



Municipality of Anchorage
Board of Ethics
C/o Municipal Clerk's Office
632 W. 6th Ave. Ste. 250 Anchorage, AK 99501

Date: October 8, 2020

To: Deitra Ennis, Deputy Municipal Attorney

Re: Response to Request for Advisory Opinion 2020-5 – Confidentiality Waived¹

Dear Ms. Ennis:

This advisory opinion responds to the above *Request for Advisory Opinion* (Request). The Request concerns Mayor Ethan Berkowitz's minority interest in three local restaurants that are eligible to apply for municipal grants using funds from the State of Alaska pursuant to the federal Coronavirus Aid, Relief, and Economic Security (CARES) Act.² This advisory opinion constitutes the opinion of the Board of Ethics (Board) as to whether the restaurants' potential application for and receipt of municipal grants would trigger any violations of the Municipal Code of Ethics (Ethics Code.) The opinion is based on the facts set forth in the Request submitted by Deitra Ennis, Deputy Municipal Attorney, and information presented by Jason Bockenstedt, the Mayor's Chief of Staff, at the Board's meeting on September 2, 2020. If material facts were not disclosed or were misrepresented, the opinion is without force and effect.

I. Factual Background

Mayor Berkowitz holds a 4.3%, 6% and 10.4% ownership interest in three local restaurants, respectively.³ He received roughly \$65,000.00 in income from these interests in 2019.

In 2020, Mayor Berkowitz issued a series of Executive Orders in response to the ongoing COVID-19 public health crisis. One such Executive Order (EO), EO 15, closed bars and restaurants within the Municipality for indoor dining from August 3 through August 31, 2020, but allowed them to remain open for delivery, take-out, and outdoor dining services.

Also in 2020, the Municipality of Anchorage (Municipality) received approximately \$156 million in CARES Act funds from the State of Alaska. The funds were to be used in part to provide relief to small businesses impacted by the COVID-19 public health crisis.

¹ See AMC 1.15.050.D ("A request for advice is confidential unless confidentiality is waived by the person requesting an advisory opinion.")

² The CARES Act authorized funding to the states for expenditures necessitated by the COVID-19 public health crisis. It was adopted on March 27, 2020.

³ The restaurants are operated by limited liability corporations.

The Berkowitz Administration submitted a proposal to the Assembly for how to allocate the CARES Act funds received by the Municipality. Following extensive public process,⁴ the Assembly adopted an amendment to the proposal that allocated roughly \$7.1 million for businesses in the tourism and hospitality industries and directed the Administrative to distribute the funds as grants to eligible businesses.⁵

After the amendment was passed, Mr. Bockenstedt, and Christopher Schutte, the Director of the Office of Economic and Community Development, consulted with the Alaska Cabaret, Hotel, Restaurant, and Retailers Association (CHARR), the Brewers' Guild, and other hospitality organizations to develop a program for how the \$7.1 million in grant monies would be dispersed.⁶ The result was a set of agreed-upon criteria, based on the extent to which the businesses had been impacted by EO 15: bars that were entirely closed by EO 15 would be eligible for \$30,000 grants; restaurants and bars that were closed for indoor dining but could continue providing delivery, take-out, and outdoor dining services would be eligible for \$15,000 grants; and restaurants and bars only minimally impacted by EO 15 would be eligible for \$7,000 grants. It was also decided that the grant funds must be used for specified purposes only - to pay employees, vendors, mortgages, and rent, but not to pay taxes - in accordance with guidance from the federal Treasury Department.⁷ So long as a business met one of the eligibility criteria and certified that it would use the grant as required, it would be entitled to receive the entire grant amount (either \$30,000, \$15,000, or \$7,000, depending on the applicable criterion), rather than a lesser amount.⁸

A determination was also made that the grant program would be administered by CHARR. As the grant administrator, CHARR would be responsible for processing grant applications, determining whether the eligibility criteria have been met, and awarding the grants.

The Mayor is not affiliated with CHARR, and the Administration would have no role in reviewing or approving the grant applications. The applicable grant amount for each of the restaurants in which the Mayor has an interest is \$15,000.

II. Discussion

The Ethics Code contains a general rule regarding a public servant's participation in municipal contracts or grants. The rule, set forth in AMC 1.15.100B.2, prohibits a public servant from "having a personal or financial interest in a municipal grant, contract or lease," unless he "does not take official action that could directly affect the request for services, nor the award,

⁴ The tourism and hospitality industries originally requested that roughly \$21 million be set aside for their businesses.

⁵ The amendment was originally submitted by Assembly Member John Weddleton. The Administration did not oppose the amendment.

⁶ Chief of Staff Jason Bockenstedt, Communications Director Carolyn Hall, and Director of the Office of Economic and Community Development Christopher Schutte participated in these discussions on behalf of the Administration.

⁷ The eligibility criteria and grant terms were not subject to review and approval of the Assembly.

⁸ Mr. Bockenstedt confirmed that the \$7.1 million is sufficient to support the awarding of grants to every bar or restaurant that submits an application, given the number of such establishments within the Municipality.

execution, or administration of the grant, contract, or lease.”⁹ A financial interest is defined in AMC 1.15.080G as the “receipt of. . . [or] expectation of receiving a pecuniary benefit.”¹⁰ An “official action” is defined in AMC 1.15.060C as:

. . . participation in a process, including deliberation, in which a decision or recommendation is reached. Official action does not include:

1. Clerical or ministerial action on a matter. For purposes of this chapter, ministerial describes an act or duty that conforms to an instruction of prescribed procedure with limited or no use of judgment by the person performing the act or duty.
2. Action on a matter that does not substantially evaluate or impact the merits of the recommendation or decision.

The Board finds that Mayor Berkowitz would obtain a financial interest in a municipal grant if any of the restaurants in which he has an ownership interest applied for and received a local CARES Act grant. Receiving the grant would provide a pecuniary benefit to the restaurant and, in turn, its owners – including a minority owner such as Mayor Berkowitz. Thus, the Mayor would have a financial interest in the grant, as defined in the Ethics Code.

The Board also finds, however, that the Mayor would not be in violation of AMC 1.15.100B.2 because he did not take official action that could directly affect the award, execution, or administration of the grants. Although the Mayor participated in the public process regarding how the Municipality’s \$156 million in State in CARES Act funding should be distributed, the decision to allocate \$7.1 million to the tourism and hospitality industries was made by the Assembly – not the Mayor or his Administration. Moreover, while the Mayor’s Office ultimately established the grant eligibility criteria, it did so in consultation with the impacted industries. The result of this collaborative process were standard, broadly accepted criteria that comport with federal guidance, are easy to apply by requiring the application of minimal, if any discretion, and render all local restaurants and bars eligible for some level of funding, based strictly on the extent to which EO-15 impacted them. In short, neither the process of developing the criteria nor the resulting criteria themselves provided a competitive advantage to the Mayor’s businesses. Finally, because the grant administrator is CHARRS, the Mayor has no role in applying the eligibility criteria and determining which businesses should be awarded grants. The Board concludes that the Mayor’s involvement in the grant program does not rise to the level of official action that directly affects the award, execution or administration of the grants under AMC 1.15.100B.2.a.¹¹

⁹ The Code further provides that even if 1.15.100B.2.a is not satisfied, a public servant may request review by the Board. *See* AMC 1.15.100B.2.b.

¹⁰ *See* AMC 1.15.080H.

¹¹ Because the Mayor was involved in the over-all administrative process involving CARES Act funds allocation, there was discussion whether that involvement, which likely constituted official action, should also lead to the characterization of the downstream hospitality grant awards as official action. The Board noted that even if the Mayor’s actions overall constituted official action, they did not directly affect the awarding of the grants and did not provide any competitive advantage for the Mayor. The Board, therefore, would have reached the same conclusion through AMC 1.15.100B.2.b, which allows a public servant (in this case, the Mayor) to request additional review by the Board. When applying 1.15.100B.2.b, the Board employs a reasonable person standard, which the Board believes was met in this case.

III. Conclusion

Based on the facts presented, the Board concludes that the restaurants' potential application for and receipt of CARES Act grants would not render Mayor Berkowitz in violation of AMC 1.15.100B.2. If you have any questions about this advisory opinion, or if the facts change, please contact us.

Respectfully,

Terrence Kelly

Nunc Pro Tunc

Terrence Kelly, Board of Ethics Chair

Board of Ethics Members: Jack McKenna, Marsha Olson and Aesha Pallesen
