



**To: Harbor Commission**  
**From: Steve McGrath, General Manager**  
**Date: November 16, 2015**  
**Re: Appointment to Harbor Commission**

Commissioners:

You received six applications for appointment to the vacant position on this Commission. You should be aware that there are potential issues for three of the candidates:

- 1 Frank "Bud" Ratts. Mr. Ratts presently serves as the "public" member of the Finance Committee. If appointed to this Commission, Mr. Ratts could no longer serve on the Finance Committee for two reasons: this would be a violation of District policy regarding the composition of the Committee, and a Committee of three members of this Commission constitutes a quorum of this Commission and thus would in effect be this Commission, thereby violating the Brown Act.
- 2 Eliza Manchester: Ms. Manchester's application indicates that her husband is an owner of the Half Moon Bay Kayak Company. The Half Moon Bay Kayak Company receives a Commercial Activity Permit from the District that identifies Christopher Manchester as one of the two permittees. Ms. Manchester's marriage to the owner of the Half Moon Bay Kayak Company presents no legal impediments that would prevent the Board from appointing her to the Board. However, at the time that the Half Moon Bay Kayak Company's permit is up for renewal at the end of 2015, there could be conflict of interest issues that will need consideration.

In addition to issues under the Political Reform Act, one of those conflicts is that presented by Government Code Section 1090, which prohibits a public official from participating in the making of a contract in which (s)he is financially interested. Again, to be crystal clear, if Ms. Manchester is

appointed to the Board, Section 1090 conflicts are not currently present as the permit was issued before Ms. Manchester took office.

It is not entirely clear whether a Commercial Activity Permit like the one at issue here is a “contract” subject to section 1090’s prohibition. Nor is it entirely clear that a board member would be deemed to have participated in the making of a contract given that the District’s GM has authority to renew permits without Board action. No case law or attorney general opinion exists that is precisely on point, although there is precedent to suggest that (a) a commercial activity permit could be considered a contract and (b) a board member is presumed to be involved in the making of his or her agency’s contracts irrespective of whether he or she actually participates in the making of the contract. It is beyond the scope of this memo to fully address this; suffice it to say that precedent provides sufficient legal concerns to staff and District counsel that make it impossible to advise that this is not an issue needing resolution.

Section 1090 conflicts are not mitigated by recusal. A contract made in violation of Section 1090 is void and unenforceable. A public official found to have violated Section 1090 faces potential sanctions. For both of these reasons, if Ms. Manchester is appointed, it will be very much in the District’s interest to address this issue, and as such, and to provide clarity going forward in general and not just this particular instance, staff and Counsel will seek clarity and guidance from the Fair Political practices commission (FPPC), which has only recently been authorized to answer questions on Section 1090 issues.

- 3 Virginia Chang Kiraly: Ms. Kiraly serves on the Board of the Menlo Park Fire Protection District (Fire District). This raises a potential issue under the doctrine of Incompatible offices. This doctrine is a conflict of interest issue, but instead of a conflict between public office and private interest, it arises when there is a potential conflict of interest between two public offices. The prohibition is described in Government Code Section 1099, which states that “A public officer, including, but not limited to, an appointed or elected member of a governmental board, commission, committee, or other body, shall not simultaneously hold two public offices that are incompatible.”

There are three reasons why offices may be “incompatible” under Section 1099:

(1) Either of the offices may audit, overrule, remove members of, dismiss employees of, or exercise supervisory powers over the other office or body.

(2) Based on the powers and jurisdiction of the offices, there is a possibility of a significant clash of duties or loyalties between the offices.

(3) Public policy considerations make it improper for one person to hold both offices.

Your staff and counsel believe that there is not an incompatible office issue, as there is no authority of one agency over the other; there is no foreseeable clash of duties; there does not appear to be a public policy issue.

If an issue of incompatibility is found to exist, Ms. Chang Kiraly forfeits her position on the first Board, in this instance the Menlo Park Fire Protection District.

In sum, staff and Counsel think the Commissioners can fulfill their important duty to appoint a new Commissioner without legal impediments. With regard to Mr. Ratts and Ms. Manchester, there may be some impacts in the future—and those involving Ms. Manchester (and by implication President Mattusch) are potentially significant.