Approved as to Form and Legality**

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City Attorney

City of Oakland
Public Ethics Commission
September 3, 2009

In the Matter of)
) Complaint No. 09-05
)

John Klein filed Complaint No. 09-05 on May 5, 2009.

I. SUMMARY OF COMPLAINT

Mr. Klein filed Complaint No. 09-05 alleging Matthew Novak violated provisions of the Oakland Lobbyist Registration Act ("LRA") by failing to register as a lobbyist and to file quarterly disclosures regarding his efforts to influence a proposal to extend planning and building entitlements for certain Oakland developers. ***Attachment 1.***

II. FACTUAL SUMMARY

On December 9, 2008, the City Council adopted a resolution extending for a period of one year the expiration date of certain City planning and building permits. The stated purpose was to preserve existing development rights during a time when economic conditions were causing delays over which developers had no control. The implementing resolution, No. 81723, was formally introduced on October 2, 2008, by City Councilmember Ignacio De La Fuente.

As previously described in the staff report to Mr. Klein's Complaint No. 08-20, some members of the Oakland Builders Alliance ("OBA"), a non-profit corporation formed to advocate on behalf of development issues in Oakland, claimed credit for getting Mr. De La Fuente to propose the resolution. Information gathered in connection with Complaint No. 08-20 indicates that OBA president Carlos Plazola began communicating with councilmembers and/or staff at least as early as July, 2008, to promote the proposal.

Mr. Klein submits with his complaint copies of emails among Mr. Novak, Mr. Plazola and Ratna Amin, Mr. De La Fuente's former legislative aide. ***Attachment 2.*** Among the submitted emails is a communication dated October 21, 2008, to City Councilmembers in which Mr. Novak argues in favor of the proposal to extend development rights for one year. In addition, Commission staff viewed a recording of the City Council's Community and Economic Development Committee's hearing on the entitlement extension proposal on October 14, 2008. Mr. Novak spoke in favor of the proposal at the meeting. His presentation focused on the general need for the

extension, the economic problems developers are currently facing, and the benefits the proposal would create.

At no time during his presentation or in any of the submitted emails did Mr. Novak say he was advocating on behalf of either OBA or his company, Dogtown Development LLC. Mr. Klein alleges that Mr. Novak was a salaried employee with Dogtown Development LLC at the time he made his communications with City Councilmembers and staff. Mr. Novak told Commission staff that he was (and is) a "partner" of Dogtown Development LLC and that at no time did he receive compensation from either Dogtown Development LLC or OBA while communicating with City officials and staff about the entitlement extension proposal.

Mr. Klein also provides a chart indicating that after Resolution No. 81723 was adopted in December, 2008, Mr. Novak applied for an entitlement extension on two projects sponsored by Dogtown Development LLC. ***Attachment 3.***

III. ANALYSIS

A. Applicable Law

Under the provisions of LRA Section 3.20.030(D), a “local governmental lobbyist” means any individual:

> (1) who receives or is entitled to receive one thousand dollars ($1,000) or more in economic consideration in a calendar month, other than reimbursement for reasonable travel expenses, or
>
> (2) whose duties as a salaried employee, officer or director of any corporation, organization or association include communication directly or through agents with any public official, officer or designated employee
>
> for the purpose of influencing any proposed or pending governmental action of the city or the redevelopment agency. . .

LRA Section 3.20.030(D) also provides "[i]n case of any ambiguity, the definition of "local governmental lobbyist" shall be interpreted broadly."

The LRA prohibits local governmental lobbyists from "engag[ing] in any activity on behalf of a client as a local governmental lobbyist unless such lobbyist is registered and has listed such client with the City Clerk." [LRA §3.20.120(A)] The LRA defines "client" in relevant part as "the real party in interest for whose benefit the services of a local governmental lobbyist are actually performed." [LRA §3.20.030(A)] Once registered, lobbyists are required to file quarterly disclosures of their lobbying activities that include 1) the item of pending or proposed governmental action sought to be influenced, 2) the name of the City official, officer or designated employee with whom

the lobbyist communicated, and 3) a description of the client's position with respect to the item. [LRA §3.20.110]

B. Does Mr. Novak Meet The Definition Of "Local Governmental Lobbyist"

Mr. Klein contends that Mr. Novak was a "salaried employee" of Dogtown Development during his communications and thus meets the definition of a "local governmental lobbyist." Mr. Novak denies he was a salaried employee at that time. He states his position with Dogtown Development was, and continues to be, as a "partner." He denies receiving a salary for his work and says his communications pertaining to entitlement extensions were made "on behalf of myself" because he believed "it was the right thing for Oakland to do."

Technically, limited liability companies ("LLCs") do not have "partners" or typically use the traditional corporate titles of "officers" or "directors". The California Corporations Code creates LLC "members" who in turn may elect a "manager" (or be legally deemed as managers themselves.) Thus based on Mr. Novak's statements and the express language of the LRA, it does not appear that Mr. Novak served as a "salaried employee, officer or director" of Dogtown Development LLC.

Commission staff has analyzed the limitations of the current definition of "local governmental lobbyist" in previous complaints and memoranda. The Commission has also noted that the current definition does not appear to apply to other forms of business organization, such as partnerships. The Commission will soon be considering various proposals for amending the definition of "local governmental lobbyist." The Commission may wish to consider whether and to what extent LLC members as well as business partnerships should also be included in the definition of "local governmental lobbyist."

IV. STAFF RECOMMENDATION

Commission staff recommends that the Commission dismiss Complaint No. 09-05 on grounds that there is no information supporting a conclusion that Matthew Novak was a "salaried employee, officer or director" of Dogtown Development LLC at the time he made the communications alleged in the complaint.

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.*