

ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

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Advisory Opinion No. 2011-5

I. INTRODUCTION

On [date], [city employee] (“Employee”), [city position] (“Position”), [city department section] (“Section”), [city division] (“Division”), [city department] (“Department”), submitted a Disclosure of Outside Interest Form (“CC-8 Form”). Employee disclosed that he/she has a non-city business called [“XYZ”]. His/Her business activities include real estate sales and leasing real property. Employee is the principal broker, president, and director of XYZ. He/She will reactivate her real estate broker’s license which has been inactive since [date] (inception of city employment) pending approval from the Ethics Commission that his/her outside business activity does not conflict with his/her official city duties.

II. ISSUE

Does Employee’s outside interest as the principal broker of his/her own real estate agency cause a conflict of interest with his/her city duties in violation of RCH Sec. 11-102.1(c)?

III. FACTS

[Description of Employee’s duties.]

The Section does not hold information regarding Section transactions confidential. All information that the Section has access to is generally considered public records that are subject to disclosure under HRS Chapter 92 F. [Description of Section responsibilities.] The Section has no access to information that would impact real estate activity such as tax rates, tax collection, zoning, variances, permitting, land use, and building codes.

[Description of Section responsibilities.] There are at least two other employees in Employee’s Section that could take an assignment should a conflict of interest arise with Employee’s situation.

IV. ANALYSIS

Until recently, the Ethics Commission required anyone who had authority to take official action to

enforce the laws or anyone who had access in the course of city employment to confidential information regarding real estate on Oahu to deactivate their real estate license and not manage the operations of a real estate firm. See Memo to All City Agencies from S. Domingo, Chair Ethics Commission, et al. Re: Guidelines on Real Estate Licenses (Oct. 23, 1995) (“Guidelines”).

In this case, Employee and his/her supervisors stated that in the course of their city employment, the Section does not have access to confidential information regarding real estate on Oahu. Therefore, neither Employee nor his/her fellow Section employees should fall under the Guideline’s historical blanket prohibition against holding active real estate licenses.

Where an employee’s or officer’s duties do not fall under the Guideline’s blanket prohibitions, the Ethics Commission analyzed situations on a case-by-case basis. In Advisory Opinion No. 215, the Ethics Commission found no conflict of interest for an engineer in the public works department to hold an active real estate license because the engineer’s direct supervisor believed the frequency of situations in which a conflict of interest may arise would be seldom, if at all such as: having access to information that may impact real estate activity, be involved with plan reviews submitted by developers, or access to confidential information which may be used for real estate development. Further, within the section, there were other similar positions which would allow for the possibility of work redistribution should a conflict of interest arise.

In Advisory Opinion No. 251, the Ethics Commission permitted a liquor commissioner to hold an active real estate license so long as he agreed that he would recuse himself if a former client appeared before the Liquor Commission, and he would not accept any person who is a liquor licensee or who holds a financial interest in a licensed establishment as a client as long as he serves as a Liquor Commissioner.

In Advisory Opinion No. 2005-1, the Ethics Commission permitted review of whether there was a conflict of interest in the case of a law enforcement employee (Liquor Commission Investigator) on a case-by-case basis overruling the Guideline’s blanket prohibition against city personnel who have authority to take official action to enforce the laws from holding active real estate licenses. The Ethics Commission allowed the employee to hold an active license provided that he submit to his appointing authority a signed statement attesting that he has “read, understood and will abide by the mandates of RCH §§ 11-102, 11-103, and 11-104.” The Ethics Commission reasoned:

We do not depart from our precedent lightly. However, it is our belief that our previous advisory opinions overemphasized the risk of conflicts of interest developing, as well as the public’s perception that they occur with frequency. We believe that it is likely that most city law enforcement personnel who hold (or would hold) active real estate licenses will not encounter actual or potential conflicts of interest. The complete ban against all city law enforcement personnel holding active real estate licenses therefore is unfair and deprives these city employees from legitimately supplementing their city incomes.

Advisory Opinion No. 2005-1. The Ethics Commission follows its’ reasoning in Advisory Opinion No. 2005-1 and similarly finds that it is unlikely that Employee will encounter actual or potential conflicts of interests.

In analyzing whether a particular situation presents a prohibited conflict under RCH § 11-102.1(c)¹, the Commission 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).

The Commission considers several factors in determining whether a conflict of interest exists and the dimensions of the conflict. Application of the factors to the present case include: (1) the relative size and importance of the financial interest to Employee; (2) the link, if any, between Employee's Position duties and the impact on the financial interest of his/her business; and (3) the extent of Employee's discretion in carrying out his/her Position responsibilities. See Advisory Opinion No. 2001-2.

In this case, the relative size and importance of Employee's financial interest in his/her business is unknown. However, as the president and owner of his/her business he/she has, at the very least, a fiduciary duty to the corporation to discharge his/her duties in good faith, with the care that an ordinarily prudent person would exercise in similar circumstances, and in a manner reasonably believed to be in the best interest of the corporation such as maximizing profitability.

[Discussion of Employee's duties.] All in all, there does not appear to be a link between Employee's city duties and impact on his/her real estate business.

Employee has limited discretion in his/her city duties. [Discussion of Employee's duties.] Based on the totality of the circumstances, it is unlikely that a reasonable person would question Employee's impartiality in carrying out his/her city duties because of his/her outside business interest. Out of an abundance of caution, the Ethics Commission requires Employee to sign a Statement of Compliance similar to the statement appended to Advisory Opinion No. 2005-1 to avoid even the reasonable appearance of impairment through conflicting loyalties.

V. CONCLUSION

The Ethics Commission finds that Employee's real estate business does not cause a conflict of interest with his/her city duties in violation of the city's ethics laws so long as he/she does the following:

- A. He/She shall recuse himself/herself from participating in any Section transactions in which any of the affected property owners are clients of his/her outside business;
- B. He/She shall not accept as a client any person who has a pending Section transaction; and
- C. He/She shall submit to his/her appointing authority a signed statement attesting that he/she has "read, understood and will abide by the mandates of RCH §§ 11-102, 11-103, and 11-104" in a form substantially similar to the statement of compliance appended to Advisory Opinion No. 2005-1.

¹ RCH § 11-102.1(c) provides: No elected or appointed officer or employee shall 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.

Dated: September 12, 2011

By: /S/
CHARLES W. GALL, Chairperson
Honolulu Ethics Commission