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(213) 978-1960
(213) 978-1988 FAX
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CITY ETHICS COMMISSION
200 N. SPRING STREET
CITY HALL - 24TH FLOOR
LOS ANGELES, CA 90012

September 18, 2009

Via Facsimile and U. S. Mail

Nicholas G. Tonsich
Glaser & Tonsich, LLP
2500 Via Cabrillo Marina, Suite 3410
San Pedro, CA 90731

Re: CEC Advice No. 2009-04

Dear Mr. Tonsich:

This letter is a response to your request for formal advice dated July 30, 2009, regarding restrictions that may apply to you as a former City official. Your question and the Commission's advice are based on the facts that you provided and facts that are available through City documents.

Section 705 of the Los Angeles City Charter (Charter) authorizes the Ethics Commission to provide formal advice regarding the City's campaign finance, ethics, and lobbying laws. When applicable, and with the concurrence of the City Attorney's office, the Commission's written advice may also include an analysis of related provisions of the California Political Reform Act of 1974, when terms used in City law are defined there. However, the Commission does not advise about other City, state, or federal laws, because those laws do not fall within the Commission's jurisdiction.

Formal written advice provides the requestor with the immunity in Charter § 705(b). However, the immunity does not address or apply to actions that predate this letter. Under Los Angeles Administrative Code (LAAC) § 24.1.1(f)(2)(K), immunity is limited to the requestor and to the specific facts contained in this advice.

QUESTION

What restrictions apply to me, as a former member of the Los Angeles Board of Harbor Commissioners, in representing a Port of Los Angeles lessee in negotiations with the Harbor Department?



CONCLUSION

You are subject to a permanent ban on receiving compensation to attempt to influence any City agency regarding matters in which you were personally and substantially involved. You are also subject to a permanent ban on receiving compensation to assist or advise a person who is attempting to influence action on those matters. Finally, you are prohibited from disclosing any confidential information that you acquired during City service for personal gain.

RELEVANT FACTS

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

1. You served as president of the Los Angeles Board of Harbor Commissioners (the Board) from August 14, 2001 to June 27, 2005.
2. The City entered into Permit 999 with China Shipping Holding Company LTD (China Shipping) on May 8, 2001. The 25-year permit authorized China Shipping to significantly expand its operations at the Port of Los Angeles. The expansion was to occur in three phases: Phase I included operation of a container terminal and wharf at Berths 100-102; Phase II included an extension to Berth 100, a wharf extension of Berth 102, and 35 acres of adjacent backlands for storing and handling containers; and Phase III included 24 additional acres of adjacent backlands. Additional information regarding the permit may be found in Council File Number 01-0723.
3. In June 2001, Permit 999 was placed on hold because of a lawsuit filed by the Natural Resources Defense Council (NRDC) against the City and China Shipping. The use of Berths 100-102 was prohibited until an additional environmental impact report (EIR) was implemented for all three phases of the project.
4. On April 13, 2004, China Shipping brought a claim against the City seeking delay damages, because the NRDC lawsuit delayed China Shipping's use of Berths 100-102 and resulted in unexpected environmental mitigation measures. The Board entered into a settlement agreement with China Shipping regarding the claim on May 27, 2005 (approved as to form by the City Attorney's office on June 3, 2005).
5. You participated in the negotiation and settlement of the NRDC lawsuit on behalf of the City. The Board approved the First Amendment to Permit 999 on May 25, 2005 (Order No. 6825), and the City Council approved it on June 28, 2005. The First Amendment reflects the terms of a settlement agreement and a stipulated judgment and includes the following provisions:
 - a. Credits of approximately \$12,000 granted to China Shipping for minimum annual guarantee (MAG) and twenty-foot equivalent unit (TEU) charges.

- b. Payout of \$10,000 to China Shipping within 10 days after approval of the First Amendment.
- c. Reimbursements of up to \$3 million per year to China Shipping for retrofitting and using alternative marine power (AMP).
- d. An extension of time from certification of the new EIR to the Port's delivery of Phases II and III.
- e. Additional credits of up to \$7.1 million (an absolute cap) granted to China Shipping if project delivery dates for Phases II and II do not meet agreed-upon deadlines.

6. You currently represent China Shipping as legal counsel in a variety of matters. China Shipping recently asked you to assist them in negotiations with the Harbor Department regarding components of Permit 999, including compensation, the logistics of landing four quayside container cranes at Berths 101-102 in the Port of Los Angeles (Phase II), and other potential amendments to Permit 999 that could result in a second amendment to that permit.

APPLICABLE LAWS

To prevent former City officials from exercising or appearing to exercise improper influence over City decisions, the Governmental Ethics Ordinance (GEO, Los Angeles Municipal Code (LAMC) §§ 49.5.1 *et seq.*) establishes certain “revolving door” limits on their attempts to influence City decisions for compensation after they leave City service. A “City official” is defined as a person who is required to file statements of economic interests¹ pursuant to a City agency’s conflict of interests code. LAMC § 49.5.2. A City “agency” is defined as an office that is required to adopt a conflict of interests code² subject to City Council approval. *Id.*

There are two types of revolving-door restrictions that apply to former City officials: 1) a time-based ban on attempting to influence decisions for compensation; and 2) a permanent ban on attempting to influence, for compensation, a matter in which the City official was personally and substantially involved. LAMC § 49.5.11.

For City officials who were not high-level officials³, the first restriction prohibits direct communications with an agency if all of the following apply:

¹ The California Political Reform Act (Government Code §§ 81000 *et seq.*) requires certain local public officials to file personal financial disclosure reports known as statements of economic interests (also known as the California Form 700). See also LAMC §§ 49.5.6 and 49.5.7.

² The Political Reform Act also requires agencies to adopt and implement conflict of interests codes, to identify which officials must file statements of economic interests.

³ High-level officials are identified in LAMC § 49.5.2. The term includes elected officials, certain members of their staffs, and some enumerated departmental executives.

1. The purpose of the communication is to attempt to influence an action or decision on a matter pending before that agency;
2. The communication is made on behalf of a person other than an agency; and
3. The communication is compensated.

LAMC § 49.5.11(D). The ban applies to any agency in which the official served in the 12 months prior to leaving City service and lasts for one year afterward. *Id.*

The second restriction applies to all former City officials who personally and substantially participated during their City tenures in a decision, proceeding, claim, piece of legislation, or other specific matter. It prohibits them from attempting to influence any action on that matter if all of the following apply:

1. The matter is still pending with the City, the City is a party to the matter, or the City has a direct or substantial interest in the matter;
2. The attempt is made on behalf of a person other than an agency; and
3. The attempt is compensated.

LAMC § 49.5.11(A). A City official “personally and substantially” participates in a matter by, among other things, making a decision, making a recommendation, conducting research, investigating, or rendering advice. *Id.* In addition, former City officials are prohibited from receiving compensation to advise or assist others who are attempting to influence action on those matters for compensation. LAMC § 49.5.11(B).

The “personal and substantial” ban does not apply in limited circumstances. For example, it does not prohibit a former City official from making a statement based on the official’s own special knowledge, as long as the official does not receive compensation other than what is required by law or regulation for witnesses. LAMC § 49.5.11(C)(1). It also does not apply if a court or agency makes written findings that the former City official has “outstanding and otherwise unavailable qualifications” necessary in a particular matter and that the public interest would be served by the former official’s participation. LAMC § 49.5.11(C)(2). Finally, the ban does not apply to a former official’s communication in a proceeding before a court or agency when at least five years have passed since the former official left City service and the former agency determines that the public interest would not be harmed. LAMC § 49.5.11(C)(3).

“Attempting to influence” means “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 § 49.5.2. “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.” *Id.* “Municipal legislation” is any legislative or administrative matter pending before an agency but does not include a request for advice, a direct response to an enforcement proceeding with the Ethics Commission, a ministerial action, an action relating to a collective bargaining agreement

or memorandum of understanding, a proceeding before the Civil Service Commission, or the preparation of items that must be submitted to the City's planning department. LAMC § 48.02.

Neither the time-based ban nor the "personal and substantial" ban applies to former City officials who represent themselves or their immediate family members, in their individual capacities, in connection with any matter pending before a City agency. LAMC § 49.5.11(H).

All current and former City officials are prohibited from receiving "pecuniary gain or personal advantage or privilege" by using or disclosing confidential information that they acquire in the course of their official duties with the City. LAMC § 49.5.3.

ANALYSIS & CONCLUSION

Because you were required, as a member of the Board, to file statements of economic interests under the Harbor Department's conflict of interests code, you were a City official. You were not a high-level official, because the position you held is not identified in LAMC § 49.5.2.

City law does not restrict the type of employment in which you may engage after leaving City service. However, your status as a former City official does restrict your compensated attempts to influence action or decisions on matters that are pending before City officials under certain circumstances.

One-Year Ban

You served as a Board commissioner from August 2001 to June 2005. More than one year has elapsed since you left City service. Therefore, you may engage in compensated attempts to influence and communicate with employees and officials at your former agency and other City offices on behalf of others, unless those attempts are subject to the "personal and substantial" ban discussed below.

"Personal and Substantial" Ban

City officials are prohibited from receiving compensation to influence matters in which they were personally and substantially involved while in City service. In addition, they may not receive compensation to assist or advise another person who is attempting to influence action on those matters. This ban lasts as long as the matter is pending with the City or the City is a party to or has a direct or substantial interest in the matter, except for a few very narrow circumstances in which the ban does not apply.

A City official personally and substantially participates in a matter by, among other things, making a decision, making a recommendation, conducting research, investigating, or rendering advice. During your tenure on the Board, you negotiated a settlement agreement regarding Permit 999 on behalf of the City and participated in the Board decision to approve the First Amendment to Permit 999. The First Amendment approved and implemented the terms of the NRDC settlement agreement you negotiated, and it also approved and implemented the

settlement terms in China Shipping's claim against the City for damages. These actions rise to the level of personal and substantial involvement.

The settlement negotiations in which you were involved specifically addressed compensation, Berths 101-102, and Phase II of Permit 999, all of which are matters regarding which you would be representing China Shipping. In addition, the City is still a party to and, as lessor, has a direct and substantial interest in Permit 999. As a result, you are prohibited from receiving compensation to influence—or to assist or advise another person who is attempting to influence—matters related to the permit on behalf of China Shipping or any other person who is not a City agency.

Confidential Information

Finally, as a reminder, you may not disclose any confidential information that you acquired in the course of your City service for pecuniary or personal gain or advantage. This applies to all current and future business endeavors.

Thank you for requesting advice from the Ethics Commission. If you have any questions regarding this matter, please do not hesitate to contact our office.

Sincerely,

A handwritten signature in cursive script that reads "LeeAnn M. Pelham". The signature is written in black ink and includes a small circular mark at the end of the last name.

LeeAnn M. Pelham
Executive Director