

# **CITY OF OAKLAND**

## **Public Ethics Commission**

Marc Pilotin, Chair  
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Whitney Barazoto, Executive Director

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TO: Public Ethics Commission  
FROM: Milad Dalju, Deputy Director and Chief of Enforcement  
Whitney Barazoto, Executive Director  
DATE: July 21, 2017  
RE: *In the Matter of Lynette Gibson McElhaney*; PEC Case No. 15-07; Investigation Summary

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### **I. INTRODUCTION**

On February 11, 2015, the *East Bay Express* published an article in which it claimed that public records showed that Councilmember Lynette Gibson McElhaney violated several City laws in her attempts to block a housing development from being built next to her home in West Oakland.

On February 18, 2015, Commission staff (Staff) opened a proactive investigation into the allegations described in the *East Bay Express* article. On February 19 and March 6, 2015, the Commission received two sworn complaints regarding the alleged violations described in February 11, 2015, *East Bay Express* article.

On June 1, 2016, the Alameda County Grand Jury published a report that included findings that an Oakland City Councilmember attempted to interfere with and improperly influence an approval process by the City and misused City resources for her personal benefit in relation to a townhouse project next door to her Oakland residence. One of the recommendations of the report was that the Commission conduct its own investigation of the facts surrounding the townhouse project and take appropriate enforcement actions.

The Commission staff's investigation found that, as part of Councilmember McElhaney's participation in the Planning Commission's appeal process related to a development project directly adjacent to her home, Councilmember McElhaney solicited and received free professional services amounting to gifts from JRDV Urban Interational (JRDV), a company that was doing business with the City on multiple projects. This report summarizes the evidence showing that Councilmember McElhaney 1) violated the City's gift limits by receiving gifts in excess of the City's annual gift limit from JRDV; 2) violated the City's conflict of interest rules by voting to extend the contract with, and increase the amount available to pay, to JRDV, and; 3) violated the City's economic interest disclosure requirements by failing to report the gifts she received from JRDV on her statement of economic interests.

Some of the alleged violations described the *East Bay Express* article and the Alameda County Grand Jury Report occurred prior to December 9, 2014. The Commission does not have

jurisdiction over alleged violations of the City's conflict of interest rules, misuse of city resources rules, and non-interference rule, that occurred prior to December 9, 2014. Therefore this report only addresses alleged violations that occurred on or after December 9, 2014.

## **II. PROCEDURAL HISTORY**

Staff opened its investigation on February 18, 2015, to determine whether Councilmember Lynette Gibson McElhaney's conduct related to a developer's zoning application to build on a vacant lot next to her home was in violation of the Oakland Government Ethics Act.

On July 22, 2016, the Commission issued an administrative subpoena that required Councilmember McElhaney to produce certain records in her control or possession. The Commission's subpoena was served on Councilmember McElhaney on July 26, 2016, with a response deadline of August 10, 2016. Councilmember McElhaney did not provide a response to the Commission's subpoena by the August 10, 2016, deadline.

On August 11, August 26, August 31, and again on September 1, 2016, Staff contacted Councilmember McElhaney, informing her that she missed the deadline to respond to the Commission's subpoena and that Staff would pursue a court order if she continued to refuse to comply with the Commission's subpoena. Each time, Councilmember McElhaney requested an extension to the deadline, and each time Staff granted an extension to the deadline. On September 1, 2016, Councilmember McElhaney asked for, and Staff granted, an extension to September 2, 2016. However, by October 5, 2016, Councilmember McElhaney had still not provided a response to the Commission's subpoena.

On October 5, 2016, Staff filed a petition with the Alameda County Superior Court (the Court) requesting an order from the Court directing Councilmember McElhaney to appear before the Court to show cause for her failure to comply with the Commission's subpoena and an order compelling Councilmember McElhaney to comply with the Commission's subpoena. On October 7, 2016, the Court issued an order that Councilmember McElhaney appear before the Court on November 7, 2016, to show cause for her failure to comply with the Commission's subpoena.

On November 3, 2016, the Court issued a tentative ruling granting Staff's petition and ordering Councilmember McElhaney to respond to and comply with the Commission's subpoena on or before November 23, 2016. The tentative ruling was not challenged and became the order of the Court on November 7, 2016.

On November 23, 2016, Councilmember McElhaney's attorneys provided a response to the Commission's subpoena.

On December 6, 2016, Staff contacted Councilmember McElhaney's attorneys and requested an interview with Councilmember McElhaney. On December 21, 2016, Councilmember McElhaney's attorneys informed Staff that she was available for an interview on January 19, 2017. On January 19, 2017, Staff interviewed Councilmember McElhaney with her attorneys present.

On March 13, 2017, Staff completed its investigation and started settlement negotiations with Councilmember McElhaney through her attorneys. To date, Staff and Councilmember McElhaney have not been able to reach a proposed settlement agreement.

### **III. VIOLATIONS**

#### Count 1: Receiving Gifts from a Restricted Source in Excess of the Annual Gift Limit

Between December 17, 2014, and December 22, 2014, Councilmember McElhaney solicited and accepted gifts in the form of free professional services from JRDV totaling approximately \$800 in value.

During that time, JRDV was a restricted source to Councilmember McElhaney because she was a member of the City Council, with whom JRDV was doing business with pursuant to the Façade Agreement and the Coliseum City Project. Councilmember McElhaney knew that JRDV was doing business with the City Council because on December 16, 2014, a day before she started soliciting and accepting gifts from JRDV, she voted to approve and forward to City Council an extension of the Façade Agreement and an increase in funds available to pay JRDV pursuant to the Façade Agreement. She had also voted several times to extend the Coliseum City Agreement between the City and JRDV.

As a City Councilmember, Councilmember McElhaney was prohibited from soliciting or accepting gifts valued at more than \$250 cumulatively in a single calendar year from a single person. Additionally, because Councilmember McElhaney knew that JRDV was a restricted source, she was prohibited from soliciting or receiving gifts valued at more than \$50 cumulatively in a single calendar year from JRDV. By soliciting and accepting gifts totaling approximately \$800 in value from JRDV in 2014, Councilmember McElhaney violated Government Ethics Act sections 2.25.060(C)(2) and 2.25.060(C)(3).

#### Count 2: Making a Governmental Decision in which a Public Servant has a Financial Interest

Because Councilmember McElhaney received gifts from JRDV in excess of the gift limit, she was prohibited from making, participating in, or attempting to influence any City decision that occurred within 12 months after she exceeded the gift limit and involved the issuance, renewal, approval, denial or revocation of a contract with JRDV.

By voting on January 6, 2015, to extend the Façade Agreement and increase the funds available to pay JRDV for services provided pursuant to the Façade Agreement, Councilmember McElhaney violated Government Ethics Act section 2.25.040(A).

#### Count 3: Failing to Report Gifts Received from a Restricted Source

Councilmember McElhaney was required to disclose by April 1, 2015, any gifts received between January 1 and December 31, 2014, from a single source that cumulated to \$50 or more in value.

By failing to disclose by April 1, 2015, all gifts she received from JRDV in 2014, which totaled approximately \$800 in value, Councilmember McElhaney violated Government Ethics Act section 2.25.040(B).

#### **IV. SUMMARY OF LAW**

##### **A. Jurisdiction**

The Government Ethics Act was adopted by City Council on December 9, 2014, and it authorizes the Commission to impose an administrative penalty of up to \$5,000 per violation, or three times the amount the person failed to report properly or unlawfully contributed, expended, gave or received, whichever is greater, on any person who commits a violation of the Government Ethics Act.<sup>1</sup> The enforcement authority established by the Government Ethics Act does not apply to alleged violations that occurred prior to December 9, 2014.<sup>2</sup>

##### **B. Investigation Summary**

At the conclusion of an investigation of alleged violations of the Government Ethics Act, Staff must prepare a written report that includes a summary of the evidence gathered and a recommendation of whether there is probable cause to believe that a violation occurred.<sup>3</sup> Upon review of the written report, the Commission may decide to dismiss, close, request further investigation, request that the Staff seek a settlement, or refer the matter to an administrative hearing.<sup>4</sup>

If the Commission decides to refer the matter to an administrative hearing, it shall decide at that time whether to sit as a hearing panel or to delegate its authority to gather and hear evidence to one or more of its members or to an independent hearing examiner.<sup>5</sup>

##### **C. Gift Limit**

A Public Servant, including City Councilmembers, may not solicit or accept any gifts valued at more than \$250 cumulatively in a single calendar year from any single individual, organization, or group of individuals working together.<sup>6</sup> Additionally, a Public Servant may not solicit or accept any gifts valued at more than \$50 cumulatively in a single calendar year from any person who the Public Servant knows, or has reason to know, is a restricted source.<sup>7</sup> A restricted source is any individual, organization, or group of individuals working together, doing business with or seeking

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<sup>1</sup> Oakland Municipal Code (O.M.C.) § 2.25.080(C)(3).

<sup>2</sup> O.M.C. § 2.25.020(D).

<sup>3</sup> Commission's Complaint Procedures § III(C).

<sup>4</sup> Commission's Complaint Procedures § IV(A).

<sup>5</sup> Commission's Complaint Procedures § V(A).

<sup>6</sup> O.M.C. §§ 2.25.030(D) and 2.25.060(C)(2); the City's gift limit provision incorporates, by reference, the State's definition of "gift."

<sup>7</sup> O.M.C. § 2.25.060(C)(3).

to do business with the department of the Public Servant or who during the prior 12 months knowingly attempted to influence the Public Servant in any legislative or administrative action.<sup>8</sup>

#### D. Economic Interest Disclosure Requirements

Every City Councilmember is required to disclose reportable interests by filing a statement of economic interests within 30 days of assuming office, annually thereafter by April 1, and within 30 days of leaving office.<sup>9</sup> Every required statement of economic interest must be filed with the City Clerk's Office, which keeps a copy and sends the original to the California Fair Political Practices Commission as the official filing officer for all City Councilmembers.<sup>10</sup>

Every annual statement of economic interests must include all income received by the City Councilmember during the calendar year covered by the annual statement of economic interest.<sup>11</sup> Income includes any gifts from a single source that cumulates to \$50 or more in value during the time covered by the statement of economic interests.<sup>12</sup> If the City Councilmember receives a gift or gifts from a single source cumulating in \$50 or more in value during a single calendar year, the City Councilmember is required to disclose on his or her annual statement of economic interests the name and address of the source of the gifts and the amount and date on which each gift was received.<sup>13</sup>

#### E. Conflict of Interest Rules

A Public Servant shall not make, participate in making, or seek to influence a decision of the City in which the Public Servant knows, or has reason to know, he or she has a financial interest.<sup>14</sup> A Public Servant 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 Public Servant.<sup>15</sup>

A Public Servant makes a governmental decision if he or she votes to obligate or commit his or her agency to any course of action.<sup>16</sup>

A Public Servant has an economic interest in any source of gifts from whom the Public Servant has received gifts that cumulate in value to more than the annual gift limit, provided or promised to, or received by the Public Servant in the immediate 12 months prior to the time that the City's decision is made.<sup>17</sup>

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<sup>8</sup> Government Code (G.C.) § 82047 and O.M.C. § 2.25.060(C)(3).

<sup>9</sup> O.M.C. § 2.25.040(B), and G.C. §§ 87202, 87203, and 87204; the City's economic interest disclosure requirement incorporates, by reference, the State's economic interest disclosure requirements, definitions, and exceptions.

<sup>10</sup> G.C. § 87500(f).

<sup>11</sup> G.C. § 87203.

<sup>12</sup> G.C. § 87207.

<sup>13</sup> *Id.*

<sup>14</sup> O.M.C. § 2.25.040(A) and GC § 87100; the City's conflict of interest rule incorporates, by reference, the State's conflict of interest requirements, definitions, and exceptions.

<sup>15</sup> G.C. § 87103.

<sup>16</sup> 2 Cal. Code of Regs. § 18704(a)

<sup>17</sup> G.C. § 87103(e).

The financial effect of a government decision on the source of a gift or gifts to the Public Servant is material if the source is a claimant, applicant, respondent, contracting party, or is otherwise named or identified as the subject of the proceeding.<sup>18</sup>

The financial effect of a decision on the economic interest of the Public Servant is presumed to be reasonably foreseeable if the economic interest is a named party in, or the subject of, the decision before the official's agency.<sup>19</sup> An economic interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of a contract with the economic interest.<sup>20</sup>

## **V. SUMMARY OF THE EVIDENCE**

Councilmember McElhaney was elected to City Council in November 2012, and has been a City Councilmember since January 2013. Councilmember McElhaney was the president of the City Council from January 2015 until January 2017.

### **A. Mr. Brecht's Zoning Application**

On January 23, 2014, Robert Brecht submitted a zoning application to the Planning and Building Department (Planning Department) for a proposed project to build a five-unit residential building on a vacant lot directly next to a home that was, at all relevant times, owned and occupied by Councilmember McElhaney.

On April 2, 2014, the Planning Department approved Mr. Brecht's application.

On April 14, 2014, Clarence McElhaney, Councilmember McElhaney's husband at all relevant times, appealed the Planning Department's decision to approve Mr. Brecht's application.

On August 6, 2014, the Planning Commission heard Mr. McElhaney's appeal and continued the matter to its December 17, 2014, meeting.

### **B. Councilmember McElhaney's Solicitation and Acceptance of Gifts from JRDV**

On December 17, 2014, Councilmember McElhaney called Art Clark, who was, at all relevant times, an architect and project manager at JRDV. She requested that Mr. Clark or Morton Jensen appear on her behalf at the Planning Commission's hearing that evening regarding her husband's appeal to explain the alleged technical inconsistencies in the Planning Department staff's arguments against the appeal. Mr. Clark informed her that he was not available to appear on her behalf that evening due to a prior engagement, and put her through to Mr. Jensen. At all relevant times, Mr. Jensen was the sole owner, as well as the principal architect, of JRDV. Mr. Jensen agreed to testify on her behalf at that evening's Planning Commission hearing regarding Mr. McElhaney's appeal. During the call Mr. Jensen and Councilmember McElhaney agreed that Mr.

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<sup>18</sup> 2 Cal. Code of Regs. § 18702.4.

<sup>19</sup> 2 Cal. Code of Regs. § 18701(a).

<sup>20</sup> *Id.*

Jensen would review Mr. Brecht's lot and application in-person in order to prepare to testify in support of Mr. McElhaney's appeal.

Around 5:00 p.m., Mr. Jensen met Councilmember McElhaney at her residence where he reviewed Mr. Brecht's lot and Mr. Brecht's application. In preparation for the hearing that night, Mr. Jensen also created an alternative design to Mr. Brecht's design and Mr. Clark called several planners to discuss Mr. Brecht's application.

The Planning Commission heard Mr. McElhaney's appeal at 6:00 p.m. Mr. Jensen and Councilmember McElhaney each testified in support of Mr. McElhaney's appeal. During her testimony, Councilmember McElhaney presented Mr. Jensen's alternative design to the Planning Commission.

At the conclusion of the hearing, the Planning Commission denied Mr. McElhaney's appeal and approved Mr. Brecht's application with a few conditions to be reviewed by the Planning Commission's Design Review Subcommittee.

Before leaving the hearing, Mr. Jensen approached Mr. Brecht's architect, stated that he was asked by Councilmember McElhaney to review Mr. Brecht's design and testify in support of Mr. McElhaney's appeal, and offered to have JRDV redesign the project for Mr. Brecht without cost. Mr. Jensen also discussed possible alternatives to Mr. Brecht's design with the City Planner assigned to Mr. Brecht's application.

A few hours after the hearing, Mr. Jensen sent Councilmember McElhaney an email in which he offered to continue to try to convince Mr. Brecht and Mr. Brecht's architect to accept an alternative design. Councilmember McElhaney responded and stated, in part, "anything you can do will be great... You're the best!"

On December 18, 2014, Councilmember McElhaney, Mr. Jensen, and Mr. Clark had several conversations about Mr. Jensen and Mr. Clark's research into Mr. Brecht's application. In one email, Mr. Jensen wrote to Councilmember McElhaney that Mr. Clark "is leading a Coliseum City community meeting. He will get back to you in the AM tomorrow."

On December 19, 2014, Mr. Clark continued to research possible objections to Mr. Brecht's application, including discussing the matter with several planners, and relayed the information he found to Councilmember McElhaney. In response, Councilmember McElhaney asked Mr. Clark to draft a letter with the objections to Mr. Brecht's project to send to the Director of the Planning Department. Mr. Clark agreed to draft the letter on behalf of Councilmember McElhaney.

On December 22, 2014, Mr. Clark sent an email to Councilmember McElhaney with a letter attached that outlined several ways that Mr. Brecht's application allegedly did not comply with the City's Planning Code. Around the same time, Mr. Jensen created a digital drawing of the alternative design Councilmember McElhaney proposed at the December 17, 2014, Planning Commission hearing, and sent the design to Rachel Flynn, who was, at all relevant times, the director of the Planning Department.

On January 7, 2015, Tanya Boyce, a professional planner who represented Mr. McElhaney in the appeal, spoke to employees of the Planning Department about the appeal at the Planning Department's public counter.

On January 8, 2015, Ms. Boyce emailed several employees of the Planning Department, including Ms. Flynn, in which she presented arguments against the Planning Commission's approval of Mr. Brecht's application, including the points drafted by Mr. Clark for Councilmember McElhaney.

On January 9, 2015, the Planning Department, at the direction of Ms. Flynn, forwarded the alternative design produced by Mr. Jensen to Mr. Brecht. On the same day, Ms. Flynn sent several emails to Mr. Brecht in which she encouraged him to consider the alternative design and informed him that the neighbors had the right to appeal the Planning Commission's decision to the Superior Court.

On February 11, 2015, the Planning Commission's Design Review Subcommittee reviewed Mr. Brecht's application, found that the application sufficiently met the conditions of approval, and finalized the approval of the application. To date, Mr. Brecht has not applied for a building permit for his project.

On April 1, 2015, Councilmember McElhaney timely filed an annual statement of economic interests for the January 1 through December 31, 2014, period. Councilmember McElhaney's 2014 annual statement of economic interests did not disclose any gifts received from JRDV, Mr. Jensen, or Mr. Clark.

The total fair market value of the services that JRDV provided to Councilmember McElhaney in 2014 was approximately \$800. JRDV never billed Councilmember McElhaney for any of the services Mr. Jensen and Mr. Clark provided her, and Councilmember McElhaney never paid for any of the services they provided her.

### C. JRDV's Business with the City: the Coliseum City Project

On March 6, 2012, the City Council adopted a resolution authorizing an Exclusive Negotiating Agreement with JRDV and two other firms "for the purposes of studying and evaluating the feasibility of, and negotiating terms and conditions for, the potential development of the Coliseum City project at the Oakland-Alameda County Coliseum and surrounding environs." The resolution authorized the City to enter into the agreement with JRDV and two other firms for 12 months, with the option of extending the agreement for an additional 6 months without City Council approval. The resolution also authorized payments of up to \$1.6 million for JRDV's services. At the time, Councilmember McElhaney was not a City Councilmember.

On March 12, 2012, the City entered into a 12-month agreement with JRDV, with an option to extend the contract for an additional 6 months. (Coliseum City Agreement.) The terms of the Coliseum City Agreement required the City to pay up to \$1.6 million for the services of JRDV and the two other firms, and designated JRDV as the lead firm and in charge of communicating with the City and invoicing the City for services performed pursuant to the agreement.

On July 30, 2013, the City Council adopted a resolution authorizing a 45-day extension of the Coliseum City Agreement. Councilmember McElhaney voted in favor of the resolution. On September 6, 2013, the City and JRDV extended the terms of the Coliseum City Agreement for 45 days.

On October 15, 2013, the City Council adopted a resolution authorizing a 12-month extension of the terms of the Coliseum City Agreement. Councilmember McElhaney voted in favor of the resolution. On October 21, 2013, the City and JRDV extended the terms of the Coliseum City Agreement for 12 months, with an option of an additional six-month extension without Council approval.

On December 10, 2013, the City Council adopted a resolution authorizing the removal of one of two firms besides JRDV from the Coliseum City Agreement. Councilmember McElhaney voted in favor of the resolution.

On October 20, 2014, the City and JRDV extended the Coliseum City Agreement to January 21, 2015.

On January 20, 2015, the City and JRDV extended the Coliseum City Agreement to April 21, 2015.

On March 31, 2015, the proposed zoning regulations developed pursuant to the Coliseum City Agreement were presented to the City Council. On April 21, 2015, upon a second reading of the findings and recommendations, the City Council adopted the recommended new zoning regulations for the Coliseum Area.

The City paid JRDV approximately \$1.6 million pursuant to the Coliseum City Agreement.

#### D. JRDV's Business with the City: the West Oakland Specific Plan

On June 29, 2011, the City entered into an agreement with JRDV to develop the West Oakland Specific Plan and associated Environmental Impact Report (West Oakland Specific Plan Agreement). Under the terms of the West Oakland Specific Plan Agreement, the City would pay JRDV up to \$650,000 for services performed between July 1, 2011, and April 30, 2013. Pursuant to the West Oakland Specific Plan Agreement, and at all relevant times, Mr. Clark was an employee of JRDV and the Project Manager of the West Oakland Specific Plan.

On April 25, 2013, the City extended the West Oakland Specific Plan Agreement to April 30, 2014, and increased the total compensation to JRDV from \$650,000 to \$723,920.

On March 5, 2014, the City extended the West Oakland Specific Plan Agreement to December 31, 2014, and increased the total compensation to JRDV from \$723,920 to \$763,420.

On September 29, 2014, the City extended the West Oakland Specific Plan Agreement until the remaining work was completed by JRDV but no later than December 2014, and increased the total compensation to JRDV from \$763,420 to \$800,000.

As part of Mr. Clark's duties as the Project Manager, he was in regular contact with Councilmember McElhaney in her capacity as the councilmember representing West Oakland. Mr. Jensen, as the owner and principal architect of JRDV, was also in regular contact with Councilmember McElhaney in her capacity as the councilmember representing West Oakland. A draft of the West Oakland Specific Plan developed by JRDV was presented to the City Council at its July 15, 2015, meeting, and adopted by City Council at its July 29, 2015, meeting.

The City paid JRDV approximately \$800,000 pursuant to the West Oakland Specific Plan Agreement.

#### E. JRDV's Business with the City: the Façade and Tenant Improvement Program

On July 1, 2011, the City entered into an agreement with JRDV to "provide on call design services to the Community and Economic Development Agency ... to provide services for various façade and physical improvement projects in one or more commercial districts in an amount not to exceed \$5,000 per project" (Façade Agreement). The terms of the Façade Agreement included that JRDV would provide services from July 1, 2011, through June 20, 2013, and that the City would pay JRDV up to \$115,000 for those services. Mr. Jensen represented JRDV in the Façade Agreement.

On December 19, 2013, the City extended the Façade Agreement to December 31, 2014.

On December 16, 2014, the Council's Community and Economic Development Committee approved and forwarded to City Council a resolution to extend the Façade Agreement to June 30, 2016, and increase the funds available to pay JRDV from \$115,000 to \$125,000. Councilmember McElhaney, who at the time was a member of the Council's Community and Economic Development Committee, voted in favor of approving and forwarding the resolution to City Council.

On January 6, 2015, the City Council adopted the resolution to extend the Façade Agreement to June 30, 2016, and increase the funds available to pay JRDV from \$115,000 to \$125,000. Councilmember McElhaney voted in favor of the resolution.

The City paid JRDV approximately \$125,000 pursuant to the Façade Agreement.

## **VI. AGGRAVATING AND MITIGATING FACTORS**

### Count 1: Receiving Gifts from a Restricted Source in Excess of the Annual Gift Limit

Accepting a gift in excess of the legal gift limit is a serious violation, especially when the source of the gifts is a restricted source.

Count 1 is aggravated by the fact that Councilmember McElhaney solicited gifts from a firm that was doing business with the City and had done business with the City in the years leading up to the time that she solicited the gifts. The day before Councilmember McElhaney solicited the gifts,

she voted to authorize extending a contract with JRDV. Additionally, the value of the gifts she solicited and accepted from JRDV were sixteen times the applicable gift limit.

Councilmember McElhaney asserts that the violation was inadvertent because: 1) she did not realize the free services she solicited and accepted amounted to gifts under the City's law, and; 2) she believed she was requesting the services on behalf of her neighborhood and not on behalf of herself. Councilmember McElhaney also asserts that the law is unclear and that her misunderstanding was partially due to the lack of education she received regarding the City's gift limits.

The Commission has the authority to impose up to a \$5,000 penalty for Count 1. Pursuant to the Enforcement Penalty Guidelines, the base-level penalty amount for a violation of the City's gift limits is \$1,000 plus the value of the gifts that exceeded the gift limit. Therefore the base-level penalty amount for Count 1 is \$1,750.

### Count 2: Making a Governmental Decision in which a Public Servant has a Financial Interest

Making a government decision in which the Public Servant has a disqualifying financial interest is a very serious violation because it creates the appearance that the City's decision was a product of that conflict of interest.

Count 2 is aggravated by the fact that Councilmember McElhaney solicited and accepted the gifts from JRDV a day after she voted to accept and forward the decision regarding the Façade Agreement to the City Council. She then voted to extend the contract with JRDV and to make the funds available to pay JRDV less than a month after she solicited and accepted the gifts from JRDV.

Councilmember McElhaney asserts that because she did not realize she received reportable gifts from JRDV, she did not realize that she could not vote on a JRDV contract. She also asserts that the fact that the vote to approve the contract was unanimous mitigates the violation.

The Commission may impose up to a \$5,000 penalty for Count 2. Pursuant to the Enforcement Penalty Guidelines, the base-level penalty amount for a violation of the City's conflict of interest rules is \$3,000.

### Count 3: Failing to Report Gifts Received from a Restricted Source

Disclosure of economic interests is important to provide transparency and prevent conflicts of interests. Failure to disclose an economic interest on a statement of economic interests is a serious violation because it deprives the public and the Commission of important information about a Public Servant's economic interests and has the potential to conceal conflicts of interest, which it did in this matter.

Count 3 is aggravated by the fact that Councilmember McElhaney failed to report gifts totaling \$800 in value from a local firm that was involved in several large City projects, including the West Oakland Specific Plan and the Coliseum City Project, in which Councilmember McElhaney, in

her capacity as a City Councilmember, was involved. Therefore, there was significant public interest in the knowledge that Councilmember McElhaney received free services from JRDV.

Councilmember McElhaney asserts that she did not know that she received reportable gifts from JRDV and therefore did not know she had to report it on her statement of economic interests.

The Commission may impose up to a \$5,000 penalty for Count 3. Pursuant to the Enforcement Penalty Guidelines, the base-level penalty amount for a violation of the City's economic interest disclosure requirements is \$1,000.

## **VII. RECOMMENDATION**

In light of the evidence that Councilmember McElhaney committed three violations of the Government Ethics Act, and the fact that Staff and Councilmember McElhaney have not reached a proposed settlement agreement after four months of negotiating, Staff recommends that the Commission refer this matter to an administrative hearing pursuant to Section IV(A) of the Commission's Complaint Procedures. If the Commission refers this matter to an administrative hearing, Staff recommends the Commission delegate its authority to gather and hear evidence to a single Commissioner pursuant to Section V(A) of the Commission's Complaint Procedures.