

## Item 6 - Staff Memorandum



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Whitney Barazoto, Executive Director

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TO: Public Ethics Commission  
FROM: Kellie F. Johnson, Enforcement Chief  
DATE: April 20, 2022  
RE: Case No. 18-16; In the matter of Ener Chiu prepared for the May 11, 2022, Public Ethics Commission Meeting

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### BACKGROUND:

On May 9, 2018, the City of Oakland Public Ethics Commission received a complaint alleging that Respondent, Ener Chiu, an employee of the East Bay Asian Local Development Corporation (EBALCD) violated the Oakland Campaign Reform Act by making a contribution to Council member Abel Guillen within months of the City signing a Disposition and Development Agreement (DDA) with EBALDC. Based on the allegations in the complaint, staff opened an investigation to determine whether the Respondent violated the Oakland Campaign Reform Act's Contractor Contribution Ban by making contributions to City of Oakland elected officials, candidates, or their controlled committees. Staff contacted the Respondent several times between October 2021 and March 2022 to reach a resolution. The Respondent has not responded to Staff since February 2022. After close consideration of all the facts and the law, and the reasons explained in this memorandum, Staff recommends that the Commission refer the matter for a hearing.

### SUMMARY OF LAW:

All statutory references and discussions of law pertain to the referenced statutes and laws as they existed at the time of the violations.

#### **Oakland Campaign Reform Act:**

**O.M.C. § 3.12.140 (1) (A)** OCRA prohibits contributions to candidates from City contractors.<sup>1</sup> This prohibition applies to any "person who contracts or proposes to contract with or who amends or proposes to amend such a contract with the City for," among other things, "purchasing or leasing any

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<sup>1</sup> In January 2017, an amended provision of O.M.C. 3.12.040 went into effect expanding the Contractor Contribution Ban to all principals of an entity, including an individual employee, independent contractor or agent of the entity, that represents is authorized to represent the entity before the City in regards to a contract or proposal contract.

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land or building from the City, whenever the value of such transaction would require approval by the City Council.”<sup>2</sup>

For purposes of this law, “contractor” includes the following provisions:

[a]nyone who contracts or proposes to contract with the City for selling or leasing any land or building to the City, or for purchasing or leasing any land or building from the City, whenever the value of such transaction would require approval by the City Council.

If a person is an entity, the restrictions of Subsections A also apply to all of the entity's principals, including, but not limited to, the following:

1. The entity's board chair, president, chief executive officer, chief operating officer, chief financial officer, and any individual who serves in the functional equivalent of one or more of those positions;
2. Any individual who owns an ownership interest in the entity of twenty (20) percent or more; and
3. An individual employee, independent contractor, or agent of the entity, that represents or is authorized to represent the entity before the City in regard to the contract or proposal contract.

The prohibition in section 3.12.140 begins with "commencement of negotiations," which is defined as occurring when a contractor or contractor's agent formally submits a bid, proposal, qualifications or contract amendment to any City Official or when a City Official formally proposes submission of a bid, proposal, qualifications or contract amendment from a contractor or contractor's agent.

"Completion of negotiations" occurs when the City or the School District executes the contract or amendment. "Termination of negotiations" occurs when the contract or amendment is not awarded to the contractor or when the contractor files a written withdrawal from the negotiations, which is accepted by a City Official or an appointed or elected School District officer or employee.

Thus, the prohibition applies from the “commencement of negotiations” until 180 days after the “completion of negotiations.”<sup>3</sup> The “commencement of negotiations” occurs when a contractor or contractor’s agent formally submits a bid, proposal, qualifications or contract amendment to any City Official.<sup>4</sup> The “completion of negotiations” occurs when the City executes the contract or amendment.<sup>5</sup>

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<sup>2</sup> See also OMC § 3.12.140(E)(4), which also specifies that “transactions that require approval by the City Council include but are not limited to ... [c]ontracts for the sale or lease of any building or land to or from the City.”

<sup>3</sup> OMC § 3.12.140(A).

<sup>4</sup> OMC § 3.12.140(G).

<sup>5</sup> OMC § 3.12.140(K). For the purposes of this analysis, the period of time in which contributions by contractors are prohibited is referred to as the “blackout period.”

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**Lobbyist Registration Act:** “Any person who receives or is entitled to receive \$1,000 or more in a calendar month to communicate directly or through agents with any public officials, officers, or designated employees, for the purpose of influencing any action of the City of Oakland (City) qualifies as a lobbyist or (2) whose duties as a salaried employee, officer, or director, of any corporation, organization or association, include communication directly or through agents with any public official, officer, or designated employee, for the purpose of influencing any proposed or pending governmental action of the City. No person may act as a lobbyist before registering as a lobbyist with the City. A lobbyist is required to file a lobbyist registration form with the City every year by January 31.<sup>6</sup> The LRA states that all local governmental lobbyists must register annually before January 31, until s/he has ceased to qualify as a lobbyist and files a notice of termination with the City.”<sup>7</sup>

### TIMELINE OF EVENTS:

- 07/14/15 The City issued a Notice of Offer and Intent to convey a vacant property known as the East 12<sup>th</sup> Street Remainder Site.
- 08/20/15 Bid proposals due.
- 03/15/16 The City Council adopted Resolution No. 86056 authorizing the City Administrator to enter into an Exclusive Negotiating Agreement (ENA) with Developer.
- 01/01/17 OCRA expanded the Contractor Contribution ban to include an entity’s principals, employees, independent contractors, and agents that represent or are authorized to represent the entity before the City regarding a contract.
- 02/15/17 A DDA was executed by the City Administrator and Developer.
- 08/14/17 Since negotiations concluded when the DDA was executed on February 15, 2017, the Contractor Contribution ban applied at least to August 14, 2017 (180 days after February 15, 2017).

### FACTUAL SUMMARY AND ANALYSIS:

On or Between July 2016 and February 2017 Chiu was a salaried employee with the East Bay Asian Local Development Corporation making between \$90K and 100K annually. In his role as a co-project manager of the “E 12<sup>th</sup> Street Remainder Parcel Developer Section,” he was an advocate and representative on behalf of East Bay Asian Local Development Corporation and was tasked, along with Jason Vargas, his co-project manager, to lobby the City and City Council to support EBALC projects that were being considered by the City. The Respondent and Vargas were each authorized to represent EBALDC in contract negotiations with the City. Witness Hui-Chang Li, the Project Lead for the City reported to PEC Staff that Chiu appeared with counsel to negotiate the E 12<sup>th</sup> Street, DDA on behalf of

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<sup>6</sup> Oakland Municipal Code (LRA) (O.M.C.) § 3.20.040 and O.M.C. § 3.20.030(D)

<sup>7</sup> O.M.C. § 3.20.110

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EBALDC. The DDA negotiations were detailed negotiations that were conducted both by telephone and in-person meetings. These meetings were held once or twice a month over an eight-month period.

During a Staff interview, Chiu admitted that he lobbied any City official, Councilmember or “anyone and everyone” he had the opportunity to speak to on behalf of EBALDC. When he spoke to members of the City Council about the EBALC Project, he spoke favorably because “you have to be an advocate for your project.” Chiu also admitted that he advocated for all EBALDC’s projects. Before any Council meeting where the project was to be discussed, Chiu reached out to all the Councilmembers to say he hoped he had their support and offered to answer questions or provide further information to help them make up their minds. He believed that he reached out by telephone and had a conference call with CEO of UrbanCore Development, LLC, Michael Johnson and a Councilmember about the Project. Chiu believed he and Johnson also met with other Councilmembers in their respective offices. Chiu did not recall the exact number of meetings he and Johnson had with the Councilmembers.

When asked about the contributions he allegedly made, Chiu acknowledged making a \$250 contribution to Abel Guillen on April 19, 2017, which he has a record of. He acknowledged making at least three other contributions that were outside the time covered by OCRA statute.

Staff also interviewed Anne Robertson, Executive and Board Operations, with EBALDC. Ms. Robertson made clear that Chiu’s contributions were personal and that EBALDC did not have any knowledge of the contributions until they were reported in a news article. Robertson and EBALDC’s Board learned about Chiu’s contributions when the former executive director, Josh Simon, brought the news article to the Board’s attention.

In summary, Chiu’s 2017 contribution was made within 180 days after the execution of the DDA in which he represented EBALDC before the City. Because the negotiations concluded when the DDA was executed on February 15, 2017, the Contractor Contribution ban applied at least until August 14, 2017 (180 days after February 15, 2017). Therefore, under the amended Contractor Ban, Chiu’s \$250 contribution to Guillen on April 19, 2017, was prohibited.

Chiu	04/19/17	Abel Guillen for City Council 2014 Officeholder Account	250.00	EBALDC
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### VIOLATION(S):

Ener Chiu violated the following Oakland Municipal Code(s):

#### **Count 1: Contractor Contribution Ban**

On or about April 19, 2017, Respondent, Ener Chiu, a representative for the East Bay Asian Local Development Corporation, which had proposed to contract with or proposed to amend a contract with the City, violated O.M.C. 3.12.040 of the Oakland Campaign Reform Act when he made a contribution in the amount of \$250, to a City of Oakland elected official/candidate Abel Guillen, before the expiration of the 180 Contractor Contribution prohibition period.

#### **Count 2: Failure to Register as a Lobbyist**

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On or between July 2016 and February 2017, Respondent Ener Chiu, a representative of the entity East Bay Asian Local Development Corporation (EBALDC), was entitled to receive \$1,000 or more in a calendar month to communicate directly or through agents with any public officials, officers, or designated employees, for the purpose of influencing any action of the City of Oakland on behalf of EBALDC (City) and therefore qualified as a lobbyist and acted as a lobbyist prior to registering as a lobbyist with the City.

Ener Chiu's Failure to Register as a lobbyist before he started to lobby City officials on behalf of EBALDC is a violation on O.M.C.3.20.110.

### Contact History

On October 29, 2021, Staff contacted the Respondent by email and proposed a resolution. On November 10, 2021, the Respondent asked for an extension to respond to the offer until December 31, 2021. Staff granted the Respondent's request. On December 31, 2021, the Respondent emailed staff a counter offer. The Enforcement team considered the Respondent's counter offer and determined that more information is needed from the Respondent to determine the appropriate resolution. On January 11, 2022, Staff forwarded an email to the Respondent with a list of questions to then for his review and response. On January 18, 2022, the Respondent emailed Staff and reported he needed time to consider and answer the new questions.

On February 3, 2022, after not hearing from the Respondent for several days, Staff sent an email inquiry requesting a response. On that same day, Staff received an auto-response from the Respondent that reported he was out of the office "dealing with a family illness... but I will be responding lightly to emails." On February 22, 2022, the Respondent emailed Staff and reported his two children were ill and that it had messed up his work scheduled. In that email, the Respondent provided responses to the questions Staff posed back on January 18, 2022. The Enforcement team considered the responses, conducted follow-up investigation and emailed a revised offer to resolve the matter on March 15, 2022. A little over one month later on April 18, 2022, Staff emailed the Respondent and informed him that the offer made on March 15, 2022, will end on April 20, 2022, at 5:00 PM and the matter would be placed on the PEC Agenda with a request for a hearing, if he did not respond. On April 25, 2022, at the time this report was updated, the Respondent has yet to respond to the PEC. In the absence of a resolution, Staff is recommending that the PEC refer this matter for a hearing.

### PENALTIES:

Oakland Campaign Reform Act authorizes the Commission to impose maximum administrative penalties of up to \$5,000, or three times the amount of the unlawful contribution (whichever is greater), per violation.<sup>8</sup> The Base Level penalty for the OCRA violation is \$1,000. The Lobbyist Registration Act authorizes the Commission to impose a maximum statutory administrative penalty of \$1,000 per violation. The Base Level penalty for an LRA violation is \$750.<sup>9</sup>

The PEC will consider all relevant mitigating and aggravating circumstances surrounding a violation when deciding on a penalty, including, but not limited to, the following factors:

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<sup>8</sup> See, Public Ethics Enforcement Penalty Guidelines, Page 5.

<sup>9</sup> See also, Public Ethics Enforcement Penalty Guidelines, Page 5.

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1. The seriousness of the violation, including, but not limited to, the extent of the public impact or harm;
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 violation was isolated or part of a pattern;
5. Whether the respondent has a prior record of violations and/or demonstrated knowledge of the rule or requirement at issue;
6. The extent to which the respondent voluntarily and quickly took the steps necessary to cure the violation (either independently or after contact from the PEC);
7. The degree to which the respondent cooperated with the PEC's enforcement activity in a timely manner;
8. The relative experience of the respondent.

The PEC has broad discretion in evaluating a violation and determining the appropriate penalty based on the totality of circumstances. This list of factors to consider is not an exhaustive list, but rather a sampling of factors that could be considered. There is no requirement or intention that each factor – or any specific number of factors - be present in an enforcement action when determining a penalty. As such, the ability or inability to prove or disprove any factor or group of factors shall in no way restrict the PEC's power to bring an enforcement action or impose a penalty

### **Aggravating Factors**

Here, the circumstances of the Respondent's conduct establish the following aggravating factors that increase the severity of the penalty:

1. The Respondent is an experienced advocate with a history of advocacy in the City of Oakland.

### **Mitigating Factors**

1. Respondent does not have prior Public Ethics Commission Violations.
2. The Respondent cooperated with the Public Ethics Commission enforcement activity.

### **RECOMMENDATION:**

Staff recommends, in the absence of a resolution, that the Commission schedule the matter for an administrative hearing.