

October 7, 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-13-128

Dear Mr. Boco:

This letter supplements our previous letters dated June 20, 2013 (*Boco* Advice Letter, No. A-13-078), and July 8, 2013 (*Boco* Advice Letter, No. A-13-092), regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹ 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.

QUESTION

May Councilmember Meyering participate in a City Council decision to adopt a new ordinance amending the development review process for certain new and existing development applications within the Peery Park Specific Plan area (“Specific Plan area”) while the Specific Plan is being developed?

CONCLUSION

No. Councilmember Meyering may not participate in a City Council decision to adopt a new ordinance amending the development review process for certain new and existing development applications within the Specific Plan area 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” pursuant to Regulation 18702.4.

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

Your request concerns Sunnyvale City Councilmember Patrick Meyering and his ownership of a single family home located within 500 feet of the Specific Plan area. At this time, you have asked us to further consider whether Councilmember Meyering may participate in a decision to adopt a new ordinance amending the development review process for certain new and existing development applications within the Specific Plan area while the Specific Plan is being developed.

The proposed ordinance would require certain new and existing development applications within the Specific Plan area to be reviewed by the City Council as the final decision-making body. More specifically, the proposed ordinance would require Planning Commission review and City Council approval of any development proposal or development application located within the Specific Plan area that involves a request for a use permit, a request for a special development permit, certain requests for design review or design review applications that involve new construction (additions, new buildings, etc.) to the east of Mathilda Avenue (within the Specific Plan area).² For planning applications that do not fall within one of the listed categories, the decision would continue to be made by the Director of Community Development without a public hearing.

In the memorandum, City of Sunnyvale staff states that the proposed ordinance would allow the City Council to review projects within the Specified Plan area, which would assist in defining the development standards for the Specific Plan area.

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). For purposes of this letter, we focus only on steps five and six in light of the analysis already provided in the previous *Boco* Advice Letters, *supra*.

² These facts were taken from a memorandum titled "Draft for Planning Commission review on September 9, 2013," which contains various exhibits, including the proposed ordinance. This memorandum was emailed to the Commission by Councilmember Meyering on September 24, 2013.

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 letters, 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.)

The Sunnyvale City Council will soon decide whether to amend the current development review process for certain new and existing development applications within the Specific Plan area. In the past, the Commission has advised that votes in connection with basic major policy decisions, such as whether to conduct an environmental impact report, require disqualification of public officials owning real property in the affected area. (*Eiser* Advice Letter, No. A-93-237.)

Here, the decision does not involve a specific development proposal or application. Instead, the decision is whether to make the Sunnyvale City Council the final decision-making body with respect to certain new and existing development applications in the Specified Plan area, which city staff believes would assist in defining the development standards for that area. It is thus logical to view the upcoming decision as one that determines a basic major policy

relating to the Specific Plan area. As a result, Councilmember Meyering may not vote on the proposed ordinance.³

Accordingly, based on his ownership of real property within 500 feet of the Specific Plan area, Councilmember Meyering may not make, participate in making, or influence the upcoming decision regarding the proposed ordinance unless he can rebut the presumption of materiality imposed by Regulation 18705.2(a)(1).⁴

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

³ Even assuming we did not find that the upcoming vote involved a basic policy decision, our conclusion would still be the same because you have provided no facts to suggest a financial effect would not result. As mentioned above, the Commission does not act as a finder of fact in providing advice (In re Oglesby (1975) 1 FPPC Ops. 71), and the determination of whether it is or is not reasonably foreseeable that this decision will materially affect Councilmember Meyering's real property interest is necessarily a factual question that is ultimately for him to decide.

⁴ As stated in *Boco* Advice Letter, No. A-13-092, Councilmember Meyering may participate as any other member of the public with respect to matters related to the proposed ordinance assuming his home is wholly owned by him or immediate family members. (See Regulation 18702.4.) However, as also explained in that advice letter, Councilmember Meyering must follow the recusal requirements set forth in Section 87105.