

MEMORANDUM

TO: Councilman Travis Mitchel
COPY: Scott Sellers, City Manager
FROM: Frank J. Garza, City Attorney
DATE: March 3, 2017

Re: Conflict of Interest Opinion

On February 24, 2017, you requested an Ethics Opinion per Section 2-280 (b) of the City Code of Ordinances. This request is a follow up to a conversation that we had prior to you taking office in May 2016.

ISSUE

Will business transactions between Mitchell Motorsports and the City of Kyle (“City”) violate the City’s Ethics Code?

BACKGROUND

Mitchell Motorsports is a family owned business with two locations, the Kyle location opened in early 2014. You are the CEO of Mitchell Motorsports and were elected to the City Council in May 2016. You stated that most of the items the City purchases from Mitchell Motorsports are because your business is the only place in Kyle to have products needed by the City. Mitchell Motorsports is the only STIHL dealer and the only Ferris dealer in town. The City uses this type of equipment for their landscaping equipment. Based on the financial records provided, the City has been doing business with Mitchell Motorsports since 2014. Mitchell Motorsports also does business with the City of Buda and Hays Consolidated Independent School District. You provided information that the purchases by the City are minor purchases. City management has confirmed that because of the minimal cost of these purchases, they are not required to go through the city’s procurement process nor do the purchases require City Council approval. Specifically, you provided the following history of transactions between the City and Mitchell Motorsports:

<u>Year</u>	<u>Gross Profits</u>	<u>Transactions</u>	<u>Avg. Transaction</u>
2014	\$ 952.73	31	\$30.73
2015	\$2,321.26	55	\$42.21
2016	\$2,645.06	54	\$49.16
2017	\$ 27.75	2	\$13.87

Based on the facts, the provisions in the Ethics Code that are relevant are as follows:

Sec. 2-171. - Improper economic benefit.

(a) *General rule.* To avoid the appearance and risk of impropriety, a city official or employee shall not take any official action that he or she knows is likely to affect the economic interests of:

- (1) The official or employee;
- (6) A business entity in which the official or employee knows that any of the persons listed in subsections (a) (1) or (a) (2) holds an economic interest;

(b) *Recusal and disclosure.* A city official or employee whose conduct would otherwise violate Subsection (a) must recuse himself or herself. From the time that the conflict is or should have been recognized, he or she shall:

- (1) Immediately refrain from further participation in the matter, including discussions with any person likely to consider the matter; and
- (2) Promptly file with the city secretary the appropriate form from disclosing the nature and extent of the prohibited conduct.

Sec. 2-172. - Unfair advancement of private interests

(a) *General rule.* Except when performing a duty or responsibility of the position held, to serve the health, welfare or public safety of the city, to accomplish a public purpose, or to benefit the public in general, a city official or employee may not use his or her official position to unfairly advance or impede private interests, or to grant or secure, or attempt to grant or secure, for any person (including himself or herself) any form of special consideration, treatment, exemption, or advantage beyond that which is lawfully available to other persons. A city official who represents to a person that he or she may provide an advantage to that person based on the official's position on a board or commission violates this rule.

Sec. 2-175. - Representation of private interests.

(b) Representation before the city.

(1) **General rule.** A city official or employee shall not represent for compensation any person, group, or entity, other than himself or herself or this or her spouse or minor children, before the city...

(2) **Prestige of Office and Improper Influence.** In connection with the representation of private interests before the city, a city official or employee shall not:

- (A) assert the prestige of the official's or employee's city position for the purpose of advancing private interests;

Sec. 2-180. Prohibited Interest in Contracts

- (a) **Charter Provision.** The Charter of the City of Kyle, in Section 12.03, states “No officer or employee of the City shall have a financial interest, direct or indirect, or by reason of ownership of stock in any corporation in any contract with the City, or be financially interested, directly or indirectly in the sale to the City of any land, materials, supplies, or services except on behalf of the City as an officer or employee;... Any violation of this section with the knowledge, express or implied, of the person or corporation contracting with the City shall render the contract voidable.”

This subsection does not permit any officer or employee to fail to comply with the requirements for giving notice of conflict, recusal and filing the required conflict forms with the City Secretary.

- (f) An officer or employee that has an interest prohibited by this Section, shall give notice of the conflict, recuse himself or herself from participation in any discussions at any public meeting, or with the city staff concerning the interest or matter in which a conflict exists, and file the required disclosure with the City Secretary;...

ANALYSIS

Based on the ethics rules above, it is clear that a business owned by a city official, including a councilman, can have transactions with the City as long as the official complies with the Ethics Code requirements. Specifically, as a city official, you must comply with the following:

- Shall not take any official action as a councilperson regarding any contract or transaction with the City. This includes voting on any contract as well as having any contact or communication with City staff regarding a transaction with Mitchell Motorsports. If the City did ever go through a procurement process or enter into a contract that required City Council action, you would be required to recuse and disclose. This recusal would preclude you from any participation in the matter and you would be required to complete the necessary affidavit with the City Secretary.
- Shall not use your position as a councilperson to unfairly advance private interests including Mitchell Motorsports, or to grant or secure, or attempt to grant or secure, for yourself or your business any form of special consideration, treatment, exemption, or advantage beyond that which is lawfully available to other businesses. This provision, even with minor transactions, would prohibit you from trying to influence where city staff purchases equipment or parts for equipment. A simple conversation with city staff about parts or equipment could be a violation of this provision because when an employee sees you, they not only see a Mitchell Motorsports employee but also a city official. This is the reason you should have no contact with a city employee regarding Mitchell Motorsports transactions.

The City Charter seems to prohibit any transaction between a city official and the City. However, Section 2-180 (f) requires the city official to basically follow the requirements of Section 2-180 (f), which would mandate that the official give notice of the conflict, recuse himself from participation in any discussions at any public meeting, or with the city staff concerning the interest or matter in which a conflict exists. Therefore this section does not prohibit the contract or transaction from taking place as long as the official does not participate in any manner with the contract or transaction. Chapter 171 of the Local Government Code would also be relevant, but this state law still allows for city officials to have contracts or conduct transactions with an official's business as long as the official discloses, recuses and does not participate in the decision. The City's ethics code was patterned after this state law.

As stated, Mitchell Motorsports may continue to do business with the City as long as you have no involvement in any capacity with the City in such transactions. If you have any questions, feel free to contact me.