

[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 15, 2010

SDEC Informal Advice Letter No. IA10-01

Advice Provided To:
Jennifer LeSar
LeSar Development Consultants
2410 First Avenue
San Diego, CA 92101

Re: Request for Advice Regarding Restrictions on Lobbying and Consulting
Following Service on the CCDC Board of Directors

Dear Ms. LeSar:

This advice letter has been prepared in response to your January 12, 2010, inquiry to the City of San Diego Ethics Commission. You are seeking advice from the Ethics Commission with regard to how your recent service on the Centre City Development Corporation [CCDC] Board of Directors affects your ability to contact current City Officials and your ability to provide services to CCDC under a consulting contract. As explained in greater detail below, you have not provided information regarding the specific projects you were involved in during your tenure with CCDC that could give rise to a conflict of interest with respect to a potential contract with CCDC. Consequently, we are treating your inquiry as a request for informal advice.

QUESTIONS

1. As a former member of the CCDC Board of Directors, are you subject to the twelve-month post-employment lobbying restrictions in the City’s Ethics Ordinance?
2. Do the conflict of interest provisions in the City’s Ethics Ordinance prohibit you, as a former CCDC board member, from contracting to provide consulting services to CCDC?

SHORT ANSWERS

1. No. You are not subject to the twelve-month post-employment lobbying restrictions in the City's Ethics Ordinance. These restrictions do not apply to individuals whose City services were provided on a volunteer basis.
2. In general, the conflict of interest provisions in the City's Ethics Ordinance do not prohibit you from contracting to provide consulting services to CCDC. You may not, however, obtain a consulting contract with CCDC or any other City department or agency if you, in your capacity as a CCDC board member, participated in the making of that contract.

BACKGROUND

Until recently, you held a position on the CCDC Board of Directors. CCDC is a public nonprofit corporation created by the City of San Diego. During your tenure on the Board, you were not a paid officer or employee of CCDC, but instead served as a volunteer.

You currently own a real estate consulting business, LeSar Development Consultants. At this time, CCDC is requesting qualifications [RFQ] from real estate economic, financial, and market consultant firms for professional services for Centre City and Horton Plaza redevelopment projects. The firms selected will provide guidance and assistance in the economic evaluation of redevelopment proposals, the preparation of documents for redevelopment plan amendments and, as required by CCDC staff, on economic issues associated with urban redevelopment. The services of the consultants will be on an "as needed" basis. The scope of services is anticipated to be refined during negotiations with the selected consultants.

You did not, in your capacity as a CCDC Board member, participate in the decision to seek outside consultants in connection with this RFQ. Your firm is presently interested in obtaining a consulting contract in connection with this RFQ. Because the closing date for submittal is January 19, 2010, you have asked for an expedited response to your questions, which concern whether or not any of the provisions in the Ethics Ordinance impact your ability to obtain a consulting contract with CCDC.

ANALYSIS

A. Post-Employment Lobbying Restrictions

The City's Ethics Ordinance, at section 27.3550, imposes lobbying restrictions on compensated City officers and employees during the one year period following their separation from City service. In particular, section 27.3550(a)'s "project ban" prohibits former City Officials who received compensation from the City to work on a particular project from being paid by a private party to contact current City officers and employees regarding that project for a one-year period. Section 27.3550(d) also imposes a one-year "cooling off" period wherein former compensated City Officials may not be paid by a private party to contact current City Officials

for the purpose of influencing any municipal decisions. Because CCDC is a City agency, these restrictions apply to CCDC's compensated officers and employees.

The above restrictions do not, however, apply to any of the former members of the City's boards, commissions, and committees. Because such individuals were volunteers, they were never "employed" by the City and are therefore not impacted by the Ethics Ordinance's post-employment provisions. As stated earlier, you served on the CCDC Board in a volunteer capacity. As such, none of the post-employment restrictions in the Ethics Ordinance will apply to you. Therefore, you may contact current City officers and employees, including CCDC officers and employees, on any matter, including the RFQ identified above, without implicating any of the provisions of SDMC section 27.3550.

Keep in mind that the above conclusion applies only to the City's Ethics Ordinance. CCDC may have adopted its own post-employment or post-service restrictions that are outside the scope of the Ethics Commission's jurisdiction. You are encouraged to contact the appropriate persons at CCDC to determine if there are any CCDC policies or bylaws that are applicable to this matter.

B. CCDC Consulting Contract

Separate and distinct from the post-employment restrictions is whether any of the Ethics Ordinance's conflict of interest provisions will impact LeSar Development Consultants' ability to enter into a consulting contract with CCDC because of your past service on the CCDC Board. As a general rule, the Ethics Ordinance does not preclude you, as a former member of the CCDC board, from providing consulting services to CCDC.

For the most part, the Ethics Ordinance's conflict of interest provisions apply to a person's conduct only while that person is currently a City Official. For example, a current City Official may not, within the course and scope of his or her official duties, participate in a municipal decision that is substantially likely to have a material financial effect on the person's business, real property, or source of income. SDMC § 27.3561. You are not, however, a current City Official, and nothing you do at this point would be performed within the course and scope of any official duties. In other words, nothing you do in your role as the owner of LeSar Development Consultants can trigger any of the disqualification provisions set forth in SDMC section 27.3561.

There is, however, another disqualification provision in the Ethics Ordinance. SDMC section 27.3560 deals specifically with disqualification in the context of contracts. Because you are interested in seeking a CCDC contract, it is relevant to this inquiry. Under section 27.3560, City Officials may not be financially interested in any contract made by them in their official capacities. Unlike section 27.3561, this prohibition extends beyond the date you ceased to be a City Official. In other words, if you participated in the creation of a particular contract while you were a member of the CCDC Board, you may never obtain a private financial interest in that contract, even after leaving City service.

This restriction is consistent with interpretations of Government Code section 1090, on which SDMC section 27.3560 is expressly based. SDMC § 27.3560(c). In *Stigall v. City of Taft*, 58 Cal. 2d 565 (1962), the California Supreme Court held that a councilman could not contract with the city after leaving office where he had participated in the planning and preliminary discussions in setting up the contract. The California Attorney General's Office, in a 1993 letter opinion (IL-92-1212), concluded that a former official may not obtain a contract that he helped to create. "In short, the former commissioner was an active participant in the overall city policy decision to 'contract-out' much of the general plan revision. Accordingly, he cannot now benefit from such participation." In 1998, the California Attorney General's Office rejected a contention that an official will violate section 1090 only if the official plans to privately execute a contract that he or she is making as a public official. "We similarly reject here the suggestion that section 1090 may only be violated when at the time the official was instrumental in setting up a government program, he subjectively intended to contract with the agency after leaving office. The statute has never been so rigidly construed. Instead, we have looked to whether the official had the opportunity and did participate in the policy decision to create the government program under which the contract would later be executed." 81 Op. Cal. Att'y Gen. 317 (1998).

Accordingly, although you did not participate in the CCDC decision to contract for the consulting services described herein, the scope of services for that contract could potentially extend to matters in which you did have an official role. In order to avoid a violation of section 27.3560, therefore, you will have to ensure that any services you provide under a consulting contract with CCDC were not necessitated by any action you took during your time on the CCDC board. For example, if while on the board you participated in a decision to rehabilitate a particular building, and that decision requires ongoing monitoring of the rehabilitation process, you may not now contract with CCDC to provide those monitoring services. In other words, while you are generally permitted to obtain a consulting contract with CCDC, you must take care to ensure that the scope of the services under such a contract does not extend to fulfilling needs that you helped create in your capacity as a CCDC Board member. In this regard, you are encouraged to contact the Ethics Commission for more specific advice in the event that you obtain the subject consulting contract with CCDC and have questions regarding the applicability of section 27.3560 to any of the services to be performed under that contract.

CONCLUSION

The Ethics Ordinance prohibits certain types of post-employment lobbying, but such prohibitions apply only to former City Officials who were compensated for their City services. As a former CCDC board member, you were not a compensated official and the post-employment lobbying restrictions do not apply to you. Moreover, your past service on the CCDC Board does not preclude you from now offering your services to CCDC under a consulting contract, but only to the extent that you did not participate as a CCDC board member in the creation of that contract or in creating any needs that would be fulfilled through the execution of that contract.

Jennifer LeSar
January 15, 2010
Page 5

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,

Alison Adema
General Counsel

By: Stephen Ross
Program Manager-Technical Assistance