

A PUBLIC REPORT
ON THE
CHANNEL ISLANDS BEACH COMMUNITY SERVICE DISTRICT'S USE
OF GOVERNMENT RESOURCES



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County of Ventura
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INTRODUCTION

In a letter dated November 21, 2006, the Ventura County Counsel opined that (1) the Channel Islands Beach Community Service District (CIBCSD) made illegal gifts of public funds and that (2) one or two CIBCSD directors may have violated California Government Code provisions regarding conflicts of interest.

The District Attorney's Office conducted an inquiry into the allegations raised in the November 21, 2006 letter. The District Attorney's inquiry was conducted by Senior District Attorney Investigator Steve O'Neil and Supervising Deputy District Attorney Robert D. Meyers (who authored this report). The inquiry included interviewing witness, reviewing hundreds of pages of documents, and reviewing tape recordings of portions of CIBCSD meetings.

After a complete review of the evidence, it is the conclusion of the District Attorney that CIBCSD directors did not commit a criminal misappropriation of public funds in violation of Penal Code section 424, subdivision (a), subsections (1) or (2), when they expended public money to the Environmental Defense Center (EDC) for the specific purpose of compiling an administrative record of Ventura County's compliance with the CEQA or when they expended public money for the "Independent Location Comparison Evaluation for the BISC" study. The CIBCSD directors, Vickie Finan, Ellen Spiegel, and Jonathan Ziv, did not commit criminal violations of Government Code sections 1090 and 1097 when they voted and participated in the authorization of those expenditures.

PROCEDURAL BACKGROUND

The District Attorney's Office initiated an inquiry by reason of a letter authored by the Ventura County Counsel alleging possible criminal misconduct by the Channel Islands Beach Community Service District (CIBCSD). The letter was published and included in the Ventura County Board of Supervisors' meeting agenda of November 21, 2006. The District Attorney first received a courtesy copy of the 18-page letter and 105 pages of attachments after the letter was filed as part of the Board's agenda. The letter stated County Counsel's opinion that the CIBCSD made illegal gifts of public funds when it granted money to the Beacon Foundation to litigate against the County's approval of the Boating Instruction and Safety Center (BISC), and when it funded an "Independent Location Comparison Evaluation for the BISC" study. County Counsel further opined that one or two CIBCSD directors may have violated the conflict of interest prohibition of Government Code section 1090 if they had an affiliation with the Beacon Foundation and failed to disclose the affiliation before voting to donate funds to the Beacon Foundation. County Counsel also stated that CIBCSD's funding for the "Independent Location Comparison Evaluation for the BISC" was subject to attack (presumably pursuant to Government Code section 1090), because Director Ziv moved to fund the study so it could be used in a future legal action against the California Coastal Commission. The letter concluded that the County may be able to pursue civil litigation against the Beacon Foundation, the CIBCSD, and the CIBCSD directors to recover the alleged improper donations.

The District Attorney first received a copy of County Counsel's letter alleging possible criminal misconduct by the CIBCSD and its directors after the letter had been filed as part of the Ventura County Board of Supervisors' agenda. Prior to that time, the District Attorney's Office had received no formal complaint of criminal misconduct from a citizen, the Board of Supervisors, or County Counsel. County Counsel's letter was provided to the District Attorney and published almost three years after the first alleged unlawful conduct. The District Attorney was duty bound to inquire and review the criminal allegations presented in County Counsel's letter. The District Attorney's inquiry focused only on the violations of criminal law suggested in the County Counsel's letter.

THE INQUIRY

The District Attorney's Office inquiry began with the County Counsel's letter of November 21, 2006, and the attached 105 pages of exhibits. The County Counsel's Office also provided documents to the District Attorney's Office it obtained as a result of a public records request served upon the CIBCSD and other documents upon which it based its opinion. The District Attorney's Office obtained additional documentary evidence and interviewed the following persons:

- Roberto Orellana, Assistant County Counsel
- Penny Boehm, representing Channel Islands Master Lessees
- John Mathews, the General Counsel for the CIBCSD
- James Kuykendall, former CIBCSD General Manager
- Jared Bouchard, present CIBCSD General Manager

Other participants of the subject CIBCSD meetings and related events, including Director Vickie Finan, Director Ellen Spiegel, Director Jonathan Ziv, and Mr. Lee Quaintance, chose not to be interviewed. However, those individuals and others, through their attorneys, provided written responses to inquiries from the District Attorney's Office.

County Counsel's letter and subsequent media coverage generated reluctance on the part of many percipient witnesses to be interviewed. As a result of the public notoriety, the District Attorney's inquiry was delayed because many percipient witnesses obtained counsel and declined to speak directly to district attorney investigators. The District Attorney's factual inquiry was also hampered because it was initially reported by CIBCSD General Manager James Kuykendall that the tape recording of the March 9, 2004, and February 22, 2005, CIBCSD meetings had previously been destroyed under the CIBCSD's adopted six-month retention schedule. On May 8, 2007, while searching for documents requested by the District Attorney's Office, CIBCSD General Manager Jared Bouchard discovered the March 9, 2004, CIBCSD meeting tape and a partial February 22, 2005, CIBCSD meeting tape. Pertinent portions of the tapes were reviewed and transcribed for this inquiry.

FACTUAL BACKGROUND

The CIBCSD is a small community services district which provides sewer, water, and trash services to the subdivisions of Sliver Strand Beach, Hollywood-by the Sea, and Hollywood Beach. The District also provides water services to the Channel Islands Harbor and sewer services to the city of Oxnard in the Channel Islands Harbor area. The physical boundaries and sphere of influence of the CIBCSD encompass the Channel Islands Harbor. At the time of the alleged improper expenditures, the CIBCSD's authorized powers and purposes were enumerated pursuant to former Gov. Code sections 61600, LAFCO Resolution (LAFC 82-2), and Resolutions of the Ventura County Board of Supervisors. Those powers were listed as follows:

- a. To supply the inhabitants of the district with water for domestic use, irrigation, sanitation, industrial use, fire protection and recreation;
- b. The collection, treatment or disposal of sewage, waste or storm water of the district and its inhabitants;
- c. The collection or disposal of garbage or refuse matter;
- d. Protection against fire;
- e. The equipment and maintenance of a police department or other police protection to protect and safeguard life and property;
- f. The opening, widening, extending, straightening, surfacing and maintaining, in whole or part, of any street, subject to the consent of the Board of Supervisors of Ventura County;
- g. The construction and improvement of bridges, culverts, curbs, gutters, drains and work incidental to the purposes specified in paragraph f.; subject to the consent of the Board of Supervisors of Ventura County;
- h. Streetlighting;
- I. The conversion of existing overhead electric and communications facilities to underground locations, which facilities are owned and operated by either a "public agency" or "public utility" as defined in section 5896.2 of the Streets and Highways Code, and to take proceedings for and to finance the cost of such conversion in accordance with section 5896.1, et seq. of the Streets and Highways Code subject to the consent of the public agency or public utility responsible for the owning, operating and maintenance of such facilities. (Exhibit A: LAFCO Resolution LAFC 82-2, July 6, 1982 and August 31, 1982 Resolutions of the Ventura County Board of Supervisors).

The CIBCSD is governed by a board of five directors elected by voters within the district. During the time of the alleged unlawful expenditures, none of the elected CIBCSD directors owned property or lived within 500 feet of the BISC location selected by the County. Although not specifically authorized by its documents of formation, the CIBSD board members have for many years taken a

position that one of the District's responsibilities is to act as a forum for the Channel Islands Beach and Harbor Community. The CIBCSD is financed primarily by rate payer service charges and additionally receives approximately \$40,000 annually in assessed property tax revenue. During the period of the alleged unlawful expenditures, the District had a fiscal year operating budget of approximately \$2.3 million.

The Channel Islands Harbor is owned by the County of Ventura and is operated by the Ventura County Harbor Department. The Ventura County Board of Supervisors is ultimately responsible for the operation of the Channel Islands Harbor, although the Ventura County Harbor Commission has the duty and function of advising the Board of Supervisors. Ventura County was the lead agency responsible for carrying out or approving the BISC project and deciding whether an EIR or negative declaration will be required for the project pursuant to the California Environmental Quality Act (CEQA). (Pub. Res. Code section 21067, 14 CCR 15367).

In June 2001, a nonprofit entity for the Ventura County Harbor Department announced the unveiling of a sign designating the future site of a Boating Instruction Safety Center (BISC) in a Ventura County-owned property located on the west side of the west channel of Channel Islands Harbor adjacent to Harbor Boulevard. Shortly thereafter, a large group of area residents attended a regular CIBCSD meeting on June 26, 2001, and expressed concerns about the proposed location of the BISC. The CIBCSD board thereafter responded with a series of actions in duly noticed public meetings advocating that Ventura County prepare an Environmental Impact Report. The Board also approved the CIBCSD staff's testimony and the submission of letters opposing the BISC site selected by the County. On June 25, 2002, the Harbor Department staff advised the Ventura County Board of Supervisors that a full Environmental Impact Report (EIR) was necessary for the BISC development and began the EIR preparation process.

The Beacon Foundation is a public benefit 501(c)(3) corporation which focuses its efforts on coastal environmental advocacy and the protection of coastal zone environmental resources in Ventura County. It is a volunteer organization that has never had an employee and none of its officers receive compensation for their services. The Beacon Foundation had a long-term working relationship with Environmental Defense Center (EDC), a Santa Barbara nonprofit law corporation that assists

community organizations in their efforts to protect the local environment and quality of life. Both the EDC and the Beacon Foundation have a history of working together in pursuing environmental advocacy issues. According to Beacon Foundation attorney, Alyse Lazar, no officer of the Beacon Foundation has ever been asked to incur or has ever incurred any personal obligation to pay EDC for any costs or legal services provided to the Beacon Foundation. The Beacon Foundation has raised funds from the public sufficient to cover the costs of EDC services in their joint projects.

During the County of Ventura's EIR administrative process determining the site of the BISC and the proposed amendment to the Channel Islands Harbor Public Works Plan (PWP), Director Vickie Finan and Director Ellen Spiegel concurrently served as directors on the CIBCSD board and as officers of the Beacon Foundation. Director Finan and Director Spiegel testified on behalf of the Beacon Foundation in a number of public hearings relating to the BISC site. The Beacon Foundation mailed newsletters and initiated a campaign resulting in hundreds of postcards being sent to the Board of Supervisors and the Coastal Commission regarding the controversy. Director Finan and Director Spiegel were also part of the CIBCSD board that authorized the CIBCSD to participate in the EIR administrative process and oppose the west side harbor site selected by the County. Director Spiegel, for example, sent an October 18, 2004, letter on behalf of the CIBCSD to the Ventura County Board of Supervisors requesting they reject a proposed Channel Islands Harbor Public Works Plan amendment that supported the west side BISC site location. Some of the concerns communicated by the CIBCSD to the County of Ventura concerning the location of the BISC related to CIBCSD's authorized purposes: (1) to supply the inhabitants of the district with water, and (2) other police protection/public safety issues. (Exhibit B: October 18, 2004, letter and attachments).

On December 16, 2003, the Board of Supervisors approved the BISC development on the west side of Channel Islands Harbor and certified the EIR for the project with Supervisor Flynn dissenting and Supervisor Parks abstaining. On January 16, 2004, the Beacon Foundation, with the assistance of the EDC, filed a civil writ action (CIV224913) challenging Ventura County's approval of the BISC project and the certification of the EIR on the grounds that it violated the California Environmental Quality Act (CEQA), the Coastal Act, and was inconsistent with the certified County Public Works Plan. On November 19, 2004, the Beacon Foundation, with the assistance of EDC, also filed a second action (CIV230584) challenging the BISC approval. Both lawsuits were consolidated on

December 16, 2004. Both actions were later dismissed pre-trial on November 21, 2005, due to a new Court of Appeals decision. The Court of Appeals held that the Coastal Commission possessed the final decision-making authority for a project (like the BISC) involving Local Coastal Plan amendments pursuant to a regulatory program that was exempt from EIR requirements. (*Santa Barbara Flower et al. v. County of Santa Barbara* (2004) 121 Cal. App. 4th 864).

The proposed BISC site location impacts the authorized operation and purpose of the CIBCSD in providing water services to the Channel Islands Harbor for recreation. A December 11, 2001, letter from a CIBCSD Water Supervisor to Penfield & Smith, an engineering firm that was working on the project, disclosed that the designated BISC site location required that an eight-inch CIBCSD waterline be relocated. (Exhibit C). On February 25, 2003, the CIBCSD provided assurances to a planning consultant firm that it had arranged for adequate water supply to serve the BISC and any other future development within Channel Islands Harbor. (Exhibit D). A July 7, 2003, letter from the CIBCSD general manager to Harbor Department Director Lyn Krieger commented on the BISC draft EIR and addressed a geotechnical engineering study that suggested the selected BISC site was susceptible to liquefaction. CIBCSD explained that, as a water purveyor, it could not guarantee a total leak-free system at all times. The CIBCSD advised it would seek indemnification or a “hold harmless agreement” from the County of Ventura because of concerns about liability issues. The CIBCSD recommended either a drastic redesign of the facility or that a more suitable location is found. (Exhibit B: July 7, 2003, letter to Lyn Krieger). In the CIBCSD March 4, 2005, meeting, CIBCSD Director Ziv discussed the direct impact of the BISC construction on CIBCSD waterlines. (Exhibit E: Minutes).

During the EIR and CEQA process, the CIBCSD also expressed its concerns to the County and Harbor Department about the impact of increased boating congestion and safety issues caused by the designated BISC site, particularly at the turning basin and the Harbor entrance. CIBCSD expressed additional concerns about the increased service levels required for the Harbor Patrol, U.S. Coast Guard, fire departments and police agencies concerning the selected BISC site and increased boating congestion. (Exhibit B: February 7, 2003, letter to Lyn Krieger)

March 9, 2004, CIBCSD Meeting and \$10,000 Expenditure to EDC for Compilation of a CEQA Administrative Record.

All five CIBCSD directors were present at the regularly scheduled March 9, 2004, District meeting as were District General Manager Bill Higgins and District General Counsel John Mathews. The following action item was on the agenda at the request of Director Finan and Director Jonathan Ziv:

Board Review of the Status the [sic] Boating Instruction & Safety Center (BISC) and the Beacon Lawsuit Challenging the BISC Environmental Impact Report and the District's possible role in the issue. Action Item: Recommendation-Receive Report, Hear from District General Counsel and take action as appropriate. (Exhibit F: Agenda).

The public testimony and discussion at the March 9, 2004, meeting proceeded generally as described in the agenda. A representative of the Beacon Foundation, Mr. Lee Quaintance, made a presentation providing information concerning the Beacon Foundation, EDC, and the status of Beacon Foundation lawsuit.

Mr. Quaintance also provided information concerning the compilation of the EIR or CEQA administrative record required for the Beacon Foundation lawsuit. He stated:

. . . we would welcome the district providing a portion of the funding to produce the administrative record. The method of doing that would be through a donation or support of the Environmental Defense Center. It would not be for direct support of the Beacon Foundation. (March 9, 2004 CIBCSD meeting tape recording).

Mr. Quaintance remarked that such a donation or support of the EDC would preserve the entire CEQA administrative record and make it available to the CIBCSD for its future requirements.

Public speakers gave opinions that the compilation of the administrative record regarding the BISC EIR would be very important to the CIBCSD for future actions the County might take with respect to the Public Works Plan and development in the harbor. Director Vickie Finan stated that she would feel comfortable expending between \$15,000 and \$20,000 to go directly to the administrative record because the District would be able to use it in the future.

CIBCSD General Counsel John Mathews advised the District Board that it could participate in the Beacon lawsuit by filing an *amicus* brief or contributing financially to the law firm that is handling

the lawsuit. He suggested that participation would require a specific agreement with the law firm about how the funding would be used and that they might want to limit it to just the administrative record. Mr. Mathews advised:

So I don't think there's any question that this would not be "a gift of Public funds" but I would like to make sure it's discreet enough that if the district chooses to monetarily participate in it that they do it within some confines. (March 9, 2004, CIBCSD meeting tape recording).

Mathews advised that the expenditure would be for a public purpose because the litigation would clearly affect people in the CIBCSD and would come within the Government Code's enumerated powers regarding recreation, harbors, and parks.

The agenda reflects that Director Finan made the following motion:

Director Finan then made a motion that the District makes a \$10,000 donation to the EDC, specifically for reconstructing the administrative record on the BISC EIR, and that the Board may consider an additional contribution in the future if it is needed. (Exhibit F: Minutes, page 4).

Director Ellen Spiegel seconded the motion. Neither Director Spiegel nor Director Finan publicly disclosed at the meeting that they were also officers of the Beacon Foundation. All five CIBCSD Directors unanimously approved the motion. (Exhibit F: Minutes - tape recording of meeting).

A CIBCSD check was issued dated March 10, 2004, in the amount \$10,000 payable to EDC. In a letter dated March 15, 2004, to EDC, the CIBCSD district manager related that ". . . the donation is made with only one condition that these funds are to be used reconstructing the administrative record in this case." Although there appears to be no written requirement that EDC provide CIBCSD a copy of the administrative record of Ventura County's compliance with CEQA, that condition was part of Mr. Quaintance's presentation. EDC provided the CIBCSD a copy of the compiled administrative record.

Our inquiry and statements by CIBCSD's District Counsel John Mathews confirm that prior to March 9, 2004, the CIBCSD was carefully monitoring the CEQA administrative process by which the County of Ventura would select the location for the BISC. According to Mathews, once the CEQA administrative process was completed and a final BISC location was selected, the CIBCSD

wished to evaluate the environmental impacts as well as its own potential legal challenge to the County's decision. The CIBCSD's decision to pay EDC to compile an administrative record of Ventura County's compliance with CEQA was considered a critical step in the District's review of the BISC project and evaluation of a potential legal action.

February 22, 2005, CIBCSD Meeting and August 16, 2005 Expenditure of \$1,578.41 to John Buse for Compilation of an Administrative Record.

By February 22, 2005, Vickie Finan had been replaced as a director and CIBCSD had three newly elected directors. At the regularly scheduled February 22, 2005, meeting of the CIBCSD, all five directors were present along with Interim General Manager John Hoagland and General Counsel John Mathews. The first item on the action calendar on the agenda was to:

Consider Further Financial Support of the Efforts to Build an Administrative Record Regarding Ventura County's Compliance with CEQA in Regards to Location and approval of the Boating Instruction and Safety Center. **Action Item: Recommendation-** Board Discretion. (Exhibit G: Agenda).

During the meeting, "Director Ziv stated that building an administrative record in this matter is important to the District constituents and therefore he moved to authorize up to \$10,000 to compile the administrative record to Mr. Buse" (Exhibit G: Minutes, Page 1) The motion was seconded by Director Keith Moore. Mr. Lee Quaintance made a presentation providing information concerning the Beacon Foundation, EDC, Attorney John Buse, the status of the consolidated Beacon Foundation lawsuits and the status of the compilation of the CEQA administrative record. Director Ziv and other speakers commented on the importance and utility of the compiled administrative record to the District regarding future development in the Channel Islands Harbor independent of the Beacon lawsuits.

A member of the public said that the County's amendment to the Public Works Plan that included the BISC had weaknesses and required additional review. He expressed safety concerns for kids going out into the harbor because of the extensions of the slips for larger boats and the poor capability of the larger boats to maneuver around small boats from the BISC. His concern was also that the enforcement of safety was left solely to the discretion of the Ventura County Harbor Department under the amended public works plan.

District General Counsel John Mathews gave his opinion that there was no conflict of interest in the expenditures to EDC or John Buse because some CIBCSD directors were also officers of the Beacon Foundation. Mr. Mathews concluded there was no conflict of interest because none of the Beacon Foundation officers or their relatives received any financial remuneration from the Beacon Foundation. (February 22, 2005, CIBCSD Meeting Tape Recording).

“The motion was amended to limit contribute[sic] up to an amount of no more than \$5000 with similar provisions to those contained in the action last year” (Exhibit G: Minutes, Page 2). The amendment was seconded by Director Moore. The motion passed with the approval of four directors. Director Ellen Spiegel abstained from voting even though she had participated in the discussion concerning the motion. On July 28, 2005, attorney John Buse sent CIBCSD an invoice for the remaining \$1,576.41 of transcription costs for preparing the administrative record in the Beacon Foundation lawsuit CIV224913. On August 16, 2005, CIBCSD paid attorney John Buse the additional transcription costs of \$1,576.41, which increased the aggregate cost of the compilation of the CEQA administrative record to \$11,578.41.

The CIBCSD Board, under the second action calendar item on the agenda, unanimously adopted a resolution formally opposing the County’s amendment of the Harbor’s Public Works Plan. In the same motion, the CIBCSD Board also approved the appearance of a CIBCSD director at the California Coastal Commission meeting on March 16, 2005, supporting an eastern harbor site for the BISC and advocating that the County EIR doesn’t adequately address the findings of the Coastal Commission.

The third action calendar item on the February 22, 2005, agenda was:

Consider Funding an Independent Location Comparison Evaluation for the Boating Instruction and Safety Center. **Action Item: Recommendation** – Board discretion (Exhibit G: Agenda Page 2)

The discussion of the item by Director Ziv was directed toward providing an independent study to compare the selected western site with an eastern harbor site for the BISC location. The independent site study could be used to possibly change the opinion of the California Department of Waterways regarding the selected western BISC site. It was also suggested that the study could be presented to

the California Coastal Commission prior to their meeting on March 16, 2005, concerning the BISC and approval of the County amendment to the PWP.

The meeting minutes reflect the following:

Director Koesterer moved to appoint Directors Ziv and Moore as an ad hoc committee with the new General Manager to pursue proposals for a report on site evaluations of the east side and west side sites and bring that information back to the Board at a Special Board Meeting on March 2, 2005 at 7:30 PM in the District Conference Room, located at 353 Santa Monica Drive to consider whether to proceed with the studies. (Exhibit G: Minutes, Page 2).

March 4, 2005, CIBCSD Meeting and May 12, 2005, Expenditure of \$2,450.11 for an Independent Location Comparison Evaluation study for the BISC.

The following agenda item appeared on the noticed special adjourned CIBCSD board meeting agenda of March 4, 2005:

Consider Funding an Independent Location Comparison Evaluation for the Boating Instruction and Safety Center. **Action Item:**
Recommendation-Board Discretion (See Exhibit E: Agenda, Page 2).

The above item had been on the previous March 2, 2005, meeting agenda but was adjourned to the March 4, 2005, CIBCSD meeting by reason of letters from the Ventura County Harbor Department Director Lyn Krieger and other persons. The letter from Lyn Krieger demanded that CIBCSD take the agenda item off their March 2, 2005, meeting agenda. The letter also demanded immediate actions to rescind certain CIBCSD Board actions regarding the location of the BISC. (Exhibit H: March 2, 2005, Lyn Krieger letter).

The March 4, 2005, meeting agenda reflects the following:

Director Ziv made a presentation summarizing the information available to date. He also listed that boat inhabitants are actually District voters and impacts to them are therefore a direct concern of the District. Also the District has a line that would be directly impacted by construction of the Center at the current proposed location because a line runs under that building site and even if relocated could also be impacted. No lines are located at the site on the other side of the harbor. Also an impact could be a problem from a public health and safety issue and is an appropriate activity. (Exhibit E: Minutes, Page 1).

Director Moore referred to the articles of formation Sections 61600 especially Item (e) [sic] and Item (e). These include water supply, recreation, and especially public safety. These are issues of concern to the District (Exhibit E: Minutes, Page 1). Director Koester (sic) – ‘It is a matter of public safety’. (Exhibit E: Minutes, Page 2).

Director Ziv moved “. . . to get the independent evaluation completed pursuant to the District Charter specifically sections 5a and 5e. The reports are to be prepared at a cost not to exceed \$3500, with the reports due on or before March 10, 2005.” (Exhibit E: Minutes, Page 2). Director Ziv was apparently referring to the sections included in LAFCO Resolution LAFC 82-2, approving the CIBCID’s formation. Section 5a of the LAFCO resolution is the authorization to provide district inhabitants with “water for domestic use . . . and recreation.” Section 5e of the LAFCO resolution is the authorized purpose of “. . . police protection to protect and safeguard life and property.” (See Exhibit A). The motion was unanimously approved by the CIBCSD Board. (See Exhibit E: Minutes, Page 2).

On March 11, 2005, the completed Independent Location Comparison Evaluation for the BISC study was provided to the County Board of Supervisors, the County Harbor Department, and the California Coastal Commission. The conclusion of the evaluation was that both the west side and east side harbor sites for the BISC were viable. The evaluation became a part of the compiled administrative record and did not endorse or condemn either site. On May 12, 2005, CIBCSD paid the Henley Alliance Company \$2,450 for the preparation of the Independent Location Comparison Evaluation for the BISC study.

On May 9, 2005, the Habitat for Hollywood Beach filed a writ of mandate lawsuit against the California Coastal Commission. At the time of the March 4, 2005, CIBCSD meeting, Jonathan Ziv was concurrently a CIBCSD director and president of the Habitat for Hollywood Beach. Mr. Ziv, through his attorney, maintains that the lawsuit by Habitat for Hollywood Beach was not contemplated at the time the “Independent Location Comparison Evaluation for the BISC” study was approved by the CIBCSD. The California Coastal Commission’s approval of the Channel Islands Harbor Public Works Plan Amendment and the Notice of Impending Development 1-05 with special conditions did not occur until March 16, 2005. Our inquiry discovered no evidence contrary to

Director Ziv's assertions or evidence that Director Ziv had a personal financial interest in the contract involving the Independent Location Comparison Evaluation study.

ANALYSIS

Alleged Unauthorized Appropriation or Use of Public Money in Violation of Penal Code Sections 424(A)(1) and 424(A) (2).

The California Constitution prohibits the state and its subdivisions, such as the CIBCSD, from authorizing the gift of public money. The Constitution provides that legislative bodies “. . . shall have no power . . . to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever” (Cal.Const., art. XVI § 6.)

A misappropriation or use of public money not authorized by law or without authority of law is a criminal violation of Penal Code sections 424(a) (1) and 424(a) (2).

A two-step “public purpose” analysis is required to determine if CIBCSD expenditures to compile a CEQA administrative record or to fund an “Independent Location Comparison Evaluation for the BISC” study are gifts of public funds and criminal misappropriations of public money. To avoid the constitutional gift of public funds prohibition or criminal violations, the expenditures by a California public agency must be: (1) for a public purpose, and (2) in furtherance of the public agency’s purposes or interests. This same general analysis has been used by the courts in California for decades in determining whether a public expenditure amounts to a gift of public funds whether the agency is the state, county, city, or special district. (See, *Oakland v. Garrison*, (1924) 194 Cal. 298, 302-305; *Mallon v. Long Beach*, (1955) 44 Cal.2d 199, 211; *Doctors General Hospital v. County of Santa Clara*, (1961) 188 Cal.App.2d 280, 286; *Golden Gate Bridge etc. Dist. v. Luehring* (1970) 4 Cal.App.3d 204, 208).

In *Oakland v. Garrison*, *supra*, (1924) 194 Cal. 298, a resolution of the Board of Supervisors of Alameda County giving the City of Oakland \$5,000 for the purpose of paving a public street in the city of Oakland was challenged as a gift of public funds. The resolution provided that the proposed improvement of the street within the city of Oakland, “. . . is of general county interest and that county aid should be extended therefor.” (*Garrison, supra*, at P. 301). Like CIBCSD’s donation to EDC for compiling the administrative record, the Alameda County resolution required all money and

aid received by the City of Oakland to be used for the specified project and any unused portion to be returned to Alameda County. The California Supreme Court observed:

. . . this court has pointed out that where the question arises as to whether or not a proposed application of public funds is to be deemed a gift within the meaning of that term as used in the constitution, the primary and fundamental subject of inquiry is as to whether the money is to be used for a public or a private purpose. If it is for a public purpose within the jurisdiction of the appropriating board or body, it is not, generally speaking, to be regarded as a gift. (*Oakland v. Garrison, supra*, 196 Cal. at P. 302).

The Supreme Court found the donation of \$5,000 to the City of Oakland was not a gift of public funds and found, in absence of evidence to the contrary, that improvement of the street in the city of Oakland was in the general interest of the County of Alameda. (*Garrison, supra*, 196 Cal. at P. 304).

The Courts have found a very wide range of public money expenditures to be authorized by law under the “public purpose” analysis. Some of the expenditures authorized by the Courts under the “public purpose” analysis are: the erection of a memorial hall to soldiers for the purpose of promoting patriotism (*Allied Architects' Assn. of Los Angeles v. Payne* (1923) 192 Cal. 431, 434); educational aid to war veterans (*Veterans' Welfare Bd. v. Riley* (1922) 188 Cal. 607, 610, *Veterans' Welfare Bd. v. Riley* (1922) 189 Cal. 159); free transportation for high school pupils living in outlying parts of school district (*Pasadena City High School Dist. of Los Angeles v. Upjohn* (1929) 206 Cal. 775, 780); compensation to owners of diseased cattle destroyed by public authorities under police power (*Patrick v. Riley* (1930) 209 Cal. 350, 356); refunding bond statutes, under which counties are authorized to give certain measure of financial aid to assessment districts with heavy delinquencies (*San Diego v. Hammond* (1936) 6 Cal.2d 709, 721); and the release of liens held against property of indigent recipients of aid under Old Age Security Act (*Alameda v. Janssen* (1940) 16 Cal.2d 276, 281).

The incidental benefits received by the Beacon Foundation and the Habitat for Hollywood Beach in their lawsuits against Ventura County and the California Coastal Commission by reason of CIBCSD'S expenditure of public funds are not relevant if the funds were expended for a reasonable public purpose and authorized CIBCSD public purpose. For example, the incidental financial benefits received by non-indigent patients treated by a public hospital (*Cmty. Mem. Hosp. v. County*

of Ventura, (1996) 50 Cal.App.4th 199, 207); the release of liens held against property of indigent recipients of aid under Old Age Security Act (*Alameda v. Janssen* (1940) 16 Cal.2d 276, 281); vacating and releasing title of a street a private individual (*Bowles v. Antonetti*, (1966) 241 Cal.App.2d 283, 286-287); and the construction of a pedestrian overpass between two privately owned buildings (*Irwin v. Manhattan Beach*, (1966) 65 Cal.2d 13, 22-23) were not prohibited gifts of public funds even though they incidentally benefited private individuals. Public funds expended by a public agency for an authorized public purpose are not prohibited gifts of public funds or criminal misappropriations merely because private individuals or other entities may also incidentally benefit from the expenditure. (Also see, *California Housing Finance Agency v. Elliott*, (1976) 17 Cal.3d 575, 583; *Kizziah v. Department of Transportation*, (1981) 121 Cal.App.3d 11, 18).

Under the community service district law existing at the time of the alleged unlawful expenditures, CIBCSD had the implied powers to perform all of the acts necessary to perform its authorized purposes. (See former Government Code section 61622; cf. 55 Ops.Atty.Gen. 379). The CIBCSD had the power to make contracts as necessary or convenient for the full exercise of its powers. (Former Government Code section 61616). The CIBCSD also had the power to bring suits in court as necessary to perform its authorized purposes. (Former Government Code section 61612).

The CIBCSD's expenditure of funds to compile a CEQA administrative record in order to review the BISC project and consider its own possible CEQA enforcement lawsuit against the County of Ventura is clearly for a public purpose rather than a private purpose. Briefly stated, the purpose of CEQA is to compel government decision makers to consider the environmental consequences when making decisions in order to prevent environmental damage. (Cal. Pub. Resources Code sec. 21000; *Residents Ad Hoc Stadium Com. v. Board of Trustees*, (1979) 89 Cal.App.3d 274, 284-285; *Bozung v. Local Agency Formation Com.*, (1975) 13 Cal.3d 263, 283 [superseded by statute on unrelated issue]). Unless exempt under a prior mutual agreement, CEQA required the County of Ventura, prior to completing an environmental impact report regarding the BISC project, to consult the CIBCSD because it had "jurisdiction by law" and exercised authority over the water supply which might be affected by the BISC project. (See, Pub. Res. Code section 21153; 14 CCR 15366). Remedies for noncompliance with CEQA are judicial writ proceedings seeking appellate review of the administrative hearings conducted by the government decision maker which in this instance was

Ventura County. (See, Pub. Res. Code sections 21168 and 21168.5). In order to seek judicial relief for possible CEQA noncompliance, CIBCSD would be required to present the alleged grounds for noncompliance to Ventura County before the close of the public hearings or issuance of the notice of determination for the BISC project. (See, Pub. Res. Code sections 21167 and 21177). In the event the CIBCSD decided to proceed with its own legal challenge to Ventura County's compliance with CEQA, the County's amendment to the PWP, or a ruling by the Coastal Commission, the CIBCSD would need to compile and preserve a complete administrative record. (See, Pub. Res. Code section 21167.6).

The CIBCSD had both the legal standing and authority as the water purveyor for the Channel Islands Harbor to initiate a lawsuit challenging Ventura County's compliance with the CEQA with respect to the BISC development. (See, *Bozung v. Local Agency Formation Com.*, *supra*, 13 Cal.3d 263, 272; *Citizens Assn. for Sensible Development v. County of Inyo* (1985) 172 Cal.App.3d 151,158). In *Santiago County Water Dist. v. County of Orange*, for example, a water district filed suit with a writ of mandate to challenge the sufficiency of an EIR that was approved by the county board of supervisors and to compel the county to set aside its approval of the EIR. When the water district's authority and standing to file the suit was challenged, the appellate court stated:

A writ of mandate may only be issued to a "party beneficially interested." (Code Civ. Proc., § 1086). This requirement has been interpreted to mean that the petitioner must have "some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." (Citations omitted). We conclude that Water District clearly fits within this definition. The Water District is the agency directly responsible for providing water to the proposed project and thus has a special interest in insuring that the EIR fully and adequately deals with the delivery of water to the project. (*Santiago County Water Dist. v. County of Orange*, (1981) 118 Cal.App.3d 818, 832).

In the present case, the CIBCSD, as the water purveyor for the Channel Islands Harbor, is also a "party beneficially interested" in the BISC project, the EIR, and the County's amendments to the Channel Islands Harbor's Public Works Plan.

The County's selected BISC site location directly impacts the authorized purpose of the CIBCSD to "supply the inhabitants of the district with water for domestic use, irrigation, sanitation, industrial use, fire protection and recreation." The designated BISC site location required that an eight-inch

CIBCSD waterline be relocated. The reconfiguration of the docks at the selected BISC site affected CIBCSD water customers who were boaters. During the EIR and CEQA administrative process the CIBCSD explained its concerns about possible liquefaction at the selected BISC site, that it could not guarantee a total leak-free water system at all times, and that it had concerns about its liability as the water purveyor. (See Exhibit B).

While it does not possess the broad police powers conferred by the California Constitution upon cities and counties, former Government Code section 61600 and CIBCSD's documents of formation gave it the rather broad power to provide "police protection to protect and safeguard life and property." (Exhibit A). This authorized power reasonably enabled CIBCSD to pursue its public safety concerns regarding the BISC location during the CEQA administrative process and to the California Coastal Commission regarding the County of Ventura's request for approval of the amendment to the Channel Islands Harbor Public Works Plan and Notice of Impending Development 1-05. During the CEQA administrative process, CIBCSD presented its concerns about the impact of increased boating congestion and safety issues caused by the designated BISC site, particularly at the turning basin and the Channel Islands Harbor entrance. CIBCSD expressed additional concerns about the increased service levels required for the Harbor Patrol, U.S. Coast Guard, Fire Departments and police agencies occasioned by the selected BISC site. (Exhibit B).

The expenditures to compile a CEQA administrative record and expenditures for the Independent Location Comparison Evaluation for the BISC study can be reasonably characterized as acts in furtherance of the CIBCSD's public purposes under its documents of formation. Sections 5a and 5e of the Local Agency Formation Commission Resolution LAFC 82-2 and the Board of Supervisors Resolution authorized the CIBCSD to ". . . supply the inhabitants of the district with water. . . ." and ". . . police protection to protect and safeguard life and property." (Exhibit B). The two alleged unlawful expenditures are reasonably related to CIBCSD's authorized purposes as are CIBCSD's review of the BISC EIR, active participation in the CEQA administrative process, the review of the amendments to the Channel Islands Harbor PWP, the presentation of the Independent Location Comparison Evaluation for the BISC study, and the presentation of CIBCSD's recommendations to the California Coastal Commission. The courts have been very clear that the determination of what constitutes a "public purpose" is primarily a matter for the legislative body and will not be disturbed

as long as it has a reasonable basis. *Cnty. Mem. Hosp. v. County of Ventura, supra*, 50 Cal.App.4th 199, 207; *County of Alameda v. Janssen, supra*, 16 Cal.2d 276, 281; *Irwin v. Manhattan Beach, supra*, 65 Cal.2d 13, 22-23.

Under these circumstances, CIBCSD's expenditures for the compilation of the CEQA administrative record relating to the BISC EIR and for the Independent Location Comparison Evaluation for the BISC study was not an unauthorized criminal appropriation or use of public money without authority of law in violation of Penal Code, section 424, subdivision (a), subsections (1) and (2).

Alleged Prohibited Conflict of Interests Violations by CIBCSD Directors Vickie Finan, Ellen Spiegel, and Jonathan Ziv in Violation of Government Code Sections 1090 and 1097.

It was also the opinion of County Counsel that one or two of the CIBCSD directors may have violated the criminal conflict of interest prohibitions of Government Code sections 1090 and 1097, if they had an affiliation with the Beacon Foundation but failed to disclose it before they voted to donate funds to the Beacon Foundation. Government Code section 1090 provides the following prohibition against district officers having a conflict of interests in contracts they make in their official capacity:

Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity. (Gov. Code section 1090).

Although the word "donation" was used in the CIBCSD meeting minutes on March 9 2004, the CIBCSD made a "contract" with EDC that the \$10,000 could be used only for reconstructing the administrative record relative to the BISC EIR. (*See, People v. Honig* (1996) 48 Cal.App.4th 289, 349-353; Civ. Code §1040; 89 Op.Atty.Gen. Cal. 258) If Ms. Finan or Ms. Spiegel was "financially interested" in the contract with EDC, they would be guilty of a felony. (Gov. Code §§1090 &1097).

In 1963, the term "financially" was added to Government Code section 1090 to more precisely describe the prohibited "interest" in contracts. (Stats. 1963, ch. 2172, § 1). The amendment was consistent with the then-existing court decisions indicating that the prohibited interest in a contract

was a **personal financial interest**. An appellate court in *People v. Darby*, for example, approved a jury instruction defining the prohibited “interest” in the contract that included the following:

The interest is indirect when the board member enters into a contract in his official capacity with a business firm, which business firm, by reason of the board member's relationship to it at the time the contract is awarded, is in a position to render actual or potential pecuniary benefit to the board member based on the contract the business firm has received. (Emphasis added). (*People v. Darby*, (1952) 114 Cal.App.2d 412, 433, Fn. 4).

After the 1963 amendment to Government Code section 1090 added the term “financially,” court decisions continued to approve a similar definition of the prohibited financial interest in contracts that clearly contemplated that the prohibited financial interest was a **personal financial interest** on the part of the public officer:

The word ‘financially interested’ as used in Government Code section 1090 means any financial interest which might interfere with a city officer's unqualified devotion to his public duty. The interest may be direct or indirect and includes any monetary or proprietary benefits, or gain of any sort, or the contingent possibility of monetary or proprietary benefits. The interest is direct when the city officer, in his official capacity, does business with himself in his private capacity. The interest is indirect when the city officer, or the board of which he is a member, enters into a contract in his or its official capacity with an individual or business firm, which individual or business firm, by reason of the city officer's relationship to the individual or business firm at the time the contract is entered into, is in a position to render actual or potential pecuniary benefits directly or indirectly to the city officer based on the contract the individual business firm has received. (Emphasis added). (*People v. Watson*, (1971) 15 Cal.App.3d 28, 37; *People v. Gnass*, (2002) 101 Cal.App.4th 1271, 1299, Fn.9; see, discussion 88 Op.Atty.Gen.Cal. 32).

A jury convicted the state superintendent of public instruction of making public contracts with a nonprofit corporation from whom his wife received a salary in *People v. Honig* (1996) 148, Cal.App.4th 289. The Court in *Honig* approved a definition of “financial interest” similar to the one above and went on to state: “Put in ordinary, but nonetheless precise, terms, an official has a financial interest in a contract if he might profit from it.” (*People v Honig, supra*, p. 333.).

In order to incur criminal liability, a public officer must act both willfully and knowingly upon a contract in which they have a **personal financial interest**. As to the knowledge required for criminal liability the Courts have stated: “The official must know that there is a reasonable likelihood that the contract may result in a personal financial benefit to him.” (Emphasis added). (*Honig, supra*,

p. 338; *Chapman v. Superior Court* (2005) 130 Cal.App.4th 261, 276-277). When describing the required willful criminal mental state, the *Honig* court said “. . . ‘willfully,’ as applied in this context, means that the official must purposefully make a contract in which he is financially interested.” (*People v. Honig, supra*, p. 334; *People v. Chacon* (2007) 40 Cal.4th 558, 570). The factual issue is whether or not the public official had knowledge that the contract might result in a personal financial benefit to him rather than knowledge that his conduct is unlawful. The reliance on advice of counsel as to the lawfulness of the conduct is therefore irrelevant. (*Chacon, Ibid.*).

In the present case there is no evidence and no reason to believe that either Director Finan or Director Spiegel had a “**personal financial interest**” in the CIBCSD expenditures to EDC or for the Independent Location Comparison Evaluation for the BISC study. Because Director Finan and Director Spiegel were not compensated for their services as officers of the Beacon Foundation, the expenditures made by CIBCSD to EDC for the compilation of the administrative record would not personally financially benefit them, either directly or indirectly. There would be no reason for the two CIBCSD directors to view the District’s donation to EDC with their own personal financial interests in mind because no officer of the Beacon Foundation had any personal obligation to pay EDC for any costs or legal services to the Beacon Foundation. The expenditures to EDC would, at most, assist the Beacon Foundation in its CEQA enforcement lawsuit against Ventura County. Conversely, neither Director Finan nor Director Spiegel would be personally financially disadvantaged in any respect if the CIBCSD made no expenditures to compile the CEQA administrative record or fund the Independent Location Comparison Evaluation for the BISC study.

Our inquiry provided no evidence that Director Jonathan Ziv, Director Ellen Spiegel, or Director Vicky Finan had a **personal financial interest** in the CIBCSD contracts or expenditures for the compilation of the administrative record, or the Independent Location Comparison Evaluation for the BISC study. Accordingly, Directors ZIV, Finan and Spiegel did not commit a criminal violation of Government Code sections 1090 and 1097.

CONCLUSIONS

The CIBCSD directors did not commit a criminal misappropriation of public funds in violation of Penal Code section 424, subdivision (a), subsections (1) or (2), when they expended public money to the EDC for the specific purpose of compiling an administrative record of Ventura County's compliance with the CEQA or when they expended public money for the Independent Location Comparison Evaluation for the BISC study. The CIBCSD directors, Vickie Finan, Ellen Spiegel, and Jonathan Ziv, did not commit criminal violations of Government Code sections 1090 and 1097 when they voted and participated in the authorization of those expenditures.

The Office of the District Attorney is not commenting on the appropriateness of the CIBCSD directors' decisions to make the expenditures. Our conclusions are limited to whether or not the expenditures were criminal misappropriations of public funds or criminal violations of conflict of interest prohibitions.