

February 5, 2013

John A. Ramirez  
Rutan & Tucker, LLP  
611 Anton Blvd., Suite 1400  
Costa mesa, CA 92626

Re: Your Request for Advice  
**Our File No. A-13-004**

Dear Mr. Ramirez:

This letter responds to your request for advice regarding the duties of Newport Beach Planning Commissioner Kory Kramer under the conflict of interest provisions of the Political Reform Act (the "Act").<sup>1</sup> Please note that there are other bodies of law, separate and apart from the Act's conflict-of-interest provisions that may apply to your situation. Our advice is based solely on the Act. We therefore offer no opinion on the application of any of these laws such as common law conflict of interest and Government Code Section 1090.

### QUESTIONS

May Commissioner Kramer perform the following duties on behalf of his employer Pacific Hospitality Group, LLC ("PHG"):

- (1) Submit a development proposal to the City concerning the reuse of the soon-to-be-vacated City Hall site?
- (2) Enter into negotiations with City executive staff and the City Council with respect to a proposed Exclusive Negotiating Agreement with PHG?
- (3) Enter into negotiations with City executive staff and the City Council with respect to a proposed ground lease for PHG?

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

(4) Process project-specific land use entitlements before the City involving the issuance of design review and a variety of other discretionary land use permits related to the PHG project?

### **CONCLUSIONS**

(1) - (4) Commissioner Kramer is prohibited from participating in any of the decisions on behalf of PHG before the planning commission. However, to the extent that the decisions are solely before the City Council, Commissioner Kramer may appear before the City Council regarding the decisions so long as he does not act or purport to act on behalf of, or as the representative of, the planning commission.

### **FACTS**

Commissioner Kramer is a current Planning Commissioner whose term extends to June 30, 2015. In his private capacity, Commissioner Kramer is the Chief Investment Officer for PHG with responsibilities for acquisitions and development.

In early 2013, the Newport Beach City Hall will relocate to a newly constructed Civic Center. This will leave the existing City Hall site vacant. In anticipation of the existing site's potential for reuse, the City Council has initiated a General Plan amendment to replace the site's existing Land Use Element and to amend the City's Zoning Ordinance to accommodate either a mixed-use development that could include up to 15,000 square feet of retail commercial or a community center and 99 multi-family residential units, or a hospitality development consisting of up to 99,675 square feet of hotel uses.

In support of the proposed amendments to the General Plan and Zoning Ordinance, the City performed or will perform the following:

- In early October 2012, the City issued Request for Qualifications No. 13-16 (the "RFQ") seeking an experienced development team for the redevelopment of the site. The City received 15 responses for the development of either a boutique hotel or mixed-use (residential and commercial) project. PHG provided one of the responses that was prepared by Commissioner Kramer on behalf of PHG.
- The Ad Hoc Revitalization Committee and City staff reviewed the responses and on January 8, 2013, recommended that the City Council direct staff to invite six of the fifteen respondents to submit development proposals for the site. Three of the proposals will be for a boutique hotel concept and three are for a residential mixed-use concept. PHG will submit one of the three proposals for a boutique hotel.
- The Planning Commission considered the MND and General Plan/Zoning Code amendments on January 17, 2013. Commissioner Kramer recused himself from participating in this item.

- It is anticipated that the City Council will consider these items on February 12, 2013. The City plans to select one of the six respondents and to commence the negotiation process on or about May 2013.
- If PHG is ultimately selected as the developer of the site, numerous other City approvals of a variety of development-specific land use entitlements and permits will be required. Most, if not all of which, will be reviewed by the City's Planning Commission. Commissioner Kramer will recuse himself in these and all related matters regarding the City Hall reuse project. However, Commissioner Kramer intends to serve as "point person" on behalf of PHG during all phases of development, including entitlement and design review.

### ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision.

The first step is satisfied under your facts. Planning Commissioners are "public officials" under the Act. (See, Section 82048 and Section 87200.) The conflict-of-interest provisions of the Act only apply to "public officials." (Section 87100.)

Similarly, steps 3 through 6 of the analysis are also satisfied. You indicated that PHG is an economic interest of the planning commissioner (step 3), is an applicant in and subject of the proceeding in question and is therefore directly involved in the proceeding (step 4), and it is apparent that the selection of PHG will have a foreseeable and material financial effect on PHG (steps 5 and 6). The Analysis also recognized two exceptions -- the public generally exception and the exception for legally required participation, neither of which is implicated by your facts.

Rather your question focuses on Step 2 of the standard analysis -- will the planning commissioner be making, participating in making, or using his official position to influence a governmental decision in performing the tasks on behalf of PHG that you identified in your questions.

- A public official "makes a governmental decision" when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.)

- A public official “participates in a governmental decision” when, acting within the authority of his or her position and without significant substantive or intervening review, the official negotiates, advises, or makes recommendations to the decisionmaker regarding the governmental decision. (Regulation 18702.2.)

You stated that the planning commissioner has not and will not “make” or “participate in making” of these governmental decision. You stated the planning commissioner will disqualify himself from decisions affecting his employer. Therefore, we do not discuss these two definitions further. Please be aware that Section 87105 and Regulation 18702.5 require that certain public officials (including Planning Commissioners) who have a conflict of interest in an agenda item must: (1) publicly identify the financial interest immediately prior to discussion of the item, as detailed in Regulation 18702.5(b); (2) recuse himself or herself from discussing, voting on, or otherwise influencing the matter; and (3) leave the room until after the discussion, vote, or conclusion of any other disposition of the matter.

The final conduct considered under step 2 of the analysis is whether the official will be using or attempting to use his or her official position to influence the governmental decision. There are two rules that address whether a public official is using or attempting to use his or her official position to influence a governmental decision.

- The first rule applies when the governmental decision is within or before the public official’s own agency or an agency appointed by or subject to the budgetary control of the public official’s agency. (Regulation 18702.3(a).) In these cases, if “the official contacts, or appears before, or otherwise attempts to influence, any member, officer, employee, or consultant of the agency” then he or she is attempting to influence a governmental decision. This includes “appearances or contacts by the official on behalf of a business entity, client, or customer.”
- The second rule applies when the governmental decision is within or before an agency other than the public official’s own agency, or an agency appointed by or subject to the budgetary control of the public official’s agency. (Regulation 18702.3(b).) Under this rule, the official cannot act or purport “to act on behalf of, or as the representative of, his or her agency to any member, officer, employee or consultant of an agency” to influence a decision that will have a material financial effect on his or her economic interests.

Thus, under the first rule, Commissioner Kramer is prohibited from contacting, appearing before, or otherwise attempting to influence, any member, officer, employee, or consultant of the Planning Commission with respect to a decision in which he has a conflict of interest. As to who is characterized as staff of the planning commission, while this is primarily a factual question, we have previously clarified the standard cannot be applied in a vacuum based on the location in an organizational chart. In the *Farrell* Advice Letter, No. I-03-121 we advised:

“[I]t is important to realize that staff does not exist in a vacuum; it is not a generic entity with its own identity. Rather, staff is a component of the agency to

which it is assigned. An “agency” includes the staff assigned exclusively to a public official’s agency (*Larmore* Advice Letter, No. A-00-275; *Martello* Advice Letter, No. A-85-190) as well as staff that are shared between that and another agency (*West* Advice Letter, No. A-88-413).”

In the *Fulhorst* Advice Letter, No. I-12-045, we advised

“Accordingly, we concluded that a member of a design review board could not meet or communicate with a staff member of another city department on behalf a client if (1) the staff member is assigned or involved in a project, analysis, presentation, or other matter that is or will be brought before the design review board, and (2) it is reasonably foreseeable that the design review board’s decision regarding the item in which the staff member is involved will have a material financial effect on one or more of the member’s economic interests. In short, when staff is shared for a project which is, or will be, before the official’s agency, meeting or otherwise communicating with the shared staff regarding the project is an appearance or communication with the official’s own agency. (*Farrell* Advice Letter, *supra*.)

“Applied to your facts, a planning commissioner may not appear before or communicate with a staff member of another city department, on behalf a client, if the staff member is assigned or involved in a project that may potentially be brought before the Planning Commission (including but not limited to a staff member who advises or provides analysis to the Planning Commission regarding the project) and it is reasonably foreseeable that the Planning Commission’s decision regarding the project in which the staff member is involved will have a material financial effect on one or more of the commissioner’s economic interests.”

While a public official may not contact staff of his or her own agency for the purpose of influencing a decision in which he or she has a financial interest, including contacts on behalf of his employer, client, or customer, a public official may contact other staff of the city under Regulation 18702.3(b) under certain circumstances. For example, so long as the planning commissioner makes it clear that he is not purporting to speak on behalf of the planning commission he may appear before the city council.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini  
General Counsel

By: John W. Wallace  
Assistant General Counsel  
Legal Division

JWW:jgl

## LEGAL DIVISION ASSIGNMENT SHEET

<b>Tracking Number:</b>	13004
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ITEM DESCRIPTION			
Advice Letter No.	13-004	Requestor	Ramirez, John A.
Regulation Project No.			
Other (describe)			

<b>Received By FPPC On:</b>	01/18/13	<b>Due Date:</b>	02/20/13
<b>Assigned To:</b>	JWW	<b>Date To Assignee:</b>	01/22/13

REVIEWERS	Date To Review	1st Approval & Date (Including Regulation Notices)	Date To Review	Final Approval & Date (Incl. Regulation Adoption Memos)
<b>Proofed</b>				
<b>Senior</b>				
<b>TAD Chief (SEI, Campaign, Conflict of Interest Code letters)</b>				
<b>Assistant GC</b>				
<b>General Counsel</b>				
<b>Executive Director (discretion of GC)</b>				
<b>Chair (discretion of GC)</b>				