

CITY OF LOS ANGELES
CALIFORNIA

CITY ETHICS COMMISSION

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May 18, 2004

VIA FACSIMILE AND HAND DELIVERY

CEC Advice No. 2004-08

The Honorable Greig Smith
Councilmember, 12th District

Re: Your Request for Advice Dated May 5, 2004

Dear Councilmember Smith:

This letter is in response to your request for formal advice¹ on behalf of former Councilmember Hal Bernson dated May 5, 2004, regarding possible restrictions on Mr. Bernson's testimony before the City Council's Planning and Land Use Management Committee. Your question and the Commission's response, based on your letter, and Planning Deputy Phyllis Winger's conversations with Nora Pollock on May 10 and 13, 2004, are detailed below.

QUESTION

What, if any, restrictions apply to former Councilmember Hal Bernson in testifying before the City Council's Planning and Land Use Management Committee on seismic safety issues?

¹ Los Angeles Admin. Code § 24.1.1(f)(2)(K) provides that formal written advice provides the requestor with the immunity set forth in Los Angeles City Charter § 705. This formal advice does not address or apply to any past actions by the requestor(s).



RELEVANT FACTS

We have determined that the following facts are relevant to your inquiry:

1. You introduced two motions (Council File (“CF”) # 04-0099 and CF # 04-0092) in City Council on January 16, 2004, regarding earthquake safety issues relating to City open, non-shear wall parking structures and concrete/non-ductile structures, respectively. The motions are scheduled to be considered for the first time by the City Council’s Planning and Land Use Management (“PLUM”) Committee on May 19, 2004.
2. You would like former Councilmember Hal Bernson provide testimony in favor of the motions to the PLUM Committee at a future meeting, and, possibly, future meetings, of the Committee. Mr. Bernson’s testimony would be based on his expertise in seismic safety issues. He would not be acting on behalf of, or receive compensation from, another person.
3. Mr. Bernson was a member of the City Council for the 12th District until June 30, 2003. As a member of the City Council, Mr. Bernson was a “High level official” within the meaning of the City’s Governmental Ethics Ordinance (Los Angeles Municipal Code (LAMC) Sec. 49.5.1 *et seq.*).
4. Mr. Bernson has authorized you to request advice from the City Ethics Commission on the above question.

APPLICABLE LAWS

To prevent former City officials, including former elected officials, from exercising, or appearing to exercise, improper influence over City decisions, the Governmental Ethics Ordinance establishes certain “revolving door” limits on their attempts to influence City decisions for compensation after they leave City service. A “City official” is defined by LAMC Sec. 49.5.2 as a person who files Statements of Economic Interests pursuant to a City agency’s Conflict of Interest Code. A “High Level official” is defined by that Section, in pertinent part, to mean a member of the City Council.

Two types of post-City service lobbying restrictions apply to former High Level City officials: a ban on attempting to influence any matter on behalf of any person other than an agency, either directly or through an agent, that remains pending and in which you had “personal and substantial involvement” (LAMC Sec. 49.5.11(A) and (B)), and a one-year restriction against attempting to influence decisions for compensation (LAMC Sec. 49.5.11(D)) on behalf of any person other than an agency.

The City’s “personal and substantial” ban restricts all former City officials and employees who personally and substantially participated in a decision, proceeding, claim, contract, legislation or other specific matter during their tenure with the City from engaging in compensated attempts on behalf of any person other than an agency to influence any action on

that matter if it is still pending with the City, or if the City is a party to or has a direct or substantial interest in the matter. In addition, former City officials or employees may not, for compensation, advise or assist others that are attempting to influence action on those matters. A City official "personally and substantially" participates in a matter by, for example, making a decision, making a recommendation, conducting research or rendering advice on a matter.

Under the one year restriction, a former High Level City official is prohibited from engaging in compensated direct communications, either personally or through an agent, with any City agency for the purpose of attempting to influence an action or decision on any matter pending before an agency, or on behalf of anyone other than a City agency, for one year after the date he or she left City service.

For purposes of the City's "revolving door" provisions, the Governmental Ethics Ordinance defines "attempting to influence" as "promoting, supporting, opposing or seeking to modify or delay any action on municipal legislation by any means, including but not limited to providing or using persuasion, information, statistics, analyses or studies" (LAMC Sec. 49.5.2). "Municipal legislation," which is defined in the City's Municipal Lobbying Ordinance (LAMC Sec. 48.01 *et seq.*), in pertinent part means "any legislative or administrative matter proposed or pending before any agency, including but not limited to those involving the granting, denial, revocation, restriction or modification of a license, permit, or entitlement for use (including all land use permits) if the Mayor, the City Council, any of its committees, any agency board, commission, committee, or general manager, or any agency officer or employee charged by law with holding a hearing and making a decision, is charged by law with making a final decision on the matter" (LAMC Sec. 48.02).

Los Angeles Municipal Code Sec. 49.5.3 states that no current or former officer or employee of the City shall use or disclose to any other person for pecuniary gain or personal advantage or privilege, confidential information acquired by him or her in the course of his or her official duties.

ANALYSIS & CONCLUSION

City law does not restrict the type of employment that Mr. Bernson, as a former High Level City official, may engage in after leaving City service. City law does, however, restrict his *compensated* attempts to influence action or decisions on matters pending before City agencies or officials under certain circumstances. Specifically, as discussed below, Mr. Bernson is not prohibited from providing testimony in favor of CF # 04-0099 and # 04-0092 to the PLUM Committee, or any other City agency or official, so long as he does not receive compensation from any source for his efforts. Should he receive compensation in connection with his testimony on these matters, Mr. Bernson would be prohibited from contacting any City official or agency for the purposes of "attempting to influence" these, or other matters, until after June 30, 2004.

One-Year Ban

The Governmental Ethics Ordinance prohibits former High Level officials from attempting to influence, *for compensation*, any City agency on behalf of any person other than an agency on any legislative or administrative matter for one year after the date the official left his or her City position (LAMC Sec. 49.5.11(D)).

You stated that Mr. Bernson would provide testimony to the PLUM Committee on CF # 04-0099 and # 04-0092 based on his expertise in seismic safety issues and would not be acting on behalf of, or receive compensation from, another person. Although Mr. Bernson would be "attempting to influence" a City decision, based on the information you provided, it appears that the one-year ban enumerated in LAMC Sec. 49.5.11(D) would not apply to Mr. Bernson's testimony, as he would not be compensated for his efforts. Mr. Bernson is therefore not prevented from providing testimony to the PLUM Committee, or any other City agency, in the manner you described, as long as he does not receive compensation to do so.

However, the one-year ban restricts Mr. Bernson, as a former High Level official, from receiving compensation to testify in favor of CF # 04-0099 and CF # 00-92 until after June 30, 2004. After that date, Mr. Bernson may engage in compensated attempts to influence any City agency or official, subject to the "personal and substantial" restrictions discussed below.

"Personal and Substantial" Ban

The Governmental Ethics Ordinance prohibits Mr. Bernson, as a former High Level official, from attempting to influence, for compensation, any action on behalf of any person other than an agency on a matter in which he personally and substantially participated during his tenure of City service. "Personal and substantial" participation includes, but is not limited to, making or voting on a decision or making a recommendation, rendering advice, or conducting research or an investigation (LAMC Sec. 49.5.11(A)).

As indicated in the "One-Year Ban" section above, although Mr. Bernson would be "attempting to influence" a City decision in providing testimony to the PLUM Committee, based on the information you provided, it appears that the "personal and substantial" ban enumerated in LAMC Sec. 49.5.11(A) and (B) would not apply to Mr. Bernson's testimony, as he would not be compensated for his efforts.

Please note that if Mr. Bernson engages in *compensated* attempts to promote, support, oppose, or seek to modify or delay any action on a matter before the PLUM Committee or any City agency concerning other matters in which he had personal and substantial involvement during his City tenure, the "personal and substantial" ban may apply. Should these circumstances arise, we encourage Mr. Bernson to contact us for further advice.

Confidential Information

Finally, we note that pursuant to LAMC Sec. 49.5.3, as a former City employee, Mr. Bernson must not disclose any confidential information acquired in the course of his City service for pecuniary or personal gain or advantage.

Thank you for contacting the City Ethics Commission about this matter. If you have any questions regarding this letter, please do not hesitate to contact me or Nora Pollock at (213) 978-1960.

Sincerely,

LeeAnn M. Pelham
Executive Director

Attachment

ATTACHMENT

Los Angeles Municipal Code (LAMC) Sec. 48.02. Definitions, defines the following term:

“Municipal Legislation” means any legislative or administrative matter proposed or pending before any agency (as defined in this Article), including but not limited to those involving the granting, denial, revocation, restriction or modification of a license, permit or entitlement for use (including all land use permits) if the Mayor, the City Council, any of its committees, any agency board, commission, committee, or general manager, or any agency officer or employee charged by law with holding a hearing and making a decision, is charged by law with making a final decision on the matter. However, "municipal legislation" does not include any of the following:

- (1) A request for advice or for an interpretation of laws, regulations, City approvals or policies, or a direct response to an enforcement proceeding with the City Ethics Commission.
- (2) Any ministerial action. An action is ministerial if it does not require the City official or employees involved to exercise discretion concerning any outcome or course of action.
- (3) Any action relating to the establishment, amendment, administration, implementation or interpretation of a collective bargaining agreement or memorandum of understanding between an agency and a recognized employee organization, or a proceeding before the Civil Service Commission or the Employee Relations Board. Further, it does not include management decisions as to the working conditions of represented employees that clearly relate to the terms of such collective bargaining agreement or memorandum of understanding. Nevertheless, A municipal legislation does include any action relating to collective bargaining taken by the City Council, any of its committees or members (including the staffs of such members), or by the Mayor or his or her office.
- (4) Preparation or compilation of any radius map, vicinity map, plot plan, site plan, property owners or tenants list, abutting property owners list, photographs of property, proof of ownership or copy of lease, or neighbor signatures required to be submitted to the City Planning Department.

LAMC Sec. 49.5.2. Definitions, defines the following terms:

“Agency” means the City of Los Angeles or any department, bureau, office, board, commission, other agency of the City, or any other government agency, required to adopt a conflict of interest code subject to City Council approval.

“Attempting to influence” means promoting, supporting, opposing or seeking to modify or delay any action on municipal legislation (as defined in Section 48.02 of this Code) by any means, including but not limited to providing or using persuasion, information, statistics, analyses or studies.

“City Official” means any elective City officer, member, officer, employee, commissioner or consultant of any agency required to adopt a conflict of interest code subject to

City Council approval, and who is required to file statements of economic interests pursuant to the conflict of interest code of his or her agency.

“Confidential information” means information to which all of the following apply:

(1) At the time of the use or disclosure of the information, the information is not a public record subject to disclosure under the California Public Records Act.

(2) At the time of the use or disclosure of the information, the disclosure is prohibited by

- (i) a statute, regulation, or rule which applies to the agency in which the officer or employee serves; or
- (ii) any limitation placed on outside employment pursuant to Section 49.5.11 of this Code.

(3) The use or disclosure of the information will have, or could reasonably be expected to have, a material financial effect on any investment or interest in real property which the officer or employee, or any person who provides pecuniary gain to the officer or employee in return for the information, has at the time of the use or disclosure of the information or acquires within 90 days following the use or disclosure of the information.

“Direct Communication” means appearing as a witness before, talking to (either by telephone or in person), corresponding with (including sending electronic mail to), or answering questions or inquiries from, any City official or employee, either personally or through an agent.

“High Level Official” means the Mayor, the City Attorney, the Controller, the members of the City Council, the Chief of Staff to the Mayor, the Assistant Chief of Staff to the Mayor, each Deputy Mayor, the Special Assistant to the Mayor for Legal Affairs, the Executive Assistant City Attorney, each Chief Assistant City Attorney, each Senior Counsel, the Chief Deputy Controller, the Administrative Coordinator to the Controller, two members of the staff of each City Council Office possessing the most decision-making responsibilities relative to governmental policy as designated by each member of the Council, the members of the City Ethics Commission, the Executive Officer of the City Ethics Commission, the members of the City Planning Commission, the Director of Planning, the members of the Board of Public Works, the Director of the Office of Administrative and Research Services, each Assistant Director of the Office of Administrative and Research Services, the Chief Legislative Analyst, each Assistant Chief Legislative Analyst, the Treasurer, and the City Clerk. In addition, "high level official" means any other member of the staff of an elected City officer possessing significant decision-making responsibilities relative to governmental policy as may be designated in writing to the City Ethics Commission by the elected City officer.

“Legislative action” means drafting, introduction, consideration, modification, enactment, or defeat of any ordinance, charter amendment, resolution, amendment, report, nomination or other matter by the City Council or by any committee, subcommittee thereof, or by a member or employee of the City Council acting in his or her official capacity. “Legislative action” also means the action of the Mayor in approving or vetoing any ordinance or resolution.

LAMC Sec. 49.5.3. Confidential Information.

No current or former officer or employee of the City shall use or disclose to any other person for pecuniary gain or personal advantage or privilege, confidential information acquired by him or her in the course of his or her official duties.

LAMC Sec. 49.5.11. Lobbying Activities of Former Officials, in pertinent part, states:

A. No former City official or employee of any agency (as defined in Section 49.5.2) who personally and substantially participated in a decision, proceeding, claim, contract, legislation or other specific matter during his or her City service, shall, for compensation, attempt to influence any action on that specific matter on behalf of any person other than an agency. This prohibition applies only if the specific matter is still pending before an agency or if an agency is a party to or has a direct or substantial interest in the specific matter. For purposes of this provision, "personal and substantial" participation includes, but is not limited to, making or voting on a decision or making a recommendation, rendering advice, investigation or conducting research.

B. No former City official or agency employee shall, for compensation, knowingly counsel, or assist any other person other than an agency (as defined in Section 49.5.2) in connection with an appearance or communication in which the former official or employee is prohibited from engaging pursuant to Subsection A.

C. The prohibitions contained in subsection A and B shall not apply:

1. To prevent a former agency officer or employee from making or providing a statement, based on the former officer's or employee's own special knowledge in the particular area that is the subject of the statement, provided that no compensation is thereby received other than that regularly provided for by law or regulation for witnesses.

2. To communications made solely for the purpose of furnishing information by a former agency officer or employee if the court or agency to which the communication is directed makes written findings that:

(a) The former officer or employee has outstanding and otherwise unavailable qualifications;

(b) The former officer or employee is acting with respect to a particular matter which requires such qualifications; and

(c) The public interest would be served by the participation of the former officer or employee.

D. For one year after leaving City service, no former elected City officer, member of the City Ethics Commission or other former high level official shall, for compensation, engage in direct communication with any agency for the purpose of attempting to influence any action or decision on any matter pending before an agency on behalf of any person other than an agency.

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