



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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June 25, 2020

Jolie Houston
City Attorney
City of Los Altos
10 Almaden Blvd. 11th Floor
San Jose, CA 95113-2233

Re: Your Request for Advice
Our File No. A-20-070

Dear Ms. Houston:

This letter responds to your request for advice on behalf of City of Los Altos Mayor Janis C. Pepper regarding the conflict of interest provisions of the Political Reform Act (the “Act”).¹ Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090.

Also note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTION

Does Mayor Pepper have a conflict of interest with respect to the proposed “reach code,” so that she must recuse herself from its consideration?

CONCLUSION

No. Mayor Pepper does not have a conflict of interest in the proposed reach code, and may participate in decisions concerning its adoption.

FACTS AS PRESENTED BY REQUESTER

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

The JPA

Peninsula Clean Energy, (“the JPA”) is a joint powers authority formed pursuant to the Joint Exercise of Powers Act, by the County of San Mateo and the 20 incorporated towns and cities in San Mateo County. Its mission is to reduce greenhouse gas emission in San Mateo County by procuring electricity for the residents and businesses pursuant to AB 117 (*Migden*, 2002). The JPA provides cleaner and greener electricity at a lower cost than electricity formerly provided by Pacific Gas & Electric (“PG&E”). As a public agency, the JPA does not operate for profit. Any excess revenues realized by it cover operating expenses and are reinvested back into the member communities through lower electricity rates for its customers, local energy programs that further its mission, and local renewable energy projects that promote local jobs and stimulate the local economy.

The JPA is involved in “community choice aggregation.” This means that within its service area, the JPA purchases electricity on behalf of consumers from power generators, including renewable energy sources. The electricity is then transmitted to households over distribution lines owned and operated by PG&E, which also provides billing services. PG&E continues to supply natural gas within the JPA’s service area, and individual consumers may opt out of the JPA’s services, in which case PG&E is responsible for meeting those consumers’ energy demands by purchasing electricity from power generators.

In addition to community choice aggregation, the JPA works to reduce greenhouse gas emissions by promoting electric transportation, including providing incentives for the purchase of new and used electric vehicles for residents and fleets. The JPA also promotes the reduction of greenhouse gas emissions by reducing natural gas usage in new and existing buildings. This includes working with the County of San Mateo and all of the San Mateo County cities and towns to consider the adoption of reach codes for new construction. The JPA has partnered with another community choice aggregator, Silicon Valley Clean Energy (which serves a portion of Santa Clara County, including the City) to develop model reach codes for local agencies to consider and adopt that are relatively similar, to avoid confusion for contractors that work in both San Mateo and Santa Clara Counties.

Mayor Pepper is the JPA’s Chief Executive Officer. She serves in this capacity as an employee, entirely independent of her role as the City’s Mayor. She receives a salary and benefits for her work, which are determined by the 22-member board of the JPA. The JPA board consists of an elected councilmember from each of the 20 cities and towns in San Mateo County and two San Mateo County Supervisors. She indicates that there will be no financial gain or loss to her if the City adopts or does not adopt a reach code.

The City

The City is a general law city incorporated in December 1952. It is located in Santa Clara County, 37 miles south of San Francisco on the lower portion of the San Francisco Peninsula. The City covers seven square miles and borders Los Altos Hills, Palo Alto, Mountain View, Sunnyvale, and Cupertino. It has a population of approximately 30,500 people, with roughly 10,585 households and 1,383 businesses. The City is not located in the JPA’s service

area, but is served by Silicon Valley Clean Energy, the community choice aggregator serving a portion of Santa Clara County, as mentioned above. As the City's Mayor, she serves on the City Council, acting both as its Mayor and as a voting member.

Proposed Reach Code

The City Council has begun to consider the adoption of a "reach code." A reach code is a local building ordinance requiring new construction to "reach" beyond state building code requirements by providing electric appliances instead of natural gas appliances for space heating, water heating, cooking, and fireplaces, and to include electrical wiring for charging electric vehicles. By requiring all-electric construction, a reach code would reduce the City's natural gas consumption and encourage consumption of electricity instead. Because the JPA does not provide community choice aggregation services in the City, increased electricity consumption within the City would not affect the JPA's revenues.

According to Mayor Pepper, the JPA would not benefit in any way from the adoption of a reach code in the City, located in Santa Clara County, because the JPA does not serve Santa Clara County. The reserves of the JPA are not affected by the adoption of a reach code in the City, because the JPA does not serve the City.

ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her position to influence a governmental decision in which the official has a financial interest. (Section 87103.) A public official has a "financial interest" in a governmental decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on one or more of the public official's interests. (Section 87103; Regulation 18700(a)).

Pertinent to these facts, Section 87103 defines financial interests to include:

- 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 \$500 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).)
- Any business entity² in which the public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d).)
- A public official has an economic interest in his or her personal finances, including those of his or her immediate family (Section 87103.)

² Section 82005 defines a "business entity" as any organization or enterprise operated for profit, including but not limited to a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation or association

Under the Act, “income,” other than a gift, does not include income received from any source outside the jurisdiction and not doing business within the jurisdiction, not planning to do business within the jurisdiction, or not having done business within the jurisdiction during the two years prior to the time any statement or other action is required under this title. (Section 82030(a).) Moreover, “income” under the Act does not include “[s]alary and reimbursement ... or similar benefit payments received from a state, local, or federal government agency.” (Section 82030(b)(2).)

You note that the JPA was formed by the County of San Mateo and the 20 incorporated towns and cities in San Mateo County, and that it does not serve Santa Clara County, in which Los Altos is located. The JPA is also a governmental agency. Thus, salary received by Mayor Pepper from the JPA does not qualify as income under the Act and the Mayor does not have an interest in the JPA as a source of income. Additionally, Mayor Pepper does not have a business entity interest in the JPA, due to its status as a public agency that does not operate for profit.

However, a personal financial effect on government salary may still be disqualifying as an effect on personal finances. Because this is the only interest that may be affected by the governmental decision, our analysis continues with respect to the personal financial effects of the decision.

Foreseeability

A financial effect on a public official’s economic interest is reasonably foreseeable if the economic interest is a named party in, or the subject of, a governmental decision before the official or the official’s agency. (Regulation 18701(a).) An economic interest is the subject of a proceeding if the decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the economic interest, and includes any governmental decision affecting a real property economic interest as described in Regulation 18702.2(a)(1)-(6). (Regulation 18701(a).)

Where a public official’s economic interest is not explicitly involved in the decision, a different standard for determining the reasonable foreseeability of a financial effect is applicable. Under Regulation 18701(b), “[a] financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official’s control, it is not reasonably foreseeable.”

Regulation 18701(b) also provides factors that should be considered in determining whether a governmental decision will have a reasonably foreseeable financial effect on a financial interest not explicitly involved in a decision. Among those factors, under Regulation 18701(b)(1), is “[t]he extent to which the occurrence of the financial effect is contingent upon intervening events, not including future governmental decisions by the official’s agency, or any other agency appointed by or subject to the budgetary control of the official’s agency.”

Here, it is not reasonably foreseeable that the City’s consideration and adoption of the proposed reach code would have an effect on Mayor Pepper’s personal finances. Based on the facts

provided, there is no indication that the City's reach code may affect Mayor Pepper's personal finances, including government salary received from the JPA, which does not operate within the City or Santa Clara County and is controlled by member agencies that include the County of San Mateo and 20 cities within San Mateo County. Accordingly, Mayor Pepper does not have a financial interest in the proposed reach code.

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

Sincerely,

Dave Bainbridge
General Counsel

Zachary W. Norton

By: Zachary W. Norton
Senior Counsel, Legal Division

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