

July 8, 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-13-092**

Dear Mr. Boco:

This letter supplements our previous letter dated June 20, 2013, (*Boco* Advice Letter, No. A-13-078) regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).<sup>1</sup> This letter is based on the facts presented. We again note that 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), and our advice is based solely on the provisions of the Act.

### QUESTIONS

1. May Councilmember Meyering participate in a City Council decision to impose a temporary moratorium on current development in the Peery Park Specific Plan area while the Specific Plan and EIR are being developed by the consultant?
2. May Councilmember Meyering participate in any future City Council proceedings leading up to and including the adoption of the Specific Plan and EIR, such as study sessions, public outreach meetings, preliminary hearings, and the final plan adoption hearing?

### CONCLUSIONS

1. No. Councilmember Meyering may not participate in a City Council decision to impose a temporary moratorium while the Specific Plan and EIR are being developed by the consultant unless he can rebut the presumption of materiality imposed by Regulation

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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.

18705.2(a)(1). However, he may appear before the City Council as a member of the general public to represent his “personal interests” as described below.

2. No. Councilmember Meyering may not participate in the specified proceedings unless he can rebut the presumption of materiality imposed by Regulation 18705.2(a)(1). However, he may appear before the City Council as a member of the general public to represent his “personal interests” as described below.

## FACTS

Your request concerns Sunnyvale city Councilmember Patrick Meyering and his ownership of a single family home located within 500 feet of the Peery Park Specific Plan area. Detailed facts relating to your request for advice are more fully described in our previous letter, the *Boco* Advice Letter, *supra*. At this time, you have asked us to further consider whether Councilmember Meyering may participate in a decision to impose a temporary moratorium on current development in the Peery Park Specific Plan area, as well as various other proceedings leading up to and including the adoption of the Specific Plan and EIR.

You clarified that the moratorium would be for the purpose of prohibiting development within the boundaries of the Specific Plan area while the plan is being developed in order to avoid the approval of uses that could ultimately be inconsistent with the plan. The boundary of the area affected by the moratorium would be identical to the Peery Park Specific Plan boundary.

## 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). However, this letter will focus only on steps two, five and six in light of the analysis already provided in the initial *Boco* Advice Letter, *supra*.

### **Step Two: Will Councilmember Meyering be making, participating in making or influencing a governmental decision?**

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her

agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.) A public official “participates in a governmental decision” when, acting within the authority of his or her position and without significant intervening substantive review, the official negotiates, advises, or makes recommendations to the decisionmaker regarding the governmental decision. (Regulation 18702.2.) For a decision before the official's own agency, a public official is attempting to use his or her official position to influence a decision if, for the purpose of influencing, the official contacts or appears before any member, officer, employee, or consultant of the agency. (Regulation 18702.3.)

Therefore, if Councilmember Meyering participates in study sessions, public outreach meetings, preliminary hearings, votes on decisions or attempts to influence any member of the city council involving any aspect of the Specific Plan and EIR, he will be making, participating in making, or influencing governmental decisions.

*Appearances before an official's agency to represent his “personal interests:”*

Regulation 18702.4 states that even if a conflict of interest is present, a public official may appear before his or her agency as any other member of the general public in the course of its prescribed governmental function in order to represent himself or herself on matters related solely to his or her “personal interests.” Such an appearance, properly made, does not constitute making, participating in making, or influencing a governmental decision. (Regulation 18702.4(a)(2) and 18702.4(b)(1).)

An official’s “personal interests” include “[a]n interest in real property which is wholly owned by the official or members of his or her immediate family.” (Regulation 18702.4(b)(1)(A).) Assuming Councilmember Meyering’s home is wholly owned by him or immediate family members, he may participate as any other member of the public with respect to matters related to the Specific Plan and EIR.<sup>2</sup>

*Recusal Requirements:*

If a public official's office is listed in Section 87200 (“87200 filers” include members of a city council) and he or she has a conflict of interest in a decision noticed at a public meeting, then he or she must: (1) immediately prior to the discussion of the item, verbally identify each type of interest involved in the decision as well as details of the interest, as discussed in regulation 18702.5(b)(1)(B), on the record of the meeting; (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,

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<sup>2</sup> We also note that an official is not attempting to use his or her official position to influence a governmental decision of an agency, as described in Regulation 18702.3(a), if the official communicates with the general public or the press. (Regulation 18702.4(b)(2).) In fact, he may discuss the Specific Plan and EIR generally with the press, friends, neighbors or other members of the community, even if he does so in an attempt to rally their support or opposition to the project, unless they are members, officers, employees or consultants of the city. (McHugh Advice Letter, No. I-98-324; Regulation 18702.4(b)(2).)

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.)

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

**Materiality**

Councilmember Meyering owns a single family home located within 500 feet of the Specific Plan area at issue. Therefore, his interest in the real property will be *directly* involved in the specified governmental decisions. As mentioned in the previous letter, 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.

**Foreseeability**

Once a public official identifies his or her relevant interests, the official must evaluate whether it is reasonably foreseeable that the decision will have a material financial effect on any of those interests. For a material financial effect to be foreseeable on an official's 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.)

You have provided no facts to suggest a financial effect would not result. Accordingly, Councilmember Meyering may not vote on the temporary moratorium or the final plan adoption, nor may he participate in study sessions, public outreach meetings, preliminary hearings or attempt to influence any member of the City Council involving any aspect of the Specific Plan and EIR unless he can rebut the presumption of materiality imposed by Regulation 18705.2(a)(1).

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