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OPINION	:	No. 12-606
of	:	December 20, 2013
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THE HONORABLE JERRY HILL, MEMBER OF THE STATE SENATE, has requested an opinion on the following question:

Does the exception to Government Code section 1090 for "public services generally provided" permit a mayor who sits on a city council, and another city council member, to participate in a city program that provides funds to residents to make home improvements designed to mitigate the effects of aircraft noise?

CONCLUSION

On the facts presented, the exception to Government Code section 1090 for "public services generally provided" permits a mayor who sits on a city council, and another city council member, to participate in a city program that provides funds to residents to make home improvements designed to mitigate the effects of aircraft noise.

ANALYSIS

Background

San Francisco International Airport (SFO) is owned by the City and County of San Francisco. In the early 1980s, the Federal Aviation Commission (FAA) and SFO established a program—the Aircraft Noise Insulation Program—designed to mitigate the impact of aircraft traffic noise in residential areas surrounding the airport. Information from noise monitors and computer models was used to create a "noise contour map," which in turn was used to identify those residential areas most affected by SFO air traffic noise.[1] SFO then distributed funds[2] to cities with affected residential areas, for the purpose of furnishing properties in those areas with noise insulation improvements. Participation in the program is voluntary on the part of the property owner. However, every homeowner who makes noise insulation improvements through the program is required to execute an "avigation easement"[3] in favor of the City and County of San Francisco, providing that the homeowner will not bring legal action against SFO for noise that does not exceed specified decibel levels. The program has significantly reduced the amount of land around SFO deemed to be incompatible with residential use.[4]

The program is administered by the cities that receive funding. Each city determines facets of its own program, such as the order in which eligible properties will

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[1] The state Department of Transportation has established a community noise equivalent level of 65 decibels as the acceptable level of aircraft noise for persons living in the vicinity of airports. Cal. Code Regs. tit. 21, § 5012; see also Cal. Code Regs. tit. 21, § 5006. This is a noise metric derived from the average noise level during a 24-hour day, measured in decibels, and adjusted to account for the lower tolerance of people to noise during evening and night time periods. See Cal. Code Regs. tit. 21, § 5001(f); *see also Muzzy Ranch Co. v. Solano Co. Airport Land Use Commn.*, 41 Cal. 4th 372, 379 n. 1 (2007).

[2] The noise mitigation program was funded by the federal government and by the City and County of San Francisco.

[3] Public Utilities Code section 21669.5(a)(1)(A) defines "avigation easement" as a transfer of certain rights from a property owner to an owner or operator of an airport, such as the right of unobstructed passage of aircraft through the airspace over the property, or the right to subject the property to noise, vibration, fumes, dust, or fuel particle emissions associated with airport activity. *See also* Pub. Util. Code §§ 21669.5(a)(1)(B), 21652(a)(2).

[4] *See* Cal. Code Regs. tit. 21, §§ 5014, 5037(f).

receive improvements; what kinds of buildings qualify; and whether the city will perform the work itself or will reimburse property owners who make improvements.

The City of South San Francisco participates in the program. South San Francisco reimburses property owners up to $15,000 for noise insulation improvements.[5] A participating property owner must sign an agreement that includes specifications and procedures, and requires the owner to grant the avigation easement to the City and County of San Francisco.[6] South San Francisco's noise insulation program has provided benefits to more than 6,000 single-family homes and approximately 800 apartment units.

South San Francisco's noise insulation program, and the zone of eligible properties as determined by the 1983 noise contour map, was approved by South San Francisco's city council in 1984. Program funds were offered in phases, on a first-come, first-served basis.[7] In 2006, the then-mayor appointed a two council-member subcommittee to consider priorities for the program going forward. On the recommendation of the program's construction manager, the subcommittee decided that property owners within the eligibility zone who had previously declined to participate in the program would be re-notified and given another opportunity to participate, and that residents of an area outside the original eligibility area would be invited to participate.[8] These phases were implemented over the next several years.

The current mayor of South San Francisco owns a residence within the newer eligibility zone. Another city council member owns a residence within the original zone, but has not previously applied for funds. Neither the mayor nor the council member was on the council in 1984, when funds were first offered to residents of South San Francisco.

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[5] Improvements authorized by the program include installation of insulated windows and doors, insulation of attics, improvement of fireplace dampeners, and installation of baffles on roof vents.

[6] The easement is executed as a separate agreement between the property owner and City and County of San Francisco.

[7] We are told that through the years, the FAA/SFO noise contour map and South San Francisco's zone of eligible properties were occasionally modified based on further noise studies.

[8] SFO approved the use of noise mitigation funds in this area.

However, both were on the council in 2006, when the program was re-offered in the original zone and extended to the newer zone.[9] The mayor was not on the two-member subcommittee that approved the newer phases of the program; the council member was.

In this opinion, we are asked whether the mayor or the council member would be permitted to receive program funds under the exception to Government Code section 1090 for "public services generally provided." We conclude that the exception permits both the mayor and the council member to participate in the program because both would qualify for benefits on substantially the same terms as are available to other, similarly-situated City residents.

Government Code Section 1090

We begin our analysis by examining the general conflict-of-interest prohibition set forth in Government Code section 1090. That section provides in relevant part:

> 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.[10]

Section 1090 codifies the common law rule prohibiting public officials and employees from having a personal financial interest in contracts they form in their official capacities.[11] As our Supreme Court recently stated, "section 1090 is concerned with ferreting out any financial conflicts of interest, other than remote or minimal ones, that might impair public officials from discharging their fiduciary duties with undivided loyalty and allegiance to the public entities they are obligated to serve."[12]

Section 1090 is intended to strike not only at actual impropriety, but also at the appearance of impropriety,[13] and courts have directed that the statute's prohibition must

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[9] The current mayor became mayor in 2012, but was a city council member at the time the modifications to South San Francisco's noise mitigation program were made.

[10] Govt. Code § 1090.

[11] *Lexin v. Super. Ct.*, 47 Cal. 4th 1050, 1073 (2010); 89 Ops.Cal.Atty.Gen. 49, 50 (2006).

[12] *Lexin*, 47 Cal. 4th at 1073; *see also 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); *People v.*

be broadly construed and strictly enforced.[14] The phrase "making of a contract" has been broadly defined to include the various activities leading up to execution of the contract, including preliminary discussions, negotiations, compromises, reasoning, and planning.[15] The renewal, renegotiation, or amendment of an existing agreement also constitutes the making of a contract for purposes of section 1090.[16] Prohibited financial interests under section 1090 may be direct or indirect, and extend to expectations of economic benefit.[17] When an officer with a proscribed financial interest is a member of the governing body of a public entity, the prohibition of section 1090 also extends to the entire body.[18] The prohibition cannot be avoided merely by having the financially interested officer or employee abstain from participating in the contracting process; the entire governing body is precluded from entering into the contract.[19]

A contract that is the result of a prohibited conflict of interest is void, regardless of whether the contract is fair and equitable to the public entity, or whether it would be more advantageous to the public entity than would other agreements.[20] A violator of section 1090 may also be subject to criminal sanctions.[21]

Honig, 48 Cal. App. 4th 289, 314 (1996).

[14] *See e.g. Stigall*, 58 Cal. 2d at 569-571; *Thorpe v. Long Beach Community College Dist.*, 83 Cal. App. 4th 655, 663-664 (2000); *Honig*, 48 Cal. App. 4th at 314.

[15] *Stigall*, 58 Cal. 2d at 569-571; *Millbrae Assn. for Residential Survival v. City of Millbrae*, 262 Cal. App. 2d 222, 237 (1968); 89 Ops.Cal.Atty.Gen. at 51.

[16] *See City of Imperial Beach*, 103 Cal. App. 3d at 196-197) (renewal and adjustment of contract); 81 Ops.Cal.Atty.Gen. 134, 137-138 (1998) (renewal, renegotiation); 85 Ops.Cal.Atty.Gen. 176, 177, n. 2 (2002) (modification).

[17] *Honig*, 48 Cal. App. 4th at 325.

[18] *Fraser-Yamor Agency, Inc. v. County of Del Norte*, 68 Cal. App. 3d 201, 211-212 (1977); 89 Ops.Cal.Atty.Gen. at 50.

[19] *Thomson v. Call*, 38 Cal. 3d 633, 647-649 (1985); *Stigall*, 58 Cal. 2d at 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003).

[20] Govt. Code § 1092; *Thomson*, 38 Cal. 3d at 646, 649. We note that although section 1092 provides that contracts made in violation of section 1090 "may be avoided," California courts have consistently maintained that such contracts are void, and not merely voidable. *See e.g. Lexin*, 47 Cal. 4th at 1073; *Thomson*, 38 Cal. 3d at 646 n. 15.

[21] Govt. Code § 1097.

A city council member and a mayor are unquestionably "city officers" within the meaning of section 1090.[22] To determine whether their conduct as public officials has violated or would violate Government Code section 1090, we must identify (1) whether they participated or will participate in the making of a contract in their official capacities; (2) whether they have a cognizable financial interest in that contract; and (3) whether the cognizable interest falls within any exception to the prohibitions of section 1090.[23]

Participation in Making of a Contract in Official Capacity

For a violation of Government Code section 1090 to occur, the employee or officer making a contract "as an individual must participate in the making of the contract in his official capacity."[24] Were the mayor and the council member to sign individual agreements allowing them to receive funds under the program, they would do so in their private capacities, as property owners. There is also no doubt that the agreements between property owners and the City of South San Francisco, under which funds are distributed to the property owners, are "contracts." In each agreement, the easement granted to the City and County of San Francisco is expressly referred to as "consideration" for the property owner's receipt of funding.[25]

This brings us to the question whether the mayor and council member participated *as public officials* in "the making of" "the contract." The mayor's and council member's participation in entering the funds-for-easement contract as individuals is different from their participation as public officials. Their participation as public officials stems from the South San Francisco City Council's role in setting the terms of the noise mitigation program as a whole, not from the fact or terms of any individual funds-for-easement contract.

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[22] *See Thomson*, 38 Cal. 3d at 644 (city council member was city officer subject to section 1090); *City of Imperial Beach,* 103 Cal. App. 3d at 195 (same); 89 Ops.Cal.Atty.Gen. at 50 (same); 91 Ops.Cal.Atty.Gen. 1, 1-2, 6-7 (2008) (applying section 1090 to conduct of city council member); 86 Ops.Cal.Atty.Gen. 118, 119, 122 (2003) (applying section 1090 to city mayor); 84 Ops.Cal.Atty.Gen. 34, 37-38 (2001) (same).

[23] *See Lexin*, 47 Cal. 4th at 1074.

[24] *Fraser-Yamor Agency, Inc.*, 68 Cal. App. 3d at 211 (citations omitted).

[25] Even if the funds were construed to be grants, the courts and this office have previously determined that grant agreements generally are contracts for purposes of section 1090. *See e.g. Honig*, 48 Cal. App. 4th at 350; 89 Ops.Cal.Atty.Gen. 258, 260-262 (2006); 85 Ops.Cal.Atty.Gen. at 177; 92 Ops.Cal.Atty.Gen. 67, 68-72 (2009).

But while the noise mitigation program as a whole may not be considered a contract in the traditional sense, we must remember that the terms "contract" and "making a contract" are not to be given narrow or technical interpretations that would limit the scope and defeat the legislative purpose of Government Code section 1090.[26] From this prophylactic perspective, we can see that the noise mitigation program as a whole makes possible, and establishes ground rules for, the individual contracts between property owners and the city. For this reason, we perceive that participation in the program is, in itself, the kind of planning and development that leads up to the execution of the individual contracts.

Our review of the facts has already established that both the mayor and the council member were on the city council when the city changed the program guidelines to authorize a new round of offers to property owners in the original zone (in which the council member resides) and to expand the zone (in which the mayor resides).[27] The council member was on the two-member subcommittee that approved the amendments of the program, and had direct involvement in the plan. The mayor was not on the two-member subcommittee, and we are informed that he abstained from discussing and participating in the adoption of the amendments to the program. Nevertheless, under Government Code section 1090, both the council member and the mayor are conclusively presumed to have been involved in the modification of the program by virtue of their membership on the council, which had ultimate authority over the program.[28]

When an official is a member of a board or commission that has the power to execute a contract, the official is deemed constructively to have participated;[29] hence, "California courts have consistently held that the public officer cannot escape liability for a section 1090 violation merely by abstaining from voting or participating in discussions

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[26] *See Honig*, 48 Cal. App. 4th at 314; *People v. Gnass*, 101 Cal. App. 4th 1271, 1292 (2002) (citations omitted); *Millbrae Assn. for Residential Survival*, 262 Cal. App. 2d at 237.

[27] *See generally* 76 Ops.Cal.Atty.Gen. 118, 121 (1993) (mere opportunity to join in affirmation of contract is participation in making); 89 Ops.Cal.Atty.Gen. at 50 (renewal of contract without negotiation or change in terms is making of contract).

[28] Even if the council delegated the responsibility of modifying the program to the subcommittee, the council would retain legal responsibility for the program. *See* 87 Ops.Cal.Atty.Gen. 9, 10 (2004) (governing board does not avoid section 1090 conflict by delegating contracting authority).

[29] *Thorpe*, 83 Cal. App. 4th at 659; *Fraser-Yamor Agency, Inc.*, 68 Cal. App. 3d at 211-212.

or negotiations."[30] Accordingly, we conclude that if the mayor and the council member were to receive program funds for noise insulation improvements to their properties, each would participate in the making of a contract in his official capacity for purposes of Government Code section 1090.

Cognizable Financial Interest

"Put in ordinary, but nonetheless precise, terms, an official has a financial interest in a contract if he might profit from it."[31] In this case, there is a direct financial interest: entering into contracts under the program would provide the mayor and council member with up to $15,000 worth of goods and services. For purposes of section 1090, both officials have been involved in shaping the program that would make them eligible for these funds. As our Supreme Court has observed, such a situation presents a "paradigmatic conflict of interest."[32] Thus, the contemplated contracts between each official and the City would clearly be proscribed by Government Code section 1090, unless the transactions come within the ambit of an exception to the statute.

Exception for Recipient of Public Service Generally Provided

The Legislature has provided certain exceptions to the application of Government Code section 1090. If an officer's financial interest is a "remote interest," as defined in Government Code section 1091, or a "noninterest," as defined in section 1091.5, a contract may be executed despite section 1090's prohibition. If a "remote interest" is present, the contract may be made if the officer discloses his or her financial interest in the contract to the public agency, such interest is noted in the entity's official records, and the officer completely abstains from any participation in the making of the contract.[33] If a "noninterest" is present, the contract may be made without the officer's abstention, and a noninterest generally does not require disclosure.[34]

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[30] *Thomson*, 38 Cal. 3d at 649 (citations omitted).

[31] *Honig*, 48 Cal. App. 4th at 333.

[32] *Lexin*, 47 Cal. 4th at 1075 (addressing situation where trustees of the board that administered city's retirement system negotiated changes to benefits received by members of the system, including themselves).

[33] Govt. Code § 1091(a); 88 Ops.Cal.Atty.Gen. 106, 108 (2005); 87 Ops.Cal.Atty.Gen. 23, 25-26 (2004); 83 Ops.Cal.Atty.Gen. 246, 248 (2000); 78 Ops.Cal.Atty.Gen. 230, 235-237 (1995).

[34] *City of Vernon v. Central Basin Mun. Water Dist.*, 69 Cal. App. 4th 508, 514-515 (1999); 92 Ops.Cal.Atty.Gen. 19, 21 (2009); 88 Ops.Cal.Atty.Gen. at 108-109; 83

The only exception that merits examination under the factual circumstances presented here is the "noninterest" specified in subdivision (a)(3) of section 1091.5. This exception 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."[35]

We have addressed the scope of the "public services" exception to section 1090 on several occasions.[36] The court of appeal discussed section 1091.5(a)(3) in the case of *City of Vernon v. Central Basin Municipal Water District*,[37] and more recently, our Supreme Court has analyzed the provision in detail in the case of *Lexin v. Superior Court*.[38] For our present purpose, we must determine whether the benefits offered by the noise mitigation program are in the nature of "public services generally provided," and whether the benefits would be granted to the mayor and council member "on the same terms and conditions" as if they were not members of the city council.[39]

"Public services generally provided" certainly include public utilities such as water, gas, and electricity.[40] 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."[41] Thus, for example, in *City of Vernon*, a municipal water district's sale of reclaimed water to just 23 water purveyors (who then retailed the water) was deemed to be a public

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Ops.Cal.Atty.Gen. at 247; 78 Ops.Cal.Atty.Gen. 362, 369-370 (1995).

[35] Govt. Code § 1091.5(a)(3).

[36] *See e.g.* 92 Ops.Cal.Atty.Gen. at 70-72; 89 Ops.Cal.Atty.Gen. 121, 123-125 (2006); 88 Ops.Cal.Atty.Gen. 122, 126-127 (2005); 81 Ops.Cal.Atty.Gen. 317, 320 (1998); 80 Ops.Cal.Atty.Gen. 335, 338 (1997).

[37] *City of Vernon*, 69 Cal. App. 4th at 513-515.

[38] *Lexin*, 47 Cal. 4th at 1085-1102 (in part, relying on this office's interpretation of the meaning and scope of Govt. Code § 1091.5(a)(3)).

[39] As both we and the *Lexin* court have noted, the legislative history of the "public services" exception does not provide any insight into the Legislature's intent with respect to the scope of the exception. *See* 81 Ops.Cal.Atty.Gen. at 320; *Lexin*, 47 Cal. 4th at 1086.

[40] 81 Ops.Cal.Atty.Gen. at 320.

[41] *City of Vernon*, 69 Cal. App. 4th at 514.

service within the scope of subdivision (a)(3).[42] We have previously determined that the rental of airplane-hangar space at a public airport is a public service,[43] as is the sale of advertising space in a city brochure to be distributed free to city residents,[44] even though relatively few individuals would seek to avail themselves of those services. Hence, the fact that the public constituency for a particular service is small is not disqualifying.[45]

Furthermore, while it is true that noise mitigation funds are available only to those whose properties are in the zones designated as most adversely affected by airport noise, an entry barrier based on restricted eligibility does not in itself preclude application of the public services exception.[46] The exception extends to services provided by a public agency to a constituency that consists of a subset of the public, as long as the services are provided to all recipients (including public officials and employees), on the same terms and conditions.[47] In accordance with these criteria, the furnishing of noise insulation improvements through the noise mitigation program is a public service within the meaning of section 1091.5(a)(3), so long as program funds are provided to the mayor and the council member on the same terms and conditions as they are provided to any other eligible resident of the covered zones.

As the *Lexin* court has stated, the phrase "on the same terms and conditions" is a key part of subdivision (a)(3), which "codifies a critical nondiscrimination principle."[48] There must be no special treatment of a council member or board member, either express or implied, as a consequence of that person's status as an official.[49] In *Vernon*, a board member of a municipal water district was also an owner and officer of one of the water companies that received deliveries of reclaimed water from the district. But, because all the companies were charged the same rate for the reclaimed water, and there was no

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[42] *Id*. at 514-515.

[43] 89 Ops.Cal.Atty.Gen. at 123-124; *see also* 81 Ops.Cal.Atty.Gen. at 320.

[44] 88 Ops.Cal.Atty.Gen. at 128.

[45] *Lexin*, 47 Cal. 4th at 1087; *see also id*. at 1100.

[46] *See Lexin*, 47 Cal. 4th at 1095 (where public employee pension benefits were conferred only on public employees, fact that public employment is not available to every citizen did not preclude application of section 1091.5(a)(3)); *see also id*. at 1093 (administration of public employee pensions is a service "generally provided" within meaning of section).

[47] *Lexin*, 47 Cal. 4th at 1094-1095.

[48] *Id*. at 1088.

[49] *Id*. at 1101.

special rate for the company in which the board member had a financial interest, the court of appeal held that the "public services" exception applied.[50]

Similarly, we concluded that where a city council member's purchase of advertising space from the city would be made at a rate established by the city council, based solely on the specifications of the ad, and with no special rate or discount for the council member, the transaction would fall within the exception.[51] We also determined that members of an airport commission that made recommendations regarding the leasing of space at a municipal airport could continue to rent hangar space at the airport at the rates applicable to other renters, and that their rental agreements would qualify as a noninterest within the meaning of subdivision (a)(3).[52] In *Lexin*, the Supreme Court determined that a pension benefit increase given to certain members of a city's retirement system, including several trustees on the public board that negotiated the increase and administered the system, was a noninterest under subdivision (a)(3), in that the trustees received the pension benefit on the same terms and conditions as other covered employees, without regard to their board membership, and with no special tailoring or individualized consideration.[53] The Court noted that, while individual employees' actual benefits might vary, the same formula for calculating the benefits—which took into account factors such as salary, length of service, and age—would be applied to all.[54]

To be clear, the public services exception generally will *not* apply when provision of the service involves an exercise of discretion that would permit favoritism toward officials, or occurs on terms that are tailored to an official's particular circumstances.[55] Thus, we concluded that a former city council member who participated in the discussion and approval of a city loan program while on the council could not later acquire a loan under the program, where a determination of the former council member's eligibility for the loan, and the terms of the loan, would require discretion and judgment, and the

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[50] *Vernon*, 69 Cal. App. 4th at 514-515.

[51] 88 Ops.Cal.Atty.Gen. at 128.

[52] 89 Ops.Cal.Atty.Gen. at 123-125.

[53] *Lexin*, 47 Cal. 4th at 1062-1063, 1099.

[54] *Id*. at 1100; *cf. id*. at 1089 n. 18 ("Term variations that hinge on neutral factors wholly independent of an official's status . . . do not affect the section 1091.5(a)(3) analysis.").

[55] *Id*. at 1088, 1100; 1100 n. 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 (same).

conditions of the loan would have been specific to the particular proposal in question.[56] Under those circumstances, it could not be demonstrated that non-officials would have received similar terms.[57]

We also recently concluded that the public services exception would not permit an air pollution control district to provide a pollution-reduction grant to an applicant who was on the district's board of directors, where each application submitted to the grant program had to be individually evaluated by the district for compliance with various performance criteria, cost-effectiveness, and consistency with the objectives of the program.[58] We determined that the weighing of the applications required the exercise of judgment and discretion, and that the public services exception does not encompass "consideration of conditions unique to each proposal and subject to the particularized judgment and discretion of the district or its board."[59] In another opinion, we concluded that an irrigation district that routinely furnished construction services to its customers at established hourly rates could not contract with a district director to construct roads on the director's property in exchange for terminating a preexisting obligation of the district to repair a bridge located on the property, even though the arrangement appeared to be financially advantageous to the district.[60] The arrangement would have been uniquely applicable to the director's property, and thus could not satisfy the "same terms and conditions" requirement of Government Code § 1091.5(a)(3).[61]

After its review of these and other authorities, the Supreme Court in *Lexin* construed section 1091.5(a)(3) as establishing 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."[62] While the exercise of some discretion in the formation of a contract is not always fatal to the availability of the public services

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[56] 81 Ops.Cal.Atty.Gen. at 320-321.

[57] *Lexin*, 47 Cal. 4th at 1089 (discussing opinion).

[58] 92 Ops.Cal.Atty.Gen. at 68, 72.

[59] 92 Ops.Cal.Atty.Gen. at 72.

[60] 80 Ops.Cal.Atty.Gen. at 336-338, 341.

[61] 80 Ops.Cal.Atty.Gen. at 338-339.

[62] *Lexin*, 47 Cal. 4th at 1092.

exception,[63] it is particularly problematic when discretion is exercised with respect to who receives a benefit, or whether or to what extent to allocate a benefit.[64]

In examining the evolution and operation of the noise mitigation program, we find that the determination of who receives a benefit is not subject to the kind of discretion that would foreclose application of the public services exception. It is true that the mayor and council member are presumed to have participated in shaping the program in a way that establishes their own eligibility to receive benefits, and that the city council could have taken other actions under which the mayor and council member might not have become eligible. However, as the *Lexin* court noted, almost all acts involve some choice among alternatives,[65] and nothing in the language of Government Code section 1091.5(a)(3) or in any case or opinion interpreting that section suggests that "discretion in the establishment of benefits that will then be available to a broad group of constituents is problematic."[66] In this case, the program's eligibility zones are directly related to the noise contour map and to criteria established by the FAA and SFO. Moreover, eligibility for funds is still based solely on whether one's home is located in one of these zones. The application form for the program merely asks the property owner if he or she wishes to participate, and requires a copy of the recorded grant deed for the property if the owner chooses to do so. The application process is thus distinguishable from the application processes we examined in connection with the city loan program and the pollution-reduction grant program, where applications competed against each other, were judged on particularized features, and were open to subjective evaluation.[67]

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[63] *Id*. at 1100.

[64] *Id*. at 1099-1100.

[65] *Lexin*, 47 Cal. 4th at 1100 (citing *Caldwell v. Montoya*, 10 Cal. 4th 972, 981 (1995).

[66] *Lexin*, 47 Cal. 4th at 1100. In *Lexin*, certain retirement board trustees became eligible for increased pension benefits when they negotiated the benefits for current city employees, a group in which they were included. The Supreme Court concluded that the fact that the negotiations did not also secure increased benefits for already-retired members of the city's retirement system did not foreclose application of Government Code section 1091.5(a)(3), so long as the board members received the benefits on the same terms and conditions as other currently-employed members of the retirement system. *Id*. at 1100-1101. By contrast, the *Lexin* court held that when another trustee, a union president, participated in negotiations that made himself and a few other incumbent union presidents uniquely eligible for individually-tailored benefits (while expressly barring future union presidents from receiving the same benefits), that conduct fell outside the purview of the public services exception. *Id*. at 1101-1102.

[67] *See* 81 Ops.Cal.Atty.Gen. at 320-321 (city loan program); 92 Ops.Cal.Atty.Gen. at

We further conclude that the allocation of benefits under the noise mitigation program comports with the requirements of the public services exception. The agreement between the city and the property owner is a standard form contract, which cannot be specially tailored for an individual homeowner. Reimbursement under the contract is contingent upon the owner's submission of plans for the noise insulation work to the city's building division and the noise mitigation program; once completed, the work must then be inspected and approved by building division staff. This individualized aspect of the program might raise a concern about improper exercise of discretion in favor of the mayor's or council member's plans or properties. However, the plans called for by the contract simply require the owner to demonstrate that each noise improvement feature added to the home meets certain objective building standards (for example, that a new window meets a specified Sound Transmission Coefficient rating, or that new attic insulation is of a certain thickness), and we are informed that inspections are performed solely with the purpose of ensuring that the applicable standards have been met.. Hence, the involvement of city staff is limited to making determinations based on objective criteria. We conclude that this process is distinguishable from the one encountered in our opinion regarding the loan program, which required a loan officer to forecast the likely success of a business plan.[68] Such a forecast, while no doubt grounded in the loan officer's expertise in the field, is necessarily based on debatable assumptions, and to some extent subjective. We also conclude that the involvement of city staff in the noise mitigation program is distinguishable from the involvement of district staff in the pollution-reduction program that we reviewed in a prior opinion. There again, staff had to make projections based on judgments that had subjective components.[69]

Finally, we address an aspect of the noise mitigation program relating to the amount of benefits allocated. The contract specifies that the program will reimburse the property owner "up to $15,000," which suggests that not all participants automatically receive the same benefit. For purposes of establishing the applicability of Government Code section 1091.5(a)(3), a contract involving a potentially variable benefit is not as straightforward to assess as is a contract involving standardized goods or services at set rates, such as the water sale contract at issue in *Vernon*,[70] or the advertising contract at issue in our opinion regarding the purchase of advertising space in a city brochure.[71] The central question is whether benefits can vary as a result of an improper exercise of

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72 (pollution-reduction grant program).

[68] *See* 81 Ops.Cal.Atty.Gen. at 320-321.

[69] *See* 92 Ops.Cal.Atty.Gen. at 68, 72.

[70] *See Vernon*, 69 Cal. App. 4th at 514-515.

[71] *See* 88 Ops.Cal.Atty.Gen. at 128.

discretion, or from special tailoring. We do not believe that to be the case here. First, the city has established maximum reimbursements for each type of noise insulation improvement (such as $800 per window or $2,500 per sliding door).[72] Second, so long as the maximum allowable amounts for each insulation feature are not exceeded, the total amount of the construction cost is not more than $15,000, and the construction work passes inspection, the requested reimbursement is routinely approved. While different homeowners may ask for, and therefore receive, different benefit amounts (up to the $15,000 cap), all are on an equal footing with respect to the benefits available. The mayor and council member will not have an advantage over other participants by virtue of their status as city officials. We believe these benefits pass muster under the standard set forth in *Lexin*: they are "broadly available to others similarly situated . . . and are provided on substantially the same terms as for any other constituent."[73]

On the facts as presented here, we conclude that the exception to Government Code section 1090 set forth in Government Code section 1091.5(a)(3), for "public services generally provided," permits a mayor who sits on a city council, and another city council member, to participate in a city program that provides funds to residents to make home improvements designed to mitigate the effects of aircraft noise.[74]

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[72] "Aircraft Noise Insulation Program (ANIP)," at www.ssf.net, under link for "Economic and community Development."

[73] *Lexin*, 47 Cal. 4th at 1092. *See also id.* at 1089-1090 (where officials' financial interests mirror those of other constituents, officials may receive government benefits so long as other constituents may receive them on same terms).

[74] We note that an interest that is a noninterest under Government Code section 1091.5 might still constitute a disqualifying interest for an official under the Political Reform Act of 1974 (Govt. Code §§ 81000-91014, "Act"). The Act provides that no public official shall "make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." Govt. Code § 87100. When a disqualifying conflict of interest exists, the Act requires that the official abstain from participating in every aspect of the decision-making process. *See Hamilton v. Town of Los Gatos*, 213 Cal. App. 3d 1050, 1058-1059 (1989); 88 Ops.Cal.Atty.Gen. 32, 33 (2005); 86 Ops.Cal.Atty.Gen. 142, 143 (2003). Some interests, however, may not require such abstention. *See* Govt. Code § 87103; Cal. Code Regs. tit. 2, §§ 18707-18707.9. A consideration of how the Act might bear on whether it is permissible for the mayor, the council member, or both, to participate in the program is beyond the scope of this opinion. The Fair Political Practices Commission provides advice to public officers concerning their duties and responsibilities under the Act. *See* Govt. Code §§ 83111-83114.

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