

June 20, 2013

Robert Boco, Assistant City Attorney
Sunnyvale Office of the City Attorney
456 W. Olive Avenue
Sunnyvale, CA 94086

Re: Your Request for Advice
Our File No. A-13-078

Dear Mr. Boco:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Please note that because the Fair Political Practices Commission ("the Commission") does not act as a finder of fact when it renders assistance (*In re Oglesby* (1975) 1 FPPC Ops. 71), this letter is based on the facts presented. We also note that our advice is based solely on the provisions of the Act.

QUESTION

May Sunnyvale Councilmember Patrick Meyering participate in a City Council decision involving to whom to award a consultant contract to prepare the Peery Park Specific Plan and Environmental Impact Report ("EIR") if he owns a residence located within 500 feet of the plan area at issue?

CONCLUSION

Yes. Assuming the three factors identified below apply, Councilmember Meyering may participate in this implementation decision involving to whom to award the consultant contract.

¹ 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

You are requesting this advice on behalf of Councilmember Meyering who owns a single family home Sunnyvale, California. On June 25, 2013, the City Council will be making a decision to award a consultant contract to prepare the Peery Park Specific Plan and EIR. The purpose of the Specific Plan is to provide the City, property owners and businesses with a guide for future development in the Peery Park area. Certain areas of the Specific Plan are located within 500 feet of Councilmember Meyering's property.

In our telephone conversation of June 12, 2013, you clarified that the upcoming decision will concern only to whom to award the consultant contract.

ANALYSIS

The Act's conflict-of-interest rules prohibit a public official from making, participating in making, or using his or her official position in any way to influence a governmental decision in which the official knows, or has reason to know, that he or she has a "financial interest." (Section 87100.) Section 87103 provides that a public official has a "financial interest" in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the official's specified interests.

Under the Act, a conflict of interest exists only when a public official has a financial interest in a particular governmental decision. To determine whether a public official has a "conflict of interest" in a specific governmental decision, we employ a standard eight-step analysis outlined in Regulation 18700(b).

As a councilmember for the City of Sunnyvale who will be called upon to vote on the consultant contract award, Councilmember Meyering is a public official who will be making a governmental decision. He therefore meets steps one and two.

Step Three: What are Councilmember Meyering's interests?

Of the interests recognized under the Act,² those interests implicated by your account of the facts are the following:

Real Property – A public official has an interest in real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)

According to your letter, Councilmember Meyering owns a single family home located within 500 feet of the Specific Plan area at issue. Assuming his interest in the home is worth \$2,000 or more, the real property is an economic interest.³ (Section 87103(b).)

² Our analysis is limited to the economic interests you have identified.

Step Four: Will Councilmember Meyering's interest be directly or indirectly involved in the upcoming governmental decision.

Real property in which a public official has an interest is directly involved in a governmental decision if it is located within 500 feet of the boundaries of the property that is the subject of the governmental decision. (Regulation 18704.2(a)(1).)

As just mentioned, your facts state that Councilmember Meyering owns a single family home located within 500 feet of the Specific Plan area at issue. Accordingly, his interest in the real property will be *directly* involved in the upcoming governmental decision that involves the awarding of the consultant contract.

Steps Five and Six: Will there be a reasonably foreseeable material financial effect on Councilmember Meyering's interests?

Materiality

A conflict of interest may arise only when the reasonably foreseeable impact of a governmental decision on a public official's economic interests is material. (Regulation 18700(a).) Different standards apply to determine whether a reasonably foreseeable financial effect on an economic interest will be material, depending on the nature of the economic interest and whether that interest is directly or indirectly involved in the agency's decision.

Regulation 18705.2(a)(1) provides the materiality standard for *directly* involved real property as follows:

The financial effect of a governmental decision on the real property is presumed to be material. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have *any* financial effect on the real property. (Emphasis added.)

Under this rule, the financial effect of the decision is material even if it has only a one penny effect. This is commonly referred to as the "one penny rule." In order to rebut this presumption, it is necessary to establish that the decision would not even affect the property's value by one cent.

³ If the property is used as a rental business, it is possible that Councilmember Meyering also has an economic interest in the home both as a business entity and source of income, as well as an economic interest in the tenant(s) as a source of income. However, no facts were provided to suggest Councilmember Meyering uses the property as a rental business so the remaining analysis will not consider those potential economic interests.

Foreseeability

Once a public official identifies his or her relevant economic interests, the official must evaluate whether it is reasonably foreseeable that the decision will have a material financial effect on any of those economic interests. For a material financial effect to be foreseeable on an official's economic interest, it need not be certain or even substantially likely that it will happen. However, the financial effect must be more than a mere possibility. (Regulation 18706(a); *In re Thorner* (1975) 1 FPPC Ops. 198.)

Implementation Decisions

Generally, the foreseeability and materiality analysis must be applied on a decision-by-decision basis. We have previously advised that under certain circumstances, decisions implementing projects may be treated separately from the decision on the project itself:

[W]e conclude that Mayor Bennett must disqualify himself from participating in decisions of the San Ramon City Council/Redevelopment Agency concerning the proposed Crow Canyon area. However, we emphasize that this conclusion applies only to the major policy decisions about the project, such as project boundaries, financing decisions, approval of the environmental impact report, types of uses, and major public improvements in the project area. Once the basic policy decisions have been reached, Mayor Bennett may participate in the decisions which implement, but do not change these policies.

For example, if the City Council/Redevelopment Agency votes to conduct an environmental impact report (a basic decision from which Mayor Bennett must disqualify himself), *Mayor Bennett may participate in the decision to choose the engineer or consultant to whom the City will award the contract to perform the EIR.* We caution, however, that most implementation decisions in which Mayor Bennett may participate will not occur until some time after the plans for the Crow Canyon Area project have been approved.

(*Athan* Advice Letter, No. A-86-094, emphasis added.)

Implementation decisions merely implement, or carry out, decisions already made. (*Boga* Advice Letter, No. A-03-067.) As mentioned, the specific decision at issue here is not whether to prepare the Peery Park Specific Plan and EIR, but instead, to whom to award the consultant contract to perform those tasks. Therefore, consistent with *Athan*, this is an implementation decision.

We have further advised that where an individual is disqualified from basic policy decisions, he or she may participate in implementation decisions so long as all of the following apply:

- (1) The decisions for which he has a disqualifying financial interest are segregated and decided first;
- (2) The remaining decisions will not result in reopening or in any way affect the decisions from which he was disqualified; and
- (3) The decisions will not independently have a material financial effect on his economic interests.

(*Warne* Advice Letter, No. I-02-052; *Olson* Advice Letter, No. A-00-237.)

You have provided no facts to suggest these three factors would not apply in this situation.⁴ Accordingly, assuming they do apply, Councilmember Meyering may participate in the implementation decision involving to whom to award the consultant contract.

Steps Seven and Eight: Does the governmental decision come within any exception to the conflict-of-interest rules?

You have not presented any facts suggesting that the “public generally” or the “legally required participation” exceptions are applicable to your situation. Accordingly, we have not provided an analysis involving those steps.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Jack Woodside
Counsel, Legal Division

JW:jgl

⁴ As already mentioned, the Commission does not act as a finder of fact when it renders assistance (*In re Oglesby* (1975) 1 FPPC Ops. 71), therefore we do not make the ultimate determination as to whether the three factors apply here.