

# State of California



## Fair Political Practices Commission

P.O. BOX 807 • SACRAMENTO, 95804 • • • 1100 K STREET BUILDING, SACRAMENTO, 95814

Technical Assistance • • Administration • • Executive/Legal • • Enforcement • • Statements of Economic Interest  
(916) 322-5662 322-5660 322-5901 322-6441 322-6444

January 18, 1985

R. W. Gittings  
City Manager  
City of San Marcos  
105 W. Richmar Avenue  
San Marcos, CA 92069

Re: Your Request for Advice  
Our No. A-84-324

Dear Mr. Gittings:

You have written on behalf of San Marcos City Councilmembers Lionel G. Burton and Pia Harris and Planning Commissioner Sydney Notkin. You have requested our advice regarding the possibility of a need for these three officials to disqualify themselves with respect to a decision on a \$120 million waste-to-energy plant proposed for San Marcos by North County Resource Recovery Associates (NCRRA). Because Planning Commission action on the project has already been completed, we decline to provide advice to Mr. Notkin.<sup>1/</sup> However, since City Council action is now pending, our advice to Councilmembers Burton and Harris is as to prospective conduct.

### FACTS

Upon presentation of the conceptual plan for the plant, the City of San Marcos, in February of 1983, as a condition of project review, required North County Resource Recovery Associates (NCRRA) to deposit or reimburse the City of San Marcos, an amount not to exceed \$200,000, in order to provide the necessary funding for the City of San Marcos to adequately research, evaluate, and address the issues that would be raised by the potential construction of the proposed project. The reason for this requirement was the City's lack of expertise and knowledge in the area of waste to energy

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<sup>1/</sup> It is the Commission's policy not to provide advice with respect to past conduct. See, Government Code Section 83114(a) and (b).

technology or issues. NCRRA concurred with this requirement. No formal signed agreement was developed to memorialize this requirement, which was approved at a Council meeting.

The City established a special fund to separate expenses incurred related to the research and evaluation of the proposed waste to energy project. In March of 1983, the developer, in a phone call with City Staff, indicated that an engineering firm, which was under contract with NCRRA, was planning to organize a third annual Resource Recovery Technology Seminar trip to Japan. In each of the two (2) previous years, the engineering firm, known as HDR Techserve Inc., had organized similar trips for engineers, public officials, and other interested parties, including bond consultants and bond counsels, to travel to either Europe or Japan to see first hand what other countries had done regarding resource recovery and waste to energy technology. In the phone conversation, a representative from NCRRA indicated that some of their representatives would be attending the trip and they were interested in seeing if City of San Marcos representatives would plan on attending as well. A short time later, the City received a letter from HDR Techserve Inc., confirming that they were planning a third annual trip and would City of San Marcos officials be interested in attending.

The request was discussed at the March 22, 1983, City Council meeting and the Council determined that two members of the Council and one member of the Planning Commission would attend the Resource Recovery Technology Seminar trip to Japan with all expenses being incurred and paid out of the previously negotiated fund established by the City and NCRRA for research and investigation into waste to energy facilities.

The seminar trip, in April 1983, was attended by a number of public officials, bond counsels, bond consultants and engineers from a variety of firms and public agencies nationwide. All expenses for the City of San Marcos participants were paid by the City out of the City of San Marcos Trash to Energy fund. Total cost per person was approximately \$3,000.

The three officials who traveled to the seminar were reimbursed in the standard manner as for other City officials traveling to seminars, in accordance with established City policies. They did not receive any additional compensation nor any gifts (free meals, drinks, etc.) from NCRRA or the engineering firm HDR Techserve Inc. Instead, they utilized the standard City per diem to pay for meals, taxi fare, etc., which were not included in the standard seminar price.

None of the three officials, to your knowledge, have any other possible direct or indirect financial interest in this project.

To date, the City has authorized expenditures of \$62,835.02 for analysis of the proposed facility. The City has received a total of \$35,750.00 from NCRRA to date and there currently exists one outstanding invoice in the amount of \$26,085.02. In addition to the above mentioned trip, other expenses associated with the analysis of the proposed facility include educational seminars, consulting services, publication fees, printing and others. You anticipate an additional \$20,000.00 to \$30,000.00 will be spent and billed to NCRRA before the project analysis is finally concluded.

#### QUESTION

The question of a conflict of interest relative to voting on the project has been raised by members of the public as to those Councilmembers and the Planning Commissioner who went on the trip to Japan. The issue is whether the trip constituted a gift from NCRRA.

#### ANALYSIS

The thrust of the question presented is whether the trip to Japan should be treated as a gift from NCRRA. If it was, then the officials have received income<sup>2/</sup> of \$250 or more within the last 12 months and would have to disqualify themselves from participating in any decision which would have a material financial effect upon NCRRA<sup>3/</sup> until one year has passed from their return from the trip.<sup>4/</sup> If, instead, the reimbursement for travel was received from the City, the officials have

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<sup>2/</sup> Income is defined for purposes of the Political Reform Act (Government Code Sections 81000-91014) as including "gifts." Government Code Section 82030(a). All statutory references are to the Government Code.

<sup>3/</sup> You have stated that NCRRA wishes to construct a \$120 million waste-to-energy plant. This proposal is the subject of your advice request. For purposes of our analysis, we will assume that the decision will have a material financial effect on NCRRA.

<sup>4/</sup> Given that the trip occurred in April 1983, nearly two years ago and that Section 87103 requires disqualification only as to sources of income and gifts received within the past 12 months, there can be no basis for disqualification at this time, even if the trip was determined to constitute a gift.

received no income<sup>5/</sup> and there is no possible basis for disqualification under Sections 87100 and 87103.

Our analysis is guided by the Commission's Stone Opinion, 3 FPCC Opinions 52, No. 77-003, June 9, 1977, in which the Commission delineated a methodology for differentiating between gifts to the City and gifts to its officials. It is a gift to the City if:

1. The donor intended to donate the gift to the city and not to the official;
2. The city exercises substantial control over use of the gift;
3. The donor has not limited use of the gift to specified or high level employees, but rather has made it generally available to city personnel in connection with city business without regard to official status; and
4. The making and use of the gift was formalized in a resolution of the city council (a written public record will suffice for administrative agencies not possessing the legislative power of adopting resolutions) which embodies the standards set forth above.

3 FPCC Opinions at 57.

In this instance, the money deposited by NCRRA in the City's special fund was done pursuant to a contractual agreement. It seems clear that the payment made by NCRRA was to the City, at the City's specific request. It was not made to the three officials in question. This satisfies the first criterion of the Stone Opinion.

The second criterion is satisfied. The City has exercised complete control over the special fund. The third criterion has also been met. Although NCRRA suggested the seminar, it was the City which determined whether the officials would go and which officials would attend.

The last criterion of the Stone Opinion also has been met because the actions of the City Council in first obtaining the funds and then in determining to spend them on the trip were all taken in formal City Council proceedings as reflected in the minutes forwarded with your letter.

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<sup>5/</sup> See Section 82030(b)(2).

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CONCLUSION

The payments received by the two City Councilmembers are part of their compensation by the City and do not constitute either income or a gift within the meaning of the Political Reform Act and, therefore, cannot form the basis for any requirement of disqualification.

Should you have any questions regarding this advice, please do not hesitate to contact me. I may be reached at (916) 322-5901.

Sincerely,

  
Robert E. Leidigh  
Counsel  
Legal Division

REL:pIh



# City of San Marcos

105 W. RICHMAR AVENUE · SAN MARCOS, CALIFORNIA 92069

619/744-4020

December 21, 1984

Fair Political Practices Commission  
1100 K Street  
Sacramento, CA 95814

Re: Request For Advice Letter

Dear Commissioners:

This is a request for an advice/ruling letter from the Fair Political Practices Commission (FPPC) regarding the possibility of a conflict of interest of a Planning Commissioner and City Council members voting on a proposed Waste to Energy project.

In way of background, the following information is provided. SCA Services, Incorporated of 60 State Street, Boston, MA and Thermo Electron Corporation of 123 Second Avenue, P.O. Box, Waltham, MA have formed a partnership that is known in San Diego County as North County Resource Recovery Associates. The intent of the partnership is to construct a \$120 million waste to energy plant at a landfill that is located within the City of San Marcos and County of San Diego. The County of San Diego is the owner of the property on which the landfill is located and where the waste to energy plant will be located, although the property is contained within the incorporated limits of the City of San Marcos.

Upon presentation of the conceptual plan for the plant, the City of San Marcos, in February of 1983, as a condition of project review, required North County Resource Recovery Associates (NCRRA) to deposit or reimburse the City of San Marcos, an amount of dollars not to exceed \$200,000, in order to provide the necessary funding for the City of San Marcos to adequately research, evaluate, and address the issues that would be raised by the potential construction of the proposed project (see attached staff report and Council minutes). The reason for this requirement was the City's lack of expertise and knowledge in the area of waste to energy technology or issues. NCRRA concurred with this requirement. No formal signed agreement was developed to memorialize this requirement.

The City established a special fund to separate expenses incurred related to the research and evaluation of the proposed waste to energy project. In March of 1983, the developer, in a phone call with City Staff, indicated that an engineering firm, which was under contract with NCRRA,

## CITY COUNCIL

Lionel G. Burton, Mayor

James D. Simmons, Vice Mayor

Lee B. Thibadeau

Pia Harris

F. H. Smith

was planning to organize a third annual Resource Recovery Technology Seminar trip to Japan. In each of the two (2) previous years, the engineering firm, known as HDR Techserve Inc., 8404 Indian Hills Drive, Omaha, NE, had organized similar trips for engineers, public officials, and other interested parties, including bond consultants and bond counsels, to travel to either Europe or Japan to see first hand what other countries had done regarding resource recovery and waste to energy technology. In the phone conversation, a representative from NCRRA indicated that some of their representatives would be attending the trip and they were interested in seeing if City of San Marcos representatives would plan on attending as well. A short time later, the City received a letter from HDR Techserve Inc., confirming that they were planning a third annual trip and would City of San Marcos officials be interested in attending.

The request was discussed at the March 22, 1983 City Council meeting (see attached Minutes) and the Council determined that two members of the Council and one member of the Planning Commission would attend the Resource Recovery Technology Seminar trip to Japan with all expenses being incurred and paid out of the previously negotiated fund established by the City and NCRRA for research and investigation into waste to energy facilities.

The seminar trip was attended by a number of public officials, bond counsels, bond consultants and engineers from a variety of firms and public agencies nationwide. All expenses for the City of San Marcos participants were paid by the City out of the City of San Marcos Trash to Energy fund. Total cost per person was approximately \$3,000.

None of the three officials, to our knowledge, have any direct or indirect financial interest in this project.

To date, the City has authorized expenditures of \$62,835.02 for analysis of the proposed facility. The City has received a total of \$35,750.00 from NCRRA to date and there currently exists one outstanding invoice in the amount of \$26,085.02. In addition to the above mentioned trip, other expenses associated with the analysis of the proposed facility include educational seminars, consulting services, publication fees, printing and others. We anticipate an additional \$20,000.00 to \$30,000.00 will be spent and billed to NCRRA before the project analysis is finally concluded.

The question of a conflict of interest relative to voting on the project has been raised by members of the public as to those Councilmembers and the Planning Commissioner who went on the trip to Japan.

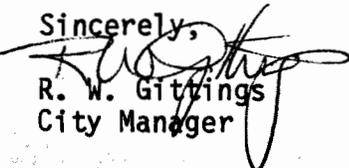
The Planning Commissioner who attended the trip has already voted on the project; out of a seven (7) member Commission, the vote was 6 to 1 in favor of the proposed facility's required Special Use Permit and certifying the facility's required Environmental Impact Report (EIR), with the Commissioner in question voting in the majority.

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The City Council will begin hearings on an appeal by opponents of the project in early January, 1985. The City Council has asked City staff to request a ruling from the FPPC on any potential conflict of interest in their voting on the appeal. The Council has also asked if a conflict of interest existed with the vote already taken by the Planning Commission, and what effect the vote has on the Planning Commission's decision. Could you advise at the earliest possible moment in order to put this issue to rest prior to the commencement of the City Council appeal proceedings.

If you require additional information, please call me at (619) 744-4020. Thanks for your assistance in this matter.

Sincerely,



R. W. Gittings  
City Manager

RWG:sv

cc: City Council  
City Attorney  
File