December 21, 2007

SDEC Informal Advice Letter No. IA07-07

Jennifer LeSar
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2410 First Avenue
San Diego, CA 92101

Re: Request for Advice Regarding City Official's Ability to Influence a Municipal Decision Involving a Client

Dear Ms. LeSar:

This advice letter responds to your e-mail communication to the City of San Diego Ethics Commission dated December 5, 2007. You seek general advice from the Ethics Commission regarding how to interpret the provisions of the City's Ethics Ordinance, which is contained in the San Diego Municipal Code [SDMC]. Your letter seeks the Commission's assistance with regard to how your position on the Centre City Development Corporation [CCDC] Board of Directors will impact your ability to participate in various municipal decisions on behalf of clients of your company, LeSar Development Company. Because you have not identified any specific municipal decisions, we are treating your e-mail as a request for informal advice.

QUESTION

Does your position on the CCDC Board of Directors legally preclude you from having conversations and negotiations with Redevelopment Agency staff (other than CCDC officials and staff members) on behalf of your clients or with regard to any development projects and opportunities that they might bring forward to the Redevelopment Agency?

SHORT ANSWER

The City's Ethics Ordinance precludes you from using your official position to influence a municipal decision that involves one of your client's projects. Thus, the lawfulness of your communications with Redevelopment Agency staff concerning a client's project depends on whether or not you are using your official position, which, in large part, depends on whether or not the client's project falls under the jurisdiction of CCDC. If a client's project has the potential of coming before CCDC, you may not attempt to influence decisions regarding that project by communicating with any staff members working on that project, including any employees of the Redevelopment Agency. On the other hand, if a client's project has no potential of coming before CCDC, then you may communicate with the staff associated with that project, including Redevelopment Agency staff, so long as it is clear to those staff members that you are not acting on behalf of CCDC.

BACKGROUND

You currently hold a position on the CCDC Board of Directors. CCDC is a public nonprofit corporation created by the City of San Diego. You also own a real estate consulting business, LeSar Development Company. This company represents clients that have business before the City of San Diego, and in particular have matters that may come before the City's Redevelopment Agency. Although the City Council serves as the Redevelopment Agency's legislative body, the Agency is legally separate and distinct from the City of San Diego.

The relationship between CCDC and the Redevelopment Agency is controlled by a 1982 Operating Agreement. This Agreement does not require Redevelopment Agency employees to serve as staff to CCDC; instead, CCDC has its own staff for the redevelopment projects within its jurisdiction. In other words, CCDC employs CCDC staff to process the matters that come before it, while "City employees" in the Redevelopment Division of the City Planning & Community Investment Department provide staffing to the Redevelopment Agency. Despite operating as two distinct entities, however, CCDC and the Redevelopment Agency do not operate in complete isolation; when a matter is subject to the jurisdiction of both entities, staff members of the Redevelopment Agency may have some involvement in matters that come before the CCDC Board.

Your December 5, 2007, e-mail communication does not identify any particular municipal decisions involving your clients. Instead, you indicate that you have clients with matters that may come before the Redevelopment Agency, and are seeking guidance regarding the extent to which you may communicate with Redevelopment Agency staff concerning these matters.

ANALYSIS

At the outset, you should know that the Ethics Ordinance's conflict of interest rules are derived from the state's Political Reform Act, and accordingly we interpret our rules to be consistent with those set forth at the state level. The state's Fair Political Practices Commission [FPPC] has adopted regulations and issued advice letters that interpret state law, and we therefore look to these resources when analyzing conflict of interest questions.

As a member of the CCDC Board of Directors, you are a "City Official" who is subject to the City's Ethics Ordinance, and in particular the provisions of the Ethics Ordinance that prohibit officials from influencing municipal decision in which they are financially interested. In particular, SDMC section 27.3561 prohibits City Officials from knowingly influencing a municipal decision if it is reasonably foreseeable that the municipal decision will have a material financial effect on any of their economic interests. The term, "municipal decision" is defined at SDMC section 27.3503 to include any decisions by any City board or commission, including the CCDC Board.

The term "reasonably foreseeable," although not defined in the Ethics Ordinance, has been 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

Adv. Ltr. I-98-175. "A financial effect need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility." *In re Harron*, FPPC Adv. Ltr. A-07-02.

The Ethics Ordinance defines "economic interests" to include "any person from whom a City Official or a member of the City Official's immediate family has received (or by whom you have been promised) $500 or more in income within twelve months prior to the municipal decision." SDMC § 27.3561(b)(4).[1] "Income of an individual also includes a pro rata share of any income of any business entity or trust in which the individual or spouse owns, directly, indirectly or beneficially, a 10-percent interest or greater." Cal. Gov't Code § 82030(a).

Because LeSar Development Company receives income from clients, and because you are the sole owner of this company, that client income must be considered when determining whether or not you are disqualified from participating in a particular municipal decision. *In re McCabe*, FPPC Adv. Ltr. A-07-072. Under SDMC section 27.3561(b)(4), you are prohibited from using your status as a City Official to influence a municipal decision that is substantially likely to have a material financial interest on any client that has provided your business with $500 or more in income during the previous twelve months. Thus, the conclusions reached in this advice letter will apply to any client that has paid $500 or more to LeSar Development Company within the previous twelve months.

In addition, for purposes of this advice letter, we will assume that your clients will be seeking some type of discretionary entitlement from CCDC or the Redevelopment Agency, or will otherwise be a named party to a proceeding before these agencies. In such circumstances, your clients would be considered "directly involved" in the particular decision. FPPC Regulation 18704.1(a). According to FPPC Regulation 18705.3, "any reasonably foreseeable financial effect on a person who is a source of income to a public official, and who is directly involved in a decision before the official's agency, is deemed material."[2] Thus, if a client has paid $500 or more to your company, and is "directly involved" in a decision before CCDC or the Redevelopment Agency, we may presume that the decision will be substantially likely to have a material financial effect on that client.

In other words, SDMC section 27.3561(b)(4) prevents you from using your position as a CCDC Board member to influence CCDC and Redevelopment Agency decisions if the decision will have a material financial effect on a client that has paid $500 or more to your company. The FPPC has adopted a regulation to assist in determining when a City Official is, and is not, using his or her official position to influence a governmental decision. According to FPPC Regulation 18702.3:

> (a) With regard to a governmental decision which is within or before an official's agency or an agency appointed by or subject to the budgetary control of his or her

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[1] Note that this advice letter addresses only the conflicts of interest that may arise from receiving client income, and does not address other types of financial interests, such as real property interests, investment interests, and sources of gifts, that may also give rise to a conflict under the Ethics Ordinance.

[2] Please contact the Ethics Commission for additional assistance with regard to any specific situation where your client is not "directly involved" in a particular municipal decision. In such circumstances, the conclusions reached in this advice letter could change.

> agency, the official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official contacts, or appears before, or otherwise attempts to influence, any member, officer, employee or consultant of the agency. Attempts to influence include, but are not limited to, appearances or contacts by the official on behalf of a business entity, client, or customer.
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> (b) With regard to a governmental decision which is within or before an agency not covered by subsection (a), the official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official acts or purports to act on behalf of, or as the representative of, his or her agency to any member, officer, employee or consultant of an agency. Such actions include, but are not limited to the use of official stationery.

Thus, there are two sets of rules that may apply to a client's matter. The first rule applies when the relevant municipal decision is within or before CCDC. The second rule applies when the relevant municipal decision is not before CCDC. *In re Stovall*, FPPC Adv. Ltr. I-06-018.

A. Decision Before CCDC

As stated above, SDMC section 27.3561(b)(4) prohibits members of the CCDC Board from appearing before the Board for the purpose of influencing a decision on behalf of a client. A member of the Board may not avoid this prohibition by simply disqualifying himself or herself from the decision. In other words, a recusal from voting on a particular decision does not enable a Board member to otherwise influence the decision by discussing the matter informally with other Board members or with the staff working on the matter. FPPC Regulation 18702.3(a) expressly provides that a public official is attempting to use his or her official position to influence a governmental decision whenever the official contacts or appears before any member, officer, employee or consultant of the agency for the purpose of influencing the decision on behalf of a client.[3]

As a member of the CCDC Board, therefore, you may not appear before CCDC on behalf of any of your clients, nor may you contact any CCDC officers, employees, or consultants regarding the client's project, even if you have already recused yourself from voting on the project. *In re Buchert*, FPPC Adv. Ltr. I-99-242. You are also prohibited from working "behind the scenes" (e.g., ghostwriting a document that your client submits) to influence such decisions. *In re Levinger*, FPPC Adv. Ltr. I-88-328. These interpretations are consistent with the conclusions reached in *In re Hyde*, SEDC Adv. Ltr I-03-08, wherein this office opined that members of a City commission may not appear, directly or indirectly, before their own commission for purposes of influencing decisions on behalf of their clients.

As indicated above, this prohibition extends beyond the immediate scope of the CCDC Board; it also applies to the staff associated with the Board. Ultimately, the prohibition applies to communications with any staff member who participates in a CCDC project by reviewing the

[3] There are several exceptions to this prohibition, such as preparing and submitting technical drawings, but none of these exceptions appears to apply to your particular situation.

project, making recommendations, rendering advice, making approvals, or otherwise assisting in the processing of the project. *In re Bowler*, FPPC Adv. Ltr. I-93-287.

Your question focuses expressly on Redevelopment Agency staff, which consists of individuals who are not employed by CCDC. The prohibition will, however, reach any staff member, including an Agency staff member, who is involved in a project that may come before CCDC. Although CCDC and the Redevelopment Agency are independent of each other and have separate staffs, the prohibition will apply to the extent that a Redevelopment Agency staff member is involved in a CCDC project. Even if an individual is not technically employed by CCDC, he or she may still serve in a staff capacity on the project. Accordingly, you would be impermissibly influencing a municipal decision if you contact Redevelopment Agency employees regarding a CCDC decision that involves one of your clients. In *In re Martello*, FPPC Adv. Ltr. A-85-190, the FPPC refused to apply the rule solely to the employees directly assigned to a planning commission. Instead, it interpreted "planning staff" to include members of the city's planning department, the public works department, the utilities department, and the city attorney's office, before concluding that "a planning commissioner may not contact or otherwise attempt to influence planning staff concerning a pending matter on behalf of a client."

As we stated previously in the *Hyde* advice letter, "the prohibition is in effect as to any staff member involved in supporting or assisting the commission with regard to commission business." Thus, to the same extent that you may not represent a client before CCDC, and may not contact CCDC staff to influence the client's matter, you are also precluded from influencing a client's project by communicating with Redevelopment Agency employees who are working on projects that have the potential of coming before CCDC.[4]

B. Decision before Agencies other than CCDC

As indicated above, there is a second rule pertaining to City Officials with clients who have matters before an agency other than the official's own agency (or in your case, before entities not subject to the budgetary or appointive authority of CCDC). This rule will apply to situations where your clients have projects that come before the Redevelopment Agency, but do not come before CCDC, such as a project in a redevelopment area outside of downtown San Diego, i.e., outside CCDC's jurisdiction. Because CCDC does not exercise budgetary or appointive control over the Redevelopment Agency, communicating with Redevelopment Agency staff on matters that don't involve CCDC does not constitute influencing a matter before your Board. Instead, such communications implicate the second rule identified above, which requires only that you act solely without regard to your official position. *In re Spencer*, FPPC Adv. Ltr. I-04-162. In other words, it must be clear to those you are communicating with that you are not acting on behalf of CCDC. You may not, for example, use CCDC letterhead or otherwise suggest to any Redevelopment Agency officer or staff member that you are representing the interests of CCDC. *Id.*

[4] Because FPPC Regulation 18702.3(a) applies not only to an official's own board, but also to any other board, committee, etc. under the budgetary or appointive authority of the official's board, this conclusion would also prohibit you from communicating on behalf of your client with regard to a project that comes before any other entity whose members are appointed by CCDC or whose budget is subject to CCDC approval.

For purposes of the second rule, it is important to keep in mind that it applies only to situations where the decision will never come before the CCDC Board. This rule will not apply to any projects that may come before the Board, that are appealable to the Board, that may be reconsidered by the Board, or that may otherwise be subject to decisionmaking by the Board, even if the possibility is remote. *In re Bowler*, FPPC Adv. Ltr. I-93-287. If a project has the potential of going before the CCDC Board, the first rule will apply. *In re Martello*, FPPC Adv. Ltr. A-85-190. On the other hand, if a project is truly outside the scope of CCDC's jurisdiction, you may communicate with the staff associated with that project, including Redevelopment Agency staff, so long as you are not doing so on behalf of CCDC.

CONCLUSION

As set forth above, the lawfulness of a communication with Redevelopment Agency staff largely depends on whether or not the communication pertains to a matter that could come before CCDC. If a client's matter involves a CCDC project, you may not engage in any communications pertaining to that project with anyone who is serving in a staff capacity in connection with that project, including those individuals who are technically employed by the Redevelopment Agency. On the other hand, if the client's matter involves a redevelopment project outside the jurisdiction of CCDC, then you may communicate with Redevelopment Agency staff concerning that project so long as you are not acting on behalf of, or as the representative of, CCDC. In such instances, we recommend that you expressly advise such staff members that you are communicating with them in your individual capacity and not as a member of the CCDC Board.

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.

Sincerely,

Alison Adema
General Counsel

By: Stephen Ross
Program Manager-Technical Assistance