

June 6, 2008

SDEC Informal Advice Letter No. IA08-04 (Amended)

Councilmember Toni Atkins  
City Council District 3  
202 "C" St., 10th Floor  
San Diego, CA 92101

Re: Request for Advice Regarding Disqualification Based on Interests in Employment  
with Housing Commission

Dear Councilmember Atkins:

This advice letter responds to your e-mail to the City of San Diego Ethics Commission dated April 28, 2008, and your follow-up email dated May 29, 2008. You seek advice from the Ethics Commission concerning disqualification provisions of the City's Ethics Ordinance, which is contained in the San Diego Municipal Code [SDMC]. Your questions relate to the Housing Commission's vacancy for the position of President and Chief Executive Officer. On May 9, 2008, this office issued Advice Letter IA08-04 in response to your initial inquiry regarding whether or not your application for employment with the Housing Commission created a conflict of interest that disqualified you from participating in upcoming municipal decisions involving the Housing Commission.

On May 29, 2008, you provided us with an email containing additional information regarding the Housing Commission position, including the fact that you have withdrawn your application for the position. The withdrawal of your application moots some of the disqualification concerns. However, in the interests of providing thorough and informative advice, we have updated Advice Letter IA08-04 based on the new facts you provided, and that letter is superseded in its entirety and replaced with this letter, Advice Letter IA08-04 (Amended).

### **QUESTIONS**

1. Has your prior application for employment with the Housing Commission created a conflict of interest that disqualifies you from participating in upcoming municipal decisions involving the Housing Commission?
2. Would the Housing Authority's involvement in the selection of the Housing Commission's new President and Chief Executive Officer effectively have precluded you from accepting this position?

### **SHORT ANSWERS**

1. The City's Ethics Ordinance provides that a City Official is prohibited from participating in a municipal decision if it is reasonably foreseeable that the decision will have a material financial effect on his or her economic interests. You have an economic interest in your own personal finances, and that interest would be impacted by paid employment with any entity, including the Housing Commission. Accordingly, when you were seeking the President and Chief Executive Officer position with the Housing Commission, you would have been precluded from participating in any municipal decisions pertaining to filling that position, but would have been permitted to participate in other Housing Commission decisions that didn't involve the vacancy. Because you subsequently withdrew your application for the Housing Commission position, you have eliminated the economic interest that disqualified you from participating in decisions related to the Housing Commission vacancy. You may now, therefore, participate in any Housing Authority decisions concerning the Housing Commission, including those decisions that pertain to the hiring or appointment of the Housing Commission's new President and Chief Executive Officer.
2. The City's Ethics Ordinance precludes the Housing Authority from making a contract in which one of its members has a financial interest. The information you have provided to us indicates that the Housing Authority has been participating in the appointment process for the Housing Commission's new President and Chief Executive Officer. Because you may not obtain a financial interest in a contract that is created by the actions of a board on which you serve, and because the Housing Authority has already participated in the early stages of making a contract to fill the Housing Commission vacancy, you would have been lawfully precluded from filling that vacancy.

### **BACKGROUND**

According to your April 28, 2008, e-mail, you submitted your resume to the Housing Commission for the open position of President and Chief Executive Officer. The Housing Commission is a public agency created by the San Diego City Council in 1979 to assist low-income families, seniors, and people with disabilities obtain affordable housing in the City. The Housing Commission reports to the San Diego Housing Authority, which is composed of the members of the San Diego City Council. Accordingly, as a member of the Housing Authority, you regularly vote on issues directly related to the Housing Commission, including the Commission's annual budget and its long-range plan. You initially sought advice regarding whether you could lawfully participate as a member of the Housing Authority in upcoming municipal decisions involving the Housing Commission given your application for the position of President and Chief Executive Officer.

Subsequently, you provided us with additional information regarding actions that have been taken, and are expected to be taken, by the Housing Authority with regard to hiring the Housing Commission's new President and Chief Executive Officer. In particular, you informed us that the Housing Authority created a subcommittee (which includes two members of the Housing

Authority) tasked with establishing criteria to be used in narrowing the field of applicants for the President and Chief Executive Officer position. It is our understanding that the Housing Authority will ultimately participate in deciding who will be offered the position. You also stated that the President and Chief Executive Officer of the Housing Commission will be cross-designated as the Executive Director or Deputy Executive Director of the Housing Authority.

Subsequent to your initial email request for advice on April 28, 2008, you withdrew your name from consideration for the Housing Commission vacancy. We are amending our previous advice to reflect this fact and the other facts that have come to light since your initial inquiry.

### **DISQUALIFICATION ANALYSIS**

#### *A. Municipal Decisions Affecting Economic Interests*

SDMC section 27.3561 prohibits you, as 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 of your economic interests. The Ethics Ordinance states that you are considered a “City Official” while you are acting in your capacity as an officer of the Housing Authority. SDMC § 27.3503. The term “municipal decision” includes any decision made by the Housing Authority. Thus, when you are serving as a member of the Housing Authority and participating in decisions regarding the Housing Commission, you are participating in a “municipal decision” under the Ethics Ordinance.

The Ethics Ordinance identifies economic interests that may lead to disqualification: business interests; business positions; real property interests; sources of income; sources of gifts; and personal finances. SDMC § 27.3561. These provisions are based on the state law contained in the Political Reform Act (Cal. Gov’t Code §§ 81000-91014).<sup>1</sup> Nothing in the e-mails you sent us suggests that any of the first five economic interests are applicable to the Housing Commission. In other words, the Housing Commission is not a business entity in which you have a financial interest or business position; it is not a piece of real property in which you have an ownership or leasehold interest; and it has not been a source of income or gifts to you during the previous twelve months.

When you applied for employment with the Housing Commission (by submitting your resume), the sixth category of economic interests (your personal expenses, income, assets, and liabilities) became relevant to decisions involving that agency. According to the “personal financial effects” rule, if your expenses, income, assets, or liabilities are substantially likely to go up or down by \$250 or more in a 12-month period as the result of a municipal decision, then that decision would have a “personal financial effect” on you. SDMC § 27.3561(b)(6); FPPC Regulation 18705.5(a).

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<sup>1</sup> Applicable definitions and provisions from the Political Reform Act and the related regulations adopted by the California Fair Political Practices Commission [FPPC] expressly apply to the City’s Ethics Ordinance. SDMC § 27.3503. We therefore turn to interpretations of state law from time to time for guidance in interpreting the City’s Ethics Ordinance.

While you were seeking the position of President and Chief Executive Officer of the Housing Commission, a paid position, it was reasonably foreseeable that decisions involving hiring for that position would have impacted your personal finances by \$250 or more. Although there is an exception to the “personal financial effects” rule for income from a government agency (FPPC Regulation 18705.5(b)), that exception does not apply to decisions that involve hiring or appointing an official. Thus, while you were seeking the Housing Commission position, you could not lawfully participate in decisions that involved hiring or appointing a person to fill that position.

Circumstances have changed, however, and you have withdrawn your name from consideration for the position. Thus, there are presently no facts upon which to base a conclusion that your personal finances would be affected by decisions involving the Housing Commission position. In other words, the fact that you applied for, and subsequently withdrew your application for, the Housing Commission’s position of President and Chief Executive Officer, does not now preclude you from participating in any Housing Commission decisions, including those relating to filling the vacancy at issue.

#### *B. Future Employment*

In addition to the disqualification provisions cited above, the City’s Ethics Ordinance contains restrictions relating to a City Official’s ability to participate in City decisions involving prospective employers. SDMC section 27.3551(a) states: “It is unlawful for any City Official to make, participate in making, or use his or her official position to influence a decision involving the interests of a person with whom he or she is seeking, negotiating, or securing an agreement concerning future employment.” The purpose of these kinds of prohibitions is to ensure that an official does not use his or her position to make decisions that unduly benefit the organization that is hiring the official. *In re Harris*, FPPC Adv. Ltr. I-07-115. Notably, however, section 27.3551 contains the following language at subsection (c): “The prohibitions set forth in subsections (a) and (b) do not apply to a City Official’s prospective employment with a public agency.”

Based on the subsection (c) exception, the future employment prohibitions contained in SDMC section 27.3551 did not apply when you were seeking employment with the Housing Commission, and certainly do not apply now that you have withdrawn your application.

#### *C. Prohibited Interest in a Contract*

Another disqualification provision in the Ethics Ordinance became relevant in light of the new information that you provided to us in your May 29, 2008, email. SDMC section 27.3560, which is interpreted consistently with California Government Code section 1090, provides a two-pronged prohibition that (1) prevents a City Official from taking any official action with regard to a contract in which that official has a financial interest; and (2) prevents a City board, such as the Housing Authority, from making a contract in which one of its members has a financial interest. The first prong is similar to the “personal financial effect” prohibition discussed earlier in this letter; you would be prohibited, for example, from influencing other City Officials with

respect to the awarding of the Housing Commission contract so long as you had an interest in that contract.

The second prong goes beyond your own personal involvement. Even if you do not personally engage in any official action to influence the creation of contract, the fact that you are a member of a governmental board generally prevents you from privately entering any contract made by that board. In other words, once the Housing Authority participates in the making of a contract, your position on the Housing Authority precludes you from obtaining a financial interest in that contract. Because you have withdrawn your application for the position with the Housing Commission, there is currently no issue of you contracting as a private party with the Housing Authority. Nevertheless, given that SDMC section 27.3560 was not discussed in our May 8, 2008, advice letter, we are now addressing this component of the City's disqualification laws in the interests of providing you with a complete analysis.

A determination regarding whether SDMC section 27.360 prohibits you from accepting an employment contract depends on whether you are a member of the board that is "making the contract." If an official is a member of a board that actually executes the contract, he or she is conclusively presumed to be involved in the making of his or her agency's contracts. *Thomson v. Call*, 38 Cal.3d 633, 645 (1985). On the other hand, if an agency makes a contract independently of the board on which an official sits, then that official is not prohibited from obtaining a financial interest in the contract. *See e.g.*, 81 Ops. Cal. Att'y Gen. 274 (1998); 21 Ops. Cal. Att'y Gen. 90 (1953).

The facts currently before us indicate that the Housing Commission position is not being filled independently of the Housing Authority. Instead, based on the facts presented in your May 29, 2008, email, it is apparent that the Housing Authority has already become involved in the selection process and will ultimately play a substantial role in deciding who will become the Housing Commission's next President and Chief Executive Officer (and who will be cross-designated as the Housing Authority's Executive Director or Deputy Executive Director).<sup>2</sup> In *Stigall v. City of Taft*, 58 Cal.2d 565 (1962), the California Supreme Court defined the making of a contract under section 1090 to include preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. In other words, all of the decisions, suggestions, recommendations, and actions that a government board makes for the purpose of eventually entering into a contract do in fact constitute the early stages of making the contract.

In light of the fact that the Housing Authority will not be a mere spectator in the selection process, but is instead playing a significant role in that process, the Housing Authority is "making a contract" in which no member of the Housing Authority may have or obtain a personal financial interest. Thus, had you not already withdrawn your application for the position, we would have advised you that based on SDMC section 27.3560, you would have

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<sup>2</sup> Once the Housing Authority formed a subcommittee for the purpose of narrowing the field of candidates for the Housing Commission position, it engaged in the early stages of making a contract. As indicated above, once a government board on which you serve participates in making a contract, you become legally precluded from having a financial interest in that contract.

been legally precluded from accepting the Housing Commission position. It is relevant to note, however, that if the Housing Commission had filled its vacancy independent of the Housing Authority, with no recommendations, suggestions, participation, etc. from the Housing Authority, then your seat on the Housing Authority would not have precluded you from having a personal financial interest in the employment contract.

Even though you recused yourself from all Housing Authority actions related to the Housing Commission vacancy, the prohibition would still have applied unless your interest in the contract had been deemed to be a “remote interest.” The City’s Ethics Ordinance incorporates the state law’s “remote interests” set forth in California Government Code section 1091. SDMC § 27.3560(c). The only “remote interest” potentially applicable is “that of a person receiving salary, per diem, or reimbursement for expenses from a government entity.” Cal. Gov’t Code § 1091(b)(13). Because the position at issue is with a government entity, one might assume that the remote interest exception would apply. The California Attorney General has opined, however, that the (b)(13) exception does not apply unless the contract at issue is between two public agencies. 89 Ops. Cal. Att’y Gen. 217 (2006). For example, a contract between a city and a county would be subject to the exception in a situation where a city board member had been receiving a salary from the county. On the other hand, “the applicability of this exception has not been extended to a situation . . . in which the public official has a *personal financial interest* in the terms of a contract.” *Id.* (emphasis added). When you were seeking the position of President and Chief Executive Officer of the Housing Commission you had a personal financial interest in the employment contract related to that position. Thus, there is no “remote interest” exception available in these circumstances, and your recusal from decisions involving the vacancy could not overcome the prohibition.

This conclusion is supported by *Finnegan v. Schrader*, 91 Cal. App. 4th 572 (2001), which involved a member of a public board seeking employment with the board’s agency. “By its terms, section 1090 applies to ‘any contract,’ with no express exclusion for employment contracts.” *Id.* at 580. The *Finnegan* court found that a “1090” violation occurred when a member of the board of directors for a public district sought to become the district manager for the district. Even though the member recused himself from the selection process, the fact that his own board participated in creating the contract was sufficient for the court to find that the member was prohibited from accepting the position.

In some instances, a contract otherwise made void by the provisions of Government Code section 1090 (and by extension, SDMC section 27.3560) can still be entered into if the “rule of necessity” applies. Generally, the rule of necessity allows public officials to take actions they would otherwise be disqualified from taking if their disqualification would make it impossible for the government agency to fulfill a vital public duty. *Kunec v. Brea Redevelopment Agency*, 55 Cal. App. 4th 511, 520 (1997). Although the Housing Commission may have an essential need for a President and Chief Executive Officer, the rule of necessity will not apply in this instance unless the Housing Authority is the only entity capable of selecting a replacement and you were the only one qualified to fill the position. Because these are not the facts before us, we do not see any basis for the application of the rule of necessity.

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## CONCLUSION

Under the City's Ethics Ordinance and the facts you have provided to us, your past interest in an executive position with the Housing Commission does not now disqualify you from participating in decisions involving the Housing Commission. You may, therefore, as a member of the Housing Authority, participate in decisions that involve the Housing Commission, including those decisions that involve the selection of the Commission's President and Chief Executive Officer.

In addition, based on the information you provided, the Housing Authority has participated in the early stages of making a government contract with whoever will become the Housing Commission's next President and Chief Executive Officer. Because no member of a government board may obtain a private financial interest in a contract created by that board, the actions of the Housing Authority have effectively created a barrier legally precluding any member of the Housing Authority from assuming the Housing Commission position.

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.

Sincerely,

Alison Adema  
General Counsel

By: Stephen Ross  
Program Manager-Technical Assistance