

October 16, 2008

Tom Story, Vice President
Sunroad Enterprises
4445 Eastgate Mall, Suite 400
San Diego, CA 92121

Re: Ethics Commission Case No. 2008-12

Dear Mr. Story:

As you know, the Ethics Commission previously authorized an investigation into allegations that you violated the City's post-employment lobbying laws after you left City employment on July 31, 2005, and went to work for Sunroad in October of 2005 as Vice President of Development and Project Management. Specifically, the allegations are derived from the eighteen counts set forth in the second amended criminal complaint filed by the City Attorney in April of 2007. I am writing to advise you that the Commission has evaluated the relevant facts and post-employment laws and, for the reasons set forth below, has concluded that there is no evidence to support any of the allegations described in the criminal complaint.

Overview of Applicable Law

The post-employment lobbying laws in the City's Ethics Ordinance prohibit former City Officials from lobbying the City on behalf of a private employer for one year after leaving the City. This provision is commonly known as the "cooling off" period or "revolving door" prohibition. There are several key defined terms in the law, including the following:

- "Lobbying" is defined as a direct communication with a City Official for the purpose of influencing a municipal decision.
- "City Official" is defined to include unclassified employees of the City who file Statements of Economic Interest. In other words, the one year "cooling off" period is intended to apply to contacts with high-level managerial employees at the City who generally have decision-making authority. It does not apply to contacts with lower-level "classified" employees.

- “Influencing a municipal decision” is defined as any attempt to affect any action by a City Official, including promoting, supporting, opposing, participating in, or seeking to modify or delay action, as well as providing information, statistics, analysis, or studies to a City Official.

In addition to the one-year “cooling off” period, the City’s Ethics Ordinance includes a “project ban” which prohibits former City Officials from contacting any employees at the City regarding a pending application for discretionary funding or entitlements for a specific project if the former City Official worked on that project in a substantial capacity while he or she was at the City. This prohibition includes helping a new employer behind the scenes regarding a pending application on the project. Key elements of the project ban include the following:

- 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.”
- The project ban applies to all direct communications with City employees, not just unclassified employees, unless the communication pertains solely to a ministerial action (one where no discretion is required).
- The term “project” is a defined term that includes an application for discretionary funding or discretionary entitlements, or a lease, agreement, or contract.
- The Ethics Ordinance includes a provision stating that long term projects may change in character and scope over time and may have discrete components or phases. Accordingly, the Ordinance states that former City Officials may obtain a written determination from the Ethics Commission regarding whether prospective work on a specific project would violate the project ban.

Both the “cooling off” period and the “project ban” extend for a period of one year from the date the former City Official leaves the City. The Ethics Commission issued an advice letter, *In re Herring*, SDEC Adv. Ltr. FA04-09, on November 30, 2004, stating that the one-year period begins to run when a City Official ceases performing his or her duties at the City, even if the City Official is still receiving payments from the City in connection with unused annual leave time (commonly known as “terminal leave”). The advice letter pointed out that this conclusion was consistent with the purpose and intent of the law, and that to conclude otherwise would allow former City Officials to lobby the City while they were on terminal leave.

When the City Attorney filed the criminal complaint in this matter in April of 2007, he took issue with the conclusion reached in above-mentioned Ethics Commission advice letter, and asserted that the one-year post-employment laws did not begin to run until a former City Official had exhausted his or her terminal leave. In support of this conclusion, the City Attorney pointed to an advice letter issued by the FPPC in 1997 stating that post-employment restrictions applicable to former state employees did not commence until the former state employee stopped receiving compensation.

On June 21, 2007, the FPPC issued an advice letter, *In re Coler*, FPPC Adv. Ltr. I-07-089, superseding its prior advice. Specifically, this advice letter held that the state's post-employment provisions begin to run as soon as the employee is no longer engaged in the performance of his or her duties, even if the employee is still receiving compensation for unused leave time. Although this FPPC advice letter pertains to the state's (not the City's) post-employment laws, it should be noted that the state's interpretation of its post-employment laws is entirely consistent with the interpretation contained in the *Herring* advice letter issued by the Ethics Commission.

Background

In December of 1997, the City and General Dynamics entered into a Development Agreement for a 242-acre site in Kearny Mesa known then as the New Century Center. The agreement provided for the development of a high-density mixed-use retail, commercial, and industrial business park. The Agreement anticipated a development term of fifteen years, and allowed General Dynamics to assign its development rights under the agreement during the fifteen year term.

As the City's Program Manager for the Multi-Species Conservation Program [MSCP], you "signed off" on this project and presented a staff report to the City Council on November 18, 1997. Shortly thereafter, on December 2, 1997, the City Council approved the Development Agreement with General Dynamics. By the end of 1997, you had been promoted to Deputy Planning Director and were responsible for transportation planning and the MSCP.

In 1998, General Dynamics sold the New Century Center project to LNR Kearny Mesa, Inc. LNR changed the name of the project to San Diego Spectrum. The original Development Agreement was revised at the time of the transfer, and again in October of 2000 when the City Council approved a variety of land use changes including the development of 998 multi-family residential units. The addition of housing units generated a need for six acres of park land in accordance with the General Plan standards.

In December of 2000, Sunroad Centrum Partners purchased 40 acres of property from LNR Kearny Mesa and changed the name of its property to Centrum. Sunroad subsequently applied for an amendment to the Development Agreement in order to build an additional 570 housing units (which necessitated the provision of additional land for park space and the relocation of an SDG&E substation away from the planned residential units). This proposal was approved by the City Council in November of 2002.

In 2001, you joined the Mayor's Office as a Senior Policy Advisor. You received a "blind copy" of a letter from Sunroad's attorney dated January 24, 2002, concerning the feasibility of constructing the additional 570 housing units in light of the City's development standards.

In February of 2005, Sunroad submitted plans for a twelve story office tower at the subject site. In addition, in February of 2005, you were named the Chief of Staff to Mayor Murphy. Following Mayor Murphy's resignation, you resigned at the end of July 2005 and went on "terminal leave," which expired on November 22, 2005. You were hired by Sunroad in October of 2005 as Vice President of Development & Project Management.

Application of the Project Ban

The language in the Municipal Code expressly contemplates a situation in which a long term project may have discrete phases and may change in character and scope over time such that work by a City Official on an early phase of a project may not prohibit the Official from working on a subsequent phase when the Official has left the City and is working for an employer in the private sector. The legislative intent behind the project ban is to prohibit a situation in which a City Official essentially "switches sides" on a pending project and uses inside information obtained while employed at the City in order to benefit a private employer seeking discretionary funding or entitlements on that project.

Discrete phases of a long-term multi-component project are not intended to be treated as a single "project" for purposes of the Ethics Ordinance's post-employment prohibitions. This notion finds support in *In re Coler*, the above-cited advice letter, wherein the FPPC determined that the state's project ban did not apply to "new" proceedings, even where that new proceeding grew out of a prior proceeding in which the official had participated: "We have found generally that proceedings to draft a plan or agreement are different from proceedings involving implementation of the same plan or agreement. For instance, the Commission considers the application, drafting and awarding of a contract, license, or approval to be a proceeding separate from the monitoring and performance or implementation of the contract, license, or approval."

In this case, you were involved in the original 1997 Development Agreement, at which time the owner of the project (General Dynamics) contemplated a 242-acre mixed-use retail, commercial, and industrial business park. As explained in detail above, the scope and character of this project changed over time. Specifically, the Development Agreement was revised at the request of the new owner (LNR Kearny Mesa) in 2000 to include the development of 998 residential units. Although the City Attorney alleges that you were involved in the project as a City employee at the time of the 2000 amendments to the Development Agreement, there is no evidence to substantiate this claim. As discussed above, Sunroad ultimately acquired 40 acres of the property from LNR in 2000, and applied for approval to construct additional housing units at the site. Although you received a blind carbon copy of a letter from Sunroad concerning the 2002 amendments while you were working in the Mayor's Office, there is no evidence to suggest that you had any direct or personal involvement in the project at that time. The mere receipt of a carbon copy of a letter from Sunroad does not constitute "substantial" involvement as described in the Ethics Ordinance.

It is clear that the project ultimately developed by Sunroad was substantially different from the project originally contemplated by General Dynamics. Specifically, from 1997 to 2002, more than 1,500 residential housing units had been added (where none were original contemplated) and a planned movie theater and shopping center had been eliminated. It is also relevant to note that it was the additional housing units proposed by Sunroad in 2002 that necessitated the relocation of the SDG&E substation and the provision of additional land for park space, two key issues before the City in 2006 that were clearly not part of the original Development Agreement.

Based on the foregoing, the Commission concluded that the Centrum project before the City in 2006 was substantially different in scope and character from the project you were involved in

while you were a City employee. In other words, the development changed so substantially that the “project” you worked on in 1997 for the City was not the same “project” you worked on in 2006 for Sunroad. The Commission, therefore, had no reason to believe that you “switched sides” during a pending project or that you unlawfully provided Sunroad with inside information that you obtained from your 1997 involvement with the General Dynamics project. In sum, the Commission determined that the “project ban” did not apply to your activities as an employee of Sunroad, and that you were not precluded from assisting Sunroad with respect to the Centrum project during your twelve month post-employment period.

Violations Alleged by City Attorney and Commission Conclusions

The second amended complaint filed by the City Attorney on April 27, 2007, delineated eighteen counts. The first nine counts are described in detail below. The remaining nine counts involve alleged activities that took place after July 31, 2006. Because the one-year post-employment period expired on July 31, 2006 (twelve months after you left the employ of the City of San Diego), the Commission has determined that there is no legal basis to support the alleged violations of the City’s post-employment laws described in counts ten through eighteen of the second amended complaint.

A summary of the facts underlying the first nine counts of the second amended complaint, together with the City Attorney’s allegations and the Commission’s conclusions regarding each count, are set forth below:

Count 1:

Underlying Facts: On April 3, 2006, you indirectly communicated with the City concerning the FAA obstruction evaluation on the Sunroad tower. Specifically, you requested that Sunroad architect Dan Munch ask John Cruz, a City of San Diego Project Manager, a question about a CLUP consistency determination.

City Attorney Allegations: In the second amended complaint, the City Attorney alleges that this communication violated the project ban.

Ethics Commission Conclusions: As discussed above, the Sunroad Centrum project was substantially different from the project originally proposed by General Dynamics in 1997, and as such you were not subject to the project ban with respect to your work for Sunroad on this project. Accordingly, it was not unlawful for you to assist Sunroad’s architect with regard to his communications with the City regarding the Centrum project.

Counts 2 and 3:

Underlying Facts: The City Attorney alleges that you met with Lisa Gonzalez, Senior Policy Advisor to Councilmember Donna Frye between April 19, 2006, and May 15, 2006; it appears, however, that this meeting actually took place on January 13, 2006. Although you and Ms. Gonzalez have different recollections with respect to the subject matters discussed at this

meeting, you both deny that you did or said anything that could be construed as an attempt to influence Ms. Gonzalez or Councilmember Frye.

Moreover, although the City Attorney alleges that at the meeting in January 2006 you attempted to gain Councilmember Frye's support for the Sunroad project by mentioning that Sunroad was willing to donate money to a library endowment fund, both you and Ms. Gonzalez deny that the issue of Sunroad making a donation to the library endowment fund came up during this meeting. Instead, Ms. Gonzalez specifically recalls that the issue first came up in April of 2006 when she contacted you to tell you about the library endowment fund Councilmember Frye was establishing, and that it was not until June of 2006 that you advised her Sunroad would be making a donation to this fund.

City Attorney Allegations: In the second amended complaint, the City Attorney alleges that the meeting with Ms. Gonzalez violated both the project ban and the "cooling off" period.

Ethics Commission Conclusions: Only communications that involve an attempt to influence a municipal decision are subject to the "cooling off" period. Although you did have contacts with Ms. Gonzalez, a City Official, during your one-year post-employment period, there is no evidence supporting an allegation that those contacts constituted an attempt to influence a municipal decision. Both you and Ms. Gonzalez deny that any lobbying took place at the January 2006 meeting or during the communications relating to the library endowment fund. Thus, there is no basis upon which to allege that you violated the "cooling off" period. In addition, as discussed above, the Sunroad Centrum project was substantially different from the project originally proposed by General Dynamics in 1997, and as such you were not subject to the project ban with respect to your work for Sunroad on this project.

Count 4:

Underlying Facts: On May 11, 2006, you attended a meeting at the City's Development Services Department concerning the dispute that had arisen over the relocation of the SDG&E substation. Three other Sunroad executives and two representatives of SDG&E reportedly participated in this meeting. Representing the City at the meeting were Project Manager John Cruz, Department Director Gary Halbert, and Deputy Chief Jim Waring.

City Attorney Allegations: In the second amended complaint, the City Attorney alleges that this meeting violated the project ban.

Ethics Commission Conclusions: As discussed above, the Sunroad Centrum project was substantially different from the project originally proposed by General Dynamics in 1997, and as such you were not subject to the project ban with respect to your work for Sunroad on this project. In addition, although not alleged by the City Attorney, the investigation conducted by the Commission staff reveals that you did not actively participate in this meeting. Mere attendance at a meeting does not constitute engaging in direct communication for the purpose of influencing a municipal decision. In other words, your passive role at the meeting did not constitute lobbying, and therefore did not violate the "cooling off" period.

Count 5:

Underlying Facts: On June 9, 2006, you sent an email to the City's Project Manager John Cruz referencing a prior conversation concerning "Cycle 4 Issues."

City Attorney Allegations: In the second amended complaint, the City Attorney alleges that the conversation referenced in the email violated the project ban.

Ethics Commission Conclusions: As discussed above, the Sunroad Centrum project was substantially different from the project originally proposed by General Dynamics in 1997, and as such you were not subject to the project ban with respect to your work for Sunroad on this project. It is also relevant to note that as a Project Manager and a member of the City's classified staff, Mr. Cruz was not a "City Official" as defined in the Ethics Ordinance. Therefore, any communications with Mr. Cruz would not have been subject to the "cooling off" period.

Count 6:

Underlying Facts: On July 10, 2006, you participated in a meeting with City staff as discussed in the June 26, 2006, email to Mr. Cruz (see information under Count 7).

City Attorney Allegations: In the second amended complaint, the City Attorney alleges that this meeting violated the project ban.

Ethics Commission Conclusions: As discussed above, the Sunroad Centrum project was substantially different from the project originally proposed by General Dynamics in 1997, and as such you were not subject to the project ban with respect to your work for Sunroad on this project. Further, as discussed below, none of the City employees who participated in the meeting were "City Officials" as defined in the Ethics Ordinance. Therefore, any communications with them would not have been subject to the "cooling off" period.

Count 7:

Underlying Facts: On June 26, 2006, you sent an email to Mr. Cruz requesting a meeting with him as well as Associate Planner Darren Genova, Project Manager Farah Mahzari, Senior Planner Lesley Henegar, Associate Planner Craig Hooker, and Park Designer Jeff Harkness, in order to discuss various issues concerning the Sunroad project.

City Attorney Allegations: In the second amended complaint, the City Attorney alleges that this email violated the project ban.

Ethics Commission Conclusions: As discussed above, the Sunroad Centrum project was substantially different from the project originally proposed by General Dynamics in 1997, and as such you were not subject to the project ban with respect to your work for Sunroad on this project. It is also relevant to note that none of these City employees were "City Officials" as

defined in the Ethics Ordinance. Therefore, any communications with them would not have been subject to the “cooling off” period.

Counts 8 and 9:

Underlying Facts: On July 13, 2006, you sent an email to Mr. Cruz concerning ground floor access at the Sunroad project.

City Attorney Allegations: In the second amended complaint, the City Attorney alleges that this email violated both the project ban and the “cooling off” period.

Ethics Commission Conclusions: Because Mr. Cruz was not a “City Official” as defined in the Ethics Ordinance, there is no basis upon which to allege that you violated the “cooling off” period by contacting him. In addition, as discussed above, the Sunroad Centrum project was substantially different from the project originally proposed by General Dynamics in 1997, and as such you were not subject to the project ban with respect to your work for Sunroad on this project.

Conclusion

The Ethics Commission has evaluated the relevant facts in the context of the City’s post-employment laws and has concluded that there is no evidence to support any of the allegations described in the criminal complaint filed by the City Attorney. Specifically, the Commission stands by its previous advice that the twelve month post-employment period began to run as soon as you left the City (not when your terminal leave expired). Accordingly, after July 31, 2006, you were no longer subject to the post-employment lobbying restrictions, and there is no legal basis to assert that you violated the City’s post-employment lobbying laws as alleged in Counts 10 through 18 of the second amended complaint. Moreover, the General Dynamics project you worked on in 1997 was substantially different from the Centrum project Sunroad was constructing in 2006, and thus your post-employment activities involving the Centrum project were not subject to a “project ban.” Accordingly, the Commission concluded that you did not violate the project ban as alleged in Counts 1, 2, 4, 5, 6, 7, and 8 of the second amended complaint. Finally, the Commission found that there was no evidence to support the allegations that you directly lobbied City Officials in violation of the “cooling off” period, as set forth in Counts 3 and 9 of the second amended complaint.

If you have any questions concerning the foregoing, please contact me at your convenience.

Sincerely,

Stacey Fulhorst
Executive Director