

ATTACHMENT 3

TO: Vince Morici, Administrative Analyst
FROM: Warren R. Jensen, County Counsel
DATE: July 14, 2009
SUBJECT: Response to Grand Jury Report on Examining Planning Commissioner Conduct

RECOMMENDATION

It is recommended that this report serve as the County Counsel's response to the Grand Jury Report on *Examining Planning Commissioner Conduct*.

DISCUSSION

On May 15, 2009, the Grand Jury issued a report on Examining Planning Commissioner Conduct. This response addresses the recommendations for which the Grand Jury seeks a response.

The Department's complete response is included in the attached report. It is shown in italics following the specific applicable portions of the Grand Jury Report.

OTHER AGENCY INVOLVEMENT/IMPACT

Not Applicable

FINANCIAL CONSIDERATIONS

Costs for preparing this response are included in the current department budget.

RESULTS

This response will meet the legal requirements for responding to a Grand Jury report with findings and recommendations.

**Response by the County Counsel to the
Grand Jury Report of May 2009 on
*Examining Planning Commissioner Conduct***

The San Luis Obispo County Counsel has the following comments to offer in respect to the **Recommendations 1, 3, 4, 5 & 6** contained within the report titled: **Examining Planning Commissioner Conduct**.

GRAND JURY RECOMMENDATIONS

1. The Planning Department, with the assistance of County Counsel, should revise and update the Planning Commissioner's Handbook to include explanations of the following:
 - a. The quasi-legislative and quasi-judicial roles of the Planning Commission and the reasons why planning commissioner conduct in one role is not necessarily acceptable in the other role.
 - b. The due process requirements and legal standards of conduct for quasi-judicial proceedings conducted by the Planning Commission, including but not limited to the right of an applicant to hear and respond to evidence being considered by the planning commissioners and the right to reasonably impartial, non-involved reviewers.
 - c. The reasons why ex parte contacts by planning commissioners have the potential to violate due process requirements.
 - d. Non-financial conflicts of interest such as loyalties to groups or organizations with positions on land use planning and regulation.

Response: Recommendations 1a, 1b, and 1c have been implemented by the Planning Department following consultation with County Counsel. The Handbook has been amended and the amended sections of the Handbook distributed to the planning commissioners. Recommendation 1d will not be implemented because it is not warranted as follows:

The reference to "non-financial conflicts of interest" is really speaking to common law bias. It is well understood that all property owners appearing before the Planning Commission are entitled to hearings conducted by reasonably impartial, noninvolved reviewers. Planning commissioners can violate fair hearing requirements if they demonstrate an unacceptable probability of actual bias through their pre-hearing statements. Mere membership in a group or organization concerned with land use or planning issues has never been found to be the basis for common law bias. Planning commissioners each take an oath to uphold the Constitution and there is a legal presumption of honesty and integrity that applies to their Commission actions.

3. The Planning Department, with the assistance of County Counsel, should provide annual training sessions for planning commissioners that provide more detailed education and training on the topics of due process and lack of bias that are identified in the ethics training program required by the enactment of AB 1234.

Response: This recommendation will not be implemented because it is not warranted as follows:

Each planning commissioner is currently provided with access to legal counsel and training materials covering the elements of procedural due process and common law bias. The commissioners are each provided one-on-one training at the outset of their terms and this is supplemented by the bi-annual AB 1234 required training. Pursuant to California Government Code section 53234(d)(4), the bi-annual AB 1234 training must extend to "Laws relating to fair processes, including, but not limited to, common law bias prohibitions, due process requirements, incompatible offices, competitive bidding requirements for public contracts, and disqualification from participating in decisions affecting family members." In addition, each commissioner is provided the opportunity to present questions to the County Counsel's office. Those questions are given a timely response within the limitations of budget and conflict of interest requirements. Annual training sessions on procedural due process and common law bias are unnecessary under these circumstances

4. The Planning Commission, with the assistance of the Planning Department and County Counsel, should revise its Rules of Procedure concerning ex parte contacts to define or limit the ex parte contacts which can be initiated by planning commissioners and improve the adequacy of planning commissioners' disclosure of the substance of their permitted ex parte contacts when functioning in their quasi-judicial role.

Response: This recommendation will not be implemented because it is not warranted as follows:

The Planning Commission is under no legal obligation to restrict or prohibit ex parte contacts. The commissioners do, however, have an obligation to conduct a fair hearing that allows everyone to hear and comment upon any evidence received outside of the hearing room. The Planning Commission Rules of Procedure include an existing provision requiring disclosure of the substance of permitted ex parte contacts. No change to the rules is needed in order to comply with current legal requirements.

5. County Counsel should educate planning commissioners on the importance of not making ex parte contacts or pre-hearing comments which might reasonably be perceived as suggesting that a planning commissioner has made a decision on a project before the planning commissioner has had an opportunity to hear and weigh all of the evidence on the project which will be presented at a public hearing.

Response: This recommendation will not be implemented because it is not warranted as follows:

The County Counsel's office already provides training to each planning commissioner at the beginning of his or her term that addresses the issue of common law bias based on pre-hearing statements. This issue has now also been addressed in an updated Planning Commissioner's Handbook. Finally, every two years each commissioner is required to complete an AB 1234 training course also addressing this potential problem.

6. County Counsel should provide assistance and advice to individual planning commissioners in resolving their questions or concerns as to whether or not they have a

non-financial conflict of interest or an actual bias with respect to an application for a discretionary decision.

Response: This recommendation will not be implemented because it is not warranted as follows:

The County Counsel's office cannot provide personal confidential legal advice to individual planning commissioners. Our client is the County, the Board of Supervisors, and the various County departments. The County Counsel's office can, and if fact does, explain various aspects of the law to individual planning commissioners. We will continue to provide this information that creates a context within which individual commissioners may reach their own conclusions regarding bias and fair hearing requirements.

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