



DATE: March 14, 2019

TO: Recycling Board

FROM: Wendy Sommer, Executive Director

REVIEWED BY: Farand Kan, Deputy County Counsel

SUBJECT: Request for Board Action:
Board Member John Moore’s Representation of Antoinette Stein against the Waste Management Authority in *Boone et al. v. Alameda County Waste Management Authority*, California Court of Appeal, First Appellate District, Case No. A154804

SUMMARY

At the Recycling Board’s meeting on March 14, 2019, staff will request that the Board discuss and take appropriate action regarding Board member John Moore’s representation of Antoinette Stein in a case against the Alameda County Waste Management Authority (WMA), involving a Countywide Integrated Waste Management Plan (CoIWMP) amendment recommended by the Recycling Board and approved by WMA.

DISCUSSION

Role of the Recycling Board

The Countywide Element of the CoIWMP provides a blueprint for how the County, through the Alameda County Waste Management Authority, meets its waste management goals. It includes a list and description of local waste management facilities.

When a company applies for a CoIWMP amendment to include a new facility, the company/applicant is responsible for obtaining all local land use permits and ensuring that its project has received appropriate review under the California Environmental Quality Act (CEQA). WMA’s role is to make a conformance finding and add the approved facility to the CoIWMP. WMA does not process CoIWMP amendments until and unless the lead agency has approved the project, completed the environmental review, provided notice to the public, and received and considered any public input.

The Recycling Board, serving as both the Local Task Force and as the Planning Committee of the Authority, considers CoIWMP amendments. In its advisory capacity, the Local Task force reviews the application and provides comments on the proposed CoIWMP amendment (which can include a

comment recommending adoption). The Planning Committee receives the staff report and considers whether to recommend approval of the proposed CoIWMP amendment and conformance finding to the full WMA.

Timeline

February 9, 2017	The Recycling Board, as the Local Task Force and the Planning Committee of the WMA, considered a CoIWMP amendment for Waste Management’s Organics Materials Recovery Facility (OMRF) at Davis St., San Leandro and recommended (7-2, and two recusals) that the WMA Board approve the CoIWMP amendment by ordinance and hold a public hearing. Mr. Moore actively participated in the meeting and voted against the recommendation.
February 22, 2017	The WMA Board held a public hearing and first reading of the subject project and related ordinance.
March 22, 2017	The WMA Board held another public hearing and second reading of the ordinance, adopting amendments to the CoIWMP and finding CoIWMP conformance for the Davis St. OMRF project.
April 28, 2017	A.R. Boone and Antoinette Stein (who was a Recycling Board member at the time) filed a lawsuit (petition for writ of mandate) in the Alameda County Superior Court challenging the WMA’s adoption of the ordinance.
April 11, 2018	The court issued judgment denying Boone and Stein’s petition for writ of mandate.
May 7, 2018	Stein filed a motion to vacate judgment and enter new judgment in petitioner’s favor, or for a new trial.
June 11, 2018	The court denied Stein’s motion to vacate and enter new judgment or order a new trial.
July, 2018	Boone filed an appeal on July 11 and Stein filed hers on July 30.
February 13, 2019	Board member John Moore notified the California Court of Appeal, First Appellate District, that he is representing Stein in the appellate case of <i>Boone et al. v. Alameda County Waste Management Authority</i> .

California Rules of Professional Conduct

Shute, Mihaly & Weinberger, the WMA’s legal counsel, sent a letter dated February 22, 2019 addressed to Board member Moore with a cc. to all of the Recycling Board members (Attachment A), requesting Board member Moore to immediately withdraw from representing Ms. Stein in this case absent informed written consent from the Recycling Board.

The letter cited California Rules of Professional Conduct 1.11 and 1.7.

Rule 1.11 - *Special Conflicts of Interest for Former and Current Government Officials and Employees* (Rule Approved by the Supreme Court, Effective November 1, 2018) states that except as law may otherwise expressly permit, a lawyer currently serving as a public official or employee is subject to rule 1.7.

Rule 1.7 - *Conflict of Interest: Current Clients* (Rule Approved by the Supreme Court, Effective November 1, 2018) states that a lawyer shall not, without informed written consent from each client, represent a client if the representation is directly adverse to another client in the same or a separate matter.

Mr. Moore responded in a letter dated March 1 (Attachment B), explaining his difference of opinion, and suggested placing an item on the agenda in order to seek consent from the Recycling Board to continue representing Ms. Stein.

Conflict of Interest Recusals

The Alameda County Waste Reduction and Recycling Initiative Charter Amendment (“Measure D”), under Subsection 64.130.P.1 states:

“No Recycling Board member shall participate in any Recycling Board action or attempt to influence any decision or recommendation by any employee of or consultant to the Recycling Board which involves herself or himself, or which involves any entity with which the member is connected as a director, officer, elected official, consultant, or full-time or part-time employee, or in which the member has a direct personal financial interest within the meaning of California Government Code Section 87100, or any successor statute thereto.”

The Political Reform Act Basic Rule and Guide to Conflict of Interest Regulations, 2 CCR § 18700 states:

“A public official at any level of state or local government has a prohibited conflict of interest and may not make, participate in making, or in any way use or attempt to use his or her official position to influence a governmental decision when he or she knows or has reason to know he or she has a disqualifying financial interest. A public official has a disqualifying financial interest if the decision will have a reasonably foreseeable material financial effect, distinguishable from the effect on the public generally, directly on the official, or his or her immediate family, or on any financial interest described . . . herein.”

The Political Reform Act Disqualification Requirements, 2 CCR § 18707 requires the disqualified member to recuse himself or herself and leave the room. An exception (§ 18707(a)(3)(C)) allows for the recused member to speak as a member of the public regarding an applicable personal interest.

The Recycling Board Rules of Procedure Section 4-14 (Voting Ineligibility) requires:

“Any Recycling Board member attending a Recycling Board meeting and ineligible to vote on any matter under consideration by the Recycling Board at that meeting shall briefly describe the reason for being ineligible and then shall leave the Recycling Board table before the matter is considered and refrain from participation in any action concerning the matter. If the member is ineligible due to a conflict of interest under the Political Reform Act, the member’s disclosure shall include the information required by that Act and the member shall leave the room and not be counted towards a quorum.”

Based on the above, Board members John Moore and Tianna Nourot (who works for Waste Management, Inc.) will be requested to recuse themselves from this item and leave the room/table.

RECOMMENDATION

Staff recommends that the Board discuss this issue and make a decision on whether to provide consent or request withdrawal of Board member Moore regarding his representation of Ms. Stein in *Boone et al. v. Alameda County Waste Management Authority*.

Attachment A: Letter dated February 22, 2019 from Shute, Mihaly & Weinberger

Attachment B: Letter dated March 1, 2018 (2019) from John Douglas Moore

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February 22, 2019

Via E-Mail and U.S. Mail

John Douglas Moore
1999 Harrison Street, 18th Floor
Oakland, CA 94612
E-Mail: jmoore@recyclelaw.com

Re: Notification of Conflict and Request for Withdrawal – *Boone et al. v. Alameda County Waste Management Authority*, Case No. A154804

Dear Mr. Moore,

You recently filed an appearance on behalf of appellant Antoinette Stein in *Boone et al. v. Alameda County Waste Management Authority*, Appellate Case No. A154804. In that case, Ms. Stein challenges the Alameda County Waste Management Authority's decision to amend its Countywide Integrated Management Plan to include a new recycling and organics processing facility in San Leandro (the "Project"). As you know, the Authority approved the Project at the recommendation of the Alameda County Source Reduction and Recycling Board ("Recycling Board"). The Recycling Board, on which you sit as a voting board member, is a subsidiary body of the Authority (see Alameda County Charter section 64.130(C)), and the Authority and the Recycling Board share interests in this litigation.

Under California Rule of Professional Conduct 1.11, your duties to the Recycling Board (and the Authority), which support the Project, directly conflict with your duties to Ms. Stein, who seeks to overturn the Project. Because the Recycling Board has not consented to your representation of Ms. Stein in Appellate Case No. A154804, you must withdraw from the litigation.

Rule 1.11, adopted in November 2018, governs the conduct of attorneys who also hold official positions in public agencies. In particular, Rule 1.11(d) states that attorneys, in their capacity as public officials, are "subject to rule[] 1.7," which governs conflicts of interests among clients. Under Rule 1.7, an attorney cannot represent two entities or individuals with directly conflicting interests without first obtaining informed written consent from the affected entities or individuals. Even after an attorney relinquishes

public office, Rule 1.11 continues to require the attorney to obtain informed written consent from the public agency before representing a private client “in connection with a matter in which the lawyer participated personally and substantially as a public official or employee.” Rule 1.11(a)(2).

There is no question that the Recycling Board’s interest in Appellate Case No. A154804 directly conflicts with Ms. Stein’s interest. Not only does the Recycling Board, as a subsidiary to the Authority, generally share the Authority’s interests, but the Board has expressly acted in favor of the Project that Ms. Stein challenges. On February 9, 2017, the Recycling Board, sitting as the Local Task Force under Public Resources Code section 40950 and Alameda County Charter section 64.130(B), considered the Project and recommended that the Authority approve the Project. You were present during this meeting and fully participated in the Recycling Board’s deliberations.

Your obligations as an attorney serving as a public official on the Recycling Board directly conflict with your representation of Ms. Stein in the above-reference litigation. I therefore request that you immediately withdraw from this litigation and, absent informed written consent from the Recycling Board and Ms. Stein, refrain from providing any legal advice to Ms. Stein regarding the case. I further request that, to the extent that you possess confidential information regarding the Recycling Board or the Authority, that you continue to keep that information confidential and refrain from sharing it with Ms. Stein or anyone else.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP



Tamara S. Galanter

Cc (email only): Recycling Board Members
Arthur Boone
Antoinette Stein
Farand Kan
Andee Leisy
Wendy Sommer

ATTACHMENT B

LAW OFFICE OF JOHN DOUGLAS MOORE

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March 1, 2018

Tamara S. Galanter, Esq.
Shute, Mihaly, and Weinberger
396 Hayes St.
San Francisco, CA 94112

Re: Boone v. ACWMA

Dear Ms. Galanter:

This letter responds to yours of February 22 regarding RPC 1.7 and 1.11. We have a difference in perception, a difference of opinion about what Dr. Stein is challenging, and a difference of opinion about the application of the rules of professional conduct that you cite.

I read these rules prior to taking on the representation of Dr. Stein. Here is how I look at it, and I solicit your comments:

Dr. Stein has not challenged the "Project" as you say. Dr. Stein's appeal solely relates to whether the WMA complied with CEQA, a public reporting statute. I hope we can agree that legislative policy implemented by CEQA is that public disclosure of potential environmental impacts of a project is important. WMA's attorney told Judge McLaren that the outcome of Dr. Stein's case will not stop the project

Dr. Stein has not taken a position "adverse" to the ACRB. Her brief does not put the ACRB in a negative light by editorializing what staff did and said. The brief describes Stopwaste as "world class" among government agencies dedicated to resource recovery. The brief does not reference my own relationship with the ACRB or argue that my view should get added weight because of that relationship. Dr. Stein does not seek any relief against the

ACRB. I don't think it is obvious, as you seem to think, that there is any adversity involved in my representation of Dr. Stein.

While Section 64.130 of Measure D mentions that the ACRB is a "subsidiary" body, nowhere does Measure D say exactly what that means or delegate any responsibility from the County or WMA to the ACRB. ACRB and WMA are described as "separate" in the County Integrated Waste Management Plan. ACRB does not have power to make CEQA determinations under state law. The ACRB website describes its function as being "...responsible for programs that promote source reduction, recycling, recycled product procurement, market development, and grants to non-profit waste reduction enterprises."

Newly adopted RPC 1.11 states that a lawyer shall not represent a client where the "lawyer participated personally and substantially as a public official or employee."

The primary purposes of adding RPC 1.11 were to conform to the ABA model rules and to provide additional protection of confidential information. I do not possess any confidential information of the ACRB or WMA. I have never participated in a closed session of the ACRB. I have never provided legal services to either the ACRB or WMA.

According to comment 3 to RPC 1.11 the term "substantial" means "that the lawyer's involvement be of significance to the matter." I do not see that this applies to me under the circumstances. As you say, the ACRB did not "approve" the project but rather "recommended" approval to the WMA on a vote with two noes and 2 recusals. I thought at the time, and have had this view confirmed since by review of the administrative record, that the ACRB was misled about what it was being asked to approve. My part in the process was not "substantial", which seems to be a factual question not a legal one.

Having said all this, if Ms. Sommer and you wish to agendaize an item at the next ACRB meeting where I can seek consent of the Board to continue to represent Ms. Stein and moot any issue about RPC 1.11, I will make my case to them.

Dr. Stein had her opening brief due February 28, a deadline that the Court had said it would not extend, and I had no ethical choice but to file it on her behalf.

Please clarify your position about how you think I substantially participated in the decision of a legislative body on which I do not serve, to make a CEQA determination based upon misleading and incomplete information. There are First Amendment and SLAPP issues to consider also.

Very truly yours,

John Douglas Moore