

May 23, 2002

SDEC Formal Advice Letter No. FA02-01

Advice Provided to:

James R. Dawe, Esq.  
Seltzer Caplan McMahon Vitek  
2100 Symphony Towers  
750 B Street  
San Diego, CA 92101

Re: Request for Advice Regarding Lobbying Activity of City Board  
and Commission Members

Dear Mr. Dawe:

This advisory opinion is in response to your letter to the City of San Diego Ethics Commission dated May 21, 2002. You have requested a formal, written advisory opinion from the Ethics Commission concerning the effect of the Ethics Ordinance on your law firm's continued representation of clients in matters involving the City.<sup>1</sup> Your questions and the Commission's response, based on the information provided in your letter, are detailed below.

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<sup>1</sup> San Diego Municipal Code section 26.0414 provides that it is the responsibility and duty of the Ethics Commission to issue formal and informal advice and opinions to any person regarding the governmental ethics laws within the Commission's jurisdiction. This section further provides that "No person who acts in good faith based upon a formal opinion issued to him or her by the Commission shall be subject to administrative penalties for so acting, provided that the material facts are as stated in the opinion request."

## **QUESTIONS**

1. Does the Ethics Ordinance, including specifically San Diego Municipal Code [SDMC] section 27.3561, prohibit an attorney in your firm who serves on a City Board from attempting to influence municipal decisions which are not rendered by the City Board on which the attorney serves?
  
2. Does the Ethics Ordinance, including specifically SDMC section 27.3561, prohibit an attorney in your firm from attempting to influence municipal decisions, including a decision rendered by a City Board on which another attorney in your firm currently serves?

## **BACKGROUND**

You explain in your letter that a significant portion of your law firm's practice involves representation of various landowners, developers, and interested parties in administrative matters before the City. Several attorneys in your law firm are registered lobbyists under the City of San Diego Lobbying Ordinance.

Several of attorneys in your firm currently serve or anticipate serving on a "City Board" as defined in the Ethics Ordinance. These attorneys include Norman T. Seltzer (Civil Service Commission), Daniel E. Eaton (Civil Service Commission), Gregory A. Vega (Ethics Commission) and Victor Vilaplana (pending appointment to Centre City Development Corporation). In their capacity as volunteer members of City Boards, each of these attorneys is required to file an annual statement of economic interests pursuant to the California Political Reform Act of 1974, as amended.

The Ethics Ordinance generally governs conduct of "City Officials" including, among other persons, "any City Board member." SDMC § 27.3503. In turn, the phrase "City Board" includes "the boards of directors of all City agencies, and any board, commission, committee, or task force of the City established by action of the City Council under authority of the City Charter, Municipal Code, or Council resolution, whose members are required to file a statement of economic interests pursuant to the California Political Reform Act of 1974, as amended." SDMC § 27.3503.

In section 27.3561 of the SDMC entitled, “Disqualification of City Officials in Municipal Decisions Affecting Economic Interests,” the Ethics Ordinance provides:

It is unlawful for any City Official to knowingly influence a municipal decision if it is reasonably foreseeable that the municipal decision will have a material financial effect on:

- (a) the City Official or a member of his or her immediate family, if the material financial effect is distinguishable from its effect on the public generally; or
- (b) any of the following economic interests:
  - (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 hold any position of management; and
  - (3) any real property which the City Official or a member of the City Official’s immediate family has invested \$2,000 or more; and
  - (4) any person from whom a City Official or a member of the City Official’s immediately family has received (or by whom you have been promised) \$500 or more in income within twelve months prior to the municipal decision; and
  - (5) any person from whom a City Official or a member of the City Official’s immediate family has received gifts which total \$320 or more within twelve months prior to the municipal decision. This gift threshold is subject to adjustment in accordance with the provisions of section 27.3521; and
  - (6) the personal expenses, income, assets, or liabilities of a City Official or a member of the City Official’s immediate family.
- (c) For purposes of this section, “material financial effect” has the same meaning as that term is used in title 2, sections 18705 through 18705.5 of the California Code of Regulations.

The phrase “influencing a municipal decision” is defined in the Ethics Ordinance to mean

“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. The phrase “municipal decision” is defined to include essentially any decision of the City Council or a City Board as well as most decisions involving applications for land development, permits or approvals. SDMC § 27.3503.

### ANALYSIS

The legislative history which documents the adoption of San Diego Municipal Code section 27.3561 makes it unambiguously clear that this provision in the Ethics Ordinance was intended to locally codify a mirror image of the requirements in the Political Reform Act pertaining to disqualification of City Officials from decisions involving any of the City Official’s economic interests. See, page six of the Memorandum to the Council of the City of San Diego from Charles B. Walker, Executive Director, City of San Diego Ethics Commission, dated February 11, 2002, on file in the Office of the City Clerk of San Diego.

The provision in the Political Reform Act which parallels SDMC section 27.3561 is found at Government Code section 87100 and reads as follows:

No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

The scope of this disqualification requirement is defined in more detail in Title 2, Division 6 of the California Code of Regulations, section 18702.2 which is titled “Determining When a Public Official is Participating in Making a Governmental Decision.” This regulation reads in full as follows:

A public official "participates in making a governmental decision," except as provided in Title 2, California Code of Regulations, section 18702.4, **when, acting within the authority of his or her position**, the official:

- (a) Negotiates, without significant substantive review, with a governmental entity or private person regarding a governmental decision referenced in Title 2, California Code of Regulations, section 18701(a)(2)(A);
- (b) Advises or makes recommendations to the decisionmaker either directly or

without significant intervening substantive review, by:

- (1) Conducting research or making any investigation which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision referenced in Title 2, California Code of Regulations, section 18701(a)(2)(A); or
- (2) Preparing or presenting any report, analysis, or opinion, orally, or in writing, which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision referenced in Title 2, California Code of Regulations, section 18701(a)(2)(A).

(emphasis added)

The key language for determining the scope of the disqualification requirements under the Political Reform Act is the qualifying language in the regulation which limits its application to those circumstances in which an official acts “within the authority of his or her position.” This is a very important distinction for individuals, such as certain attorneys in your firm, who are City Officials serving as a volunteer member of a City Board or Commission, and who, in a separate, distinct, and private capacity lobby the City or represent clients doing business with the City.

It is the opinion of the Ethics Commission that the threshold criteria for disqualification under SDMC section 27.3561 is identical to the threshold criteria for disqualification of local governmental officials subject to Government Code 87100, et. seq. Under SDMC section 27.3561, a City Official is required to refrain from knowingly influencing a municipal decision only when (a) it is reasonably foreseeable that the municipal decision will have a material financial effect on the City Official’s economic interests; and (b) the City Official is acting or purporting to act in the course and scope of his or her duties as a City Official.

Your Question number 2 raises a concern regarding whether another attorney [Firm Attorney] in your firm, presumably one who is not a “City Official,” as that term is defined in the Ethics Ordinance, may attempt to influence a municipal decision before a City Board or Commission on which an attorney in your firm [Officer-Attorney] sits. Section 27.3561 does not contain any prohibitions applicable to the Firm Attorney because that attorney is not a City Official. However, section 27.3561 does prohibit the Officer-Attorney from participating in municipal decisions involving the Firm Attorney if it is reasonably foreseeable that the municipal decision will have a material financial effect on the Officer-Attorney’s economic interests. Generally, a City Official has an economic interest in “any business entity for which the City Official . . . is a director, officer, partner, trustee, employee, or holds any position of management. SDMC

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§ 27.3561(b)(2). A determination regarding whether a particular financial effect is “material” may be reached by applying the standards set forth in title 2, sections 18705, et seq. of the California Code of Regulations.

### CONCLUSION

**Answer to Question 1:** SDMC section 27.3561 prohibits an attorney in your firm who serves on a City Board from attempting to influence a municipal decision which will have a material financial effect on that attorney’s economic interests as defined in the Ethics Ordinance only in those circumstances when the attorney is acting or purporting to act in the course and scope of his or her duties as a City Official. For attorneys who are members of City Boards and Commissions, this means he or she is acting or purporting to act on behalf of that Board or Commission to which he or she serves as a member on or acting or purporting to act as a member of that Board or Commission. Disqualification is not required or triggered under SDMC section 27.3561 by the conduct of attorneys in your firm who are acting outside the scope of their duties as a City Official in the capacity of representing or lobbying on behalf of various landowners, developers and interested parties in administrative matters before the City.

**Answer to Question 2:** Except as specified above in answer to Question 1, SDMC section 27.3561 does not prohibit an attorney in your firm from attempting to influence municipal decisions, including a decision rendered by a City Board on which another attorney in your firm currently serves. However, the attorney serving on the City Board shall be disqualified from participation if the decision has a material financial effect on that attorney’s economic interests, as required by SDMC section 27.3561 and the Political Reform Act.

Thank you for contacting the Ethics Commission about this matter.

Sincerely,

Charles B. Walker  
Executive Director

CBW:db