



**County Counsel  
Interoffice Memo**

from the desk of .....

**Jefferson Billingsley**  
County Counsel

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Deputy County Counsel

Date: October 27, 2021

To: Melanie McCavour, Planning Commissioner

Re: Concerns Regarding Dual Role as THPO and Planning Commissioner

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**ATTORNEY-CLIENT PRIVILEGED  
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DO NOT DISCLOSE**

Thank you for engaging in the conversation regarding the potential conflicts and fair hearing issues arising from your recent employment as the Tribal Historic Preservation Officer (THPO) for the Bear River Band of the Rohnerville Rancheria (Bear River).

In quasi-judicial proceedings, hearings must be conducted “before a reasonably impartial, non-involved reviewer.” (*Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 219.) Because the hearings are broadly applicable to the rights of citizens and businesses, and in light of the strong public interest in fair hearings, such hearings must be fair. (*Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 90.) For additional cases exploring due process and fair hearing concerns see, e.g., *English v. City of Long Beach* (1950) 35 Ca.2d 155, 157; *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 90; *Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205; *Desert Turf Club v. Board of Sup'rs of Riverside County* (1956) 141 Cal.App.2d 446, 455; and *City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768.

Bear River received/will receive through referral from the Planning Department approximately two thirds of the cannabis applications in the County. The THPO for Bear River is intricately involved in evaluating these projects and working with County staff and applicants to resolve concerns, engage in AB52 consultation, evaluate and form project mitigation measures, and work through project details. The County’s cannabis ordinance is unique in the amount of collaboration and contact it fosters with Tribes on cannabis projects due to the requirement that commercial cannabis activity be set back 600 feet from a Tribal Cultural Resource.

There are several concerns stemming from your dual role as THPO and Planning Commissioner. First, you would have a significant amount of interaction with staff, applicants, and Bear River in your role as THPO during the project evaluation process. Your dual role creates a concern regarding the balance of power in those interactions. Staff would be, and applicants could be, aware that you are a Planning Commissioner. This could give you more influence and bargaining power than a THPO would normally have, and staff may engage with you differently than they would a THPO who is not a Planning Commissioner. Staff could also be put in the position of feeling like they need to disclose to the Commission and public what information you received in your role as THPO due to their own ethical obligations. This is an untenable position for staff.

Further, you would receive information about the project from the Tribe, the County, and the applicant that would not be available to the other Planning Commissioners during the hearing. This receipt of *ex parte* information would inevitably influence your decision-making process. You would be required to weigh that information as THPO. Then, it could be difficult not to incorporate it into your subsequent decision as a Planning Commissioner. If the entire Commission did not have the benefit of receiving all of the information that you received, that could create a fair hearing issue because applicants and project opponents should have the opportunity to challenge and discuss the information that is considered by Planning Commissioners when rendering a decision on a project. You would likely also receive confidential information that by nature could not be shared in a public hearing but could still influence your decision on the project. These circumstances could create the perception of bias or actual bias, which could result in a fair hearing challenge.

There may also be questions posed about whether your decision on a project as a Planning Commissioner is predetermined based on your evaluation of the project and recommendations as THPO. Questions may also arise regarding your participation in hearings for projects the Tribe opposes.

Because of these concerns we recommend that moving forward, you recuse yourself from hearing and deciding all projects referred to the Bear River Tribe.

Cc: John Ford, Director, Planning & Building Department