

SALT LAKE CITY CORPORATION

LAW DEPARTMENT

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CITY ATTORNEY

RALPH BECKER
MAYOR

December 21, 2012

Søren D. Simonsen
Salt Lake City Council
304 City & County Building
Salt Lake City, UT 84111

Re: Ethics Opinion: Participation on Matter Involving Zoning Change

Dear Councilmember Simonsen:

Question: May you participate in official discussions and voting on a proposed rezoning of certain property in Sugar House (the "Zoning Change")?

Short Answer: It does not appear that you have a disqualifying conflict of interest based on: (a) some financial or professional interest of yourself; or (b) some attempt to obtain a professional benefit to yourself from the use of your office of City Council member. However, see discussion below.

I.

FACTS

On November 26, 2012, you requested an advisory opinion as to whether the City's conflict of interest ordinance or other applicable law would require you to recuse yourself from participating in or voting on the Zoning Change, because you and your employer perform architectural services for a commercial property owner whose property would be affected by the Zoning Change.

From your representations, this office understands the following to be the operative facts:

1. You are a professional architect who is employed by (but have no ownership interest in) a firm that currently is preparing site planning studies for the owner (the "Owner") of a commercially-zoned property (the "Property") that would be affected by the Zoning Change. You are not the primary architect in your firm who is working on this matter, but you are doing some of the work.
2. You have no ownership interest in the Property or the Owner.

3. You do not know whether the Zoning Change would lead to the Owner undertaking a project on the Property. However, you believe that the Zoning Change would create an incentive for the Owner to redevelop the Property.

4. The Owner has agreed to pay your firm a fixed fee for preparing the site planning studies for the Owner. It is probable that the vote on the Zoning Change will not change the amount of that fee.

5. The fee to be paid your firm will be less than \$10,000. Less than two-tenths of one percent of your firm's revenues this year will come from its services for the Owner.

6. The Zoning Change would affect property in the Sugar House area in at least two non-contiguous blocks, one of which includes part of Fairmont Park. Of the property that would be affected by the Zoning Change, 15 to 20 percent is owned by the Owner.

7. You did not initiate the petition for the Zoning Change. It was initiated by the City following a recommendation made by a consultant after a study.

8. You have no reason to believe that your relationship with your firm or with the Owner would suffer as a result of your vote on the Zoning Change.

9. Aside from your assumption that the Owner would like the redevelopment flexibility that the Zoning Change would create, you do not know how strongly the Owner feels about the Zoning Change issue.

10. All of the property to be rezoned is in the city council district that you represent, and the portion of the proposed Zoning Change that would affect Fairmont Park is controversial. You believe that your constituents would be strongly desire that your voice be heard regarding the Zoning Change.

II.

DISCUSSION

This matter implicates two sections of the *Salt Lake City Code*.¹ First, whenever your performance as a public servant constitutes governmental action on any matter involving your financial or professional interest and it is reasonably foreseeable that the decision will have an individualized material effect on that interest (distinguishable from its effect on the public generally), you must publicly disclose the matter to the Mayor and the City Council and, in the case of a financial interest, disqualify yourself from participating in any deliberation and voting on the matter.² In this case, it is necessary to analyze whether you have a financial interest or a professional interest in the Zoning Change matter.

¹ No State law is inconsistent or more restrictive than the City ordinance on this issue. Therefore, this opinion focuses on the more specific City ordinance.

² 2.44.030 *Salt Lake City Code*.

The second section prohibits you from “corruptly” using or attempting to use your official position to either: (1) further substantially the financial or professional interest of yourself or someone else; or (2) secure special privileges for yourself or someone else.³

The following is an analysis of the application of those sections to the situation you presented to this office.

A. Individualized Material Effect.

1. Financial or Professional Interest.

The conflict of interest ordinance defines “financial interest” as: (A) to possess a “substantial interest” (i.e., a 10 percent or greater ownership interest in a business entity by you or your relative); or (B) to hold a position in a business entity as an officer, director, trustee, partner, or employee, or hold any position of management in a business entity. In this case, you have no financial interest (as defined in the ordinance) in the Owner or the Zoning Change matter.

The ordinance defines “professional interest” as any interest that (A) results in a direct or immediate professional benefit or detriment to a public servant, or (B) creates a fiduciary duty with respect to a professional interest and is distinguishable from the professional benefit or detriment to the public generally or the public servant’s profession, occupation, or association generally. . . .”

We believe that the definition of professional interest typically would include the performing of architectural work for a client. However, § 2.44.030 only applies to governmental action that would have “an individualized *material* effect” on your professional interest. In this case the effect is not material, because your firm’s work for the Owner in preparing site planning studies accounts for such a small part of your firm’s revenue, and because only 15 to 20 percent of the property under consideration for rezoning is owned by the Owner.

Situations like this involve two competing policy interests. First, City Council members should make decision on the merits, not on the basis of special interests. Second, whenever possible, City Council members should be allowed to represent the interests of their constituents by voting on issues.

We believe the following statement by a court is applicable to this case:

Local governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official. If this were so, it would discourage capable men and women from holding public office. . . . [T]o abrogate a municipal action at the suggestion that some remote and nebulous interest is present,

³ 2.44.040 *Salt Lake City Code*.

would be to unjustifiably deprive a municipality in many important instances of the services of its duly elected or appointed officials. The determinations of municipal officials should not be approached with a general feeling of suspicion.⁴

We conclude that you may participate in the deliberations and vote on the Zoning Change without violating § 2.44.030.

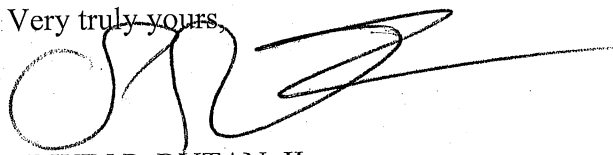
B. Corrupt Use of Official Position.

Section 2.44.040(B) is violated only when action is done "corruptly." "Corruptly" is defined as "any act done with wrongful intent and for the purpose of obtaining or receiving any financial or professional benefit or detriment resulting from some act or omission of a public servant . . . that is inconsistent with the proper performance of his or her public duties."⁵

In this case, this office has no information suggesting undue influence or corruption. You have voluntarily disclosed the facts of this situation. Further, there is no evidence, known to us, that you have any wrongful intent in this matter, or that you intend to act in a way inconsistent with the proper performance of your public duties.

Based on that understanding, we conclude that you may participate in the deliberations and vote on Zoning Change without violating § 2.44.040(B).

Very truly yours,



EDWIN P. RUTAN, II
City Attorney

cc: Mayor Anderson
City Council
City Recorder

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⁴ *Van Itallie v. Borough of Franklin Lakes*, 146 A.2d 111, 116 (N.J. 1958).

⁵ *Salt Lake City Code* § 2.44.020.