



FAIR POLITICAL PRACTICES COMMISSION

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March 5, 2003

Adam U. Lindgren
City of Fort Bragg
c/o Meyers Nave Riback
Silver & Wilson
777 Davis Street, Suite 300
San Leandro, CA 94577

**Re: Your Request for Advice
Our File No. A-02-323**

Dear Mr. Lindgren:

This letter is in response to your request for advice on behalf of City of Fort Bragg Mayor Jere Melo regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹

QUESTIONS

1. Is Georgia-Pacific indirectly involved in decisions regarding the general plan update for the City of Fort Bragg?
2. May Mayor Melo participate in discussions regarding comment by the city council on the general plan update to be submitted to the Coastal Commission for final approval?
3. May Mayor Melo participate in decisions to amend the general plan update?

CONCLUSIONS

1. Unless it was determined that the applicant of record was acting as an agent of Georgia-Pacific, your additional facts do not change the conclusion that Georgia-Pacific is indirectly involved in the general plan update decisions.

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

2. Mayor Melo is prohibited from participating in these discussions or in any other general plan update decision if the decision will result in a material financial effect on one or more of his economic interests.
3. Without specific information regarding a particular amendment decision and its effects, we are unable to determine whether Mayor Melo is disqualified from participating in an amendment decision.

FACTS

Based on your correspondence and phone conversations with Commission counsel, you have provided the following information. Jere Melo is the mayor of the City of Fort Bragg, Mendocino County, California. He is employed by Georgia-Pacific ("G-P"), whose property has been included in the general plan update undertaken by the City of Fort Bragg. G-P is a Fortune 500 company. Mayor Melo also has an investment of \$10,000 in the Pacific Marine Farms aquaculture venture ("PMF").

Georgia-Pacific Property

The G-P property comprises 460 acres and includes nearly all of the city's oceanfront. The current general plan land use designation in effect for the property is Industrial-Heavy (IH). Under the IH designation, the property has historically been used for a variety of industrial uses, most of which have been related to timber products processing. The IH zoning permits certain manufacturing, fabrication, distribution and storage uses. Due to the limited number of undeveloped parcels available in the city, the majority of major new development, if it were to occur at all, would likely occur on the G-P property.

General Plan Update: TRI Zoning

The general plan update for the City of Fort Bragg was recently adopted by the city council but has not been approved by the Coastal Commission. (Mayor Melo did not participate in this adoption decision.) The city council may be asked to comment on the update to the Coastal Commission. Additionally, the city council may contemplate amendments to the general plan.

The general plan update proposes to change the general plan land use designation on the G-P property from Industrial-Heavy to Timber Resources Industrial (TRI). The TRI zoning designation is a new designation not found in previous versions of the Fort Bragg General Plan. Pursuant to the general plan update, the TRI designation:

“is intended primarily for timber resource and forest products related manufacturing. It allows a variety of industrial uses relating to forest products processing such as [mills and nurseries] and related support activities

including railroad lines, truck shipping facilities, boiler and powerhouse operations, and related uses.”

G-P’s property is the only property in the city that will be subject to the new TRI designation. G-P announced its intention to close the mill in June 2002, and is in the process of closing operations, demolishing certain buildings, selling equipment and preparing the site for possible future sale and development.

Program LU-5.1.1

The future development and rezoning of lands designated as TRI is addressed in the general plan update by Program LU-5.1.1. Under this program, a specific plan must be in place before future rezoning and development of lands designated as TRI can take place. G-P’s property has been divided up into 5 separate segments that constitute the possible specific plan areas. Therefore, future rezoning and development of the properties currently owned by G-P must be done within the entire area of each of the individual designated zones; the five segments cannot be divided up into smaller portions and developed piecemeal. (Program LU-5.1.1 does not affect the current use of the land or development of the land for uses consistent with the TRI designation.)

Specific plans prepared pursuant to Program LU-5.1.1 would have to meet the following minimum criteria:

- “a) The specific plan shall make provisions for existing and future infrastructure connections such as roads, utilities, and coastal access to surrounding developed and undeveloped areas.
- b) The specific plan shall contain financing methods to provide infrastructure and public amenities based on a nexus between development exactions being imposed and the development-induced needs being met by those exactions, establish an orderly phasing of development, and include other measures as needed to protect the health, safety, and well-being of the community.
- c) The specific plan, and environmental studies required for that plan, shall be paid for by the applicant who may be repaid by future developers of other portions of the specific plan area on a pro rata basis.”

Under the current general plan, there is no explicit requirement that major new development provide for all the roads, utilities and other infrastructure. However, Fort Bragg currently has the authority to require developers to pay for such infrastructure based upon their own authority, without relying on any authority granted under the general plan. The city attorney understands that the City of Fort Bragg has sporadically, but not consistently, required major development to provide its own infrastructure as would be required for the G-P property under the general plan update. It is also the current practice of the city to require all developers to pay for environmental studies needed to evaluate their projects.

Under Program LÜ-5.1.4 a discretionary permit, known as a conditional use permit, will be required in the TRI zone for a) construction of a new building; b) expansion of an existing building by 25% or more; and c) a change in the use of an existing building from one type of industrial process or storage to a different type of use.

Georgia-Pacific's Participation

In crafting the general plan policies that apply to the G-P property, the consultant and city staff met with and conferred with G-P representatives, including staff, legal counsel and planning consultants (but never including Mayor Melo). As noted in previous letters, G-P has not requested this rezoning. Instead, G-P has provided information, maps and assistance in response to the city's proposed zoning change of the G-P property. Such interaction between a city and major stakeholders in a community is not unusual on a general plan update.

Economic Impacts

At this time, you are unable to provide information about the exact economic impacts of redesignating G-P's property from HI to TRI zoning and making other contemplated changes. Comparative property values are also not yet available since this is the first property in the city to be zoned TRI but you have identified the following considerations:

- The general plan update may increase the value of the G-P property by signaling a willingness by the city to entertain development proposals for specific, potentially higher value uses of the property. However, on its face, the text of the update does not make the property any more or less likely to be zoned and developed for any particular new use.
- Additional costs for development of the G-P property may arise due to Program LU-5.1.1 which sets out a series of requirements for infrastructure, financing public amenities and environmental analysis. According to city planning and public works staff, the amount of infrastructure necessary to serve a 460-acre site is entirely dependent on development plans, so estimating costs is speculative. However, the costs could be significant depending on the type of development. For example, if an extension of the city's grid street system were required, estimated costs would amount to more than \$20,000,000. (It is uncertain whether a developer would be required to provide such infrastructure under the city's current authority.)
- Under the TRI redesignation, the usability of the G-P property is narrowed.

Pacific Marine Farms

The PMF aquaculture project is a proposal to construct a facility for growing abalone, shrimp, salmon, and other marine products on 33.21 acres of the G-P property. The project site is on a portion of the timber mill site leased from G-P for two consecutive five-year leases that expire in 2009.

PMF has made some progress in processing its development applications, but it has not secured final development approvals or begun construction. The city council has approved a change in the local custom program, general plan and zoning to allow aquaculture on the G-P property; this change is before the Coastal Commission for possible final approval. You note that Mayor Melo did not participate in these actions. PMF is still involved in the development application process.

No modifications to the general plan were necessary for the PMF project since the city council had already modified the general plan to allow aquaculture on the proposed project site. Additionally, LU-5.1.1 does not appear to be relevant to the PMF project to the extent that no specific plan will be required due to the city council's action to allow aquaculture. However, the requirement of the general plan update that development pay for its own infrastructure and impacts may affect the PMF project.

ANALYSIS

The primary purpose for the conflict-of-interest provisions of the Act is to ensure that “[p]ublic officials, whether elected or appointed, [should] perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them.” (Section 81001(b).) In furtherance of this goal, section 87100 of the Act prohibits a 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.

We have previously advised Mayor Melo regarding his economic interests in G-P and PMF for purposes of determining a conflict of interest with regard to Fort Bragg general plan decisions. (*Lindgren* Advice Letter, No. A-99-313 and *Jackson* Advice Letter, No. A-01-056, enclosed.)

In the *Lindgren* letter, we concluded that, under then-applicable materiality standards, it was reasonably foreseeable that a general plan decision involving rezoning of the G-P property would materially affect G-P given the number of acres potentially involved, the potential increases in land value, and the unique size, location, and character of G-P's land. As a result, Mayor Melo (then Councilmember Melo) was disqualified from participating in that decision.

In the *Jackson* letter, we were presented with new facts that the city council had decided to make no changes to the zoning of G-P's property. Therefore, we concluded that Mayor Melo could participate in general plan decisions provided that a decision to

maintain the heavy industrial zoning designation for the property was segregated from the rest of the general plan update decisions using the Commission's segmentation procedure.

You have inquired as to whether Mayor Melo, under the Commission's current rules, may participate in general plan update decisions before the city council given the recent developments regarding the TRI zoning designation and Program LU-5.1.1.

Determining whether a conflict of interest exists under section 87100 requires analysis of the questions outlined below.²

Steps One and Two: Is Mayor Melo considered a "public official" and is he making, participating in making, or influencing a governmental decision?

As previously determined, Mayor Melo is a public official subject to the conflict-of-interest provisions of the Act. (Section 82048; regulation 18701(a).) He will "make a governmental decision" if he votes on a decision regarding the general plan update for City of Fort Bragg. Additionally, if he engages in any of the actions described in enclosed regulations 18702.2 and 18702.3 with regard to this decision, he will "participate in making" or "influence" that decision.

Step Three: What are Mayor Melo's economic interest — the possible sources of a conflict of interest?

Section 87103 provides that a public official has a "financial interest" in a governmental decision "if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family," or on any of the official's economic interests, described as follows:

- A public official has an economic interest in a business entity in which he or she has a direct or indirect investment³ of \$2,000 or more (section 87103(a); regulation 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management (section 87103(d); regulation 18703.1(b));
- A public official has an economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more (section 87103(b); regulation 18703.2);

² These questions are based on the Act's conflict-of-interest analysis provided at regulation 18700(b).

³ An indirect investment or interest means any investment or interest owned by the spouse of an official or by a member of the official's immediate family, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's immediate family, or their agents own directly, indirectly, or beneficially a 10-percent interest or greater. (Section 87103.) "Immediate family" is defined at Section 82029 as an official's spouse and dependent children.

- A public official has an economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (section 87103(c); regulation 18703.3);
- A public official has an economic interest in any source of gifts to him or her if the gifts aggregate to \$340 or more within 12 months prior to the decision (section 87103(e); regulation 18703.4);
- A public official has an economic interest in his or her personal finances, including those of his or her immediate family -- this is the "personal financial effects" rule (section 87103; regulation 18703.5).

Based on your facts, Mayor Melo has economic interests in two business entities. He has an economic interest in G-P, his employer and a source of income to him. (Section 87103(c).) In addition, he has an economic interest in PMF due to his investment in PMF of \$10,000.⁴

Since you have not provided information regarding any other economic interest of Mayor Melo's, for purposes of this letter, we assume that he has no other economic interests relevant to the decisions about which you have inquired.

Step Four: Are Mayor Melo's economic interests directly or indirectly involved in the governmental decision?

A business entity is directly involved in a decision before an official's agency when that person, either directly or by an agent:

- “(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;
- (2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.” (Regulation 18704.1(a).)

Georgia-Pacific

We have previously determined that G-P is indirectly involved in the general plan decision if G-P did not request the general plan update, and because G-P did not otherwise meet the criteria for being directly involved in a governmental decision. (*Lindgren, supra; Jackson, supra.*) Unless it was determined that the applicant of record was somehow acting as an agent of G-P,

⁴ Provided that PMF is a separate legal entity, Mayor Melo does not have an economic interest in the G-P property leased by PMF.

your additional facts do not change the conclusion that G-P is indirectly involved in the general plan update decisions.

Pacific Marine Farms

Our conclusion regarding the indirect involvement of G-P was based on our past advice that a given business entity is not considered directly involved in a general plan decision simply by virtue of being within the jurisdiction of the political body adopting the general plan. (*Lindgren, supra*; see also *Whittier* Advice Letter, No. A-99-256.) In general, a business entity will be directly involved in a general plan decision if the entity has initiated proceedings pertaining to the general plan. (Regulation 18704.1; *Barrow* Advice Letter, No. A-01-260.) Based on your facts, PMF has not initiated proceedings regarding the general plan update. Therefore, PMF is only indirectly involved in the update decisions.

Step Five: What is the applicable materiality standard?

For business entities which are indirectly involved in a decision, subdivision (c) of regulation 18705.1 applies.⁵

Subdivision (c)(1) of regulation 18705.1 applies only where a business entity is listed on the Fortune 500. Subdivisions (c)(2) – (3) of regulation 18705.1 apply where a business entity is listed on a certain exchange (*e.g.*, the New York Stock Exchange, the NASDAQ, or the American Stock Exchange); in addition, subdivisions (c)(2) –(c)(3) apply where a business entity is not listed on one of the specified exchanges but an alternate earnings/income criteria for the entity is met. Finally, subdivision (c)(4) applies to business entities not covered by subdivisions (c)(1)-(3).

Georgia-Pacific

For an indirectly involved business entity listed on the Fortune 500, the financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that:

“ (A) The governmental decision will result in an increase or decrease in the business entity’s gross revenues for a fiscal year of \$10,000,000 or more; or

(B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$2,500,000 or more; or

(C) The governmental decision will result in an increase or decrease in the value of the business entity’s assets or liabilities of \$10,000,000 or more.” (Regulation 18705.1(c)(1).)

⁵ Regulation 18705.1, as recently amended, is attached for your reference.

This materiality standard of regulation 18705.1(c)(1) is applicable to Georgia-Pacific.⁶

Pacific Marine Farms

Your facts do not indicate that PMF is listed on any exchange. Additionally, because PMF is still in the development application process, we assume this business entity has not yet realized income which meets the applicable earnings/income thresholds of the alternate listing criteria of regulation 18705.1(c)(2) and (c)(3). As a result, the materiality standard of regulation 18705.1(c)(4) will apply. Regulation 18705.1(c)(4) provides that the financial effect of a governmental decision on a business entity covered by this subdivision is material if it is reasonably foreseeable that:

- “(A) The governmental decision will result in an increase or decrease in the business entity’s gross revenues for a fiscal year in the amount of \$20,000 or more; or,
- (B) The governmental decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$5,000 or more; or,
- (C) The governmental decision will result in an increase or decrease in the value of the business entity’s assets or liabilities of \$20,000 or more.” (Regulation 18705.1(c)(4).)

Step Six: Is it reasonably foreseeable that the financial effect of the governmental decision upon one of Mayor Melo’s economic interests will meet this materiality standard?

An effect upon economic interests is considered “reasonably foreseeable” if there is a substantial likelihood that it will occur. (Regulation 18706(a).) A financial effect need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

According to your facts, you are unable to provide information about the exact economic impacts of the general plan update yet have identified a number of considerations which could result in a financial effect on the G-P property.⁷ You also stated that the requirement of the general plan update which requires that development pay for its own infrastructure and impacts may financially affect PMF. All of these considerations support a conclusion that it is reasonably foreseeable that financial effects on Mayor Melo’s economic interests will result from the general plan update.

⁶ Please note that our previous advice issued in the *Lindgren* letter regarding the “nexus” between Mayor Melo’s duties for G-P (a source of income) and the general plan decision is still applicable. (See regulation 18705.3(c).)

⁷ In addition, the factors which were cited to support the conclusion of a conflict of interest in the *Lindgren* letter still exist; these factors include the number of acres involved, the potential increases in land value, and the unique size, location, and character of G-P’s land.

However, the conflict-of-interest analysis does not merely require that it is reasonably foreseeable that financial effects on Mayor Melo's economic interests will result from the decision, but also requires that the financial effects equal or exceed the applicable monetary amounts outlined in regulation 18705.1(c).⁸

Please note that the Commission is not a finder of fact. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Because the determination of foreseeability and materiality is necessarily a factual question, Mayor Melo himself, exercising the required degree of diligence, must determine the substantially likely financial effects of the general plan update decisions. If it is reasonably foreseeable that the applicable materiality standard for any of his economic interests will be met, then he will be prohibited from participating in the general plan update decisions.⁹

You have not provided specific information regarding a particular amendment to the general plan update before the city council. Therefore, we are unable to advise as to whether Mayor Melo is disqualified from participating in such an amendment decision.

Steps Seven and Eight: "Public Generally" and "Legally Required Participation" Exceptions

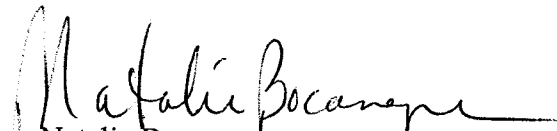
The facts you have presented do not suggest that the final steps of the conflict-of-interest analysis, exceptions to the conflict-of-interest rules, are applicable to Mayor Melo's situation.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

By:


Natalie Bocanegra
Counsel, Legal Division

Enclosures

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⁸ We point out that it is not necessary to quantify the exact financial effects resulting from the decision in order to determine whether the materiality standard is met.

⁹ If Mayor Melo ultimately determines that he has a conflict of interest, he may wish to consider whether the segmentation process addressed in the *Lindgren* and *Jackson* letters will be helpful to him.