer.²² Section 1091 defines a variety of remote interests, but none of them fits the circumstances of this case.

That leaves us with the question whether this situation satisfies the definition of any “noninterest” under Government Code section 1091.5. The only plausible candidate is a provision allowing an officer to receive “public services generally provided” by his or her board, if the officer receives the services “on the same terms and conditions” as if he or she were not a member of the board.²³ We have previously considered the question whether an individual grant or loan application program (in that case a city-run small-

App. 3d at 217-218; 67 Ops.Cal.Atty.Gen. 369, 375 (1984).

²⁰ See 73 Ops.Cal.Atty.Gen. 191, 195 (1990); 69 Ops.Cal.Atty.Gen. 102, 107-112 (1986); 65 Ops.Cal.Atty.Gen. 305, 308-311 (1982).

²¹ See *Caminetti v. P. Mut. Life Ins. Co.*, 22 Cal. 2d 344, 366-367 (1943).

²² Govt. Code § 1091(a).

²³ Government Code section 1091.5(a)(3), provides:

(a) An officer or employee shall not be deemed to be interested in a contract if his or her interest is any of the following:

(3) That 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 board.

business loan program) is a “public service” within the meaning of this exemption,²⁴ and we concluded that it is not. We believe that the exception for “public services” is intended to apply only to services for which rates and charges have been clearly established, and which are provided uniformly to all comers.²⁵ Thus we have concluded that the exception applies to public utilities (such as water, gas, and electricity), and to the renting of hangar space in a municipal airport offered on a first come, first served basis.²⁶ In contrast, we believe that a government loan is not a “public service” within the meaning of the exemption because it involves the exercise of judgment or discretion on the part of administering officials.²⁷

We have also previously considered the question whether the acceptance of a business advertisement for publication in a city’s community services brochure of classes and activities constituted a “public service” subject to the noninterest exemption.²⁸ In that case we concluded that such publication was a public service in that it did not involve discretionary or highly customized services particularly benefitting one or more council members. The city newsletter was provided free to all city residents, and those placing advertisements in it were providing commercial information with respect to products and services that would be available to the city’s residents.²⁹ Advertising space was available to anyone at a predetermined rate based solely upon the size and duration of the advertisement.³⁰

Our reasoning in these matters has been endorsed by the Court of Appeal in *City of Vernon v. Central Basin Municipal Water District*, in which a member of a municipal water district board, who was also an owner and officer of a private water company, purchased reclaimed water from the district for his company.³¹ Citing one of our opinions, the court held that the continuing sales of reclaimed water to the company constituted “public services generally provided” within the meaning of section

²⁴ 81 Ops.Cal.Atty.Gen. 317 (1998).

²⁵ *Id.* at 320.

²⁶ *Id.*

²⁷ See also 80 Ops.Cal.Atty.Gen. 335 (1997). There we concluded that the service in question amounted to private construction services for a member of the governing board on unique terms, and therefore did not qualify under the exception.

²⁸ 88 Ops.Cal.Atty.Gen. 122 (2005).

²⁹ *Id.* at 122.

³⁰ *Id.*

³¹ 69 Cal. App. 4th 508 (1999).

1091.5(a)(3).³² In reaching its conclusion, the Court of Appeal addressed a question shared with the inquiry now before us: public services offered only to a small segment of the public. It concluded that, although the district provided reclaimed water to a relatively small number of customers, it did so at a previously adopted rate and on the same terms and conditions to all its customers³³

In each of these examples where a “public service” exemption has been recognized, the services have been provided without any exercise of judgment and discretion by the public officials involved. It is the absence of judgment and discretion that distinguishes these examples from the grant-award process under discussion here.

It is true that because limited funds are available, grants under the Carl Moyer program are available to a relatively small number of applicants. However, that factor alone would not necessarily cause us to rule out a public services exception. “Public agencies provide many kinds of ‘public services’ that only a limited portion of the public needs or can use. This does not derogate from their characterization as ‘public services’ according to the ordinary meaning of those words.”³⁴ Additionally, we are informed that the board considers applications on a first come, first served basis,³⁵ which gives them at least some surface indicia of being administered objectively and without favor.³⁶ On balance, though, we conclude that the Carl Moyer program simply does not contemplate that grants will be awarded on the “same terms and conditions” to all applicants, as is required by section 1091.5(a)(3). A grant is to be awarded only after an application has been individually scrutinized and evaluated to determine its compliance with statutory criteria.³⁷ Each application is weighed according to the characteristics of the proposed engine, its emissions performance, its cost-effectiveness (*i.e.*, emissions reduction per dollar of cost), and considerations of whether the engine is cleaner than required under

³² *Id.* at 514-515 (citing 80 Ops.Cal.Atty.Gen. at 337-338).

³³ *Id.* at 515.

³⁴ *City of Vernon*, 69 Cal. App. 4th at 515.

³⁵ *See* 2005 Guidelines, Part I at II-24.

³⁶ On the other hand, there is a possibility that this aspect of the program would work to the advantage of a board member over the public generally, by dint of the board member’s superior knowledge of the level of funds available and the application period’s opening and closing. Because our opinion turns on other factors, we need not resolve that issue here.

³⁷ *See* 2005 Guidelines, Part I at II-24.

the applicable air quality laws have been ascertained.³⁸ The district’s evaluation may also include a determination “that an application is not in good faith, not credible, or not in compliance with [the governing statute] and its objectives.”³⁹ These considerations require the exercise of judgment and discretion.

The “public services generally provided” exemption of section 1091.5(a)(3) does not, in our view, encompass the awarding of a grant that must be based upon consideration of conditions unique to each proposal and subject to the particularized judgment and discretion of the district or its board. Although we recognize that the goals of the Carl Moyer Program are advanced by making its grants available to otherwise qualified applicants, to permit them to be awarded to members of the board would be contrary to long-established policy and authority on conflicts of interest.

Therefore we conclude that the exception to Government Code section 1090 for “public services generally provided” does not permit a County Air Pollution Control District to provide grant funding under the Carl Moyer Memorial Air Quality Standards Attainment Program to an applicant who is a member of the District’s Board of Directors.

³⁸ *Id.*

³⁹ Health & Safety Code § 44288(a).