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5 Petitioner

6  
7 **BEFORE THE CITY OF SAN DIEGO**  
8 **ETHICS COMMISSION**

9  
10 In re the Matter of:

) Case No.: No. 2008-54

11 NANCY GRAHAM,

12 Respondent.

)  
) **PETITIONER’S BRIEF RE WHETHER**  
) **THE ETHICS ORDINANCE: (1)**  
) **INCORPORATES AFFILIATED**  
) **ENTITIES RULES; AND (2) PERMITS**  
) **MULTIPLE COUNTS FOR REPEATED**  
) **VIOLATIONS OF SECTION 27.3561**  
)  
) **Date:** May 13, 2010  
) **Time:** 5:00 p.m.  
) **Location:** 202 C Street, 12th Floor  
) San Diego, CA 92101

17 **I**  
18 **INTRODUCTION**

19 The City of San Diego Ethics Commission [Commission] asked the parties to brief two  
20 legal questions relevant to its determination of Respondent Nancy Graham’s [Respondent]  
21 alleged violations of the City’s Ethics Ordinance in participating in municipal decisions affecting  
22 one of her economic interests. Petitioner is alleging that as President and Chief Operating Officer  
23 of the Centre City Development Corporation [CCDC], Respondent participated extensively in  
24 negotiations concerning key issues associated with the addition of a large-scale hotel at the  
25 Ballpark Village project, which is co-owned by a California subsidiary of Lennar Corporation.  
26 Petitioner alleges that Lennar’s California subsidiary is one of Respondent’s economic interests  
27 because she received over \$3.5 million in income from Lennar’s Florida subsidiary within 12  
28 months of participating in numerous aspects of negotiating the Ballpark Village project.

1 Following a probable cause hearing, the Commission determined on December 10, 2009,  
2 that probable cause existed to believe that Respondent may have violated San Diego Municipal  
3 Code section 27.3561, as reflected in Counts 1 through 34 of Petitioner’s Administrative  
4 Complaint. In setting the matter for an administrative hearing, the Commission directed the  
5 Petitioner and Respondent to provide further briefing on the following two legal issues in  
6 advance of the hearing: (1) whether the affiliated entities rule applies to the Ethics Ordinance;  
7 and, (2) whether the acts alleged constitute a single or multiple violations of the San Diego  
8 Ethics Ordinance. At a pre-hearing conference held on April 13, 2010, the Presiding Authority  
9 set a briefing schedule for the two issues and ordered that during the open session portion of the  
10 Ethics Commission’s regularly-scheduled meeting on May 13, 2010, the Commission shall  
11 discuss and consider the Presiding Authority's recommendation and make a final determination  
12 of the two legal issues. (Respondent’s brief raises issues at sections A(2) – A(4), pp. 6-9, beyond  
13 the scope of the legal issues to be decided by the Commission on May 13, 2010.)

## 14 II

### 15 **AFFILIATED ENTITIES RULES APPLY** 16 **TO THE ETHICS ORDINANCE**

#### 17 *A. Summary of Argument*

18 With regard to whether the affiliated entities rules apply to the Ethics Ordinance, the  
19 Ethics Ordinance must be interpreted in accordance with the state’s Political Reform Act [PRA]  
20 and Fair Political Practices Commission [FPPC] Regulations. The only exception to this mandate  
21 is for instances when the City has decided to impose stricter requirements on local City officials  
22 than are required under state law. Significantly, well-established principles of preemption do not  
23 permit the City to hold its officials to lower governmental ethics standards, only to higher ones.

24 Respondent acknowledges that “[t]he state ethics laws and the city ordinance are very  
25 similar, in fact, for most cases they are identical.” (Respondent’s brief, p.4:11-12.) However, she  
26 depicts the Ethics Ordinance and state law as “very different” with respect to disqualification.  
27 Respondent either does not understand the interplay between the Ethics Ordinance and state law  
28 or is purposefully trying to mislead the Commission in an attempt to avoid responsibility for

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1 participating in decisions from which she was disqualified. Either way, Respondent’s argument  
2 must fail.

3         The hypertechnical distinction Respondent seizes on between the word “person” in the  
4 Ethics Ordinance and “source of income” in the Government Code is meaningless because the  
5 concept described by the two laws is the same. Moreover, Respondent has purposefully omitted  
6 or made a gross error in her “side by side” comparison table by excluding the key FPPC  
7 Regulation that defines “source of income” using the word “person,” *just like the Ethics*  
8 *Ordinance*. Notably, Respondent’s table fails to mention FPPC Regulation 18703.3 (attached as  
9 Ex. 1), which defines a “source of income” as “any *person* from whom he or she has received  
10 income” (emphasis added). This regulation also defines a source of income as including  
11 affiliated entities. Thus, the *relevant* FPPC Regulation not only shows that “person” and “source  
12 of income” are two sides of the same coin, but also that the affiliated entities rules are applicable  
13 to Respondent’s alleged violations of the Ethics Ordinance.

14         In addition, to make abundantly clear that SDMC section 27.3561 was drafted with the  
15 intent of incorporating the state’s disqualification prohibitions and not meant to impose different  
16 rules, including the affiliated entities rules, Petitioner supports its brief with a Declaration (Ex. 2)  
17 stating this intent from the principal author of the Ethics Ordinance, former San Diego Deputy  
18 City Attorney Richard A. Duvernay.

19         *B. The Ethics Ordinance Generally Incorporates the PRA and FPPC Regulations*

20         A law may incorporate another law by a specific reference to a single statute or  
21 regulation, or by referring to a body of laws or to the general law relating to the subject matter.  
22 *See Palermo v. Stockton Theaters, Inc.*, 32 Cal. 2d 53, 59 (1948). The incorporation language in  
23 SDMC section 27.3503 provides:

24                 Except as otherwise provided herein, the terms and provisions of this Division *shall*  
25                 *have the meanings and shall be interpreted in accordance with the applicable*  
26                 *definitions and provisions* of the Political Reform Act of 1974, as amended  
                    (California Government Code sections 81000 through 91014) and the regulations of  
                    the California Fair Political Practices Commission, as amended. (emphasis added)

27         SDMC section 27.3503 generally and broadly incorporates all of the definitions and provision of  
28 the PRA and FPPC Regulations concerning the matters covered by the Ethics Ordinance. The

1 use of the word “shall” in SDMC section 27.3503 requires that terms and concepts in the Ethics  
2 Ordinance be interpreted in a manner consistent with state law.

3 The introductory phrase “except as otherwise provided herein” provides an exception to  
4 this general incorporation in situations where the City has decided to be more restrictive than  
5 state law. For example, the Ethics Ordinance includes language at section 27.3510(d) requiring  
6 elected officials to file a semi-annual gift disclosure form that is in addition to the annual Form  
7 700 required by state law.

8 On the other hand, where the City does not expressly and clearly signify a departure from  
9 state law, there is no basis for a different interpretation of the respective laws, even when  
10 different words are used. In other words, a choice to use different phrasing for space  
11 considerations, structural consistency with neighboring language, or similar non-substantive  
12 reasons should not be presumed to suggest, let alone mandate, a departure from established  
13 provisions of state law. Thus, SDMC section 27.3561’s use of different words to reflect the  
14 state’s disqualification provisions should not be seen as a rejection of those provisions.

15 *C. SDMC section 27.3561 is Based on the State’s Disqualification Provisions*

16 By virtue of SDMC section 27.3503 generally incorporating the PRA and FPPC  
17 Regulations into the Ethics Ordinance, the Ethics Commission has no discretion to ignore  
18 relevant provisions of state law in interpreting SDMC section 27.3561’s disqualification  
19 provision. Respondent, however, urges the Commission to ignore the most relevant provision.

20 Page 5 of Respondent’s brief compares the language of SDMC section 27.3561 and  
21 Government Code section 87103, both which pertain to disqualification based on income.  
22 Significantly, Respondent’s table fails to include FPPC Regulation 18703.3 (titled “Economic  
23 Interest, Defined: Source of Income”), the regulation that actually defines a “source of income”  
24 for purposes of Government Code section 87103. Instead, Respondent chose to use FPPC  
25 Regulation 18730 (titled “Provisions of Conflict of Interest Codes”), a regulation that is not  
26 germane. It is found in a different article of the FPPC Regulations that addresses disclosure  
27 issues. In particular, Regulation 18730 pertains to “conflict of interest codes” that are adopted by

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1 the City Council for the employees of City departments and agencies to use when completing  
 2 their Forms 700.

3 Petitioner presents below the portions of the Ethics Ordinance and state law, including  
 4 the most relevant provision (Regulation 18703.3), demonstrating the Ethics Ordinance’s  
 5 consistency with state laws, including the incorporation of the affiliated entities rules:

SDMC § 27.3561	Government Code § 87103	California Code of Regulation § 18703.3
It is unlawful for any <i>City Official</i> to knowingly <i>influence a municipal decision</i> if it is reasonably foreseeable . . . the <i>municipal decision</i> will have a material financial effect on:	A public official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, . . . on:	For purposes of disqualification under Government Code sections 87100 and 87103, a public official has an economic interest in:
(4) any <u>person</u> from whom a <i>City Official</i> . . . has received (or by whom you have been promised) \$500 or more in income within twelve months prior to the <i>municipal decision</i> .	(c) Any <u>source of income</u> . . . aggregating . . . \$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.	(a)(1) any <u>person</u> from whom he or she has received income . . . aggregating five hundred dollars (\$ 500) within 12 months prior to the time when the relevant governmental decision is made.  (a)(2) An official has an economic interest in a business entity which is a <u>parent</u> or <u>subsidiary</u> of, or is <u>otherwise related</u> to, a business entity in which the official has an interest as defined in Government Code section 87103(c).

17 Respondent’s argument against the incorporation of the state affiliated entities rules turns  
 18 on the Ethics Ordinance’s use of the term “person” in SDMC section 27.3561(b)(4), and the use  
 19 of the term “source of income” in Government Code section 87103. Respondent argues that the  
 20 City rejected “source of income” and replaced the term with “person.” (Respondent’s brief,  
 21 p.5:19-20) This is an argument of form over substance. There is no requirement that the City use  
 22 the exact wording of a state statute or regulation in every instance in order to maintain  
 23 consistency with state law. The English language is flexible enough to allow one to express a  
 24 concept with one word (“person”) and without that word being treated as contradictory to other  
 25 words (“source of income”) expressing the same concept. Surely, a “farmer” can also be a  
 26 “person who grows crops,” just as a “person” can be a “source of income.” The terms are  
 27 harmonious, not contradictory.

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1           Moreover, as established by the above table, state law, through FPPC Regulation 18703.3  
2 actually *defines* “source of income” and does so by reference to any “*person* from whom he or  
3 she has received income” (emphasis added). This regulation clearly demonstrates that state law  
4 uses the term “person” to describe a “source of income” for disqualification purposes. Both state  
5 and local law define “person” in the same broad manner, and under both definitions the term  
6 clearly encompasses all of the Lennar entities involved in this action. Cal. Gov’t Code §82047;  
7 SDMC § 27.3503. In addition, Regulation 18703.3 contains the affiliated entities rule at  
8 subsection (a)(2), showing that this rule is integral to determining the extent of a public official’s  
9 economic interest based on income received from a person (defined as including business  
10 entities) and their affiliated entities.

11           Petitioner also directs the Commission’s attention to FPPC Regulation 18705.3, a  
12 companion provision that establishes the materiality thresholds for sources of income under  
13 Regulation 18703.3. The Commission should note that Regulation 18705.3 uses both “person”  
14 and “source of income” in the same context:

15           Materiality Standard for Disqualification (Source of Income):

16           (a) Any reasonably foreseeable financial effect on a *person* who is a *source of*  
17 *income* to a public official, and who is directly involved in a decision before the  
18 official’s agency, is deemed material. (emphasis added)

19           As evidenced by the use of the word “person” in Regulations 18703.3 and 18705.3, the  
20 FPPC is using the word “person” in exactly the same manner used by the City in SDMC section  
21 27.3561. The parallel wording in state and local law shows that section 27.3561 is based on, and  
22 is intended to be interpreted consistent with, state law. Had the City wanted to establish “source  
23 of income” rules different than those in state law, it would have defined “income” and/or “source  
24 of income” and done so in a way to distinguish such definitions from those in state law. In fact,  
25 the Ethics Ordinance contains no language suggesting an intent that section 27.3561(b)(4) be  
26 construed differently from state law. Rather than signifying a rejection of the PRA (as  
27 Respondent would have you believe), the identical use of the word “person” in both the Ethics  
28 Ordinance and FPPC Regulations corroborates Petitioner’s assertion that a disqualifying source  
of income under local law is no different than a disqualifying source of income under state law.

1 *D. SDMC section 27.3561(c) Expressly Incorporates the State’s Disqualification Laws*

2 SDMC section 27.3561(c) expressly states that: “[f]or purposes of this section, ‘material  
3 financial effect’ has the same meaning as that term is used in title 2, sections 18705 through  
4 18705.5 of the California Code of Regulations.” Respondent turns this specific reference on its  
5 head by arguing that it somehow evidences the City’s intent to incorporate into section  
6 27.3561(c) only the FPPC Regulations concerning material financial effect, and ignore other  
7 applicable FPPC Regulations. (Respondent’s brief, p.8:2-6) This argument defies common sense  
8 because the FPPC’s materiality regulations necessarily rely on neighboring regulations,  
9 including the one that defines sources of income. Moreover, as supported by Mr. Duvernay’s  
10 declaration (Ex. 2), the City’s reference to Regulation 18705.3 was never intended to serve as a  
11 rejection of the state’s “source of income” definition. Instead, the express incorporation was a  
12 legislative drafting decision that achieved two key purposes.

13 First, unlike other terms in section 27.3561, the precise meaning of “material financial  
14 effect” is not readily apparent or easily defined. The term by itself does not establish any  
15 objective criteria upon which one would know if a financial effect is “material” or not. Given  
16 that the FPPC adopted fifteen pages of regulations just to establish materiality thresholds,  
17 defining “materiality” in the Ethics Ordinance was not a practical solution. Instead, a decision  
18 was made to direct the reader to the state law for an understanding of what constituted  
19 materiality in a given situation. (Ex. 2, ¶ 12.)

20 Second, the Ethics Ordinance’s express reference to Regulations 18705 through 18705.5  
21 emphasizes that an application of SDMC section 27.3561 to a particular situation will result in  
22 the same conclusion that would have been achieved in a state law analysis. (Ex. 2, ¶ 12.) SDMC  
23 section 27.3561(c), therefore, requires a “material financial effect” under state law to be treated  
24 as a “material financial effect” under the City’s Ethics Ordinance. By expressly incorporating the  
25 state’s materiality threshold, the Ethics Ordinance also incorporates the steps used by the state to  
26 reach that threshold. Under state law, when situations involve parent, subsidiary, and otherwise  
27 related entities, one can reach the materiality threshold only through the affiliated entities rules  
28 set forth in FPPC Regulations 18703.1 and 18703.3.

1 Similarly, one can determine whether a particular source of income is “directly involved”  
2 or “indirectly involved” in a municipal decision only by looking to FPPC Regulation 18704.1,  
3 which is also an essential step on the path towards a finding of materiality. The terms “directly  
4 involved” and “indirectly involved” are not defined in the Ethics Ordinance, and in fact do not  
5 even appear in the Ethics Ordinance. They are incorporated by SDMC’s general incorporation  
6 language, and not by specific reference. Nevertheless, they are a crucial part of any local  
7 disqualification analysis, and ignoring the distinction between the two terms would inevitably  
8 lead to confusion and absurd results.

9 Ultimately, if a Lennar entity is considered a “person who is a source of income” under  
10 FPPC Regulations, then that Lennar entity will also be considered one of Respondent’s economic  
11 interests for purposes of the Ethics Ordinance. Thus, the reverse of Respondent’s argument is  
12 true – the reference to the state’s materiality regulations actually supports a conclusion that the  
13 Ethics Ordinance incorporated the affiliated entities rules.

14 *E. The City Never Excluded the State’s Affiliated Entities Rules*

15 When the Ethics Commission, in conjunction with the City Attorney’s Office, drafted the  
16 proposed Ethics Ordinance in 2002, it intended to be consistent with state law disqualification  
17 provisions, not reject them in favor of something different. (Ex. 2, ¶ 9) “We presume that the  
18 Legislature, when enacting a statute, was aware of existing related laws and intended to maintain  
19 a consistent body of rules.” *McAllister v. CA Coastal Com’n*, 169 Cal. App. 4th 912, 930 (2008).

20 Respondent cannot produce evidence of a contrary intent because none exists. SDMC  
21 section 27.3561 was adopted to incorporate the state’s disqualification provisions without  
22 copying over voluminous pages of text from the PRA and FPPC Regulations. (Ex. 2, ¶ 8.) There  
23 was no need to spell out all the details in the Ethics Ordinance because a reader could find any  
24 necessary guidance and interpretation in the provisions of state law, as required by the  
25 incorporation language of SDMC section 27.3503. (Ex. 2, ¶ 10.) The fact that the drafters of the  
26 Ethics Ordinance chose to use different phrasing in SDMC 27.3561 is not evidence of a desire to  
27 create laws that are different from those in state law. (Ex. 2, ¶ 8.) Instead, it is merely evidence of  
28 an attempt to impose the rules in a streamlined fashion.

1           When presenting the draft Ethics Ordinance to the City Council in 2002, the Ethics  
2 Commission left no doubt that SDMC section 27.3561 was intended to mirror state law. “Section  
3 27.3561 is intended to codify the requirements in the Political Reform Act pertaining to the  
4 disqualification of City Officials from decisions involving any of the City Official’s economic  
5 interests. This provision is commonly known as disqualification for a conflict of interest.” (Ex. 3,  
6 p.6, Memo to City Council from Executive Director Charles B. Walker (Feb. 11, 2002).) Nothing  
7 in Mr. Walker’s memorandum suggests that section 27.3561 would deviate from state law. In  
8 2002, the City Council adopted section 27.3561 as proposed by the Ethics Commission, without  
9 changes, and it has not been amended since that time. Ordinance O-19055 (Apr. 29, 2002).  
10 Section 27.3561’s disqualification language was adopted at the same time as section 27.3503’s  
11 state law incorporation language. *Id.* There is nothing in the legislative history of the Ethics  
12 Ordinance in general, or section 27.3561 in particular, evidencing any intent to adopt a  
13 disqualification provision that is different from state law.

14           The state’s affiliated entities rules have been in place for more than a quarter of a century,  
15 having been adopted by the FPPC in 1984. It would have been an extraordinary act of the City  
16 Council to intentionally reject these longstanding rules to make weaker laws. In the absence of  
17 any evidence supporting such a decision, an interpretation to that effect would also be contrary to  
18 the rules of statutory interpretation. “We are assisted by the rule that courts should not presume  
19 the Legislature in the enactment of statutes intends to overthrow long-established principles of  
20 law unless that intention is made clearly to appear either by express declaration or by necessary  
21 implication.” *Torres v. Automobile Club of So. California* 15 Cal. 4th 771, 779 (1997).

22           Respondent has provided no reports, no memoranda, no ordinance language, no Rules  
23 Committee meeting transcripts, no City Council meeting transcripts, no evidence at all of a City  
24 Council intent that section 27.3561(b)(4) be inconsistent with state law. Petitioner, on the other  
25 hand, has produced Mr. Duvernay’s declaration in his capacity as the primary author of the  
26 Ethics Ordinance, as well as Mr. Walker’s memorandum to the City Council, both confirming  
27 the City’s intent to incorporate the state’s disqualification laws, including the affiliated entities

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1 rules. Without any evidence to the contrary, it is readily apparent that this local disqualification  
2 provision must be interpreted in accordance with the state’s longstanding affiliated entities rules.

3 To conclude otherwise, one would have to accept the notion that any entity can escape  
4 the reach of the Ethics Ordinance by simply creating a subsidiary company. Respondent states as  
5 much at the top of page 9 of her brief (arguing that Lennar never had business before CCDC  
6 because it created and used a limited liability company to conduct the business it had before  
7 CCDC). Under Respondent’s theory, any company, including one located solely in San Diego,  
8 could create a subsidiary to provide \$1 million to a Councilmember without the Councilmember  
9 becoming disqualified from voting on a decision to award a \$100 million contract to the  
10 company. Respondent is arguing that the City of San Diego intended to have weak  
11 disqualification laws, when in fact the clearly stated purpose and intent of the Ethics Ordinance  
12 is to “avoid conflicts of interest.” SDMC § 27.3501. “In deciding the proper interpretation of  
13 statutes, the primary goal is to determine the intent of the Legislature when the law was enacted.  
14 The goal of statutory construction is to ascertain the legislature's intent to effectuate the purpose  
15 of the law.” *Tucker v. Grossmont Union High School Dist.* 168 Cal. App. 4th 640, 644 (2008).  
16 As discussed above, there can be no doubt that the City of San Diego intended to adopt  
17 disqualification laws no less tough than those in existence at the state.

18 *F. Many Provisions of State Law Are Similarly Incorporated into the Ethics Ordinance*

19 The affiliated entities rules are but a few of the state’s provisions that could be applicable  
20 to an Ethics Commission enforcement action. State law also includes exceptions for income from  
21 a former employer (FPPC Regulation 18703.3(b)); defines “commission income” (FPPC  
22 Regulation 18703.3(c)(1)); regulates income from a domestic registered partner (FPPC  
23 Regulation 18229); provides an exception for salary from a governmental entity (FPPC  
24 Regulation 18232); recognizes community property interests (Gov’t Code § 82030(a)); adds an  
25 exception for credit card indebtedness (Gov’t Code § 82030(b)(10)); and provides many other  
26 relevant provisions.

27 None of the above state law provisions appear within the pages of the Ethics Ordinance,  
28 and none are expressly incorporated into the Ethics Ordinance. Yet when the Ethics Commission

1 conducts an enforcement matter, it has no latitude to ignore any of these provisions. Rather than  
2 copy and paste all these potentially applicable provisions of law into the Ethics Ordinance, the  
3 incorporation language of SDMC section 27.3503 fulfills the same function. The fact that many  
4 of the explanatory or guiding provisions mentioned above are not pasted into the Ethics  
5 Ordinance does not render them inapplicable to local enforcement. These state law provisions  
6 apply locally either to exempt a person from enforcement or, in the alternative, establish the  
7 basis for enforcement.

8 *G. Any Interpretation to the Contrary is Preempted By State Law*

9 Lastly, and perhaps most importantly, Respondent’s interpretation of the Ethics  
10 Ordinance is contrary to the fundamental manner in which state and local laws co-exist. As a  
11 charter city, the City of San Diego has the authority to establish laws governing the conduct of its  
12 officials. Cal. Const. art. XI, § 5. The California Constitution, however, limits a city’s exercise of  
13 legislative power by prohibiting local laws that conflict with “general” or state laws. Cal. Const.  
14 art. XI, § 7. The City may not, therefore, adopt, either expressly or by implication, a law that  
15 conflicts with the PRA. Accordingly, although the City may impose more stringent  
16 disqualification laws upon its officials, it is legally prevented from adopting laws that are less  
17 restrictive. As stated by the FPPC, “nothing shall prevent a local agency from imposing  
18 additional requirements on any person if the requirements do not prevent the person from  
19 complying with the Political Reform Act.” *In re McCabe*, FPPC Adv. Ltr. I-91-093.

20 A local law conflicts with state law if it contradicts the state law. *People ex rel.*  
21 *Deukemejian v. County of Mendocino*, 36 Cal. 3d 476, 484 (1984). A local ordinance will be  
22 found invalid if it undermines the purpose and intent of a state statute. *American Financial*  
23 *Services Ass’n v. City of Oakland*, 34 Cal. 4th 1239, 1272-73 (2005). Only when a local  
24 ordinance furthers the stated goals of state legislation will preemption be avoided. Decades ago,  
25 the FPPC confirmed that charter cities may not adopt laws superseding the PRA. *In re Edwin L.*  
26 *Miller*, FPPC Op. 75-125 (July 06, 1976). “The Political Reform Act will preempt local laws that  
27 are inconsistent with the provisions of the Act.” *In re Rubin*, FPPC Adv. Ltr. G-95-346.

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1 In *In re Buchanan*, FPPC Adv. Ltr. A-95-228, a local public entity presented a draft  
2 disqualification ordinance to the FPPC for review. The FPPC found it to be invalid because it  
3 was inconsistent with the PRA and because “it suggests language which is clearly in violation of  
4 the Act.” It stated that “in order for the ordinance to comply with state law, it must be drafted in  
5 a manner consistent with the conflict-of-interest provisions of the Act. In general, the proposed  
6 ordinance provides an incorrect interpretation of the conflict-of-interest provisions, and,  
7 therefore, is not in compliance with the Act.”

8 Preemption laws preclude the City from adopting a law that allows an action prohibited  
9 by state law. Respondent, nevertheless, is asserting that the City Council intentionally chose to  
10 allow its officials to participate in governmental decisions even when such decisions involve the  
11 parent or subsidiary of an entity that gave money to such officials. Although state law clearly  
12 disallows such participation, Respondent would have you believe that a contrary local law can  
13 take precedence and serve to exempt what the state prohibits. As set forth above, a local law that  
14 contradicts state law is preempted by the state Constitution. Simply put, *the City’s Ethics*  
15 *Ordinance may not allow what the PRA prohibits*. The City may not impose lesser standards that  
16 exempt or immunize public officials from laws that exist in the PRA. The City was aware of this  
17 fact when it adopted the Ethics Ordinance. (Ex. 2, ¶ 6.) Only if the state’s affiliated entities rules  
18 were repealed would they cease to impact City Officials. Unless and until that happens, the  
19 City’s Ethics Ordinance cannot be interpreted in a manner that negates or ignores the existence  
20 of the state’s affiliated entities rules.

### 21 III

#### 22 SEPARATE INSTANCES OF PARTICIPATION 23 ARE SEPARATE COUNTS

##### 24 A. *Summary of Argument*

25 The Commission also requested briefing on whether the acts alleged in the Final  
26 Administrative Complaint constitute a single or multiple violations of SDMC section 27.3561.  
27 The Complaint contains 34 separate counts, describing instances from March 15, 2006, through  
28 May 16, 2008, in which Respondent participated in or otherwise influenced Ballpark Village  
project decisions when it was reasonably foreseeable that those decisions would have a material

1 financial impact on Lennar Homes of California. Under SDMC section 26.0440, the Ethics  
2 Commission has the authority to impose a fine of up to \$5,000 per count.

3 As illustrated below, the plain language of the Ethics Ordinance, California case law, past  
4 practices of the FPPC and the Ethics Commission, and constitutional proscriptions against  
5 preemption all support multiple counts for multiple violations of the same code section in this  
6 administrative enforcement action.

7 *B. A Violation Occurs with Each Impermissible Attempt to Influence a Decision*

8 Section 27.3561 prohibits a City Official from knowingly influencing a municipal  
9 decision. The Ethics Ordinance defines “influencing a municipal decision” as:

10 affecting or attempting to affect any action by a City Official on one or more  
11 municipal decisions by any method, including promoting, supporting, opposing,  
12 participating in, or seeking to modify or delay such action. Influencing a  
13 municipal decision also includes providing information, statistics, analysis or  
14 studies to a City Official.

15 According to the plain language of SDMC section 27.3561, a City Official is influencing  
16 a municipal decision each time he or she affects or attempts to affect other City Officials with  
17 regard to a municipal decision. Each attempt constitutes a violation. Nothing in the language of  
18 section 27.3561 suggests that multiple attempts to influence a single project constitute a single  
19 violation. In other words, the fact that all 34 counts pertain to attempts to influence the Ballpark  
20 Village project does not transform multiple violations into a single count.

21 The rules of statutory construction require the avoidance of any “interpretation that would  
22 lead to absurd consequences.” *People v. Coronado*, 12 Cal. 4th 145, 151 (1995). It would be  
23 absurd to interpret section 27.3561 to allow a City Official to continue participating in a decision  
24 in which he or she has a financial conflict without any consequences. Here, for instance,  
25 Respondent’s first act of unlawful participation in the Ballpark Village project occurred on  
26 March 15, 2006, when she signed a CCDC staff report recommending approval of a development  
27 permit associated with Ballpark Village. Thereafter, Respondent allegedly attempted to influence  
28 decisions relating to the project 33 additional times through May 2008. According to  
Respondent’s absurd interpretation of the law, none of the 33 attempts may stand as a count, and  
none may be individually punished.

1 As discussed above with respect to the affiliated entities rule, the goal of statutory  
2 construction is to identify and support the legislative intent of the law. *Tucker v. Grossmont*  
3 *Union High School Dist.* 168 Cal. App. 4th 640, 644 (2008). Because one of the stated purposes  
4 of the Ethics Ordinance is to avoid conflicts of interest (SDMC section 27.3501), it would clearly  
5 undermine the legislative intent to interpret the law as essentially immunizing a City Official  
6 from subsequent violations of SDMC section 27.3561. Instead, the Commission should interpret  
7 section 27.3561 to always incentivize a disqualified City Official to cease influencing a  
8 municipal decision, and to deter subsequent acts of prohibited participation by determining, as  
9 the language of section 27.3561 supports, that each act of unlawful participation gives rise to a  
10 separate count under the Ethics Ordinance.

11 *C. No Public Policy Rationale for Limiting the Number of Counts*

12 Reducing Respondent's improper two year course of conduct to a single count would not  
13 be consistent with the rationale behind the adoption of the Ethics Ordinance, which has as one of  
14 its purposes and intents the avoidance of conflicts of interest in the City's decisionmaking  
15 process. SDMC § 27.3501. Accordingly, one must view SDMC section 27.3561 as a tool  
16 designed to prohibit *all* efforts by a disqualified official to influence the municipal decision-  
17 making process, not just the official's initial attempt.

18 In this case, a single count for Respondent's repeated instances of impermissible  
19 participation over a nearly two-year period would not result in a fine commensurate with the  
20 harm that her actions caused to CCDC's reputation and the public's loss of confidence in that  
21 agency. It is only with multiple counts that the Commission has the ability to impose an  
22 appropriate penalty for Respondent's repeated violations. Under Respondent's interpretation of  
23 the Ethics Ordinance, where the Commission can enforce only a single count regardless of the  
24 existence of multiple violations, the public is afforded no protection against its officials engaging  
25 in future wrongdoing. This simply defies common sense, and is contrary to the core purpose  
26 behind the City's adoption of the Ethics Ordinance. The Commission should be mindful that the  
27 Ethics Ordinance was adopted to protect the public's interest in transparent and accountable  
28 government, not to shield public officials from culpability for their wrongdoing.

1           The Ethics Commission has the option of imposing a fine between \$0 and \$5,000 per  
2 violation. SDMC § 26.0440. Therein lies the ability of the Commission to impose a sanction  
3 commensurate with the severity of the violations. Although 34 separate counts, at the maximum  
4 \$5,000 per count, could technically result in a fine as high as \$170,000, such a dollar amount  
5 merely represents the upper limit, just as \$0 represents the lower limit. The Commission has  
6 discretion to impose whatever fine it deems appropriate within those limits; nothing compels it to  
7 apply the maximum or the minimum. Drastically reducing the number of counts, however, would  
8 eliminate the Commission’s flexibility to impose a fine that adequately addresses the totality of  
9 the circumstances surrounding Respondent’s actions. The number of counts does nothing more  
10 than ensure that the Commission has ample room within which to impose an appropriate penalty.

11           *D. Multiple Counts Are Appropriate in an Administrative Enforcement Action*

12           There is precedence in administrative enforcement actions for the imposition of multiple  
13 counts for the same offense. In *Ralphs Grocery Company v. California Dept. of Food and*  
14 *Agriculture*, 110 Cal. App. 4th 694 (2003), the Fourth District Court of Appeal upheld an  
15 administrative decision by the Riverside County Sealer of Weights and Measures that dealt with  
16 repeated violations of Business and Professions Code section 12023, a consumer protection  
17 statute. In that action, Ralphs argued that it should not be fined for each instance in which it  
18 packaged and labeled seafood with an inaccurate weight, but only once when it prepared the  
19 labels. The court disagreed, focusing on the prohibition against selling inaccurately labeled  
20 items. The court upheld the administrative agency’s finding that each inaccurately labeled  
21 package offered for sale was a separate and distinct violation.” *Id.* at 701.

22           In the *Ralphs* case, although the violations pertained to a single labeling issue, multiple  
23 counts were supported because of the multiple times the incorrectly labeled packages were  
24 offered for sale to the public. Similarly, Respondent’s violations pertain to a single project  
25 (Ballpark Village), but multiple counts are supported because of the multiple times Respondent,  
26 a public official in whom public trust had been placed, impermissibly attempted to influence the  
27 project. Just as Business and Professions Code section 12023 is intended to protect the public  
28 against wrongdoing by merchants, SDMC section 27.3561 is likewise intended to protect the

1 public from City Officials participating in municipal decisions involving their own economic  
2 interests. In both cases, the imposition of multiple counts is appropriate.

3 *E. Alleging Multiple Counts for Repeat Violations is the Practice of the FPPC*

4 The FPPC, in its enforcement actions, including those based on a public official's conflict  
5 of interest, has a history of alleging multiple counts for repeated violations. Attached as Exhibit 4  
6 is an April 28, 2010, memorandum from Gary Winuk, the Chief of the FPPC's Enforcement  
7 Division advising that it is the policy of the FPPC that multiple violations may be pursued in  
8 conflict of interest cases where a respondent participated in or influenced a decision on multiple  
9 occasions. Mr. Winuk cites several cases in the FPPC's enforcement history that reflect this  
10 policy, including a 2003 stipulation *In re Mark Baldwin* , FPPC. No. 2003/204 (Exhibit 5).

11 In the *Baldwin* matter, Mark Baldwin, a California Department of Water Resources  
12 official, impermissibly participated in a governmental decision in which he had a financial  
13 interest. Mr. Baldwin, on behalf of his agency, engaged in negotiations with Wild Goose  
14 Storage, Inc., a source of income to Mr. Baldwin. The negotiations took place on two different  
15 dates. When pursuing an enforcement action against Mr. Baldwin for violating Government  
16 Code section 87100 (on which SDMC section 27.3561 is based), the FPPC alleged multiple  
17 counts – one for each instance of negotiating with Wild Goose Storage, Inc. Page 7 of the  
18 attachment to the FPPC stipulation states the following for Counts 1 and 2: “Accordingly, by  
19 making two separate requests of Wild Goose, a source of income to him, to store natural gas for  
20 the State of California, Respondent committed two violations of section 87100.”

21 Mr. Winuk's memorandum and the *Baldwin* stipulation demonstrate that the FPPC does  
22 not limit itself to a single count in instances where repeated, similar acts serve to influence a  
23 single government decision. There is no reasonable basis upon which one may conclude that the  
24 Ethics Commission should operate differently. The matter currently before the Commission is  
25 comparable to the *Baldwin* matter in that both actions are based on a public official participating  
26 on multiple occasions in a single governmental decision in which he or she has a disqualifying  
27 conflict of interest. In *Baldwin*, the official impermissibly participated in a single governmental

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1 decision on multiple occasions, and the FPPC fined that official the maximum amount allowed  
2 under law *for each instance of unlawful participation* (Page 9 of Ex. to FPPC stipulation).

3 *F. Any Interpretation to the Contrary is Preempted By State Law*

4 The above discussion of the affiliated entities rules noted that the City of San Diego is  
5 legally precluded from adopting conflict of interest laws that are more permissive than those in  
6 state law. This concept applies with equal force to the issue of limiting Respondent's multiple  
7 violations to a single count. If the Ethics Ordinance actually limited the enforcement of section  
8 27.3561 to a single count regardless of the number of times it was violated, Respondent would be  
9 entitled to repeatedly use her official position to improperly influence a municipal decision  
10 without fear of punishment beyond the first violation. Such a drastic limitation would mean that  
11 the Ethics Ordinance is far more permissive than state law. Although Respondent urges the  
12 Ethics Commission to believe that the City has adopted overly permissive disqualification laws  
13 that defy common sense, it has not done so, and in fact is legally precluded from doing so.

14 *G. Multiple Counts for Repeat Violations is the Practice of the Ethics Commission*

15 In its July 16, 2008, Order in the Luis Acle case (Ex. 6), the Ethics Commission imposed  
16 fines against Mr. Acle on the basis of 42 separate and distinct counts. Many of those counts were  
17 triggered by repeat violations of the same SDMC section. For example, counts 1 through 4  
18 pertained to Mr. Acle's failure to timely pay 4 invoices submitted by the same vendor. Although  
19 these violations involved a single provision of the Ordinance and a single vendor, the Ethics  
20 Commission correctly recognized that each failure to timely pay an invoice should result in a  
21 separate count and a separate fine. Notably, the 4 fines collectively reached \$11,342, an amount  
22 well above what a single count would have allowed. The Commission also fined Mr. Acle nearly  
23 \$40,000 for 22 counts of failing to report his accrued expenses, even though the failure involved  
24 only 3 campaign statements. The fact that Mr. Acle violated SDMC section 27.2930 on 22  
25 occasions was sufficient to support 22 separate fines rather than a single fine for a single code  
26 section violated or 3 fines for the 3 campaign statements at issue. Although this matter involves a  
27 disqualification issue rather than a campaign matter, the concept is the same. The Ethics

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1 Commission has already concluded that multiple violations of the same law may be enforced as  
2 separate and distinct counts.

3 *H. The Civil Cases Respondent Cites Are Irrelevant to Administrative Enforcement*

4 Rather than identify a published case involving multiple counts in an administrative  
5 enforcement action, Respondent reaches to civil litigation cases. She cites civil cases involving  
6 the “primary right theory” to support her contention that only a single count can be alleged in  
7 this case. The primary right theory looks at whether causes of action or counts are identical and  
8 thus may not be “split.” The theory also is used to determine whether a party may bring more  
9 than one lawsuit arising from the same facts. *Miller v. Collectors Universe, Inc.*, 159 Cal. App.  
10 4th 988, 1004-05 (2008). The significant factor in determining the “primary right” is the harm or  
11 injury suffered by the plaintiff. Simply stated, the primary right is a plaintiff’s right to be free  
12 from the particular injury suffered. *Slater v. Blackwood*, 15 Cal. 3d 791, 795 (1975).

13 Respondent’s reliance on the *Miller* case and the primary rights theory is misplaced. That  
14 case involved a plaintiff suing another party because it used his name, without his permission, on  
15 more than 14,000 certificates of authenticity. The plaintiff suffered only one injury, the mental  
16 anguish caused by the misappropriation of his name. Thus, his civil action was appropriately  
17 limited to a single count. In other words, the court declined to find that the defendant injured the  
18 plaintiff’s mental feelings 14,000 times by issuing the certificates.

19 The *Miller* case and the other primary rights theory civil actions that Respondent relies on  
20 have nothing in common with an administrative enforcement action by the Ethics Commission.  
21 The Commission is not claiming to possess a right that was violated. It is not claiming that it or  
22 the City was injured by Respondent’s acts. Unlike a civil case, the Commission is not suing  
23 Respondent to recover damages for injuries. Instead, this action arises out of the City’s exercise  
24 of its constitutional power to adopt a law prohibiting certain kinds of conduct, and Respondent’s  
25 repeated violations of that law.

26 Petitioner is pursuing this case to protect the public’s interest in its officials performing  
27 their duties free from conflicts of interest and the appearance of conflicts of interest, and to help  
28 reinforce public trust, as set forth by the statement of purpose and intent codified in the Ethics

1 Ordinance. *See* SDMC § 27.3501. Although the Ethics Ordinance was adopted to protect the  
2 public from wrongdoing by City Officials, Petitioner need not show actual harm for the Ethics  
3 Commission to find a violation. Instead, Petitioner need only show that Respondent’s actions  
4 constituted violations of the law; each separate and distinct violation supports a separate and  
5 distinct count. Nothing in the cases cited by Respondent suggests that the primary right theory  
6 applies to an Ethics Commission administrative enforcement action.

7 *I. The Criminal Cases Respondent Cites Are Irrelevant to This Action*

8 California Penal Code section 654 precludes a prosecutor from separately charging  
9 multiple offenses for the same act. The case Respondent relies on to explain section 654,  
10 however, clearly illustrates why section 654 has no bearing on this case. In *People v. Barthel*,  
11 231 Cal. App. 2d 827 (1965), the defendant was a bookmaker charged with three separate  
12 offenses: (1) bookmaking; (2) occupying a room with betting paraphernalia; and, (3) recording  
13 bets. In finding that all three offenses were essentially the same offense (bookmaking) and that  
14 the defendant should have been charged with only one violation, the court relied on Penal Code  
15 section 654, which prohibits punishing a defendant through different provisions of law for the  
16 same act.

17 Penal Code section 654 does not, however, apply to this action. Petitioner has not alleged  
18 that Respondent violated multiple laws. To the contrary, Petitioner is alleging that Respondent  
19 violated a *single law*, SDMC section 27.3561. Penal Code section 654 would be relevant to this  
20 case only if Petitioner had alleged that Respondent violated section 27.3561 *and* one or more  
21 other SDMC sections (such as SDMC section 27.3562, which prohibits City Officials from  
22 participating in decisions that involve “benefactors”) for a single act or omission.

23 Although Penal Code section 654 is inapplicable (because only violations of a single law  
24 are alleged in this action, and because Petitioner need not meet the higher standards of proof  
25 required in a criminal action), other criminal cases do provide ample support for alleging  
26 multiple counts for multiple instances of violating the same law. For instance, in *People v.*  
27 *Neder*, 16 Cal. App. 3d 846 (1971), the court found that a person who falsely signed another  
28 person’s name to credit card receipts while making three purchases at a Sears store was correctly

1 convicted on three counts of forgery. Courts have found multiple counts to be appropriate  
2 “particularly so where the offenses are temporally separated in such a way as to afford the  
3 defendant opportunity to reflect and to renew his or her intent before committing the next one.”  
4 *People v. Gaio*, 81 Cal. App. 4th 919, 935 (2000). The counts alleged against Respondent are  
5 based on actions that took place at different times. After each violation, Respondent had the  
6 opportunity to reflect and consider her actions before committing the next one. This is  
7 particularly relevant in light of Respondent’s decision to continue to influence Ballpark Village  
8 decisions *after* the media raised concerns regarding her participation in matters involving her  
9 sources of income.

10 Courts have observed that in instances where a prosecutor has the ability to charge  
11 hundreds or even thousands of separate counts, discretion should be exercised to ensure that the  
12 punishment is commensurate with the violations at issue. *People v. Jones*, 51 Cal. 3d 294, 314  
13 (1990). In fact, in this case, Petitioner did exercise discretion in determining the number of  
14 counts by alleging counts only for *significant* instances of participating in the Ballpark Village  
15 project. For example, Petitioner chose not to allege a separate count for each e-mail Respondent  
16 sent or each telephone call she made in connection with the Ballpark Village project, choosing  
17 instead to limit the number of counts to Respondent’s *substantive* attempts to influence the  
18 project’s main deal points. In so doing, Petitioner has provided the Commission with the  
19 opportunity to apply its own discretion by imposing a fine that is commensurate with the  
20 seriousness of Respondent’s actions.

21 For all of the reasons set forth above, each attempt by Respondent to influence a  
22 municipal decision may appropriately serve as the basis for a separate count.

23  
24 Dated: May 3, 2010

CITY OF SAN DIEGO ETHICS COMMISSION

25  
26 By \_\_\_\_\_  
Alison Adema, General Counsel