

April 24, 2006

SDEC Formal Advice Letter No. FA06-08

Advice Provided to:  
Councilmember Ben Hueso  
San Diego City Council, District 8  
202 "C" Street, 10th Floor  
San Diego, CA 92101

Re: Request for Advice Regarding Participation in Municipal Decision Concerning  
Mercado Alliance, LLC

Dear Councilmember Hueso:

This advice letter has been prepared in response to your telephonic request submitted to the City of San Diego Ethics Commission on April 21, 2006. You are seeking advice from the Ethics Commission interpreting the provisions of the City's Ethics Ordinance which is contained in the San Diego Municipal Code [SDMC]. In particular, you are seeking advice on whether you may participate in a municipal decision concerning the Disposition and Development Agreement [DDA] between the Redevelopment Agency of the City of San Diego and Mercado Alliance, LLC in light of your previous employment by the City as the Project Manager for the Barrio Logan Redevelopment Project Area.

### **QUESTION**

May you participate in a municipal decision concerning potential litigation between the City's Redevelopment Agency and Mercado Alliance, LLC?

### **SHORT ANSWER**

Yes. Although you were previously involved in the Mercado project when you served as the City's Project Manager for the Barrio Logan redevelopment project area, your income from the City does not trigger disqualification because income from government agencies is exempt for purposes of the analysis. Similarly, although you may be called as a witness or named as a defendant in the potential litigation, it is not reasonably foreseeable that your personal finances will be affected in the amount of \$250 or more provided that your involvement in the project was within the scope of your City employment. The City has an obligation to defend and indemnify

you with regard to acts you performed within the scope of your City employment, and therefore your involvement in litigation related to the Mercado project should not affect your personal finances.

### **BACKGROUND**

From March of 2001 to February of 2004, you were employed by the City of San Diego as the Project Manager for the Barrio Logan redevelopment project area. Prior to March of 2001, the City's Redevelopment Agency entered into the DDA with the Mercado Alliance, LLC, which provided for the development of the Mercado commercial center in the Barrio Logan redevelopment project area. The development of this project continued during your tenure as Project Manager, such that you were involved in a variety of typical development issues. Your involvement with the Mercado project ceased in approximately late 2003, at which time the Deputy Director of the Redevelopment Division took over the City staff responsibilities for this project. In February of 2004, the Barrio Logan redevelopment project area was re-assigned to another City employee, and in November of 2004, you terminated your employment with the City. On January 10, 2006, you were elected to serve as the Councilmember for City Council District 8 in a special runoff election.

The City Council docket for April 24, 2006, states that the City Council will meet in closed session to discuss the Mercado DDA in the context of the "right of reverter" and potential litigation. You have indicated that, as a result of your previous role as the Barrio Logan Project Manager, you may be called as a witness or named as a defendant in this potential civil litigation.

### **ANALYSIS AND CONCLUSION**

SDMC section 27.3561 prohibits a City Official from knowingly influencing a municipal decision if it is reasonably foreseeable that the municipal decision will have a material financial effect on the City Official, a member of the City Official's immediate family, or any of the City Official's economic interests. According to section 27.3561, economic interests include the following:

- (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;
- (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;
- (3) any real property which the City Official or a member of the City Official's immediate family has invested \$2,000 or more;
- (4) 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; 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.<sup>1</sup>
- (6) the personal expenses, income, assets, or liabilities of or a member of the City Official's immediate family.

Based on the information you have provided, it is clear that subsections (1), (2), and (3) are not relevant to the analysis. Similarly, you have advised us that you have not received gifts with an aggregate value of \$360 or more from any party directly or indirectly involved in the Mercado DDA within the past twelve months. Therefore, in order to determine if your economic interests will be involved in the upcoming municipal decision concerning the Mercado DDA, it is appropriate to analyze subsections (4) and (6). With respect to subsection (4), you clearly received \$500 or more in income from the City of San Diego as the Barrio Logan Project Manager. However, the definition of "income" set forth in the Political Reform Act and accompanying regulations promulgated by the Fair Political Practices Commission [FPPC] explicitly exclude income from a local government agency. Cal. Gov't Code § 82030(b)(2) and FPPC Regulation 18232. (Note that the Ethics Ordinance specifically incorporates the applicable definitions and provisions of the Political Reform act and the FPPC Regulations. SDMC § 27.3503.)

We must also examine subsection (6) in light of the potential litigation and the fact that you may be called as a witness and/or named as a defendant and may therefore incur legal fees. According to SDMC section 27.3561(c), the term "material financial effect" has the same meaning as set forth in FPPC Regulations 18705 through 18705.5. Regulation 18705.5 states that the effects of a decision on an official's personal finances are "material" if the decision involves \$250 or more in a twelve-month period. We must therefore evaluate the underlying facts to determine if your involvement as a witness or defendant in the potential Mercado litigation would affect your personal expenses in the amount of \$250 or more in a twelve month period.

You have advised us that your prior involvement with the Mercado project was limited to the scope of your employment as the Barrio Logan Project Manager. You have stated that you did not have any involvement in this project as a private citizen. In addition, you have denied that you violated any law or in any way acted outside the scope of your duties and responsibilities as a City employee. Provided that your involvement in the Mercado project was limited to the proper exercise of your duties as the Barrio Logan Project Manager, the City must provide you with legal counsel should you be named as a defendant in the potential civil litigation. See Cal. Gov't Code § 825, which provides that the City has a legal obligation to defend and indemnify its employees in a civil lawsuit if the lawsuit arises out of acts performed by its employees in the course and scope of their duties. Note that the City Attorney's Office has recognized this obligation. See, e.g., City Attorney MOL 88-7 (February 1, 1988).

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<sup>1</sup> The \$320 gift limits at the time this section went into effect have been raised to \$360.

Additionally, you have stated that if you are called as a witness you would have no reason to require separate legal counsel independent from the attorneys assigned to represent the Redevelopment Agency in the potential litigation. It is therefore not reasonably foreseeable that your personal finances will be affected if you are called as a witness in the potential litigation involving the Mercado project.

As discussed above, it does not seem reasonably foreseeable that your participation in the upcoming closed session docket item will affect your personal finances in the amount of \$250 or more. Note that the FPPC has opined that an effect is considered “reasonably foreseeable” only if there is a substantial likelihood that it will occur. *In re Orlik*, FPPC Adv. Ltr. I-98-175. Moreover, the FPPC has stated that any financial effect, no matter how small, will result in the “reasonably foreseeable” standard being met as long as there is a substantial likelihood that the effect will occur. *Id.* An effect need not be certain to be considered “reasonably foreseeable,” but it must be more than a “mere possibility.” *In re Churchwell*, FPPC Adv. Ltr. A-06-034, citing *In re Thorner*, 1 FPPC Ops. 198 (1975).

In conclusion, your prior employment with the City as the Project Manager for the Barrio Logan redevelopment project area does not prohibit your participation in the closed session docket item concerning potential litigation between the City’s Redevelopment Agency and Mercado Alliance, LLC. On the one hand, your prior income from the City is irrelevant because salary from a local government agency is exempt for purposes of disqualification. On the other hand, it is not reasonably foreseeable that this decision will affect your personal finances. Although you may be named as a defendant in this potential litigation, the City will be obligated to provide you with legal counsel to the extent that your previous actions were limited to the scope of your duties and responsibilities 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 from an attorney 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 contact our office.

Sincerely,

Stacey Fulhorst  
Executive Director