

ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

715 SOUTH KING STREET, SUITE 211, HONOLULU, HAWAII 96813-3091
Phone: (808) 527-5573 \$ Fax: (808) 527-6936 \$ EMAIL: ethics@honolulu.gov
Internet: www.honolulu.gov/ethics

JEREMY HARRIS
MAYOR



CHARLES W. TOTTO
EXECUTIVE DIRECTOR & LEGAL COUNSEL

Advisory Opinion No. 2004-3*

I. Summary

Unless exempted by law, a city officer may not appear on behalf of private interests before a city permitting agency.

II. Facts

On December 12, 2003, the Ethics Commission (Commission) received a third-party request for advice asking whether Councilmember Rod Tam violated the city ethics laws by acting as a "permit expeditor" for private interests before the city's Department of Planning and Permitting (DPP). A permit expeditor is someone who applies for building permits on behalf of a person or business and who acts as a liaison and coordinator between the owner, contractors and architect on the one hand and DPP plan review and construction inspection personnel on the other.

Councilmember Tam acted as a plan expeditor for two clients regarding five permit applications submitted to DPP during 2003. One client was the Mainland company contracted to build the American Eagle Outfitters space at 1450 Ala Moana Boulevard and the American Eagle Outfitters space at Pearlridge Mall. This work required three permits, which Councilmember Tam handled for a fee of approximately \$3,100 according to the contractor. These permits required an architectural plan review and various construction inspections by DPP personnel. The second client was a local property owner who needed repair permits for two houses in Kaimuki with termite damage. According to the owner, as part of selling termite treatment service for the properties, Councilmember Tam agreed to act as the permit expeditor for the repair permits. There is no evidence of a separate charge for expediting the repair permits.

The third-party request also noted the use of Councilmember Tam's title when he was a state senator. In reviewing records through DPP's permit tracking system, Councilmember Tam is sometimes referred to as "Senator Tam," although his contact number is that of his privately owned cellular telephone. In addition, his address is listed in DPP records as being Honolulu Hale. Councilmember Tam states that he has never used his position as a senator or a councilmember to obtain special treatment for himself or his clients. He believes that the use of his state or city title and address is a result of DPP staff knowing who he was and placing that information in the DPP computer system. He claims he did not use his title in any permit application. In discussing the use of his title and address with various personnel at DPP, no one is sure how this information was

supplied to the computer system, but they admit it could have been entered by DPP personnel without Councilmember Tam's knowledge.

In discussing the interactions between the DPP staff and Councilmember Tam, the plan reviewers reported no attempts to influence the staff because of his position or to obtain special treatment for his clients. However, the staff members were aware that he was a councilmember.

Councilmember Tam did not request advice from the Commission as to whether his conduct would be an ethics violation. However, he has been timely and open in his responses to the Commission's investigation and witnesses have corroborated his responses.

Although Councilmember Tam was notified of his right to ask for a hearing and present evidence in this matter, he did not make such a request. When the subject of the investigation declines to request a hearing, the Commission may decide the matter on the information available to it. ROH Sec. 3-6.7(c).¹

III. Issue

The question presented is whether Councilmember Tam has violated the city standards of conduct, specifically RCH Secs. 11-104 or 11-102(e) and ROH Sec. 3-8.2(c), by acting as a permit expediter.

IV. Discussion

A. Fair and equal treatment policy

The fair and equal treatment policy stated in RCH Sec. 11-104 prohibits an officer or employee from using his or her official position to obtain special treatment to anyone.² Although the DPP staff who worked with Councilmember Tam were aware of his governmental position, there is no evidence showing that he attempted to secure special treatment for his permit clients.

B. Ban against appearing on behalf of private interests before city agencies

Turning to RCH Sec. 11-102(e), this law prohibits an officer or employee from "... [appearing] in behalf of private interests before any agency . . ."³ See also, ROH Sec. 3-8.2(c).⁴

¹ **Sec. 3-6.7 Requests by third parties.**

(c) Where no hearing is requested by the officer or employee involved, the commission shall render its opinion on the basis of the information available; provided, that the commission may request for additional information when deemed necessary.

² **Section 11-104. Fair and Equal Treatment --**

Elected or appointed officers or employees shall not use their official positions to secure or grant special consideration, treatment, advantage, privilege or exemption to themselves or any person beyond that which is available to every other person.

³ **Section 11-102. Conflicts of Interest --**

No elected or appointed officer or employee shall:

Traditionally, this law has been applied to ban city officers and employees from requesting discretionary permits or otherwise appearing before city agencies on behalf of others because of the potential that special treatment may be sought by or afforded to someone who works within the government. For example, in prior decisions, the Commission found that it was a violation of the law for a board or commission member to place his or her professional architecture or engineering stamp on plans to be filed with a city agency. See, Advisory Opinion Nos. 15, 189, 201, and 299. In Advisory Opinion No. 277, the Commission ruled that a lobbyist before city agencies should not be permitted to sit on the Neighborhood Commission because, as a city officer, the lobbyist would not be permitted to represent private interests before city agencies. Similarly, a landscape architect for the city was prohibited from appearing before city agencies to apply for permits for his private clients. Advisory Opinion No. 152.

There appears to be no controversy regarding the basic facts regarding Councilmember Tam's work as a permit expeditor. As a result, the Commission may reasonably conclude that Councilmember Tam violated RCH Sec. 11-102(e) and ROH Sec. 3-8.2(c).

However, Councilmember Tam makes two arguments in defense of his actions. First, he does “. . . not believe the intent [of the ethics law] was to prevent an elected official from utilizing the services provided by the city when he represented himself as a private individual.” January 27, 2004 letter from Tam, pp.1-2. He is correct that the Commission has interpreted RCH Sec. 11-102(e) and ROH Sec. 3-8.2(c) to allow city personnel to apply for permits for their *personal* use.⁵ However, the flaw in Councilmember Tam's argument is that he was not seeking a building permit for his own property but was representing a contractor and a homeowner before DPP.

Second, Councilmember Tam notes that councilmembers are part-time employees of the city and, therefore, are expected to have outside employment to supplement their city income. He states that he interpreted the ethics laws to mean “. . . that so long as I did not utilize my position as a City councilman to gain undue privilege or an unfair advantage over members of the general public that [sic] such employment opportunities would be allowed.” His interpretation is generally correct regarding the fair and equal treatment policy, RCH Sec. 11-104. Yet he appears not to have considered the prohibition against representing private parties before city agencies stated in RCH Sec. 11-102(e) and ROH Sec. 3-8.2(c). In Advisory Opinion No. 152, the Commission noted that there were no applicable exceptions to ROH Sec. 11-102(e) and concluded that “. . . the absolute prohibition against appearing in behalf of private interests before City agencies applies.”

(e) Represent private interests in any action or proceeding against the interests of the city or appear in behalf of private interests before any agency, except as otherwise provided by law.

⁴ The prohibition was recently amended to allow board and commission members to appear before city agencies, except for the one on which they serve. See, ROH Sec. 3-8.2(c). However, this exception does not apply to councilmembers.

⁵ The Commission has interpreted this law to permit an officer or employee to seek permits for their own personal use. See, e.g., Advisory Opinion No. 298 (city employees may seek liquid waste hauler permit that is issued by city department because they represented their own businesses and, therefore, were not representing another private interest before the agency).

V. Recommendation

Regarding the allegations that Councilmember Tam used his city position to obtain special treatment at DPP for his clients in violation of RCH 11-104, the Commission finds that there is insufficient evidence to show a violation.

There is no dispute that Councilmember Tam appeared on behalf of the contractor and homeowner for the review of five building permits and the subsequent review and inspection by DPP personnel. As a result, Councilmember Tam violated RCH Sec. 11-102(e) and ROH Sec. 3-8.2(c). The Commission strongly urges Councilmember Tam not to repeat the violation by continuing to represent clients before city agencies.

Dated: March 3, 2004

/S/
ROBIN DAVID LIU, Chairperson
Ethics Commission

* The entire confidential version of this opinion was made public by a third party. As a result, the Ethics Commission is publishing the confidential opinion.