



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION

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February 9, 2016

Christopher J. Diaz
City Attorney
Town of Colma
Best Best & Krieger, LLP
2001 North Main Street, Suite 390
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Re: Your Request for Advice
Our File No. A-15-235

Dear Mr. Diaz:

This letter responds to your request on behalf of Town of Colma Vice Mayor Helen Fisicaro for advice regarding the conflict of interest provisions of the Political Reform Act (the "Act")¹ and Section 1090 et seq. Because the Fair Political Practices Commission (the "Commission") does not act as a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), this letter is based on the facts presented.

When a request for advice involves potential issues raised under Section 1090, the Commission is required to forward a copy of the request to the Attorney General's Office and the local district attorney prior to proceeding with the advice. (Section 1097.1(c)(3).) Accordingly, we have forwarded your request to the Attorney General's Office and San Mateo County District Attorney's Office. We did not receive a written response from either entity. (Section 1097.1(c)(4).) Finally, the following advice is not admissible in a criminal proceeding against any individual other than the requestor. (Section 1097.1(c)(5).)

QUESTIONS

1. Does the Act prohibit the Vice Mayor from taking part in the governmental decision on whether to adopt an ordinance establishing the Peninsula Clean Energy joint powers authority as the default electrical energy provider for Town of Colma consumers?

2. Does Section 1090 prohibit the Vice Mayor from making or participating in the making of, and the Town of Colma City Council from entering into, an agreement authorizing the Town to join the Peninsula Clean Energy joint powers authority?

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.

CONCLUSIONS

1. No. The Act does not prohibit the Vice Mayor from taking part in the decision on whether to adopt the ordinance establishing Peninsula Clean Energy joint powers authority as the default electrical energy provider for Town consumers.

2. No. Section 1090 does not prohibit the Vice Mayor from participating in the making of, or the Town from entering into, the agreement authorizing the Town to join the Peninsula Clean Energy joint powers authority.

FACTS

You are the City Attorney for the Town of Colma, a general law city located in San Mateo County and a customer of Pacific Gas & Electric Corporation ("PG&E") for its electrical energy. Vice Mayor Fisicaro is a retired employee of PG&E as of February 1, 2010. As a former employee, the Vice Mayor holds PG&E stock in an amount in excess of \$2,000 in an existing 401(k) plan. The Vice Mayor's 401(k) plan holds less than three percent of the outstanding shares of PG&E common stock. The dividends paid on the Vice Mayor's stock to her 401(k) plan exceed five percent of her annual income, and aggregate to an amount in excess of \$500 in the prior 12 months. The dividends paid on the Vice Mayor's stock to her 401(k) plan are not paid to her as income. Rather, they are reinvested into more PG&E stock in the 401(k) plan, and the reinvested dividends are not treated as income to her for tax purposes.

In addition to the 401(k) plan, the Vice Mayor also receives payments from an Internal Revenue Code Section 401(a) qualified, defined benefit pension plan that was established through her previous employment at PG&E. As a defined benefit plan, the pension benefits are guaranteed regardless of the performance of the underlying assets, and the nature of those underlying assets is immaterial to the Plan's beneficiaries.

San Mateo County is currently spearheading an effort to form a joint powers authority ("JPA"), to be known as Peninsula Clean Energy ("PCE"), comprised of the County and all the cities within the County. The purpose of the JPA will be to form a separate governmental entity to purchase electricity on the open market from providers of clean or renewable electricity.

The Colma City Council will soon consider whether to enter into an agreement to become a member of PCE. The agreement to become a member of PCE would be between the County and all the cities in the County, assuming they choose to join, and would primarily address how PCE would operate. The agreement details the composition of the new PCE Board that would be made up of one appointee from each city and two appointees from the County. The agreement also details the powers of PCE itself, the votes required for certain actions, and provides that PCE shall indemnify the County and all the cities that join.

The City Council will also soon consider whether to adopt an ordinance establishing PCE as the default electrical energy provider for Town consumers. Under the ordinance, a Town consumer may opt out and affirmatively re-designate PG&E as his or her electrical energy provider. The City Council's adoption of the ordinance is an essential step required under State law to properly

authorize PCE to provide electrical energy to Town consumers. The expectation is that PCE, once formed and authorized to provide electrical energy to Town consumers, will enter into agreements with electricity suppliers and other service providers to provide electrical energy to residents and businesses at rates that are competitive with those of PG&E.

PG&E serves nearly 16 million Californians across a 70,000 square mile service area in Northern and Central California, is a Fortune 200 energy-based holding company, and is the parent company of Pacific Gas and Electric Company, California's largest investor-owned utility. According to the 2010 United States Census, the population of the Town of Colma was 1,792.

PG&E has indicated to the Town that it will lose revenue if it is no longer the supplier of electrical energy to Town consumers. PG&E, however, has also indicated that any revenue it loses from the formation of PCE will be insufficient to affect its stock price.

ANALYSIS

The Act

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial 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 on or more of the public official's interests. Section 87103 also sets forth the interests from which a conflict of interest may arise. Of those interests, the Vice Mayor's interests are as follows:

- Any business entity in which the public official has a direct or indirect investment worth \$2,000 or more. (Section 87103(a); Regulation 18702.1.)
- Your personal finances, including those of your immediate family, also known as the "personal financial effects" rule. (Section 87103; Regulation 18702.5.)

The Vice Mayor has an interest in PG&E as a business entity because she holds PG&E stock in an amount in excess of \$2,000 in an existing 401(k) plan, and an interest in her own personal finances, as well as those of her immediate family.²

Foreseeability

In order to determine if the Vice Mayor has a conflict of interest under the Act with respect to the decision on whether to adopt the ordinance establishing PCE as the Town's default electrical energy provider, we must consider whether a financial effect of the decision on one or more of the Vice Mayor's interests would be reasonably foreseeable. Under the Act, an effect on an interest is

² The Act excludes from its definition of "income" dividends, interest, or any other return on a security registered with the United States Securities and Exchange Commission, as well as payments received under a defined benefit pension plan under Internal Revenue Code Section 401(a). (Section 82030(b)(5) and (11), respectively.) Thus, for purposes of the Act's conflict of interest provisions, the Vice Mayor has no source-of-income interest in the dividends received in the 401(k) plan, the 401(a) plan, or the payments received under the 401(a) plan.

presumed foreseeable if the interest is explicitly involved in the decision, and an interest is “explicitly involved” if the interest is a named party in, or subject of, the decision. (Regulation 18701(a).) In this case, the Vice Mayor’s interests are not explicitly involved in the decision on whether to adopt the ordinance. Therefore, an effect of the decision on one or more of her interests is reasonably foreseeable if it can be recognized as a realistic possibility and more than hypothetical or theoretical. (Regulation 18701(b).)

If the Town adopts the ordinance, PCE will become the default electrical energy provider for the Town’s consumers, and PG&E will lose the business of the Town’s consumers who do not opt out and affirmatively re-designate PG&E as their electrical energy provider. This loss of customers and revenue could result in a decrease in the value of PG&E stock. Therefore, it is reasonably foreseeable that the adoption of the ordinance could affect the Vice Mayor’s interest in PG&E, and as a result, could also affect the Vice Mayor’s interest in her personal finances.

Materiality

Regulation 18702.1(b) provides the test for whether an effect on an official’s interest in a business entity is material.³

“[The] financial effect is material if a prudent person with sufficient information would find it is reasonably foreseeable that the decision’s financial effect would contribute to a change in the price of the business entity’s publicly traded stock, or the value of a privately-held business.”

PG&E serves nearly 16 million Californians across a 70,000 square mile service area in Northern and Central California, is a Fortune 200 energy-based holding company, and is the parent company of Pacific Gas and Electric Company, California’s largest investor-owned utility. The population of the Town of Colma was 1,792. Furthermore, PG&E has indicated that any revenue it loses from the formation of PCE will be insufficient to affect its stock price. Based on these facts, a prudent person with sufficient information would not find it reasonably foreseeable that the decision’s effect would contribute to a change in the price of PG&E’s publicly traded stock. Therefore, we conclude that the Act does not prohibit the Vice Mayor from taking part in the decision on whether to adopt the ordinance establishing PCE as the default electrical energy provider for Town consumers.

³ Regulation 18702.5 sets forth the test for materiality for the effect of a decision on an official’s personal finances. Subdivision (c) of Regulation 18702.5 provides that Regulation 18702.5 does not apply and materiality is instead determined pursuant to Regulation 18702.1, if the decision affects a business entity in which the official has a financial interest. Here, the decision affects PG&E, a business entity in which Vice Mayor Fisicaro has a financial interest. Accordingly, the applicable test for materiality is contained in Regulation 18702.1.

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. City of 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.) The prohibition applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.) When an officer with a proscribed financial interest is a member of the governing body of a public entity, the prohibition of Section 1090 extends to the entire body. (89 Ops.Cal.Atty.Gen. 49, 50 (2006).)

We employ the following analysis to determine whether an official has a conflict of interest under Section 1090.

Is the Vice Mayor subject to the provisions of Section 1090?

Section 1090 applies to virtually all state and local officers, employees, and multi-member bodies, whether elected or appointed. Subdivision (a) of Section 1.02.030 of the Town of Colma Municipal Code requires, among other things, the City Council to select from its ranks a councilmember to serve as Vice Mayor, as specified. Therefore, the Vice Mayor is subject to Section 1090 because she is a local officer and a member of a multi-member body.

Does the decision at issue involve a contract?

To determine whether a contract is involved in the decision, one may look to general principles of contract law (84 Ops.Cal.Atty.Gen 34, 36 (2011); 78 Ops.Cal.Atty.Gen. 230, 234 (1995)), while keeping in mind that “specific rules applicable to Sections 1090 and 1097 require that we view the transactions in a broad manner and avoid narrow and technical definitions of ‘contract.’” (*People v. Honig, supra*, at p. 351 citing *Stigall v. City of Taft, supra*, at pp. 569-571.)

The City Council will soon consider whether to enter into an agreement to become a member of PCE. That agreement is a contract for purposes of Section 1090.

Public Utilities Code Section 366.2(b)(2)(B) authorizes two or more entities authorized to be a community choice aggregator to participate as a group in a community choice aggregation program through a JPA if each entity adopts an ordinance to implement the program, establishing the JPA as the default electrical energy provider for the entity. The City Council will also soon consider whether to adopt such an ordinance, establishing PCE as the default provider of electrical

energy to Town consumers. At issue is whether the ordinance is a contract for purposes of Section 1090.

The Attorney General has opined that a certificate of public convenience and necessity issued by a city to authorize the recipient to operate an ambulance service within the city, without the imposition of a fee upon the service provider, was a license or regulatory permit and not a contract. (84 Ops.Cal.Atty.Gen. 34 (2001).) The Town's ordinance at issue is akin to the certificate in the Attorney General's opinion. Like the certificate, the ordinance authorizes a service provider to provide a service within the municipality's jurisdiction without the imposition of a fee upon the service provider. Therefore, we find that the ordinance would be a license or regulatory permit and not a contract for purposes of Section 1090.

Is the Vice Mayor making or participating in making a contract?

For purposes of Section 1090, participation in the making of a contract is defined broadly as any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitations for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall v. City of Taft, supra*, at p. 569.)

As a member of the City Council, which will soon consider whether to enter into an agreement to become a member of PCE, Vice Mayor Fisicaro would be participating in the making of a contract.

Does the Mayor have a financial interest in the contract?

Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest" (*People v. Honig, supra*, at p. 333), and officials are deemed to have a financial interest in a contract if they might profit from it in any way. (*Ibid.*) Section 1090 does not specifically define the term "financial interest." In determining whether a financial interest exists for purposes of Section 1090, courts "generally focus on whether the contract in question could confer some type of pecuniary advantage to the target of a Section 1090 inquiry." (See *Eden Township Healthcare District v. Sutter Health* (2011) 202 Cal.App.4th 208, 225.) Whether a proscribed financial interest exists in a public contract is primarily a question of fact. (See *People v. Vallerger* (1977) 67 Cal.App.3d 847, 865 citing *People v. Darby* (1952) 114 Cal.App.2d 412, 431-432; 84 Ops.Cal.Atty.Gen. 158, 161-162(2001).)

We first consider whether the Vice Mayor's defined benefit pension plan qualified under Internal Revenue Code Section 401(a) and the payments made under such a plan are financial interests for purposes of Section 1090. We have previously determined, in an advice letter also concerning the Town of Colma and then-Mayor Fisicaro, that a 401(a) plan and the payments made under such a plan are not financial interests for purposes of Section 1090. (*Peters Advice Letter*, No. C-14-036.) We found no financial interest in such a plan because payments made under the plan are defined, fixed benefits that could not be affected by the public contract at issue. In this case, the Vice Mayor has a 401(a) plan, and the potential agreement between the Town and PCE could not affect the payments due under the plan because they are defined and fixed. Therefore, consistent with our determination in the *Peters Advice Letter, supra*, we find that neither the Vice

Mayor's 401(a) plan nor the payments made thereunder are financial interests for purposes of Section 1090.

We next consider whether the Vice Mayor's stock holdings in PG&E in her 401(k) plan and the dividends paid on that stock into her 401(k) plan are financial interests for purposes of Section 1090.

"The focus of section 1090 is to avoid the conflict that is created when public officers or employees stand to receive pecuniary benefits from transactions made by them in their official capacities: 'Put in ordinary, but nonetheless precise, terms, an official has a financial interest in a contract *if he might profit from it.*'" (*Eden Township Healthcare District, supra*, at p. 221, quoting *People v. Honig, supra*, at p. 333, italics in original). PG&E serves nearly 16 million Californians across a 70,000 square mile service area in Northern and Central California, is a Fortune 200 energy-based holding company, and is the parent company of Pacific Gas and Electric Company, California's largest investor-owned utility. As of the last census, the population of the Town of Colma was 1,792, a customer base of limited significance to a utility the size of PG&E. Furthermore, PG&E has indicated that any revenue it loses from the formation of PCE will be insufficient to affect its stock price. If any lost revenue resultant from the agreement is insufficient to affect PG&E's stock price, the Vice Mayor's participation in the making of the agreement would not provide any chance for her to profit from it with respect to her PG&E stock held in her 401(k) plan and the associated dividends.

Therefore, we find that the Vice Mayor has no financial interest in the potential agreement authorizing the Town to join the Peninsula Clean Energy joint powers authority for purposes of Section 1090.⁴ Accordingly, we conclude that Section 1090 does not prohibit the Vice Mayor from participating in the making of, or the Town from entering into, that agreement.

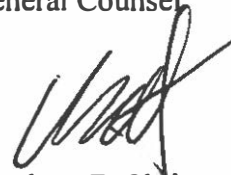
⁴ In the *Peters* Advice Letter, *supra*, we determined, with respect to a contract between the Town of Colma and PG&E, that then-Mayor Fisicaro's ownership of PG&E stock in her 401(k) plan, and the receipt of dividends on that stock into her 401(k) plan, were a remote financial interest pursuant to Section 1091(b)(14). In this case, the contract at issue is between the Town and PCE. We note that the same interest of the Vice Mayor is at issue, and that interest is even more remote in this contract than it was in the contract at issue in the *Peters* Advice Letter, *supra*, in which that interest was determined to be remote.

The Act is also instructive in determining whether the Vice Mayor's PG&E stock held in her 401(k) plan and the associated dividends are a financial interest for purposes of Section 1090. In *Lexin v. Superior Court* (2010) 47 Cal4th 1050, 1090-91, the Court applied the "*in pari materia*" canon of statutory construction and in determining that Section 1090 should be harmonized with the Act when possible. Under the Act, the decision on whether to enter into an agreement authorizing the Town to join PCE would implicate the Vice Mayor's interest in PG&E as a business entity and her interest in her own personal finances. (Section 87103.) Consistent with our analysis above, a prudent person with sufficient information would not find it reasonably foreseeable that the effect of the decision to join PCE would contribute to a change in the price of PG&E's publicly traded stock because the decision would not have a reasonably foreseeable material financial effect on the Vice Mayor's interests. Thus, the Vice Mayor would not have a conflict of interest in regard to the decision under the Act. We reach the same conclusion under Section 1090.

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

Sincerely,

Hyla P. Wagner
General Counsel

A handwritten signature in black ink, appearing to read 'MFC', is written over the printed name of Matthew F. Christy.

By: Matthew F. Christy
Counsel, Legal Division

MFC:jgl