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6
7 **BEFORE THE FAIR POLITICAL PRACTICES COMMISSION**

8 **STATE OF CALIFORNIA**

9
10 In the Matter of) FPPC No. 10/485
11)
12 DAN K. WATERS,) STIPULATION, DECISION and
13) ORDER
14 Respondent.)

15 Complainant Roman G. Porter, Executive Director of the Fair Political Practices Commission,
16 and Respondent Dan Waters, hereby agree that this Stipulation will be submitted for consideration by
17 the Fair Political Practices Commission at its next regularly scheduled meeting.

18 The parties agree to enter into this Stipulation to resolve all factual and legal issues raised in this
19 matter and to reach a final disposition without the necessity of holding an administrative hearing to
20 determine the liability of Respondent.

21 Respondent understands, and hereby knowingly and voluntarily waives, any and all procedural
22 rights set forth in Sections 83115.5, 11503 and 11523 of the Government Code, and in Section 18361.1
23 through 18361.9 of Title 2 of the California Code of Regulations. This includes, but is not limited to,
24 the right to personally appear at any administrative hearing held in this matter, to be represented by an
25 attorney at Respondent's own expense, to confront and cross-examine all witnesses testifying at the
26 hearing, to subpoena witnesses to testify at the hearing, to have an impartial administrative law judge
27 preside over the hearing as a hearing officer, and to have the matter judicially reviewed.

1 It is further stipulated and agreed that Respondent Dan Waters violated the Political Reform Act
2 by attempting to use his official position to influence a governmental decision in which he had a
3 financial interest, in violation of Section 87100 (1 count), as described in Exhibit 1, which is attached
4 hereto and incorporated by reference, as though fully set forth herein. Exhibit 1 is a true and accurate
5 summary of the facts in this matter.

6 Respondent agrees to the issuance of the Decision and Order, which is attached hereto.
7 Respondent also agrees to the Commission imposing upon him an administrative penalty in the amount
8 of Two Thousand Five Hundred Dollars (\$2,500). A cashier's check from Respondent in said amount,
9 made payable to the "General Fund of the State of California," is submitted with this Stipulation as full
10 payment of the administrative penalty, to be held by the State of California until the Commission issues
11 its Decision and Order regarding this matter. The parties agree that in the event the Commission refuses
12 to accept this Stipulation, it shall become null and void, and within fifteen (15) business days after the
13 Commission meeting at which the Stipulation is rejected, all payments tendered by Respondent in
14 connection with this Stipulation shall be reimbursed to Respondent. Respondent further stipulates and
15 agrees that in the event the Commission rejects the Stipulation, and a full evidentiary hearing before the
16 Commission becomes necessary, neither any member of the Commission, nor the Executive Director,
17 shall be disqualified because of prior consideration of this Stipulation.

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19 Dated: _____

Roman G. Porter, Executive Director
Fair Political Practices Commission

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22 Dated: _____

Dan Waters

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2 **DECISION AND ORDER**

3 The foregoing Stipulation of the parties “In the Matter of Dan Waters, FPPC No. 10/485,”
4 including all attached exhibits, is hereby accepted as the final Decision and Order of the Fair Political
5 Practices Commission, effective upon execution below by the Chairman.

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7 IT IS SO ORDERED.

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9 Dated: _____

Ann Ravel, Chair
Fair Political Practices Commission

EXHIBIT 1

INTRODUCTION

Respondent Dan Waters (Respondent) was the Customer Services Supervisor in the Community Development Department for the City of Sacramento for all periods relevant to this matter. Respondent's father is Sacramento City Council Member Robbie Waters. Respondent formed a business, LEWA Inc., with a partner, Ken Le, on or about June 2, 2009. Ken Le is also the owner of Oshima Sushi, a restaurant in the City of Sacramento. Ken Le applied for a permit to expand Oshima Sushi to include a patio that would be used by LEWA Inc. for their business of selling cigars and cigarettes in December of 2008. Revisions were made to the permit and approved personally by Dan Waters on or about May 13, 2009.

On or about July 2009, Ken Le applied for amended Entertainment Permit Conditions for Oshima Sushi to allow live music on the outdoor patio of Oshima Sushi from 6:00 p.m. to 10:00 p.m. Thursdays and Fridays, and to allow all recorded and live music and all entertainment events/activities until midnight on Thursdays and 1:30 a.m. on Fridays and Saturdays. Dan Waters participated in the negotiation and facilitation of these amended Entertainment Permit Conditions through direct contact with Bob Rose, the Code Enforcement Manager for the Community Development Department for the City of Sacramento. This contact included the facilitation of a meeting with a homeowners association in the area immediately surrounding Oshima Sushi who had concerns about the noise that might be generated from the amended permit. Bob Rose ultimately approved the amended Entertainment Permit on August 6, 2009.

As a public official, as defined in Government Code Section 82048 Respondent was prohibited by Government Code §87100 of the Political Reform Act¹ (the "Act") from making, participating in making, or attempting to use his official position to influence any governmental decision in which he had a financial interest.

In this matter, Respondent impermissibly attempted to use his official position to influence a governmental decision in which he had a financial interest. For the purposes of this Stipulation, Respondent's violation of the Act is stated as follows:

- **COUNT 1:** From on or about July 2009 to on or about August 6, 2009 Respondent Dan Waters, Customer Services Supervisor in the Community Development Department for the City of Sacramento, attempted to use his official position to influence a government decision, the amendment of the Oshima Entertainment Permit with the City of Sacramento, while he co-owned LEWA Inc. and shared facilities with the owner of Oshima restaurant, in violation of Government Code Section 87100.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18109 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

SUMMARY OF THE LAW

Conflicts of Interest

The primary purpose for the conflict-of-interest provisions of the Act is to ensure that, “public officials, whether elected or appointed, perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them.” (Section 81001, subdivision (b).)

In furtherance of this goal, Section 87100 prohibits a public official from making, participating in making, or in any way attempting to use his or her official position to influence a governmental decision in which the official knows, or has reason to know, that he or she has a financial interest. Under Section 87103, a public official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect on an economic interest of the official. For purposes of Sections 87100 and 87103, there are six analytical steps to consider when determining whether an individual has a conflict-of-interest in a governmental decision.²

First, the individual must be a public official as defined by the Act. Section 82048 defines “public official” to include an employee of a local governmental agency.

Second, the official must make, participate in making, or attempt to use his or her official position to influence a governmental decision. Under Regulation 18702.2, a public official “participates in making a governmental decision” when the official negotiates with a governmental entity or private person regarding specified types of governmental decisions, including the issuance, denial, suspension or revocation of any permit, license, application, certificate, approval order, or similar authorization and entitlement.

Further, Regulation 18702.2 provides that a public official “participates in making a governmental decision” when the official advises or makes recommendations to the decisionmaker either directly or without significant substantive review by 1. Conducting research or making any investigation which requires the exercise of judgment on the part of the official and the purpose of which is to influence a government decision, including the issuance, denial, suspension or revocation of any permit, license, application, certificate, approval order, or similar authorization and entitlement, or 2. Preparing or presenting any report, analysis, or opinion, orally, or in writing, which requires the exercise of judgment on the part of the official and the purpose of which is to influence a governmental decision, including the issuance, denial, suspension or revocation of any permit, license, application, certificate, approval order, or similar authorization and entitlement.

Third, the official must have an economic interest that may be financially affected by the governmental decision. Under Section 87103, subdivision (a), a public official has a financial interest in any business entity in which the public official has a direct or indirect investment worth

² Neither the Public Generally Exception (Section 87103, Regulation 18707) nor the Legally Required Participation Exception (Section 87101, Regulation 18708) apply to this case.

two thousand dollars (\$2,000) or more. Under Regulation 18703.1, a public official has an economic interest in a business entity if they are otherwise related business entities and there is shared management and control between the entities. In determining whether there is shared management and control, consideration should be given to the following factors:

- (i) The same person or substantially the same person owns and manages the two entities;
- (ii) There are common or commingled funds or assets;
- (iii) The business entities share the use of the same offices or employees, or otherwise share activities, resources or personnel on a regular basis;
- (iv) There is otherwise a regular and close working relationship between the entities; or
- (C) A controlling owner (50% or greater interest as a shareholder or as a general partner) in one entity also is a controlling owner in the other entity.

Fourth, it must be determined if the economic interest of the official is directly or indirectly involved in the decision. Under Regulation 18704.1 a business entity is directly involved in a decision before an official's agency when that person is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.

Fifth, under Regulation 18705.1 the financial effects of a governmental decision on a business entity which is directly involved in the governmental decision is presumed to be material. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect on the business entity.

Sixth, it must have been reasonably foreseeable, at the time the governmental decision was made, that the decision would have a material financial effect on the economic interest of the official. Under Regulation 18706, subdivision (a), a material financial effect on an economic interest is reasonably foreseeable if it is substantially likely that one or more of the materiality standards applicable to the economic interest will be met as a result of the governmental decision. Whether the financial consequences of a decision are "reasonably foreseeable" at the time of a governmental decision depends on the facts of each particular case.

SUMMARY OF THE FACTS

Respondent Dan Waters (Respondent) was the Customer Services Supervisor in the Community Development Department for the City of Sacramento for all periods relevant to this matter. Respondent formed a business, LEWA Inc., with a partner, Ken Le, on or about June 2, 2009. Ken Le is also the owner of Oshima Sushi, a restaurant in the City of Sacramento. Ken Le applied for a permit to expand Oshima Sushi to include a patio that would be used by LEWA Inc. for their business of selling cigars and cigarettes in December of 2008. Revisions were made to the permit and approved personally by Dan Waters on or about May 13, 2009.

On or about July 2009, Ken Le applied for amended Entertainment Permit Conditions for Oshima Sushi to allow live music on the outdoor patio of Oshima Sushi from 6:00 p.m. to 10:00

p.m. Thursdays and Fridays, and to allow all recorded and live music and all entertainment events/activities until midnight on Thursdays and 1:30 a.m. on Fridays and Saturdays. These expanded permit conditions were for the benefit of both Oshima Sushi and LEWA Inc. The business agreement between Respondent and Ken Le discussed joint use of the patio facility at Oshima, and joint use of Oshima staff to sell cigars and cigarettes on commission.

Dan Waters participated in the negotiation and facilitation of these amended Entertainment Permit Conditions through direct contact with Bob Rose, the Code Enforcement Manager for the Community Development Department for the City of Sacramento. Waters and Rose were in separate divisions of the Community Development Department, and worked in different office locations. Waters was not a staff member with responsibility for Code Enforcement Services. This contact included the facilitation of a meeting with a homeowners association in the area immediately surrounding Oshima Sushi who had concerns about the noise that might be generated from the amended permit. Bob Rose ultimately approved the amended Entertainment Permit on August 6, 2009.

COUNT 1

MAKING A GOVERNMENTAL DECISION IN WHICH THE OFFICIAL HAS A FINANCIAL INTEREST

1. Respondent Was a Public Official as Defined by the Act

As the Customer Services Supervisor in the Community Development Department for the City of Sacramento for the period in question, Respondent was a public official as defined in Section 82048, and was therefore subject to the prohibition against attempting to influence a decision in which he has a financial interest under Section 87100.

2. Respondent Used His Official Position to Influence a Governmental Decision

From on or about July 2009 to on or about August 6, 2009 Respondent participated in the negotiation and facilitation of amended Entertainment Permit Conditions through direct contact with Bob Rose, the Code Enforcement Manager for the Community Development Department for the City of Sacramento. The amended Entertainment Permit Conditions were approved August 6, 2009. Consequently, Respondent used his official position to influence a governmental decision for purposes of Regulation 18702.2.

3. Respondent Had an Economic Interest in Oshima Sushi and LEWA Inc.

At the time of the governmental decision, Respondent co-owned LEWA Inc. with Ken Le, the owner of Oshima Sushi. The business addresses listed for both entities is the same. Ken Le, who owned a 50% interest in LEWA Inc., is also a controlling owner of Oshima Sushi. The Respondent and Ken Le planned to sell cigars and cigarettes as LEWA Inc. within Oshima Sushi and, in fact, built an extra patio and sought the Entertainment Permit amendments to facilitate LEWA Inc. LEWA Inc. agreed to provide Oshima Sushi employees with a commission for all cigar and cigarette sales for LEWA Inc. Thus, the business entities shared the use of the same offices or employees, and otherwise shared activities, resources or personnel on a regular basis, and had

a regular and close working relationship, and a controlling owner (50% or greater interest as a shareholder or as a general partner) in one entity also is a controlling owner in the other entity. Thus Respondent had an economic interest in Oshima Sushi.

4. Respondent's Economic Interest Was Directly Involved in the Decision

Oshima Sushi was the applicant for the amendment to the Entertainment Permit. Thus, the economic interest was directly involved in the in the decision under Regulation 18704.1.

5. Applicable Materiality Standard

Oshima Sushi was directly involved in the governmental decision. The financial effects of a governmental decision on a business entity which is directly involved in the governmental decision is presumed to be material. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect on the business entity. There is no evidence to rebut this presumption. Therefore the economic interest was material under Regulation 18705.1.

6. It Was Reasonably Foreseeable That the Applicable Materiality Standard Would Be Met

The permit was designed to enhance business for Oshima Sushi and, by extension, to expand their revenues. Thus it is reasonably foreseeable that there would be a material financial effect.

By attempting to use his official position to influence a governmental decision in which he had an economic interest, Respondent violated section 87100 of the Act.

CONCLUSION

This matter consists of one count of violating the Act carrying a maximum administrative penalty of \$5,000.

In determining the appropriate penalty for a particular violation of the Act, the Enforcement Division considers the typical treatment of a violation in the overall statutory scheme of the Act, with an emphasis on serving the purposes and intent of the Act. Additionally, the Enforcement Division considers the facts and circumstances of the violation in context of the factors set forth in Regulation 18361.5, subdivision (d)(1)-(6): the seriousness of the violations; the presence or lack of intent to deceive the voting public; whether the violation was deliberate, negligent, or inadvertent; whether the Respondent demonstrated good faith in consulting with Commission staff; and whether there was a pattern of violations.

For Count 1, participating in a governmental decision in which an official has a financial interest is one of the more serious violations of the Act as it creates the appearance that a governmental decision was made on the basis of public official's financial interest. The typical administrative penalty for a conflict-of-interest violation, depending on the facts of the case, has been in the mid-to-high range of available penalties.

FACTORS IN AGGRAVATION

The significance of the public harm in public officials using their official position to influence government decisions that have a material financial effect on them is high. In this case, Respondent was actively using his official position to influence a decision made by his Department that directly impacted his business. Respondent initially personally approved the permit to build the patio at Oshima Sushi which was clearly intended to benefit his business, prior to his formal involvement with his business, but clearly during the period where the business was being planned.

FACTORS IN MITIGATION

In mitigation, Respondent fully cooperated with the investigation. Additionally, Respondent was not a decision-maker on the Entertainment Permit amendment.

PENALTY

The facts of this case, including the aggravating and mitigating factors discussed above, justify imposition of the agreed upon penalty of Two Thousand Five Hundred Dollars (\$2,500).