87100/103

State of California

Memorandum

To : File

Date : March 4, 1980

A-80-03-076

From : **FAIR POLITICAL PRACTICES COMMISSION**
Sarah Cameron SC

Subject: Conversation with Tom Haas, City Attorney of Fairfield

By letter of February 11, 1980, Mr. Haas had asked me to comment on an opinion he had provided to one of the members of the Fairfield City Council. [Attached]

I called him today and told him that I thought the analysis of Thorner was correct except for the paragraph numbered (3) on page six of the opinion. I pointed out to Mr. Haas that under the Thorner analysis, if the contractor buys only from the councilmember's firm, or if there is some special reason to think that a regular customer's bid will be accepted, then the councilmember/supplier should disqualify himself from decisions relating to the project. I based this analysis on the second full paragraph on page 10 of the Thorner opinion, 1 FPPC Ops. 207, the paragraph which begins "In the case of a contractor who in the past has purchased only from MacPhail's . . ."

Haas assured me that the Councilmember in question asks Haas's advice on a case by case basis, and that he would use this correct analysis of Thorner if such a case ever came up. He reminded me that this gravel pit has just begun operation so that there are no customers yet who can be said to buy only or even regularly from the councilmember's business.

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CITY of FAIRFIELD

Incorporated December 12, 1903

City Hall
1000 Webster Street
Fairfield, Calif. 94533
(707) 425-1031

Office of City Attorney

February 11, 1980

Ms. Sarah Cameron
Legal Division
Fair Political Practices Commission
P. O. Box 807
Sacramento, California 95804

Dear Ms. Cameron:

I would like to thank you again for taking the time to talk with me by telephone on January 30, 1980 about the application of the Political Reform Act to the situation involving the gravel pit operation outside the City of Fairfield.

I am enclosing a copy of the letter I sent Councilman Huber on the matter. I would appreciate any comments you might have on Part II of the letter, which deals with the Political Reform Act.

Very truly yours,

Tom Haas

Thomas Haas
City Attorney

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Enclosure

CITY of FAIRFIELD □ *Incorporated December 12, 1903*

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Fairfield, Calif. 94533
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Office of City Attorney

February 8, 1980

Councilman G. Ben Huber
1129 Churchill Drive
Fairfield, California 94533

Re: Gravel Pit Operation

Dear Councilman Huber:

This letter is in reply to your letter of January 18, 1980. As you requested, it will discuss both contractual conflicts of interest and application of the Political Reform Act of 1974. As you state in your letter, the pertinent facts are: "Explosive Technology (ET) owns a gravel pit located on our property in the Potrero Hills 8 miles southeast of Fairfield. We have been leasing the pit to A. Teichert and Son, Inc., since shortly after we acquired the property in the middle '70s. Our lease with Teichert ended on December 31, 1979, and ET is seriously considering operating the pit by establishing a subsidiary corporation that would be 100 percent wholly owned by Explosive Technology. I would not be an officer or director of the new corporation; but, as you know, I am an officer and director of Explosive Technology. I am also a minority stockholder in OEA, Inc., ET's parent company, but own less than 3 percent of the outstanding shares. The shares I do own are valued at more than $1,000."

I.

CONTRACTUAL CONFLICTS OF INTEREST

The governing code sections on contractual conflicts of interest are found in Government Code §§1090, et seq. Gov. Code §1090 provides in relevant part that no officer or employee shall be interested in any contract made by them in their official capacity, or by any body or board of which they are members.

As your letter describes the situation, it is clear that as an officer or director of Explosive Technology (hereafter

"ET"), you have more than a "remote interest" in the contracts of a wholly-owned subsidiary. See Gov. Code §1091. Therefore, under these provisions, the City of Fairfield may not enter into any contractual arrangement with the ET subsidiary while you are on the Council, or on a matter which was planned to a significant degree while you were on the Council, and awarded by the Council after you leave. Stigall v. Taft, 58 Cal.2d 565 (1958). (These same rules also apply to any other entity on which you serve on the governing board, including the Fairfield-Suisun Sewer District, Fairfield Housing Authority, Fairfield Redevelopment Agency, and the Travis Wastewater Authority.)

This prohibition would cover contracts on which the ET subsidiary was a subcontractor, Stigall v. Taft, supra, or on which it had previously agreed to supply materials. People v. Daysher, 2 Cal.2d 141 (1934).

An exception to this rule has been stated by the courts as follows:

> "The purchase, after award of contract and without previous agreement so to do, by the contractor of material, used in the performance of the contract, from a member of the board awarding the contract, or from a corporation of which such member is a stockholder or employee, does not create, in such member, an interest in the contract, which will invalidate it. (Citations omitted.) However, if the purchase is made pursuant to an agreement, made before the award of contract, the latter is void. (Citations omitted.) In the last case it is said: 'However devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void.' 'In determining whether or not a contract such as this is against public policy and illegal, the court is not concerned with the technical relationships of the parties, but will look beyond the veil which enshrouds the matter to discern the vital facts.' (Citations omitted.) The making of an agreement may be inferred by proof of conduct as well as by proof of the use of words. (Citations omitted.) People v. Daysher, 2 Cal.2d 141, 146 (1934).

Applying the rule in the Daysher case to the facts in your letter, material may be supplied by the ET subsidiary to a city contractor only in the situation where there is no agreement of any type between the contractor and the ET subsidiary prior to the award of the contract.

You have asked orally whether the contractual conflict

of interest provisions would prohibit the ET subsidiary from bidding or participating in bids on the Highway 12 project or the Travis Blvd./I-80 Interchange modification. These projects are to be awarded and supervised by the State of California Department of Transportation. While the City is paying all or part of the cost of design and construction, the design and specifications are being prepared by an independent contractor civil engineer, and reviewed and approved by both the City and State. As part of the State highway system, both projects can only be built to State standards. See, generally, Caltrans Policy and Procedure No. P78-3. Under these circumstances, I do not believe the contract can be said to have been made by the Fairfield City Council. However, a contrary opinion can be reached with an expansive reading of the case of Stigall v. Taft, 58 Cal.2d 565 (1958). In this case the California Supreme Court found a prohibited conflict when a councilman sat on the Taft City Council during the planning and bidding of a new civic center. The councilman sat on the building committee which supervised the plans and specifications. The councilman's plumbing firm was low bidder on the plumbing work; he resigned from the council, and the council thereupon awarded the construction contract to the general contractor which contract included the sub-bid by the councilman's plumbing company. The court held that the award of the contract, which was concededly made after the resignation, was not the only sense in which it would construe the contract as having been "made." Rather, the court stated that the planning, preliminary discussions, compromises, drawing of plans and specifications, and solicitations of bids, all of which the councilman participated in, were in the broad sense, embodied in the making of the contract.

I would suggest that given the City Council's minimal involvement in the engineering and planning decisions, the analogy would not stretch to cover our situation. I, therefore, conclude that Gov. Code §1090 would not prohibit the ET subsidiary from contracting on these State highway projects.

II.

POLITICAL REFORM ACT OF 1974

The Political Reform Act of 1974 is found at Government Code §§81000, et seq. It provides that, "No public official at any level of state or local government shall make, participate in making, or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." Government Code §87100.

For purposes of this provision, a financial interest is defined as:

> "An official has 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:
>
> (a) Any business entity in which the public official has a direct or indirect investment worth more than one thousand dollars ($1,000);
>
> (b) Any real property in which the public official has a direct or indirect interest worth more than one thousand dollars ($1,000);
>
> (c) Any source of income, other than loans by a commercial lending institution in the regular course of business, aggregating two hundred fifty dollars ($250) or more in value received by or promised to the public official within twelve months prior to the time when the decision is made; or
>
> (d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management. . ."

The code further defines "investment" to include stock in a ". . .business entity or any parent, subsidiary or otherwise related business entity. . ."

The regulations of the Fair Political Practices Commission give the following definition of a material financial effect:

> "18702. Material Financial Effect (87103).
>
> (a) The financial effect of a governmental decision on a financial interest of a public official is material if the decision will have a significant effect on the business entity, real property or source of income in question.
>
> (b) In determining whether it is reasonably foreseeable that the effects of a governmental decision will be significant within the meaning of the general standard set forth in paragraph (a), consideration should be given to the following factors:
>
> (1) Whether, in the case of a business entity in which the public official holds a direct or indirect investment of one thousand dollars ($1,000) or more or in the case of a business entity in which the public official is a director, officer,

partner, employee, trustee or holds any position of management, the effect of the decision will be to increase or decrease:

(A) The annualized gross revenues by the lesser of:

1. One hundred thousand dollars ($100,000); or

2. One percent if it is one thousand dollars ($1,000) or more; or

(B) Annual net income by the lesser of:

1. Fifty thousand dollars ($50,000); or

2. One half of one percent if it is one thousand dollars ($1,000) or more; or

(C) Current assets or liabilities by the lesser of:

1. One hundred thousand dollars ($100,000); or

2. One half of one percent if it is one thousand dollars ($1,000) or more.

Current assets are deemed to be decreased by the amount of any expenses incurred as a result of governmental decision."

As I understand the proposed gravel pit operation, the ET subsidiary will establish prices on the material, and sell to anyone meeting your price. The ET subsidiary will also probably contract with a general contractor who will be able to contract directly with customers and haul material bought from the ET subsidiary to the customer's site. The ET subsidiary will not haul the material for customers, but will load customers on the pit site. For the purposes of this discussion, it is assumed that the ET subsidiary is doing business in the jurisdiction.[1]

In our conversations, you have estimated that Teichert may have supplied between 0 and 5 percent of the aggregate used in Fairfield in any one of the past several years. A check of the yellow pages shows twelve concerns listed under "Sand and Gravel," indicating the assumed percentages are probably reliable.

Assuming for the present analysis that votes before the

Council on general development issues, such as general plan amendments and other nonproject-related decisions could be said to have financial effects both material and reasonably foreseeable on the ET subsidiary, the projected level of aggregate business does not approach the level heretofore required by the Fair Political Practices Commission to be "distinguishable from the effect on the public generally," Government Code §87103. Opinion requested by Tom Thorner, 1 FPPC 198, 207, 208. Accordingly, you could participate in such decisions.

In decisions involving specific projects, the best analysis available to guide your participation is the opinion requested by Tom Thorner, 1 FPPC 198. A copy of that opinion is being sent to you with this letter.

Based on the FPPC analysis in the Thorner opinion, when the potential amount of business to the ET subsidiary exceeds the materiality levels described in Section 18702 of the regulations (quoted at pages 4-5 of this letter), the following patterns should guide your participation on specific project approvals before the Council:

(1) There is no reasonably foreseeable financial effect where the ET subsidiary has no known connection with the project, you may participate in the decision.

(2) If the ET subsidiary is preparing or has prepared a bid on the project, there is a reasonably foreseeable financial effect, and if material, you should not vote or participate in the decision.

(3) If a contractor or regular customer of ET's subsidiary who normally buys principally or only from the ET subsidiary is only at the state of preparing a bid on the project, you may participate in the decision.

(4) If the contractor or customer described in No. 3 has already been awarded the contract on the project, and if the materiality test is met, you should not vote or participate in the decision.

This discussion has been necessarily general since we are discussing assumed future events and facts. As the ET subsidiary becomes active and as specific projects appear before the Council, we can further review your participation in the matter.

Very truly yours,

Thomas Haas

Thomas Haas
City Attorney

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[1]This is an assumption of some magnitude, and requires careful note. Both the definitions of "investment" and "source of income" in the Act require that the business entity be doing business in the jurisdiction. Arguably, if the entity is not doing business in the jurisdiction, investments and sources of income need not be disclosed, nor need disqualification take place. The counter argument is that interests doing business outside the jurisdiction need not be disclosed, but if a governmental decision would foreseeably affect the interest (even though the interest was outside the jurisdiction), the policy behind the Act requires disqualification since the Act's intent is that no one make a governmental decision which would affect their private financial interests.