February 28, 2006

Amended SDEC Formal Advice Letter No. FA06-04

Advice Provided to:
Councilmember Kevin Faulconer
City Council District 2
202 "C" Street, 10th floor
San Diego, CA 92101

Re: Request for Conflict of Interest Advice on Downtown Community Plan

Dear Councilmember Faulconer:

This amended advice letter has been prepared in response to your email to the San Diego Ethics Commission dated February 17, 2006, and will supplement the advice letter previously issued on February 27, 2006. You are seeking formal advice from the Ethics Commission interpreting the provisions of the City's Ethics Ordinance, which is contained in the San Diego Municipal Code [SDMC].

QUESTION

Are you disqualified from participating in an upcoming municipal decision concerning the approval of the City's Downtown Community Plan update as a result of the two business entities operated by your spouse in the downtown area?

SHORT ANSWER

You are prohibited from participating in this municipal decision if it is reasonably foreseeable that the decision will have a material financial effect on your economic interests. Because the two business entities operated by your spouse are indirectly involved in the decision concerning the Downtown Community Plan update, you will be prohibited from participating in this decision if it is substantially likely that the approval of the plan will increase (or decrease) either business entity's gross revenues for a fiscal year in the amount of $20,000 or more. Likewise, your spouse's leasehold interests in real property in the downtown area will not be considered material unless it is reasonably foreseeable that the decision concerning the Downtown Community Plan will affect her leasehold interests in the specific manner described in detail below. Finally, there are public generally exceptions that may apply to these economic interests.

BACKGROUND

According to the information you have provided, your spouse currently owns two businesses located in the downtown area: Restaurant Events and Spa Tiki. Restaurant Events is a corporation wholly owned by your spouse in the business of planning and coordinating restaurant events for incoming convention attendees. In addition, Restaurant Events sells Gaslamp Quarter Gift Certificates and coordinates corporate block parties for private entities seeking to use the Gaslamp as a venue for an event. Spa Tiki is a limited partnership. Your spouse is the sole owner of Island Spa, Inc., the general partner of Spa Tiki. Spa Tiki is a spa and retail facility located in the Harbor Club. While both of your spouse's businesses are located in the downtown area, they are each operated out of leased premises.

You have also provided information concerning the proposed Downtown Community Plan update. You have reportedly conferred with the staff at the Centre City Development Corporation and determined that there are only two aspects of the plan that might be relevant to your economic interests: land use and housing, and economic development. You have provided a copy of the portion of the plan that addresses land use and housing, which outlines the following strategies:

- ensuring an overall balance of uses that furthers downtown's rule as the premier regional population, commercial, civic, cultural, and visitor center;
- fostering a diverse mix of uses in each neighborhood to support urban lifestyles;
- achieving building densities that ensure efficient use of available land;
- attaining an overall employment level of approximately 165,000 quality jobs to reflect downtown's rule as the premier employment center in the region;
- targeting a residential buildout population of approximately 90,000 people of diverse incomes to create vitality, a market for a broad array of supporting stores and services, and opportunities for living close to jobs and transit; and
- enhancing livability through arrangement of land uses and development intensities, including development of a system of neighborhoods sized for walking.

In addition to the chapter concerning land use and housing, you have provided a copy of the portion of the plan that addresses economic development. This section of the plan reflects a desire to increase the magnitude and concentration of employment in the downtown area through employment-oriented land uses including:

- attracting a greater variety of commercial tenants for office space;
- developing additional hotels geared toward serving more than the conventioneer market; and

- the addition of retail and service businesses (including restaurants and entertainment) designed to serve the influx of new residents in the area.

The plan documents further indicate that the role of City's Redevelopment Agency with respect to economic development will include: promoting development that furthers regional smart growth initiatives, financing public improvements, and maintaining land use balances.

ANALYSIS AND CONCLUSION

The question you present requires us to look at the City's Ethics Ordinance, which is located at SDMC sections 27.3501 through 27.3595. The Ethics Ordinance contains the City's rules governing conflicts of interest. Applicable definitions and provisions from the Political Reform Act [PRA] and the related regulations adopted by the California Fair Political Practices Commission [FPPC] expressly apply to the City's Ethics Ordinance. SDMC § 27.3503. We therefore turn to interpretations of state law from time to time for guidance in interpreting the City's Ethics Ordinance. These interpretations occur in the form of FPPC Regulations and FPPC advice letters.

A. General Prohibition

With respect to potential disqualification issues, SDMC section 27.3561 prohibits a City Official from knowingly influencing a municipal decision if it is reasonably foreseeable that the municipal decision will have a material financial effect on:

(1) any business entity in which the City Official or a member of the City Official's immediate family has invested $2,000 or more; and

(2) any business entity for which the City Official or a member of the City Official's immediate family is a director, officer, partner, trustee, employee, or holds any position of management.

(3) Any real property which the City official or a member of the City Official's immediate family has invested $2,000 or more.

In order to determine whether your spouse's business interests trigger a disqualification requirement, we must look at the definitions of the key terms contained in section 27.3561: "City Official," "influencing a municipal decision," "reasonably foreseeable," and "material financial effect."

B. City Official

The definition of "City Official" set forth in the City's Ethics Ordinance includes any elected or appointed City officeholder. Accordingly, as an elected member of the City Council, you are a City Official as defined in local law.

C. Influencing a Municipal Decision

The Ethics Ordinance defines the term "influencing a municipal decision" as follows:

> Influencing a municipal decision means affecting or attempting to affect any action by a City Official on one or more municipal decisions by any method, including promoting, supporting, opposing, participating in, or seeking to modify or delay such action. Influencing a municipal decision also includes providing information, statistics, analysis or studies to a City Official.

SDMC § 27.3503.

As a member of the City Council, which has the authority to approve or reject the proposed Downtown Community Plan update, it is clear that any participation (e.g., voting, supporting, opposing, etc.) in that determination will result in you "influencing a municipal decision."

D. Reasonably Foreseeable

The term "reasonably foreseeable," although not defined in the Ethics Ordinance, has been thoroughly analyzed by the FPPC in its advice letters. The FPPC has opined that an effect is considered "reasonably foreseeable" if there is a substantial likelihood that it will occur. *In re Orlik*, FPPC Inf. Adv. Ltr. I-98-175. The FPPC has also stated in several advice letters that in the earlier stages of a project or process, there is less likely to be a substantial likelihood of a material financial effect than in the later stages of a project. *In re Biondo*, FPPC Adv. Ltr. I-90-071; *In re Ragghianti*, FPPC Adv. Ltr. I-98-064. Ultimately, in order for your spouse's business interests to trigger your disqualification, it must be "substantially likely" that the subject decision will have a material financial effect on her two businesses.

E. Material Financial Effect – Business Entities

According to SDMC section 27.3561(c), "material financial effect" has the same meaning as that set forth in sections 18705 through 18705.5 of the California Code of Regulations. Regulation 18705.1 sets forth the materiality standards for "direct" and "indirect" economic interests in business entities. This regulation provides that the financial effect of a governmental decision on a business entity that is "directly involved" in the decision is presumed to be material. In other words, if Restaurant Events or Spa Tiki are "directly involved" in the municipal decision, there is a presumption that the decision will have a material financial effect on those entities. On the other hand, if these business entities are merely "indirectly involved" in the decision, it is presumed that the decision's financial effect on the entities will be material only if certain dollar thresholds are met.

FPPC Regulation 18704.1 contains guidelines for determining whether a business entity is directly or indirectly involved in these kinds of decisions. According to this regulation, a business entity is considered to be "directly involved" in a governmental decision if it "(1) initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or; (2) is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person." FPPC Regulation 18704.1(a). Based on the factual information you have provided, it is clear that your spouse's business interests are not directly involved in the decision concerning the Downtown Community Plan update.

Although not directly involved, your spouse's business entities may be indirectly involved in the proposed Downtown Community Plan update because they are located in the downtown area. In other words, her business interests may be indirectly affected by the proposed plan to increase housing density, create mixed-use centers, and promote employment-oriented land uses. FPPC Regulation 18705.1 delineates the criteria that must be applied in order to determine if the proposed Downtown Community Plan update will have a material financial effect on these indirectly involved business interests. In particular, this Regulation provides that the financial effect of a governmental decision on a business entity that is indirectly involved in the governmental decision is material if it is reasonably foreseeable that the governmental decision will result in:

- an increase or decrease in the business entity's gross revenues for a fiscal year in the amount of $20,000 or more;
- the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of $5,000 or more; or
- an increase or decrease in the value of the business entity's assets or liabilities of $20,000 or more.

FPPC Regulation 18705.1(c)(4).

In other words, is it substantially likely that the passage of the proposed Downtown Community Plan update will result in either Restaurant Events or Spa Tiki earning (or losing) $20,000 or more in a single fiscal year? This is a determination that you must make yourself; the Ethics Commission does not act as a finder of facts when providing advice. However, it is important to note that the subject municipal decision concerns an overall community plan and does not involve approving any specific projects. Based on the information you have provided, any specific projects ultimately proposed under the Downtown Community Plan would be subject to another review and approval process. So long as you have economic interests in the downtown area, each future decision pertaining to the approval of a specific project in that area will require a separate conflict of interest analysis. We suggest, therefore, that you consult with the Ethics Commission again in the future if and when a decision concerning a specific project involving the downtown area comes before you in order to thoroughly assess the effects that the project may have on your economic interests in that area.

F. Material Financial Effect – Real Property Interests

As discussed above, your spouse has a leasehold interest in the two properties that are the subject of this letter. FPPC Regulation 18704.2 sets forth guidelines for determining whether a real property interest is "directly" or "indirectly" involved in a municipal decision. In particular, real property is considered directly involved in a governmental decision if:

> The real property in which the official has an interest, or any part of that real property, is located within 500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the governmental decision. For purposes of subdivision (a)(5), real property is located "within 500 feet of the boundaries (or proposed boundaries) of the real property which is the subject of the governmental decision" if any part of the real property is within 500 feet of the boundaries (or proposed boundaries) of the redevelopment project area.

FPPC Regulation 18704.2(a)(1).

Because your spouse has a leasehold interest in real property located within the area encompassed by the Downtown Community Plan, these interests are considered to be "directly" involved in the pending municipal decision. FPPC Regulation 18705.2 identifies the materiality standards for "directly" involved real property interests. In particular, this Regulation states that directly involved leasehold interests in real property are presumed to be material, but that this presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any effect on any of the following:

> (A) The termination date of the lease;
>
> (B) The amount of rent paid by the lessee for the leased real property, either positively or negatively;
>
> (C) The value of the lessee's right to sublease the real property, either positively or negatively;
>
> (D) The legally allowable use or the current use of the real property by the lessee; or
>
> (E) The use or enjoyment of the leased real property by the lessee.

FPPC Regulation 18705.2(a)(2).

As with the business interests discussed above, you must ultimately decide whether the Downtown Community Plan is substantially likely to affect your spouse's leasehold interests in any of the manners described above. It is important to reiterate that, although the current decision involves an overall community plan and not a specific project, you may need to revisit this analysis if and when a decision is pending concerning a specific project in order to determine whether disqualification will be required when your spouse's leasehold interests are materially affected.

G. Public Generally Exception

Even if it is reasonably foreseeable that a governmental decision will have a material financial effect on your spouse's business or real property leasehold interests, you would not be disqualified from participating in the decision if the effect of the decision on your interests is indistinguishable from the effect of the decision on the "public generally." FPPC Regulation 18707. This exception exists because it is assumed that a public official is less likely to be biased by a financial impact on his or her economic interest when a significant part of the community is experiencing the same impact from a governmental decision. *In re Condotti*, FPPC Adv. Ltr. A-99-154. In order for the "public generally" exception to apply, it must be reasonably foreseeable that the decision will affect a "significant segment" of the public in substantially the same manner. FPPC Regulation 18707(a).

In the case of an interest in a business entity, a "significant segment" of the jurisdiction is defined to mean: 2,000 or twenty-five percent of all business entities in the jurisdiction or the district the official represents, so long as the effect is on persons composed of more than a single industry, trade, or profession. FPPC Regulation 18707.1(b)(1)(C). In order for the exception to apply, not only must the governmental decision affect a significant segment of business entities, but it must also affect the public official's economic interest in substantially the same manner that it will affect the other business entities.

With respect to an interest in real property, FPPC Regulation 18707.1(b)(1)(B) defines a "significant segment" of the jurisdiction as follows: "(i) ten percent or more of all property owners or all homeowners in the jurisdiction of the official's agency or the district the official represents; or (ii) 5,000 property owners or homeowners in the jurisdiction of the official's agency." In other words, in order for the "public generally" exception to apply to your spouse's leasehold interests, the decision must affect the threshold number or percentage of property owners identified in this Regulation.

H. Conclusion

Your spouse's ownership of Restaurant Events and Spa Tiki constitutes economic interests for you that must be considered when these business entities are directly or indirectly involved in municipal decisions. You may not participate in a municipal decision if it is reasonably foreseeable that the decision will have a material financial effect on your spouse's business or leasehold interests unless you determine that the decision will affect a significant segment (as defined above) of the public in substantially the same manner. Whether the financial effect is "material" depends on whether the business entity or leasehold interest is "directly" involved (in which case materiality is presumed but can be rebutted in the case of a real property interest) or whether it is "indirectly" involved (in which case materiality depends on one or more particular thresholds being met). If, for a particular decision, you determine that the financial effect of the decision on your spouse's economic interests is "material," and you determine that the "public generally" exception does not apply, then you must disqualify yourself from participating in that decision.

Please note that this advice letter is being issued by the Ethics Commission solely as technical assistance from a regulatory agency as provided by SDMC section 26.0414(b). It is not to be construed as legal advice from an attorney to a client. Moreover, the advice contained in this letter is not binding on any other governmental or law enforcement agency.

If you have any additional questions, please do not hesitate to contact our office.

Sincerely,

Stacey Fulhorst
Executive Director