



California Fair Political Practices Commission

November 4, 1988

Victor J. Westman
Contra Costa County Counsel
P.O. Box 69
Martinez, CA 94553-0006

Your Request for Advice
Our File No. A-88-370
Follow-up to Advice Letter Nos.
A-86-168 and A-87-327

Dear Mr. Westman:

This is in response to your request for advice on behalf of Contra Costa County Supervisor Robert Schroder regarding his responsibilities under the conflict-of-interest provisions of the Political Reform Act (the "Act").^{1/} The letter is a follow-up to our Advice Letters A-86-168 and A-87-327.

QUESTIONS

1. If the pending Contra Costa County initiative for the East Contra Costa County Sanitary Landfill is approved at the November 8, 1988 election and the county's general plan is thereby amended to provide for that site, may Supervisor Schroder participate in the decision to approve or disapprove the conditional use permit for landfill operations?

2. If the pending initiative for the Marsh Canyon site is approved and the county's general plan is thereby amended to provide for that site, may Supervisor Schroder participate in the decision to approve or disapprove the conditional use permit for landfill operations?

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

3. Assuming one or both of the two general plan initiatives are passed, may Supervisor Schroder participate in decisions concerning the approval or disapproval of proposed development or franchise agreements for the two sites?

4. May Supervisor Schroder participate in decisions concerning whether Contra Costa County should adopt an ordinance requiring the obtaining of a franchise (or an equivalent agreement) before any solid waste disposal site or transfer station may be established?

5. Pertaining to the proposed adoption of a new solid waste management plan for Contra Costa County, can Supervisor Schroder participate in decisions concerning:

a. The adoption of that new plan with tentative reserved or reserved disposal sites indicated thereon?

b. Is the answer the same if his vote is necessary in order for three votes to be obtained to adopt a new plan?

c. If the California Attorney General's office obtains a writ of mandate directing the Contra Costa County Board of Supervisors to consider and adopt a new solid waste management plan, may Supervisor Schroder participate in decisions concerning the adoption of that revised plan pursuant to such a court ordered mandate?

CONCLUSIONS

1. Supervisor Schroder may participate in the decision to approve or disapprove the conditional use permit for the East Contra Costa Sanitary Landfill unless it is reasonably foreseeable that the decision will increase or decrease the value of Waste Management's Marsh Canyon Site by \$1,000,000 or more.

2. Supervisor Schroder may not participate in the decision regarding whether to issue a conditional use permit for the Marsh Canyon site.

3. Supervisor Schroder may not participate in a decision concerning proposed development or franchise agreements for the Marsh Canyon site. He may participate in a decision concerning a proposed development or franchise agreement for the East Contra Costa Sanitary Landfill unless the decision will increase or decrease the value of the Marsh Canyon site by \$1,000,000 or more.

4. Supervisor Schroder may participate in decisions concerning whether Contra Costa County should adopt an ordinance requiring the obtaining of a franchise unless it is reasonably foreseeable that the decision will have a material financial effect on Waste Management.

5. Supervisor Schroder may not participate in the adoption of a new solid waste management plan with tentative reserved or reserved disposal sites indicated thereon regardless of whether his vote is necessary in order for three votes to be obtained to adopt a new plan. Our advice would not be altered by the issuance of a writ of mandate directing the Contra Costa County Board of Supervisors to consider and adopt a new solid waste management plan.

FACTS

Supervisor Schroder is a 50-percent owner in the Schroder Insurance Company. Schroder Insurance is the insurance broker for Valley Disposal Service Company, a subsidiary of Waste Management, Inc. In this capacity, Schroder Insurance earns annual commissions in excess of \$500.

Waste Management owns the proposed Marsh Canyon landfill site. As of the date of your letter, Waste Management had not yet filed any entitlement applications with the county for the Marsh Canyon site but has indicated at public meetings and before the Board of Supervisors that it proposes to do so very shortly.

ANALYSIS

As stated in our previous advice letters, Supervisor Schroder may not participate in any decision which will have a reasonably foreseeable material financial effect on Valley Disposal's parent company, Waste Management, Inc. (Schroder Advice Letters Nos. A-87-327 and A-86-168, copies enclosed.)

Foreseeability

An effect on an official's interest is foreseeable when there is a substantial likelihood that it will ultimately occur as a result of a governmental decision. An effect does not have to be certain to be foreseeable; however, if an effect is a mere possibility, it is not foreseeable. (In re Thorner (1975) 1 FPPC Ops. 198.)

Conditional Use Permits

In our previous advice letters, we have concluded that decisions regarding land use approvals for landfills other than the Marsh Canyon site will affect the likelihood of whether Waste Management will be granted a permit to operate a landfill at the Marsh Canyon site. Similarly, if the general plan is approved to provide for the East Contra Costa County Sanitary Landfill, a subsequent decision regarding the conditional use permit for that site would undoubtedly affect the likelihood of whether Waste Management would be granted a permit to operate the Marsh Canyon site. If the decision would have a material financial effect on Waste Management, Supervisor Schroder would be prohibited from participating in the decision. For a business entity the size of Waste Management (a Fortune 500 company), the effect of the decision would be considered material if it would result in an increase or decrease in the value of the Marsh Canyon site of \$1,000,000 or more. (Regulation 18702.2(c)(3), copy enclosed.)

With regard to a decision on a conditional use permit on the Marsh Canyon site, Supervisor Schroder would be prohibited from participating in the decision. Regulation 18702.1 describes certain situations in which the effect of a decision will be deemed material. Among these is a situation in which a source of income of \$250 or more appears before the official. In the present situation, Waste Management through its subsidiary Valley Disposal is a source of income to Supervisor Schroder. (Regulation 18706, copy enclosed.) By applying for a conditional use permit, Waste Management would "appear" before the Board of Supervisors. (Regulation 18702.1(b).) Accordingly, Supervisor Schroder would be prohibited from participating in the decision.

With regard to decisions concerning approval of proposed development agreements or franchise agreements for the two sites, our response is the same as above. Supervisor Schroder may not participate in any such decisions with regard to the Marsh Canyon site and is prohibited from participating in any such decision regarding the East Contra Costa Sanitary Landfill site which would materially affect Waste Management.

Franchise Ordinance

You have indicated that the county will very shortly be considering the adoption of a franchise ordinance which will require any person or entity proposing to establish a new solid waste disposal site in the unincorporated area to first obtain a franchise or equivalent agreement with the County. The adoption of the ordinance does not provide a franchise for any of the pending or proposed new solid waste sites.

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Since Waste Management is one of a very limited number of entities which may seek to obtain the franchise, the decision regarding whether such a franchise must be obtained would have a reasonably foreseeable effect upon Waste Management. The question then becomes whether the effect would be material. Again, Waste Management is a Fortune 500 company. Accordingly, an effect will be deemed material if it will result in a \$1,000,000 increase or decrease in Waste Management's assets or gross revenues in a fiscal year, or a \$250,000 increase or decrease in Waste Management's expenses in a fiscal year. (Regulation 18702.2) We do not have sufficient facts in the present situation to determine whether the potential of having to obtain a franchise agreement will have any such impact upon Waste Management.

Solid Waste Management Plan

You have also asked if Supervisor Schroder may participate in the adoption of a new solid waste management plan which would include tentative reserved or reserved disposal sites. Presumably, Waste Management would seek to have its Marsh Canyon site included in the new solid waste plan. Under such circumstances, Waste Management would again "appear" before the Board of Supervisors and Supervisor Schroder's participation would be prohibited. (Regulation 18702.1.)

This conclusion would not be altered merely because Supervisor Schroder's participation is needed to provide the third vote to break a 2-2 tie regarding adoption of the new plan. Section 87101 permits an otherwise disqualified official to participate in a decision if his participation is legally required. Regulation 18701(a) (copy enclosed) provides that an official's participation is legally required if there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision. Both Section 87101 and Regulation 18701 specifically state that the fact that an official's vote is needed to break a tie does not make his participation legally required.

In the present situation, only one of the four members of the Board of Supervisors has been disqualified from participating in the decision. The Board of Supervisors has a quorum with which to make decisions. Accordingly, Supervisor Schroder's participation is not legally required for the Board of Supervisors to act on the plan.

Neither would Supervisor Schroder's participation be legally required because of a court order mandating the Board of Supervisors to adopt a new solid waste management plan. Again, the Board of Supervisors has a quorum with which to adopt such a plan. Thus, Supervisor Schroder's participation would not be legally required.

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If you have any further questions, please contact me at
(916) 322-5901.

Sincerely,

Diane M. Griffiths
General Counsel

A handwritten signature in black ink, appearing to read "John G. Mclean". The signature is written in a cursive style with a large initial "J" and "M".

By: John G. Mclean
Counsel, Legal Division

DMG:JGM:ld

Enclosure

VICTOR J. WESTMAN
COUNTY COUNSEL

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September 21, 1988

John G. McLean
Counsel, Legal Division
California Fair Political
Practice Commission
428 "J" Street, Ste. 800
P.O. Box 807
Sacramento, CA 95804-0807

Re: Request for Advice, your Advice Letters No.: A-86-168,
A-87-327; Supervisor Robert Schroder

Dear McLean:

On behalf of Contra Costa County Supervisor Robert Schroder, this letter requests additional advice concerning his obligations under the Conflict-of-Interest provisions of the Political Reform Act.

QUESTIONS

1. If the pending Contra Costa County initiative for the East Contra Costa County Sanitary Landfill is approved at the November 8, 1988 election and the County's general plan is thereby amended to provide for that site, can Supervisor Schroder thereafter vote to approve or disapprove the conditional use permit required to be issued before landfill operations may be established on the site?
2. If the pending County initiative to amend the Contra Costa County general plan to show the Marsh Canyon site as a landfill site is approved in November and the County's general plan thereby amended, can Supervisor Schroder participate in decisions concerning whether a conditional use permit should be approved for that site?
3. Assuming one or both of the two general plan initiatives noted in questions 1 and 2 above are passed, can Supervisor Schroder participate in decisions concerning the approval or disapproval of proposed development and/or franchise agreements for the two sites?
4. Can Supervisor Schroder participate in decisions concerning whether Contra Costa County should adopt an ordinance requiring the obtaining of a franchise (or the entering of an equivalent agreement) before any solid waste disposal site or transfer station may be established?

5. Pertaining to the proposed adoption of a new solid waste management plan for Contra Costa County, can Supervisor Schroder participate in decisions concerning:

a. The adoption of that new plan with tentative reserved or reserved disposal sites indicated thereon?

b. If his vote is necessary in order for three votes to be obtained to adopt a new plan?

c. Should the California Attorney General's office obtain a writ of mandate directing the Contra Costa County Board of Supervisors to consider and adopt a new solid waste management plan, can Supervisor Schroder participate in decisions concerning the adoption of that revised plan pursuant such a court ordered mandate?

FACTS

1. Waste Management. Accept as indicated below, the general facts remain as set forth in your February 5, 1988 opinion (No. A-87-327) and in Ms. Natalie E. West's July 21, 1988 letter to you (copy attached). As indicated in Ms. West's July 21 letter, we have been unable to determine how the decisions concerning the two pending landfill applications (Marsh Canyon and East Contra Costa County sanitary landfill) would affect the value of the Marsh Canyon (Creek) site. As of the date of this letter, Waste Management has yet to file any entitlement applications with the County for the Marsh Canyon site but has indicated at public meetings and before the Board of Supervisors that it proposes very shortly to do so. In light of the pending November initiative election for the Marsh Canyon site, we assume entitlement requests (when received from Waste Management) for that site would involve at least an application for a conditional use permit and possibly for a franchise or development agreement.

It is our understanding that Waste Management through its subsidiary company, Oakland Scavenger, is presently negotiating with the Alameda County Solid Waste Management Agency to obtain an amendment to the Alameda County Solid Waste Plan to provide for the acceptance of solid waste from Contra Costa County. Alameda County officials have indicated it will be some months before they can make a decision on those pending waste management applications.

2. New County Solid Waste Management Plan As indicated in the attached September 8, 1988 letter from this office to the California Attorney General and in his August 31, 1988 letter to

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us, the State Solid Waste Management Board takes the position that Contra Costa County is in violation of law in that it has not in a timely manner adopted a new County solid waste management plan indicating potential sites for the location of new solid waste disposal sites and facilities. The Attorney General has been directed by the State Board to consider initiating legal action to obtain a writ of mandate directing the Contra Costa County Board of Supervisors to take action to approve a new Contra Costa County Solid Waste Management Plan with designated (tentative or reserve) sites shown thereon.

In our Question No. 4 above, we seek your views as to whether Supervisor Schroder may participate at this time (prior to the initiation and conclusion of the said litigation) in Board of Supervisor's decisions concerning the adoption of a new County Solid Waste Management Plan showing tentative or reserve disposal sites (including possibly the Marsh Canyon site). In other words, based upon the Attorney General's August 31 letter, can Supervisor Schroder vote on a new plan when considered by the Board of Supervisors? Can Supervisor Schroder vote if his vote is necessary in order for three votes to be obtained to adopt a new plan?

Should the Attorney General obtain a writ of mandate directing the Board of Supervisors to consider and adopt a new solid waste management plan, can compliance with that writ (court order) on the part of Supervisor Schroder be done in a manner which does not place him in violation of the Political Reform Act? In other words, if Supervisor Schroder would be subject to possible contempt proceedings if he did not participate pursuant to a court's writ of mandate direction to do so, would that allow his participation under the Political Reform Act?

3. Franchise Ordinance As indicated in the attached County Counsel's report to the Board of Supervisors, the County will very shortly be considering the adoption of a franchise ordinance which will require any person or entity proposing to establish a new solid waste disposal site in the unincorporated area to first obtain a franchise and/or equivalent agreement from the County. Can Supervisor Schroder participate in a decision as to whether the County should adopt this ordinance? Please note that the adoption of the ordinance does not provide a franchise for any of the pending and/or proposed new solid waste sites. Only by subsequent applications filed with the Board, would specific sites be addressed as to whether or not they should be granted franchises.

If the ordinance is adopted, we assume that any subsequent application for a site specific franchise would be similar in

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nature to a request for a conditional use permit. In other words, whatever your decision is as to Questions 1 and 2 above, would appear dispositive as to whether Supervisor Schroder could participate on a specific application under the franchising ordinance for franchise site approval and/or the approval of an equivalent development agreement.

While it appears the Board of Supervisors will not take any action on Marsh Canyon or East Contra Costa County landfill site use permits or franchise agreements until after the November election, we would appreciate your answers to Question 1, 2 and 3 no later than November 8, 1988. Concerning Questions 4 and 5, we expect the Board of Supervisors to address them in the next two to four weeks. For this reason, we would appreciate your views at your earliest convenience.

If you have any questions concerning the foregoing or desire further information on any points involved with these questions, please feel free to call upon me and this office to provide you with that information.

Very truly yours,



Victor J. Westman
County Counsel

VJW/jh

cc: Supervisor Schroder, Danville Office



California Fair Political Practices Commission

September 27, 1988

Victor J. Westman
Contra Costa County Counsel
P.O. Box 69
Martinez, CA 94553-0006

Re: 88-370

Dear Mr. Westman:

Your letter requesting advice under the Political Reform Act was received on September 26, 1988 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact John McLean, an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

Diane M. Griffiths
Diane M. Griffiths
General Counsel

DMG:plh