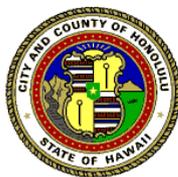


ETHICS COMMISSION  
**CITY AND COUNTY OF HONOLULU**

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PETER B. CARLISLE  
MAYOR



CHARLES W. TOTTO  
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**Advisory Opinion No. 2011-3**

**I. SUMMARY**

The Honolulu Ethics Commission (Ethics Commission) imposed a civil fine in the amount of \$650 on Andrew Jamila, Jr., a member of the City and County of Honolulu Planning Commission ("Planning Commission") for the following actions: failure to disclose conflicts of interest and failure to recuse himself from participating in matters in which he had conflicts of interest when Ethics Commission staff had already advised him to do so; and failure to provide material information on financial disclosure forms for two calendar years as well as on his appointee information form used by the Mayor and City Council for his reappointment to the Planning Commission.

**II. FACTUAL BACKGROUND**

Since 1999, Mr. Jamila has been the president of Waimanalo Construction Coalition ("WCC"), a domestic non-profit corporation that assists residents island-wide with employment opportunities in the construction trade such as providing a commercial driver's license training program.<sup>[1]</sup>

From fiscal years 2007 to the present, Mr. Jamila, on behalf of WCC, applied for grants from the Leeward Coast Community Benefits Program ("LCCBP") in the cumulative amount of \$150,000; and received \$120,000 of the requested amount. Mayor Mufi Hannemann dedicated the LCCBP in 2006 to offset the impact of the Waimanalo Gulch Landfill on adjacent communities.<sup>[2]</sup> The LCCBP provides awards to community-based non-profit organizations that seek to address the needs or concerns of the Makakilo, Kalaeloa, Kapolei, Honokai Hale/Nanakai Gardens, Ko`olina, Nanakuli, Maili, Waianae, Makaha and Keaau areas for public service activities or capital improvement projects.<sup>[3]</sup>

Mr. Jamila was first appointed and confirmed to the Planning Commission on July 6, 2005 for a term expiring on June 30, 2010.<sup>[4]</sup> On January 3, 2008, Mr. Jamila submitted a Disclosure of Conflict of Interest to the Ethics Commission. Mr. Jamila stated that: "The City has offered this benefit package to WCC to assist in offset (sic) the impact of the Waimanalo Landfill for the community. The Waimanalo Construction Coalition (WCC), a nonprofit organization have (sic) been awarded the amount of \$60,000 from the 2007 community Landfill Benefit Grant Package. I'm the President for WCC." Mr. Jamila further stated that, "The following matter is before this agency, board or commission and is related to the above interest: the City has request (sic) the 2 year extension for the Waimanalo Gulch Landfill current operating permit." Mr. Jamila also indicated that he participated in the decision making process on this

matter.

In response to this submission, Ethics Commission staff informed Mr. Jamila that, "The City's offer to benefit the community affected by the Landfill would have a direct impact on you and WCC...a reasonable member of the public could conclude that the (sic) receiving the benefit package could dispose you to act favorably on behalf of the City regarding the Landfill." Ethics Commission staff advised Mr. Jamila that he should have removed himself from the Landfill hearing, deliberations and decision making process; that under Hawaii law, if a commission member votes on a matter where he has a conflict of interest, his vote is void; and should this or any other conflict of interest arise in the future to please, recuse himself. (Emphasis added.) Mr. Jamila acknowledged receipt of this email.

From May through August 2009, Mr. Jamila participated in fourteen matters related to the Department of Environmental Services' Special Use Permit Application 2008/SUP-2 (RY) to expand the Landfill by 92.5 acres ("Application") and the Withdrawal of State Special Use Permit No. 86-SUP-5 (RY). Mr. Jamila voted on a total of seven matters; and signed the Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order in the Matter of the Application. Mr. Jamila participated in all of these matters without disclosing any conflict of interest.

Board and commission members are city officers<sup>[5]</sup> and are required to follow the ethics laws. As a city officer, Mr. Jamila is required to file a Financial Disclosure Form annually until the end of the term of his office pursuant to ROH Sec. 3-8.4(b)(2). In 2009<sup>[6]</sup> and 2010, Mr. Jamila failed to disclose his presidency of WCC as a fiduciary position.<sup>[7]</sup>

On May 25, 2010, Mayor Hannemann, reappointed Mr. Jamila to the Planning Commission subject to confirmation by City Council.<sup>[8]</sup> Mayor Hannemanbn provided the City Council with Mr. Jamila's Appointee Personal Information Form ("Form") that Mr. Jamila completed for City Council's review. Nowhere on this Form did Mr. Jamila indicate a conflict of interest between WCC and his duties on the Planning Commission regarding the Landfill, despite Ethics Commission staff advice that a conflict of interest existed. On June 9, 2010, the City Council confirmed Mr. Jamila's appointment during public hearing.<sup>[9]</sup>

During the Ethics Commission meeting on January 24, 2011, the Commission found that there was probable cause that Mr. Jamila violated the ethics laws for the reasons stated above. Ethics Commission staff issued a Notice of Possible Violation ("NOPV") to Mr. Jamila on February 2, 2011. On March 16, 2011, Mr. Jamila met with staff and admitted that he received staff's email on May 28, 2008, and he should have known to recuse himself from the Landfill matters. Mr. Jamila alleged that he failed to read the entire email thoroughly.

In May 2011, Mr. Jamila requested an opportunity to speak before the Ethics Commission to determine the amount of a civil fine and any other disciplinary actions. After hearing from Ethics Commission staff and Mr. Jamila at the investigatory hearing on June 6, 2011, the Ethics Commission concludes that it will issue an advisory opinion identifying Mr. Jamila; impose a civil fine on Mr. Jamila in the amount of \$650.00; and provide a copy of the advisory opinion to Mr. Jamila's appointing authority for disciplinary action, if any.

### **III. ANALYSIS**

**A. Mr. Jamila violated RCH §§ 11-102.1(c) and 11-103 because he knew or should have known that he had a conflict of interest in matters related to the Landfill, failed to disclose his conflict of interest, and failed to recuse himself from participating in those matters.**

In analyzing whether a particular situation presents a prohibited conflict under RCH § 11-102.1(c)<sup>[10]</sup>, 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. 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. 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).

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 Mr. Jamila; (2) the link, if any, between Mr. Jamila's duties on the Planning Commission and the impact on the financial interest in WCC; and (3) the extent of Mr. Jamila's discretion in carrying out his responsibilities as a member of the Planning Commission. See Advisory Opinion No. 2001-2.

First, Mr. Jamila received grants from LCCBP in the cumulative amount of \$120,000 since 2007, a substantial amount of money. Although Mr. Jamila does not receive a salary or other direct financial benefit as president of WCC, he has a fiduciary duty to WCC to protect and advance its interests. Second, there is a nexus between Mr. Jamila's duties on the Planning Commission regarding

the Landfill and the impact on the financial interest of WCC. The purpose of the LCCBP grant is to offset the impact of the Landfill on adjacent communities. Planning Commission decisions affecting the Landfill may reasonably appear to impact the financial interest of WCC. For example, proliferation of the Landfill appears to be in WCC's best interest as it would tend to perpetuate the negative impacts on the Leeward Coast community and in turn justify the continuation of LCCBP and grant money awards. Finally, Mr. Jamila has complete discretion to perform his duties on the Planning Commission.

Based on the totality of circumstances, a reasonable person could conclude that Mr. Jamila's independent judgment regarding the performance of his duties on the Planning Commission related to Landfill issues would be impaired by WCC's receipt of LCCBP grant awards. The Ethics Commission is not implying that Mr. Jamila's participation was in fact tainted by his non-profit's receipt of money; only that under an objective approach, a reasonable person could question Mr. Jamila's impartiality under the circumstances, and therefore a conflict of interest exists.

"In general, a city employee or officer violates the ethics laws if he or she *knew or should have known* that his or her conduct would constitute a violation." Advisory Opinion No. 2004-7; *See also* Advisory Opinion No. 306 (June 16, 2000) (deputy corporation counsel's use of official corporation counsel stationery for a personal letter supporting a nominee for a state board violated RCH § 11-104 notwithstanding the fact that the deputy claimed he "failed to think about the personal nature of the letter at the time [he] signed it."). "The subjective intent (or lack thereof) to violate the ethics laws goes to the seriousness or degree of the violation and is a factor to be taken into account in determining the appropriate penalty to be imposed; it is not a required element of an ethics violation." Advisory Opinion No. 2004-7.

Based on the Commission's advice to Jamila in May 2008, Mr. Jamila knew or should have known that his involvement in matters related to the Landfill was a conflict of interest. Therefore, Mr. Jamila is in violation of RCH §§ 11-102.1(c) and 11-103 because he failed to disclose his conflict of interest and failed to recuse himself from participating in all Landfill related matters that came before the Planning Commission when he knew or should have known to do so.

**B. Mr. Jamila violated RCH § 11-103 by failing to disclose his conflict of interest on the Appointee Personal Information form ("Form")**

Mr. Jamila failed to disclose that he was the President of WCC and that WCC contracted with the City for the acceptance of LCCBP grant awards in the Form. The following are Mr. Jamila's responses to relevant questions on the Form:

7. Do you or does any member of your immediate family hold office or own stock in any firm? *NO*. Does the firm do business with the City and County of Honolulu? *NO*.
8. Do you have any part-time employment, professional activity, or financial interests other than those indicated in the previous question? *NO*.
9. Do you foresee any possible conflict between your present work, financial investments, business transactions or any other activity which would be incompatible with the proper discharge of your

official duties or hinder you from effectively carrying out the duties for which you have been appointed? *NO*.

It appears that the purpose of the Form is to provide City Council with background so as to make an informed decision on confirming the appointee. Therefore, an appointee should respond to the questions on the Form as thoroughly as possible to provide the City Council with a true and accurate overview of the appointee's background. While the Commission would not expect an appointee to foresee any and all potential conflicts of interest related to duties performed on the Planning Commission, here, Mr. Jamila was informed that he had a conflict of interest in matters related to the Landfill due to WCC's receipt of City money. Therefore, in response to the question numbers 7-9 above, Mr. Jamila should have disclosed that he was the president of WCC; that WCC does business with the city in the form of applying for and receiving LCCBP grant money; and he had been advised that he has a conflict of interest in regard to participating in Landfill matters. Mr. Jamila should have shared this information on the Form since it was apparent at the time he filled out the Form.

**C. Mr. Jamila violated ROH § 3-8.4 by failing to disclose that he was WCC president in the 2009 and 2010 Financial Disclosures.**

In an interview, Mr. Jamila stated that he wasn't sure what the word "fiduciary" meant in the Financial Disclosure form, and apologized for not listing his presidency of WCC as a fiduciary position. Mr. Jamila admitted that it was his mistake. Mr. Jamila knew or should have known that he was required to list his affiliation with WCC on the Financial Disclosure form especially since Mr. Jamila previously listed WCC on the Financial Disclosure Forms for calendar years 2006 and 2007. Further, Mr. Jamila should have contacted the Ethics Commission when he was unclear of what the term "fiduciary" meant so that he could accurately complete the form.

**IV. CONCLUSIONS**

**A. Issue an advisory opinion to guide city officers on the importance and consequences of failing to disclose conflicts of interest and recusal.**

A government record, such as a formal advisory opinion, may not be disclosed if disclosure would constitute "a clearly unwarranted invasion of personal privacy." However, disclosure of a government record does not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interest of the individual. Public interest in disclosure includes official information that sheds light on the conduct of government officials (Mr. Jamila) and on an agency's (the Ethics Commission) performance of its statutory purpose.

In balancing a government employee's privacy interests against the public's interest in disclosure, a court should consider several factors, including: (1) the government employee's rank; (2) the degree of wrongdoing and strength of evidence against the employee; (3) whether there are other ways to obtain the information; (4) whether the information sought sheds light on a government activity; and (5) whether the information sought is related to job function or is of a personal nature. The factors are not all inclusive, and no one factor is dispositive.

See, OIP Op. Ltr. No. 10-03, at 7 citing Perelman v. United States Dept. of Justice, 312 F.3d 100, 107-08 (2d Cir. N.Y. 2002).

Mr. Jamila is a member of the Planning Commission who has significant discretionary power over holding public hearings and making recommendations through the Mayor to the City Council on proposals to adopt or amend the General Plan, Development Plans, and zoning ordinances. The

Planning Commission also holds public hearings and makes recommendations on State Land Use District boundary amendments for parcels of 15 acres or less in other than Conservation Districts, and approves state land use special use permit applications for uses on agricultural land.

Mr. Jamila's violations are numerous (over a dozen) and are exacerbated given the fact that Mr. Jamila failed to follow the Ethics Commission's instructions to him. The evidence is strong as the facts are not contested. There is no other means for the public to find out if Mr. Jamila, as a specific Planning Commissioner, violated RCH Secs. 11-102.1(c) and 11-103. Finally, the identity of Mr. Jamila and the details of the Advisory Opinion would shed more light on what the government is doing and opens the Ethics Commission's action to the light of public scrutiny.

All of the factors above weigh in favor of identifying Mr. Jamila in the advisory opinion. Under the Ethics Commission's Opinion Policy, Mr. Jamila will be given notice 10 days before the opinion is published.

## **B. Impose a civil fine on Mr. Jamila in the amount of \$650.00.**

ROH Sec. 3-8.5(d) allows the Commission to impose a civil fine on city officers based on twelve factors enumerated in ROH Sec. 3-8.5(d)<sup>[11]</sup> including, but not limited to the nature and seriousness of the violation; the duration of the violation; whether the officer had prior notice that his conduct was prohibited; the effort taken to correct the violation; the presence or absence of any intention to deceive; whether the violation was negligent or intentional; whether the officer demonstrated good faith by consulting the ethics commission staff or another government agency or an attorney; and the amount if any of the financial or other loss to the city as a result of the investigation; and whether the officer was truthful and cooperative in the investigation.

As previously discussed, the ethics violations are exacerbated because Mr. Jamila had prior notice from the Ethics Commission staff that the conduct was prohibited. The Ethics Commission balances these aggravating factors with mitigating factors including Mr. Jamila's demonstration of good faith; the negligence of the violations; minimal fiscal impacts on the city, if any; and Mr. Jamila's truthfulness and cooperation during the investigation.

Mr. Jamila demonstrated good faith by consulting the Department of Community Services and the Mayor if there was a conflict of interest. Mr. Jamila asked former Deputy Director of the Department of Community Services Ernie Martin, as well as former Mayor Mufi Hannemann whether he had a conflict of interest that prevented him from serving on the Planning Commission when WCC received LCCBP grant money. He stated that they both told him he did not have any conflict of interest so long as he was not personally receiving money from the LCCBP grant. Mr. Jamila also contacted Winston Wong, deputy Corporation Counsel who advises the Planning Commission. Mr. Wong informed Mr. Jamila to declare the conflict and to contact the Ethics Commission for advice. Mr. Jamila did disclose his conflict at that time on January 3, 2008. In response to receipt of the disclosure, Ethics Commission staff clearly advised Mr. Jamila that he did have a conflict of interest and that he had to recuse himself from participating in all matters related to the Landfill. Unfortunately, Mr. Jamila failed to do so.

During a recent interview, Mr. Jamila told Ethics Commission staff that he did not read the entirety of staff's email where staff instructed him to recuse himself. He had no reason why he allegedly failed to read that part of the email. As such, it appears that Mr. Jamila either ignored the advice or, at the very least, was negligent in reading the advice carefully.

From May through August 2009, Mr. Jamila voted on nine Landfill matters. Fortunately, none of those matters need to be voided as there was an affirmative vote of a majority of the entire Planning Commission even after nullifying<sup>[12]</sup> Mr. Jamila's vote. As such, there are no fiscal impacts caused by

Mr. Jamila's actions. However, there may be an affliction on the community's view of the Planning Commission's impartiality once this advisory opinion is published.

Lastly, it is important to note that Mr. Jamila has been cooperative during the investigation of this case. He admitted that he made a mistake by failing to read staff's email in its entirety and that he should have known to disclose and recuse himself from Landfill matters.

In Advisory Opinion No. 2011-1, the Commission recommended imposing a civil fine on former Council Chair Todd Apo in the amount of \$500 for failure to disclose a conflict of interest of a bill he introduced after the Ethics Commission previously advised him that he had a conflict of interest. Chair Apo reasoned that RCH Sec. 11-103 was unclear about when he was supposed to disclose his conflict of interest and therefore, he did not know when to disclose his conflict of interest. Nonetheless, the Commission found that Chair Apo had enough notice such that he knew or should have known to disclose his conflict of interest as soon as it was apparent based on the Ethics Commission's prior advice to him on the exact same issue.

In this case, Mr. Jamila failed to recuse himself from voting on nine Landfill matters and failed to disclose his conflicts of interest on the following dates: May 1, 6, 20, 2009, June 10, 22, 2009, July 31, 2009, and August 4, 2009. Despite the fact that there were 16 ethics violations for failure to recuse and disclose the conflict of interest, these 16 violations are all related to only one matter before the Planning Commission regarding the Application to expand the Landfill. Further, unlike former Council Chair Apo who received a salary for his official city duties, Mr. Jamila is an unpaid volunteer for the City. Therefore, the Ethics Commission believes that a fine in the amount of \$500 is appropriate.

The Ethics Commission will impose a fine in the amount of \$50 for each failure to include material facts on the Appointee Personal Information Form (May 25, 2010) and Mr. Jamila's Financial Disclosures for calendar years 2008 and 2009. This is based on the penalties provided in ROH Sec. 3-8.4(f)<sup>[13]</sup> which imposes a fine of \$100.00 for a late filing. Here, Mr. Jamila was not late in filing his disclosures. Instead he failed to disclose a material fact in his filing.

In sum, the Ethics Commission shall impose a total civil fine on Mr. Jamila in the amount of **\$650.00**.

**C. Transmit the Advisory Opinion to the Mayor for Review to Determine Appropriate Disciplinary Action**

Finally, the Ethics Commission shall transmit this Advisory Opinion to Mr. Jamila's appointing authority, Mayor Carlisle, for his review and determination of appropriate disciplinary action, if any, of Mr. Jamila.

Dated: July 15, 2011

/S/

By: CHARLES W. GALL, Chairperson  
Honolulu Ethics Commission

APPROVED AS TO FORM  
AND LEGALITY:

/S/  
CHARLES W. TOTTO  
Executive Director and Legal Counsel

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<sup>[1]</sup> <http://hbe.ehawaii.gov/documents/business.html?fileNumber=116630D2&view=info> (Dec. 29, 2010).

<sup>[2]</sup> Requests for Proposals LCCBP (Feb. 16, 2010).

<sup>[3]</sup> Requests for Proposals LCCBP (Feb. 16, 2010).

<sup>[4]</sup> City Council Journal (Jul. 6, 2005); Report of the Committee on Planning and Transportation, CR-315, (Jun. 23, 2005).

<sup>[5]</sup> RCH Sec. 13-101.4(b)

<sup>[6]</sup> There are no Financial Disclosures on file for 2008.

<sup>[7]</sup> Financial Disclosure (Mar. 10, 2009); Financial Disclosure (Mar. 13, 2010).

<sup>[8]</sup> Mayor's Message 72 from Mayor Hanneman to T. Apo and City Council Members (May 25, 2010).

<sup>[9]</sup> City Council Journal (Jun. 9, 2010).

<sup>[10]</sup> 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.

<sup>[11]</sup> **Sec. 3-8.5 Violation--Penalty.**

- (d) In addition to any other penalty, sanction or remedy provided by law, the ethics commission may impose a civil fine against a former or current officer or exempt employee of the city who has been found by the ethics commission to have violated the standards of conduct in Article XI of the revised charter or this article. For the purposes of this section, "officer" has the same meaning as in Section 13-101.4 of the revised charter and "exempt employee" means all employees of the executive and legislative branches of the City and County of Honolulu who are exempt from civil service pursuant to revised charter Sections 6-1103(a) – (d) and (i) and 6-1104(a) – (d), but shall not mean exempt employees in clerical positions or employees within a bargaining unit as described in Section 89-6, Hawaii Revised Statutes.
- (1) Where a civil fine has not otherwise been established in this article, the amount of the civil fine imposed by the ethics commission for each violation shall not exceed the greater of \$5,000 or three times the amount of the financial benefit sought or resulting from each violation.
  - (2) In determining whether to impose a civil fine and the amount of the civil fine, the ethics commission shall consider the totality of the circumstances, including, but not limited to:
    - (A) The nature and seriousness of the violation;
    - (B) The duration of the violation;
    - (C) The effort taken by the officer or exempt employee to correct the violation;

- (D) The presence or absence of any intention to conceal, deceive or mislead;
  - (E) Whether the violation was negligent or intentional;
  - (F) Whether the officer or exempt employee demonstrated good faith by consulting the ethics commission staff or another government agency or an attorney;
  - (G) Whether the officer or exempt employee had prior notice that his or her conduct was prohibited;
  - (H) The amount, if any, of the financial or other loss to the city as a result of the violation;
  - (I) The value of anything received or sought in the violation;
  - (J) The costs incurred in enforcement, including reasonable investigative costs and attorneys' fees;
  - (K) Whether the officer or exempt employee was truthful and cooperative in the investigation; and
  - (L) Any other relevant circumstance.
- (3) No civil fine shall be imposed unless the requirements of Chapter 91 and HRS Section 46-1.5(24), have been met.
  - (4) The ethics commission may recover any civil fines imposed pursuant to this section and may, through the corporation counsel, institute proceedings to recover any civil fines.
  - (5) Pursuant to Chapter 1, Article 19, the ethics commission shall have executive authority to add unpaid fines by administrative order to any taxes, fees or charges.
  - (6) Notwithstanding Section 3-6.3(c), no civil fine may be imposed under this subsection:
    - (A) If the applicable complaint or request for advisory opinion is submitted more than four years after the alleged violation occurred; or
    - (B) For an investigation commenced by the commission on its own initiative, if the investigation is commenced more than four years after the alleged violation occurred.

<sup>121</sup> See Hui Malama Aina O Ko`olau v. Pacarro, 4 Haw. App. 304 (1983) (A councilmember's indirect personal interest in a townhouse development, in that land owned by him would benefit by road improvements required of developer, requires disclosure in writing under terms of municipal charter, but failure to disclose does not invalidate council action when sufficient votes existed excluding the councilmember's vote.)

<sup>131</sup> ROH Sec. 3-8.4(f) provides: "Any city officer or employee, who has received this notice and fails to file the required disclosure within 10 days of receipt of the notice, shall be subject to a civil fine according to the following schedule: \$100.00 for the first late filing; \$200.00 for the second late filing; and thereafter, for each additional late filing, the fine imposed for the previous late filing plus \$200.00."