Approved as to Form and Legality**

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City Attorney

City of Oakland
Public Ethics Commission
April 7, 2010

In the Matter of	)	
	)	Complaint No. 10-01
	)	

David Mix filed Complaint No. 10-01 on January 21, 2010.

I. SUMMARY OF COMPLAINT

Mr. Mix filed Complaint No. 10-01 alleging that Oakland Mayor Ron Dellums and City Council President Jane Brunner violated the City Council's Code of Ethics and various other laws by withdrawing the proposed nomination of Lorenzo Hoopes to the Paramount Theatre board of directors at the City Council meetings of January 5, 2010, and January 19, 2010. ***Attachment 1.***

II. FACTUAL SUMMARY

On January 5, 2010, the Oakland City Council considered four nominations from Mayor Ron Dellums for appointment to the Paramount Theatre's board of directors. The nominees were Lorenzo Hoopes, Clinton Killian, Rob McKean and Ed Thomas. During consideration of the nominees, a public speaker and City Councilmember Nancy Nadel raised concerns over reports that Mr. Hoopes had contributed a large sum of money in support of Proposition 8. (Proposition 8, otherwise known as the "California Marriage Protection Act," was approved by voters during the November 2008 election. It added a new section to the California Constitution providing "Only a marriage between a man and a woman is valid or recognized in California.") The City Council adopted a motion to continue the item for two weeks until its January 19 meeting.

At the January 19, 2009, meeting, City Council President Jane Brunner announced that the Mayor's Office requested that the item be pulled from the agenda that evening. According to Bouapha Toommaly of the Mayor's staff, the nominations to the Paramount Board have not been re-submitted to the City Council. The members continue to serve in a "holdover" capacity.

Mr. Mix alleges that Mayor Dellums and Councilmember Brunner violated their oaths of office, the City Council Code of Ethics and various other laws for removing the nomination of Mr. Hoopes from City Council consideration.

III. ANALYSIS

A. Commission Jurisdiction

Section 2.24.020(B) of the Commission's enabling ordinance states that it shall be the "function and duty" of the Commission to "oversee compliance with the City Code of Ethics." Section I of the Commission's General Complaint Procedures states that the procedures shall apply to "the review, investigation and hearing" of alleged violations of "The City Council Code of Conduct" and the "City of Oakland Code of Ethics, if adopted by the City Council." Based on these authorities, the Commission has historically considered complaints alleging violations of the City Council's "Code of Conduct."

B. City Council's Code Of Conduct/Code of Ethics

On March 2, 2010, the Oakland City Council adopted its most recent version of its Rules of Procedures. Contained in the City Council's Rules of Procedures is the City Council's "Code of Conduct." [1] The Code of Conduct provides broad standards of conduct to which the City Council voted to adhere.[2]

Commission staff has consistently expressed concerns about the administrative enforceability of the City Council Code of Conduct/Code of Ethics. While several provisions are reasonably specific (though not relevant to this complaint), most are too vague and/or ambiguous to give adequate notice of what type of conduct will or will not constitute a violation. Since Paragraph 12 of the Code refers to the "censure" by the City Council of any member who "willfully violates the rules of conduct contained

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[1] *The current Code of Conduct has previously been designated as the City Council's "Code of Ethics" in prior versions of the City Council's Rules of Procedure. The current "Code of Conduct" also refers to itself as the "Code of Ethics" in Paragraph 12.*

[2] *Each member of the City Council has a duty to:*

1. Respect and adhere to the American ideals of government, the rule of law, the principles of public administration and high ethical conduct in the performance of public duties.

2. Represent and work for the common good of the City and not for any private interest.

3. Refrain from accepting gifts or favors or promises of future benefits which might compromise or tend to impair independence of judgment or action.

4. Provide fair and equal treatment for all persons and matters coming before the Council.

5. Learn and study the background and purposes of important items of business before voting.

6. Faithfully perform all duties of office.

7. Refrain from disclosing and information received confidentially concerning the business of the City, or received during any closed session of the Council held pursuant to state law.

8. Decline any employment incompatible with public duty.

9. Refrain from abusive conduct, personal charges or verbal attacks upon the character, motives, ethics or morals of other members of the Council, staff or public, or other personal comments not germane to the issues before the Council.

10. Listen courteously and attentively to all public discussions at Council meetings and avoid interrupting other speakers, including other Council members, except as may be permitted by established Rules of Order.

11. Faithfully attend all sessions of the Council unless unable to do so because of disability or some other compelling reason.

12. Maintain the highest standard of public conduct by refusing to condone breaches of public trust or improper attempts to influence legislation, and by being willing to censure any member who willfully violates the rules of conduct contained in this Code of Ethics.

in this Code of Ethics," the Commission has in the past considered whether to forward specific complaints to the City Council for consideration.

City Charter Section 200 expressly provides that the Mayor is not a member of the City Council. Thus the Council-adopted Code of Conduct, as most recently adopted on March 2, 2010, does not apply to him or to his actions. Mr. Mix argues that the Code of Conduct should apply to the Mayor because the Mayor was once a member of the City Council and, in approving the amendment to create a separate office of the Mayor, voters did not intend to have the Code of Conduct no longer apply to the Mayor. Nevertheless, the City Charter is the paramount law of the City and the City Council has re-adopted its Code of Conduct a number of times since it was amended, fully aware that the Mayor was no longer part of the City Council. Thus it is difficult to accept that the City Council, in re-adopting the Code of Ethics in March 2010, intended to include the Mayor in its provisions.

Finally, even if the Mayor were bound by the Code of Conduct, and even if the Code of Conduct were actionable in this complaint, Commission staff cannot appreciate how voting for a motion to continue the January 5 item to January 19, as Ms. Brunner and all other councilmembers did, or pulling the item from consideration at the January 19 meeting as Mr. Dellums did, would constitute a violation of any of the standards. According to Ms. Toommaly, the Mayor's Office is still contemplating Mr. Hoopes' nomination.

C. Violations Of Other Provisions Of Law

Mr. Mix contends that by pulling the nominations, Mayor Dellums violated his oath of office, the state and federal constitutions, the Oakland City Charter and "all other laws pertaining thereto." Commission staff was unable to identify any other law over which the Commission has authority to determine that would be applicable to Mr. Mix's allegations. Mr. Mix argues that the Commission's broad Charter mandate gives the Commission authority to determine issues arising under City laws. However, as Commission staff repeatedly points out, Charter Section 202(b) provides that the Commission's functions, duties, powers and jurisdiction shall be prescribed by the City "by ordinance." There is no other ordinance over which the Commission has authority to determine that regulates the issue of which Mr. Mix complains.

IV. STAFF RECOMMENDATION

Commission staff recommends that the Commission dismiss Complaint No. 10-01 on grounds that there is no information to support a conclusion that Mayor Dellums or City Councilmember Jane Brunner violated provisions of the City Council's Code of Ethics or any other provision of law when Ms. Brunner voted to continue consideration of the item on January 5, 2010, or when Mayor Dellums requested that the item be

pulled from consideration prior to the City Council meeting of January 19, 2010.

Respectfully submitted,

Daniel D. Purnell
Executive Director

** *City Attorney approval as to form and legality relates specifically to the legal issues raised in the staff report. The City Attorney's approval is not an endorsement of any policy issues expressed or of the conclusions reached by staff on the merits of the underlying complaint.*