

August 5, 2014

Jeffrey A. Mitchell  
West Sacramento City Attorney  
400 Capitol Mall, 27<sup>th</sup> Floor  
Sacramento, CA 95814

Re: Your Request for Advice  
**Our File No. A-14-124**

Dear Mr. Mitchell:

This letter responds to your request for advice regarding the conflict of interest provisions of the Political Reform Act (the “Act”).<sup>1</sup> You make the request on behalf of Martin Tuttle, City Manager for the City of West Sacramento. Please note that we are only providing advice under the conflict of interest provisions of the Act. Because you have not specifically requested it, this letter does not provide advice under Government Code Section 1090. We are also not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), meaning that any advice we provide assumes the facts the requester provides to us are accurate. If this is not the case, then our advice could be different.

### QUESTIONS

(1) May Mr. Tuttle, as Executive Director of the West Sacramento Redevelopment Successor Agency (“Successor Agency”), renegotiate the terms of the Option with the Developer pursuant to the terms of the Successor Agency Oversight Board’s (“Oversight Board”) proposed July 2014 resolution and make recommendations to the Successor Agency concerning the Option?

(2) May Mr. Tuttle, as Chief Executive Officer of the Sacramento-Yolo Port District (“Port”), negotiate with the Developer regarding the terms of the assignment of the Option from the Port to the Developer and make recommendations to the Port concerning the Assignment?

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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.

(3) May Mr. Tuttle, as City Manager for the City of West Sacramento, participate in the negotiations of a development agreement for the Site and make recommendations concerning the development agreement to the City Council?

### **CONCLUSIONS**

(1) No. Mr. Tuttle may not renegotiate the terms of the Option with the Developer pursuant to the terms of the Oversight Board's proposed July 2014 resolution or make recommendations to the Successor Agency concerning the Option.

(2) No. Mr. Tuttle may not negotiate with the Developer regarding the terms of the assignment of the Option from the Port to the Developer or make recommendations to the Port concerning the Assignment.

(3) No. Mr. Tuttle may not participate in the negotiations of a development agreement for the Site or make recommendations concerning the development agreement to the City Council.

### **FACTS**

Mr. Tuttle has been City Manager of the City of West Sacramento since July 2012. By virtue of his position as City Manager, Mr. Tuttle serves as Executive Director of the West Sacramento Redevelopment Successor Agency ("Successor Agency") and Chief Executive Officer of the Sacramento-Yolo Port District ("Port"). The City, the Successor Agency, and the Port are distinct legal entities, but they are all run by City staff. The City Council serves as the Board of the Successor Agency, and four of the five members of the Port Board are City Council members.

The Stone Lock property (the "Site") is owned by the Successor Agency. The Site is comprised of six parcels which, taken together, total approximately 215 acres of undeveloped land situated east of Jefferson Boulevard, on the north and south side of the Barge Canal, and immediately north of existing residential neighborhoods. Although still in the design stages, the project could have up to 2,500 housing units, 1.5 million square feet of office space, 890,000 square feet of retail space, and up to 800 hotel rooms at build out.

Mr. Tuttle owns and resides on property within 500 feet of the boundary of two of the parcels that are part of the Site. A privately-owned pipeline runs along the boundary between these two parcels pursuant to a license agreement approved in 1965. Because of the location of the pipeline, the developable portion of one of these parcels is more than 500 feet from Mr. Tuttle's property.

In 2007, the West Sacramento Redevelopment Agency ("Agency") selected the Cordish Company (the "Developer") to purchase and develop the Site. Between 2007 and 2011, the Agency negotiated exclusively with the Developer on the terms of the sale for the Site. On

March 29, 2011, the Agency and City approved a joint resolution directing the Agency's Executive Director to execute an option agreement ("Option") with the Port. The Port subsequently assigned the Option to the Developer via an assignment agreement ("Assignment".) The Option provides the holder of the Option with the right to purchase the Site under certain conditions. The Assignment establishes certain additional requirements that must be met before the Developer can exercise the Option.

The Developer's compliance with the terms of the Option Agreement and the Assignment Agreement is in dispute, and the Successor Agency Oversight Board ("Oversight Board") will be considering a resolution directing that the Successor Agency attempt to renegotiate the terms of the Option, including the Site's sale price. As Executive Director of the Successor Agency, Mr. Tuttle would typically play a critical role in these renegotiations. The resolution may further request that the Port (and by extension, Mr. Tuttle as Chief Executive Officer of the Port) accelerate the Developer's performance obligations under the Port's Assignment to the Developer.

Separate from the disputes discussed above, the Developer's right to exercise the Option is contingent on the Developer obtaining a development agreement from the City of West Sacramento (see Section 1.5.2 of the Option Agreement). Any development agreement must be approved by the City Council, and approval is entirely within the City Council's discretion. In his capacity as City Manager, Mr. Tuttle would typically be in charge of the team negotiating the terms of the development agreement on behalf of the City and making a recommendation to the City Council.

You have enclosed with your letter several Attachments, including a map illustrating the location of Mr. Tuttle's residence relative to the Site and the fact that Mr. Tuttle's residence is located within 500 feet of a portion of the Site. The Attachments also include copies of the Option, Assignment, and the June 12, 2014 Staff Report to the Oversight Board, which contains a copy of the proposed resolution that will be considered by that board.

## ANALYSIS

### **I. Conflicts of Interest under the Act**

Section 87100 prohibits any state or local public official from making, participating in making, or using his or her official position to influence a government decision in which the official has a financial interest specified in Section 87103. A public official has a "financial interest" in a government decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the public official's interests. (Section 87103; Regulation 18700(a).) The Commission has adopted an eight-step standard analysis for deciding whether an individual has a conflict of interest under Section 87100.

**Step One - Is the individual a public official? (Section 87100; Regulation 18700(b)(1).)**

In his capacities as City Manager, Executive Director of the Successor Agency and Chief Executive Officer of the Port, Mr. Tuttle is a public official for purposes of Section 87100. (Sections 82003, 82041 and 82048(a).)

**Step Two - Will the public official be making, participating in making, or using his or her official position to attempt to influence a government decision? (Section 87100; Regulation 18700(b)(2).)**

As stated above, a public official is subject to Section 87100 if he or she makes, participates in making, or uses his or her official position to attempt to influence a government decision.

Under Regulation 18702.1, an official “makes” a government decision when he or she, among other things, votes on a matter, enters into a contract on behalf of his or her agency, or obligates or commits his or her agency to any course of action. (Regulation 18702.1(a).) Under Regulation 18702.2, an official “participates” in a government decision when, generally, he or she negotiates, without significant substantive review, regarding a government decision, or advises or makes recommendations to the decisionmaker directly or without significant substantive review. (Regulation 18702.1(a) and (b).) Under Regulation 18702.3, an official “uses his or her official position to influence” a government decision when he or she contacts, appears before or otherwise attempts to influence a member, officer, employee or consultant of the official’s own agency or, when appearing before another government agency, the official acts or purports to act on behalf of his or her own agency. (Regulation 18702.3(a) and (b).)

Therefore, if Mr. Tuttle negotiates or renegotiates the terms of the Option or Assignment in his respective capacities as Executive Director of the Successor Agency or Chief Executive Officer of the Port, or makes recommendations to the City Council on the redevelopment agreement in his capacity as City Manager, he would be participating in a government decision for purposes of Section 87100.

**Step Three – Identify the public official’s interests that may be affected by the government decision. (Sections 87100 and 87103; Regulation 18700(b)(3).)**

Section 87103 and Regulations 18703 through 18703.5 set forth the types of financial interests held by a public official that, when affected by a government decision, may expose the official to a possible conflict of interest. Under the facts provided, Mr. Tuttle has one interest for purposes of the Act that raises a possible conflict of interest issue that being an interest in real property (presumably worth \$2,000 or more) based on his ownership of his residence located within 500 feet of a portion of the Site. (Section 87103(b) and Regulation 18703.2.)<sup>2</sup>

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<sup>2</sup> Because you only identify Mr. Tuttle’s real property as a financial interest for purposes of your questions, we assume that Mr. Tuttle does not hold any other interests, as set forth in Section 87103 that could also raise possible conflict of interest issues.

**Steps Four, Five and Six – Is the public official’s interest directly or indirectly involved in the government decision (Regulation 18700(b)(4)) and is it reasonably foreseeable that the decision will have a material financial effect on that interest (Regulation 18700(b)(5) and (6)).**

As mentioned above, an official does not have a conflict of interest under the Act unless the government decision in which he or she participates has a “reasonably foreseeable material financial effect” on his or her interests. (Sections 87100 and 87103.) Steps 4, 5, and 6 assist in making this determination by first generally classifying the government decision in issue as “directly” or “indirectly” involving the official’s interest and, based on that classification, determining whether it is “reasonably foreseeable” that the decision’s financial effect on the official’s interest is “material.”

In the case of a real property interest such as Mr. Tuttle’s, Commission regulations skip the determination of whether the official’s interest is “directly” or “indirectly” involved in the decision and instead proceed directly with the materiality analysis as set forth in Regulation 18705.2. (Regulation 18704(a)(2).)

Subdivision (a) of Regulation 18705.2 sets forth twelve situations in which the reasonably foreseeable financial effect of a government decision relating to a parcel of real property owned by an official would be deemed material and thus, absent an exception (see Steps Seven and Eight discussed below), create a conflict of interest for the official.

Because Mr. Tuttle’s residential property is within 500 feet of the Site, it appears that the situation under subdivision (a)(11) of the regulation is directly applicable. Subdivision (a)(11) provides that a government decision that has a reasonably foreseeable financial effect on a parcel of residential real property owned by an official is “material” if the decision would affect the value of real property “located within 500 feet of the property line of the official’s real property.” This provision also provides that “[n]otwithstanding this prohibition, the Commission may provide written advice allowing an official to participate under these circumstances if the Commission determines that there are sufficient facts to indicate that there will be no reasonably foreseeable measurable impact on the official’s property.”

Additionally, because of the magnitude of the development that is the subject of the governmental decision, certain other factors listed in Regulation 18705.2(a) would impact the conflict analysis and, assuming the “reasonable foreseeability” test is met as described below, Mr. Tuttle would have a conflict of interest even if his property was not within 500 feet of the two parcels. Subdivision (a)(10) provides that the financial effect of a government decision on real property is material if the decision would, among other things, change the character of the property by substantially altering traffic levels or intensity of use of property surrounding the official’s real property, noise levels or air quality. Subdivision (a)(12) provides that the financial effect of a government decision on real property is material if it would cause a reasonably

prudent person to believe it is reasonably foreseeable the decision would affect the property's market value.

Regulation 18706 establishes the test for whether the effect of a government decision on an official's financial interest is "reasonably foreseeable." For an interest that is not explicitly involved in the government decision, such as Mr. Tuttle's residential property, subdivision (b) of Regulation 18706 applies. This provision states that, for the effect of a decision to be reasonably foreseeable, the effect need not be likely but only needs to be "recognized as a realistic possibility and more than hypothetical or theoretical . . . ." To assist in this determination, the regulation provides a non-exclusive list of six factors that may be considered. Among these factors, the following appear to be most relevant to your questions:

- Whether the public official should anticipate a financial effect on his or her interest as a potential outcome under normal circumstances when using appropriate due diligence and care. (Regulation 18706(b)(2).)
- Whether a reasonable inference can be made that the financial effects of the governmental decision on the public official's interest could compromise the public official's ability to act in a manner consistent with his or her duty to act in the best interests of the public. (Regulation 18706(b)(4).)
- Whether the public official has the type of interest that would cause a similarly situated person to weigh the advantages and disadvantages of the governmental decision on his or her economic interest in formulating a position. (Regulation 18706(b)(6).)

Thus, Mr. Tuttle will have a conflict of interest in any of these government decisions if, considering these three factors, there is a realistic possibility that the decision will have any measurable financial impact on his property, alter the character of his property by changing traffic patterns or intensity of use on the Site, or would cause a reasonably prudent person to believe the decision would affect the property's market value.

Examining the facts you have presented, it appears that the decisions by the Successor Agency, Port and City relating to the negotiation of the terms of the Option or Assignment, negotiation of the development agreement, and an ultimate recommendation to the City on the development agreement are interrelated. For example, renegotiation with the Developer of the sale price for the Site on behalf of either the Successor Agency or the Port is for the ultimate purpose of reaching a development agreement and appears likely to lead to discussion of development issues. On this basis, we would consider any participation by Mr. Tuttle in the negotiations relating to the Option or Assignment, as well as any participation by him in the

formulation of and recommendations concerning the development agreement, to be essentially the same decision for purposes of our analysis.<sup>3</sup>

Turning to the issues of materiality and foreseeability, we note that the Site consists of 215 acres and, when built out, could have up to 2,500 housing units, 1.5 million square feet of office space, 890,000 square feet of retail space and up to 800 hotel rooms. Also, the parcel within the Site that is partially situated within 500 feet of Mr. Tuttle's residence constitutes a very large part of the total acreage in the Site. While many of these details could change, given the large scope of the anticipated development on this parcel, it would seem reasonable to anticipate that the Successor Agency, Port, and City will be considering some development scenarios that would have some fiscal impact on Mr. Tuttle's residence. Moreover, Mr. Tuttle's participation in these considerations could reasonably lead to at least the perception either that his decision-making could be compromised or that the financial advantages and disadvantages to his property in the various development proposals may weigh on his recommendations to the City Council. Finally, although the development's fiscal impact on Mr. Tuttle's property is impossible to calculate at this point, based on the potential scope of the development, the possible impact would be "measurable" in that there is a realistic possibility there could be some discernable financial effect on the property. Therefore, we conclude that, under Regulations 18705.2 and 18706, it is reasonably foreseeable that these government decisions will have a material financial effect on Mr. Tuttle's property.

#### **Steps Seven and Eight -- "Public Generally" and "Legally Required Participation" (Regulation 18700(b)(7) and (8)).**

Steps Seven and Eight of our analysis provide two ways in which an official who has a conflict of interest in a government decision may nevertheless be permitted to participate in the decision.

Step Seven is known as the "public generally exception." Under this rule, an official who otherwise has a conflict of interest may participate in a decision if the decision affects the official's financial interest in "substantially the same manner" as it affects similar interests held by a "significant segment" of the persons in the jurisdiction. (Section 87103; Regulations 18707 and 18707.1.) In regards to residential real property such as Mr. Tuttle's, the exception only applies if the decision has substantially the same effect on either ten percent or more, or 5,000 or more, of all the property or real property owners in the jurisdiction. (Regulation 18707.1((b)(1)(B) and (2).) You have provided no facts indicating that this would be the case in regards to Mr. Tuttle's property.

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<sup>3</sup> Regulation 18709 sets forth conditions under which an agency that is making several decisions on the same general topic may segment the decisions in a way that the official may still participate in those decisions in which he or she has no financial interest. However, one requirement for segmentation is that the segmented decisions are not "inextricably interrelated" with the decisions in which the official has a financial interest. As discussed, we think all of the decisions about which you inquire are inextricably related at this point.

Step Eight is the “legally required participation” exception. This exception applies only when an official who has a conflict of interest in a decision is legally required to make or participate in the government decision and there is no other legal source that can do so in the official’s place. (See Section 87101 and Regulation 18708.) Again, you have provided no facts indicating that this would be the case in regards to Mr. Tuttle.

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

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Scott Hallabrin  
Counsel, Legal Division

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