

April 20, 2018

SDEC Formal Advice Letter No. IA18-02

Advice Provided To:
Ted Miyahara
Vice President, Multifamily Housing Finance
San Diego Housing Commission
1122 Broadway, Suite 300
San Diego, CA 92101

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

Dear Mr. Miyahara:

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 will be triggered when you leave employment with the San Diego Housing Commission [Housing Commission] and assume the position of Chief Executive Officer [CEO] at the San Diego Community Housing Corporation [SDCHC]. Because you have not identified a specific contemplated action during your post-employment period, we are treating your inquiry as a request for informal advice.

QUESTIONS

You have asked the following questions relating to your employment with SDCHC during the one-year period that the City's post-employment lobbying restrictions will be in effect:

1. Upon leaving City service, to what extent may I continue to communicate with current City Officials and employees?
2. Does my upcoming employment impact SDCHC's ability to provide services to, or partner with, owners or developers of housing who are currently seeking discretionary funding or discretionary entitlements from the City of San Diego or the Housing Commission, or will do so in the future?

SHORT ANSWERS

1. Upon leaving City service and during your one-year post-employment period you may continue to communicate with City Officials and City employees, but only to the extent that you are not lobbying on behalf of your new employer or communicating on projects that you worked on while employed by the Housing Commission.

2. The City's post-employment restrictions do not preclude SDCHC from providing services to, or partnering with, owners or developers of housing who are or will be seeking discretionary funding or discretionary entitlements from the City or the Housing Commission. Post-employment restrictions do not affect the actions of SDCHC or its development partners other than with regard to your personal communications.

BACKGROUND

You are currently employed by the San Diego Housing Commission as the Vice President of Multifamily Housing Finance. You are responsible for multifamily lending and multifamily bond issuance activities that require public hearings before the Housing Commission and the Housing Authority. In addition, you are responsible for the management and oversight of the Housing Commission's loan portfolio and private activity bond portfolio. Your last day of employment will be April 26, 2018, and on May 3, 2018, you will begin employment as the CEO of SDCHC, a nonprofit affordable housing developer. According to the information you provided, SDCHC may wish to engage in consulting, partnerships, or development opportunities with other developers that you conducted business with during your tenure at the Housing Commission.

ANALYSIS

A. General Prohibitions

The City's Ethics Ordinance prohibits former officials from engaging in certain types of communications on behalf of a new employer for one year following their separation from the City. Your one-year post-employment period will commence on April 26, 2018 (your last day of employment with the Housing Commission) and will continue until April 26, 2019.

There are two prongs to the City's post-employment prohibitions: the project ban and the cooling off period. Neither prong prohibits you from working on any SDCHC projects or with any SDCHC development partners; the restrictions only impact your direct and indirect communications with the City. The "project ban" prohibits former City Officials from communicating (or helping others communicate) with current City officers and employees (including Housing Commission board members 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 any 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, they have distinctive features and are discussed separately below.

Keep in mind that the prohibitions discussed in this letter apply solely to your direct and indirect communications with City Officials and City staff. The fact that these prohibitions apply to you does not prevent SDCHC from applying for funding or entitlements from the City, alone or in partnership with other developers. In other words, nothing in the City's Ethics Ordinance precludes SDCHC from continuing to participate in the same types of business it engaged in previously. Instead, the post-employment prohibitions serve only to restrict your involvement in SDCHC efforts to engage in such activities.

B. Project Ban

The City's project ban pertains to projects that are still pending at the City, 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 San Diego Municipal Code [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).

Although you did not identify any particular pending "projects" that you worked on as a Housing Commission employee, you should nevertheless be familiar with the project ban. To the extent that you worked on a project that is still pending, the project ban will apply to you during your one-year post-employment period. During this period, you may not communicate with anyone at the City or any of its agencies (Housing Commission, Civic San Diego, Convention Center Corporation) on behalf of SDCHC regarding any pending "project" that you worked on while with the Housing Commission. Note that this prohibition applies to any "project" you worked on, regardless of whether or not SDCHC was involved in the project.

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.

Accordingly, you may not assist other SDCHC employees, or any other developers that SDCHC is partnering with, regarding their communications with anyone at the City or any City agency if the communications concern a pending project you worked on while with the Housing Commission. In other words, to the extent that the project ban prohibits you from directly communicating with the

City, you are equally prohibited from indirectly communicating with the City by helping someone else make that communication.

The project ban applies as long as the project is pending during the one-year post-employment period. Once the project is no longer pending (e.g., contract is awarded, permit granted), the project ban no longer applies to communications related to that project. Keep in mind, however, that you will still be subject to the cooling off period for the full one-year period following your separation from the City, i.e., until April 26, 2019.

C. Cooling Off Period

In addition to the “project ban,” the Ethics Ordinance contains a separate prohibition that precludes former City Officials from lobbying the City on any municipal decision for a one-year period following their separation from City service. This one-year period is often referred to as the “cooling off” or “revolving door” period, and is intended to prevent former high level 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” is defined to include all elected officials, unclassified employees, commission and board members, consultants, and agency employees, to the extent that they file a Form 700. The term includes every Housing Commission employee who files a Form 700 and each member of the Housing Commission Board of Commissioners.

Unlike the project ban, the cooling off period does not apply to communications with City staffers or City agency staffers who are not required to file a Form 700. On the other hand, the cooling off period applies to more than just “projects” and thus extends to many more types of decisions than the project ban. It precludes you from lobbying City Officials on any pending “municipal decision,” which is defined as “any governmental decision that is not a ministerial act.” SDMC § 27.3503. Accordingly, during your one-year post-employment period you may not lobby any City Officials (including those at the Housing Commission) on any non-ministerial decisions, including SDCHC’s applications for funding or entitlements. This prohibition applies to any effort to affect the decision-making process, including the provision of information, statistics, analysis or studies. If SDCHC has an interest in, for example, a City ordinance addressing affordable housing in the downtown area, you may not provide information or statistics to City Officials regarding such issues.

Unlike the project ban, the cooling off provisions do not include a “behind the scenes” component. If the project ban does not apply, you may assist other SDCHC employees with regard to their communications with City Officials. In other words, although you will be precluded from directly contacting City Officials regarding a particular municipal decision, you may still work on that decision internally for SDCHC. You may, for example, provide background information and personal observations to a SDCHC employee in order to help them communicate with City Officials.¹

D. Other Permissible Communications with City Officials

There are other types of communications that do not fall within the prohibitions of the “project ban” or “cooling off” period. You may, of course, continue to have social contacts with former colleagues and communicate with them regarding any matter that is outside the scope of a “project” or involves some type of ministerial decision.

Moreover, the Ethics Ordinance provides that you may appear as a speaker at a public hearing or otherwise provide written statements that become part of the record of a public hearing. Communications made in this regard are expressly excluded from both the project ban and the cooling off provisions. SDMC § 27.3550(e)(5). A “public hearing” is any meeting subject to the Ralph M. Brown Act where a public record is kept. Thus, you may make an appearance on behalf of SDCHC at a Housing Commission or Housing Authority meeting to discuss any type of municipal decision, including one involving a “project” that you worked on while with the Housing Commission.²

In addition, you may discuss “projects” and other municipal decisions with current City Officials and staff members when doing so is not at the behest of, or in the interest of, SDCHC. Because the project ban and cooling off provisions apply only to communications for which you are compensated, you may communicate with the City on matters for which you receive no compensation. For example, you would not be precluded from sharing your thoughts with City Officials regarding a municipal decision to cut funding for the arts because you would not be doing so on behalf of SDCHC. It is relevant to note that the post-employment prohibitions apply to former City Officials on a “24/7” basis; they do not allow former City Officials to temporarily step out of their private employment (e.g., on their lunch hour or while on vacation) to discuss a matter on behalf of an employer.

¹ Note that all former City Officials are prohibited from using or disclosing any “confidential” information obtained during their City service. SDMC § 27.3564(e). Please contact the Ethics Commission for additional assistance if you have questions regarding this prohibition.

² SDMC section 27.3550(e) contains other exceptions to the post-employment prohibitions, including providing witness testimony, representing personal interests, and providing services to a public agency. Because these exceptions appear to be irrelevant to your employment with SDCHC, they are not discussed in this letter.

E. Working with Other Developers

Your inquiry also seeks guidance regarding SDCHC's ability to work with other developers in light of the City's post-employment laws. These laws do not impose any obligations or restrictions on SDCHC, nor do they apply to anyone employed by SDCHC other than you. The post-employment restrictions do not preclude SDCHC from providing services to, or partnering with, anyone, including any developers who are or will be seeking discretionary funding or discretionary entitlements from the City or the Housing Commission. The restrictions do not impair the actions of SDCHC other than with regard to your ability to directly or indirectly communicate with the City.

Moreover, because these rules apply only to your communications, they do not extend to other developers that are or will be working with SDCHC. In other words, these rules will not in any way restrict the ability of a developer partnering with SDCHC on a particular project to freely communicate with City Officials, including Housing Commission officers and employees. Aside from the restrictions that will apply to you, both SDCHC and its partners will be free to conduct business with each other and the City as they have done in the past.

CONCLUSION

The Ethics Ordinance prohibits you from engaging in particular types of communications with the City for a one-year period. To the extent that you worked on a particular project while with the Housing Commission, you may not, during your one-year post-employment period, have any communications (outside of a public hearing) with anyone at the City on behalf of SDCHC regarding that project, nor may you, on behalf of SDCHC, provide assistance to someone else who is making such communications. Moreover, you may not lobby (outside of a public hearing) any City Officials during the one-year post-employment period on behalf of SDCHC with regard to any municipal decision. These prohibitions do not, however, preclude you from communicating with current City Officials and City staff on matters unrelated to City business or unrelated to the interests of SDCHC. Nor do they preclude SDCHC from partnering with other developers for the purpose of seeking funding or entitlements from 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