

May 17, 2013

Judith Propp  
Town Attorney  
Town of Los Gatos  
110 E. Main Street  
Los Gatos, CA 95301

Re: Your Request for Advice  
**Our File No. A-13-058**

Dear Ms. Propp:

This letter responds to your request for advice, on behalf of councilmember Marcia Jensen, regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”)<sup>1</sup> and is based on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Please note there are other bodies of law, separate and apart from the Act’s conflict-of-interest provisions that may apply to your situation. We offer no opinion on the applicability, if any, of other conflict-of-interest laws. In addition, this letter should not be construed as assistance on any conduct that may have already taken place. (Regulation 18329(b)(8)(A).)

### QUESTION

Does the Act prohibit Councilmember Marcia Jensen from participating in upcoming decisions of the Town Council regarding development of real property owned by LG Business Park LLC (the “Applicant”) where her spouse is a partner in a law firm that provides legal services to a proposed tenant for an office in the development?

### CONCLUSION

Councilmember Jensen is not prohibited from participating in these decisions if the decisions will not have a reasonably foreseeable material financial effect on her husband’s law firm under the standards set forth below.

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<sup>1</sup> 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 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.

## FACTS

Councilmember Jensen was elected to the Town Council in late 2012. Prior to her election, she served on the Town Planning Commission.

By way of background, while Councilmember Jensen was still on the Planning Commission, the Applicant applied for land use entitlements for real property located at 90-160 Albright Way and 14600 Winchester Boulevard. The proposed project (the "First Project") called for the construction of up to 550,000 square feet of Class A office space for a "corporate campus," with potential for a combination of multi-family or senior housing. Ms. Jensen participated in the first hearing on the matter. Subsequently, during the application process, she learned that the law firm of which her husband is a partner (the "Law Firm") performs legal services for a tenant that was proposed to be the main tenant (the "Tenant") on the property. The legal work performed by the Law Firm for the Tenant is limited to technology matters and is not related to any legal services on land use matters or any lease issues. The Applicant is not a client of the Law Firm. Councilmember Jensen's husband has an ownership interest in the Law Firm of less than ten percent.

At the time of the first hearing, the Tenant had not signed a lease, but had been named by the Applicant. Out of an abundance of caution, Ms. Jensen abstained from participating in a subsequent hearing regarding the First Project and recused herself at the formal Planning Commission hearing at which the matter was considered.

In 2012, the Applicant proposed an alternative plan to develop the property that called for construction of only offices and a parking garage (the "Proposed Project"). The application for the Proposed Project will be considered in 2013 by the Town Council for a final decision. The Tenant has signed a lease and the Applicant has disclosed to the media the fact that a lease has been signed and naming the Tenant as a major tenant of the property. The Tenant is not an applicant or a party to the Applicant's land use application.

## ANALYSIS

The Act's conflict-of-interest provisions ensure that public officials will "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(b).) Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest. (Regulation 18700(b).) The general rule, however, is that a conflict of interest exists whenever a public official makes a governmental

decision which has a reasonably foreseeable material financial effect on one or more of his or her financial interests.

**Steps 1 and 2. Is Councilmember Jensen making, participating in making, or using her official position to influence a governmental decision?**

As a Town Council member, Councilmember Jensen is a “public official.” (Section 82048.)<sup>2</sup> In addition, she will be making, participating in making, or influencing a governmental decision when taking part in Town Council land use decisions regarding the Proposed Project. (Section 87100; Regulations 18702.1-18702.3.)

**Step 3. What are Councilmember Jensen’s economic interests?**

The Act’s conflict-of-interest provisions apply only to conflicts of interest arising from certain enumerated economic interests. These economic interests are described in Section 87103 and Regulations 18703-18703.5, inclusive. The facts you have provided indicate the following economic interests.

- An indirect investment in a business entity. (Section 87103(a).) An indirect investment means any investment owned by the spouse of an official or by a member of the official’s immediate family, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official’s immediate family, or their agents own directly, indirectly, or beneficially a ten percent interest or greater. (Section 87103.)
- A public official has an economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the time in which the relevant governmental decision was made. (Section 87103(c); Regulation 18703.3.) This includes community property income. (Section 82030.) This also includes a pro rata share of income from a client of the business if the official’s direct or indirect (through the spouse) ownership interest in the business is ten percent or more.
- A public official has an economic interest in his or her personal finances and those of his or her immediate family - this is the “personal financial effects” rule. (Section 87103; Regulation 18703.5.) A public official always has an economic interest in his or her personal finances, and may have a conflict of interest in any decision resulting in an increase or decrease in the personal expenses, income, assets or liabilities of the official or his or her immediate family. (Section 87103; Regulation 18703.5.)

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<sup>2</sup> If a public official’s office is listed in Section 87200, which specifically includes mayors and city council members, and the official has a conflict of interest in a decision noticed at a public meeting, the official must: (1) verbally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in Regulation 18702.5(b)(1)(B), on the record of the meeting and immediately prior to the discussion of the item; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences, and speaking as a member of the public regarding personal interests, special rules found in Regulation 18702.5 subdivisions (c) and (d) apply. (Section 87105.)

Councilmember Jensen's husband presumably has at least a \$2,000 ownership interest in the Law Firm. By virtue of his interest, Councilmember Jensen has an indirect economic interest in the Law Firm. (Section 87103.) In addition, Councilmember Jensen's husband receives compensation from the Law Firm. Thus, Councilmember Jensen also has an economic interest in her community property share of his compensation as a source of income to her. However, the Law Firm's clients are not considered sources of income to Councilmember Jensen under the Act because her husband's ownership interest in the firm is less than ten percent.

**Step 4. Will Councilmember Jensen's economic interests be directly or indirectly involved in the decisions?**

*Business Entities and Sources of Income*

A person, including business entities and sources of income, is directly involved in a decision before an official's agency when that person, either directly or indirectly by an agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

“(2) 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.” (Regulation 18704.1(a).)

The Law Firm is not initiating the proceeding in which the application will be considered, nor is it a named party in, or the subject of the proceeding. Accordingly, the Law Firm is indirectly involved.

*Personal Finances*

The personal finances of a public official or his or her immediate family are always deemed to be directly involved in a governmental decision if the decision will have *any* financial effect on his or her personal finances or those of his or her immediate family. (Regulation 18704.5)

**Steps 5 & 6. Will there be a reasonably foreseeable material financial effect on Councilmember Jensen’s economic interests?**

**Materiality**

Having identified the economic interests involved, and determined whether each interest is directly or indirectly involved in the decisions at issue, it is necessary to identify the materiality standard appropriate to each economic interest.

*Business Entities and Sources of Income*

The applicable materiality standards for governmental decisions involving business entities are found in Regulation 18705.1. Subdivision (c) sets forth the materiality standard for business entities that are indirectly involved in a governmental decision, including those that are sources of income. As indicated below, the materiality standard varies by the size of the business as measured by its net income, or in the case of the largest companies, by their revenues.<sup>3</sup> You have not provided any information regarding the income or revenues of the Law Firm and, therefore, we must leave the determination of the applicable materiality standard to you and Councilmember Jensen.

<b>Type of Business</b>	<b>Effect on Gross Revenues</b>	<b>Effect on Expenses</b>	<b>Effect on Assets/Liabilities</b>
Listed on the Fortune 500 or revenues of no less than the company listed as 500 <sup>th</sup> on the Fortune 500	\$10,000,000 or more	\$2,500,000 or more	\$10,000,000 or more
Listed on NYSE or net income of no less than \$2,500,000	\$500,000 or more	\$200,000 or more	\$500,000 or more
Listed on NASDAQ or AMEX, or net income of no less than \$750,000	\$300,000 or more	\$100,000 or more	\$300,000 or more
All others	\$20,000 or more	\$5,000 or more	\$20,000 or more

*Personal Finances*

The materiality standard for an effect on an official’s personal finances is stated in Regulation 18705.5(a), which provides that a reasonably foreseeable financial effect on a public official’s personal finances is material if it is at least \$250 in any 12-month period.

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<sup>3</sup> “Net income” means a business entity’s total earnings and is often expressed as “net profit” or as revenues adjusted for the costs of doing business, depreciation, interest, taxes, and other expenses. (Regulation 18705.1(d)(5).) “Gross revenues” means revenue before adjustments or deductions for returns and allowances and the costs of goods sold, and prior to any deduction for these and other expenses. (Regulation 18705.1(d)(3).)

### **Foreseeability**

Once a public official has determined the materiality standard applicable to each of his or her economic interests, the next step is determining whether it is “reasonably foreseeable” that the standard will be met. A material financial effect on an economic interest is “reasonably foreseeable” if it is substantially likely that one or more of the materiality standards will be met as a result of the governmental decision. (Regulation 18706(a).) An effect need not be certain to be considered “reasonably foreseeable,” but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

Ultimately, whether a material financial effect is foreseeable at the time a decision is made depends on facts and circumstances peculiar to each case. (*In re Thorner, supra*). Because the Commission does not act as a finder of fact in providing advice (*In re Oglesby, supra*), the foreseeability of a particular financial effect is a determination that must be left, in most instances, to the informed judgment of the public official.

Nonetheless, based on the facts you have provided, it appears that decisions relating to the Proposed Project will not have a reasonably foreseeable material financial effect on any of Councilmember Jensen’s economic interests.

### **Steps 7 & 8. The “public generally” and “legally required participation” exceptions.**

Even if a material financial effect on a public official’s economic interest is reasonably foreseeable, he or she still may not be disqualified if the financial effect of the governmental decision on the public official’s economic interest is indistinguishable from its effect on the public generally (Section 87103, Regulations 18700(b)(7) and 18707(a),) or if the official is legally required to participate (Section 87103; Regulation 18708). You have not presented any facts indicating that either of these exceptions is applicable to Councilmember Jensen’s situation.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Valentina Joyce  
Counsel, Legal Division

VJ:jl