ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU
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Advisory Opinion No. 2010-5

I. Summary

A city officer had a financial interest in property, the value of which could be affected by the granting of a permit. The conflict of interest created between the private financial interest and the officer's duty to fairly and impartially discharge his/her city duties prohibited the officer from appearing before the city permitting agency to oppose the request for a permit.

II. Facts

The Honolulu Ethics Commission ("Commission") received a complaint [on date] alleging that a city officer ("Officer") used his/her city position to oppose a party seeking a permit from the city permitting agency (Agency"). Officer had drafted and signed a letter in opposition to the permit dated [], which was also signed by four other government officers. Officer also attended the [date] Agency hearing on the permit request and stated his/her objections to granting the permit as part of his/her official government role.

Officer has a very substantial ownership interest in a business that

owns and operates property in close proximity to the enterprise seeking the permit. The Agency presumes that property owners within a certain distance of an address for which a permit is sought have an interest in whether the permit is granted and, therefore, notifies those owners of the hearing on the permit application.

Officer appeared before the Commission and apologized for the misconduct, stating that it was not intentional but a result of a mistaken understanding of the conflict of interest laws. Officer stated that, once he/she learned from Commission staff that his/her involvement in this case was improper, he/she avoided participating in a similar matter before the Agency.

III. Question presented

May a city officer appear before a city agency in his/her official capacity and oppose the granting of a permit when the city officer owns property that may be affected by the agency's decision?

IV. Analysis

Section 11-102.1(c), Revised Charter of Honolulu, states the law regarding business or financial conflicts of interest:

> **No elected or appointed officer or employee shall**:
>
> (c) Engage in any business transaction or activity or have a financial interest, direct or indirect, which is incompatible with the proper discharge of such person's official duties or which may tend to impair the independence of judgment in the performance of such person's official duties.

At its core, RCH § 11-102.1(c) prohibits city officers and employees from placing themselves in situations where their personal business or financial interests conflict, or may conflict, with their official responsibilities. *See* Advisory Opinion No. 2001-2.

In analyzing whether a particular situation presents a prohibited conflict under RCH § 11-102.1(c), proof that one's judgment in discharging his/her official duties is actually impaired is not required. The reasonable appearance of impairment through conflicting loyalties is sufficient to establish a violation. *See, e.g.,* Advisory Opinion No. 2001-6 (likelihood of real conflict of interest arising is sufficient to establish violation of RCH § 11-102(c)); Advisory Opinion No. 158 (possibility of real conflict of interest arising is sufficient to establish violation of RCH § 11-102(c)).

In other words, the Commission applies an objective approach under RCH § 11-102.1(c). That is, it determines whether under the totality of the circumstances a reasonable member of the public would perceive that the business or financial interest of the officer or employee is "incompatible with the proper discharge of such person's official duties or . . . may tend to impair the independence of judgment in the performance of [his/her] official duties." RCH § 11-102.1(c). As the Commission has stated:

> One purpose of the ethics laws is to prevent conflicts of interest because city officers and employees should not serve two masters. Therefore, the Commission has regularly required city officers and employees to forego activities that are likely to place them in a position where conflicts will arise. <u>These limitations are imposed without a finding that the officers or employees would allow themselves to be swayed by the personal or financial interest because such an analysis is inherently subjective and unreliable.</u> Instead, the objective

> standard used is whether a reasonable person, given all the facts, would conclude that the officer's independent judgment may tend to be impaired.

Advisory Opinion No. 2001-2 (citations omitted; emphasis added).

Looking at the facts of this case, on the one hand, Officer has the duty to carry out his/her city work duties in a fair and impartial way. On the other hand, he/she has a very significant financial interest in a business that may be affected by the granting of the permit. The business includes the ownership and rental of the apartments. Those apartments are within a distance of the property subject to the permit, so that the Agency notifies residents and businesses whose business interests or living conditions may be changed by the approval of the permit. In this way the Agency ensures that neighborhood businesses and residents may weigh in on noise, parking, crime and other issues that may impact the neighborhood as a consequence of the permit. These potential impacts from a permit could lower the value of Officer's property and business. Officer's financial interest in the property creates a conflict with his/her carrying out her ethical responsibility to carry out his/her city work duties in an impartial way. As a result, Officer should have not participated in the permit matter in his/her official capacity.

V. Conclusion and recommendation

The Commission does not find that Officer was primarily or even partially motivated to oppose the permit because of his/her financial interest in his/her nearby property. However, under the circumstances in this case, a reasonable person could question Officer's impartiality in performing his/her city duty because of his/her financial interest in the property. The Commission notes that, once Officer learned from Commission staff that Officer's involvement in this permit issue was improper, he/she did not participate in another similar matter before the

Agency. Therefore, the Commission does not believe that any discipline is warranted.

Dated: November 22, 2010

By: /S/_____
SUSAN HEITZMAN, Chairperson
Honolulu Ethics Commission