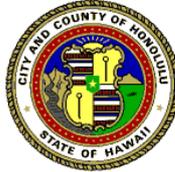


ETHICS COMMISSION
CITY AND COUNTY OF HONOLULU

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Advisory Opinion No. 2011-2

I. SUMMARY

This Advisory Opinion is in response to a request for a formal advisory opinion from the [] Department (“[Department A]”) on behalf of the [] Agency (“[Agency]”) as to whether [], a member of the Agency, (“Member”) has a conflict of interest that would preclude the Member from participating in a matter. We conclude that the Member does not because he/she has no present or likely future financial interest that may tend to impair his independent judgment.

II. FACTUAL BACKGROUND

[] (“Owner”) owns several properties in the [] area including the properties known as the [] located at [] (“[Property A]”) and the [] located at [] (“[Property B]”) since [year]. Properties A and B are collectively referred to herein as the “Properties.”

The Member is the president, secretary, treasurer, director and 100% owner of [] firm (“Firm”). From 2003 through 2006, the Firm conducted work for four projects: three on Property B and one on Property A which amounted to \$[amount] or approximately 0.3% of the Firm’s revenue from 2003-2006. In 2008, the Firm provided consulting services on Property B which amounted to \$[amount] or 0.05% of the Firm’s revenue that year.

Since 1998, the Member’s [sibling] (“[Sibling]”) has [conducted business] in the lobby of Property B twice a week in the mornings. The Sibling pays a nominal fee of \$[amount] per day to conduct business at Property B. The Sibling earns \$[amount] per day from conducting business at Property B. The Sibling conducts his/her business across Oahu, Tokyo, Japan and online. The Member has no financial interest in his/her Sibling’s [] business, and the Member and the Sibling do not share the same household.

On [date], the Owner submitted an application [] (“Application”) to allow a [] (“Project”) to the [] Department (“[Department B]”). On [date], Department B Director, granted a partial approval of the Application (“Order”). On [date], the approval was appealed to the Agency (“[Action]”). On [date], [Department A], on behalf of the Agency, requested that the Ethics Commission (“Commission”) issue a formal advisory opinion on whether the Member has a conflict of interest such that he/she should recuse himself/herself from participating in all aspects of the Action.

III. ISSUE AND SHORT ANSWER

Does the Member have an interest based on his/her Firm's prior work on the Properties and/or his/her Sibling's business at Property B such that a reasonable member of the public would believe that the Member's impartiality would be impaired by participating in the Action?

No, because the Member has no current or reasonably foreseeable financial interests in the Project, the Owner, the Properties, or in his/her Sibling's business. The relative size and importance of the financial interest to the Member's Firm based on prior work performed on the Properties is negligible in respect to the Firm's annual income. There is no link between the Member's duties with the Agency and the impact on the Member's financial interest such that a reasonable person would question the Member's impartiality in participating in the Action.

IV. DISCUSSION

In analyzing whether a particular situation presents a prohibited conflict under RCH § 11-102.1(c)¹¹, the reasonable appearance of impairment through conflicting loyalties is sufficient to establish a violation. See, e.g., Ethics Commission 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)).

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 the Member; and (2) the link, if any, between the Member's duties on the Agency and the impact on the financial interest on the Member. See Ethics Commission Advisory Opinion No. 2001-2.

The Firm's receipt of income from prior work performed on the Properties is nominal. The income received for the work on the Properties accounted for approximately 0.2% of the Firm's entire income during the relevant years. The Firm has no current contracts with the Owner and the last time any substantial work was performed for the Properties was over six years ago. In regard to the Member's Sibling, Property B is just one of many locations that the Sibling conducts business which decreases the importance and size of the financial interest to the Sibling, and by familial association, the Member. Based on the totality of the circumstances, a reasonable member of the public would not perceive that the Member's financial interest in his/her Firm or his/her Sibling's business would impair the independence of judgment on the Member's participation in the Action. Any financial interests the Member may have in the

outcome of the Action are too remote to be of consequence.

The Firm has not been retained for any work on the Project, and the Member does not foresee the Firm performing any future work on the Project. While there is no guarantee that the Firm would never perform any future work on the Project or on the Properties, the Commission has held that basing a conflict of interest simply on future plans was too speculative. See Ethics Commission Advisory Opinion No. 2009-2 at 5 (“We would be entering the proverbial slippery slope were we to find a present conflict of interest based on an assumption or speculation about the commissioners’ future plans.”) Furthermore, courts faced with analyzing conflicts of interest cases recognize balancing the need for public integrity with practicality:

Local governments would, however, be seriously handicapped if any conceivable interest, no matter how remote and speculative, would require the disqualification of a[n] [] official. If this were so, it would not only discourage but might even prevent capable men and women from serving as members of the various [] authorities. Of course, courts should scrutinize the circumstances with great care and should condemn anything which indicates the likelihood of corruption or favoritism. They must, however, also be mindful that to abrogate a municipal action on the basis that some remote and nebulous interest may be present would be to deprive unjustifiably a municipality, in many important instances, of the services of its duly-elected or appointed officials.

Anderson v. [] Commission of City of Norwalk, 253 A.2d 16, 19 (Conn. 1968) (internal citations omitted). Keeping these principles in mind, it is important to note that the city’s ethics laws do provide a safeguard against even the appearance of impropriety based on future plans. Ethics laws prohibit city officers from appearing before any city agency in relation to any case, proceeding, or application with respect to which such person was directly concerned or which was under the person’s active consideration while in city service. ROH § 3-8.3(b). As applied to this case, even if the Member participates in the Action, the Member and his/her Firm would be prohibited from appearing before any city agency in relation to the Project for one year after the Member leaves city service. Id.

Based on the totality of the circumstances, a reasonable person would not conclude that the Member’s independent judgment regarding the performance of his/her duties on the Agency related to the Action would be impaired by the Firm’s former services provided to the Owner on the Properties and/or on the Sibling’s business conducted on Property B.

V. CONCLUSION

The Member does not have a conflict of interest under the city’s ethics laws that would require the Member to recuse himself/herself from participating in the Action.

Dated: July 15, 2011

