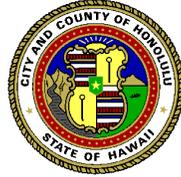


**ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU**

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KIRK CALDWELL
MAYOR



JAN K. YAMANE
EXECUTIVE DIRECTOR
AND LEGAL COUNSEL

**ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU**

Date and Place: February 15, 2017
Kapālama Hale
1st Floor Conference Room

Present: Michael Lilly, Esq., Vice Chair

Peter S. Adler, Commissioner
Stephen Silva, Commissioner (holdover, term exp. 12-31-16)
Stanford Yuen, P.E., Commissioner (holdover, term exp. 12-31-16)

Jan K. Yamane, Executive Director and Legal Counsel
Laurie A. Wong-Nowinski, Associate Legal Counsel
Lisa P. Parker, Legal Clerk III
Kristine Bigornia, Legal Clerk I
Joseph Pagkalinawan, Po‘okela Intern
John (Jack) McDonald, Esq., MPA Intern
Moana Yost, Deputy Corporation Counsel,
Department of the Corporation Counsel (COR)

Dr. and Mrs. Kioni Dudley, Members of the Public
Ann Sack Shaver, President, League of Women Voters (League)
Pamela Boyar, Hawaii Farmers Union United (HFUU)
Timothy J. Garry, Member of the Public
Jayna Omaye, Reporter, Star Advertiser

Absent: Hon. Victoria Marks (ret.), Chair
Hon. Riki Amano (ret.), Commissioner
Hon. Allene Suemori (ret.), Commissioner

MINUTES OF THE FEBRUARY 15, 2017 OPEN SESSION MEETING

I. Call to Order, Public Notice, Quorum

Vice Chair Lilly called the meeting to order at 11:30 a.m., and informed the Commission that only one written testimony was received by Dr. Dudley and that the League of Women Voters would be testifying.

II. New Business

A. Chair's Report

1. Announcements, Introductions, and Correspondence

None.

2. For Action: Approval of Open Session Minutes of January 18, 2017

Vice Chair Lilly requested a motion to approve the Open Session Minutes of the January 18, 2017 meeting. It was moved by Commissioner Yuen, seconded by Commissioner Adler, and unanimously carried to approve the Open Session Minutes of the January 18, 2017 meeting.

3. For Action: Approval of Executive Session Minutes of January 18, 2017

Vice Chair Lilly requested a motion to approve the Executive Session Minutes of the January 18, 2017 meeting. It was moved by Commissioner Adler, seconded by Commissioner Silva, and unanimously carried to approve the Executive Session Minutes of the January 18, 2017 meeting.

4. Nomination and Vote for Chair and Vice Chair, Calendar Year 2017

Vice Chair Lilly stated that the Commission was the best it had ever been and that it was an outstanding organization, including staff, working well together.

Vice Chair Lilly asked for any nominations for Chair. Commissioner Silva nominated Chair Marks. Vice Chair Lilly then asked if there were any other nominations, and Commissioner Yuen nominated Vice Chair Lilly.

Vice Chair Lilly again asked if there were any other nominations, and since there were none, asked the Commission if all were in favor of Judge Marks continuing as Chair for calendar year 2017. All were in favor and unanimously carried to approve Judge Marks as Chair for calendar year 2017.

Vice Chair Lilly asked if there were any nominations for Vice Chair. Commissioner Yuen nominated Vice Chair Lilly. Vice Chair Lilly then asked if there were any other nominations, and since there were none, closed the nominations. All were in favor and unanimously carried to approve Vice Chair Lilly as Vice Chair for calendar year 2017.

B. Executive Director and Legal Counsel's Report

1. Staff Work Reports Summary

The EDLC referenced her memo which outlined staff work over the last month. One major difference from the prior month was that a lot of financial disclosures and lobbyists' annual reports and registrations were being received, processed, and reviewed but no filing statistics were available yet.

The EDLC explained that staff has also been restructuring and organizing the e-files, creating and submitting the UIPA report, and responding to auditor requests. Ms. Yonamine, the EC investigator, spent more time on investigations this month compared to the prior month. Her administrative time was spent on developing policies and procedures to support the complaint intake and investigation process.

The EDLC further informed the Commission that the ALC's work continued to be administratively heavy and there was a significant increase of time spent reviewing and processing financial disclosures. She reminded the Commission that city employees were required to file their disclosures electronically and board and commission members were still filing their disclosures on a downloadable form from the Ethics Commission website. She hopes to have e-filing available for board and commission members in the future and post a formal report on the website. She also stated that staff will be posting lobbyists' registration and reports on the website.

Vice Chair Lilly asked for clarification on lobbyists' reports, and the EDLC responded that lobbyists file both an annual report and registrations, but only a summary of registrations are posted on the website.

2. Statistics – Complaints, Requests for Advice

The EDLC informed the Commission that statistics would be reported at next month's meeting. She also stated that during this past month, staff closed several cases although new cases came in during the month.

3. Budget

a. FY2017 Operating Budget – None

b. FY2018 Operating Budget Request – None

4. Ethics Training Program

The EDLC reported that the City Clerk's office completed the ethics web-based Mindflash training. The next round of training invitations were then sent to Council Services'

and City Auditor's offices. Within a few days, half of their staffs have already completed their training.

Vice Chair Lilly asked if there were any comments from the employees from the City Clerk's office. The EDLC directed the Commission to Exhibit 4, Ethics Training Pilot Program Survey, which showed 100 percent (100%) support for electronic training use. She further informed the Commission that staff is working simultaneously with the Department of Information Technology ("DIT") for a city-created web-based training program. They set a target date of April 1, 2017, for completion. DIT would be able to send out the training to 4,500 employees by a push of a button. The 4,500 blue collar workers that do not have access to a desk-top computer could watch the presentation in a department conference room and complete the quiz and survey using a fill-in-the-bubble answer sheet that could be auto-scanned and recorded.

The EDLC informed the Commission that the first training course to be sent out is for all city employees. Staff would be developing additional training courses thereafter for managers and supervisors, cabinet, city council, and other specialized training. Eventually she would like to be able to make the training available on demand from our website.

Vice Chair Lilly commented that the Mayor and City Council would need one-on-one specialized training. The EDLC agreed and further stated that managers and supervisors should also review the all-employee training so that everyone would know what the line employees had been trained on.

5. Charter Amendment Question No. 2 – None
6. Audit – None
7. Legislation – Bills Report

The EDLC informed the Commission that she was planning to report on Bill House Bill (HB) 71, relating to ethics, which would prohibit a sitting governor or mayor from maintaining outside employment or receiving emoluments, but it was deferred on February 9, 2017, by the House Committee on Consumer Protection & Commerce. Since HB 71 didn't make it pass the first committee, HB 71 was dead. The EDLC stated that there are other bills that are part of the State Ethics Commission package that need to be monitored. Any changes to the state ethics laws may be of interest for city ethics law revisions depending on how successful they are and the kinds of amendments being made to the language.

Vice Chair Lilly stated that it would be worthwhile for the Commission to deliberate the circumstances under which the Commission might testify on legislation. Commissioner Adler asked if there were any specific circumstances, and Vice Chair Lilly responded that it would be on any ethics bill in the state or the city that might affect ethics laws that the Commission oversees.

The EDLC responded that the issue of whether to testify on state legislation arose in part due to the media's focus on HB 71. The language indicated that it might extend jurisdiction of the State Ethics Commission over the mayor, who would typically be under the county ethics commission jurisdiction.

The EDLC reiterated that HB 71 was dead. None of the other counties' ethics commissions testified. Should HB 71 be resurrected, a member should be authorized to speak on behalf of the Commission, and Vice Chair Lilly agreed.

8. Performance Appraisals

a. Six-Months – EDLC, ALC, Investigator

b. Annual – Legal Clerks

The EDLC informed the Commission that she was looking for some guidance on how the Commission wanted to conduct its 6-month evaluations of the EDLC, ALC, and Investigator, and annual performance evaluations of the two legal clerks.

Vice Chair Lilly responded that in the past there were no 6-month staff evaluations, only annual evaluations. He stated that a 6-month review of the EDLC was unnecessary; with respect to the EDLC's staff, the frequency and content of the evaluations would be the EDLC's decision.

C. Rule-Making – None

Vice Chair Lilly asked if there were any comments, discussion, or observations, and Commissioner Adler asked about the intern from U.H. The EDLC responded that there were two interns, Jack MacDonald, who was working with the rule-making process, which was still being drafted. The other was the Po'okela intern, Joseph Pagkalinawan, who would be working with the Ethics Commission until June or July. He was currently assisting with the financial disclosures and lobbyist registrations and annual report forms.

Vice Chair Lilly asked that the record reflect Mrs. Kioni Dudley joined the meeting. Vice Chair Lilly then asked if there was any testimony from the public on any of the agenda items. He acknowledged Dr. Dudley to testify and also mentioned that Dr. Dudley's written testimony had been received. Vice Chair Lilly also reminded everyone to limit their testimony to five minutes.

D. For Discussion and Adoption: DRAFT Advisory Opinion 2017-01, Do "Independent Expenditures" Made by Super PACs for the Benefit of a City Officer Create a Conflict of Interest Under Revised Charter of Honolulu (RCH) Section 11-102.1(a)?

E. For Discussion: Are the Conclusions in Advisory Opinion No. 76 (December 21, 1977) Still Correct Under Current Laws?

F. For Discussion and Adoption: DRAFT Advisory Opinion 2017-02, Does the Honolulu Ethics Commission Have Jurisdiction to Decide:

1. Whether a Councilmember's Receipt of 40 Percent or More of Campaign Contributions by a Special Interest Group Creates a Conflict of Interest When the Councilmember Has to Make Official Decisions Affecting the Special Interest Group; and
2. If Question 1 is Answered in the Positive, Were the City Council's Five Votes Approving the Ho'opili Project (Bill 3, 2015) Invalid?

Testimony of Dr. Kioni Dudley

Dr. Dudley stated that he was not allowed to see draft advisory opinions that addressed Agenda Items D. and F. and commented that he was unaware of the contents.

Dr. Dudley stated that independent expenditures made by super PACs for the benefit of city officers creates a conflict of interest under the Revised Charter of Honolulu, Section 11-102.1(c). Dr. Dudley reiterated that Councilmember ("CM") Brandon Elefante raised \$13,000 from people who were not connected with Ho'opili or the rail, but ultimately raised over \$130,000 with super PAC support. Dr. Dudley stated that this was a prohibited financial interest under 102.1(c).

Dr. Dudley further stated that CM Carol Fukunaga received \$86,000, but was able to raise a lot of money herself and also stated that Kimberley Pine received more than \$90,000 from super PACs, which is a lot of money and that there has to be some kind of accountability for this super PAC money, or at the very least should be disclosed.

Vice Chair Lilly asked Dr. Dudley to proceed with further testimony.

G. For Discussion and Action: Request for Reconsideration of Material Submitted in support of Agenda Items II.D., E., and F., at the December 21, 2016 Ethics Commission Meeting and for Further Analysis Under RCH Sections 11-102.1(c), 11-103, and 11-104.

Continuing Testimony of Dr. Kioni Dudley:

Dr. Dudley informed the Commission that his foregoing testimony was to request reconsideration of materials submitted in support of Agenda Items D. E. and F., at the Ethics Commission meeting on December 21, 2016, and for further analysis of his materials under RCH Sections 11-102, etc.

Dr. Dudley referenced a letter that he submitted to the Commission last week that asked the Commission to rule that the city councilmembers were guilty of an unspoken but completely understood quid pro quo with members of the development community who put them

in office by providing 40 percent (40%) to 90 percent (90%) of campaign support, with the expectation of profiting directly from approval of Ho‘opili and other construction projects. The average person would conclude that this unspoken agreement was evidenced by the councilmembers unwillingness to hold or organize public presentations, engage in public discussion of the major problems with the project, and allowance of D.R. Horton’s sale of property for use that is strictly forbidden under AG 1 zoning months before the councilmembers vote would change the zoning.

Dr. Dudley further stated that the average person would agree that when the councilmembers cast “yes” votes for Bill 3 in 2012, approving the Ho‘opili development, all councilmembers violated RCH 11-104 by using their positions to self-deal by ensuring future funding for future elections, and to give special treatment to their developer contributors, who would profit from the Ho‘opili construction to the detriment of the community including the loss of sustainable farmland, worsening traffic conditions, and a decreased quality of life.

Dr. Dudley concluded that he filed his papers on August 19, 2015, and had been waiting a long time for the Commission to reach a decision. He requested that the decision be expedited because the work on Ho‘opili had already started, and needs to be stopped.

Vice Chair Lilly asked if there were any questions for Dr. Dudley. As there were none, Vice Chair Lilly stated that the Commission would be going into deliberations with counsel in executive session, and informed Dr. Dudley that he may want to wait until after the executive session discussion to hear the outcome of his agenda items.

Vice Chair Lilly reminded Dr. Dudley about the section in 11-102 that exempts campaign contributions as a conflict. Dr. Dudley responded that he was now focusing on 11-102.1(c) which does not contain the exception. Vice Chair Lilly confirmed and also stated that the Commission would be looking at the application of section 11-103 and 11-104 to campaign contributions and super PAC expenditures as well.

Testimony of Ann Sack Shaver – League of Women Voters

Ann Sack Shaver introduced herself as President of League of Women Voters (“League”). Ms. Shaver informed the Commission that the League’s concerns had long been on record regarding both the rail and the best use of Ho‘opili. The League is now hearing allegations that perhaps councilmembers’ judgments may have been influenced by campaign contributions. The League’s interest is about honest transparent government which is vital for the public to be reassured that their representative’s decisions have been made in the best interest of all who live in the state and not what’s best for a small powerful group.

Ms. Shaver further stated that the League is also concerned that the Ethics Commission had deferred consideration of Dr. Dudley’s complaints.

Commissioner Adler asked Ms. Shaver how she came to the conclusion that the EC had jurisdiction over campaign contributions; he was concerned whether or not the Commission

could address super PAC expenditures as the Commission is unable to make a ruling on campaign contributions.

Vice Chair Lilly responded that they could only address campaign finances to the extent that it is impacted by the ethics laws.

Commissioner Adler asked if the EC had the jurisdiction to make a decision on the request by Dr. Dudley and the League, and Vice Chair Lilly responded that it would be discussed with counsel in executive session.

Testimony of Pamela Boyar

Ms. Boyar stated that she moved to Hawai‘i ten years ago and that she has been working with farmers for 40 years. She is also a farmers’ advocate, runs five farmers’ markets, and is also very involved with the Hawai‘i Farmer’s Union United. She further stated that the land in Ho‘opili is the most important agricultural land on Oahu, which produces about 32 percent (32%) of local produce (onions, zucchini, large tomatoes, any kind of squash, cabbage). Ms. Boyar also stated that 90 percent (90%) of our food is imported and that the only way Oahu can be sustainable is if they work with the young farmers and preserve agricultural land. She felt compelled to share the information, since Ho‘opili is so important because of what it can grow.

Testimony of Timothy J. Garry

Mr. Garry stated that it is obvious to any normal person and that if the councilmembers received 70 percent (70%) of their contributions through a super PAC of course they would do whatever the contributor wants them to do. Even if there is no super PAC collusion with the candidates, the outcome would still be the same since money would be expended on advertising to get the vote.

Mr. Garry also stated that he can’t remember the last time anybody was prosecuted on public corruption charges. Historically, developers bribed city councilmembers all the time during development of Waikīkī. He finds it incredulous to believe that everybody is a saint, but also contends that bribery probably happens everywhere.

Vice Chair Lilly asked if there were any questions, and since there were none, requested a motion to go into executive session. It was moved by Commissioner Silva, seconded by Commissioner Yuen, and unanimously carried to go into executive session.

RETURNED TO OPEN SESSION AT 1:49 P.M.

Vice Chair Lilly stated that with regard to agenda item II.D., the Commission unanimously adopted AO 2017-1, and that the answer to the question is “no.” Vice Chair Lilly stated that the Commission would still be reviewing the implications of Sections 11-103 and 11-104, with respect to super PAC contributions and whether those sections implicate super PAC contributions.

With regard to agenda item II.E., Vice Chair Lilly stated that it had already been decided at last month's meeting.

With regard to agenda item II.F., Vice Chair Lilly stated that the Commission voted unanimously to adopt AO 2017-2 and that with respect to agenda item II.F.1., it was not the Commission's jurisdiction to set a threshold, and the question was already answered by AO 2017-1 with respect to Section 11-102.1(a). With respect to agenda item II.F.2., it was also not the Commission's jurisdiction to determine whether or not a councilmember's vote is invalid for failure to disclose a conflict of interest. Although there's a state Supreme Court case opining on the issue, the Commission only has jurisdiction to determine the implication of ethics laws on the vote.

With respect to agenda item II.G., Vice Chair Lilly stated that it had been deferred and will be considered in future meetings.

III. Executive Session

- A. For Discussion: Kealoha v. Totto, Civil No. 16-1-1166 GWBC in the Circuit Court of the First Circuit, State of Hawaii

Vice Chair Lilly reported that the Commission conferred with its attorneys.

- B. For Discussion: Independent Ethics Investigator Retained Due to Conflict of Interest

This matter has been deferred.

- C. For Discussion and Action: Request for Reconsideration of Investigation of Ethics Complaint

The Commission voted unanimously not to reconsider staff's investigation and conclusion.

IV. For Discussion: Strategic Planning – None

V. ADJOURNMENT

Vice Chair Lilly requested a motion to adjourn the meeting. It was moved by Commissioner Silva, seconded by Commissioner Yuen, and unanimously carried to approve the motion to adjourn the meeting.

The meeting concluded at 1:53 p.m.