

MEMORANDUM OF LAW

DATE: April 28, 1994

TO: Patricia K. Hightman, Deputy Executive Director,
Redevelopment Program

FROM: City Attorney

SUBJECT: Request for Opinion Regarding Possible Conflict of
Interest of Developer for Mercado Commercial
Project

This Memorandum of Law is in response to your request for a legal opinion regarding a possible conflict of interest of Richard Juarez, a partner in San Diego Mercado Associates ("SDMA"), which is the developer of the Mercado Commercial Project (the "Project"). The Project is located in the Barrio Logan Redevelopment Project area. Mr. Juarez sits on the Board of Directors of the Southeastern Economic Development Corporation ("SEDC") which is under contract with the Agency to provide redevelopment services (pursuant to the California Community Redevelopment Law as codified in California Health and Safety Code section 33000 et seq.) in the southeastern part of San Diego. The SEDC Board serves as an advisory body to the Agency and makes recommendations on redevelopment projects within SEDC's jurisdiction. The Barrio Logan Redevelopment Project is outside of SEDC's sphere of influence.

The Agency and SDMA are negotiating a Disposition and Development Agreement ("DDA") for the development of the Project. As you state in your memorandum, Section 602 of the draft DDA contains the following conflict of interest language:

No member, official or employee of the Agency shall have any personal interest, direct or indirect in this Agreement nor shall any such member, official or employee participate in any decision relating to the Agreement which affects his personal interests or the interests of any corporation, partnership or association in which he is, directly or indirectly, interested. The

Developer warrants that it has not paid or given, and will not pay or give, any third party any money or other consideration for obtaining this Agreement.

Given Mr. Juarez's position on the SEDC Board of Directors, your concern is whether entering into this DDA would pose a conflict of interest.

ANALYSIS

To determine whether Mr. Juarez would have a conflict, we have to analyze the situation in light of Section 602 of the Draft DDA, California Government Code section 1090 et seq., California Government Code section 81000 et seq. (the Political Reform Act), and City Council Policy 000-4. Each will be taken separately.

Section 602 of the Draft DDA

Who is a "Member, Official or Employee"?

Section 602 states that no "member, official or employee of the Agency" shall have any personal interest in the DDA or participate in any decisions regarding the DDA that would affect his or her personal interest(s). For a conflict to arise under this section, it would first have to be determined if Mr. Juarez was a member, official or employee of the Agency. Mr. Juarez sits on the Board of Directors of SEDC, which provides redevelopment services to the Agency pursuant to an Operating Agreement it has with the Agency. SEDC is a nonprofit corporation with The City of San Diego being its only member. Article II, Section 1 of SEDC's Bylaws provides:

The City of San Diego shall be the sole member of this corporation and shall act through its City Council in accordance with the City Charter, the City's Municipal Code and the applicable state laws.

The function of the member shall be to elect the Board of Directors and to perform such other duties as the Board of Directors may from time to time assign or establish with the prior approval of the member.

No Violation

Mr. Juarez was appointed by the City Council to sit on SEDC's Board according to the provisions of Article II,

Section 1. As the City is a separate and distinct governmental entity from the Agency, Mr. Juarez would not be considered a "member, official or employee of the Agency." SEDC's relationship with the Agency is contractual. It should also be noted that since the Barrio Logan Redevelopment Project is outside SEDC's jurisdiction, the SEDC Board would not review the DDA or make a recommendation to the Agency and Council regarding the Project.

California Government Code section 1090 et seq.

Section 1090 states in pertinent part:

Members of the Legislature,
state, county, district . . . and
city officers or employees shall not
be financially interested in any
contract made by them in their
official capacity, or by any body or
board in which they are members

. . . .

As used in this article,
"district" means any agency of the
state formed pursuant to general law
or special act, for the local
performance of governmental or
proprietary functions within limited
boundaries.

While the term "financial interest" is not defined in the code, case law indicates that it is to be construed very liberally. See, *Thompson v. Call*, 38 Cal. 3d 633, 645 (1985).

Who is an "Officer"?

The first determination is whether Mr. Juarez would be considered an "officer" for purposes of Section 1090. The case of *City Council v. McKinley*, 80 Cal. App. 3d 204 (1978), is instructive in this regard. A landscape architect who was a partner in his own firm was appointed by the City Council to sit on the City's Park and Recreation Board. The Park and Recreation Board made recommendations to the City Council regarding projects and improvements to the City's parks. In holding that the landscape architect was an officer under Section 1090, the Court said:

The term officer, in its
common acceptance, is sufficiently
comprehensive to include all persons
in any public station or employment .

. . .

It is apparent now there are

two requirements for a public office; first, a tenure of office which is not transient, occasional, or incidental but is of such nature that the office itself is an entity in which incumbents succeed one another and which does not cease to exist with the termination of incumbency and, second, the delegation to the officer of some portion of the sovereign functions of government either legislative, executive, or judicial.

McKinley, at 210 (citation omitted).

The Court determined that since the Park and Recreation Board had the authority to "investigate and advise the Council in its legislative role on the matters of development of parks and recreation within the city," that its members were "officers" under Section 1090. See, McKinley, at 211.

Utilizing the two requirements outlined in McKinley, it does appear that Mr. Juarez would be an "officer" under Section 1090. SEDC's Articles of Incorporation make it quite clear that the Agency has delegated certain powers and authority regarding redevelopment activities. The Articles of Incorporation state in Article II that the purposes of the corporation include:

- b. Redevelopment services which can, under California law, be done by contract with the Redevelopment Agency of The City of San Diego.
- c. Economic development and revitalization activities which will upgrade the Southeast Community by initiating industrial and commercial development to create jobs primarily in the community and increase community pride.
- d. Effectuate the City's General Plan and Community Plans as they affect the Southeast San Diego Community and policies by the Redevelopment Agency and the San Diego City Council.

- e. Negotiate and make recommendations to the Redevelopment Agency with regard to property ownership, development, and financial activity
- f. Make recommendations concerning redevelopment plans and project areas and implementation strategies.

Regarding the requirement that "officers" serve terms that are "not transient, occasional, or incidental," the Bylaws contain provisions for appointment of Board members, who serve terms of three years. See Article III, Section 3 of the Bylaws.

Participation in Making a Contract

The next step in this inquiry is whether Mr. Juarez participated in the making of a contract in his official capacity, i.e. that of a SEDC Board member. The DDA concerns a redevelopment project area outside of SEDC's geographical jurisdiction. The SEDC Board will not review the DDA in one of its Board meetings, nor will it be making a recommendation to the Agency or the City regarding the project.

No Violation

Even though Mr. Juarez would be considered an officer under Section 1090, he did not participate in the making of a contract in his official capacity, as the DDA involves a project that would not be reviewed by the SEDC Board, as it is outside the geographical area administered by SEDC.

The Political Reform Act (the "Act")

Who is a "Public Official"?

Government Code section 87100 holds:

No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

As in the case of Government Code section 1090, Mr. Juarez would be considered a public official. The Fair Political Practices Commission (the "FPPC") has held that the Act applies to members of all boards, commissions, or committees with decision making authority. C.C.R., tit. 2, Section 18700(a)(1). A board, commission, or committee has decision making authority when:

1. It may make a final governmental decision. C.C.R., tit. 2, Section 18700(a)(1)(A);
2. It may compel or prevent the making of a governmental decision by its action or inaction. C.C.R., tit. 2, Section 18799(a)(1)(B); or
3. Its recommendations are routinely and regularly followed. C.C.R., tit. 2, Section 18700(a)(1)(C).

SEDC is, by contract, an arm of the Agency. It oversees all redevelopment activities in the Southeastern portion of the City, which includes project planning, land acquisition, negotiations, and coordinating "activities and appearances before City bodies, agencies, departments and commissions, and Federal or State agencies and commissions, as may be necessary." See Section 2.01(e) of the Operating Agreement between the Agency and SEDC. The Board of Directors reviews all projects and agreements, and advises the Agency on them prior to the Agency making a final determination. Clearly then, Board members would be required to follow the Act's provisions.

Participation in the Making of a Contract

As stated above in the analysis of Government Code section 1090, Mr. Juarez did not utilize his official position in the making of the DDA.

No Violation

There does not appear to be any violation of the Act by Mr. Juarez in his participation in the Project.

Council Policy 000-4

Council Policy 000-4 holds in pertinent part:

No . . . appointee . . . of
The City of San Diego shall engage in
any business or transaction or shall
have a financial or other personal
interest, direct or indirect, which
is incompatible with the proper
discharge of his official duties or
would tend to impair his independence
or judgment or action in the
performance of such duties.

As Mr. Juarez is a Council appointee, this policy would pertain to him. However, it would be up to him to determine if participation in the Project was "incompatible with the proper discharge of his official duties" as a SEDC Board member. Please note, that this is a policy, not law, and does not have any legal force and effect.

Conclusion

From the above analysis, it does not appear that Mr. Juarez has any legal conflict of interest with his participation in the

Project. If you have any further questions, please feel free to contact me.

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By

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Deputy City Attorney

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TOP