CONFLICT OF INTEREST/POLITICAL REFORM ACT

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Presented by

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Kathleen Bales-Lange is the County Counsel of the County of Tulare. Appointed as County Counsel in 1996, Ms. Bales-Lange has been with the office since 1981, rising through the ranks in serving first as a deputy, then as chief deputy, prior to her appointment. Ms. Bales-Lange graduated from Hastings College of the Law in 1980. Ms. Bales-Lange and her staff of twenty lawyers provide legal advice and representation to the Board of Supervisors, all County departments, fifty school districts, memorial and cemetery districts and the Superior Court by contract. Most litigation is handled in-house. The legal issues facing Tulare County include all aspects of government law, and often include issues which arise due to Tulare County's status as one of the top agricultural producers in the nation. Ms. Bales-Lange has been recognized twice by the County Counsel's Association of California for outstanding service, in 1993 and 1996. She serves on the Electronic Communications Committee, and the Labor Relations Subcommittee for the California State Association of Counties. Ms. Bales-Lange is the co-author and editor of the chapter on Employment Law for the *County Counsel's Benchbook [1991 through 1996 editions]*. She has made numerous presentations to both legal and lay audiences, most often on subjects related to public employment law.

Due Process, Entanglement, Bias and Conflict of Interest

Due Process

- **All persons have the constitutional right to due process of law before the government makes decisions that affect substantial property interests.**

Basic due process rule:

- Government must give a person notice of action and opportunity to be heard before decisions affecting property interests are made.

Substantial Property Interests include those of:

- the property owner,
- the neighbors,
- other interested parties and
- the general public.

The elements of this basic rule are:

- Notice of the proposed action
- Reasons for the action
- Copies of the materials upon which the action is based
- The right and/or opportunity to respond
- The right to an impartial tribunal

Board Members and Planning Commissioners are Judges for Quasi Judicial Matters and must provide an Impartial Tribunal

Quasi-judicial matters include hearings on applications for:

- special use permits and amendments,
- variances,
- surfacing mining permits,
- subdivision maps,
- parcel maps, and
- permit revocations.
- (General Plan amendments and re-zoning actions, are considered legislative in nature and are not subject to the rule requiring decisions to be based only on evidence presented at the public hearing.)

Point of concern:

- Contacts outside of the formal public hearing between members of the Board or Commission and persons that appear before the Board or Commission are of concern and must be properly addressed to avoid violation of due process rights and resulting County and individual liabilities.

Three basic types of contact create due process problems:

- ex parte contact,
- personal embroilment and
- conflict of interest.

Ex Parte Contacts

- Ex parte contacts are generally those contacts between members of the Board or Commission and persons that appear before the Board or Commission in hearings on special use permits, variances, or similar other land use decisions and appeals. These include site visits which give the Board or Commission member information outside of the public hearing.

Issue:

- If the information or knowledge obtained outside of the public hearing is not presented to persons attending the public hearing, including other Board members or Commissioners, those persons are denied the opportunity to consider, comment on, or challenge the information. That denial is a violation of due process of law.

Cure:

- Ex parte contacts can generally be "cured" by adequate disclosure in the public hearing. To be effective, the disclosure must occur early in the public hearing so that interested parties have the opportunity to consider the information disclosed, and must be sufficiently detailed to allow meaningful comment or response.

When does normal constituent contact becomes ex parte contact?

- The nature of their offices obligate Board members and Commissioners to be available and open to the public in order to develop an understanding of public desires and concerns.
- However, when such contact moves from general policy or general information to site specific or project specific information, it becomes an ex parte contact which must be disclosed at the public hearing.

Consequences:

- Ex parte contact which is not cured by disclosure may result in a lawsuit setting aside the Board or Commission decision with an award of money damages, costs and attorneys fees.

Recommendations:

As soon as a situation moves from a general constituent contact to an ex parte contact, we recommend:

- that any ex parte contact be terminated, and
- that the circumstances and content of the contact be noted as accurately as possible for disclosure in case the matter should later be the subject of a public hearing before the Board or Commission.

Practice Tip:

- If an interested party contacts you and asks to discuss a quasi-judicial matter on the agenda before your government body or which could later appear on the agenda, decline by advising that:

Practice Tip: Statement to Constituent

- "as a [Board member or Commissioner], I am required by law to only receive information concerning this matter in a County public hearing, and any vote I make in this matter must be based on the information presented at that public hearing. Consequently, I cannot discuss this matter further with you or I may not be able to vote on this matter. However, I encourage you to present your information and your concerns at the public hearing or to the staff."

Personal Embroilment or Entanglement

Prior Involvement Bias

Elements:

Personal embroilment is characterized by

- a prior relationship between a Board member or Commissioner and persons who appear before the Board or Commission in hearings on special use permits, variances, or similar other land use decisions and appeals,
- when that relationship may result in bias either for or against a project.

Elements:

Prior involvement can include the increased level of interest or participation in a project resulting from:

- an independent investigation of the project,
- giving direction to staff,
- consulting with staff and one or more of the interested parties,
- communicating with third parties, or
- advocating for or against the project.

Issue

- The prior relationship or involvement may result in:
- an unacceptable degree of bias for or against the project, and
- a legally intolerable risk of unfairness, amounting to a prejudgment of the matter and
- a denial of one or more of the interested parties' rights to an impartial hearing.
- That prejudgment or denial of an impartial hearing is a violation of due process of law.

Cure:

- Personal embroilment or prior involvement generally cannot be "cured" by disclosure in the public hearing.
- Instead, the Board member or Commissioner should decline to sit as a member of the Board or Commission on the matter.

Consequences:

Continued participation by a Board member or Commissioner in a matter as a decision maker where the Board member or Commissioner is personally embroiled with interested parties or has had prior involvement in the matter can result in a lawsuit

- setting aside the Board or Commission decision
- awarding money damages, costs and attorneys fees.

Consequences:

If the individual Commissioner or Board member's bias or prior involvement is deemed elevated to the level of a civil rights violation, the individual Board member or Commissioner may also be liable for:

- an award of money damages,
- punitive damages,
- costs and attorneys fees under a civil rights violation claim.

Recommendations:

We recommend that once the Board member or Commissioner is personally embroiled or has had substantial prior involvement in the matter:

- they notify staff and decline to sit as a member of the Board or Commission during the hearing, deliberation and decision.
- To avoid losing a quorum for the decision making body, we recommend that Board member and/or Commissioners take care to not intervene, become involved in or agree to look into a particular project, investigate a particular project or assist any interested parties in their dealings with staff.

Practice Tip:

- If an interested party contacts you and asks you to intervene in a matter on the agenda before your government body or which may later appear on such agenda, decline by advising that:

Practice Tip: statement to Party

- "as a [Board member or Commissioner], I am required by law to be an impartial decision-maker in this instance. Consequently, I can not intervene on your behalf with staff and must limit my information gathering concerning this matter to information presented in a County public hearing. Otherwise, I may not be able to vote on this matter. However, I encourage you to contact staff directly with your information or concerns."

Conflict of Interest

- Conflict of interest basically refers to bias or private prejudice for or against a project based on a Board member or Commissioner having a personal financial interests of some nature that may be effected by a particular project or matter.
- The financial interests involved include sources of income, gifts and campaign contributions. The conflicts and their ramifications are defined both by statute and by case law.

Issue:

- Basically, public officials are prohibited from making, participating in making or attempting to use his or her official position to influence a governmental decision in which he or she knows or has reason to know that he or she has a financial interest.

Financial Interest:

The public official has a financial interest in a decision if it is reasonably foreseeable that

- the decision will have material effect on the official or a member of his or her immediate family, or
- on business or real property in which the official has an interest, or
- on a source of income or employment position of the official, or
- on a donor of gifts to the official or
- on a contributor of campaign funds to the official.

Cure:

- A conflict interest resulting from the receipt of a gift or gifts totaling between $50 and $420 (as of January 1, 2009) may be cured by disclosure at the public hearing.
- Otherwise, conflicts of interest can only be cured by the Board member or Commissioner disqualifying themselves from sitting as a member of the Board or Commission during the hearing, deliberation and decision in the matter.
- In some instances, the Board member or Commissioner is required to disclose the conflict as well as disqualifying themselves from participation.

Consequences:

Continued participation by a Board member or Commissioner in a matter as a decision maker where the Board member or Commissioner has a conflict of interest can result in a lawsuit

- setting aside the Board or Commission decision
- awarding money damages, costs and attorneys fees against both or either the decision making body and the

Recommendations:

- We recommend that the Board member or Commissioner who has a conflict of interest immediately notify staff and decline to participate in the Board or Commission hearing, deliberation and decision.

Practice Tip:

- If a Board member or Commissioner is disqualified due to a conflict of interest, the Chairman of the Board or Commission should announce the disqualification at the public hearing and caution themselves and the public on the record as follows:

Practice tip: Statement

- "Before we proceed on this matter, I would like to announce for the record that [Commissioner/ Board member _____] has declared a conflict of interest in this matter.
- Consequently [he/she] will not hear this matter or participate in the [Board's/Commission's) deliberations or decision in this matter.
- Members of the [Commission/Board]

Questions?