[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."]

February 27, 2007

SDEC Formal Advice Letter No. FA07-02

Paul C. Marra
Keyser Marston Associates, Inc.
1660 Hotel Circle North, Suite 716
San Diego, CA 92108

Re: Request for Formal Advice Regarding Disqualification from Municipal Decisions that Involve Real Property Interests

Dear Mr. Marra:

This advice letter has been prepared in response to the February 2, 2007, letter sent by Centre City Development Corporation [CCDC] on your behalf to the City of San Diego Ethics Commission, seeking advice from the Commission interpreting the provisions of the City's Ethics Ordinance.

QUESTION

Does your ownership of real property within the CCDC redevelopment project area present a conflict of interest for you in your capacity as a CCDC consultant whose assignments are related to policies and programs within the redevelopment project area?

SHORT ANSWER

Because your condominium property is located within the CCDC redevelopment project area, it is "directly involved" in any CCDC decisions that affect the entire project area. It is presumed that such decisions will have a material financial effect on your condominium. As a general rule, you may not participate in any municipal decisions that will have a material financial effect on your condominium. The presumption of materiality, however, may be rebutted by proof that it is not substantially likely that the municipal decision will have any financial effect on the condominium. Moreover, your condominium ownership will not create a conflict of interest for you to the extent that the effect of any municipal decision on the property is indistinguishable from the decision's effect on the "public generally." Ultimately, however, if you cannot rebut the presumption of materiality or show that the "public generally" exception applies, then your condominium ownership will preclude you from engaging in the CCDC assignments identified.

BACKGROUND

According to information provided, you perform work for CCDC under a consulting contract. There has been a determination that you are a "City Official" under the City's Ethics Ordinance, and accordingly you file a Statement of Economic Interests pursuant to CCDC's conflict of interest code. You are purchasing a condominium within the CCDC redevelopment project area, and in that regard have identified a potential for conflicts of interest arising from your work on CCDC matters.

The February 2, 2007, letter to the Ethics Commission states that most of the services provided by your firm (Keyser Marston Associates, Inc.) to CCDC concern redevelopment proposals and transactions for specific sites, but that some of your assignments will be related to redevelopment proposals and transactions of a downtown-wide nature. Your letter seeks advice only with regard to the downtown-wide assignments, and accordingly this letter does not address any conflict of interest issues pertaining to specific sites.[1] You have identified the following five "downtown-wide" assignments:

(1) Assist CCDC in finalizing underwriting guidelines and other financial parameters to be used to evaluate development proposals and requests for assistance from affordable housing developers throughout downtown.

(2) Assist CCDC with its existing financial assistance program for moderate-income first-time homebuyers within the downtown area by providing information on comparable programs and outcomes in other communities, and preparing financial models of possible new programs for the downtown area.

(3) Provide financial analysis to CCDC with regard to its update of the Centre City Public Facilities Financing Plan. The update will include additional public facilities and set appropriate development impact fees for residential and non-residential development throughout downtown.

(4) Assist CCDC in structuring the Transfer of Development Rights Bank, a "bank" of developable Floor Area Ratio [FAR] that can be sold to developers seeking additional density in proposed developments, and which relates to a park acquisition program under the Downtown Community Plan. You would assist CCDC in developing methodologies to value the FAR and offer the FAR for sale.

(5) Estimate the fair market value of all underlying fee interests in downtown public streets in anticipation of possible future sales to individual developers.

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[1] Note as well that this letter does not address potential conflicts of interest created by your ownership interest in Keyser Marston or any other entity that may do business in the redevelopment area. This letter is concerned solely with potential conflicts of interest arising from your ownership interest in real property in the redevelopment area.

DISQUALIFICATION ANALYSIS

A. General Prohibition

With respect to potential disqualification issues, the City's Ethics Ordinance, at San Diego Municipal Code [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 "any real property which the City Official or a member of the City Official's immediate family has invested $2,000 or more." In order to determine whether your purchase of the condominium (which would obviously exceed the $2,000 threshold) triggers a disqualification requirement, we must look at the definitions of the key terms contained in section 27.3561: "influencing a municipal decision," "reasonably foreseeable," and "material financial effect."

B. Influencing a Municipal Decision

The Ethics Ordinance defines "municipal decision" to include any decisions by a "City board," a term that includes the CCDC board. Municipal decisions also include CCDC contracts and quasi-judicial land use decisions. With regard to whether or not you are "influencing" any municipal decisions in the course of providing consulting services to CCDC, the Ethics Ordinance states the following:

> Influencing a municipal decision means 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 February 2, 2007, letter indicates that your work for CCDC will include the five assignments identified above. Thus, to the extent that any of these assignments involve matters that will come before the CCDC Board or otherwise involve a contract or quasi-judicial land use decision, your involvement in these matters will rise to the level of "influencing a municipal decision."

C. Reasonably Foreseeable Material Financial Effect

The San Diego Municipal Code expressly incorporates the California Fair Political Practices Commission's [FPPC] regulations (title 2 of the California Code of Regulations) concerning the materiality of governmental decisions on various economic interests. SDMC § 27.3561(c). When evaluating conflict issues, therefore, we turn to the FPPC for guidance in interpreting the Municipal Code's disqualification rules. The FPPC has analyzed the term "reasonably foreseeable" in many of its advice letters, and has opined that an effect is considered "reasonably foreseeable" if there is a substantial likelihood that it will occur. *In re Orlik*, FPPC Inf. 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.*

Based on the law set forth above, disqualification will depend on whether you, as a City Official, are influencing municipal decisions in circumstances where it is substantially likely that the decision will have a material financial effect on the condominium you are purchasing. According to SDMC section 27.3561(c), "material financial effect" has the same meaning as that set forth in FPPC Regulations 18705 through 18705.5. Regulation 18705.2 sets forth the materiality standards for "direct" and "indirect" economic interests in real property. This regulation states that the financial effect of a governmental decision on real property that is "directly involved" in the decision is presumed to be material, while the financial effect of a decision on real property that is "indirectly involved" in the decision is presumed not to be material.

Regulation 18704.2 sets forth the guidelines for determining whether real property is directly or indirectly involved in a governmental decision. According to this regulation, an official's real property is considered to be "directly involved" in a governmental decision if "any part of the subject property is located within 500 feet of the boundary of the property that is the subject of the decision." FPPC Reg. § 18704.2(a). FPPC regulations also provide that a parcel of real property will not be considered "directly involved" if the decision solely concerns (1) the amendment of an existing zoning ordinance or other land use regulation which is applicable to all other properties designated in that category; (2) repairs, replacement, or maintenance of existing streets, water, sewer, storm drainage, or similar facilities; or (3) the adoption or amendment of a general plan (under certain circumstances). FPPC Reg. § 18704.2(b).

<u>1. Affordable Housing Transaction Parameters</u>

The first assignment identified is to assist CCDC in finalizing underwriting guidelines and other financial parameters to be used to evaluate development proposals and requests for assistance from affordable housing developers throughout downtown. Because this assignment pertains to the entire redevelopment project area, and because your condominium is situated within 500 feet of the project area (is actually inside the project area), your condominium is considered "directly involved" in the municipal decisions that relate to this assignment. FPPC Reg. § 18704.2(a)(1). Even though the assignment pertains to the entire downtown redevelopment project area rather than a specific site, the 500-foot rule still applies. See, e.g., *In re Hull*, FPPC Adv. Ltr. A-04-052 (council members' real properties situated within 500 feet of redevelopment project area were "directly involved" in decision to transfer funds from project area; "where the property of a council member is within 500 feet of a particular project area, the council member's property will be directly involved in a decision regarding that project area."); *In re Weil*, FPPC Adv. Ltr. I-03-098 (official's leased property, which was less than 500 feet from downtown area, was considered "directly involved" in decision to revitalize downtown and in decision to use downtown redevelopment funds). Even though these two FPPC advice letters concerned the entire redevelopment area rather than any specific sites, the FPPC nevertheless applied the 500-foot rule to properties in or near those larger areas. Based on the conclusions reached by the FPPC, therefore, your condominium property is “directly involved” in the municipal decisions relating to this assignment.

Moreover, according to the facts provided in the February 2, 2007, letter, this assignment does not rise to the level of amending an existing zoning ordinance or land use regulation; does not concern repairs, replacement, or maintenance of existing streets, water, sewer, etc.; and does not involve the adoption or amendment of a general plan. Accordingly, this assignment does not trigger the FPPC Regulation 18704.2(b) exemption identified above.

2. Downtown First-Time Homebuyer Program

Your second assignment involves assisting CCDC with its existing financial assistance program for moderate-income first-time homebuyers within the downtown area by providing information on comparable programs and outcomes in other communities, and preparing financial models of possible new programs for the downtown area. For the same reasons identified above in (1), your real property would be “directly involved” in the municipal decisions relating to this assignment.[2]

3. Public Facilities Financing Plan Update

Your third assignment will be to provide financial analysis to CCDC with regard to its update of the Centre City Public Facilities Financing Plan. The update will include additional public facilities and set appropriate development impact fees for residential and non-residential development throughout the downtown area. Again, for the reasons stated above, your condominium would be “directly involved” in the municipal decisions relating to this assignment.

4. Transfer of Development Rights Bank

Your fourth assignment is to assist CCDC in structuring the Transfer of Development Rights Bank, a “bank” of developable Floor Area Ratio that can be sold to developers seeking additional density in proposed developments. You would assist CCDC in developing methodologies to value the FAR and offer the FAR for sale. Based on the same rationale applied above, your condominium would be “directly involved” in the municipal decisions relating to this assignment.

5. Valuation of Underlying Fee Interests in Public Rights of Way

Your fifth assignment involves estimating the fair market value of all underlying fee interests in downtown public streets in anticipation of possible future sales to individual developers. This assignment differs from the previous four on the basis that you will be analyzing specific parcels of real property, including some that may be situated within 500 feet of your condominium. Thus,

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[2] Because you are already purchasing a condominium in the downtown area, it is obvious that you would not be eligible to participate in any first-time homebuyers program you are helping to create. Note, however, that even if you were eligible to participate, the Ethics Ordinance, at section 27.3560, prohibits you from obtaining a loan from a program you helped create.

your condominium property would be considered "directly involved" in any municipal decisions relating to the valuation program for the reasons articulated above, and it also appears that it would be "directly involved" in any decision to sell a specific fee interest in any public street that is situated within 500 feet of your condominium.

As established in the preceding paragraphs, your condominium property will be "directly involved" in any municipal decision relating to the five assignments you have identified. For "directly involved" properties, the financial effect of a governmental decision on the real property is presumed to be material. FPPC Reg. § 18705.2(a)(1). In other words, there is a presumption that your involvement in each of the above-referenced assignments will have a material financial effect on your condominium.

This presumption may, however, be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have *any* financial effect on the real property." FPPC Reg. § 18705.2(a)(1) (emphasis added). Thus, the burden would be on you to provide evidence that the municipal decisions in which you participate would not be substantially likely to have *any* financial effect (even a dollar's worth) on your condominium. If you can meet this burden, then you may lawfully participate in the decision, i.e., engage in the assignments relating to that decision. In addition, as set forth below, there is a "public generally" rule that may apply to the assignments you've identified, and may eliminate the need to rebut the materiality presumption.

D. Public Generally Exception

Even if it is reasonably foreseeable that a governmental decision will have a material financial effect on your real property interests, you will not be disqualified from participating in the decision if the effect of the decision on your property is indistinguishable from the effect of the decision on the "public generally." FPPC Reg. § 18707. This exception exists because it is assumed that a public official is less likely to be biased by a financial impact on his or her economic interest when a significant part of the community is experiencing the same impact from a governmental decision. *In re Condotti*, FPPC Adv. Ltr. A-99-154. In order for the "public generally" exception to apply, it must be reasonably foreseeable that the decision will affect a "significant segment" of the public in substantially the same manner. FPPC Reg. § 18707(a).

In the case of an interest in real property, a "significant segment" of the jurisdiction is defined to mean: "(i) Ten percent or more of all property owners or all residential property owners in the jurisdiction of the official's agency or the district the official represents; or (ii) 5,000 property owners or residential property owners in the jurisdiction of the official's agency." FPPC Reg. § 18707.1(b)(1)(B).[3, 4] Not only must the governmental decision affect a significant segment of residential property owners, but the decision must affect the public official's economic interest in

[3] "The official may choose to count each residential property affected as being owned by one property owner if, and only if, the official counts himself or herself as the sole owner of the public official's residential property regardless of his or her actual ownership interest." FPPC Reg. § 18707.1(b)(1)(B)(iii).

[4] "Residential property means any real property that contains a single family home, or a multi-family structure of four units or fewer, on a single lot, or a condominium unit." FPPC Reg. § 18707.1(b)(1)(B)(iv).

"substantially the same manner" that it will affect the other property owners or homeowners. FPPC Reg. § 18707.1(b)(2).

Based on the above rule, your participation in the five identified assignments will not rise to the level of a prohibited conflict of interest if the municipal decisions relating to those assignments will have the same effect on your condominium as it has on 5,000, or ten percent or more, of the residential property owners in the CCDC redevelopment project area. Because the February 2, 2007, letter states that your assignments are not, with one exception addressed below, focused on particular parcels of property, but instead concern policies and programs for the entire redevelopment project area, the "public generally" exception may be applicable to your assignments. If it is, you could lawfully engage in all five of the listed assignments, except as set forth below, notwithstanding your ownership of a condominium situated within the redevelopment project area.

Because the Ethics Commission is not a finder of fact when giving advice, it cannot make a factual determination regarding whether or not the "public generally" exception applies to the five assignments identified above. It is a determination that you must make. Fortunately, the FPPC has developed guidelines to assist public officials in making this determination. "For a decision that affects a public official's economic interest in his or her real property, financial effects are measured in terms of the overall dollar amount of the increase or decrease in the value of the property and not by a percentage increase or decease affecting property values as a whole. Factors to be considered in determining the financial effect on the official's property in comparison with the financial effect on the public generally include, but are not limited to, the following:

(i) The magnitude of the financial effect of the governmental decision on the official's property as compared with other properties contained within the significant segment;

(ii) The lot size of the official's property compared with other properties contained within the significant segment (e.g., one acre versus 10 acres);

(iii) The square footage of the building space of the property compared with the square footage of the building space of other properties contained within the significant segment;

(iv) The proximity of the official's property to the property that is the subject of the governmental decision compared with the proximity of other properties contained within the significant segment;

(v) The number of units/parcels owned by the official compared to others in the significant segment;

(vi) The physical characteristics or permitted use of the property (i.e., historical, commercial, residential) as compared to other properties in the significant segment;

(vii) The location of the official's property compared with the location of other properties contained within the significant segment;

(viii) The neighborhood in which the official's property is located is comparable to the neighborhoods in which other properties contained within the significant segment are located;

(ix) The quality of the structure contained on the official's property compared with the quality of other structures contained on properties within the significant segment;

(x) The current fair market value of the property as compared to other properties in the significant segment;

(xi) Improvements made to the official's property as compared with other properties contained within the significant segment;

(xii) The developmental potential or income producing potential of the real property in which the official has an economic interest compared with other properties contained within the significant segment; and

(xiii) The character of the effects on the neighborhood of the property in which the official has an economic interest including, but not limited to, substantial effects on: traffic, view, privacy, intensity of use, noise levels, air emissions, or similar traits of the neighborhood compared with the neighborhoods of other properties contained within the significant segment."

FPPC Reg. § 18707.1(b)(2)(A).

Your determination, therefore, will be based on an application of the above factors to any municipal decisions relating to a particular CCDC assignment. If you conclude that a municipal decision relating to a particular assignment will affect your interest in your condominium in substantially the same manner as a significant segment (i.e., 5,000 or 10%) of the other residential property owners in the redevelopment area, then the "public generally" exception will apply. If, on the other hand, you conclude that the decision will not affect your interest in your condominium in substantially the same manner as a significant segment of the other residential property owners in the redevelopment area, then the exception will not apply and you will not be able to lawfully participate in the decision (unless you have otherwise rebutted the presumption of materiality by showing that the decision will have absolutely no financial effect on the property).

One additional aspect to consider pertains to assignment number five, and the valuation of fee interests in public streets throughout the downtown area. If the valuation program involves specific public streets located within 500 feet of your condominium, the "public generally" exception is less likely to apply. As stated above, the exception will apply only if you can show that the sale of a particular fee interest would affect 10% or 5,000 of the other residential property owners in the redevelopment area in substantially the same manner that it affects you. Again, this is a factual determination that the Ethics Commission cannot make. Thus, you must decide whether or not such sales would have the same impact on your condominium as they would on the "public generally." In addition, you may determine that the sale of the fee interests in question (which is described as having limited financial value) will have zero financial impact on your condominium. If that is the case, you could rebut the presumption of materiality and participate in a particular assignment without having a prohibited conflict of interest.

CONCLUSION

Because your five anticipated CCDC assignments pertain to the entirety of the CCDC redevelopment project area, and because your condominium is located within that project area, your condominium is directly involved in the municipal decisions that relate to those five assignments. Because your property interests are directly involved in such decisions, the financial effect of those decisions on your property is presumed to be material. This presumption may, however, be rebutted by proof that it is not substantially likely that a particular municipal decision will have *any* financial effect on the property. In addition, the "public generally" rule allows you to participate in a decision when the decision's impact on your property is shared by a significant segment of the rest of the properties in the area. Keep in mind that you have the burden of showing that the effect of a particular municipal decision on your condominium is indistinguishable from its effect on the "public generally." Ultimately, unless you rebut the presumption of materiality or otherwise show that the "public generally" exception is applicable, you will have a disqualifying conflict of interest in the CCDC assignments identified above.

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