



Office of County Counsel Memorandum

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To: Board of Supervisors
Subject: Conflict of Interest – Planning Commissioner

The Board of Supervisors will consider the appointment of CJ Jackson as the Planning Commissioner for the Third District on September 25, 2007. The Board requested County Counsel to report on the application of conflict of interest laws to Mr. Jackson's appointment. The Santa Ynez Band of Chumash Indians in a letter dated September 7, 2007 objected to his appointment, stating two primary grounds:

- A. Mr. Jackson, or his family, has significant property and business interests in the Santa Ynez Valley, an area subject to the Commission's jurisdiction.
- B. Mr. Jackson, as a leader of the organization Concerned Citizens of Santa Ynez Valley, has made numerous statements in opposition to activities of the Chumash. This is said to demonstrate bias against the Tribe.

As discussed below, there is no legal impediment to Mr. Jackson's appointment to the Commission. Matters that come before the Commission must be analyzed case by case to determine if he is disqualified from participation because of his economic interests or biased against the Chumash so as to preclude his serving as an impartial decision-maker.

CONFLICT OF INTEREST UNDER THE POLITICAL REFORM ACT

Members of Planning Commissions are among the local officials subject to Article 2 of the Conflict of Interest provisions of the California Political Reform Act. See Government Code § 87200. Section 87202 requires planning commissioners to file a statement within 30 days of appointment to office "disclosing ... investments and ... interests in real property held on the date of assuming office, and income received during the 12 months before assuming office."

Government Code § 87100 prohibits government officials from participating in decisions that affect their financial interests:

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.

Government Code § 87103 defines “financial interest”:

A public official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the **official, a member of his or her immediate family**, or on any of the following:

(a) Any **business entity** in which the public official has a direct or indirect investment worth two thousand dollars (\$2,000) or more.

(b) Any **real property** in which the public official has a direct or indirect interest worth two thousand dollars (\$2,000) or more.

(c) Any **source of income**, [except regular business loans], aggregating five hundred dollars (\$500) or more in value provided or promised to, received by, the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

(e) Any **donor of... a gift** or gifts aggregating two hundred fifty dollars (\$250) or more in value [adjusted every 2 years – now \$380] provided to, received by, or promised to the public official within 12 months prior to the time when the decision is made.

For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agents, spouse, and dependent children own directly, indirectly, or beneficially ' 10-percent interest or greater.

The disqualifying financial interests are those of the official and his immediate family. (The Act defines “immediate family” to mean the spouse and dependent children of an official. [§ 82029].)

The California Fair Political Practices Commission is responsible for interpreting and enforcing the Act. The FPPC has adopted regulations for determine whether each type of interest is direct (different disqualification standards apply to direct and indirect interests), material, and foreseeable. Regulations also cover the “public generally” and “necessity” exceptions that allow financially interested officials to participate.

A determination of conflict of interest cannot be made in the abstract. Each decision must be analyzed individually. This requires analysis of:

- A. The nature and effect of the action to be taken.
- B. Whether the decision involves one of the official’s economic interests.

Mr. Jackson will be disqualified if his business investment or employment interests, real property, or sources of income or gifts, will be materially and foreseeably affected. He must disclose his interest, recuse himself from participation in the decision, and leave the room.¹

A decision that affects a business or property owned by Mr. Jackson's father, Palmer Jackson, is not disqualifying to CJ Jackson unless:

- ☞ CJ Jackson has an investment or employment interest in the business or property, or
- ☞ Palmer Jackson is a source of income to CJ Jackson.

As indicated above, this requires case by case analysis.

Special rules apply to real property and community plans. If Mr. Jackson's property is involved in any of the types of decisions specified in the regulations, he has a direct, material interest and may not participate.² The FPPC regulations provide an exception for decisions relating to general plans.³ Further, decisions concerning general plans may be segmented, and an official with an interest allowed to participate, if "the decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the [disqualifying decision]."⁴ (2 C.C.R. § 18709.)

BIAS

The United States and California Constitutions guarantee that government may not deprive a person of property without due process of law. One aspect of due process is the right to an impartial decision-maker, that is, one who hears a matter based on evidence and not prejudice or bias.

¹ Gov. Code § 87105. (a) A public official who holds an office specified in § 87200 who has a financial interest in a decision within the meaning of § 87100 shall, upon identifying a conflict of interest or a potential conflict of interest and immediately prior to the consideration of the matter, do all of the following: (1) Publicly **identify the financial interest** that gives rise to the conflict of interest or potential conflict of interest in detail sufficient to be understood by the public, except that disclosure of the exact street address of a residence is not required. (2) **Recuse himself or herself from discussing and voting on the matter**, or otherwise acting in violation of § 87100. (3) **Leave the room** until after the discussion, vote, and any other disposition of the matter is concluded, unless the matter has been placed on the portion of the agenda reserved for uncontested matters. (4) Notwithstanding paragraph (3), a **public official ... may speak on the issue during the time that the general public speaks on the issue.**

² See 2 C.C.R. § 18704.2. Determining Whether Directly or Indirectly Involved in a Governmental Decision: Interest in Real Property. Generally, an official has a direct interest that requires recusal if any part of his property is located within 500 feet of the boundaries (or the proposed boundaries) of the property that is the subject of the governmental decision, or if the decision involves zoning, sale or lease, annexation, permit or other land use entitlement, imposition of taxes or fees, or public improvements resulting in new or improved services.

³ § 18704.2(b)(3) provides that an official's interest is indirect if the decision solely concerns the adoption or amendment of a general plan and the decision: (A) only identifies planning objectives or is otherwise exclusively one of policy; (B) requires a further decision by the public official's agency prior to implementing the planning or policy objectives; (C) does not concern an identifiable parcel or parcels or development project; and (D) does not concern the agency's approval of, or change to, a permit, license, zoning designation, zoning variance, land use ordinance, or specific plan or its equivalent.

⁴ See § 18709(b) ... "decisions are "inextricably interrelated" when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision." "Once all the separate decisions related to a ... general plan affecting the entire jurisdiction have been finalized, the public official may participate in the final vote ... to adopt, reject, or amend the general plan." (§ 18709(c).)

The recent case of *Nasha LLC v. City of Los Angeles* (2004) 125 Cal.App.4th 470 applied this principle to invalidate a planning commission decision in which a commission member who had publicly advocated against the applicant's project participated.⁵

Procedural due process in the administrative setting⁶ requires that the hearing be conducted before a **reasonably impartial, noninvolved reviewer**. ...[In] order to prevail on a claim of bias violating fair hearing requirements, [a person] must establish " 'an unacceptable probability of actual bias on the part of those who have actual decisionmaking power over their claims.' " A party seeking to show bias or prejudice on the part of an administrative decision maker is required to prove the same "with concrete facts: ' "[b]ias and prejudice are never implied and must be established by clear averments." ' " (Id. at 482-83, citations omitted.)

In the first instance, a commission member is responsible for determining and declaring that he can evaluate a case impartially on the evidence, free from bias. The question of whether bias tainted a decision so as to violate due process rights is ultimately decided by the courts.

The tribe says Mr. Jackson is biased against it as demonstrated by his past statements. No doubt Mr. Jackson opposed the tribe's fee to trust applications and has spoken against expansion of gaming activities. As a planning commissioner, he would make decisions on general plan and community plan policies, land use and development decisions affecting sacred sites. The county must consult with the tribe on these matters.⁷ We do not presume that Mr. Jackson's position on some issues will preclude him from fairly deciding other matters affecting the tribe's interests on their merits and evidence presented. Mr. Jackson's past public comments opposing casino expansion and fee to trust transfers do not necessarily imply a bias against the Santa Ynez Band of Chumash or a prejudice towards Native American persons, groups or culture in general.

Again, an analysis of Mr. Jackson's actions and statements with respect to the Santa Ynez Band must be done at the time of a decision affecting the tribe's interests. In the absence of a thorough analysis in context of a specific decision, it is premature to conclude whether there are concrete facts to show "an unacceptable probability of actual bias." See *Breakzone Billiards v. City of Torrance* (2000) 81 Cal. App. 4th 1205, 1236.

CONSEQUENCES

The Board asked for a discussion of the consequences if Mr. Jackson participated in a matter and it subsequently was found that he had a disqualifying economic interest. The answer depends on whether his participation was essential to the outcome.

⁵ In *Nasha*, the Court of Appeal set aside a planning commission decision because a planning commission member authored an article that attacked a specific project under the planning commission's consideration: "Nasha has shown an unacceptable probability of actual bias based on Lucente's authorship of the newsletter article attacking the project." *Nasha* at 483.

⁶ Due process rights attach to administrative or quasi-judicial, not to legislative or quasi-legislative decisions. 125 Cal.App.4th at 482, citing *Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1188.

⁷ See Gov. Code § 65352.3(a) (1) "Prior to the adoption or any amendment of a ... county's general plan... the ... county shall conduct consultations with California Native American tribes that are on the contact list maintained by the Native American Heritage Commission for the purpose of preserving or mitigating impacts to [sacred] places, features, and objects...."

Government Code § 91003 authorizes injunctive relief to enjoin violations or compel compliance with the Act. It provides that “if it is ultimately determined that a violation has occurred and that **the official action might not otherwise have been taken or approved**, the court may set the official action aside as void.”

The leading case involving improper financial interests is *Downey Cares v. Downey Cmty. Dev. Com* (1987) 196 Cal.App.3d 983. The city and its community development commission amended the city's redevelopment plan. Property owners sought a writ of mandate to invalidate the amending ordinance. The trial court issued a writ because a councilman whose vote was essential to the three-to-two passage of the ordinance owned property within the plan area and was ineligible to vote under the Political Reform Act. The Court of Appeal affirmed, noting that the measure would not have passed without the interested official's vote. See also *Hamilton v. Town of Los Gatos* (1989) 213 Cal. App. 3d 1050, 1057-58 (member with disqualifying interest cannot have access to confidential closed session information).

Nasha v. City of Los Angeles, supra, is to the same effect but in regards to allegations of bias by the decision maker. See 125 Cal.App.4th at 484 fn.8 (“absent Lucente [the biased commissioner], the administrative appeal would have failed. Therefore, Lucente's involvement clearly affected the outcome of the administrative appeal.”) Again, *Nasha* requires that such a showing of bias reaches the level of actual bias concerning a particular issue or party, not merely a past history of disagreement with a party on unrelated issues.

Thus, if Mr. Jackson is appointed to the Planning Commission, participates in an administrative decision adverse to the Santa Ynez Band's interests, and his vote is essential to the outcome (i.e. the commission was split 3-2), the County is subject to litigation with potential judicial reversal and remand of the decision and possible attorney's fees if it the court subsequently determines that Commissioner Jackson was biased or had an improper financial interest in the matter..

CONCLUSION

CJ Jackson is not disqualified from appointment to the Planning Commission.

He must file a statement of his economic interests and may not participate in decisions that have a material and foreseeable affect on those interests. Planning commission decisions must be impartial and based on the evidence. A challenge to Mr. Jackson's participation in future administrative decisions affecting the interests of the Santa Ynez Band might be made on the grounds of bias. The outcome would depend on a showing of concrete facts to demonstrate an unacceptable probability of actual bias on a specific issue – that is, that Mr. Jackson is likely to vote against the tribe's interests irrespective of the evidence or the nature of the matter at hand. At this time, the issue is not ripe for decision.

