[NOTE: In 2014, the California Fair Political Practices Commission amended Regulation 18706 to state that an outcome is “reasonably foreseeable” if it is a “realistic possibility.” An outcome need not be “substantially likely” to be considered “reasonably foreseeable.”]

January 24, 2007

Amended SDEC Formal Advice Letter No. FA07-01

Advice Provided To:
Councilmember Kevin Faulconer
City Council District 2
202 "C" Street, 10th floor
San Diego, CA 92101

Re: Request for Conflict of Interest Advice on Appeal of Environmental Determination Regarding Navy Broadway Complex

Dear Councilmember Faulconer:

This letter has been prepared in response to your request for an expedited answer to the question of whether or not you are disqualified from participating in the January 9, 2007, City Council discussion concerning an appeal of the environmental determination by the City of San Diego Development Services Department regarding the Navy Broadway Complex [NBC] project, and the Center City Development Corporation’s [CCDC] adoption of such determination.

[The original version of this advice letter was issued on January 8, 2007, in advance of the following day’s City Council meeting. We have subsequently discovered our error in analyzing this matter based on your spouse’s gross sales figures, when in fact it is her net income and earnings before taxes which are relevant. This letter, therefore, has been updated to reflect the appropriate materiality threshold for your spouse’s business interests. Note that the revisions to this letter do not alter the ultimate conclusion reached on the question you posed.]

BACKGROUND

Your question arises in the context of two businesses owned by your spouse in the downtown area: Restaurant Events and Spa Tiki. Restaurant Events is a corporation wholly owned by your spouse in the business of planning and coordinating restaurant events for incoming convention attendees. In addition, Restaurant Events sells Gaslamp Quarter Gift Certificates and coordinates corporate block parties for private entities seeking to use the Gaslamp as a venue for an event. You have advised us that in 2006, Restaurant Events’ net income was less than $500,000 and its earnings before taxes were less than $750,000. Spa Tiki is a limited partnership. Your spouse is the sole owner of Island Spa, Inc., the general partner of Spa Tiki. Spa Tiki is a spa and retail facility located in the Harbor Club. You have advised us that in 2006, Spa Tiki’s net income was less than $500,000 and its earnings before taxes were less than $750,000. Both of your spouse’s businesses are located in the downtown area[1], and both are operated out of leased premises. You have indicated that none of Restaurant Events' or Spa Tiki's clients or sources of income are stakeholders in the NBC project.

The fundamental issue is whether or not it is substantially likely that the NBC project decision before the City Council on January 9, 2007, will have a material financial effect on Restaurant Events or Spa Tiki. The City's Ethics Ordinance prohibits a City Official from participating in a municipal decision if it is reasonably foreseeable that the municipal decision will have a material financial effect on any business entity in which the City Official or a member of the City Official's immediate family is an officer, director, or holds a similar position of management, or has invested $2,000 or more. SDMC §§ 27.3561(b)(1)(2). Disqualification may also be required when the decision involves real property owned or leased by the official or a member of the official's immediate family. SDMC § 27.3561(b)(3).

According to the information you provided, the decision at issue before the City Council concerns a CEQA (California Environmental Quality Act) evaluation of the proposed NBC project. The evaluation was conducted by the City's Development Services Department [DSD] for CCDC, and compared the proposed project with the project described in environmental documents that were certified by the City Council in 1992. DSD concluded that the NBC project was adequately addressed in the prior environmental documents and that no additional environmental review is required. CCDC adopted DSD's evaluation. Several parties have now appealed the matter to the City Council. If the appeal is granted, additional environmental review will be required, to be paid for by the project's applicant. If the appeal is denied, no additional environmental review will be necessary.

Because the municipal decision at issue will be discussed by the City Council in only a few days, you have requested an expedited disqualification analysis. Such an analysis is set forth below. You may also be interested, however, in reviewing the advice letter we prepared for you previously (SDEC Advice Letter FA06-04), which similarly addressed conflict of interest issues raised by your spouse's ownership of Restaurant Events and Spa Tiki. That advice letter contained a thorough step-by-step disqualification analysis that may be of additional assistance to you. The discussion below consists of a more condensed analysis.

ANALYSIS

A. Material Financial Effect – Business Entities

Based on the information you provided, it is clear that neither Restaurant Events nor Spa Tiki is "directly involved" in the NBC environmental determination. Neither entity initiated the proceeding and neither is a named party to the proceeding. Because such business entities are at most "indirectly involved" in the decision, it is presumed that the decision's financial effect on these entities will not be material unless a certain dollar threshold is met. FPPC Regulation 18705.1(c).

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[1] Spa Tiki is located at 200 Harbor Drive, and Restaurant Events has its offices at 614 Fifth Avenue. You stated that neither business is located within 500 feet of the boundaries of the NBC project.

FPPC Regulations establish the thresholds that must be met before a particular municipal decision will have a material financial effect on an indirectly involved business interest. In particular, these regulations provide that the financial effect of a governmental decision on a business entity that has less than $500,000 in net income and less than $750,000 in earnings before taxes in its most recent fiscal year (as is the case with both Restaurant Events and Spa Tiki), and that is indirectly involved in the governmental decision, is material only if it is reasonably foreseeable that the governmental decision will result in:

- an increase or decrease in the business entity's gross revenues for a fiscal year in the amount of $20,000 or more;
- the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of $5,000 or more; or
- an increase or decrease in the value of the business entity's assets or liabilities of $20,000 or more.

FPPC Regulation 18705.1(c)(4).

As discussed above, the governmental decision at issue solely pertains to whether or not the NBC project will require additional environmental review. You have indicated that your spouse's business entities have absolutely no connection to the project's environmental review process or the parties involved, and that there is no basis upon which to believe that the City Council's decision to approve or denial the appeal will have any financial impact whatsoever on Restaurant Events or Spa Tiki, let alone the thresholds set forth above.

As explained above, in order for a prohibited conflict of interest to exist, it must be "reasonably foreseeable" that a decision will have a material financial effect on an official's economic interests. The City's Ethics Ordinance is based in large part on state law, and the SDMC explicitly incorporates the regulations adopted by the state's Fair Political Practices Commission [FPPC] concerning conflicts of interests. It is therefore relevant to note that the FPPC has opined that the financial effect of a decision is considered "reasonably foreseeable" only if there is a substantial likelihood that it will occur. *In re Orlik*, FPPC Inf. Adv. Ltr. I-98-175. Based on the information you have provided, it is readily apparent that it is not substantially likely that this particular decision concerning the NBC project will have a material financial effect on either of your spouse's business interests. Accordingly, we may conclude that your spouse's business interests do not create a conflict of interest that would disqualify you from participating in this matter.

B. Material Financial Effect – Real Property Interests

In addition to her business interests, your spouse has leasehold interests in the properties where Restaurant Events and Spa Tiki are located. You stated that these properties are not located within 500 feet of the boundaries of the NBC project, and that the NBC project does not involve: (1) the zoning, sale, purchase, or lease of these two parcels of real property; (2) the issuance, denial, or revocation of a license, permit, or other land use entitlement authorizing a specific use of the properties; (3) the imposition, repeal, or modification of any taxes or fees assessed or imposed on the properties; or (4) the construction of, or improvements to, streets, water, sewer, storm drainage, or similar facilities with respect to these properties. Accordingly, your spouse's leasehold interests in the two properties are at most "indirectly involved" in the NBC project decision. "The financial effect of a governmental decision on real property in which a public official has a leasehold interest and which is indirectly involved in the governmental decision is presumed not to be material." FPPC Regulation 18705.2(b)(1). This regulation also states:

> This presumption may be rebutted by proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real property in which the public official has an economic interest, which make it reasonably foreseeable that the governmental decision will:
>
> (A) Change the legally allowable use of the leased real property, and the lessee has a right to sublease the real property;
>
> (B) Change the lessee's actual use of the real property;
>
> (C) Substantially enhance or significantly decrease the lessee's use or enjoyment of the leased real property;
>
> (D) Increase or decrease the amount of rent for the leased real property by 5+ percent during any 12-month period following the decision; or
>
> (E) Result in a change in the termination date of the lease.

Because the City Council decision at issue solely concerns whether or not the NBC project will be subject to additional environmental review, and because you have indicated that such review would not have any of the above-described impacts on the Restaurant Events and Spa Tiki properties, we may conclude that there are no grounds for rebutting the presumption that the NBC project decision will not have a material financial interest on your spouse's leasehold interests. It is clear, therefore, that your spouse's leasehold interests do not create a conflict of interest that would disqualify you from participating in this particular matter.

CONCLUSION

In conclusion, based on the analysis set forth above, neither your spouse's business interests in Restaurant Events and Spa Tiki nor her leasehold interests in the properties where these businesses are located create a disqualifying conflict of interest for you with regard to the January 9, 2007, City Council discussion concerning the appeal of DSD's environmental determination of the NBC project and CCDC's adoption of that determination.

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 do not hesitate to contact our office.

Sincerely,

Cristie McGuire
General Counsel

By: Stephen Ross
Program Manager-Technical Assistance