

December 16, 2010

SDEC Informal Advice Letter No. IA10-03

Advice Provided To:  
Kris Michell  
Chief of Staff, Mayor's Office  
City of San Diego  
202 C Street, 11th Floor  
San Diego, CA 92101

Re: Request for Advice Regarding the City's Future Employment and Post-Employment Lobbying Provisions

Dear Ms. Michell:

This advice letter has been prepared in response to your request to the City of San Diego Ethics Commission for guidance with regard to the impact of the Ethics Ordinance's future employment and post-employment lobbying provisions on your upcoming employment with the Downtown San Diego Partnership. Because you have not identified a specific contemplated action, we are treating your inquiry as a request for informal advice.

### **QUESTIONS**

1. Does your upcoming employment with the Downtown San Diego Partnership currently impact your ability to participate in municipal decisions involving that entity?
2. Upon leaving City service, to what extent will the City's post-employment lobbying prohibitions prevent you from communicating with current City officers and employees?
3. Upon leaving City service, to what extent may you continue to communicate with current City officers and employees?

### **SHORT ANSWERS**

1. Yes. During your remaining days with the City, you may not use your official position to influence any municipal decisions involving the interests of the Downtown San Diego Partnership.

2. Upon leaving City service, the City's post-employment lobbying prohibitions will preclude you from communicating (or helping others communicate) with current City officers and employees on behalf of the Downtown San Diego Partnership regarding any pending projects that you worked on while with the City. These prohibitions will also preclude you from lobbying current City Officials on behalf of the Downtown San Diego Partnership with regard to any other types of municipal decisions. These prohibitions will remain in effect for a one-year period following your separation from the City.
3. During your one-year post-employment period, you may communicate with current City Officials on behalf of the Downtown San Diego Partnership if you are appearing as a speaker at a public hearing or providing a written statement that becomes part of the record of a public hearing. In addition, because the City's post-employment provisions pertain only to compensated communications, they do not preclude you from communicating with current City officers and employees regarding projects and municipal decisions that are unrelated to your employment with the Downtown San Diego Partnership.

## **BACKGROUND**

You recently announced that you will be leaving City service on January 14, 2011, and will become the President of the Downtown San Diego Partnership [DSDP] approximately one month later. According to DSDP's website, its mission is to "advance Downtown San Diego as the leading economic, cultural and governmental center of the region through leadership, advocacy and education." Its website also indicates that it: (1) represents membership before governmental agencies and community organizations; (2) serves as Downtown's watchdog; (3) supports redevelopment that stimulates business and economic growth Downtown; (4) advocates for improvements that enhance Downtown's quality of life; (5) promotes development of public facilities and infrastructure that serve Downtown; (6) supports Downtown San Diego as the center for the arts and culture for the region; (7) coordinates member efforts to improve Downtown social services and outreach programs; and (8) educates San Diego communities about the importance of a vibrant and healthy Downtown.

Most, if not all, of the above activities are related to City of San Diego governmental programs and interests, and accordingly you have asked for guidance regarding the impact of the City's future employment restrictions and post-employment lobbying prohibitions on your upcoming role as DSDP's President.

## **ANALYSIS**

### *A. Future Employment*

The Ethics Ordinance contains rules concerning the future employment of City Officials. In particular, San Diego Municipal Code [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.

For so long as you remain the Mayor's Chief of Staff, you are a City Official subject to the above provision. Because you are securing a paid position with DSDP, section 27.3551(a) precludes you from using your official position to influence any municipal decisions in which DSDP has an interest. As indicated above, DSDP has an interest in many downtown issues that could be the subject of a municipal decision. Accordingly, you must, during your remaining days of City service, refrain from engaging in any activity (e.g., participating in meetings, signing reports, making telephone calls, sending letters or emails) that could influence a decision in which DSDP has an interest.

#### *B. Post-Employment: General Prohibitions*

In addition to the above provisions that apply while you are still a City Official, the City's Ethics Ordinance prohibits former officials from engaging in certain types of communications on behalf of a new employer for one year following their separation from the City. Although you will not start working for DSDP until approximately one month after leaving City service, the one-year post employment period will commence as soon as you leave the City. Because you have an employment agreement in place, any communications with the City that you make on DSDP's behalf, even those that take place during the month before you report to work at DSDP, will be subject to these post-employment provisions.

There are two prongs to the City's post-employment prohibitions: the project ban and the cooling off period. The "project ban" prohibits former City Officials from communicating (or helping others communicate) with current City officers and employees on behalf of a new employer with regard to projects they worked on while with the City. The "cooling off" period prohibits former City Officials from lobbying current City Officials for the purpose of influencing all types of municipal decisions on behalf of a new employer. Both types of prohibitions apply for the one-year period that commences when the official leaves the City. Although the two types of prohibitions are similar, each has distinctive features. The two types are discussed separately below.

#### *C. Post-Employment: Project Ban*

The City's project ban pertains to pending projects, and is intended to prevent City Officials from working on a particular project on behalf of the City and then "switching sides" to work on the same pending project for the other side. According to SDMC section 27.3550(a):

It is unlawful for any former City Official who received compensation from the City to work on a particular project during his or her City service to engage in direct communication with the City, for compensation, with regard to any pending application for discretionary funding or discretionary entitlements before the City

relating to that particular project on behalf of any person other than a Public Agency for a one year period immediately following termination of service with the City.

The project ban does not apply to all municipal decisions, just those that involve “projects” you worked on previously. For purposes of the project ban, to “work on a particular project” means to “take part personally and substantially in the project by rendering a decision, approval, or disapproval; by making a formal written recommendation; by conducting an investigation; by rendering advice on a significant basis; or by using confidential information.” SDMC § 27.3550(a)(1). A “project” is defined to mean “any matter where a private business has made an application to the City for discretionary funding or discretionary entitlements, or where the City exercises discretion to enter into a lease, agreement, or contract with a private business.” SDMC § 27.3550(a)(2). Note that even though DSDP is a non-profit entity, it is still considered a “private business” as that term is defined in SDMC section 27.3503. As the Mayor’s Chief of Staff, you presumably worked on many “projects” by making decisions, providing advice, and offering recommendations. To the extent that you did so with regard to any project that is still pending, the project ban will apply to you during your one-year post-employment period.

During your post-employment period, you may not communicate with the City on behalf of DSDP regarding any pending “project” that you worked on while with the City. It is not relevant whether DSDP itself has an application pending before the City. Even if DSDP is merely monitoring a project, with no expectation that DSDP or any other organization that it supports will obtain a financial benefit, the project ban will still apply. In other words, the ban applies to all communications made on behalf of any entity providing you with compensation regardless of the identity of the applicant.

This prohibition applies to communications with any “City Official,” a term that includes elected officials; unclassified City staff members who file a Form 700 (Statement of Economic Interests); members of City commissions, boards, and committees who file a Form 700; consultants who file a Form 700; and employees of any City agencies (e.g., CCDC, SDDPC) who file a Form 700. Unlike the cooling off period (discussed below), the project ban also applies to City employees and City agency employees who are not required to file a Form 700.

The “project ban” also includes a “behind-the-scenes” component. According to SDMC section 27.3550(b):

It is unlawful for any former City Official, for compensation, to knowingly counsel or assist any person other than a Public Agency in connection with an appearance or communication in which the former City Official is prohibited from engaging pursuant to subsection (a) for a one year period immediately following termination of service with the City.

In accordance with the above provision, you may not advise other DSDP officers or employees how to communicate with City Officials or employees regarding any pending project on which you worked. Moreover, you cannot advise any individuals outside of DSDP regarding the making of such communications if doing so would be in connection with your employment with DSDP. In

other words, to the extent that the project ban prohibits you from communicating with the City, you are equally prohibited from helping someone else make that communication.

As indicated above, the project ban does not apply to municipal decisions you worked on as the Mayor's Chief of Staff unless those decisions fall within the definition of a "project" (e.g., a lease, agreement, contract, or application for discretionary funds). In other words, to the extent that you worked on general policy issues, community plans, ordinances, and other types of decisions outside the scope of a "project," you will not be precluded from communicating with other DSDP officers or employees "behind the scenes" concerning these issues. If, for example, you participated in municipal decisions concerning general homeless issues while you worked for the City, you would not be prohibited from continuing to work on such issues in your new role as President of DSDP.

Note that large, long-term projects often change in character and scope over time, such that a "project" a City Official worked on while with the City may not be the same "project" he or she is involved with in the private sector. In addition, some large projects may have discrete components or phases such that you may be able to assist your new employer behind the scenes on the subsequent phase of a project you worked on while with the City. As stated in the Ethics Ordinance, you may obtain a written determination from the Ethics Commission as to whether a particular prospective communication would violate the project ban. SDMC § 27.3550(c).

The project ban applies as long as the project is pending during the one-year post-employment period. Once the project is no longer pending (e.g., contract is awarded, permit granted), the project ban no longer applies to communications related to that project. Keep in mind, however, that you will still be subject to the cooling off period for the one-year period following your separation from the City, i.e., until January 14, 2012.

#### *D. Post-Employment: "Cooling Off" Period*

In addition to the "project ban," the Ethics Ordinance contains a separate prohibition that precludes former City Officials from lobbying the City on any municipal decision for a one-year period following their separation from City service. This one-year period is often referred to as the "cooling off" or "revolving door" period, and is intended to prevent former high level City Officials from using the influence of their prior positions to communicate with current City Officials (often former colleagues or subordinates) for the benefit a private employer. According to SDMC section 27.3550(d):

It is unlawful for any former City Official to engage in direct communication for the purpose of lobbying the City if all of the following circumstances apply:

- (1) the former City Official served as a City Official within the previous twelve months; and
- (2) the former City Official received compensation from the City for his or her services as a City Official; and

- (3) the former City Official is receiving compensation from a private business to engage in the direct communication with the City.

The term “lobbying” is defined as a “direct communication with a City Official for the purpose of influencing a municipal decision on behalf of any other person.” SDMC § 27.3503. The Municipal Code defines “direct communication” to include talking to other persons by telephone or in person, and corresponding with other persons in writing, electronically, or by fax. *Id.* “Influencing a decision” means “affecting or attempting to affect an 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.” *Id.* It also includes “providing information, statistics, analysis, or studies to a City Official.” *Id.* As stated above, the term “City Official” includes all elected officials, unclassified employees, commission and board members, consultants, and agency employees, to the extent that they file a Form 700. Unlike the project ban, the cooling off period does not apply to communications with City staffers or City agency staffers not required to file a Form 700.

On the other hand, the cooling off period applies to more than just “projects” and thus extends to more types of decisions than the project ban. It precludes you from lobbying City Officials on any “municipal decision,” which is defined to include all City resolutions and ordinances; reports by City Officials to the City Council or a City Council committee; City contracts; quasi-judicial decisions (e.g., issuing licenses, permits, and variances); and any other decision by the City Council or a City commission, board, or committee. SDMC § 27.3503.

Because DSDP is a “private business” that will be compensating you for your services, you may not lobby City Officials with regard to any municipal decisions on behalf of DSDP during the one-year post-employment period. For example, if DSDP has an interest in a City ordinance addressing homeless issues in the downtown area, you may not lobby any City Officials regarding that ordinance while the cooling off period is in effect.

Unlike the project ban, however, the cooling off provisions do not include a “behind the scenes” component. If the project ban does not apply, you may assist other DSDP officers and employees with regard to their lobbying contacts on behalf of DSDP. In other words, although you will be precluded from directly contacting City Officials regarding a particular municipal decision, you may still work on that decision internally for DSDP. You may, for example, provide background information, statistics, and personal observations to a DSDP employee regarding a particular issue in order to help that employee communicate with City Officials.<sup>1</sup>

#### *E. Post-Employment: Permissible Communications*

The project ban and the cooling off provisions do not completely eliminate your ability to communicate with City Officials during the one-year post-employment period. You may, of

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<sup>1</sup> Note that all former City Officials are prohibited from using or disclosing any “confidential” information obtained during their City service. SDMC § 27.3564(e). Please contact the Ethics Commission for additional assistance if you have questions regarding this prohibition.

course, continue to have social contacts with former colleagues and communicate with them regarding any matter that is outside the scope of a “project” or other types of municipal decisions.

Moreover, SDMC section 27.3550(e)(5) provides that you may appear as a speaker at a public hearing or otherwise provide written statements that become part of the record of a public hearing. Communications made in this regard are expressly excluded from both the project ban and the cooling off provisions. A “public hearing” is any meeting subject to the Ralph M. Brown Act where a public record is kept. Thus, you may make an appearance on behalf of DSDP at, for example, a City Council meeting to discuss any municipal decision, including a “project” that you worked on while with the City.<sup>2</sup>

In addition, you may discuss “projects” and other types of municipal decisions with current City Officials and staff members when doing so is not at the behest of, or in the interest of, your new employer. Because the project ban and cooling off provisions apply only to communications for which you are compensated, you will be free to communicate with the City on matters for which you receive no compensation. In other words, because you will be receiving compensation from DSDP, the post-employment prohibitions will apply to communications made on DSDP’s behalf, i.e., communications concerning City projects and decisions that are reasonably related to DSDP’s mission (see Background section above). You will, for example, be precluded from speaking to current City Officials regarding a municipal decision intended to stimulate business and economic growth in the downtown area. The prohibitions will not apply, however, to communications on matters in which DSDP has no interest and that are not part of your DSDP job duties. If, for example, DSDP has no interest in a La Jolla zoning issue, you would be free to share your thoughts regarding that issue with the Mayor, the Mayor’s new Chief of Staff, the Chief Operating Officer, members of the City Council, or any other City Official, all without violating the City’s post-employment prohibitions.

In summary, you may share your knowledge, advice, and recommendations with the City after you leave City service, but only to the extent that such communications fall outside the scope of your employment with DSDP or are in the context of a public hearing as discussed above. It is also relevant to note that the post-employment prohibitions apply to former City Officials on a “24/7” basis; they do not allow former City Officials to temporarily step out of their positions with private employers (e.g., on their lunch hour or while on vacation) to discuss a matter that is of interest to their employers.

## CONCLUSION

The Ethics Ordinance prohibits City Officials from using their official positions to influence municipal decisions of interest to future employers. Because you are in the process of accepting employment with DSDP, you are precluded from using your City position to influence decisions in which DSDP has an interest. This prohibition will remain in place until you leave City service.

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<sup>2</sup> SDMC section 27.3550(e) contains other exceptions to the post-employment prohibitions, including providing witness testimony, representing personal interests, lobbying on behalf of another public agency, and engaging in litigation-related communications. Because these exceptions appear to be irrelevant to your employment with DSDP, they are not discussed in this letter.

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Once you leave City service, the Ethics Ordinance precludes you from engaging in particular types of communications with the City for a one-year period. To the extent that you worked on a particular project while with the City, you may not, during your one-year post-employment period, have any communications (outside of a public hearing) with the City on behalf of DSDP regarding that project, nor may you, on behalf of DSDP, provide assistance to someone else who is making such communications. Moreover, you may not lobby (outside of a public hearing) any City Officials during the one-year post-employment period on behalf of DSPD with regard to any other types of municipal decisions. These provisions apply to communications made on behalf of DSDP during the one-year post-employment period. They do not, however, preclude you from communicating with current City Officials and City staff on matters unrelated to City business or unrelated to the interests of DSDP.

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 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,

Stephen Ross  
Program Manager-Technical Assistance