



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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June 13, 2022

Ryan T. Plotz
The Mitchell Law Firm, LLP
426 First Street
Eureka, CA 95502

Re: Your Request for Advice
Our File No. A-22-015

Dear Mr. Plotz:

This letter responds to your request for advice on behalf of Stephen Kullmann, an elected member of the Board of Commissioners for the Humboldt Bay Harbor, Recreation, and Conservation District (“District”), regarding Government Code Section 1090, et seq.¹ Please note that we are only providing advice under Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest.

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.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General’s Office and the Humboldt County District Attorney’s Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice “is not admissible in a criminal proceeding against any individual other than the requestor.” (See Section 1097.1(c)(5).)

QUESTION

May Commissioner Kullmann participate in decisions under consideration by the District relating to (i) the District’s decision to participate in the Redwood Coast Energy Authority’s (“RCEA”) Community Choice Energy Program; (ii) offshore wind and the District’s development of port facilities to support the offshore wind leases; and (iii) the District’s decision to utilize RCEA to provide energy efficiency services?

CONCLUSION

Section 1090 does not prohibit Commissioner Kullmann from making or participating in making, or the District from entering into, potential contracts involving the Community Choice

¹ All statutory references are to the Government Code, unless otherwise indicated.

Energy Program or offshore wind development because the noninterest exception set forth in Section 1091.5(a)(9) applies, so long as Commissioner Kullmann discloses his interest in RCEA to the District at the time the potential agreements are considered and the disclosure is noted in the District's official records.

Commissioner Kullmann has a remote interest in the agreements between the District and RCEA for any contracts involving energy efficiency services, as these agreements involve the department that employs him, and he may not participate in the decisions. The District may approve the contracts provided that Commissioner Kullmann discloses his interest in the contracts to the District, the interest is noted in the District's official records, and he abstains from any participation in making or approving the contracts.²

FACTS AS PRESENTED BY REQUESTER

The District was formed in 1973 to manage the harbor and port of Humboldt Bay, as well as to promote recreation and conservation over certain tide and submerged lands within the County of Humboldt. The District is a county-wide agency with permitting jurisdiction over all tide, submerged and other lands granted to the District, including all of Humboldt Bay.

The District is governed by a five-person Board of Commissioners, elected from five separate geographic areas within the County. The Board of Commissioners is principally responsible for development of policy and the hiring and supervision of an Executive Director, who serves as the chief executive officer of the District and is tasked with implementing the Board's policy directives. In a follow-up email, you stated that Commissioner Kullmann was appointed to the Board of Commissioners on February 16, 2017.

RCEA is a local government Joint Powers Agency whose members include the County of Humboldt; the Cities of Arcata, Blue Lake, Eureka, Ferndale, Fortuna, Rio Dell, and Trinidad; and the Humboldt Bay Municipal Water District. The District is not a member of RCEA.

One of RCEA's purposes is to develop and implement sustainable energy initiatives that reduce energy demand, increase energy efficiency, and advance the use of clean, efficient and renewable resources available in the region for the benefit of the Member agencies and their constituents.

Commissioner Kullmann is employed by RCEA as the Director of Demand Side Management. In a follow-up email, you stated that Commissioner Kullmann began his employment with RCEA in May 2020. As the Director of Demand Side Management, Commissioner Kullmann oversees RCEA's residential, commercial, and public customer energy efficiency services throughout Humboldt County. This includes Public Agency energy planning, assistance, and referrals to third party providers of services through a Local Government and Community Partnership with Pacific Gas & Electric Company, direct residential and non-residential energy

² You have also asked whether Commissioner Kullmann has a conflict of interest as it pertains to providing energy efficiency and/or energy procurement services, on behalf of RCEA, to the District's existing or future tenants. As these would not be decisions made by the District, and would not involve contracts to which the District would be party, we do not analyze this question further.

efficiency rebates and incentives through California Public Utility Commission (“CPUC”) Program Administer status, as well as other community programs through additional funding mechanisms. Commissioner Kullmann’s compensation from RCEA exceeds \$10,000 annually.

Community Choice Energy Program

In addition to RCEA’s Demand Side Management energy efficiency program, RCEA is also a community choice aggregator (“CCA”) of electrical services and acts as the regional electricity generation service provider through its community choice energy (“CCE”) program. Through the CCE program, all residential and electric commercial energy users in the region receive the electricity from RCEA instead of the investor-owned utility, which is Pacific Gas and Electric (“PG&E”) for this region, unless they opt out of RCEA’s CCE program. RCEA’s CCE program currently serves over 60,000 customers providing approximately 700,000 mWh of annual electric load.

The procurement and selling of energy to RCEA’s CCE customers is primarily managed through RCEA’s Power Resources division, which is separate from the Demand Side Management division. Commissioner Kullmann’s position as Demand Side Director does not directly include supervision over CCE program implementation. However, there are points of engagement that are detailed below.

The District is not currently a RCEA CCE customer, and receives its electricity energy as a direct access customer from PG&E. However, the District and RCEA are in preliminary discussions from which the District will assess whether to switch to RCEA’s CCE program. To do so, the District would first need District Board approval and would then execute an agreement directly with RCEA. Commissioner Kullmann has not, to date, been involved in any of these discussions as either an RCEA employee or District Board Commissioner.

Offshore Wind

In 2018, RCEA and a consortium of private entity partners entered into a Cooperation Agreement to Engage in Preparatory Activities For Development of Redwood Coast Offshore Wind Energy. RCEA and the consortium, and its successors, seek to develop an approximate 100 MW to 150 MW offshore wind energy facility to be owned and operated by the consortium’s project company, Redwood Coast Offshore Wind LLC (“ROW”). To this end, ROW intends to submit a bid on one or more offshore wind energy leases off the coast of Humboldt County that will be offered by the federal Bureau of Ocean Energy Management (“BOEM”). If granted a lease, ROW will have the right to site and operate wind turbines off the coast of Humboldt County and to sell the generated energy. RCEA will enter into a power purchase agreement with ROW to offtake at least some of the wind energy produced by ROW. It is uncertain at this time whether BOEM will issue leases to more than one party for multiple projects.

The District owns certain real property along Humboldt Bay that is being considered as a potential port to support offshore wind development, including providing facilities to manufacture, construct, and ready for transport wind turbines and related infrastructure for the benefit of the lessees of the BOEM leases, which will be awarded in the third quarter of 2022, among other port uses. In June 2019, the District, RCEA, and the then offshore wind consortium entities entered into

a Memorandum of Understanding and Intent to Cooperate (“MOU”). The MOU acknowledges the importance of the District’s port to the successful development of offshore wind energy and formalizes an intention among the parties to cooperate and work together for planning the infrastructure improvements necessary to adequately service the proposed offshore wind energy project.

The District Board of Commissioners will be tasked with making a series of formal actions to ready the port facilities for the proposed offshore wind development, including: (i) approving expenditures of funds to secure regulatory approval and completing environmental review of the proposed port facility improvement project; (ii) approving funding sources for the port facility improvement development; (iii) acquiring adjacent property to expand the District’s existing fee title parcel; (iv) approving development agreements for the construction of the port facilities; (v) approving use and operation agreements for the port facilities; and (v) hiring consultants and engineers. On or about July 12, 2021, RCEA provided the District with \$50,000 to apply toward consultant fees for preliminary infrastructure improvement planning.

In a follow-up email, you stated that RCEA provided the \$50,000 to assist the District to hire a consultant to prepare a grant application and to prepare a master plan for a 168 acre new heavy lift marine terminal project for a \$56 million Federal Port Infrastructure Development Grant Application. The application was not successful, and the district was not granted the \$56 million. The total project costs to prepare the grant application was \$109,050 with \$50,000 coming from RCEA, \$35,000 coming from the County of Humboldt Headwaters Fund and the remaining \$24,050 coming from the Harbor District. You have also stated that the offshore wind project and related port development are still ongoing.

It is currently unknown whether the District will enter into any direct agreement with any of the BOEM lessees, but it is certain that the lessees will benefit greatly from the close proximity of the port facilities to the lease areas and that the lessees will utilize the District real property. In its National Environmental Policy Act (“NEPA”) Draft Environmental Assessment, dated January 11, 2022, BOEM describes the role of the District’s port facilities as follows:

2.2.1.4 Port Facilities Assumptions

BOEM assumes that during the site assessment and site characterization stages, a lessee will stage from the Port of Humboldt Bay, which is approximately 32.2 km (20 mi) east of the Humboldt WEA [Wind Energy Area]. The closest alternative harbors would be Crescent City (approximately 90 mi to the north), Coos Bay (approximately 349 km (217 mi) to the north), and San Francisco Bay (approximately 368.5 km (229 mi) to the south).

BOEM has identified the Port of Humboldt Bay (BOEM 2016b) as a deep-water port with the potential to be a Quick Reaction Port (a port that is within 2 hours by boat to the project site).

Energy Efficiency Services

RCEA is also interested in providing the District with energy efficiency services, such as energy efficient outdoor lighting for its facilities. This service would be offered by the RCEA Demand Side Management team, which is managed by Commissioner Kullmann, and may involve one or more direct contracts between the District and RCEA as well.

Additionally, tenants of the Harbor District may request directly from RCEA any of the energy efficiency services provided by the RCEA Demand Side Management team.

ANALYSIS

Section 1090

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Section 1090 is intended “not only to strike at actual impropriety, but also to strike at the appearance of impropriety.” (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.)

Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.” (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) When an officer with a proscribed financial interest is a member of the governing body of a public entity, the prohibition of Section 1090 also extends to the entire body, and it applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.) An official has an interest in the community and separate property income of his or her spouse. (*Nielsen v. Richards* (1925) 75 Cal.App. 680; *Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal.App.4th 655; 89 Ops.Cal.Atty.Gen. 69 (2006).)

In this instance, it is not contested that, an elected member of the Board of Commissioners for the District, Commissioner Kullmann is a public officer subject to the provisions of Section 1090 and that the aforementioned agreements involving the District and RCEA are contracts for purposes of Section 1090. Additionally, as a member of the Board of Commissioners for the District, Commissioner Kullmann is presumed to be involved in the making of all contracts by the District irrespective of whether he actually participates in the making of the contract. (*Thomson, supra*, at pp. 645, 649.) Commissioner Kullmann also works for and receives income from RCEA as the Director of Demand Side Management.³ Thus, the determinative question is whether Commissioner Kullmann has an interest in the aforementioned agreements involving the District

³ The Act states that “government salary” is not included in the definition of “income.” (See Section 82030(b)(2).) Moreover, the facts do not indicate any effect on Commissioner Kullmann’s personal finances. (See Regulation 18702.5.) Accordingly, the disqualification provisions of the Act do not apply based on the facts provided, and no further analysis under the Act is necessary.

and RCEA and, if so, whether his interest is a “remote interest” or a “noninterest” as defined in Sections 1091 and 1091.5.

The Legislature has created various statutory exceptions to Section 1090’s prohibition where the financial interest involved is deemed to be a “noninterest,” as defined in Section 1091.5, or a “remote interest,” as defined in Section 1091. If a noninterest is present, the contract may be made without the officer’s abstention, and a noninterest generally does not require disclosure. (*City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 514-515.) If a remote interest is present, the contract may be made if: (1) the officer discloses the interest in the contract to his or her public agency; (2) that interest is noted in the agency’s official records; and (3) the officer abstains from any participation in the making of the contract. (Section 1091(a).)

“Government Salary” Exceptions

Under Section 1091.5(a)(9), a public official is deemed to not be interested in a contract—and therefore may take part in the contracting process—if the official’s interest is “[t]hat of a person receiving salary, per diem, or reimbursement for expenses from a government entity, unless the contract directly involves the department of the government entity that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record.” Section 1091.5(a)(9) is applicable where an official has an interest “in whatever indirect or incidental benefits might arise from the simple fact of contracting with or on behalf of one’s employer,” but does not apply where the contract under consideration would “actually affect a direct change in the [public official’s] personal compensation.” (99 Ops.Cal.Atty.Gen. 35 (2016); see also *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1083-1084 [Section 1091.5(a)(9) “does not extend further to contracts that . . . most directly affect one’s interests by actually altering the terms of one’s employment . . .”].)

Section 1091(b)(13) similarly provides that a public official has only a “remote” interest in a contract—such that the contract may still be entered into without the official’s participation—if the official’s interest is “[t]hat of a person receiving salary, per diem, or reimbursement for expenses from a government entity.” As with Section 1091.5(a)(9), however, the Supreme Court of California has explained that while Section 1091(b)(13) “relaxed the prohibition against contracting in a way that affected one’s own department, it did so only so long as the contract in question would not result in personal financial gain.” (*Lexin, supra*, 47 Cal.4th at p. 1081.)

Energy Efficiency Services-Remote Interest Exception

Commissioner Kullmann is employed by RCEA as the Director of Demand Side Management. As the Director of Demand Side Management, Commissioner Kullmann oversees RCEA’s residential, commercial, and public customer energy efficiency services throughout Humboldt County, so any contract pertaining to RCEA’s residential, commercial, and public customer energy efficiency services between the District and the RCEA, which would be offered by the RCEA Demand Side Management team, necessarily involves the department that employs him.

Accordingly, Commissioner Kullmann’s interest in any contract between the District and the RCEA pertaining to energy efficiency services is a remote interest under Section 1091(b)(13), and

the District may approve the contract provided that he discloses his interest in the contract to the District, the interest is noted in the District's official records, and he abstains from any participation in making or approving the contract. (Section 1091(a).)

Community Choice Energy Program and Offshore Wind-Noninterest Exception

The District is not currently a RCEA CCE customer, and receives its electricity energy as a direct access customer from PG&E. However, the District and RCEA are in preliminary discussions from which the District will assess whether to switch to RCEA's CCE program. To do so, the District would first need District Board approval and would then execute an agreement directly with RCEA. The procurement and selling of energy to RCEA's CCE customers is primarily managed through RCEA's Power Resources division, which is separate from the Demand Side Management division. Under Section 1091.5(a)(9), an officer or employee of a government agency receiving salary, per diem, or reimbursement for expenses from another government entity has a noninterest in a contract between the two agencies "unless the contract directly involves the department of the governmental entity that employs the officer or employee.

Therefore, Section 1090 would not prohibit Commissioner Kullmann from making or participating in making, or the District from entering into, either of those potential contracts because the noninterest exception set forth in Section 1091.5(a)(9) applies so long as Commissioner Kullmann discloses his interest in RCEA to the District at any time the potential contracts are considered, and the interest is noted in the District's official record.

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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