

RAVI MEHTA  
CHAIRMAN



FAIR POLITICAL PRACTICES COMMISSION

March 4, 1996

Ms. Betsy Strauss  
City Attorney  
City of Fairfield  
1000 Webster Street  
Fairfield, California 94533

Re: Your Request for Advice  
Our File No. A-96-034

Dear Ms. Strauss:

This is in response to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup>

QUESTIONS

1. Is it reasonably foreseeable that a decision by the city council to amend the Fairfield general plan to allow residential development large enough to include potentially disqualifying projects but without the approval of a tentative subdivision map (or other decision necessary to proceed with development) will have a material financial effect on Solano Garbage Company?

2. Is it reasonably foreseeable that a decision by the city council to rezone property to allow residential development large enough to include potentially disqualifying projects but without the approval of a tentative subdivision map (or other decision necessary to proceed with development) will have a material financial effect on Solano Garbage Company?

3. Is it reasonably foreseeable that a decision by the city council to amend the Fairfield general plan or rezone property to

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<sup>1</sup> 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, Sections 18000-18995.

allow commercial development will have a material financial effect on Solano Garbage Company?

4. Is it reasonably foreseeable that a decision by the city council that determines that an annexation of undeveloped land is consistent with the Fairfield general plan will have a material financial effect on Solano Garbage Company?

5. Is it reasonably foreseeable that a decision to approve a tentative subdivision map which would subdivide unimproved property into 180 residential lots will have a material financial effect on Solano Garbage Company/Solano Recycles?

6. Is Regulation 18702.2(f) the correct test to apply to determine whether a decision will have a material financial effect on Solano Garbage Company/Solano Recycles? Is 180 the correct threshold number of lots?

7. If a residential development is projected to be built over a multiple year period (for example, five years), may the financial effect of a decision be divided equally on an annual basis over that period?

8. Since only the decision to approve a development's size may trigger a "material financial effect" on Councilmember O'Regan's source of income, would most city decisions after approval of the tentative subdivision map be considered "implementation decisions" except those decisions that themselves could increase a development's size by 180 residences (or increase a commercial development's size similarly)?

#### CONCLUSIONS

1 - 5. The Act's standard for when the financial effect of a decision is "reasonably foreseeable" is broad. As interpreted by the Commission and courts, the effects of a decision are considered reasonably foreseeable if there is a "substantial likelihood" or a "substantial probability" that they will occur. The mere fact that a decision does not provide a landowner with a "vested right" to develop property is not determinative under the Act.

It is certainly reasonably foreseeable that a council decision to approve a tentative subdivision map or a specific plan which creates over the threshold number of lots would have a material financial effect on Solano Garbage Company. Further, it is highly probable that many council decisions regarding annexation, general plan amendments, and rezoning of property, will lead to development that will have a material financial effect on Solano Garbage Company. Therefore, Councilmember O'Regan must disqualify herself from participating in such decisions.

We recognize, however, that not all of the council's land use decisions are directly linked to development that would have a material financial effect on Solano Garbage Company. In certain limited instances, it may not be reasonably foreseeable that a council decision regarding more general land use issues, such as annexation of undeveloped land, some general plan amendments, or certain zoning changes, would have a material financial effect on Solano Garbage Company. It is more likely, however, that even these decisions will meet the foreseeability test and will fall out of Section 87100, if at all, under the materiality standard or some exception, such as the "public generally."

With respect to council decisions regarding commercial land use, the fact that commercial users are not legally mandated to contract with Solano Garbage Company for services under the city code is not determinative. In analyzing foreseeability, the main factor to consider is how many commercial users actually do contract for refuse pick-up. Presumably most of them do.

6. Yes. Because Solano Garbage Company meets the financial thresholds of Regulation 18702.2(f), the materiality standards in 18702.2(c) apply. Councilmember O'Regan must disqualify herself from land use decisions that would increase Solano Garbage Company's revenues by \$30,000 in a fiscal year. Based on the current revenue per residence that the company receives for garbage and recycling services, your calculation of 180 lots appears to be a correct threshold for a disqualifying project.

7. No. In applying the materiality standards of Regulation 18702.2, you must consider the maximum increase in annualized gross revenues to Solano Garbage Company or Solano Recycles as a result of the decision. If the residential development project has a projected build-out of five years, to determine whether Councilmember O'Regan may participate in the decision you must consider the maximum increase in gross revenues to Solano Garbage Company or Solano Recycles in the fifth year, when all the new houses are built and the potential new customers are receiving service.

8. Yes. Once a tentative subdivision map has been approved setting the size of a development, Councilmember O'Regan may participate in implementation decisions including decisions about lot layout, design or layout of common areas, and subdivision design features.

#### FACTS<sup>2</sup>

Councilmember Noreen O'Regan is a salaried employee of Solano Garbage Company. Councilmember O'Regan does not participate in

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<sup>2</sup> The facts summarized are from your letter requesting advice dated January 22, 1996, as supplemented by your letter dated February 26, 1996.

the profits of the company, nor does she receive any compensation that is tied to the company's revenues.

Solano Recycles is a division of Solano Garbage Company. When Solano Garbage Company was awarded a franchise for residential and commercial recycling from the City of Fairfield, it chose to call this new part of the company Solano Recycles both to reflect the difference between refuse collection and recycling and to more easily track the income and loss of this new division. Solano Recycles is in fact Solano Garbage Company, doing business as Solano Recycles.

Solano Garbage Company has an exclusive contract with the City of Fairfield to pick up and dispose of all residential and commercial garbage within the City of Fairfield. In addition, Solano Garbage Company, doing business as Solano Recycles, has an exclusive contract with the City of Fairfield to pick up and recycle certain defined recyclable materials from residences and commercial sites within the City of Fairfield.

The Fairfield City Code requires the owner of each single-family residence to use and pay for one collection per week of garbage at the monthly rate determined by the city ("mandatory garbage service"). The city code also requires the owner of each single-family residence to pay for one collection per week of recyclable materials. The charges for these services are billed and collected by the city and then paid to Solano Garbage Company and Solano Recycles.

The city sets the rate which can be charged by Solano Garbage Company for picking up and disposing of residential garbage and residential recycling. The city does not set the rate for either commercial garbage pick-up or commercial recycling. The code does require each commercial, multi-family residential and industrial establishment to pay recycling charges established by Solano Recycles. There is no mandatory garbage service for non-residential (commercial, multi-family, industrial) users.

The city code treats non-residential consumers of garbage services differently from residential consumers. The code does not require the commercial consumer to use and pay for garbage service from Solano Garbage. However, the code does require the commercial consumer to use the services of Solano Garbage if the commercial consumer contracts for the collection of garbage service.

The net tangible assets of Solano Garbage Company are at least \$4,000,000. The company had pre-tax income for the last fiscal year of at least \$750,000, with net income from that period of at least \$400,000.

The current monthly residential rate for garbage collection is \$11.34. The current monthly rate for recycling is \$2.40. The combined annual revenue from these two services for each

residential unit is approximately \$165. The city deducts eight percent of the revenues received from residential garbage customers and remits the remainder to Solano Garbage Company/Solano Recycles.

Based on these facts, you have advised Councilmember O'Regan that she may not participate in a city decision to approve a tentative subdivision map that subdivides unimproved property into 180 residential lots. You have further advised her that if Solano Garbage Company and Solano Recycles receive rate increases, then her disqualification will be triggered at a lower threshold than 180 residential homes.

Your advice on requiring disqualification on a pending tentative subdivision map approval is because this approval (one of many in a long line of land use decisions that might come before the city in regards to a particular property) is the one that establishes the size of the development and provides the legal entitlement to develop the property.

#### ANALYSIS

Section 87100 of the Act prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. Section 87103 states that a public official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from the effect on the public generally, on the official or a member of his or her immediate family or on:

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

#### Section 87103(c).

As you stated, because Councilmember O'Regan is a salaried administrative employee of Solano Garbage Company, the company is a source of income to her. Consequently, Councilmember O'Regan is prohibited from making, participating in making, or influencing decisions if it is reasonably foreseeable that such decisions will have a material financial effect on Solano Garbage Company.

1-5. Foreseeability. There are numerous land use decisions involved in the development process including annexing undeveloped land, amending a general plan, rezoning property, approving

subdivision maps, etc. Your first five questions ask whether the financial effect of various land use decisions on Solano Garbage Company would be considered foreseeable.

You ask whether it is reasonably foreseeable that the council's decision to amend the Fairfield general plan or to rezone property to allow residential development large enough to include potentially disqualifying projects but without the approval of a tentative subdivision map (or other decision necessary to proceed with development) will have a material financial effect on Solano Garbage Company. In your opinion, "if a land-use decision does not provide a landowner/developer with the legal entitlement to develop his property, then it is not foreseeable that the decision will have a financial effect on an official's financial interest." You state, "if a land-use decision does not provide a landowner-developer with the legal entitlement to develop his property to a size where the increase of customers for Solano Garbage Company and Solano Recycles exceed the number of new residences or commercial square footage that result in a 'material financial effect' on Councilmember O'Regan, then it is not foreseeable that the decision will have a financial effect on her financial interest."

However, the definition of "reasonably foreseeable" as used in the Act and interpreted by the Commission and courts is broader than this. The standard of reasonable foreseeability under the Act requires public officials to disqualify themselves if there is a "substantial likelihood" or "substantial probability" that the decision would have a financial effect on a source of income.

The Commission's interpretation of "foreseeability" is set forth in In re Thorner (1975) 1 FPPC Ops. 198. There the Commission stated that the effect of a decision is considered reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required. However, if an effect is only a mere possibility, it is not reasonably foreseeable.

The Commission applied this standard to a question from a water district board member, Mr. McPhail, about whether he could participate in a water district decision on an application for water service for new developments. First the Commission discussed situations where the official's business interest, McPhail's, had bid or was planning to bid to supply materials to the project in question.

As a general rule ... when the bid is made with a serious hope that the contract will be awarded to McPhail's, we think a financial effect on McPhail's is reasonably foreseeable even if there is substantial competition. The statute requires foreseeability, not certainty. Furthermore, the fact that a seriously competitive bid on the project is being prepared or has been made is likely to focus the attention of the

[official] on the fact that he may benefit if a variance is granted. The ultimate test is whether the element of foreseeability, together with the other elements discussed earlier, is present to the point that the official's "unqualified devotion to his public duty" might be impaired. People v. Darby, 114 Cal.App.2d 412, 433 (1952).

Emphasis added.

The Commission went on to apply the standard to a situation where a third party was supplying materials to the project, but the third party was a regular customer of McPhail's and normally bought principally or only from McPhail's. The Commission stated:

[A]lthough there is no certainty that McPhail's will receive business, there is a high probability that it will since the contractor ... is a regular customer. Although there is no agreement ... between McPhail's and the contractor, there is, without question, a sufficient likelihood that McPhail's will receive business to make the financial effect on Director McPhail "reasonably foreseeable."

The court construed foreseeability in the land-use context in Downey Cares v. Downey Community Development Com. (1987) 196 Cal.App.3d 983. The court found that an ordinance amending the city's redevelopment plan must be set aside because a councilmember with a conflict of interest had participated in the vote. The councilmember had a financial interest in the decision because of his ownership of properties and a real estate business in the project area. The court found that it was reasonably foreseeable that adoption of the ordinance would have a material affect on the councilmember's financial interest as a realtor. The court stated:

Appellants contend that, as a matter of law, the adoption of the ordinance amending the redevelopment plan could not have had a material financial effect on Mr. Santangelo's property and business. They contend that because the plan at this stage does not specify or authorize expenditures for any particular projects of improvement, it is not reasonably foreseeable that any particular business or real properties, such as Santangelo's, will be materially affected by the adoption of the redevelopment plan. Conceding that Mr. Santangelo may well be barred from future votes on specific ways to "implement" the plan, they contend he was not barred from voting to "adopt" the plan. We find appellants' argument unpersuasive. It is based on an improperly narrow

interpretation of the Political Reform Act and the redevelopment law.

Appellants' contention is similar to the one rejected in Witt v. Morrow (1977) 70 Cal.App.3d 817, 822 [139 Cal.Rptr. 161], one of the few appellate court decisions interpreting the Political Reform Act. There the official was president and attorney, on a retainer or salary of \$550 a month, for a nonprofit corporation which owned several properties with apartment buildings across the street from a proposed shopping center redevelopment area. The trial court held the official disqualified by conflict of interest from participating in decisions on the redevelopment plan, and the appellate court affirmed. The official argued that "the experts' testimony only showed redevelopment of the [shopping center] could have a significant impact on the value of [the corporation's] properties and did not prove it." (Italics in original.) The court replied, "The statute, however, requires only it be 'reasonably foreseeable . . . the decision will have a[n] effect.'" "

Downey, supra, at 990-991 (emphasis added.)

The question of foreseeability is a fact-based one which must be examined separately for each decision. With respect to council land use decisions affecting Solano Garbage Company, clearly a decision to amend the general plan or rezone property is further removed from actual development than a decision to approve a tentative subdivision map. In certain instances, it may not be reasonably foreseeable that a decision to amend the general plan or rezone property would have a financial effect on Solano Garbage Company. For example, a general plan amendment may relate to the traffic patterns, permissible noise levels, the preservation of open space or natural resources, or something else which is not directly linked to the development of residential or commercial uses that would have a material financial effect on Solano Garbage Company. Or a general plan amendment or zoning change may be sought by a landowner in order to make his or her property more marketable, but no development may be currently contemplated for the property. If Councilmember O'Regan determines that a general plan amendment or a zoning change would not change the permitted use of property in a way that is substantially likely to have a material financial effect on Solano Garbage Company, her disqualification would not be required.

In many cases, however, it may be reasonably foreseeable that a general plan amendment or zoning change will have a financial effect on Solano Garbage Company. For example, the developer may come to the council requesting the general plan amendments or

zoning changes necessary to proceed with the development of a specific subdivision or commercial project. Or a landowner may request general plan or zoning changes to prepare his property for development. Councilmember O'Regan could not participate in such land use decisions. (See Stone Advice Letter, No. I-92-133 (the mayor, seven councilmembers, and other officials in the City of Riverside must disqualify themselves from participating in decisions to adopt a revised general plan for the city if the decisions would have a material financial effect on their economic interests -- generally the ownership of homes and rentals).

We agree with your conclusion that Councilmember O'Regan is disqualified from participating in a decision regarding approval of a tentative subdivision map that would have a material financial effect on Solano Garbage Company. (Siegler Advice Letter, No. A-92-508 (councilmember employed as a computer programmer by a mortgage company may not participate in decisions regarding the approval of subdivisions or ordinances regulating the issuance of building permits if such decisions would have a material financial effect on mortgage company); Dean Advice Letters, Nos. A-88-425 and I-88-316 (Roseville city councilmembers and planning commissioners owning stock in or working for Roseville Telephone Company ("RTC") may not participate in decisions to adopt specific plans that will result in new consumers of telephone service and equipment because they will have a foreseeable material financial effect on RTC); and Dean Advice Letter, No. A-88-118 (planning commissioner who is an architect is disqualified from participating in decisions to adopt specific plans for the northwest and north central areas of Roseville).

The fact that Solano Garbage Company has an exclusive franchise raises the probability that land use decisions will have a material financial effect on the company. As discussed in In re Thorner, supra, and the Guinan advice letter,<sup>3</sup> one aspect of the foreseeability analysis is how much competition a business has. In Thorner and Guinan, the businesses that the public officials owned had competition, which reduced the foreseeability that increased construction would mean extra revenue for their businesses. Conversely, in the Dean advice letters, supra, Roseville Telephone Company had a monopoly on telephone service in the city, and after deregulation the company still had a majority of such business. For companies, such as Solano Garbage Company, that have a monopoly or substantial percentage of the business in

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<sup>3</sup> Guinan Advice Letter, No. A-94-047 (councilmember who owns a steel fabricating and ornamental iron business which is one of 12 to 14 such businesses in Marin county, may participate in a council decision to amend the city's general plan to change land use designations of certain property and permit commercial, residential and high-density residential development, because it was not reasonably foreseeable that the decision would have a financial effect on his business).

a city, it is, of course, more foreseeable that a land use decision approving additional residential or commercial development will have a material financial effect.

a. Non-Residential Garbage and Recycling Service. You state that the city code treats non-residential consumers of garbage services (commercial, industrial, and multi-family residential) different from residential consumers. The city code does not require commercial consumers to use and pay for garbage service from Solano Garbage Company. However, the code does require commercial consumers to use the services of Solano Garbage Company if they contract for the collection of garbage service. This distinction in the way residential and commercial users are treated causes you to ask whether it is reasonably foreseeable that a council decision to amend the Fairfield general plan to rezone property to allow commercial development will have a material financial effect on Solano Garbage Company.

The fact that commercial users are not legally mandated to contract for garbage services does not change the foreseeability analysis, if in fact, most do contract with Solano Garbage Company for refuse pick-up. You need to ask how many commercial users actually do contract for garbage services. Presumably most businesses and apartment complexes require garbage services.

The city code requires nonresidential users to recycle through Solano Recycles. The city does not set the rate for that service. The rate is agreed upon by the user and Solano Recycles. You state that for this reason it is more difficult to develop a threshold for disqualification for non-residential projects. We concur that you will have to analyze materiality on a case-by-case basis. You could use the garbage and recycling fees generated by similar-sized commercial projects as a guide. In addition, we agree that it is foreseeable that a permit which entitles non-residential development will have a financial effect on Solano Garbage Company. However, certain land use decisions prior to a permit, such as a general plan amendment or zoning change requested in connection with the development of a commercial project, would also have a financial effect on the company.

6. Materiality Threshold. Based on the information you provided regarding Solano Garbage Company's net tangible assets, pre-tax income, and net income, the materiality thresholds of Regulation 18702.2(c) apply. Councilmember O'Regan may not make a decision if it would change the company's gross revenues by \$30,000 in a fiscal year, expenses by \$7,500 in a fiscal year, or assets or liabilities by \$30,000. Based on the current revenue per residence that the Solano Garbage Company receives for garbage and recycling services, your calculation of 180 lots appears to be a correct threshold for a disqualifying project.

7. Measuring Financial Effect Over Time. If a residential development is projected to be built out over five years, for example, you question whether the financial effect of a decision

may be divided equally on an annual basis over that period. It may not. For example, the standard for materiality in Regulation 18702.2(c), asks whether the decision will result in an "increase or decrease in the gross revenues for a fiscal year of \$30,000 or more[.]" The regulation does not say that this effect must take place in the next fiscal year.

Therefore, consider a decision about a tentative subdivision map which includes 500 homes to be built out over five years at the rate of 100 homes per year. The potential increase in gross revenues for Solano Garbage Company or Solano Recycles which must be considered is that in the fifth year, when the 500 homes are built, and the potential occupants are receiving garbage collection services. (See Doane Advice Letter, No. I-95-319; and Garcia Advice Letter, No. A-85-031.)

The Garcia Advice Letter, supra, involved the effect on Pacific Telesis of a city council's decision to approve the development of 1,000 new homes. The letter attempted to estimate the increased revenues to the telephone company that would result from the development. The letter assumed the homes would be built out over a five-year period. The letter stated as follows:

Based upon this data, and assuming a 5-year build-out period so that no more than one-fifth of the installation charges would occur in any single fiscal year, the maximum increase in annualized gross revenues which is reasonably foreseeable would be \$250,416.88 in the fifth year when all units are occupied and 94.7% [percentage of California households that had telephone service per 1980 census] are receiving service.

The only costs that were divided among the five years in the Garcia letter were the basic one-time telephone "hook-up" or "installation fee." Thus, the letter examined the financial effect of the decision on the telephone company in the fifth year, when all homes would be built and receiving service.

Similarly, the financial effect on Solano Garbage Company of the decision on the tentative subdivision map is the effect on gross revenues when all the proposed homes are built and potential customers are receiving garbage collection service.

8. Implementation Decisions. The council's decision to approve a development's size is what may trigger a material financial effect on Solano Garbage Company. Therefore, you ask whether most city council decisions following approval of a tentative subdivision map (except those that might affect the development's size), would be considered "implementation decisions" in which Councilmember O'Regan could participate.

We have advised that public officials who were disqualified from participating in certain development decisions because of conflicts, nevertheless could participate in subsequent

implementing decisions which did not give rise to conflicts under the Act.

For example, in the Athan Advice Letter, No. A-86-094, we advised:

[W]e conclude that Mayor Bennett must disqualify himself from participating in decisions of the San Ramon City Council/Redevelopment Agency concerning the proposed Crow Canyon area. However, we emphasize that this conclusion applies only to the major policy decisions about the project, such as project boundaries, financing decisions, approval of the environmental impact report, types of uses, and major public improvements in the project area. Once the basic policy decisions have been reached, Mayor Bennett may participate in the decisions which implement, but do not change these policies.

The Doane Advice Letter, No. I-95-319, is closest to your facts. In that letter, councilmembers with investments in a local telephone company were prohibited from voting on certain development decisions that would have had a material financial effect on the telephone company. With respect to subsequent implementation decisions, we advised as follows:

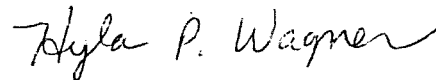
For example, once the number of homes in a development is set, it would appear that councilmembers with financial interests in RTC may participate in many future implementation decisions.... [S]ince it would appear that potential financial effects on RTC are tied to the number of homes in a development (and possibly the size), other decisions on a project may not be disqualifying for the councilmembers....

You provided examples of implementation decisions that occur after the approval of a tentative subdivision map and do not affect the number of lots within the development. These include decisions about lot layout, design or layout of common areas or public improvements, and subdivision design features. As a specific example, you cite a developer of 75 lots whose tentative subdivision map was approved several years ago. The developer is now ready to build the homes and he wants to make certain design changes and add gates to the community. The planning commission denied his request to add gates and the matter was appealed to the city council. Because these types of implementation decisions would have no material financial effect on Solano Garbage Company, Councilmember O'Regan may participate in them.

I trust this answers your questions. If you have any further questions regarding this matter, please contact me at 916/322-5660.

Sincerely,

Steven G. Churchwell  
General Counsel

A handwritten signature in cursive script that reads "Hyla P. Wagner".

By: Hyla P. Wagner  
Counsel, Legal Division

SGC:HPW:ak