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6 NANCY GRAHAM

7
8 **BEFORE THE CITY OF SAN DIEGO**
9 **ETHICS COMMISSION**
10

11 THE CITY OF SAN DIEGO ETHICS
12 COMMISSION,

13 Petitioner,

14 v.

15 NANCY GRAHAM,

16 Respondent.
17

CASE NO. 2008-54

RESPONDENT'S MOTION TO:

- (1) **DISMISS THE ADMINISTRATIVE COMPLAINT BECAUSE THE AFFILIATED ENTITIES RULE DOES NOT APPLY; OR**
(2) **MERGE ALLEGED ACTS WHICH CONSTITUTE A SINGLE VIOLATION**

18 DATE: May 20-21, 2010
19 TIME: 9:00 a.m.
20 LOCATION: 1200 Third Avenue #300
San Diego, CA 92101

21 **COMES NOW RESPONDENT NANCY GRAHAM** and submits the following in
22 support of her motion to dismiss the administrative complaint or merge the alleged acts:
23

24 **I.**

25 **FACTS**

26 **A. NANCY GRAHAM IN FLORIDA**

27 Ms. Graham graduated college from the University of Central Florida (1979 with high
28 honors), and the University of Florida Holland Law Center. Ms. Graham then practiced law for

958903.1

1 almost 10 years, specializing in land use, zoning, comprehensive planning and environmental
2 law.

3 In 1991, Ms. Graham was elected mayor of West Palm Beach, Florida, she served as the
4 city's mayor until March 1999. Under her leadership, the city experienced a remarkable
5 renaissance, especially in its downtown. Ms. Graham's vision and leadership have been
6 recognized through numerous national, state and local awards, including the U.S. Conference of
7 Mayors' City Livability Award and the 1,000 Friends of Florida Community Steward Award for
8 the revitalization of downtown West Palm Beach. She was listed by *Newsweek* as one of the top
9 25 mayors in the country, and has been the subject of feature stories in *Working Woman*
10 *Magazine* and the *New York Times*. *Governing Magazine* honored her in November 1998 as one
11 of the ten national "Public Officials of the Year." In 2000, Governor Jeb Bush appointed her to
12 the Growth Management Study Commission to review and make recommendations for updating
13 Florida's growth management laws (she chaired the Urban Revitalization Subcommittee).

14 After leaving public office, Ms. Graham resided and worked in Florida with her spouse at
15 the time, Kevin Lawler. Together they formed N-K Ventures LC, a Florida limited liability
16 company ("N-K Ventures"). On June 10, 2002, N-K Ventures entered into a Profit Participation
17 Agreement with Lennar Communities of South Florida, Inc., ("Lennar South Florida") a Florida
18 Corporation, and Trelcom Development, Ltd., owned by The Related Group of Florida, a Florida
19 General Partnership ("Related"), The Profit Participation Agreement set forth N-K Ventures'
20 participation in the profits of a joint venture between Lennar South Florida and Related for the
21 development of a mixed-use condominium project on property in Lantana, Florida, known as the
22 Moorings at Lantana ("Lantana project"). According to the terms of the Profit Participation
23 Agreement, N-K Ventures was to receive \$12,000 per month for 12 months beginning on July 1,
24 2002, a one-time payment of \$250,000, and 25% of the net profits from the project. In exchange,
25 N-K Ventures contributed its right to acquire the subject property upon which the development
26 was constructed, and provided services to facilitate the development.

27 Lennar South Florida and Related subsequently formed and created a completely separate
28 entity named, RL Lantana Boatyard, Ltd., a Florida limited partnership, on June 12, 2002, for the

1 purpose of developing the Lantana project ("RL Lantana"). RL Lantana is comprised of the
2 following entities:

- 3 • TRG-Lantana Boatyard, Ltd. (.10%) — General Partner
- 4 • Lennar-Lantana Boatyard, Inc. (.10%) — General Partner
- 5 • Trelcom Development, Ltd. (49.90%) - Limited Partner
- 6 • Lennar Communities of South Florida, Inc. (49.90%) — Limited Partner

7 Lennar Corporation, a Delaware Corporation ("Lennar") owns a majority of the shares of
8 both Lennar-Lantana Boatyard, Inc. and Lennar Communities of South Florida. But Lennar does
9 not own a majority of the shares of RL Lantana, they are equal partners.

10 As of June 2007, N-K Ventures had been paid approximately \$7.5 million in income from
11 RL Lantana entity pursuant to the Profit Participation Agreement, including payments of:
12 \$250,000 on March 7, 2006; \$1,250,000 on March 23, 2006; \$2,000,000 on April 5, 2006;
13 \$1,250,000 on April 12, 2006; \$2,000,000 on April 25, 2006; \$500,000 on May 8, 2006; and
14 \$250,000 on approximately April 30, 2007. N-K Ventures subsequently distributed Respondent's
15 share of the proceeds to her within approximately ten days of receiving each of these payments.

16
17 **B. BALLPARK VILLAGE IN SAN DIEGO**

18 On May 25, 2005, the Centre City Development Corporation ("CCDC"), under the
19 guidance of its President and Chief Executive Officer, Peter Hall, approved an Owner
20 Participation Agreement ("OPA"), with Ballpark Village LLC ("Ballpark"), a Delaware limited
21 liability company. The OPA was for the development of two parcels located within the CCDC
22 redevelopment project area known as the Ballpark Village project. The Ballpark Village project
23 was a \$1.5 billion mixed-use project development on three million square feet of acreage adjacent
24 to PETCO Park. On October 18, 2005, the OPA for Ballpark Village was adopted by the
25 Redevelopment Agency.

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1 According to the OPA, Ballpark's has two members are JMIR-Ballpark Village LLC, a
2 Delaware limited liability company ("JMIR"), and Lennar Homes of California, Inc, ("Lennar
3 CA").

4 **C. NANCY GRAHAM IN SAN DIEGO**

5 On December 1, 2005, (three months after the OPA was in place), Nancy Graham
6 assumed office as CCDC's President and Chief Operating Officer.

7 **II.**

8 **LEGAL ANALYSIS**

9 The State of California has ethics laws that are found in the Government Code and the
10 California Code of Regulations. The City of San Diego has its own ethics ordinance. It is found
11 in the San Diego Municipal Code (SDMC). The state ethics laws and the city ordinance are very
12 similar, in fact, for most cases they are identical. However, this case concerns a portion of the
13 San Diego ordinance that is very different than the California statutes.

14 The charges against Ms. Graham are the direct result of Petitioners mistaken belief that
15 the difference between the state law and our ethics ordinance is meaningless. Petitioner has
16 essentially interpreted the City Ordinance as if it was identical to the state laws and have
17 effectively ignored the right of the City of San Diego to adopt it's own ethics rules.

18 **A. THIS CLAIM SHOULD BE DISMISSED BECAUSE THE ETHICS COMMISSION**
19 **INCORRECTLY APPLIED THE AFFILIATED ENTITY RULE**

20 **1. *PERSON VS. "SOURCE OF INCOME"***

21 The Commission alleges that Ms. Graham violated §27.3561 of the City of San Diego
22 Municipal Code ("SDMC"). Section 27.3561 is titled, "Disqualification of City Officials in
23 Municipal Decisions Affecting Economic Interests." This section was added by the City Council
24 on April 29, 2002, and states:

25 It is unlawful for any City Official to knowingly influence a
26 municipal decision if it is reasonably foreseeable that the
27 municipal decision will have a material financial effect on:
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2 (4) any person from whom a City Official or a member of the
3 City Official's immediate family has received (or by whom
4 you have been promised) \$500 or more in income within
5 twelve months prior to the municipal decision...

6 This portion of the SDMC differs from state ethics codes. For convenience sake we have
7 placed the San Diego Ordinance side by side with the state laws so the differences can be seen.
8 We have also underlined the particular portions that are critical our analysis here.

SDMC § 27.3561	Government Code § 87103	California Code of Regulations § 18730
It is unlawful for any <i>City Official</i> to knowingly influence a municipal decision if it is reasonably foreseeable ... the decision will have a material financial effect on:	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:	No... employee shall participate in making ... any governmental decision which ... will have a reasonably foreseeable material financial effect ... on:
(4) Any <u>person</u> from whom a <i>City Official</i> ... has received (or by whom you have been promised) \$500 or more in income within 12 months prior to the <i>municipal decision</i> .	(c) Any <u>source of income</u> ... aggregating ... \$500 or more in value provided or promised to, received by, the public official within 12 months prior to when the decision is made..	(c) any <u>source of income</u> ... aggregating ... \$500 or more in value provided to, received by or promised to the ... employee within 12 months prior to ... when the decision is made.

18
19 As can be seen above, the City eliminated the term "source of income." contained in the
20 state statutes and replaced it with the word "Person". The City Council also italicized the word
21 "*Person*" and defined it in the ordinance. It is impossible to conclude, as the Commission does,
22 that these changes were inadvertent or meaningless.

23 SDMC § 27.3503, titled, "Definitions", states that:

24 Each word or phrase that is defined in this Division appears in the text of
25 this Division *in italicized letters*. Except as otherwise provided herein, the
26 terms and provisions of this division shall have the meanings and shall be
27 interpreted in accordance with the applicable definitions and provisions of
28 the Political Reform Act of 1974, as amended (California Government Code §§ 81000 through 91014) and the regulations of the California Fair Political Practices Commission, as amended. For purposes of this Division, the following definitions shall apply:

1 ...*Person* means any individual, business entity, trust, corporation,
2 association, committee, or any other organization or group of *persons*
3 acting in concert.

4 Petitioner attaches no significance to the change from “source of income” to “person”.
5 This mistake is critical because it is only by reference to the “source of income” definitions
6 found in Code of Regulations section 18703.3 that Petitioner makes its case. By using CCR
7 18703.3 Petitioner tenuously links Ms. Graham’s relationship with the Lantana Boatyard project
8 to the Ballpark Village project. Without that link Ms. Graham was free to participate in the OPA
9 modification process.

10 Effectively, the City Council removed the “source of income” language from our
11 ordinance and Petitioner has put it back in. This sleight of hand is accomplished in paragraph 10
12 of the Final Administrative Complaint. There the Petitioner states “for purposes of
13 disqualification involving sources of income a city official has an economic interest in an entity
14 that is a parent, subsidiary, or is otherwise related to the entity that has provided the city official
15 with income of \$500 or more within the previous 12 months (emphasis added).” Petitioner offers
16 no justification for the re-inclusion of the “source of income” language. Petitioner doesn’t even
17 discuss the issue. Petitioner has simply proceeded as if the City Council completely adopted the
18 state statutes.

19 The Commission is not free to re-write the SDMC to its liking. Without the “source of
20 income” analysis relied upon by the Commission its allegations fail.

21 **2. THE GOVERNMENT CODE SPECIFICALLY EXCLUDES ANY INCOME**
22 **FROM ANY SOURCE OUTSIDE SAN DIEGO**

23 It is again useful to return to the SDMC economic interest disqualification section
24 Ms. Graham allegedly violated, Section 27.3561, which states,
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1 It is unlawful for any City Official to knowingly influence a municipal
2 decision if it is reasonably foreseeable that the municipal decision will
3 have a material financial effect on:

4 (4) any person from whom a City Official or a member of the
5 City Official's immediate family has received (or by whom you have
6 been promised) \$500 or more in income within twelve months prior to
7 the municipal decision...

8 Because "income" is not a defined term within the SDMC, both parties agree the correct
9 definition of the term is found at Government Code section 82030. The Commission's accusation
10 correctly quotes the first half of the "income" definition but ignores the second half. The entire
11 definition is as follows:

12 (a) "Income" means. . . payment received. . . Income of an
13 individual also includes a pro rata share of any income of any
14 business entity. . . in which the individual. . . owns a 10% interest or
15 greater. Income. . . does not include income received from any
16 source outside the jurisdiction and not doing business within the
17 jurisdiction, not planning to do business within the jurisdiction, or
18 not having done business within the jurisdiction during the two years
19 prior to the time any. . . action is required under this
20 title.(underlining added).

21 Ms. Graham's income came from NK Ventures. The Commission concedes throughout
22 its Final Administrative Complaint that N-K Ventures was a Florida entity, doing business in
23 Florida and never did or intended to do business in the City of San Diego. RL Lantana, which
24 developed Florida project and paid N-K Ventures is also an out of state entity that has also never
25 done business in San Diego.

26 The Government Code specifically excluded income from NK Ventures and RL Lantana
27 as a basis for disqualification. Despite the Government Code's unambiguous direction that
28 income from "any" source outside the jurisdiction was to be excluded, Petitioner is using RL
Lantana or NK Ventures income as the basis of it's accusation. We believe that the word "any"
in the Government Code means "any" and not "any except as otherwise described in CCR
18703.3". Petitioner has, without support, added exceptions to the Government Code that

1 contradict it's plain meaning.

2 It cannot be overlooked that in other portions of the SDMC the ordinance refers to and
3 adopts specific portions of the California Code of Regulations. For example in this same section
4 of the ordinance "material financial effect" is defined by reference to CCR sections 18705
5 through 18705.5. The drafters of the City ordinance were clearly aware of the CCR definitions
6 and did not include CCR's "source of income" definitions as a part of the ordinance.

7 A significant problem with the Commission's analysis is that city employees would have
8 no way of knowing that the Government Code definition of income should be ignored in favor of
9 the CCR definition urged by Petitioner.

10 **3. DIRECTLY VS. INDIRECTLY INVOLVED**

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12 Even assuming arguendo that Petitioner's "source of income" analysis is correct Ms.
13 Graham still was not required from withdrawing from participating in the Ballpark Village
14 project.

15 The state "source of income" statutes make a distinction between corporations that are
16 directly involved in a project and those who are indirectly involved in a project. CCR 18705.3.
17 We believe it is clear that Lennar was indirectly involved in the Ballpark Village project.
18 Petitioner argues Lennar was directly involved. This is an important distinction because if Lennar
19 was indirectly involved in the Ballpark Village project then Ms. Graham would have had to
20 foresee that the governmental decision would result in an increase or decrease of \$10,000,000 or
21 more in Lennar's assets. Petitioner does not assert that the ten million dollar threshold has been
22 met.

23 The Commission Final Administrative Complaint correctly states, "A business entity is
24 directly involved in a decision before the official's agency when it initiates the proceeding, is a
25 named party to the proceeding, or is the subject of the proceeding."¹ Lennar does not fit into any
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28 ¹ See Paragraph 14, page 5, lines 20-22 of the Commission's Final Administrative Complaint.

1 of the quoted categories. The entity that was before the CCDC was Ballpark Village LLC, not
2 Lennar. The best evidence of this is the OPA, which says on its title pages that the agreement is
3 by and between the Redevelopment Agency of the City of San Diego and the participant -
4 Ballpark Village LLC.

5
6 There has been no showing that the decisions Ms. Graham allegedly influenced resulted in
7 an increase or decrease in Lennar's assets of \$10,000,000 or more. Without such a showing the
8 allegations should be dismissed.

9
10 **4. PETITIONER'S INTERPRETATION OF THE ORDINANCE WAS NOT**
11 **FORESEEABLE**

12 Petitioner and Respondent agree that Ms. Graham cannot have violated the ordinance
13 unless it was "reasonably foreseeable" that the municipal decision would have a material financial
14 effect" on petitioner. A material financial effect on an economic interest is "reasonably
15 foreseeable" if it is substantially likely that one or more of the materiality standards will be met as
16 a result of the governmental decision. (See Cal. Code of Reg. 18706(a)). An effect need not be
17 certain to be considered "reasonably foreseeable," but it must be more than a mere possibility.
18 (*In re Thorner* (1975) FPPC Ops. 198.)

19 Ultimately, whether a material financial effect is foreseeable at the time a decision is made
20 depends on facts and circumstances peculiar to each case. (See *In re Thorner*). In this case it was
21 not reasonably foreseeable for Ms. Graham to conclude that her participation in 2007, while
22 performing her normal duties as CCDC President, she was influencing decision that would have a
23 \$10,000,000 material impact on Lennar, a Fortune 500 company.

24 The difference between the City and state ethics laws are so complex that a good faith
25 analysis of the City Ordinance would cause a reasonable person to believe that out of state
26 payments are excluded from disqualification rules and that Lennar's participation was not direct.
27 In fact, Ms. Graham never met with or spoke to a Lennar representative during the entire project.
28

1 **B. THE ALLEGED ACTS BY MS. GRAHAM SHOULD BE MERGED BECAUSE**
2 **THEY ACTUALLY CONSTITUTE TWO VIOLATIONS**

3 Petitioner alleges that Ms. Graham should have disqualified herself from participating in
4 the Ballpark Village OPA modifications. Instead of alleging a single violation of the SDMC,
5 Petitioner has alleged 34 violations. Petitioner's position is that any time Ms. Graham wrote a
6 letter, made a phone call, attended a meeting, sent an e-mail or engaged in a discussion about
7 modifying the OPA she committed a separate and distinct violation of the ordinance. We
8 disagree. That position is inconsistent with case law and bad policy.

9 This issue has been decided in both civil and criminal cases. In civil cases there is a
10 prohibition against "splitting" a single cause of action into many pieces. In criminal cases there is
11 a similar rule (Penal Code section 654) that prohibits double punishment.

12 For example, in *Miller v. Collectors Universe, Inc.*, 159 Cal. App. 4th 988, (Cal. App. 4th
13 Dist. 2008) a sports memorabilia company wrongfully issued 14,060 certificates of authenticity
14 (COA's). The plaintiff claimed that the issuance of each certificate was a separate offense. If
15 there were separate offenses the defendant would be liable for millions in fines. The court
16 analyzed the issue as follows:

17 But we must still decide whether Miller suffered a new violation of his
18 primary right with each new COA, i.e. "separate wrongs" (4 Witkin, Cal.
19 Procedure, supra, Pleading, § 40, p. 100), such as to constitute 14,060 causes of
20 action. Our decision is informed by those cases that have considered whether a
series of related acts, having a common purpose or committed pursuant to a
common plan or scheme, but resulting in the same injury or harm, give rise to a
single cause or multiple causes of action...

21 Thus, in *Conger v. White* (1945) 69 Cal. App. 2d 28 the plaintiff alleged
22 she was the victim of a conspiracy to defraud her in connection with the purchase
23 and sale of three separate parcels of real property. (Id. at pp. 30, 41.) "All of the
24 acts of defendants were alleged to have been done in pursuance of this common
25 purpose and design... Despite the fact the plaintiff had been defrauded in three
separate property transactions, the court held that the "series of fraudulent acts
committed in the execution of an entire scheme to divest plaintiff of [her] property
states a single cause of action." (Ibid.)

26 In *Tooke v. Allen* (1948) 85 Cal. App. 2d 230 the defendant landlord
27 committed a series of wrongful acts against his tenant . . . (Id. at p. 234.) . . . But
28 the court held the tenant's right of peaceful possession was the primary right
violated by the landlord's conduct. Noting the gravamen of the defendant's offense

1 was "the pursuit of a purpose of unrelenting persecution by petty annoyances," the
2 court held that despite the series of different acts, only a single cause of action was
stated ...

3 Finally, in another fraud case, *Stoner v. Williams* (1996) 46 Cal.App.4th
4 986, the defendant was charged with committing seven separate fraudulent acts.
(Id. at pp. 993-994.) ... (T)he court held only a single cause of action was stated
5 despite "multiple, alternative fraudulent acts" (Id. at p. 1004.)

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7 Here, 14,060 COA's were issued to authenticate 14,060 separate items.
8 But they were all issued for a common purpose pursuant to a common plan: to use
Miller's name as a member of the panel of authentication experts....

9 In sum, Miller's claim against Collectors for the misappropriation of his
10 name under section 3344(a) constitutes a single cause of action for which his
statutory damages are \$ 750. Miller v. Collectors Universe, Inc., 159 Cal. App.
11 4th 988, 1007-1008 (Cal. App. 4th Dist. 2008).

12
13 In criminal cases the courts have reached the same result.. For example in *People v.*
14 *Barthel* (1965)231 Cal. App. 2d 827 the defendant was a bookmaker. She was separately charged
15 with bookmaking, occupying a room with betting paraphernalia and recording or registering bets.
16 The court ruled that the defendant could not be punished separately for all three acts:

17 "Whether a course of criminal conduct is divisible and therefore
18 gives rise to more than one act within the meaning of section 654
19 depends on the intent and objective of the actor. If all of the offenses
were incidental to one objective, the defendant may be punished for any
one of such offenses but not for more than one." (55 Cal.2d at p. 19.)....

20 The ultimate question in this case is whether the act or course of
21 conduct of the defendant was committed with an intent and objective
22 from which it can be concluded that each offense was a divisible
transaction.

23 The intent and objective of the defendant was to engage in
24 bookmaking. Occupying the place containing the paraphernalia and
25 registering bets were incidental and the means to her primary objective,
which was obtaining money by placing bets. We hold therefore, that the
26 trial court erred in not applying section 654. (citations omitted)

27 In *People v. Bailey* (1961), 55 Cal 2d 514 the defendant was accused of stealing welfare
28 funds. The money was stolen in small amounts over the period of many months. The question

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III.

CONCLUSION

For the reasons stated above the alleged ethics violations by Ms. Graham should be dismissed or merged into one violation.

DATED: April 23, 2010

HIGGS, FLETCHER & MACK LLP

By:


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