

January 17, 2018

SDEC Formal Advice Letter No. FA18-01

Advice Provided To:
Jana Mickova Will, Of Counsel
Environmental Law Group LLP
Varco & Rosenbaum
225 Broadway, Suite 1900
San Diego, California 92101

Re: Request for Advice Regarding the City's Post Employment Lobbying Provisions

Dear Ms. Will:

This advice letter has been prepared in response to your request to the City of San Diego Ethics Commission for guidance regarding the application of the Ethics Ordinance's post-employment lobbying provisions that have been triggered by you leaving City employment to take a position with the Environmental Law Group [ELG]. You are seeking clarification of your ability to communicate with City Officials during your one-year post-employment period.

QUESTIONS

1. Does the Ethics Ordinance's "litigation exception" allow you to communicate with City Officials in the City Attorney's Office regarding several cases involving a development project in the La Jolla Shores area that you previously worked on as a Deputy City Attorney?
2. Do the City's post-employment restrictions preclude you from communicating with City Officials in connection with a conflict of interest waiver that might be required to allow you to work for ELG on the litigation arising from the La Jolla Shores project?
3. Do the City's post-employment restrictions preclude you from assisting other employees of ELG with their lobbying efforts on municipal decisions in which you were not personally or substantially involved in your capacity as a City employee?

SHORT ANSWERS

1. Yes. The post-employment lobbying restrictions in the Ethics Ordinance contain a "litigation exception" that permits communications between attorneys involved in litigation brought by or against the City. Thus, to the extent that you are representing a party in litigation involving the City of San Diego, you may communicate with representatives of the City Attorney's Office regarding the litigation without violating the City's post-employment restrictions.

2. In general, yes. The City's post-employment restrictions prohibit you from attempting to influence municipal decisions on behalf of ELG and its clients during your one year post-employment period. Any communications you have with the City regarding a conflict waiver would ostensibly be made on behalf of ELG and its clients, and would therefore be prohibited unless an exception applies. An exception does exist, but it is limited to allowing you speak on the matter at a public hearing, such as a meeting of the City Council. Communications concerning a conflict waiver do not fall within the "litigation exception."
3. No. The City's post-employment restrictions do not preclude you from assisting other employees of ELG with their lobbying efforts provided that such efforts do not relate to projects in which you were personally or substantially involved in your capacity as a City employee.

BACKGROUND

Until recently, you were a Deputy City Attorney working in the San Diego City Attorney's Office's Land Use Litigation Unit. Your last day of employment with the City was January 8, 2018, and you are now employed by ELG, a land use and environmental law firm. ELG represents the real parties in interest [RPI] in two pending San Diego Superior Court [SDSC] cases: *La Jolla Shores Tomorrow v. City of San Diego, Bob Whitney and Playa Grande LLC* (SDSC case no. 37-2015-00037115) and *Segal v. City of San Diego, Playa Grande LLC* (SDSC case no. 37-2015-00037498) [hereinafter, "the La Jolla Shores Cases"]. Both cases challenge the City's issuance of entitlements for a development project in La Jolla Shores, and in both cases RPI have agreed to defend and indemnify the City. You previously represented the City in these cases in your capacity as a Deputy City Attorney, and are now interested in representing RPI as an ELG employee.¹

As a former City Official, your ability to communicate with current City Officials, including the Deputy City Attorney now representing the City in the above cases, is subject to the post-employment prohibitions contained in the City's Ethics Ordinance.

ANALYSIS

A. General Prohibitions

The City's Ethics Ordinance prohibits former City Officials from engaging in certain types of communications on behalf of a new employer for one year following their separation from the City. As a Deputy City Attorney, you were a "City Official," as that term is defined in San Diego Municipal Code [SDMC] section 27.3503. Because your City employment ended on January 8, 2018, these prohibitions will continue to apply to you until January 8, 2019.

¹ Although you stated that the City's interests in the La Jolla Shores Cases are aligned with RPI (and memorialized in a "joint defense/common interest agreement"), you also recognized the possibility of a conflict of interest under the California Rules of Professional Conduct arising from representing RPI after previously representing the City in the same litigation. Such conflicts fall outside the scope of the Ethics Ordinance, and are addressed only in the context of the application of the City's post-employment lobbying restrictions to communications relating to waiving such conflicts.

There are two prongs to the City's post-employment prohibitions: the project ban and the cooling off period. The "project ban" prohibits former City Officials from communicating (or helping others communicate) with current City officers and employees on behalf of a new employer with regard to projects they worked on while with the City. The "cooling off" period prohibits former City Officials from lobbying current City Officials for the purpose of influencing all types of municipal decisions on behalf of a new employer. Both types of prohibitions apply for the one year period that commences when the official leaves the City. Although the two types of prohibitions are similar, each has distinctive features. The two types are discussed separately below.

B. Project Ban

The City's project ban pertains to pending projects, and is intended to prevent City Officials from working on a particular project on behalf of the City and then "switching sides" to work on the same pending project for the other side. According to SDMC section 27.3550(a):

It is unlawful for any former City Official who received compensation from the City to work on a particular project during his or her City service to engage in direct communication with the City, for compensation, with regard to any pending application for discretionary funding or discretionary entitlements before the City relating to that particular project on behalf of any person other than a Public Agency for a one year period immediately following termination of service with the City.

The project ban does not apply to all municipal decisions, just those that involve "projects" you worked on previously. For purposes of the project ban, to "work on a particular project" means to "take part personally and substantially in the project by rendering a decision, approval, or disapproval; by making a formal written recommendation; by conducting an investigation; by rendering advice on a significant basis; or by using confidential information." SDMC § 27.3550(a)(1). A "project" is defined to mean "any matter where a private business has made an application to the City for discretionary funding or discretionary entitlements, or where the City exercises discretion to enter into a lease, agreement, or contract with a private business." SDMC § 27.3550(a)(2).

If the "project ban" applies to work you performed as a Deputy City Attorney, you would be legally precluded from communicating with all City employees regarding that project on behalf of ELG and its clients so long as the project is pending. The "project ban" also includes a "behind-the-scenes" component. According to SDMC section 27.3550(b): "It is unlawful for any former City Official, for compensation, to knowingly counsel or assist any person other than a Public Agency in connection with an appearance or communication in which the former City Official is prohibited from engaging pursuant to subsection (a) for a one year period immediately following termination of service with the City."

We can conclude, however, that the "project ban" does not apply to the litigation you worked on while with the City. Although a "project" existed with regard to the City granting permits for the La Jolla Shores project, the litigation surrounding the challenge of these permits is a separate and

distinct matter and does not itself constitute a “project.” In other words, while you were involved as a Deputy City Attorney in various municipal decisions relating to the litigation (i.e., how to defend the City against plaintiffs’ allegations), those lawsuit-related decisions are not “projects.” Accordingly, you are not subject to the “project ban” as a result of working as a Deputy City Attorney on the La Jolla Shores Cases. As discussed below, however, you are still subject to the cooling off period for the one-year period following your separation from the City.

C. Cooling Off Period

In addition to the “project ban,” the Ethics Ordinance precludes former City Officials from being paid to lobby the City on any municipal decision for a one-year period following their separation from City service. SDMC § 27.3550(d). This one-year period is often referred to as the “cooling off period” or “revolving door provision,” and is intended to prevent former City Officials from using the influence of their prior positions to communicate with current City Officials (often former colleagues or subordinates) for the benefit a private sector employer. The term “lobbying” is defined as a “direct communication with a City Official for the purpose of influencing a municipal decision on behalf of any other person.” SDMC § 27.3503. The Municipal Code defines “direct communication” to include talking to other persons by telephone or in person, and corresponding with other persons in writing, electronically, or by fax. *Id.* “Influencing a decision” means “affecting or attempting to affect an 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.” *Id.* It also includes “providing information, statistics, analysis, or studies to a City Official.” *Id.*

The term “City Official” means all elected officials, unclassified employees, commission and board members, consultants, and agency employees, to the extent that they are required to file a Statement of Economic Interests, or Form 700. This term encompasses all of the attorneys currently working in the City Attorney’s Office, including any Deputy City Attorney assigned to work on the La Jolla Shores Cases. Accordingly, you may not try to influence Deputy City Attorneys or any other City Officials with regard to any municipal decisions on behalf of ELG or its clients during the one-year post-employment period, unless an exception applies.

D. Litigation Exception

The City’s post-employment lobbying restrictions include an exception for communications between attorneys in the context of litigation. In particular, SDMC section 27.3550(e)(6) states that neither the project ban nor the cooling off period will apply to “any communication among attorneys representing a party or potential party to pending or actual litigation brought by or against the City or City agent, officer, or employee.” This exception applies squarely to your proposed representation of RPI in the La Jolla Shores Cases as an ELG employee. In other words, you may, on behalf of ELG and its clients, discuss litigation strategies, coordinate pleadings, and otherwise engage in direct communications with the attorneys in the City Attorney’s Office without violating the City’s post-employment restrictions.

In answer to your first question, therefore, your past employment as a Deputy City Attorney and your prior representation of the City in the La Jolla Shores Cases do not now preclude you from communicating with current Deputy City Attorneys regarding these cases on behalf of ELG and RPI.

E. Conflict Waiver

Your second question concerns potential communications with City Officials in connection with a conflict of interest waiver that might be required to allow you to represent RPI on the litigation arising from the La Jolla Shores project. As discussed above, the City's "cooling off" provisions preclude you from communicating with City Officials on behalf of ELG and its clients for the purpose of influencing a municipal decision, which includes decisions associated with the conflict waiver. The litigation exception discussed above does not encompass such communications.²

There is, however, a limited exception that applies to communication made in connection with public hearings (i.e., meetings held pursuant to the Ralph M. Brown Act; Cal. Gov't Code § 54950, *et seq.*), including meetings of the City Council. SDMC § 27.3550(e)(5). Thus, notwithstanding the prohibition discussed above, you may address the City Council if and when it meets to consider the waiver. You may also submit documents to the City that are made part of the record of that meeting.

Moreover, the "cooling off" period that applies to you during your one-year post-employment period does not apply to other representatives of ELG. In other words, other attorneys at ELG may communicate with the City regarding the conflict waiver and, as discussed below, you may assist ELG with such efforts.

F. Behind the Scenes Participation

Unlike the project ban, the cooling off provisions do not include a "behind the scenes" component. So long as the project ban does not apply to a particular municipal decision, you may assist other ELG employees with regard to their lobbying communications with City Officials concerning that decision. In other words, and to answer your third question, although you are precluded from directly contacting City Officials for the purposes of influencing municipal decisions, you may still assist ELG in its lobbying efforts. You are permitted to provide background information, opinions, and observations to other ELG employees in order to help them communicate with City Officials. You may, for example, assist other ELG employees with any direct communications they have with the City regarding the conflict waiver issue.

Keep in mind that, in addition to the one-year post-employment restrictions, the City's Ethics Ordinance contains a ban on sharing "confidential information." In the course of providing any "behind the scenes" information to ELG employees, you may not share any "confidential information" you obtained during your City employment. This prohibition generally applies when

² Although the conflict waiver is associated with litigation, the exception is intended to apply solely to communications between attorneys on matters directly related to pending litigation.

the disclosure of information is barred by law or could harm the City. Although the City and RPI don't appear to be adverse parties in the La Jolla Shores Cases, you are nevertheless encouraged to discuss with the City Attorney's Office the disclosure of any information that it may consider "confidential."

CONCLUSION

The Ethics Ordinance precludes you from lobbying the City for a one-year period after you've left City service. Accordingly, you may not have any direct communications with current City Officials during your post-employment period on behalf of ELG or any of its clients for the purpose of influencing municipal decisions. There is, however, an exception for communications with the City Attorney's Office on matters directly related to pending litigation. In addition, although the prohibition precludes you from communicating with any City Officials concerning a potential conflict of interest waiver, there is a narrow exception for written or verbal statements made at City Council meetings. Finally, the prohibition does not preclude you from assisting other ELG employees with their efforts to lobby City Officials so long as such efforts do not involve any projects in which you were significant involved as a City employee.

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 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,

[Redacted]

Stephen Ross
Program Manager-Technical Assistance