

[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.”]

August 18, 2008

SDEC Informal Advice Letter No. IA08-06

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

Re: Request for Advice Regarding Disqualification from Municipal Decisions
Involving Spouse

Dear Councilmember Atkins:

This advice letter responds to your e-mail to the City of San Diego Ethics Commission dated August 8, 2008. You seek advice from the Ethics Commission concerning the disqualification provisions of the City’s Ethics Ordinance, which is contained in the San Diego Municipal Code [SDMC]. Your questions relate to the disqualification concerns that you will face upon your upcoming marriage to Jennifer LeSar in light of Ms. LeSar’s personal financial assets. Because you have not identified any specific municipal decisions, we are treating your inquiry as a request for informal advice.

QUESTION

What disqualification concerns will you face under the City’s Ethics Ordinance upon your marriage to Jennifer LeSar?

SHORT ANSWER

The City’s Ethics Ordinance prohibits any City Official 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. When you become married, your economic interests will include those of your spouse. As a result, Ms. LeSar’s financial assets will be assets that you must take into consideration when deciding whether or not you are disqualified from influencing a municipal decision. As a general rule, you will be precluded from influencing a municipal decision if it is reasonably foreseeable that the decision will have a material financial effect on the economic interests you will have by virtue of your marriage to Ms. LeSar.

BACKGROUND

You currently serve as the Councilmember for Council District 3. You are planning to marry Jennifer LeSar. Ms. LeSar is the President of LeSar Development Company, a real estate development and financial consulting firm. Ms. LeSar is also a member of the Board of Directors of the Centre City Development Corporation [CCDC]. CCDC is a public nonprofit corporation created by the City of San Diego to implement projects and programs in the downtown area. As a Councilmember, you also serve as a member of the City's Redevelopment Agency, and in that capacity you have occasion to participate in decisions involving CCDC and projects that come before CCDC.

ANALYSIS

Because you have not identified any specific municipal decisions coming before you that involve Ms. LeSar or any of her financial assets, the following analysis provides you with a general overview of the disqualification rules that could be implicated by virtue of your upcoming marriage to Ms. LeSar. In the event that Ms. LeSar or her financial assets become involved in a decision coming before the City Council, you are encouraged to contact the Ethics Commission for more specific guidance.

A. Basic Prohibitions

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 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).¹

These disqualification provisions are implicated by the interests of an official's immediate family. The term "immediate family" means "an individual's spouse and dependent children." SDMC § 3503.² Thus, when you marry Ms. LeSar, she will be considered your "immediate family" and all of the disqualification provisions in the Ethics Ordinance that apply to "immediate family" will apply to Ms. LeSar in the context of the municipal decisions that come before you. In other words, you will have, by virtue of your marriage to Ms. LeSar, additional economic interests that will disqualify you from participating in a particular municipal decision when it is reasonably foreseeable that the decision will have a material financial effect on one or more of those economic interests.

B. Reasonably Foreseeable

¹ 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.

² As of January 1, 2005, the term "spouse" includes registered domestic partners.

The term “reasonably foreseeable,” although not defined in the Ethics Ordinance, has been analyzed by the FPPC in its advice letters. The FPPC 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. Ultimately, in order for Ms. LeSar’s financial assets to trigger your disqualification, it must be “substantially likely” that the subject decision will have a material financial effect on those assets.

C. Economic Interests

Upon your marriage, Ms. LeSar’s financial assets will essentially become your “economic interests” for purposes of the Ethics Ordinance. The Ordinance defines “economic interests” as follows:

- (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;³
- (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; and⁴
- (6) the personal expenses, income, assets, or liabilities of a City Official or a member of the City Official’s immediate family.

SDMC § 27.3561.

Based on the above provisions, when you marry Ms. LeSar, she will become a member of your “immediate family,” and you may not thereafter influence any municipal decisions that are substantially likely to have a material financial effect on any business entity in which Ms. LeSar has a \$2,000 or greater investment interest, or in which Ms. LeSar is a director, officer, partner, trustee, employee, or holds a position of management. Although Ms. LeSar sits on the CCDC Board of Directors, CCDC is not a “business entity” for purposes of these disqualification rules

³ For purposes of consistency with state law, which bases a public official’s interest in his or her spouse’s income on community property interests, we interpret the SDMC’s \$500 rule to apply to an official’s community property interest in his or her spouse’s income. In other words, you will have an economic interest in a source of income to Ms. LeSar that amounts to at least \$1,000 (your 50% community property interest would be at least \$500).

⁴ The \$320 gift limits at the time this section went into effect have been raised to \$390.

because it is not a for-profit entity. A “business entity” is defined as “any organization or enterprise operated for profit.” Cal. Gov’t Code § 82005. “A volunteer position for a non-profit organization does not create an economic interest.” *In re Dean*, FPPC Adv. Ltr. I-99-152. Because CCDC does not constitute an economic interest for Ms. LeSar, you may participate in decisions involving CCDC without violating the City’s Ethics Ordinance. Unlike CCDC, LeSar Development Company is a for-profit company owned and operated by Ms. LeSar. Accordingly, you may not influence municipal decisions that are substantially likely to have a material financial effect on LeSar Development.

In addition, you may not influence any municipal decisions that are substantially likely to have a material financial effect on any real property in which Ms. LeSar has a \$2,000 or greater investment. You will also be prohibited from influencing a decision that is substantially likely to have a material financial effect on any source of \$1,000 or more in income to Ms. LeSar within the previous twelve months or on any source of \$390 or more in gifts to Ms. LeSar within the previous twelve months. (Note that sources of income may include clients of LeSar Development or other sources of income to Ms. LeSar, such as rental income from real property tenants.) Finally, you may not influence municipal decisions that are substantially likely to have any financial impact on Ms. LeSar’s personal expenses, income, assets, or liabilities.

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.” SDMC § 27.3503. When you are prohibited from influencing a decision, you must recuse yourself from voting on that decision, refrain from discussing the decision with other officials and City staff, avoid making any recommendations concerning the decision, and otherwise refrain from using your position to influence the outcome of the decision. In addition, when the decision is docketed for consideration by the City Council, you must identify the nature of your economic interest at the meeting before the item is discussed, and you must leave the room while the matter is discussed and voted upon by your City Council colleagues. FPPC Regulation 18702.5.

Note that you will not have a community property interest in Ms. LeSar’s income if you and Ms. LeSar have a separate property agreement or a prenuptial agreement. *In re Morales*, FPPC Adv. Ltr. A-99-246(a). You have not indicated that such an agreement will exist, but if it did, you would not be required to report her separate income on your Statement of Economic Interests [Form 700], nor would the source of that income constitute one of your economic interests for disqualification purposes. Keep in mind that a separate property or prenuptial agreement would only affect your community property interest in Ms. LeSar’s sources of income, and not her investment interests in business entities or real property. For example, even if a separate property agreement or a prenuptial agreement existed, you would still have to report Ms. LeSar’s investment interest in LeSar Development and you would still be required to disqualify yourself from any decision that was substantially likely to have a material financial effect on Ms. LeSar’s business. *In re Shaw*, FPPC Adv. Ltr. I-90-377; *In re Katz*, FPPC Adv. Ltr. A-86-335.

D. Directly Involved Economic Interests

It is beyond the scope of this advice letter to explain all the ways in which a financial effect is considered “material” for the various types of economic interests identified above. You should be aware, however, that a financial effect on an economic interest is much more likely to be “material” when that economic interest is “directly involved” in the decision.

For business interests, sources of income, and sources of gifts, an entity is “directly involved” in a municipal decision when that entity:

- (1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;
- (2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.

FPPC Regulation 18704.1

For real property interests, the property is “directly involved” in a municipal decision when it:

- (1) is located within 500 feet of the boundaries (or the proposed boundaries) of the property which is the subject of the governmental decision;
- (2) the governmental decision involves the zoning or rezoning, annexation or deannexation, sale, purchase, or lease, or inclusion in or exclusion from any city, county, district or other local governmental subdivision, of the real property in which the official has an interest or a similar decision affecting the real property;
- (3) the governmental decision involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use or uses of the real property in which the official, has an interest;
- (4) the governmental decision involves the imposition, repeal or modification of any taxes or fees assessed or imposed on the real property in which the official has an interest;
- (5) the governmental decision is to designate the survey area, to select the project area, to adopt the preliminary plan, to form a project area committee, to certify the environmental document, to adopt the redevelopment plan, to add territory to the redevelopment area, or to rescind or amend any of the above decisions; and real property in which the official has an interest, or any part of it is located within the boundaries (or the proposed boundaries) of the redevelopment area; or,

- (6) the decision involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the real property in which the official has an interest will receive new or improved services.

FPPC Regulation 18704.2

Finally, with regard to the personal finances rule, a “public official or his or her immediate family are deemed to be directly involved in a governmental decision that has any financial effect on his or her personal finances or those of his or her immediate family.” FPPC Regulation 18704.1.

E. Materiality

When an economic interest is “directly involved” in a municipal decision, there is generally a presumption that the financial effect of that decision will be material. FPPC Regulations 18705.1; 18705.2; 18705.3; and 18705.4. For the personal finances rule, a financial effect on a public official’s (or his or her immediate family’s) personal finances is deemed to be material if it is at least \$250 in any 12-month period. FPPC Regulation 18705.5.

Based on the above, there is a presumption of materiality that will disqualify you from being involved in any municipal decision where, by virtue of your marriage to Ms. LeSar, you have a business interest, source of income, or source of gifts that is directly involved in the decision, or where it is reasonably foreseeable that the decision will affect Ms. LeSar’s personal finances by \$250 or more. For example, if Ms. LeSar owns real property that is the subject of a decision before the City Council, that property would be directly involved in the decision, and thus there would be a presumption that the decision would have a material financial effect on the property. Because of your marriage to Ms. LeSar, you would be precluded from influencing that decision. In some instances, the presumption of materiality can be rebutted by proof that it is not reasonably foreseeable that the decision will have any financial effect on the applicable economic interests. In situations where you believe that may be the case, you are encouraged to contact the Ethics Commission for additional assistance with regard to whether the facts at issue support a conclusion that the materiality threshold has not been reached.

In instances where you have an economic interest by virtue of your marriage to Ms. LeSar, and where that interest is only “indirectly involved” in a decision, the materiality of the financial effect of a decision on those interests depends on a variety of factors. For example, with regard to an interest in a business entity, the larger the business entity, the greater the impact the decision will need to be on that entity in order for the financial effect to be considered material. A decision that has a negligible financial impact on a large business entity could have a substantial impact on a small business. In other words, what is “material” to a small company might not be “material” to a large one. For example, if Ms. LeSar owns a business that is not directly involved in a municipal decision, but could still be financially affected by the decision, whether or not you will be precluded from participating in that decision depends on the size of her business and the amount of the financial impact that is substantially likely to result from the decision.

The Ethics Commission has prepared a series of seven disqualification Fact Sheets that address the various types of economic interests discussed in this letter. These Fact Sheets contain charts detailing the amount of financial impact a decision would have to have on various types of “indirectly involved” entities in order to meet the materiality threshold. These Fact Sheets are available on the Commission’s website at www.sandiego.gov/ethics/sheets/index.shtml.

F. Public Generally Exception

Even if it is reasonably foreseeable that a municipal decision will have a material financial effect on Ms. LeSar’s business interests, real property interests, sources of income, or sources of gifts, you would not be disqualified from participating in the decision if the effect of the decision on those interests is indistinguishable from the effect of the decision on the “public generally.” FPPC Regulation 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 Regulation 18707(a). The criteria for this exception are complex and vary depending on the type of economic interest.

Please contact the Ethics Commission for assistance with regard to any specific municipal decisions where you believe that the “public generally” exception may apply. Keep in mind that the Ethics Commission is not a finder of fact and it would be your responsibility to make a good faith effort to assess the effect of the decision by using reasonable and objective methods.

G. Legally Required Participation

Under rare circumstances, “a public official who has a financial interest in a decision may establish that he or she is legally required to make or to participate in the making of a governmental decision within the meaning of Government Code section 87101 only if there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision.” Cal. Gov’t Code § 87101; FPPC Regulation 18708. If you believe that this exception may apply to a particular municipal decision, please contact our office for additional assistance.

H. Prohibited Interest in a Contract

In addition to the disqualification concerns raised above, SDMC section 27.3560, which is interpreted consistently with California Government Code section 1090, prevents a City Official from taking any official action with regard to a contract in which that official has a financial interest. Under section 27.3560, when you have an interest in a City contract, you are prohibited from making that contract in your official capacity, including influencing other City Officials with respect to the contract. When you marry Ms. LeSar, you would likely obtain a prohibited financial interest in a City contract if Ms. LeSar has an interest in that contract. When you have a prohibited financial interest in a City contract, the City Council may not enter that contract even

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if you recuse yourself from participating in the making of that contract. SDMC § 273560(b). For example, upon your marriage, the City Council will be unable to enter into a contract with the LeSar Development Company while you are a Councilmember.

This prohibition extends to contracts involving clients of Ms. LeSar's company. The California Attorney General concluded that "a city council member had a financial interest in a development agreement where the council member's spouse was a partner in a law firm that represented the contracting developer on matters unrelated to the contract." 78 Op. Cal. Att'y Gen. 230 (1995). Thus, you would have a prohibited financial interest in a City contract if the LeSar Development Company represented a party to that contract, even where the representation was not related to the contract. In this scenario, the City Council would be prohibited from entering into the contract in light of your financial interest. SDMC § 27.3560(b).

The California Government Code contains a number of "remote interest" and "non-interest" provisions that apply to government contracts. These provisions apply when the interest is so removed as to diminish or extinguish the potential conflict of interest. The City's Ethics Ordinance expressly incorporates these provisions. SDMC § 273560(c). If you have a "remote interest" in a contract because of Ms. LeSar's financial assets, the City Council may still enter that contract so long as you disclose that interest and the City Council makes the contract without your participation. If you have a "non-interest," you need not recuse yourself, and you may lawfully participate in the making of the contract.

With regard to a contract between the City and CCDC (for which Ms. LeSar is a board member), there is a "non-interest" exception that appears relevant: "[t]hat of a noncompensated officer of a nonprofit, tax-exempt corporation, which, as one of its primary purposes, supports the functions of the body or board or to which the body or board has a legal obligation to give particular consideration, and provided further that this interest is noted in its official records." Cal. Gov't Code § 1091.5(8). CCDC clearly supports the functions of the City, and the City clearly has a legal obligation to give particular consideration to the actions of CCDC. Thus, to the extent that Ms. LeSar does not receive any compensation from CCDC other than reimbursement for necessary travel and other actual expenses incurred with respect to her CCDC duties, the exception will apply and you will have a "non-interest" in the City's contracts with CCDC, notwithstanding your marriage to Ms. LeSar. Nevertheless, should there be an occasion where the City and CCDC are considering entering into a contract while you are on the City Council and Ms. LeSar is a member of the CCDC Board, please contact us for more specific assistance.

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). Please contact our office for additional assistance if you believe that this exception may be applicable to a particular contract the City is seeking to enter.

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CONCLUSION

Under the City's Ethics Ordinance, your marriage to Ms. LeSar will result in her financial assets becoming relevant to any consideration of whether or not you are disqualified from influencing a particular municipal decision. In other words, her financial assets will essentially become your economic interests for purposes of disqualification. You will be legally precluded from influencing a municipal decision if it is substantially likely that the decision will have a material financial effect on those economic interests. Moreover, if the decision involves a contract, you and the City Council may be lawfully precluded from making that contract depending on the nature of Ms. LeSar's interest in that contract.

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
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