

July 17, 2018

SDEC Formal Advice Letter No. FA18-03

Advice Provided To:
Erica Snyder
LeSar Development Consultants
404 Euclid Ave., Suite 212
San Diego, CA 92114

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

Dear Ms. Snyder:

This advice letter has been prepared in response to your request to the City of San Diego Ethics Commission for guidance regarding the Ethics Ordinance's post-employment lobbying provisions that were triggered when you left the San Diego Housing Commission in March of 2018 to assume a new position with LeSar Development Consultants [LDC].

QUESTION

Will the City's post-employment lobbying restrictions apply to communications you plan to have with City Officials regarding the City's 2020-2024 Consolidated Plan in connection with LDC's contract with the City?

SHORT ANSWER

No. Your communications with City Officials regarding the Consolidated Plan will be within the scope of representing the interests of the City, and accordingly they are exempt from the City's post-employment restrictions under the "public agency" exemption.

BACKGROUND

Until March 9, 2018, you were employed by the San Diego Housing Commission as the Director of the Homeless Housing Innovations Department. In this capacity, you were a "City Official" as this term is defined by San Diego Municipal Code [SDMC] section 27.3503. You thereafter began employment with LDC, a consulting firm that, according to its website,¹ works "with individual municipalities and regional consortiums to assess their housing, community, and economic development needs and market conditions." In this capacity, LDC currently has a

¹ <http://www.lesardevelopment.com/projects/consolidatedplanning> (July 17, 2018)

contract with the City to assist with the development of the City's 2020-2024 Consolidated Planning Process [CPP]. Per the City's website,² "The Consolidated Plan is prepared every five years, and its planning process serves as the framework for a community-wide dialogue to identify housing, economic, and community development needs and priorities." You stated that LDC will be providing community engagement services (community forums and the development of a survey for community input) and reviewing local data to enable the City to determine the future goals and prioritizations for the new Consolidated Plan. You are currently working on this project in your capacity as an LDC employee, including providing project management services and meeting with local stakeholders. You plan to present project-related data and analysis to the City Council. Because your responsibilities will involve communicating with City Officials, you have asked for guidance regarding any impact the City's post-employment lobbying restrictions will have on your duties.

ANALYSIS

There are two prongs to the City's post-employment prohibitions: the cooling off period and the project ban. The "cooling off" period prohibits former City Officials from lobbying³ current City Officials for the purpose of influencing all types of municipal decisions on behalf of a new employer. The "project ban" prohibits former City Officials from communicating with current City officers and employees on behalf of a new employer with regard to projects they worked on while with the City. Both types of prohibitions apply for the one-year period that commences when the official leaves the City. Your one-year post-employment period commenced on March 9, 2018, your last day of employment with the Housing Commission, and will continue until March 9, 2019. Any communications you have with current City Officials and employees during this period are potentially subject to the Ethics Ordinance's post-employment lobbying prohibitions.⁴ As discussed below, however, the communications you have regarding the CPP are permissible under the Ethics Ordinance because they are being made on behalf of a public agency.

The cooling off period is set forth in SDMC section 27.3550(d), and includes an exemption for work performed by former City Officials on behalf of a public agency (see underlined language below):

- (d) It is unlawful for any former City Official to engage in direct communication for the purpose of lobbying the City if all of the following circumstances apply:
- (1) the former City Official served as a City Official within the previous twelve months; and
 - (2) the former City Official received compensation from the City for his or her services as a City Official; and

² <https://www.sandiego.gov/cdbg/general/consolidatedplanmaterials> (July 17, 2018)

³ 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." San Diego Municipal Code [SDMC] § 27.3503.

⁴ During your one-year post-employment period, you may not, for example, lobby the City regarding amending or extending LDC's contract with the City.

- (3) the former City Official is receiving compensation from a private business to engage in the direct communication with the City.

SDMC section 27.3550(d) applies only to lobbying activities paid for by a “private business,” which by definition excludes all public agencies. SDMC § 27.3503. Although you will be performing your CPP duties as an employee of a private business, these duties are ultimately being performed for the benefit of the City in connection with LDC’s contract with the City.⁵ Therefore, the communications you will make in connection with the CPP are more akin to that of a City employee working on the CPP. This office previously reached a similar conclusion in the case of a former Deputy City Attorney providing services to various City agencies within the scope of her new firm’s City contract. *In re Cola*, SDEC Adv. Ltr. FA06-10. Accordingly, the one-year cooling off period will not apply to any communications you have with City Officials regarding the CPP that are within the scope of LDC’s City contract.

The project ban is addressed in SDMC 27.3550(a) and (b), and also excludes work performed on behalf of a public agency (see underlined language below):

- (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.

....

- (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.

Nothing in the facts you provided suggests that you worked on any “projects” as a Housing Commission employee that are still before you as a LDC employee.⁶ However, even if the project ban did apply, the “public agency” language in subsections (a) and (b) would exempt any communications regarding the CPP made within the scope of LDC’s contract with the City. Finally, SDMC section 27.3550(e) provides an additional exemption applicable to the prohibitions contained within both the cooling-off provisions and the project ban. Subsection (e)(3) expressly states that these prohibitions do not apply “to the activities of any former City

⁵ Although you will receive a salary from LDC, and not the City, to work on the CPP, it is clear that your duties, including related communications with City Officials, will be performed on behalf of, and essentially paid for by, the City through its LDC contract.

⁶ In particular, the CPP is not a pending “project,” as that term is defined by SDMC section 27.3550(a)(2); moreover, your Housing Commission duties did not include assisting in the creation of the City’s Consolidated Plan. The project ban is discussed here only to provide a more complete overview of the City’s post-employment restrictions, and to point out that even if the ban applied it would be negated by the public agency exemption.

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Official who is an elected or appointed officer or employee of any Public Agency, or a consultant of any Public Agency, when that former City Official is solely representing that agency in his or her official capacity as an officer, employee, or consultant of the agency.” In other words, the Ethics Ordinance’s post-employment lobbying restrictions do not apply to your communications with City Officials to the extent that such communications are made within the course and scope of working on LDC’s City contract.

CONCLUSION

The Ethics Ordinance precludes you from engaging in particular types of communications with the City for a one-year period. As a general rule, you may not communicate with City Officials on behalf of LDC regarding pending municipal decisions during your one-year post-employment period. This prohibition does not, however, preclude you from communicating with City Officials and City staff on matters in which you are representing the interests of a public agency. Thus, the public agency exemption in SDMC section 27.3550 allows you to freely communicate with City Officials and City staff regarding CPP matters so long as you are doing so within the course and scope of LDC’s contract with the City.

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