STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
428 J Street • Suite 620 • Sacramento, CA 95814-2329
(916) 322-5660 • Fax (916) 322-0886

September 22, 2015

Rebecca L. Moon
Sr. Assistant City Attorney
456 W. Olive Avenue
P.O. Box 3707
Sunnyvale, CA 94088

Re: Your Request for Advice
Our File No. A-15-160

Dear Ms. Moon:

This letter responds to your request for advice on behalf of Sunnyvale City Councilmember David Whittum regarding the conflict of interest provisions of the Political Reform Act (the "Act").[1] Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090. Finally, this letter is based on the facts presented. The Fair Political Practices Commission does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTION

May Councilmember Whittum participate in and vote on governmental decisions on whether to approve the Environmental Impact Report (EIR) for the Peery Park Specific Plan ("PPSP") and whether to approve the PPSP despite having provided consulting engineering services to a company located within the project area?

CONCLUSION

Yes. The Councilmember may participate in and vote on governmental decisions on whether to approve the EIR for the PPSP and whether to approve the PPSP.

FACTS

The purpose of the PPSP is to guide future development of an existing industrial business park, addressing the type, location, intensity, and design of industrial and commercial buildings, as well as transportation and infrastructure improvements. The plan would include land use changes to

[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.

allow for redevelopment of under-utilized or under-developed industrial properties to provide new commercial, industrial, and research and development space for technology-based business development, as well as supporting uses within defined activity centers, such as mixed commercial and residential uses along San Aleso on the east side of Mathilda. The Specific Plan would include development policies, land use regulations, design standards, a capital improvement program and a financing program concisely within a single document to define and guide development within the Project area over the next 10 to 20 years.

Councilmember Whittum has provided consulting engineering services to a privately-held medical device company that leases a building within the PPSP project area, and has received more than $500 in compensation for those services in the past 12 months. The company uses the leased building as a corporate headquarters and for manufacturing its devices. The value of the company is believed to be more than $23 million.

You stated that if the Council approves the EIR for the PPSP and approves the PPSP, there will be no direct effects on the medical device company, its existing lease, or its productive use of the property. However, there may be minimal, incidental effects on its actual use of the property.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest. (Section 87103.) Section 87103 defines interests from which a conflict of interest may arise and includes among those interests:

- Any source of income, except gifts or loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status, aggregating $500 or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made. (Section 87103(c).)

Foreseeability: A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official's interests is material. The standard for foreseeability differs depending on whether an interest is explicitly involved in the decision. Under your facts, the medical device company is not explicitly involved in the decisions on whether to approve the EIR for the PPSP or whether to approve the PPSP. Thus, as applied to the medical device company, Regulation 18701(b) provides: "In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable."

Materiality: Regulation 18702.3(a)(4) provides the test for materiality: "For income received by the official or his or her spouse for goods and services provided in the ordinary course of business, including a salary, the financial effect is material if: . . . The source is a business entity that will be financially affected under the standards as applied to a financial interest in Regulation 18702.1." Regulation 18702.1(b) provides that the financial effect of a governmental decision is material "if a prudent person with sufficient information would find it is reasonably foreseeable that

the decision's financial effect would contribute to a change in the value of a privately-held business entity."

Here, neither the approval or denial of the EIR for the PPSP nor the approval or denial of the PPSP itself will directly affect the medical device company, its existing lease, or its productive use of the property. The PPSP may result in minimal, incidental impacts on the company's actual use of the property, but these impacts are highly unlikely to affect the value of the company, which is believed to be more than $23 million.

Given the facts presented, we determine that there is no reasonably foreseeable material financial effect on the Councilmember's financial interest in the medical device company as a result of the governmental decisions on whether to approve the EIR and whether to approve the PPSP. Accordingly, we conclude that the Councilmember may participate in and vote on these decisions.

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

Sincerely,

Hyla P. Wagner
General Counsel

/s/

By: Matthew F. Christy
Counsel, Legal Division

MFC:jgl