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July 11, 2007

Mayor Juan Carlos Escamilla
Sonia Sanchez, City Clerk

Re: Opinion of City Attorney Regarding Possible Conflict of Interest

Dear Mayor:

This letter is in response to your question concerning possible conflict of interest concerning your vote to direct staff to seek a modification of the existing loan between the San Luis Industrial Development Authority ("IDA") and Bank of America which would increase said loan by an additional two million dollars. This opinion is being written pursuant to the provisions of A.R.S. §38-507. It has been reviewed by David Merkel, Esq., General Counsel of the League of Arizona Cities and Towns, and meets with his approval.

The two million dollars will be used to reimburse the City for money it has lent to the IDA to cover costs of improvements, fixtures, furnishings and equipment that the IDA was obligated to provide pursuant to its lease agreement with Advanced Call Center Technologies, Inc. ("ACT"). It is my understanding that your wife is presently an employee at ACT. The question presented is whether you have a conflict in interest in voting on matters regarding the business dealings between the City and the IDA, and more specifically, this particular vote. There is at least one more upcoming vote on Council regarding this loan and upcoming votes on a future bond issue. This opinion will address all of these matters.

To answer these questions properly one must view the structure of the business dealings and how they interrelate with each other, and the impact, if any, on Mrs. Escamilla. Mrs. Escamilla did not become an employee of ACT until June 2, 2007. On April 2, 2007 she worked for Manpower as a temporary worker and was assigned to work for ACT. Prior to those dates she did not have any connection, direct or indirect, with ACT.

It is also important to note that the IDA is a legal entity, with its own Board of Directors, separate from the City of San Luis. See ARS §35-702(A). It derives its powers from Title 35, Chapter 5 of the Arizona Revised Statutes.

HISTORY

The City of San Luis ("City") and the Industrial Development Authority of the City of San Luis ("IDA") embarked on an economic development project to bring a call center to the City of San Luis. This project involved several legal component parts. Without going into all of the details, the following are the decisions of both the City and the IDA which affect the legal issues involved in this opinion.

On December 13, 2006, by motion, the City Council of the City of San Luis voted to approve a purchase agreement to buy the property located at 580 San Luis Plaza, San Luis, Arizona, commonly known as the Price Center building. The City Council, pursuant to the record of that meeting, determined to purchase that building regardless of whether the call center project came to fruition or not. The purpose of the purchase was economic development. The provisions of that purchase agreement included several contingencies, including financing. The date by which the City had to exercise those contingencies was January 15, 2007.

On January 10, 2007 the City Council, as part of its agenda, considered the matter of the adoption of Resolution No. 709. This was a resolution to give preliminary approval to the issuance of taxable bonds by the IDA for the call center project. Approval of the city council is a statutory administrative action required by A.R.S. §35-721(B). A long presentation was made by the City Manager and staff regarding the proposed call center, the financial details as best as they were known at that time, and the impacts to the City, the IDA, and the community. The meeting was taped, and a transcript can be produced, if necessary. During that presentation, the topic of a pledge of City revenues as being necessary to secure the bond issue was presented. Also mentioned to Council was the January 15, 2007 date to exercise the contingencies in the purchase agreement and that staff would interpret Councils vote on this resolution as whether to proceed with the ACT call center project or not. The project called for the first phase of improvements to the Price Center building to be complete such that Advanced Callcenter Technologies ("ACT") can begin to occupy the premises on or before April 1, 2007. As a result, this is an ambitious project on a very fast track, and this impact was very carefully laid out as part of the presentation on January 10, 2007. The decision was presented as a "go or no go" decision, and once made, there would be no looking back without severe financial consequences. City Council voted to approve Resolution No. 709.

The IDA in its resolutions approved a lease with ACT, issuance of bonds, approval of financing from Bank of America, approved purchase of the Price Center building and reimbursement to the City, approved contracts for construction and building improvements, and has approved several other related contracts for equipment, fixtures, and furnishings to comply with the requirements of the lease with ACT. The lease is between the IDA and ACT, and the City is not a party to said lease. The lease was made

on or about February 8, 2007. The IDA approved reimbursing the City for any expenditure the City may make for this project prior to funding of the finance commitment.

In early February, legal review disclosed that Resolution No. 709 failed to specifically mention a pledge of municipal revenues to secure the bond issue of the IDA. On February 8, 2006 the City Council adopted Resolution No. 714, A Resolution of the City Council of the City of San Luis, Arizona Declaring Its Intent in the Adoption of Resolution No. 709. Section 1 of that resolution states in applicable part:

> "That the Mayor and City Council hereby clarifies the record by stating that it was its intent and purpose to pledge the excise taxes revenues of the City of San Luis to secure payment of the bonds authorized by Resolution No. 709 of the City of San Luis as part of the adoption of said resolution."

The construction plans for the improvements for ACT were to be in two phases pursuant to the terms of the lease agreement. The first phase was to be complete on or before April 15, 2007, and the second phase on or before June 15, 2007. The total cost of financing for the project was estimated to be no more than $8,700,000.00, the authority granted by Resolution 709. However, to pay the bills during development, the IDA secured "bridge" financing from Bank of America in the amount of $5,500,000.00. It was anticipated that the "permanent financing" in the form of a long term revenue bond issue would be secured before the end of June, 2007, in time to pay the bills for phase two of development.

Due to the lateness of the City audit for fiscal year 2005/2006, the ability to even begin the process for a "permanent" "take out" bond issue could not even begin until the month of June 2007. Phase two, however, was completed ahead of schedule. As a result bills from the contractors and vendors became due and exceeded the amount of the bridge loan. The City had pledged to stand behind the project. The bills became due, and funds did not exist with the IDA to pay them without either additional monies from the existing loan, or the permanent bond issue becoming funded. As a result there are three choices. First is for the City to loan money to the IDA from its treasury and wait for permanent financing. Second is to increase the existing loan between the IDA and Bank of America, reimburse the City for any moneys it may have spent to cover outstanding bills, and wait for permanent financing. Third is to not pay bills and risk the penalties provided by law, including mechanic's and materialman's liens and risk being in default of the existing loan agreement. Choice three exposes the City to pay up to five and a half million dollars now due to its pledge.

Please note the duties and responsibilities between the IDA and ACT were formed pursuant to the lease agreement. Nothing in the existing loan agreement, the proposed amendment of said loan, or the proposed future permanent take out bond issue, involve, change, or financially impact the existing duties and obligations under said agreement.

None of the financing agreements financially impact ACT either as a benefit or a detriment, since none of them change or modify the existing lease in any way.

LAW OF CONFLICT OF INTEREST

As a general rule, the conflict of interest statutes would prohibit a member of Council who has a substantial interest in an item on the agenda from participating in a discussion or vote regarding that particular matter. The member of the body must declare a conflict then refrain from any participation. There are some exceptions to this rule, but those circumstances are not applicable in this particular case. The conflict of interest law covers matters involving the interests of not only the member of Council, but of close relatives as well. The interests of Mrs. Escamilla fall under this law.

The first question that must be addressed in any analysis is whether one has a "substantial interest." A.R.S. §38-502(11) defines this term as follows:

> "11. "Substantial interest" means any pecuniary or proprietary interest, either direct or indirect, other than a remote interest.

"Remote interest" is defined at ARS §38-502(10). This is a list of ten specific circumstances. None of those circumstances are present here. Arizona case law has held that if there is any pecuniary interest, direct or indirect, and it is not in the list of circumstances described in ARS §38-502(10), then it is a substantial interest and participation in either a discussion or vote would be a violation of ARS §38-503(A). As this is not a matter of being a "remote interest" as defined, one must focus on the issue of whether this is a matter involving a pecuniary or proprietary interest sufficient to be a "substantial interest."

For one to have a conflict of interest one, or a covered relative, must have a "substantial interest" in the matter being voted upon. For one to have a "substantial interest" one must have a direct or indirect pecuniary or proprietary interest. "Pecuniary" means money and "proprietary" means property. *Hughes v. Jorgenson*, 203 Ariz. 71, 74, 50 P.3d 821(2003). For one to have a "substantial interest" one must "gain something or lose something." *Yetman v. Naumann*, 16 Ariz.App. 314, 317, 492 P.2d 1252 (Div.2 1972).

Any attempt to connect the dots and create an impact between the benefits received by Mrs. Escamilla as an employee of ACT and the loan agreements between the IDA and Bank of America, becomes speculative at best. Nothing in the existing loan agreement or the proposed modification creates a situation where Mrs. Escamilla will gain something or lose something. The lease agreement between the IDA and ACT was created at a time prior to Mrs. Escamilla's employment with ACT. While lease payments are security for the debt with Bank of America, other than as security, nothing in the obligations of the loan agreements is connected to the lease agreement with ACT.

Nothing in the proposed loan agreement creates a situation where ACT will gain something or lose something. And nothing in the proposed loan agreement creates a situation where Mrs. Escamilla will gain something or lose something.

In *Yetman v. Naumann*, 16 Ariz.App. 314, 492 P.2d 1252 (Div.2 1972) the court held at page 317:

> "We do not believe however, that the legislature intended that the word 'interest' for purposes of disqualification was to include a mere abstract interest in the general subject or a mere possible contingent interest. Rather, the term refers to a pecuniary or proprietary interest, by which a person will gain or lose something as contrasted to general sympathy, feeling or bias. Moody v. Shuffleton, 257 P. 564 (Cal.App.1927), rev'd on grounds that an 'interest' was shown, 203 Cal. 100, 262 P. 1095 (1928)."

In *Hughes v. Jorgenson*, 203 Ariz. 71, 50 P.3d 821(2003) the Supreme Court upheld this interpretation by the *Yetman* court. In *Hughes* the court was faced with a circumstance where a County Sheriff directly participated in a criminal investigation of his sister. The argument was made: "...that Hughes's conduct falls within the ambit of the conflict of interest statute because both Hughes and his sister 'had some financial interest to gain or lose by [Jane Doe's] arrest, incarceration, and prosecution for drug possession.'" The Supreme Court in rejecting the proposition that the Sheriff had a conflict of interest cited with authority the *Yetman* decision and the cases of *Shepherd v. Platt*, 177 Ariz. 63, 865 P.2d 107 (App.1993) and *Arizona Farmworkers Union v. Agric. Employment Relations Bd.*, 158 Ariz. 411, 762 P.2d 1365 (App.1988). The Supreme Court in approving the law of these cases stated at page 74:

> "These cases make clear that to violate the conflict of interest statute, a public official must have a non-speculative, non-remote pecuniary or proprietary interest in the decision at issue."

In citing the *Shepard* decision, the Supreme Court stated at page 74:

> "In Shepherd v. Platt, 177 Ariz. 63, 865 P.2d 107 (App.1993), the court of appeals determined that Navajo tribal members who served as county supervisors had not violated the conflict of interest statute in their decisions regarding county expenditures on the Navajo Reservation. Noting that a conflict exists within the meaning of A.R.S. § 38-503 only "when a public official [or a relative] has a substantial pecuniary or proprietary interest in one of his or her decisions," id. at 65, 865 P.2d at 109, the court succinctly defined the terms at issue: "[p]ecuniary means money and proprietary means ownership." Id."

Like the situations involved in *Hughes, Shepherd v. Platt*, 177 Ariz. 63, 865 P.2d 107 (App.1993) and *Arizona Farmworkers Union v. Agric. Employment Relations Bd.*, 158 Ariz. 411, 762 P.2d 1365 (App.1988), this situation is not statutorily defined as a "remote interest", but also like these cases, it is clearly factually a remote and speculative interest at best. Therefore, the opinion of this office remains that there is no violation of the conflict of interest statutes by the participation in the discussion and vote on the possible modification of the existing loan between the IDA and the Bank of America, or in any future vote on financing, as long as the lease agreement between the IDA and ACT remains unchanged. In the event a decision involves a change in said lease, this opinion will need to be revisited as a precaution. This is not to say it would be a conflict for you to vote under those circumstances, rather, it is the desire of this author to revisit the matter and look closely at the facts as they would exist at that time.

Respectfully,

Glenn Gimbut
City Attorney