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

August 18, 2009

Orrin Mahoney
REDACTED

Re: Warning Letter - FPPC No. 06/115, Orrin Mahoney

Dear Mr. Mahoney:

As you are aware, we received complaints alleging that as a member of the Cupertino City Council you violated the conflict of interest provisions of the Political Reform Act (the "Act")[1]. Specifically, the complaint alleged that you violated the Act in 2006 with regard to the approval of Ordinance No. 1977, a land use decision affecting the Hewlett-Packard Company. We have concluded our review and investigation. This letter is to advise you of our resolution.

Under Section 87100, a conflict of interest exists when you, as a *public official, make, participate in making, or attempt to use your official position to influence a governmental decision* in which you know or have reason to know you have a "financial interest." You have a "financial interest" in a decision, within the meaning of Section 87100, if it is *reasonably foreseeable* that the decision will have a *material financial effect*, distinguishable from its effect on the *public generally*, on you, a member of your immediate family, or, among other things, on *any business entity in which you have an investment interest valued at $2,000 or more, or on any source of income aggregating $500 or more which you received within 12 months of the decision*. (Section 87103, subdivision (a) and (c).) (Emphasis added.)

As a city council member, you are a public official within the meaning of the Act, and you were participating and making decisions related to the approval of Ordinance No. 1977 in March 2006. The ordinance involved a 32-acre parcel of land belonging to HP, which was being developed by the Toll Brothers, a national building company. This land development was commonly known as the "Toll Brothers Project."

Our investigation regarding the complaint's allegations revealed the following:

You worked for HP for 35 years, and retired in 2002. Upon retirement, you received a lump sum payment from your retirement savings plan, and retained shares of HP stock. Your wife retired

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[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.

from HP in 2005 and also received a lump sum payment of her retirement savings plan.[2] In 2006, you worked for the Carl Group, a temporary employment agency, as a consultant to HP.

During your candidacy and after assuming office, you reported your HP investment interest on your statements of economic interest (SEI). On your candidate SEI, you reported HP stock valued at between $100,000 and $1,000,000. On your assuming office SEI, filed on January 12, 2006, you reported HP stock valued at between $10,000 and $100,000. In your interview with FPPC Senior Special Investigator Sandra Buckner, you stated that you began divesting your HP stock after your election in order to diversify your retirement portfolio.

In early 2006, shortly after you assumed office, the Cupertino City Council was engaged in land use and zoning decisions related to the Toll Brothers Project. In anticipation of a potential conflict with HP matters, you met with Cupertino City Attorney Charles Kilian. Mr. Kilian told you that your HP stock investment would not be a problem because HP was a Fortune 500 company, and your investment was a "miniscule" amount. You also discussed your employment with the Carl Group, and Mr. Kilian wrote to the FPPC's Legal Division on January 17, 2006, requesting advice with regard to your participation in the Toll Brothers Project. Mr. Kilian explained that you were semi-retired and working part-time as a consultant for the Carl Group, which had a contract to perform marketing and administrative tasks in connection with HP's account with the General Motors Corporation. Your work for the Carl Group was limited to the General Motors account, and was not related to any HP real estate decisions. Mr. Kilian did not mention your shares of HP stock in his request for legal advice.

On February 2, 2006, the Legal Division issued an advice letter to Mr. Kilian. (Advice Letter No. I-06-006.). The letter discussed the 8-step conflict of interest analysis and concluded that the Carl Group was <u>not</u> a disqualifying source of income with respect to the Toll Brothers Project. The advice letter only analyzed the income from the Carl Group as a potential economic interest.

On February 7, 2006, the Cupertino City Council had a first reading of Ordinance No. 1977, which would provide the necessary rezoning of the HP property for the Toll Brothers Project. During public comment, you were questioned about your ability to participate because you were an HP consultant. You responded that you requested and received legal advice from the FPPC that indicated you could participate and vote because your employment was through a temporary agency and not directly through HP. You participated in the discussion on the ordinance, which was continued to March 21, 2006.

At the March 21, 2006 city council meeting, the Toll Brothers Project was on the agenda for approval of Ordinance No. 1977. Your potential conflict was again raised by members of the public. You stated that your work relationship with HP had been reviewed by the city attorney and the FPPC, including your past career and current consulting agreement, and there was no conflict of interest. You participated in the discussion on Ordinance No. 1977, and it was approved on a 3-2 vote, with you voting in favor of the ordinance.

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[2] Funds you and your wife received from HP's defined benefit plan are not "income" within the meaning of the Act, having been specifically excluded under Section 82030, subdivision (b)(11). Therefore, they would not be a disqualifying economic interest for conflict of interest purposes.

After the above city council meetings, citizens filed referenda petitions to either rescind Ordinance No. 1977 or place it on an election ballot for approval by Cupertino voters. A special election was held on November 7, 2006, and Measure A, which required a majority vote to approve Ordinance No. 1977, was defeated by 63.57% of the vote.

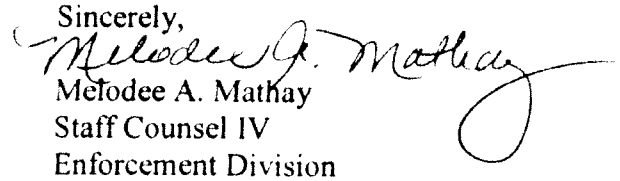
We obtained minutes and staff reports of the above Cupertino City Council meetings, and interviewed both you and Mr. Kilian as part of our investigation. Based on our review, your investment interest in HP in the form of shares of stock would have been a disqualifying economic interest if it was valued at $2,000 or more. In your interview with Ms. Buckner, you stated that you believed your stock was valued at $25,000 or more at the time of the March 21, 2006 city council vote.[3] However, you stated that you relied on the city attorney's representation that your stock investment was too small to trigger a conflict of interest violation. This advice was not correct. Regulation 18705.1, subdivision (a) and (b) provides that when the business entity, in which a public official has an investment interest of $2,000 or more, is directly involved in a governmental decision the material financial effect is presumed material and the public official should disqualify himself, unless the official can prove there would be no effect on the business entity. HP, as the owner of the real property at issue, was directly involved in the decision related to the Toll Brothers Project, and therefore, the material financial effect was presumed material. Further, it appears that the zoning decision would have had some effect on HP.

Based on the foregoing facts and circumstances, we have concluded that you had a conflict of interest when you voted on Ordinance No. 1977 on March 21, 2006 based on your investment interest in HP. However, it appears that you sought legal advice in good faith, and relied on the opinion of Cupertino City Attorney Charles Kilian with respect to your investment interest in HP not being a disqualifying economic interest. We note that your stock in HP was always disclosed on your SEIs, and you did not attempt to hide this interest from the public. It appears that the city attorney's failure to include the investment interest in the advice request forwarded to the FPPC led to your continuing belief that you did not have a conflict of interest. Based on these factors, we have determined that prosecution for the conflict of interest violation is not warranted.

Nevertheless, please be advised that your failure to properly comply with the conflict of interest provisions of the Act in the future could result in an enforcement action being brought against you. In addition, the circumstances of this case may be used as aggravating information in any future prosecution we may bring against you for violations of the Act. If you need guidance regarding your obligations, please contact the FPPC's Technical Assistance Division at 1-866-275-3772. Please also visit our website at www.fppc.ca.gov.

If you have questions regarding our resolution of this matter, please contact me at (916) 322-8062.

Sincerely,



Melodee A. Mathay
Staff Counsel IV
Enforcement Division

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[3] Regulation 18705.1, subdivision (b)(2) provides a possible exception if the official's investment interest is $25,000 or less. However, since your investment interest was greater than $25,000, this exception would not apply.