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7
8 **BEFORE THE FAIR POLITICAL PRACTICES COMMISSION**
9 **STATE OF CALIFORNIA**

10
11 In the Matter of:

12 CLAY AURELL,

13 Respondent.

FPPC No. 11/650

14 STIPULATION, DECISION AND ORDER

15 **STIPULATION**

16 Complainant, the Fair Political Practices Commission, and Respondent, Clay Aurell, agree that
17 this Stipulation will be submitted for consideration by the Fair Political Practices Commission at its next
18 regularly scheduled meeting.

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

22 Provided that the Commission accepts this Stipulation as the final disposition of this matter,
23 Respondent hereby knowingly and voluntarily waives any and all procedural rights set forth in
24 Government Code sections 83115.5, 11503 and 11523, and in California Code of Regulations, title 2,
25 sections 18361.1 through 18361.9. This includes, but is not limited to the right to appear personally at
26 any administrative hearing held in this matter, to be represented by an attorney at Respondent's own
27 expense, to confront and cross-examine all witnesses testifying at the hearing, to subpoena witnesses to

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1 testify at the hearing, to have an impartial administrative law judge preside over the hearing as a hearing
2 officer, and to have the matter judicially reviewed.

3 As described in Exhibit 1, it is further stipulated and agreed that Respondent attempted to use his
4 official position to influence a governmental decision in which he knew that he had a financial interest, in
5 violation of Government Code section 87100.

6 Exhibit 1, which is attached hereto and incorporated by reference as though fully set forth herein,
7 is a true and accurate summary of the facts in this matter.

8 Respondent agrees to the issuance of the Decision and Order, which is attached hereto, and
9 Respondent agrees to the Commission imposing upon him an administrative penalty in the amount of
10 \$3,500. One or more cashier's checks or money orders totaling said amount—to be paid to the General
11 Fund of the State of California—is/are submitted with this Stipulation as full payment of the
12 administrative penalty described above, and same shall be held by the State of California until the
13 Commission issues its Decision and Order regarding this matter. The parties agree that in the event the
14 Commission refuses to accept this Stipulation, it shall become null and void, and within fifteen (15)
15 business days after the Commission meeting at which the Stipulation is rejected, all payments tendered
16 by Respondent in connection with this Stipulation shall be reimbursed. Respondent further stipulates and
17 agrees that in the event the Commission rejects the Stipulation and a full evidentiary hearing before the
18 Commission becomes necessary, neither any member of the Commission, nor the Executive Director,
19 shall be disqualified because of prior consideration of this Stipulation.

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21 Dated: _____

Gary S. Winuk, Chief of Enforcement
Fair Political Practices Commission

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24 Dated: _____

Clay Aurell, Respondent

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1 **DECISION AND ORDER**

2 The foregoing Stipulation of the parties “In the Matter of Clay Aurell,” FPPC No. 11/650,
3 including all attached exhibits, is hereby accepted as the final decision and order of the Fair Political
4 Practices Commission, effective upon execution below by the Chairman.

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6 IT IS SO ORDERED.

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8 Dated: _____

Ann Ravel, Chair
Fair Political Practices Commission

EXHIBIT 1

INTRODUCTION

At all relevant times, Respondent Clay Aurell had a partnership interest in an architectural firm and was a member of the Architectural Board of Review for the City of Santa Barbara.

For purposes of this stipulation, Respondent's violation of the Political Reform Act (the "Act")¹ is set forth as follows:

Count 1: Between approximately April 2010 and May 2011, Respondent Clay Aurell attempted to use his official position to influence a governmental decision in which he knew that he had a financial interest, in violation of Section 87100.

SUMMARY OF THE LAW

All statutory references and discussions of law pertain to the Act's provisions as they existed at the time of the violation in question.

Need for Liberal Construction and Vigorous Enforcement of the Political Reform Act

When the Political Reform Act was enacted, the people of the state of California found and declared that previous laws regulating political practices suffered from inadequate enforcement by state and local authorities. (Section 81001, subd. (h).) To that end, Section 81003 requires that the Act be liberally construed to achieve its purposes.

One of the purposes of the Act is to prevent conflicts of interest by public officials. (Section 81002, subd. (c).) Another purpose of the Act is to provide adequate enforcement mechanisms so that the Act will be "vigorously enforced." (Section 81002, subd. (f).)

Conflicts of Interest

The primary purpose of 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, subd. (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 official position to influence a

¹ The 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 18110 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.

governmental decision in which the official knows, or has reason to know, that he 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.

First, the individual must be a public official. (Section 87100.) Section 82048 defines “public official” to include an employee of a local government agency.

Second, the official must make, participate in making, or attempt to use his official position to influence a governmental decision. (Section 87100 and Regulation 18700.)

Third, the official must have an economic interest that may be financially affected by the governmental decision. (Sections 87100 and 87103.) A public official has an economic interest in any person from whom he or she has received income, aggregating \$500 or more within 12 months prior to the time when the relevant governmental decision is made, including income promised to the public official, but not yet received. (Regulation 18703.3, subd. (a)(1).) Also, a public official has an economic interest in a business entity if the public official is a director, officer, partner, trustee, employee, or holds any position of management in the business entity. (Regulation 18703.1, subd. (b).)

Fourth, it must be determined if the economic interest of the official is directly or indirectly involved in the decision. (Regulation 18704.)

Fifth, it must be determined if the governmental decision has a material financial effect on the economic interest. (Sections 87100 and 87103.) Any reasonably foreseeable financial effect on a person who is a source of income to a public official, and who is directly involved in a decision before the official's agency, is deemed material. (Regulation 18705.3, subd. (a).)

Sixth, at the time of the governmental decision, it must have been reasonably foreseeable that the decision would have a material financial effect. (Sections 87100 and 87103.) 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. (Regulation 18706, subd. (a).) Whether the financial consequences of a decision are “reasonably foreseeable” at the time of a governmental decision depends upon the facts of each particular case. (Regulation 18706, subd. (b).)

SUMMARY OF THE FACTS

As stated above, at all relevant times, Respondent Clay Aurell had a partnership interest in an architectural firm, AB Design Studio, and was a member of the Architectural Board of Review for the City of Santa Barbara.

Count 1

Between approximately April 2010 and May 2011, Respondent and his architectural firm were representing Heidi Ferguson in connection with a proposal to construct an accessory dwelling unit above a three-car garage located at 903 West Mission Street.

During this time, the project came before the Architectural Board of Review for the City of Santa Barbara multiple times, culminating in final approval on May 16, 2011. Although Respondent stepped down at the time of the final approval vote, during the months leading up to the vote, Respondent made several contacts with staff members for the City of Santa Barbara who were involved with the processing and evaluation of the matter before the Architectural Board of Review.

There is an exception to the general rule regarding conflicts of interest where members of architectural review boards prepare drawings or submissions of an architectural, engineering or similar nature to be used by a client in connection with a proceeding before the board. However, this exception applies only if the official has no direct oral or written contact with the agency regarding the client's proceeding—except for necessary contact with agency staff concerning the processing or evaluation of the drawings or submissions prepared by the official. (See Regulation 18702.4, subd. (b)(4).)

In this case, the exception does not apply because Respondent's contacts with staff, which included several conversations and emails, went beyond mere necessary contact with agency staff concerning the processing/evaluation of drawings/submissions prepared by Respondent. For example, in an email dated April 27, 2011, Respondent wrote: "Please confirm that staff will continue to support our project and be there to clearly layout why this project is back on the agenda and that they can give and should give it PDA and Final. I don't want any opportunity for PDA to be appealed and then go back for Final. Heidi [his client] was very upset about this and is very concerned."

As a member of the Architectural Board of Review for the City of Santa Barbara, Respondent was a public official. His above-described contacts with staff amounted to using his official position to influence a governmental decision in which he knew that he had a financial interest.

At the time, Respondent's client, Heidi Ferguson, was one of Respondent's economic interests in that she was a source of income to Respondent.² Respondent's client was directly involved in the governmental decision because she was the applicant before the Architectural Board of Review. (Regulation 18704.1, subd. (a).) It was reasonably foreseeable that the board's decision of final approval would have a material financial effect on Respondent's client because the decision would allow Respondent's client to improve her real property.

² It is worth noting that Respondent's architectural firm, AB Design Studio, and not just Respondent's client, is an economic interest in this case.

In acting as described above, Respondent committed one violation of Section 87100.

CONCLUSION

This matter consists of one count of violating the Act, which carries a maximum administrative penalty of \$5,000. (Section 83116, subd. (c).)

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 the context of the following factors set forth in Regulation 18361.5, subdivision (d)(1) through (6):

- (1) The seriousness of the violation;
- (2) The presence or absence of any intention to conceal, deceive or mislead;
- (3) Whether the violation was deliberate, negligent or inadvertent;
- (4) Whether the violator demonstrated good faith by consulting the Commission staff or any other government agency in a manner not constituting a complete defense under Government Code section 83114(b);
- (5) Whether the violation was isolated or part of a pattern and whether the violator has a prior record of violations of the Political Reform Act or similar laws; and
- (6) Whether the violator, upon learning of a reporting violation, voluntarily filed amendments to provide full disclosure.

Regarding Count 1, one of the most recent stipulations involving a violation of Section 87100 imposed a penalty in the mid-range. (See *In the Matter of Jan Horton*, FPPC No. 09/671, approved Sep. 22, 2011 [\$3,000 penalty imposed for city council member who voted on housing density matter for parcels within 500 feet of her own real property].)

Attempting to influence a governmental decision in which an official has a financial interest is one of the more serious violations of the Act because it may create the appearance that a governmental decision was made on the basis of a public official's financial interest. In this case, Respondent's contacts with staff amounted to advocacy for the direct benefit of Respondent's client and Respondent's business interests, which warrants a higher penalty than what was imposed in the comparable case described above. Respondent should have known that such use of his official position would be in violation of the Act.

Under these circumstances, it is respectfully submitted that imposition of an agreed upon penalty in the amount of \$3,500 is justified. A higher penalty is not being sought because Respondent cooperated with the Enforcement Division of the Fair Political Practices Commission by agreeing to an early settlement of this matter well in advance of the Probable Cause Conference that otherwise would have been held. Also, there is no history of prior violations of the Act by Respondent.