

Attachment E

Correspondence Between Appellant's Counsel and
County Counsel

Advocates for the Public Trust

Kathy Felch SBN 109303
William McKinnon SBN 129329
952 School Street, #316
Napa, CA 94559

Received
JAN 21 2020
Napa County Counsel

January 21, 2020

Laura J. Anderson
Deputy County Counsel
Office of Napa County Counsel
1195 Third Street, Suite 301
Napa, CA 94559-3035

BY HAND DELIVERY

Dear Ms. Anderson:

RE: Appeal of Decision of Napa County Planning Commission
Approval of Use Permit Exceptions No P19-00153 UP Except
(Assessor's Parcel Nos. 021-400-002 & 021-420-027)

Please note our change in street address to that set forth above.

In my email of December 2, 2019, I wrote in part:

The appeal clearly asserts Mr. Hackett's contention that the Board of Supervisors has an inherent conflict of interest as a result of its participation in the underlying Superior Court litigation. Your letter does not address this subject, the resolution of which will precede any discussion of the merits of the matter.

While one might reasonably infer from the Board's unilateral scheduling of proceedings that this issue has been decided, we have yet to receive any communication from you that the Board has determined one way or the other on this inherent conflict. Please advise forthwith the Board's position on this issue. Additionally, we respectfully request that you advise us of the process by which this determination has been made; the persons who made it, the records, submissions and/or arguments they considered before making their determination; when and where it was made; and the person or persons who observed and/or recorded the process of consideration and/or the determination. To the extent that the process or the determination was recorded in writing, we request a copy of that record.

Respectfully,
ADVOCATES FOR THE PUBLIC TRUST

William McKinnon

Attorneys for Michael Hackett
By: William McKinnon

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): KATHY FELCH, SBN 109303 WILLIAM McKINNON, SBN 129329 952 SCHOOL STREET, #316 NAPA, CALIFORNIA 94559 TELEPHONE NO.: _____ FAX NO. (Optional). _____ E-MAIL ADDRESS (Optional). _____ ATTORNEY FOR (Name). _____	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: _____ MAILING ADDRESS: _____ CITY AND ZIP CODE: _____ BRANCH NAME: _____	
PLAINTIFF/PETITIONER: MICHAEL HACKETT DEFENDANT/RESPONDENT: SUPERIOR COURT OF CALIFORNIA, et al.	CASE NUMBER: _____
PROOF OF SERVICE OF SUMMONS	Ref. No. or File No. _____

(Separate proof of service is required for each party served.)

1. At the time of service I was at least 18 years of age and not a party to this action.
2. I served copies of:
 - a. ☐ summons
 - b. ☐ complaint
 - c. ☐ Alternative Dispute Resolution (ADR) package
 - d. ☐ Civil Case Cover Sheet (served in complex cases only)
 - e. ☐ cross-complaint
 - f. ☒ other (specify documents): **CORRESPONDENCE RE: STATUS OF APPEAL U.P. P19-00153**
3. a. Party served (specify name of party as shown on documents served):
LAURA J. ANDERSON, DEPUTY COUNTY COUNSEL
- b. ☒ Person (other than the party in item 3a) served on behalf of an entity or as an authorized agent (and not a person under item 5b on whom substituted service was made) (specify name and relationship to the party named in item 3a):
Diana Moore CFO. Asst. #
4. Address where the party was served:
1195 THIRD STREET, SUITE 301, NAPA, CALIFORNIA
5. I served the party (check proper box)
 - a. ☒ **by personal service.** I personally delivered the documents listed in item 2 to the party or person authorized to receive service of process for the party (1) on (date): **JAN. 21, 2020** (2) at (time): **3:45 p.m.**
 - b. ☐ **by substituted service.** On (date): _____ at (time): _____ I left the documents listed in item 2 with or in the presence of (name and title or relationship to person indicated in item 3): _____
 - (1) ☐ **(business)** a person at least 18 years of age apparently in charge at the office or usual place of business of the person to be served. I informed him or her of the general nature of the papers.
 - (2) ☐ **(home)** a competent member of the household (at least 18 years of age) at the dwelling house or usual place of abode of the party. I informed him or her of the general nature of the papers.
 - (3) ☐ **(physical address unknown)** a person at least 18 years of age apparently in charge at the usual mailing address of the person to be served, other than a United States Postal Service post office box. I informed him or her of the general nature of the papers.
 - (4) ☐ I thereafter mailed (by first-class, postage prepaid) copies of the documents to the person to be served at the place where the copies were left (Code Civ. Proc., § 415.20). I mailed the documents on (date): _____ from (city): _____ or ☐ a declaration of mailing is attached.
 - (5) ☐ I attach a **declaration of diligence** stating actions taken first to attempt personal service.

PLAINTIFF/PETITIONER: MICHAEL HACKETT

CASE NUMBER:

DEFENDANT/RESPONDENT: SUPERIOR COURT OF CALIFORNIA, et al.

5. c. ☐ by mail and acknowledgment of receipt of service. I mailed the documents listed in item 2 to the party, to the address shown in item 4, by first-class mail, postage prepaid,
- (1) on (date): (2) from (city):
- (3) ☐ with two copies of the Notice and Acknowledgment of Receipt and a postage-paid return envelope addressed to me. (Attach completed Notice and Acknowledgment of Receipt.) (Code Civ. Proc., § 415.30.)
- (4) ☐ to an address outside California with return receipt requested. (Code Civ. Proc., § 415.40.)
- d. ☐ by other means (specify means of service and authorizing code section):

☐ Additional page describing service is attached.

6. The "Notice to the Person Served" (on the summons) was completed as follows:
- a. ☐ as an individual defendant.
- b. ☐ as the person sued under the fictitious name of (specify):
- c. ☐ as occupant.
- d. ☐ On behalf of (specify):
- under the following Code of Civil Procedure section:
- | | |
|---|---|
| <input type="checkbox"/> 416.10 (corporation) | <input type="checkbox"/> 415.95 (business organization, form unknown) |
| <input type="checkbox"/> 416.20 (defunct corporation) | <input type="checkbox"/> 416.60 (minor) |
| <input type="checkbox"/> 416.30 (joint stock company/association) | <input type="checkbox"/> 416.70 (ward or conservatee) |
| <input type="checkbox"/> 416.40 (association or partnership) | <input type="checkbox"/> 416.90 (authorized person) |
| <input type="checkbox"/> 416.50 (public entity) | <input type="checkbox"/> 415.46 (occupant) |
| | <input type="checkbox"/> other: |

7. Person who served papers

- a. Name: LINDA GHIRINGHELLI
- b. Address: 952 SCHOOL STREET, #316, NAPA, CA 94559-2824
- c. Telephone number:
- d. The fee for service was: \$
- e. I am:

- (1) ☒ not a registered California process server.
- (2) ☐ exempt from registration under Business and Professions Code section 22350(b).
- (3) ☐ a registered California process server:
- (i) ☐ owner ☐ employee ☐ independent contractor.
- (ii) Registration No.:
- (iii) County:

8. ☒ I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

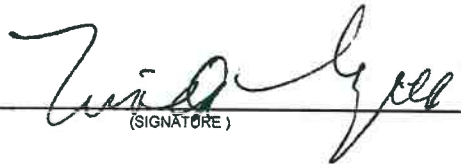
or

9. ☐ I am a California sheriff or marshal and I certify that the foregoing is true and correct.

Date: JAN.21, 2020.

LINDA GHIRINGHELLI

(NAME OF PERSON WHO SERVED PAPERS/SHERIFF OR MARSHAL)


(SIGNATURE)

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A Tradition of Stewardship
A Commitment to Service

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January 24, 2020

By mail and email: mail@williammckinnon.com
William McKinnon
Advocates for the Public Trust
952 School Street, #316
Napa, CA 94559-3035

Re: Appeal of Use Permit No. P19-00153-UP; 975 Deer Park Road, St. Helena, California
(APNs 021-400-002 and 021-420-027)

Dear Mr. McKinnon:

I am writing to respond to your letter dated January 21, 2020, which argues that the Board of Supervisors must decide in advance the first basis of the appeal filed by your clients, which alleges that the Board cannot hear the appeal due to a common law conflict of interest that would violate procedural due process.

The Board of Supervisors does not have a disqualifying conflict of interest. No Board member has a financial interest in the above-identified Use Permit that would be subject to disqualification under the Political Reform Act, and your appeal and letter make no argument to the contrary.

Nor does any member of the Board have a common law conflict of interest that warrants disqualification. A common law conflict of interest exists only in limited circumstances that do not exist here. (*See BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1233 ["We continue to be cautious in finding common law conflicts of interest. ... We reject the application of the doctrine in this case, assuming, arguendo, it exists"].) A common law conflict of interest requires you to prove "an unacceptable probability of actual bias" on the part of the Board. (*Id.* at p. 1236.) "A mere suggestion of bias is not sufficient overcome the presumption of integrity and bias." (*Id.*) Bias is never implied, and your clients' "unilateral perception of an appearance of bias cannot be a ground for disqualification." (*Id.* at p. 1237.)

No such evidence exists here. You have not alleged that your clients have a significant property interest subject to procedural due process. (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612 ["Due process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest"].) No Board member has demonstrated any actual bias against the project applicant or any other party. No Board member has made any statements regarding the use permit application, and any such statements would not violate due process in any event. (*Fairfield v. Superior Court of Solano County* (1975) 14 Cal.3d 768, 772, 780-781.)

Your argument to the contrary rests on an allegation that “the Board of Supervisors entered into a private settlement agreement in a lawsuit brought by County against the Permittees” and directed the Planning Commission to limit its review of the use permit application. This claim is factually incorrect and legally unavailing. The settlement agreement does not mandate any outcome or require the Board to take any particular action on this application. The agreement merely requires the applicant to submit a complete application regarding walls and bridge structures, which the applicant has done. The settlement agreement does not address the barn, restroom, or other structures proposed in this use permit, and has no bearing on the Planning Commission’s decision regarding those structures.

In addition, the Board never directed the Planning Commission to limit its review or exercise its discretion in any particular way. Instead, multiple Commissioners asked at the October 16, 2019 hearing if the Commission had authority to deny the application, and what would happen if the Commission did so. Staff advised the Planning Commission that it had full authority to approve, deny, or condition the requested use permit. Staff further explained that denial would result in non-compliant structures that would be subject to code enforcement and potential removal of the structures. As Chair Gallagher recognized at the hearing, “We do not have power over [the settlement agreement], but we do have power over the decision we make.”

I am not aware of any authority suggesting that entry of a settlement agreement can constitute a common law conflict of interest or violation of procedural due process. If you are aware of any authority that supports your argument, please forward it for my review.

It may be worth noting that even if the entire Board had a disqualifying conflict of interest, the likely result is that three Board members would be chosen at random to vote on the appeal. (See California Code of Regulations, title 2, section 18705.) Counties have the fundamental power to control their own land use decisions, which derives from their inherent police power rather than any delegation of authority by the state. (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1151.) The County Code requires the Board to decide on this appeal, and identifies no alternative source of decision. As a result, the Board’s participation is legally required.

In short, no evidence or authority suggests that the entire Board of Supervisors has a common law conflict of interest that would necessitate recusal or violate procedural due process.

Very truly yours,



Laura J. Anderson
Deputy County Counsel

Advocates for the Public Trust
Kathy Felch SBN 109303
William McKinnon SBN 129329

952 School, #316
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Received
FEB 12 2020
Napa County Counsel

February 10, 2020

Laura J. Anderson
Deputy County Counsel
Office of Napa County Counsel
1195 Third Street, Suite 301
Napa, CA 94559-3035

Dear Ms. Anderson:

Appeal of Use Permit No. P19-00153-UP; 975 Deer Park Road, St. Helena
California (APNs 021-400-002 and 021-420-027)

Thank you for your explanation of the County's position on the issue of the Board of Supervisors' capacity to sit in judgment on our client's appeal. We must humbly disagree with your conclusion that the Board may and, indeed, must hear the appeal.

The Board of Supervisors prosecuted the applicant, Bremer Family Winery, in Napa Superior Court case entitled *Napa County v. John Alex Bremer and Laura Joyce Bremer, Trustees of the Bremer Family 1995 Living Trust* dated August 23, 1995; *Bremer Group, LLC, et al.*, Napa Superior Court case number 17CV000884 filed August 4, 2017. (COMPLAINT, EXHIBIT 1) Almost a year later, on July 12, 2018, Napa County appeared in Napa County Superior Court in this case and received a case analysis prepared by the judge presiding over the matter. (WOOD'S ANALYSIS, EXHIBIT 2). Many more months passed before Napa County and the Bremers signed off on a stipulated settlement agreement which was then entered as a judgment by the trial court on February 8, 2019 (SETTLEMENT AGREEMENT, EXHIBIT 3). The Napa County Board of Supervisors met about this case in a closed session during its regular meeting on January 8, 2019. While it remains speculative at this juncture that the terms of the settlement agreement were discussed in this closed session, there was no further discussion by the Board of Supervisors either in closed or open session about this case, leaving a high probability that the terms of the settlement were discussed and agreed up during the January 8, 2019 closed session.

The Napa County Board of Supervisors as the arbiter of our client's appeal acts as a quasi-judicial capacity. A requirement of a fair hearing is a matter of procedural due process applicable to quasi-judicial proceedings. *Beck Development Co. v Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160.

The common law principle that prohibits a party from sitting in judgment of its own decision goes back to the seventeenth century and continues to the present. See e.g. *Bonham's Case* (K.B. 1610). And recently "a person cannot be a judge in his or her own case." *Woody's Group v.*

The Board of Supervisors has already decided what the resolution of the Bremer application will be. The terms are contained in the Settlement Agreement, to which your attention is directed (Settlement Agreement, Exh. 3). Although the settlement agreement contains self-serving language about not guaranteeing a certain outcome, it was clear from the comments of Planning Commissions that more than one believed themselves to be bound by its terms. (TRANSCRIPT OF PLANNING COMMISSION MEETING, EXHIBIT 4).

Commissioner Hansen stated "A settlement agreement has been developed and signed, and so I am comfortable moving this forward just because I feel it's maybe inefficient for us to spend a lot more time on things we have absolutely no control over today." (EXH. 4, p. 62.).

Indeed, your own comments at that hearing militate against the Board hearing this appeal "... I don't believe the settlement agreement, and perhaps (applicant's counsel) can speak to this, contemplated what would happen if the improvements didn't get recognized through this process. And, obviously, the Applicant would have an ability to appeal your decision to the Board." (Exh. 4, p. 63) and further "The only other comment I would add is that as part of the settlement agreement, the Board directed, and the parties agreed, that this would be the avenue that they would pursue to come into compliance, and ultimately that was the goal of the settlement agreement is to get everyone into compliance. So I think that the Board desired that those structures and improvements be removed, that certainly that's something that could have been explored at the time instead of channeling the Applicant through this process." (Exh. 4, p. 65).

Commissioner Cottrell expressed concern about having the Commission bound by the settlement agreement to which it was not a party: "I have a few thoughts. First, I just want to respond to this -- I appreciate my fellow commissioners, the kind of hypothetical, well, what happens if we deny this exception request, and Ms. Anderson's point that the settlement agreement didn't really contemplate the denial of the exception request. And I guess I have -- that concerns me because an agreement, a settlement agreement, that relies on a specific decision by a third party that --- because we, as the Commission, we are not a party to that settlement agreement, so I -- that concerns me. I don't feel like that provides the appropriate leeway or options back -- back and forth for the Commission's denial." (Exh. 4, pp. 67-68).

There is an undeniable public interest in fair hearings in the administrative adjudication arena. *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81. The public and our client are entitled to a fair hearing. Our client need not prove actual bias. But rather he must demonstrate the probability of unfairness based on concrete facts and not mere speculation. *Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648, *Withrow v. Larkin* (1975) 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712, 723.

The entire board was present at the January 8, 2019 at which time staff was given direction regarding the Bremer case. Irrespective of any financial conflict that may or may not exist, the fundamentals of procedural due process to which our client, as a member of the public and appellant herein, dictate the entire Board's recusal. An alternative adjudicative body must be considered.

We respectfully await your reply.

Best regards,

Kathy Felch

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A Tradition of Stewardship
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February 24, 2020

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William McKinnon
Kathy Felch
Advocates for the Public Trust
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Re: Appeal of Use Permit No. P19-00153-UP; 975 Deer Park Road, St. Helena, California
(APNs 021-400-002 and 021-420-027)

Dear Mr. McKinnon and Ms. Felch:

I am writing to respond to your letter dated February 10, 2020 (hand delivered on February 12, 2020), which continues to argue that the Board of Supervisors must recuse itself from hearing the appeal because of the Board's participation as a party in the litigation. With all due respect, we continue to disagree with your assertions and do not find the authority that you have cited to be persuasive or to cause us to reconsider our previous position. The Board of Supervisors does not have a disqualifying conflict of interest. Your client and the public have been afforded due process in this matter and there is no alternative adjudicative body that can or should consider the appeal.

Per the requirements of the Brown Act, the jurisdictional question cannot be discussed or answered by the Board directly until the entire Board of Supervisors meets at the hearing on March 17th. Staff has responded to your allegations and will be making the same recommendation (e.g., that no conflict exists) to the Board in the Staff Report. That Report will be publicly released on March 6th.

The County has a long standing local practice of holding pre-hearing conferences with the parties and the Chair of the Board of Supervisors to enable the actual hearing to be as orderly and efficient as possible. Reasonable advance notice is given to the parties along with an agenda of topics to be discussed. At the conference, the Chair determines time limits for each party, submittal of supplemental information and similar issues –very much like a pre-trial conference. This process has resulted in smoother appeal hearings with all parties and the public being fully apprised of the conduct of the hearing. Your client's participation in the pre-hearing conference and/or the Board hearing does not subject your client to the Board's jurisdiction and waive your objection to any alleged conflict of interest.

William McKinnon
Kathy Felch
February 24, 2020
Page 2 of 2

We continue to encourage all parties to fully participate in the County's process including adherence to the deadlines and procedures set by the Chair at the pre-hearing conference. A copy of the minutes from the pre-hearing conference is enclosed for your convenience. Participation by all parties will ensure that there is a final decision by the Board of Supervisors on this matter.

Very truly yours,

Laura J. Anderson (e-signature)

Laura J. Anderson
Deputy County Counsel

Enclosure

**Bremer Family Winery Appeal
Post-Hearing Conference Agenda
January 27th at 10:30 a.m.
County Counsel's Conference Room**

I. Introductions (*Chair Dillon*)

CONFERENCE ATTENDEES: Chair Dillon, David Gilbreth and Laura Anderson

II. Purpose of Pre-hearing Conference (*Chair Dillon*)

III. Housekeeping Items (*Chair Dillon*)

- A. Appeal hearing date is March 17, 2020 at 9:30 a.m. **HEARING TO BE OPENED AND CONTINUED ON 2/4**
- B. Monies owed to COB and deadline for payment (if any). **APPELLANT OWES \$1200.83**
- C. Transcripts are available and have been posted on County PBES website.
- D. Any other items for pre-hearing conference agenda.

IV. Conduct of Appeal Hearing (*Laura*)

- A. Scope of the record – Transcripts of hearings; staff reports; all materials and correspondence provided to Planning Commission, etc.
- B. Scope of the appeal is limited to grounds identified in the appeal documents. The appeal hearing is based on a review of the documentary record unless appellant or the applicant asserts, and the Chair finds, “good cause” exists* for: (1) the record to be augmented with new evidence on existing issues and/or; (2) the matter to be heard de novo (e.g., an entirely fresh hearing).

*Each request must identify the specific facts and rationale (e.g., a substantial reason) to support the required “good cause” finding for: (1) the record to be augmented with new evidence on existing issues and/or; (2) the matter to be heard de novo (e.g., an entirely fresh hearing). The Chair shall evaluate whether good cause exists.

- C. February 7, 2020 - deadline for submittal of “good cause” basis if appellant or applicant desire to augment the record and/or request de novo review. The Chair’s decision as to whether “good cause” exists will be announced in writing by February 21, 2020. The Chair’s decision may be overruled by a majority of the Board upon request by appellant or applicant on the day of the appeal hearing.

- D. February 25, 2020 - deadline for applicant and appellant to submit written request to overrule the Chair's "good cause" determination.
- E. February 28, 2020 – deadline for appellant and applicant to submit witness lists and order of go of each witness to County.
- F. February 25, 2020 - deadline for submittal of any additional written information by either appellant or applicant. Appellant's additional information must relate to information identified in the grounds of appeal and cannot raise new issues, new evidence or new grounds of appeal. Any additional information submitted by appellant shall not exceed 5 pages and shall not exceed 10 pages by applicant. The page limits include any exhibits or attachments.
- G. March 6, 2020 - appeal packet and staff report released to parties and posted on County's website.
- H. March 13, 2020 - deadline for submittal of any PowerPoint presentations to be delivered via a stick, thumb drive or drop box to the clerk of board. PowerPoint presentations will not be accepted after the deadline.
- I. March 13, 2020 @ noon – deadline for submittal of updated witness list if there is a last minute change in the order of go, the witness identified or time previously estimated for a particular witness.

**All deadlines are by 5:00 p.m., County's close-of-business.

V. Overview of Appeal Hearing (*Laura*)

- A. Chair introduces item.
- B. If requested, appellant or applicant may request that the Chair's prior decision on "good cause" be overruled by a majority of the Board.
- C. Chair opens public hearing; staff report/presentation.
- D. Appellant's presentation.
- E. Testimony from the public (e.g., neighbors, community activists).
- F. Testimony from applicant.
- G. Final rebuttal from appellant. No rebuttal from applicant.
- H. Chair closes public hearing, Board deliberates and takes a tentative action on the appeal and refers the matter to County Counsel for preparation of findings.
- I. Findings to Board for adoption tentatively scheduled for May 5, 2020 @ 9:25 am.

VI. Identification of witnesses, subject matter of expected testimony and length of time (*Chair Dillon*)

- A. All witnesses must be identified on the witness list along with a general description of the subject matter of their testimony and length of time submitted by February 28, 2020.
- B. Unidentified witnesses' testimony shall be limited to three minutes.
- C. Time limits for appellant's presentation, applicant's presentation and rebuttal by appellant. Maximum of 45 minutes for appellant's presentation including rebuttal and a maximum of 45 minutes for applicant. No rebuttal by applicant.

VII. Questions

Appeals –PC /Bremer/Post-Hearing Conf Agenda.doc