

March 17, 2003

SDEC Informal Advice Letter No. IA03-03

Advice Provided to:

David Watson, Chair, Citizens' Task Force on Chargers Issues
Nikki Clay, Vice-Chair, Citizens' Task Force on Chargers Issues

Re: Retention of Task Force Members by the City of San Diego

Dear Mr. Watson and Ms. Clay:

This advice letter has been prepared in response to your letter to the City of San Diego Ethics Commission dated February 28, 2003. You have sought Ethics Commission advice regarding the following questions:

QUESTIONS

1. May the City of San Diego retain any member of the Citizens' Task Force on Chargers Issues to serve as a member of the staff/consultant team negotiating a new or amended agreement between the City of San Diego and the San Diego Chargers regarding stadium renovation or construction of a new stadium after completion of the Task Force term?
2. May the City of San Diego retain any member of the Citizens' Task Force on Chargers Issues to represent the City of San Diego in any litigation between the San Diego Chargers and the City of San Diego related to or arising from the existing stadium agreement between the Chargers and the City after completion of the Task Force work?

SHORT ANSWERS

1. Probably not. The Ethics Ordinance prohibits city officials from having a financial interest in any contract made by them in their official capacity. In other words, if the members of the Citizens' Task Force on Chargers Issues considered the hiring of outside consultants by the City for any purpose, then the City is precluding from hiring any members of the Task Force for that same purpose.
2. Same as #1.

ANALYSIS

According to the Ethics Ordinance, city officials are prohibited from having a financial interest in any contract made by them in their official capacity (SDMC section 27.3560). This local law is based on Government Code section 1090, which provides that:

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

With respect to the making of a contract, the California Supreme Court has ruled that taking part in the planning, preliminary discussions, compromises, drawing of plans, etc., qualifies as the making of a contract for purposes of Government Code section 1090 (*Stigall v. City of Taft*, 58 Cal.2d 565 (1962)). In that case, a member of the city council was involved in the preliminary stages of the planning and negotiating process but resigned from the council prior to its vote on the contract; nevertheless, the court found that the councilmember was still involved in the making of the contract. In other words, if the members of the Citizens Task Force on Chargers Issues merely discussed the issue of the City assembling a team of private consultants, they were involved in the making of one or more contracts, even if they were not involved in the ultimate award of any contracts. The Court in *Stigall* reasoned that:

The instant statutes are concerned with any interest, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of the city. . . . Conceding that no fraud or dishonesty is apparent in the instant case, the object of the enactments is to remove or limit the possibility of any personal influence, either directly or indirectly which might bear on an official's decision, as well as to void contracts which are actually obtained through fraud or dishonest conduct.

Id. at 570.

The Court in *Stigall* also incorporated the reasoning of the United States Supreme Court in *U.S. v. Mississippi Valley Co.* (364 U.S. 520, at pages 549-550):

The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government. To this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened. It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation.

Thus, even if the members of the Task Force were well-meaning and did not use their positions to dishonorably influence the hiring of outside consultants and thereby enhance their own prospective financial interests, they are still precluded from entering into a contract which the Task Force helped create.

The California Attorney General has issued various opinions which serve to clarify the scope of Government Code section 1090. For example, the Attorney General concluded in an informal opinion that a former member of a city planning commission would violate section 1090 if he were to enter into a contract with the city to be a consultant with respect to the city's general plan revision since, while he was a commission member, the commission adopted a policy to use consultants instead of staff members for the plan revision (Cal.Atty.Gen., Indexed Letter, No. IL 92-1212 (Jan. 26, 1993)). The Attorney General opined that "the former commissioner was an active participant in the overall city policy decision to 'contract-out' much of the general plan revision. Accordingly, he cannot now benefit from such participation." *Id.* In addition, the Attorney General clarified that this conclusion did not mean that members of all boards and commissions may never be hired as consultants after leaving public service. Instead, the Attorney General explained that, "if the officials were instrumental in proposing 'contracting-out' services, they may not later be the beneficiaries of their proposals." *Id.*

In another opinion, the Attorney General rejected the suggestion that an official must intend to contract with the agency after leaving office for section 1090 to be violated. The attorney general contended that the statute has never been so rigorously construed, and stated that the test is whether the official had the opportunity to and did participate in the policy decision to create the governmental program under which the contract would later be executed (81 Ops. Cal. Atty. Gen. 317). In that opinion the Attorney General concluded that a city councilmember who participated in the planning and discussions regarding the creation of a city loan program for developing businesses could not leave the council and subsequently apply for a loan under the program. To apply this reasoning to the Citizens' Task Force, a member of the Task Force need not intend to contract with the City for consultant services in order for the prohibitions of section 1090 to apply.

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Instead, the question is whether the members of the Task Force participated in any discussion concerning the policy decision to retain outside consultants in the first place.

CONCLUSION

If the members of the Citizens' Task Force on Chargers Issues were in any way involved in preliminary discussions regarding the retention of private consultants for purposes of negotiations or litigation with the San Diego Chargers, then the City of San Diego cannot retain any members of the Task Force for these same purposes. The prohibition applies even if a member of the Task Force did not intend to contract with the City at the time he/she served on the Task Force.

Sincerely,

Charles B. Walker
Executive Director

cc: Honorable Mayor and City Council
City Attorney
City Manager