

McCRACKEN, STEMERMAN & HOLSBERY, LLP

Counselors and Attorneys at Law

September 13, 2019

Mayor Heidi Harmon, hharmon@slocity.org
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Council Member Carlyn Christianson, cchristianson@slocity.org
Council Member Aaron Gomez, agomez@slocity.org
Council Member Erica Stewart, estewart@slocity.org

San Francisco

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Re: Clean Energy Policy and Related Ordinances
Vice Mayor Pease's Disqualifying Conflict of Interest

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John J. Davis, Jr. (CA)
Kristin L. Martin (CA, NV, HI)
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Sarah Varela (CA, AZ, NV)
Sarah Grossman-Swenson (CA, NV)
Kimberly Hancock (CA)
Yuval Miller (CA, NV)
David L. Barber (CA, NV)
Kimberly C. Weber (CA, NV)
A. Mirella Nieto (CA)

Dear Mayor Harmon and City Council Members:

We represent Utility Workers Union of America Local 132. We write to point out that under the California Political Reform Act of 1974 and the Fair Political Practices Commission's conflict-of-interest regulations, Vice Mayor Andrea Pease is and has been disqualified from voting upon, deliberating or even being present for the Council's consideration of the "Clean Energy Policy" Resolution and related Ordinances that were considered and voted upon on September 3, 2019 and will be before the Council again on September 17, 2019.

Vice Mayor Pease's business interests that create the conflict.

Andrea Pease is a licensed architect and a partner in a firm called In Balance Green Consulting. According to its web site, In Balance provides professional consulting on "green" and renewable energy, working "closely with entire building teams . . . to uncover and develop the most effective methods of energy efficiency based on the specific project's design."

Robert P. Cowell (1931-1980)

Philip Paul Bowe (CA) (Ret.)
Barry S. Jellison (CA) (Ret.)

In describing its services, In Balance says on its web site:

- "You can expect thorough and timely documentation, administration, and team coordination services as we certify your project for . . . **local green building programs.**"
- "We'll create diverse and detailed solutions for your project, reducing energy use and increasing comfort in cost-effective ways."
- "Our in-house experts look at all the variables: energy modeling and optimization, passive solar design, renewable energy analysis, and measurement and verification services."

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- “Through our green consulting services, we’ll create a path for you to achieve a sustainable project. Our thorough analysis of sustainable measures, coupled with insightful strategies, delivers diverse and detailed solutions.”
- The web site also promotes In Balance’s “value-added services” in “Local Green Building programs.”

On the U.S. Green Building Council web site, Ms. Pease describes herself as follows:

- “Bringing together integrated design, daylight and water use analysis, low impact development, energy efficiency, materials selections and other strategies, [Ms. Pease] has helped scores of clients through a green building process.”

Ms. Pease’s California Form 700 for 2018 states that her ownership interest in In Balance in 2018 was between \$10,001 and \$100,000. Her Form 700 states that her 2018 income from In Balance was between \$10,001 and \$100,000.

Relevant aspects of the Clean Energy Policy Resolution and Related Ordinances.

The Clean Energy Policy Resolution and the two accompanying Ordinances are set forth in Agenda Item 18 of the Agenda Packet for the September 3, 2019 City Council meeting. The City Council passed them on a 4-to-1 vote, with Vice Mayor Pease voting.

The September 3rd Agenda Item describes a plan that will “include 1) identification of appropriate in-lieu fee amounts for various building types, 2) community education and outreach, 3) development of a program making professional consultation and design services available to property owners, and 4) identification of a series of incentives, such as permit streamlining and property development standard allowances (for example, parking reductions and building height allowances) in exchange for all-electric development[.]”

The Resolution and Ordinances impose extensive, highly technical clean-energy requirements on new construction projects. As the staff report points out, “energy code compliance can be a daunting and expensive task.” The new rules will necessitate builders’ and homeowners’ reliance on professional advice and assistance from architects who can identify and calculate the needs of a building, design the building to meet the Ordinances and other applicable law, and represent owners through the building-permitting process.

The Resolution and Ordinances will require advice and assistance from architects like

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Andrea Pease. Because Ms. Pease is a professional who specializes in clean-energy consulting, and because she is also a highly placed insider in the City's political and administrative structure, the new Clean Energy rules will drive a great deal of business to her architectural firm. As a consequence:

1. Ms. Pease's conflict of interest disqualified her from deliberating or voting on the Clean Energy Resolution and Ordinances, or even being present in the Council Chamber during the discussion and vote on September 3, 2019.
2. Ms. Pease's conflict of interest disqualifies her from deliberating or voting on the Clean Energy Resolution and Ordinances, or even being present in the Council Chamber during the discussion and vote on September 17, 2019.
3. Ms. Pease's participation in the September 3rd discussion and vote so thoroughly infected the process that her colleagues on the Council are likely disqualified from deliberating or voting on the matter in the future.

California conflict-of-interest law disqualifies Ms. Pease from deliberating or voting on the Clean Energy Resolution and Ordinances.

The Political Reform Act's conflict-of-interest provisions are found at Government Code section 87100, *et seq.* Section 87100 states the basic rule: "No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest."

The Act establishes the Fair Political Practices Commission. (Gov. Code § 83100.) The Commission adopts regulations that carry out the purposes of the Act. (Gov. Code § 83112.)

Section 18700, subdivision (d)¹ of the Commission's regulations creates a three-part test for determining whether a public official has a prohibited conflict of interest:

"Step One: Is it reasonably foreseeable that the governmental decision will have a financial effect on any of the public official's financial interests? To determine if the financial effect is reasonably foreseeable, apply Regulation 18701."

¹ Title 2, Cal. Code of Regulations, section 18700, subdivision (d). Further references to the Regulations are to Title 2.

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Regulation 18701, subdivision (b) explains that “if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable.”

Here, it is far more than a realistic possibility, and it is far more than hypothetical or theoretical that adoption of the Clean Energy Policy Resolution and Ordinances will drive business to Ms. Pease’s In Balance Green Consulting firm. Therefore her participation in the matter meets the first step in determining that she has a prohibited conflict.

“Step Two: Will the reasonably foreseeable financial effect be material? To determine if the reasonably foreseeable financial effect is material, apply Regulation 18702.”

Under Regulation 18702, where the question involves a public official’s interest in a business, the test for materiality is in Regulation 18702.1. Regulation 18702.1, subdivision (b) provides that a financial effect is material for conflict-of-interest purposes if the governmental decision would “regulate or otherwise establish conditions for an activity in which the business entity is engaged” or if the decision would “increase or decrease the need for the products or services that the business entity supplies[.]” (Reg. 18702.1, subdvs. (b)(1) and (b)(3).)

Here, it is clear that with respect to Ms. Pease and In Balance Green Consulting, the Clean Energy Policy Resolution and Ordinances meet both tests for prohibition. They regulate and establish conditions for In Balance’s clean-energy consulting practice, and they will increase the need for In Balance’s services. Therefore Ms. Pease’s participation in this matter meets the second step in establishing that she has a prohibited conflict.

Step Three: Can the public official demonstrate that the material financial effect on the public official’s financial interest is indistinguishable from its effect on the public generally? To determine if the material financial effect on any of the public official’s financial interest is indistinguishable from its effect on the public generally, apply Regulation 18703.

Ms. Pease cannot meet the test of Step Three. To do so she would have to prove that the Resolution and Ordinances would affect at least 25 percent of the businesses in San Luis Obispo in the same way that they affect In Balance Green Consulting. (Reg. 18703.) There is no possibility that Ms. Pease can meet this test.

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The foregoing discussion establishes beyond question that Ms. Pease had and has a conflict of interest that prohibited and will prohibit her participation in deliberations and voting on the Resolution and Ordinances. Had she consulted the Commission before violating the law, that's exactly what she would have been told. (*See, e.g., Goleta Water Dist., FPPC Advice Letter, File No. A-16-270.*)

The next question is, what should she and the Council have done on September 3rd, and what should they do on September 17th?

Ms. Pease should have announced her business interest that created the conflict of interest, recused herself from the discussion and vote, and left the room.

Government Code section 87105, subdivision (a) makes crystal clear what Ms. Pease should have done on September 3rd, and at any other Council or committee meeting at which the Resolution and Ordinances were or will be discussed. Ms. Pease was required to:

1. Publicly announce the financial interest that gives rise to the conflict of interest or potential conflict of interest, and do so in detail sufficient to be understood by the public. (Gov. Code § 87105, subd. (a)(1).)
2. Recuse herself from discussing and voting on the matter, or otherwise acting in violation of Section 87100. (Gov. Code § 87105, subd. (a)(2).)
3. Leave the room until after the discussion, vote, and any other disposition of the matter is concluded. (Gov. Code § 87105, subd. (a)(3).)

Public officials are expected to know the fundamental laws that govern their behavior. And the State makes ample educational guidance available for them. Unfortunately, neither Ms. Pease nor her colleagues recognized this very serious legal and ethical problem.

Obviously, Ms. Pease violated the Political Reform Act on September 3, 2019. That violation incurs liability for penalties and other remedial action by the Commission ((Gov. Code § 83100, *et seq.*), and to criminal prosecution (Gov. Code § 91000, *et seq.*).

Further, the failure to follow proper procedures requires vacation of the Council's action approving the Resolution and Ordinances. (*Woodland Hills Residents Ass' v. City Council of Los Angeles* (1980) 26 Cal.3d 938, 948-49; *Kunec v. Brea Redevelopment Agency* (1997) 55 Cal.App.4th 511, 521-25.)

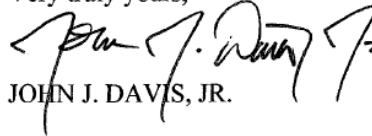


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Utility Workers Local 132 requests that at its meeting of September 17, 2019, the City Council vacate its September 3rd approval of the Clean Energy Policy Resolution and Ordinances, and take no further action on those measures until the Council's September 3rd violations have been rectified.

Very truly yours,



JOHN J. DAVIS, JR.

cc: Eric Hofmann, President
Utility Workers Local 132

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