



# COUNTY of NAPA

## OFFICE OF COUNTY COUNSEL

Friday, May 2, 2008

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Mr. Keene Simonds, Executive Officer  
Local Agency Formation Commission  
1700 Second Street, Suite 268  
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Re: *Options for the Appointment of Alternate Legal Counsel (Agenda Item No. 7c)*

Dear Mr. Simonds:

Thank you for providing me with a copy of your staff report discussing the above referenced matter. It has been some time since I have provided LAFCO with an explanation of the manner in which my office provides you and the LAFCO with legal representation to ensure that no conflicts of interest will arise. Due to the change in the composition of LAFCO over the past few years, and the discussion of alternate legal counsel in conflict situations that is to occur at the May 5<sup>th</sup> LAFCO meeting, this seems to me to be an appropriate time to again provide that explanation. Thus I would appreciate it if you would provide the LAFCO members with a copy of this letter as a part of the above referenced agenda item.

### LEGAL PRINCIPLES

As you know, actions and determinations of LAFCO are treated as quasi-legislative acts rather than quasi-judicial acts (*San Joaquin County Local Agency Formation Commission v. Superior Court (April 22, 2008) Cal. App. LEXIS 592* [The Legislature has delegated quasi-legislative authority to LAFCOs; excessive judicial interference with LAFCO's legislative authority would conflict with the well-settled principle that the legislative branch is entitled to deference from the courts because of the constitutional separation of powers]).

Unfortunately, judicial decisions discussing conflict of interest considerations where quasi-legislative actions are involved are for the most part non-existent. However, there are a significant number of judicial decisions discussing when conflicts in quasi-judicial proceedings require disqualification. While not required to follow those judicial decisions because LAFCO decisions are not quasi-judicial, I have nonetheless used these judicial decisions as a guide when developing office procedures that would avoid all conflicts of interest that might otherwise arise the office's representation of the LAFCO.

The basic conflict of interest/bias rule is that the standard of impartiality required at an administrative hearing is less exacting than that required in a judicial proceeding. Thus, a party seeking to show bias or a conflict of interest requiring disqualification in an administrative proceeding is required to provide concrete facts demonstrating that a conflict of interest or bias actually exists. In other words, the unilateral perception of the appearance of a conflict of interest or bias is never is a ground for disqualification absent extraordinary circumstances (*Andrews v. Agricultural Labor Relations Board*

(1981) 28 Cal.3d 781).<sup>1</sup> The only clear exception to this rule is where the probability of bias or conflict of interest exists due to a financial or personal bias. Personal bias unrelated to a financial interest usually involves a familial relationship with a party to the proceedings (*American Isuzu Motors, Inc. v. New Motor Vehicle Board* (1986) 186 Cal.App.3d 464). This seems to be the approach embraced by the LAFCO statutes since subparagraphs (b) and (d) of section 56384 of the Government Code, read together, contemplate the use of alternate LAFCO counsel only in the case of financial conflicts of interest.

There are also a number of judicial decisions discussing when a conflict might exist in the public sector where two city attorneys or county counsels from the same office become involved in a single hearing. Those judicial decisions have consistently determined that dual representation from the same public office is acceptable and does not represent a conflict of interest so long as there are assurances that the office procedures ensure the two attorneys assigned avoid inappropriate contacts during the pendency of the proceeding involved. Thus, for example, should the County become involved in a LAFCO proceeding, regardless of whether it is in support or opposed to the staff recommendation, the fact that Ms. Gong represents LAFCO and someone else from my office represents the County at the hearing does not constitute a conflict of interest or bias so long as the office has policies ensuring the two attorneys did not have inappropriate contacts during the pendency of the proceeding.

### **OFFICE PROCEDURES**

As noted in the previous paragraph, so long as appropriate safeguards are in place, assigning an deputy county counsel to represent LAFCO and also represent the Conservation, Development and Planning Department or Board of Supervisors on land use matters is possible and does not create a disqualifying conflict of interest or bias situation. Nonetheless, to avoid the appearance of a conflict of interest or bias the approach of this office has always been to ensure that the deputy county counsel representing LAFCO has no assignments involving the Napa County Conservation, Development and Planning Department, the Conservation, Development and Planning Commission, or any other agency that might be involved in land use decisions. Nor has a LAFCO deputy county counsel ever been assigned to represent the Board of Supervisors in land use matters.

Thus when Ms. Gong joined the office she was assigned to represent the Human Resources Department and LAFCO exclusively. That remains the case today although her assignments have been expanded slightly to include matters in the social services and health areas. I do not expect her assignment to change in the foreseeable future. Additionally, appropriate steps have been taken in the office to ensure that no inappropriate contacts occur between Ms. Gong and the rest of the office regarding LAFCO matters to comply with the above described conflict of interest principles even though, as noted, those principles may not be fully applicable to quasi-legislative agencies such as LAFCO. For example, the electronic files of LAFCO maintained by the office cannot be accessed by anyone in the office other than

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<sup>1</sup> An excellent example of what is needed to demonstrate a disqualifying conflict of interest may be found in *Nasha v. City of Los Angeles* (2004) 125 Cal. App. 4th 470 [in order to prevail on a claim of bias against Planning Commissioner Lucente, plaintiff Nasha must establish an unacceptable probability of actual bias and prove the same with concrete facts; bias is never implied and must be established by clear averments; in this case Nasha has shown an unacceptable probability of actual bias based on Planning Commissioner Lucente's authorship of the newsletter article attacking the project he voted to deny].

Keene Simons,  
Re: *Options; Appointment of Alternate Legal Counsel*  
May 2, 2008  
Page 3 of 3

Ms. Gong and the other attorneys in the office have been instructed not to discuss LAFCO matters with Ms. Gong.

### CONCLUSION

For the above reasons, it is my view that it is highly unlikely that a disqualifying event might occur that would require the use of alternate counsel other than the very remote possibility that Ms. Gong might some day have a financial or personal conflict of interest/bias. However, I recognize that the LAFCO membership might nonetheless wish in an isolated case to utilize alternate legal counsel simply because the County is involved and Ms. Gong is a part of the County Counsel's office.

Should such a case arise, I have always been willing to ask the County Counsel from a surrounding county to assign his or her LAFCO deputy to provide Napa County's LAFCO with representation regarding that matter. My office has provided other LAFCOs and Grand Juries with such representation in the past at no cost as a professional accommodation. I have no doubt that the County Counsel's who made these requests would be willing to return the favor in the unlikely event the need should arise.

You may wish take this into consideration in determining whether soliciting applications for, and appointing alternate legal counsel, considering the expense involved, is preferable to utilizing a LAFCO deputy county counsel from another county at little or no cost.

In any event, I hope this update of the process the office follows to avoid the possibility of a conflict of interest arising insofar as LAFCO is concerned is helpful in your discussion of the matter. I expect to be present at the LAFCO meeting when this agenda item is discussed in the event you or any Commissioner have any questions regarding the content of this letter.

Very truly yours,

ROBERT WESTMEYER  
Napa County Counsel

cc. Jackie Gong, LAFCO Commission Counsel  
Nancy Watt, County Executive Officer