

December 18, 2013

John A. Ramirez
City Attorney
611 Anton Blvd., Suite 1400
Costa Mesa, CA 92626

Re: Your Request for Advice
Our File No. A-13-156

Dear Mr. Ramirez:

This letter responds to your request on behalf of Newport Beach Planning Commissioner Kory Kramer regarding his duties under the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ This letter is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as a finder of fact when rendering advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

Please note that our advice is based only on the provisions of the Act. We offer no opinion on the application of other laws that may apply, such as common law conflict-of-interest.

QUESTION

Does Commissioner Kramer have an interest in RD Olson Development ("Olson") that will create a conflict of interest in Olson's Newport Beach Project?

CONCLUSION

Based on your facts, the commissioner does not have an interest in Olson that will create a conflict of interest in the Newport Beach Project.

¹ 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.

FACTS

Your firm represents the City of Newport Beach (“City”) and Planning Commissioner Kory Kramer. Commissioner Kramer has served as a planning commissioner since July of 2011 and his current term ends June 30, 2015.

In his private capacity, Commissioner Kramer is the Chief Investment Officer (CIO) of a privately-owned, California limited liability company -- the Pacific Hospitality Group, LLC (“PHG”). As the CIO of PHG, Commissioner Kramer receives a salary in an amount that has exceeded \$500 in the past 12 months. Commissioner Kramer does not have any ownership interest in PHG, which is wholly owned by a single shareholder. PHG is involved in the operation, development, ownership, and management of a collection of resort hotel properties throughout the State of California.

PHG has recently entered into a Joint Venture Agreement with Olson related to the development, ownership, construction, and management of Pacific City Hotel as a full service hotel (consisting of 250 rooms and a host of other amenities). Olson is a small, privately-owned firm that is also involved in the development, construction, and ownership of hotels. Under the terms of the Joint Venture Agreement, Olson and PHG plan to create a third company (the Pacific City Hotel LLC) to acquire the hotel site and pursue the development, ownership, construction, management, and operation of the Pacific City Hotel. Ownership, management and control of, the Pacific City Hotel LLC will be shared equally between PHG and Olson. Through the Pacific City Hotel LLC, PHG and Olson will share in profits resulting from the project. In addition to his salary from PHG, Commissioner Kramer will also receive a fee and small share of profits resulting from the Pacific City Project. With the exception of the Pacific City Project, neither PHG nor Commissioner Kramer are partnered with Olson in connection with any other projects, or otherwise have any other dealings with Olson.

Olson is the proposed developer/applicant of a new hotel in the City of Newport Beach. You stated that the Newport Beach Project is completely unrelated to the Pacific City Project and neither PHG nor Commissioner Kramer has any ownership, management role, or other connection to the Newport Beach Project. On August 13, 2013, the City Council approved an Exclusive Negotiating Agreement with Olson, which contemplates a ground lease for the Newport Beach Project. Approval of the Ground Lease requires environmental analysis, which is currently being completed. On November 6, 2013, the City issued a Notice of Preparation for a draft Environmental Impact Report (“EIR”). It is anticipated that the EIR, along with all other relevant discretionary approvals, will go to the Planning Commission for review and approval in June 2014. To date, nothing related to the Newport Beach Project has been presented to the Planning Commission, and Commissioner Kramer has not participated in the Newport Beach Project.

You also noted:

- Commissioner Kramer is employed by PHG, and holds no employment position with Olson, and has no investment in Olson.
- Moreover, neither PHG nor Olson have a controlling ownership interest in (or otherwise control) the other, nor do they have shared management/control.
- You stated that PHG had \$2.5 million or more in pre-tax earnings for its most recent fiscal year.
- You stated that the Newport Beach Project decision will not result in (1) any increase or decrease in gross revenue to PHG or Pacific City Hotel LLC, (2) PHG or Pacific City Hotel LLC incurring, avoiding, reducing, or eliminating any additional expenses in the fiscal year, or (3) any increase or decrease in PHG's or Pacific City Hotel LLC's assets or liabilities.

ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials will "perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them." (Section 81001(b).) Section 87100 provides:

"No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest."

The Commission has adopted an eight-step standard analysis for deciding whether an official has a "financial interest" in a decision. (Regulation 18700(b).)

Steps 1 and 2. Is Commissioner Kramer a "public official" within the meaning of Section 87100 and will he be making, participating in making or influencing a governmental decision?

As a planning commissioner, Commissioner Kramer is a public official under Sections 82028 and 87200. When voting on Olson's Newport Beach project, the commissioner will be making a governmental decision.²

² When a public official who holds an office specified in Section 87200 has a conflict of interest in a decision noticed at a public meeting, then he or she must: (1) immediately prior to the discussion of the item, orally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in Regulation 18702.5(b), on the record of the meeting; (2) recuse himself or herself; and (3) leave the

Step 3. What are the commissioner's interests that may be affected by the decision?

The Act's conflict-of-interest provisions apply only to conflicts of interest arising from certain enumerated interests described in Section 87103 and Regulations 18703-18703.5. A public official has an interest in the following:

- A business entity in which he or she has a direct or indirect investment of \$2,000 or more. (Section 87103(a); Regulation 18703.1(a)) or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d); Regulation 18703.1(b).)
- Real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)
- Any source of income, including promised income, totaling \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- Any source of gifts to him or her if the gifts total \$440 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- His or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is commonly referred to as the "personal financial effects" rule. (Section 87103; Regulation 18703.5.)

You have acknowledged that Commissioner Kramer has an interest in his employer PHG as well as the joint venture formed by PHD and Olson -- Pacific City Hotel LLC. Your question is whether the commissioner has an interest in Olson that would create a conflict of interest in all decisions affecting Olson.

Your facts indicate that the commissioner does not receive any income from Olson, nor does he have an investment in, or hold any employment with, Olson. However, as you accurately point out, the Act is broadly construed to in some cases reach beyond the obvious source of income to reach others affiliated with the source.

Parents and Subsidiaries

Regulation 18703.1 provides that an official has an interest in a business entity that is *a parent or subsidiary of, or is otherwise related to*, a business entity in which the official has one of the interests defined in Section 87103(a) or (d). A parent-subsidiary relationship exists when one corporation directly or indirectly owns shares possessing more than 50 percent of the voting

room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences and speaking as a member of the public regarding personal interests, special rules found in Regulation 18702.5(c) and 18702.5(d) apply.

power of another corporation. You stated that PHG and Olson are not parents or subsidiaries of each other since neither own more than 50 percent of other. Moreover, Pacific City Hotel LLC is not a subsidiary of either PHG or Olson, since PHG and Olson will share interest in and management and control equally.

Otherwise Related Business Entities

In the alternative, PHG, Olson, and Pacific City Hotel LLC may be otherwise related business entities. Businesses are otherwise related if any one of the following three tests is met:

“(A) One business entity has a controlling ownership interest in the other business entity.

“(B) There is shared management and control between the entities. In determining whether there is shared management and control, consideration should be given to the following factors:

“(i) The same person or substantially the same person owns and manages the two entities;

“(ii) There are common or commingled funds or assets;

“(iii) The business entities share the use of the same offices or employees, or otherwise share activities, resources or personnel on a regular basis;

“(iv) There is otherwise a regular and close working relationship between the entities; or

“(C) A controlling owner (50% or greater interest as a shareholder or as a general partner) in one entity also is a controlling owner in the other entity.”

While these standards would apply to find that PHG and Pacific City Hotel LLC are otherwise related, none of the facts you provided appear to support a finding that Olson and PHG are anything more than partners with respect to a single project -- the Pacific City Hotel. Thus, the commissioner is not presumed to have any interest in Olson.

Imputed income

In your letter requesting advice you also referenced Regulation 18703.3(a)(3) which provides that in addition to having an economic interest in any business entity from which the official has received income of \$500 or more, the official is also deemed to have an interest in any individual owning a 50 percent or greater interest in that business entity, and any individual, regardless of the extent of the individual's ownership interest in that entity, who has the power to direct or cause the direction of the management and policies of the business entity.” You stated

that there was no individual that met the criteria of the regulation; therefore this rule would not apply.

Step 4. Will the commissioner's interests be directly or indirectly involved in decisions concerning the Newport Beach Project?

Under Regulation 18704.1(a), a person, including a business entity and source of income, is directly involved in a decision before an official's agency when that person, either directly or by an agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

“(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.”

Neither PHG nor Pacific City Hotel LLC has initiated the Newport Beach Project nor will they be named parties in, or the subject of the Newport Beach Project decisions. Accordingly, under Regulation 18704.1(a), the businesses in which the commissioner has an interest are indirectly involved in the Newport Beach Project decisions.

Steps 5 and 6. What is the applicable materiality standard and is it reasonably foreseeable that the financial effect of the governmental decision on the commissioner's interests will meet the applicable materiality standard?

A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official's economic interest is material. (Regulation 18700(a).) A material financial effect on an interest need not be certain or even substantially likely to be “reasonably foreseeable,” but it must be more than a mere possibility. (Regulation 18706(a); *In re Thorner* (1975) 1 FPPC Ops. 198.)

The applicable materiality standard for governmental decisions indirectly involving business entities is found in Regulation 18705.1(c). You stated that the materiality standard applicable to PHG and Pacific City Hotel LLC was set forth in Regulation 18705.1(c)(2) and (c)(4) respectively. However, you also stated that the Newport Beach Project will not have any financial effect on the revenues, expenses, assets or liabilities of the two businesses in which the Commissioner has an interest. Therefore, the commissioner's interests will not be foreseeably and materially affected by the Newport Beach Project.

Steps 7 and 8: Exceptions

Since it appears the decisions will not have a material financial effect on the commissioner's interests, we need not apply the exceptions to the conflict of interest rules.

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

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