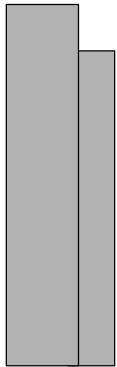


New Supervisors Institute County Counsel Role and Responsibilities



CSAC NEW SUPERVISORS INSTITUTE

James N. Fincher, Merced County Counsel
Kathleen Bales-Lange, Tulare County Counsel
Bruce Goldstein, Sonoma County Counsel

Introduction to the Role and Duties of County Counsel

1

County Counsel – General Law Counties

- ☐ Authorized by the California Government Code and appointed by the Board of Supervisors. (Gov. Code § 27640)
- ☐ Appointed to 4 year terms. (Gov. Code § 27641)
- ☐ May be removed for neglect of duty, malfeasance or misconduct in office, or for other good cause. (Gov. Code § 27641)
- ☐ There are 44 general law counties in California.

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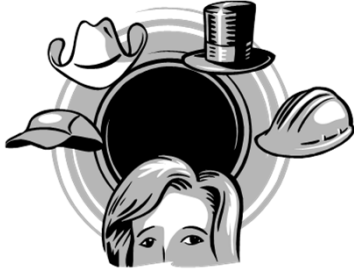
Charter Law Counties

- ☐ Position is created by County Charter. (Cal. Const., art. XI, § 4, subd. (c))
- ☐ Where charter does not create the office the Board of Supervisors may contract with outside counsel. (Gov. Code §§31000, 31000.4, 31001)
- ☐ Duties and role of County Counsel will be defined by County Charter but generally correspond to duties in general law counties.
- ☐ Where county charters are silent, Government Code may be used to "fill in the blanks."
- ☐ There are 14 charter law counties in California.

3

The Duties of County Counsel

Multitasking



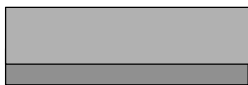
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Provide legal services and opinions, to the county and all county officers. (Gov. Code §§ 26520, 27642)

Attend meetings of the Board of Supervisors and oppose all unjust and illegal claims and accounts against the county. (Gov. Code § 26256)

5



Defend/prosecute civil actions where the County, or any officer, is a party in an official capacity. (Gov. Code § 26529, subd. (a))

Defend some civil actions against county employees for acts or omissions in the scope of their public employment. (Gov. Code § 995)

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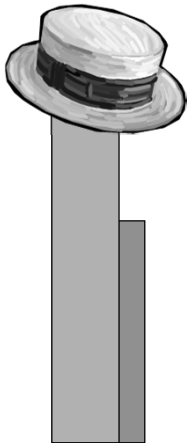
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Serve as the legal advisor to the grand jury with respect to civil matters. (Pen. Code § 934)

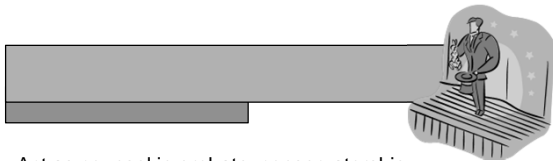
Review contracts, leases, memorandums, legal documents, Board Agenda Items and other documents. (Gov. Code §§ 26520, 27642.)

7



Represent the Auditor or Treasurer when there is a question about the validity or constitutionality of any laws or direction affecting the payment of funds held in the county treasury in those cases where the interest of the county is not adverse. (Gov. Code § 26523)

8



Act as counsel in probate, conservatorship, guardianship, and juvenile dependency proceedings. (Gov. Code §§ 27643, 27646, Welf. & Inst. Code § 318.5)

Appear and defend proceedings brought by persons involuntarily confined for treatment in private hospitals (Welf. & Inst. Code § 5000 *et seq.*)

Respond to petitions regarding conditions of confinement in the County jail.

9



Prepare impartial analysis of county ballot measures showing the effect of the measure on the existing law and the operation of the measure. (Elec. Code § 9313)

Ensure that the proposed ballot measure is constitutional. (*Jahr v. Casebeer* (1999) 70 Cal.App.4th 1250)

10

WHO IS THE CLIENT?

County as a whole

Individual Supervisor



11

Who Directs County Counsel?

- ☐ County Counsel works for the Board of Supervisors.
- ☐ The collective Board, not an individual Supervisor, directs counsel.
- ☐ The collective Board is the client.
- ☐ The CEO/CAO does not supervise the County Counsel.

12

County Counsel Cannot be Your Personal Attorney

Attorney-client privilege only exists with the "Board" itself.

While discussions between County Counsel and individual Board members is privileged from public disclosure, discussions may be subject to full disclosure to other Board members.

No attorney-client privilege on non-county business.

Ask, does my question relate to County business?

13

County Counsel Conflicts

- Conflicts may arise with your County Counsel when he/she acts in a dual representation role.
- Examples:
 - Retirement Board and Employing Department
 - Civil Service Commission and County Department or "Appointment Authority"
 - Assessment Appeals and County Assessor

14

Potential Due Process Violation

Counsel must be wary of dual representation when there is the potential for a due process violation.

Example:

- A lawyer engaged in a prosecutorial function (e.g., code enforcement) may not, in the same or related case, participate or advise in either the decision or the agency's review of the decision. (*Nightlife Partners v. City of Beverly Hills* (2003) 108 Cal.App.4th 81)

15

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When a Conflict Arises, County Counsel May:

- ☐ Screen off attorneys to avoid conflicts.
- ☐ Hire outside counsel.
- ☐ Contract with a neighboring County Counsel to represent one of the parties.
- ☐ When a conflict has been declared and outside counsel has been provided, communication about the issue should be with the outside counsel.

16



Don't be Your Own Headline

18

Board Conflicts of Interest Involving Contracts Govt. Code § 1090

Public Officers cannot enter into any contract in which they have a financial interest.

If one supervisor has a conflict, the entire Board is disqualified from contracting. (*People v. Drinkhouse* (1970) 4 Cal.App.3d 931)

Contracts made in violation of 1090 are void.

1090 violations are punishable by fine or imprisonment and permanent disqualification from holding any California public office. (Gov. Code § 1097)

1090 may be prosecuted as a felony. 19

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FPPC, Form 700 and Potential Conflicts

Form 700 – Statement of Economic Interests is a helpful gauge of whether a conflict of interest may exist.

County Counsel can generally advise you on Form 700 questions, but cannot advise you on specific issues.

County Counsel does not advise individual board members regarding particular disclosures or when to disqualify themselves from particular decisions. (Remember, no attorney-client privilege for individual members discussing personal matters.)

Reminder - A Form 700 must be filed within 30 days of assuming office. (Gov. Code § 87200) ²⁰

If You Think You Have a Conflict

OPTION 1

- ☐ Seek an oral or written opinion from the FPPC
- 1-800-ask-fppc

OPTION 2

- ☐ Seek the advice of independent counsel

ALWAYS ERR ON THE SIDE OF
CAUTION

²¹

Campaign Contributions



Form 460 – Report funding, determine conflicts.

Gov. Code § 84308 tells you when you must withdraw from permit, license or other proceedings.

\$250.00 individual contribution limit – disclose or disqualify!

²²



Acting in Quasi Judicial Matters

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.

Basic Due Process Rule:

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

24

Point of Concern:

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

25

Three Basic Types of Contact Create Due Process Problems:

- ☐ Ex parte contact,
- ☐ personal embroilment,
bias and
- ☐ conflict of interest.



26

Ex Parte Contacts

- ☐ Ex parte contacts are generally those contacts between members of the Board and persons that appear before the Board in hearings on special use permits, variances, or similar other land use decisions and appeals. These contacts may include site visits which give the Board member information outside of the public hearing.
- ☐ The nature of their offices obligate Supervisors to be available to the public.
- ☐ 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.

27

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, those persons are denied the opportunity to consider, comment on, or challenge the information. That denial is a violation of due process of law.

28

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.

29

Consequences



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

30

Remove Embroilment/Bias

Clark v. City of Hermosa Beach

- The Clarks bought a duplex a block from the beach to demolish it and build a two unit condo. The Planning Commission approved the project.
- A neighbor, Robert Benz, opposed the decision because it would adversely affect his view. He gathered signatures on petitions and wrote letters to the City Council and filed an appeal.

31

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- In the interim, Mr. Benz was elected to the City Council.
- At the Public Hearing before the City Council a resident raised a “point of order,” asking Councilmember Benz to recuse himself because he lived in close proximity to the proposed project and had opposed the Clarks’ plans.

32

- City Attorney stated that the location of Benz’s apartment did not create a financial conflict of interest because Benz leased, rather than owned, his residence. Further, he stated that Benz’s opposition to the Clarks’ project did not establish bias.

33

- The City Council voted to deny the permits.
- The court found for the Clarks, ruling that their right to due process had been violated.

34

Nasha, LLC v. City of Los Angeles

- Nasha owned five lots and sought to develop the property with five three-story single-family homes.

35

- Various groups, including Mr. Hennessy, submitted written comments. Based on the comments, the Planning Department amended the project conditions and approved the project. Hennessy and others appealed the decision to the Planning Commission.

36

- Before the hearing, Commissioner Lucente, in his role as President of the Residents Association, authored an article hostile to the project in the Association newsletter advocating against the project.
- Lucente also introduced Hennessy to speak against the project at the Residents Association meeting. According to Lucente, he left the room for the duration of Hennessy's remarks.

37

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- At the hearing, Lucente admitted that as president of the Residents Association, he had included an “informational article” in the newsletter.
- He claimed to have had no direct contact with any of the appellants, and had not discussed this project “in any substantive way with anyone.”

- After the hearing, Lucente made a motion to grant the appeal. The motion was carried.
- **The Court of Appeal reversed the decision of the Commission finding that Lucente was biased against the project and should have recused himself from the vote.**

Practice Tip: Statement to Constituent

“As a Supervisor, 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 County staff.”

Personal Embroilment/Entanglement and Prior Involvement Bias

Personal embroilment is characterized by a prior relationship between a Board member and persons who appear before the Board 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.

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

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

Problem:

The prior relationship or involvement may result in:

- ☐ an unacceptable degree of bias for or against the project;
- ☐ a legally intolerable risk of unfairness, amounting to a prejudgment of the matter;
- ☐ 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.

Consequences:

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

- setting aside the Board decision;
- awarding money damages, costs and attorneys fees; and
- leading to possible personal liability for a civil rights violation.

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.

Financial Conflict of Interests

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

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Issue:

Public officials are prohibited from making, participating in making or attempting to use their official position to influence a governmental decision in which they know, or have reason to know, that they have a financial interest.

Financial Interests:

A 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 /her immediate family;
- The decision will have an effect on business or real property in which the official has an interest;

- The decision will have an effect on a source of income or employment position of the official;
- The decision will have an effect on a donor of gifts to the official or
- The decision will have an effect on a contributor of campaign funds for a campaign in which an appointed official is involved.*

(*Includes someone else's campaign if appointed official accepts, solicits or directs contributions.)

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Consequences:

- Participation by a Supervisor in a matter as a decision maker where the Supervisor 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 Supervisor or Commissioner; and
- Expose the Supervisor to possible fines and criminal penalties.

Recommendations:

A Supervisor who has a financial conflict of interest should immediately notify staff and Counsel at the earliest possible point and decline to participate in the Board deliberation and decision.

Practice Tip:

If a Supervisor is disqualified due to a financial 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:

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Statement:

"Before we proceed on this matter, I would like to announce for the record that Supervisor _____ has declared a conflict of interest in this matter because _____. (Specific description of financial interest.)

Consequently [he/she] will not hear this matter or participate in the Board's deliberations or decision in this matter."

Cure:

- ☐ A conflict interest resulting from the receipt of a gift or gifts totaling between \$50 and \$420 (through December 31, 2012) may be cured by disclosure at the public hearing.
- ☐ Otherwise, conflicts of interest can only be cured by the Supervisors disqualifying themselves from sitting as members of the Board during the hearing, deliberation and decision in the matter.
- ☐ In some instances, the Supervisors are required to disclose the conflict as well as disqualifying themselves from participation.
- ☐ 1090 violations are not subject to cure.



COMMON LAW CONFLICTS

Common law conflicts exist even where the legislature is silent.

Public officers must perform with integrity and fidelity and not let private interests influence them.

Always disclose conflicts and withdraw from participation.

Avoid the appearance of impropriety.

Other ways to find yourself in hot water.