



Office of County Counsel Memorandum

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To: Board of Supervisors
Subject: Questions re Advisory Committee Do Not Vitiating Board Decision on Uniform Rules.

The Board of Supervisors will consider amendments to the Uniform Rules for Agricultural Preserves on September 25, 2007. The Board's consideration will be informed by additional environmental review to consider cumulative impacts, by recommendations from the County's Agricultural Preserve Advisory Committee ("Committee" or "APAC") and by public comment.

Bob Field, a local resident, has raised objections regarding the participation of Willy Chamberlin and Bill Giorgi ("C & G") on the Committee. He contends that they were not appointed by the Board, that the Committee's recommendations are regularly approved without change (making it a "decision-making" body subject to the Political Reform Act)¹, that as Williamson Act contract holders C & G have a disqualifying conflict of interest, and that the Committee's recommendations in which they participated are void. Mr. Field has advised that he intends to contact the Fair Political Practices Commission. *This memo advises that the Board need not delay the Uniform Rules amendments until the legal questions are resolved.*

County Counsel is docketing a Board Letter recommending that the Board of Supervisors:

(a) Adopt a resolution re-organizing the Committee. Find the need to have representatives of agricultural

¹ Gov. Code § 82019(b)(1) " 'Designated employee' [subject to the Act] does not include ... any unsalaried member of any board or commission which serves a solely advisory function." *Commission on Govt. Org. & Econ. v. Fair Political Practices Commission* (1977) 75 Cal.App.3d 716 held that a government watchdog commission was "decision-making" and not "solely advisory" as demonstrated by analysis of its character, function, and track record. FPPC Regulation 2 C.C.R. § 18701 addresses the issue. For purposes of determining if a person is subject to the Act:

(1) "Member" shall include, but not be limited to, salaried or unsalaried members of committees, boards or commissions with decisionmaking authority.

(A) A committee, board or commission possesses decisionmaking authority whenever: ...

(iii) It makes substantive recommendations that are, and over an extended period of time have been, regularly approved without significant amendment or modification by another public official or governmental agency....

Neither the Court of Appeal decision nor the FPPC regulation addresses when during the "extended period of time" a body's recommendations become "regularly approved." When an agency determines that its recommendations have been regularly followed over an extended period of time, it should adopt a conflict of interest code and present it to the Board of Supervisors for inclusion in the County's Single Conflict of Interest Code. We expect the Committee will adopt its Code in the near future.

production or Williamson Act contract holders as members.²

(b) Consider the appointment of C &G, as nominees of the Agricultural Advisory Committee, to the Agricultural Preserve Committee.

(c) If the Board determines to appoint C & G, refer questions regarding California conflict of interest law to the Fair Political Practices Commission and Attorney General. Direct that C & G not participate in Committee decisions until issues are resolved.³

We are requesting that the Board hear this matter on the October 9 departmental agenda.

This memo advises that the Board may hear and take action on the Uniform Rules Amendments, even if questions regarding C &G's participation in the Committee recommendations are unresolved. Their votes were not essential to passage of the Committee recommendations. The irregularities in its composition do not void the Committee's advice or undermine the Board of Supervisors' decision.

The reasons for our advice are:

- 0 C & G were nominated by the Agricultural Advisory Committee, consistent with Board direction, and in early 2006 began to attend committee meetings apparently in the good faith belief their appointment was complete. In fact, they were not appointed by the Board as specified in the minute order.
- 0 The Uniform Rules Project was started and except for the environmental review largely completed before C &G began sitting on the Committee. C & G voted on two fairly minor issues raised late in the process. Since the vote was unanimous, their participation would not have affected the outcome. APAC has not participated in the environmental review.

² See 2 C.C.R. § 18707.4(a). For purposes of the Act's disqualification rule, the "public generally" exception applies to "appointed members of boards... who are appointed to represent a specific economic interest, ... if all of the following apply:

(1) The ... provision of law which creates or authorizes the creation of the board ... contains a finding and declaration that the persons appointed to the board ... are appointed to represent and further the interests of the specific economic interest.

(2) The member is required to have the economic interest the member represents.

(3) The board's ... decision does not have a reasonably foreseeable material financial effect on any other economic interest held by the member, other than the economic interest the member was appointed to represent.

(4) The decision of the board ... will financially affect the member's economic interest in a manner that is substantially the same or proportionately the same as the decision will financially affect a significant segment of the persons the member was appointed to represent. For purposes of this regulation, a significant segment constitutes fifty percent of the persons the member was appointed to represent."

³ The FPPC has jurisdiction to interpret the Political Reform Act and its implementing regulations. The Attorney General and local District Attorneys have jurisdiction over criminal violations of the Act and over Government Code § 1090, which prohibits self-dealing in contracts. Because the Williamson Act Rules are related to the contracts (see Gov. Code § 51243 [“Every contract shall ...: (a) Provide for the exclusion of uses other than agricultural, and other than those compatible with agricultural uses, for the duration of the contract”]; § 51231 [board shall adopt rules that shall be applied uniformly throughout the preserve including compatible uses]), participation in amendment or interpretation of the rules could be considered a violation of § 1090, with serious civil and criminal repercussions. See Gov. Code §§ 1097 (fine, imprisonment in state prison, and bar on holding public office). We advise that contract holders not sit on the Committee pending advice from the Attorney General.

- 0 The Committee is designed and serves to advise the Board of Supervisors.⁴ The members of a “solely advisory committee” are not subject to the Political Reform Act and the prohibition on participation in a decision affecting their economic interest does not apply.⁵ The Committee appears to meet the standard for a “decision-making” body subject to the Act because throughout its history its advice has been regularly approved. (See Footnote 1.) However, no government agency or court has so found.⁶
- 0 When C & G participated in meetings, the Committee was considered advisory. In our opinion, the change in Committee status from advisory to decision-making body has only prospective effect. The Committee is required to adopt a Conflict of Interest Code, and the disqualification rules of the Political Reform Act apply, once there is a finding that the body’s recommendations have been regularly approved without change over an extended period of time and the Committee is thus considered “decision-making.” The legal requirements (filing, disclosure, disqualification) are not applied retroactively to portend criminal and civil sanctions for non-compliance with a law that C & G did not know or believe applied at the time they participated in Committee business.⁷ ***A definitive answer to this question can only be provided by the FPPC, the Attorney General or a court.***
- 0 Even if the Committee is subject to the Political Reform Act and C &G were disqualified from participating on the Uniform Rules Project, their votes were not essential to the passage of the recommendations. Two recommendations were made with participation by C & G, but in both instances their votes were not needed for the passage of the motions. Under California law the Committee’s decision is not void.⁸
- 0 The Board of Supervisors will be considering the Uniform Rules Project and exercising its legislative discretion to adopt or reject the proposed amendments. This will be done at a public hearing, on the departmental agenda. Irrespective of whether the “track record” of the Committee is such that it is considered a “decision-making” body, the Board will be the final decision-maker on the Uniform Rules amendments. Whether characterized as advice or “decision” the Committee’s recommendations do not bind the Board. Similarly, irregularities in the Committee’s composition do not taint the Board’s consideration and process or undermine its decision.

Thus, the Board’s discretion whether to proceed with the Uniform Rules Amendments is unfettered.

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⁴ See Gov. Code 51239 (“The board may appoint an advisory board, the members of which shall serve at the pleasure of the board ... and may be paid their expenses. They shall advise the board ... on the administration of the agricultural preserves in the county ... and on any matters relating to contracts entered into pursuant to [the Williamson Act].”).

⁵ Compliance with Government Code § 1090 does not depend on whether the Committee is advisory or decision-making. Rather, the critical question under § 1090 is whether the official participated in the making of a contract. See *MARS v. Millbrae* (1968) 262 Cal.App.2d 222 (“the word ‘made’ is not used [in § 1090] in its narrower and technical contract sense but ... in the broad sense to encompass ... preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and solicitation for bids”). Similarly, common law conflict of interest principles prohibit public officials from “serving two masters.” *People ex rel. Chapman v. Rapsey* (1940) 16 Cal. 2d 636. The Legislature may authorize action despite existence of a common law conflict. *Am. Canyon Fire Prot. Dist. v. County of Napa* (1983) 141 Cal.App.3d 100 (board of supervisors distributing and receiving funds may be common law conflict of interest but is allowed by statute).

⁶ The Committee (1967) predates the Political Reform Act (1974). From its creation until the Board’s determination that agriculture should be represented, all committee members were county officials who already had to file Economic Interest Statements under the Act. As a public official’s salary from a government agency does not constitute a disqualifying interest, no conflict of interest questions arose. (See Gov. Code 82032(b)(2); 2 C.C.R. § 18232; *Lexin v. Superior Court*, 2007 Cal. App. LEXIS 1484 (analysis for “salary exception” under § 1090)). Until questions were raised about C & G, there was no need to determine whether the committee was advisory or decision-making.

⁷ See Gov. Code § 91000 (misdemeanor for knowing violation of Political Reform Act); § 91005 (liability in civil action for three times the value of benefit received by participating in decision when disqualified).

⁸ See *Downey Cares v. Downey Dev. Com* (1987) 196 Cal.App.3d 983 (ordinance invalid where member with disqualifying interest participated and vote was essential to the 3-to-2 passage of ordinance); Civil Code § 3537 (“superfluity does not vitiate”).