

CHSRA Board Meeting – Sept 2, 2010

This transcript is provided by Rita Wespi on behalf of CARRD, rwespi@carrdnet.org.

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Audio: http://www.cahighspeedrail.ca.gov/images/chsr/20100902153649_9-2-10%20Day%20%20Board%20Meeting%20Audio.WMA

Video: http://stateofcalifornia.granicus.com/MediaPlayer.php?clip_id=61

Full Packet:

<http://www.cahighspeedrail.ca.gov/about/default.asp?topic=boardArchive&year=2010&month=9>

Transcript is limited to Agenda Item 3, Executive/Administrative Committee Report, Board Policies and Procedures, proposed Amendment #3 related to incompatible offices.

Packet item for proposed Amendment #3:

http://www.cahighspeedrail.ca.gov/images/chsr/20100827064322_Agenda%20Item%205%20-%20Proposed%20Amendment%20No%203.pdf

1:36:00 audio, 1:50:20 video. (Times below are for audio. Add 14 minutes to synchronize with video.)

Kopp: The next two [items] emanate from the implications of government code section 1099 number two states that no authority board member who holds another public office incompatible with authority board membership may participate in board or committee discussions or action that falls within the jurisdiction or reasonably could affect an interest of the other public office.

This does not collide with section 1099 in fact it is consistent with, and compatible with the policy behind government code section 1099 and the item contains an analysis by the staff of the law concerning incompatible offices, and I would move adoption of this as a policy of the authority.

Diridon: May I ask a question? I think the law is clear on the matter. It's on the California statutes, and it's clear. Why would we need to say it again? The Attorney General's office has already communicated on the subject. The question of you, as chair of the committee, to debate the issue, I guess, and of Quentin: why do we need to say it if it's already very clearly declared in CA law?

Pringle: Certainly that is the question at hand why Mr. Kopp chooses to pick this element of the government code – the political reform act or others that we are all bound to live by, and feels that it's important to put, as part of our board policies state law which we are bound to live by. There are a tremendous amount of state law that any board must operate under and this is just but one of them and Mr. Kopp feels that it's important to put it in the board policies. I don't believe that's necessary. And I agree with your point that you're making with your question.

Diridon: The reason I made the point has nothing to do with this issue. It's to do with our policies. If we begin restating all of the aspects of CA code that relate to our board in our policies, our policies will look like a telephone book. [Pringle interjects a side comment.]

Diridon: I don't think that's to our advantage.

Pringle: Yes, Mr. Kopp, you wish to respond.

Kopp: This is not a restatement of section 1099, Mr. Diridon. As I said, this emanates from section 1099. Section 1099 has a different remedy. This is a policy which articulates a different policy and a different rule by prohibiting participation or action either in a committee or at the board by any member who holds another public office incompatible with Authority Board membership. It's an effort to insulate this authority against legal vulnerability.

Pringle: Mr. Kopp moves this addition of the board policy. Any member of the board second that?

Mr. Crane seconds.

Pringle: Any further discussion?

Crane: So let me ask a question of Member Kopp or the AG's office. What is the remedy under section 10 -- Member Diridon is saying it's already covered under state law. What is the remedy there and how does that differ from the remedy that Member Kopp is proposing?

George Spanos, AG office & counsel to the CHSRA: Mr. Crane, the remedy under sec 1099 deals with a person, a public official who holds one office who then assumes another office. If that second office and the first office are incompatible, then the remedy is that pursuant to the law that person is deemed to have forfeited the first office at the time he assumes the second office. That's the remedy. He or she is not prevented from participating in matters -- well let me back up. If that person remains -- continues to serve in that first office as well as serves in the later office, he or she is not prevented from taking part in discussions or actions in that second position that affect the first position, or could affect it. So the law doesn't address that situation. As I understand this proposed policy, it does address that situation. It would say that if you hold another office that's incompatible, when you're on this board, maybe you're not required to forfeit this position, but you are required to refrain from participating in actions and discussions. Basically it raises what you could call institutional conflict of interest because of your other position.

Pringle: But isn't it true, Mr. Spanos, that the use of the words that are part of this, if the attorney general's office argues and it's declared in court that someone serves in two incompatible offices, if you follow thru the process and if it is deemed that 2 offices are and so forth incompatible, the remedy is the forfeiture of the first office, correct?

Spanos: You're talking about section 1099 --

Pringle: --Yes, I am, under the word 'incompatible' because this board policy references the word 'incompatible' and the use of incompatible offices under state law is defined very specifically, correct?

Spanos: It's not defined specifically; it is defined in section 1099 as the codification of common law.--

Pringle: --Exactly.

1:42:41 Spanos: This is the distinction I was trying to bring draw to Mr. Crane's commented on, the remedy --

Pringle: --But let's follow through the process. Under 1099, if offices are deemed to be incompatible, therefore -- you -- the first office an individual must be removed from the first office, correct?

Spanos: No. No. The offices can be incompatible and a person can continue to serve in that office but that's deemed to be an intrusion into that 1st office and the remedy is triggered by a request for [?] to file a quo warranto. That's explained in the analysis --

Pringle:-- well, that's what I was trying --

Spanos: -- but it doesn't prevent that person who is legally intruding on the 1st office from participating in any action taken by the context of the 2nd office. The proposal addresses that other situation; I think that's the distinction between section 1099 and this remedy on the one hand and this proposal on the other.

Crane: Thank you to that, George. This strikes me as just common sense. I mean in -- I have found that one of the things that stunned me more about state government in the last 7 years is that somehow people are able to engage in discussions I found this particularly to be the case when I was on the {?} board, people can engage in discussions about things -- and even vote on them -- when in that case they were personally benefitting. Campaign contributions from people who had business with {?}. This whole notion that exists that --I don't even need to know the context because if I were on the board of a private company and the board was having a discussion about entering into an agreement with a supplier that happened to give me gifts or that might benefit me somehow, I would recuse myself from that. That's just common sense. So it seems to me that this proposal is just ensuring that we engage in commonsensical actions. None of us should engage in discussions or vote on things where we can benefit or benefit some other office that we may have. It's just common sense.

Pringle: Okay.

Diridon: David's logic is irrefutable. I can see the issue is definition of incompatible office --

Pringle?: -- exactly

Diridon: -- which is a real bag of mush which I can read in the materials so far and not only in terms of the definition of the office, but also the timing. If you're on a committee and you're talking about general policy -- let's put up a straw person just for the sake of discussion. Let's say one of us is -- -- on a

city council that we're going to have a station or something like that. And we're not talking about anything to do with that city. We're talking about environmental document that might go along that corridor, but nothing to do with the city in terms of specifics. Wouldn't this policy disqualify that person from doing anything? Not just things to do with the downtown city council activities, but anything with that committee? That's not right. But it doesn't relate to the logic of your comment either, David, which I agree with. I think we've all from time to time found ourselves in conflict and declared that and disqualified ourselves from debating the issue. And that's appropriate. But it doesn't disqualify you from serving on the committee forever or the board forever.

Katz: I think that a number of people expressed the point of view, and I guess the thing that I find the most troubling about that is the fact that this commission has to a large extent been isolated and set aside from the public in a lot of ways. And I think that a lot of the problems that we have today statewide come from the previous leadership of this board's actions that isolated the communities. There's a reason why the Gateway Cities COG in LA feel like they've been ignored for 4 years. There's a reason why folks up and down this state feel they've been ignored for 4 years. And part of that is that this was treated as something that should be put upon a pedestal and not interact with local government and local issues. Our constituents are local government and local issues. The people who are going to make decisions about this train are all local folks in various jurisdictions around the state and if this train is going to be successful we need their support. One of the things that's happened because you have people now on this commission that have ties to local government, the MOU s and a variety of working relationships that didn't exist 2 years ago that have tried to move this train forward. It also shows to me a fundamental misunderstanding of the fed application and how this thing's supposed to function. If you think about incompatible almost by definition, you're talking about things that work at cross purposes from each other. If you look at the ARRA requirements for independent utility of anything we build, you can't not have independent utility in the case that HSR does not happen and we don't want to wind up with a Sarah Palin bridge to nowhere. It requires a cooperative effort between the local entities and HSR. All of these benefits – in fact I'm trying, I've tried since this was first raised here – or what I've read about it recently since I was not directly contacted - but when I first read about it I tried to put my mind around what decisions somebody in the future might make in a local government office -- transportation commission in particular since that's what we're talking about – and HSR that was in contradiction, because unless the locals and the HSR work out joint working agreements the train ain't going nowhere.

1:49:24 audio

Diridon: here I go with this logic thing again. If we follow this stricture – if we say that the only people who could serve on this board, would be retired people. You wouldn't have people that were heavily involved in the subject matter that we would like expertise on, able to serve on the board. And that would be a sad situation. You'd only have old fogies like me who might have had some experience in the past but don't have any background or current relationship with the communities that we're trying to serve.

1:50:20 Crane: Well then I must be reading this wrong because the language says no authority board who holds another public office that's incompatible -- that doesn't apply just to just old fogies but to private citizens who don't hold public offices. Whether the authority board membership may participate in board or committee discussion or action -- doesn't say they can't serve -- that falls within the jurisdiction of reasonably affecting interest of the other office. So I guess what we need is someone to tell me how strictly we can construe this, because all I want -- what all of us should want -- on something which is the largest public works program in the country, financed very significantly by taxpayers and federal taxpayers and others, is a process that everybody can have complete confidence in, that people are doing things for the right reason. I don't want to get us in a situation where we are stuck with just old retired fogies on the board who know nothing about--. I want young fogies [laughter] who know where they're going on the board, but I don't want them to be able to influence things that might also benefit them somewhere else. We all have to have the right incentive here.

Pringle: The question is 'benefit them' -- I will step forward as one that says I am the target of this point. That there has been discussion as to serving as mayor -- an elected member as mayor of my city, I was appointed by this Governor to serve on the HSRA, serving to build a statewide system that has no unique benefits to my city that are different than any of the other cities that will be benefited along the way. Is that incompatible serving in that capacity? That's an open question. But you say 'no'. Others may say 'yes'. But what is left in law under 1090 [sic] is to define if it *is* incompatible as articulated by the attorney general's office. Somehow they were presented with this resolution, by the way, by Mr. Kopp not to the chair, but directly to the attorney general so they could craft this nice maliceness, and in fact it says there is a process by which incompatible offices can be determined in this state and there's a remedy for that, live by that. And if there's incompatible offices, live by that. Don't create a new rubric -- a brand new one that's different from the state law, different than the common law that was codified into state law a couple years ago and somehow state here that who is the determinant of another public office that's incompatible? Who determines that, if it's in our board policies & procedures? We're using the words that are in government code 1090 therefore there is a procedure to determine if there is a conflict, or an incompatible office. Live by that procedure. If the people wish to follow that process, follow that process. But in fact here we're creating a new layer within our own org that says we want to allow or put ourselves in even greater jeopardy or question as to "is that based upon an incompatible action". Now I think what Mr. Diridon is pointing out is going into the Diridon Station -- is that incompatible with a public position that Mr. Diridon may have in some other [everyone talking laughing over each other]

Serving on the Orange County Transportation Authority as I do, is that incompatible with serving as mayor of Anaheim. Well, we in fact -- law says that they're not incompatible. Serving on a Metrolink board and the OCTA, is that incompatible? Those issues are left to other places in law to determine, not left to elements within this board to be battering around and saying which decisions which members of the board may participate in, and which they can't. so I think this was set up to stir the pot on this board, not to address what is the law and is presently the law that oversees the issues of incompatible offices.

[Kopp requests to be heard.]

Pringle: Ms. Schenk?

Schenk: I would hope that you don't really believe that it's to stir a pot, I mean that's -- we've all been operating under some reasonable good will amongst one another. I have a couple of questions -- I don't know that I'm prepared to vote on this today because it does bring up layers of questions and it is important and certainly valuable to have the discussion. The issue of incompatible office is a term of art in the law that speaks to public office holders. So my question 1 is, under the law today, George, could any member come to the attorney general directly or to through the executive director or even through the chair and have the question brought to the attorney general for determination of that incompatibility?

Spanos: As I understand it, and let me point out that I'm speaking out of the AG not as your legal counsel, but as the AG, the attorney general's opinion in this position is that -- well, first of all, the law -- and I think it's cited in here in the analysis, actually it's cited in the analysis to your proposed policy amendment number 3 governing code section 12159 that says that the attorney general shall render an opinion in writing to any state agency -- I left out through ellipses some of the other enumerations which include county, council, --

Schenk: --Excuse me for interrupting, I really want to be clear -- is that the analysis about the proposed amendment, or the law as it is today? I'm interested in the law as it is today.

Spanos: that's the law as it is today. The attorney general will render an opinion on the request by the code -- section 12159 of government code enumerates the public officials who can request opinions from the attorney general. In that enumeration is a reference to state agencies. Now you are a state agency, but you're governed by a multi-member board, which means that you act collectively. An individual member of the board is not the authority so consequently the attorney general -- and I think this was the point made in the letter from the attorney general's office -- is saying if we get a proper a request, i.e. a request that is on behalf of the board, then we will respond to that. So an individual member of a multi-member board does not have the authority to trigger the attorney general's responsibilities under section 12159.

Schenk: I'd like to follow this through. Will that take a majority vote of this board, then, to act as the agency, and would that require the recusal of the person in question?

Spanos: Well the answer to the first question is yes because you generally act on majority votes so long as you have a quorum present and the matter's on the agenda and so forth. As far as the recusal, it's kind of a catch-22 situation because you don't know the answer to the question until after it's been answered.

Schenk: well presumably the individual is identified as a subject to the motion. Okay. The 2nd part of my concern here is -- setting aside public officials and getting back to what David had said earlier -- it is very

important that anyone of us whether in another public office or not – not act incompatibly or to have a conflict of interest of any kind. So I would be more comfortable if we were looking at something that talked about someone who holds another position -- whether in the private sector or the public sector -- that is incompatible with an issue before us. Again, if we did something like that in your opinion right now – I won't hold you to it, just in your thinking – would the attorney general's office division of opinion be the right entity to which we would present that kind of an issue?

Spanos: I believe you're referring to financial conflicts of interest. As distinct from say an institutional conflict of interest.

Schenk: it could be – right now I can't think of the example, but I serve on the board of Sempura Energy and I'm on the Board of Directors. [gives hypothetical using her position. Asks who would determine if it's an incompatible position.]

Spanos: It's not an issue – what you're raising are financial conflicts of interest and the legal requirements that you disqualify yourself if you have an interest in the decision being considered. It's not a question of incompatibility; it's a question of conflict of interest which is set forth in your conflict of interest code, in the political reform act and in the regulations of the Fair Political Practices Commission. Now in terms of whom you would ask, one of the services we provide as in-house counsel is guidance and assistance in helping a member to resolve those kinds of disqualification issues. The law does require you to disqualify yourself from a decision in which you have a financial or material financial interest. You can also request advice in terms of financial conflicts of interest from the Fair political practices act.

Schenk: In the interest of time, I don't necessarily agree that it's only financial conflict of interest. I think common sense we can distill it down if there are incompatible positions – whether they're financial or in the best interest of our community that we serve, or whatever – that we do need to take a look at it. I'm just not sure that today this particular proposal addresses my own concern on that, but it's one that I do believe we ought to continue the discussion on, but we're running out of time. I don't want to belabor it right now.

Pringle: Any other comments at this time?

2:02:22 audio; 2:17:00 video

Kopp: Yes, Mr. Chairman. I resent your imputation that I proposed this policy to stir the pot. I'll add two other facts to the discussion. Incompatibility of office has been a part of CA common law for decades. At least 70 years ago the CA Supreme Court defined it. Secondly, if the Legislature, which codified that common law in 2005 with Section 1099 believes it is beneficial public policy to exempt certain offices and certain office holders of those offices from such historical rule of law, it does so. It does so for example with the Metropolitan Transportation Commission where county supervisors, city council members are specifically authorized to serve. It does so with the Orange County Transportation Authority, where the mayor of the City of Anaheim and other office holders are authorized to serve. It

does so with the Los Angeles Metropolitan Transportation Authority. And it could, it could -- if it wished to do -- do it with this commission. It has not done it with this commission. And this commission's actions are vulnerable. You cannot disregard it; you cannot deny it. It is common sense. As the discussion notes, the authority cannot change the provisions of 1099. This policy is designed and is consistent with those provisions. And again, Mr. Crane uses the word 'ensure,' and that's an appropriate word: 'ensure' us against vulnerabilities. And I'd ask for a call of the role.

Pringle: [Calls for a role.]

Crane: I'd like to have a little bit more discussion. I'd like to ask a question here of Member Kopp. If this rule went into effect now, and the legislature did not provide the exemptions you just described (that the OCTA has, etc.), who from this board would have to depart? Let me ask you this way: would anybody from this board, in your opinion, have to depart the board?

2:05:22

Kopp: It's not my opinion, it's the opinion of the Legislative Counsel of CA that a couple members would fall within that category. But this policy, the fact would be such members would simply not participate in discussion or vote on any item which is within the jurisdiction or affects the interest of the other public office.

Crane: Before we vote on such a momentous thing -- we don't know enough. We don't know the consequences. I just heard then from you something very different than what Member Diridon has said and what I believe some other people believe -- which is that we'd actually have to have people actually depart the board. [Mr. Kopp in background says "no".] Or depart their other position. [Mr. Kopp again in background says, "That's not true".] I want to know what the consequences are. Because what I want is that common sense outcome. I want to draw this narrowly so that it works, but it's not a sledge hammer. We need good people on this board. And I trust them to do the right thing. But I don't want them to be able to deliberate on things where there is a direct conflict. So we need to understand what the real consequences would be from this thing and if we're going to vote on it now without knowing the consequences, I will withdraw my second. What I would rather do is understand this, fully, and if it doesn't do what we want it to do, draw it away.

I'm struck by the fact that -- just to go back to the pension boards. They're governed by state laws but they also have their own rules and they also have some federal rules that apply to them. So it's not unusual for there to be a state law which governs these activities and for us to design our own rules which would give us the comfort we want without draconian consequences. So unless we're prepared for someone to tell us exactly what the consequences would be -- for example, would the chairman have to give up his mayor position in Anaheim in order to stay on our board or would he have to depart our board, that's a real problem for me. Because we need good people to get this done. We need him. I want to know that. But on the other hand, if we're going to be discussing the financing or a segment that involves Anaheim, then if I was him I would recuse myself from that discussion. That's the kind of outcome that I would like.

Pringle: Very good. I actually believe there was some new information I learned, too, and that was the discussion that Mr. Kopp had that he believes there's a leg council opinion that speaks to the issue.--

Diridon: --Why would Leg. Counsel have any impact on us related to the AG?

Pringle: Thank you, Mr. Diridon, I guess that makes my point, Mr. Crane, that therefore this type of board policy that's different than state law and different definitions, possibly from state law, and doesn't use the same apparatus by which state laws establish and operates under 1099, basically could set us up that someone gets a legal opinion that says someone, be it a judge who presently is a retired judge that serves under various cases in the state, that that could be an incompatible office, too. I mean, those -- we don't know, and it's not going after those -- you could craft a legal opinion possibly that does target members of the board. Or we could set ourselves up to say everyone who disagrees with elements of this board figure out ways to get a legal opinion to start taking off various members of the board on various decisions. I think that there is a state law that oversees this and I'm content to live within it, and not to create a new rubric for this board membership to have to operate under.

Crane: You know they have a rule, for example going back to the pension funds, now the FCC has finally applied it to pension funds. It's long been the rule for example with the sale of muni bonds that while the members of our pension boards in CA are governed by the equivalent of 1099 and other provisions in terms of the office they can have, and that sort of thing, they are separately covered by rule soon by the FCC for example, that anybody who makes a contribution to them or gives a gift to them cannot do business with the state pension board for 2 years, let's say. So it seems to me what we need here is to have a rule -- this is not like an either-or, it's not binary, it's not like we're either covered by 1090 and we make it explicit with respect to us, it's more that we're covered by 1090 -- that's a state law -- but we want to make explicit that we want to make sure we recuse ourselves in situations that we shouldn't be involved in. So my suggestion would be that we craft the rule that works. I'd be happy to work on that with somebody -- to craft a rule that works.

Pringle: And maybe that discussion is a proper termination of this discussion. I would want to make sure that we're very cautious for example, if someone from, uh, sat on Caltrain who sat on this board as well, say that there should be no discussion-- that nothing that they do in terms of giving a decision, direction, or participation on this board that anything that this board may do dealing with Caltrain they should be exempt from discussion. I actually think that that person brings the most expertise to us if they were a Caltrain board member, don't you?

Crane: It depends on whether there's a financial discussion taking place and the state can be subsidizing Caltrain.

Pringle: That's fine. But what about an operational discussion?

Crane: The operation, I'd love it. Financially, I wouldn't.

Pringle: Well, but David, you've dissected this even further that it all depends on if we provide funding to Caltrain, then you'd feel comfortable, but making sure they operate compatible? Would that be a worthy opportunity? I mean, you certainly wouldn't want to tell them they should not participate in that discussion, right?

Crane: Yes, but if the alternative is that there is [?]

Pringle: I believe we're all public figures, though, sitting on this board. People know who we are and where we come from and exactly when we sit on other public boards we sit on public boards and they're public and therefore it's not that those questions can be drawn, but the point is to lose or disregard expertise, I think is a question I would have. I mean I'm soon sunseting my service in my city so that issue is soon not even going to be one I consider, but I certainly know the expertise I gained in serving there was very valuable.

Alright, so what's the board's interest in this? There's a motion; is there a substitute motion?

Diridon: I ask that the maker and seconder allow the matter to be carried over and that David and Lynn have a look at the material and see if they can draft something that would divide the baby in effect – what you're really talking about doing, David, is applying the concepts of the fiscal conflict to jurisdictional conflicts. And I'm not sure you can do it, based on the current jurisdictional conflict code that says that if you identify that as a conflict you lose your original office. But I'd be happy to let you have a whack at it and bring it back. 2:28:05 video; 2:13:25 audio

Pringle: Is that a motion, Mr. Diridon, to direct the board--

Diridon: --If the maker and seconder will just withdraw the motion –

Kopp: I'm not withdrawing the motion.

Diridon: Then I move that we table the matter for a month and let David and Lynn -- [someone interjects 'two months'] – two months and let David and Lynn – well it might take that long.

[Several people speak at once.]

Crane: And Quentin. I want to work with Quentin, too.

Diridon: It's up to you to work with whomever you'd like, and that you bring it back within the next two months for board consideration and through the Executive Committee.

Pringle: Mr. Diridon moves to table this item – amendment 2 and 3 – for purposes of drafting language that would be acceptable.

Crane seconds.

Diridon: It specifically includes the 2 individuals who [], although the chair can assign as he likes.

Kopp: I'm pleased to inform you, Mr. Chairman, I do not sit as a judge by assignment, and secondly, I do not withdraw the motion because time is imperative. This board meets every month. This board meets every month, and acts every month, and discusses every month.

Pringle: Thank you, Mr. Kopp. Mr. Diridon makes a substitute motion that is before us, seconded by Mr. Crane.

Diridon: It's actually a motion to table.

Pringle: That's fine, if you wish to make that motion to table. Motion to table takes precedence over everything else, so a motion to table the item by Mr. Diridon, seconded by Mr. Crane. Call the role.

Roll: 7-1, Kopp 'no', Umberg absent.

Diridon: Mr. Chairman, I'm not sure we all need to do this, but since Quentin did, I'd like to note for the record that I have no other offices and I have no financial interest with anybody. I wish I had some financial interest, but retired politicians don't have any. And so I have no conflict.

Pringle: Thank you. It was very nice of you to share that with all of us.

2:30:30 video. 2:16:00 audio.