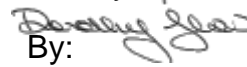


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Superior Court of California
County of Mendocino

By: 
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Deputy Clerk

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF MENDOCINO

11 CITY OF FORT BRAGG, a California
municipal corporation,

12 Plaintiff,

13 v.

14 MENDOCINO RAILWAY AND
15 DOES 1–10, inclusive

16 Defendants.

Case No. 21CV00850

*Assigned for all purposes to: The Honorable
Clayton L. Brennan, Ten Mile Branch*

**OPPOSITION TO REQUEST FOR JUDICIAL
DISQUALIFICATION**

18 Plaintiff City of Fort Bragg submits the following in Opposition to the “Objection to
19 Judge Presiding Over Trial and All Other Proceedings Concerning this Action [C.C.P. §
20 170.3(C)],” requesting the disqualification of the judicial officer currently assigned to the above-
21 captioned matter, filed by Defendant Mendocino Railway on September 12, 2022. This
22 Opposition is submitted for consideration by the judge assigned to determine the issue of
23 disqualification:

MEMORANDUM OF POINTS AND AUTHORITIES

24 Generally, “[a] judge shall hear and decide all matters assigned to the judge except those
25 in which he or she is disqualified.” Cal Rules Ct., Canon 3 (B)(1). *See also*, Cal. Civ. Proc. Code
26 § 170 (“A judge has a duty to decide any proceeding in which he or she is not disqualified.” In
27 fact, a judge may only “disqualify himself or herself in any proceeding in which disqualification
28

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PURSUANT TO GOVERNMENT CODE SECTION 6103

1 is required by law.” Cal. Rules Ct., Canon 3 E, Advisory Committee Commentary (1).

2 The Court of Appeal in *Flier v. Superior Court*, 23 Cal. App. 4th 165, 170 (1994)
3 (changes omitted), summarized disqualification of judges:

4 A determination on a challenge for cause “touches upon the core of the judicial
5 process -- the appearance of objectivity of the decision maker -- requiring a
6 careful balancing of the affected interests. A decision must consider both the
7 public’s right to be assured of the fair, but yet efficient, resolution of disputes and
8 the parties’ right to a decision based upon the court’s objective evaluation of the
9 facts and law. Judicial responsibility does not require shrinking every time an
10 advocate asserts the objective and fair judge *appears* to be biased. The duty of a
11 judge to sit where not disqualified is equally as strong as the duty not to sit when
12 disqualified.” (*United Farm Workers of America v. Superior Court* (1985) 170
13 Cal.App.3d 97, 100, 216 Cal.Rptr. 4.) . . . “While this objective standard clearly
14 indicates that the decision on disqualification not be based on the judge’s personal
15 view of his own impartiality, it also suggests that the litigants’ necessarily
16 partisan views not provide the applicable frame of reference.” (*United Farm
17 Workers of America v. Superior Court, supra*, 170 Cal.App.3d at p. 104, fn.
18 omitted.)

19 Defendant’s objection seeks disqualification on the asserted ground that “[a] person aware
20 of the facts might reasonably entertain a doubt that the judge would be able to be impartial.” Cal.
21 Civ. Proc. Code § 170.1(a)(6)(A)(iii). The “facts” at issue relate to a development application
22 Judge Brennan currently has pending with the *County* of Mendocino. (Objection, at p.2, ¶ 3
23 (e)(iii).) Although Defendant claims that the County’s decision on the pending application is
24 “preliminary,” Defendant acknowledges that the application merely *may* be subject to the Coastal
25 Commission’s appeal authority. *Id.* In fact, Defendant acknowledges that “the application has
26 yet to be set for a public hearing before a County permit body,” let alone even subject to any
27 appeal – if it ever even will be. Indeed, Defendant goes so far as to assert that “for the
28 foreseeable future, Judge Brennan must gain the support of the very entity that now seeks legal
relief from him” by way of the Commission’s motion to intervene in this matter. In other words,
the Commission is not yet even a *party* in this action, as well as its potential appellate authority as
to the application merely being hypothetical conjecture at this point in time. In fact, the “relief”
presently requested by the Commission is merely procedural, by way of intervention, which is
usually liberally granted, and does not affect any substantive rights whatsoever.

Moreover, even if intervention were granted and the Commission were granted status as a
party in this action, there still would not be proper grounds for disqualification merely based upon

1 the facts asserted in the Objection, in that a pending application of the type generally required of
2 members of the public and considered by the Commission in due course is simply not the type of
3 activity reasonably lending itself to any claim of interest that would reasonably lend doubt to the
4 judge’s impartiality. Generally, a party claiming grounds for disqualification must show by
5 evidence that there exists some matter reasonably undermining a judge’s impartiality. Indeed,
6 “potential bias and prejudice must clearly be established. Courts must apply with restraint statutes
7 authorizing disqualification of a judge due to bias.” *In re Scott*, 29 Cal. 4th 783, 817 (2003).
8 Further, “[t]he reasonable person is not someone who is hypersensitive or unduly suspicious, but
9 rather is a well-informed, thoughtful observer. The partisan litigant emotionally involved in the
10 controversy underlying the lawsuit is not the disinterested objective observer whose doubts
11 concerning the judge’s impartiality provide the governing standard. *Rebmann v. Rohde*, 196 Cal.
12 App. 4th 1283, 1291 (2011) (internal notations and quotations omitted). In fact, Defendant seeks
13 disqualification of the assigned judge in this matter on the basis of the above code section, which
14 is based on “federal due process grounds for challenging the impartiality of a judge.” *People v.*
15 *Cowan*, 50 Cal. 4th 401, 456 (2010) (changes and quotations omitted). And, although subsection
16 (a)(6)(A)(iii) of section 170.1 does not require “a showing of actual bias,” “neither is the *mere*
17 *appearance of bias* sufficient. Instead, based on an objective assessment of the circumstances in
18 the particular case, there must exist the *probability* of actual bias on the part of the judge or
19 decisionmaker.” *Id.* at 456 (internal quotations omitted) (italics added). In addition, the meaning
20 of reasonable probability “must necessarily be based upon reasonable probabilities rather than
21 upon mere possibilities.” *Hung v. Wang*, 8 Cal. App. 4th 908, 930 (1992) (changes and
22 quotations omitted) (quoting *People v. Watson*, 46 Cal.2d 818, 837 (1956)).

23 Here, Defendant has made as assertion that Judge Brennan cannot be reasonably expected
24 to remain impartial due to the fact that he might need to gain the support of the Commission
25 relating to his pending development application, and that such application might, at some
26 unknown time in the future, be subject to Commission consideration. First, this is based upon
27 conjecture and hypothetical possibilities, not reasonable probabilities. Second, this presumes that
28 any reasonable person could expect that a judge would even reasonably think that a ruling in

1 favor of the Commission could actually garner any support or favor from the Commission.
2 Indeed, this does not seem like a reasonable conclusion at all, particularly because *if* the
3 Commission were ever to consider the application on appeal under some unknown circumstances
4 or at some unknown future time, the Commission is bound by the law as to its determination, and
5 considers certain set criteria, which may include, for instance, such matters as “conformity with
6 the certified land use plan,” “the degree of factual and legal support for the local government’s
7 decision,” “the significance of the coastal resources affected by the decision,” and the “regional
8 or statewide significance” of the issues presented in an appeal – all of which evaluation must be
9 based on substantial evidence as a matter of law. 14 Cal. Code Regs. § 13337. Moreover, the
10 Commission is restricted as to, and must disclose, any *ex parte* communications it has relating to
11 a matter under its consideration. It also acts as to such appeals in a quasi-judicial capacity,
12 constrained in a similar manner as judges and courts, and is generally constrained by principles of
13 “due process of law [which] require that the commission conduct its affairs in an open, objective,
14 and impartial manner free of undue influence and the abuse of power and authority.” Cal. Pub.
15 Res. Code §§ 30320, 30324, 30327. Thus, Defendant’s Objection calls into question not just
16 Judge Brennan’s impartiality, but also the integrity and impartiality of the Commission itself –
17 suggesting that either Judge Brennan or the Commission would or could even consider a ruling in
18 this matter as some *quid pro quo* for a favorable decision on a permit application appeal, or vice
19 versa – and, assuming the Commission were ever even to be presented with an appeal at all. This
20 simply presumes too much, namely that any reasonable person would think that a ruling in favor
21 of the Commission could even be expected to have any impact, whether positive or negative, on a
22 potential appeal. In reality, this presumes that the Commission could be so swayed, and that any
23 reasonable person would think that its analysis or evaluation of the evidence before it as to an
24 appeal would count for nothing, and the Commission would solely give its “support” based on
25 unrelated rulings in this action, contrary to its statutory duties. Nor is it reasonable, as Judge
26 Brennan explained in his Answer, that “the Coastal Commission would make objections to [his]
27 project to exact favorable treatment in this lawsuit.” (Answer, at p. 3.)

28 ///

1 As has been recognized by the Court of Appeal, “[i]t is common knowledge that some
2 attorneys or parties may abuse the statutory privilege by disqualifying a judge for tactical reasons,
3 without any genuine belief that the judge is prejudiced.” *Brown v. Superior Court*, 124 Cal. App.
4 3d 1059, 1061 (1981). This seems to be the case here, where Defendant is taking advantage of a
5 non-disqualifying disclosure made to the parties by Judge Brennan, and attempting to stretch
6 disqualification principles simply to avoid a judge who has, so far, given Defendant an
7 undesirable ruling. Notably, Defendant is also presently seeking to have this action related to
8 another pending action in a different department, in order to have this matter transferred away
9 from Judge Brennan, for the same reason. Further, Defendant has filed a writ of mandate and
10 petition for review to the appellate courts, attempting to challenge Judge Brennan’s initial ruling
11 denying Defendant’s demurrer, as well as an action in federal court to obtain a declaratory
12 judgment that would have the effect of overturning Judge Brennan’s decision. The pattern is
13 clear, and Defendant should not be permitted to use the disqualification process in such manner to
14 obtain a different result to its liking, especially when it does so by trying to manufacture an
15 impartiality that does not reasonably exist and by arguing for an unjustified expansion of
16 reasonable principles of disqualification. Plaintiff thus urges that a finding of no disqualification
17 of the judge primarily and properly assigned to this matter is not warranted or justified under the
18 objective and reasonable circumstances put forth by Plaintiff, and Judge Brennan should be found
19 to suffer from no valid ground for disqualification.

20
21
22 Dated: September 27, 2022

JONES MAYER

23
24 By: 

25 _____
26 Krista MacNevin Jee,
27 Attorneys for Plaintiff
28 CITY OF FORT BRAGG

3 **PROOF OF SERVICE**

4 **STATE OF CALIFORNIA**)

5 **COUNTY OF ORANGE**) **ss.**

6 I am employed in the County of Orange, State of California. I am over the age of
7 18 and not a party to the within action. My business address is 6349 Auburn Blvd., Citrus
8 Heights, CA 95621. On September 27, 2022, I served the foregoing document described
9 as **Opposition to Request for Judicial Disqualification**, on each interested party **listed**
10 **below**/on the attached service list.

11 Paul J. Beard, II
12 Fisherbroyles LLP
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27 — (VIA MAIL) I placed the envelope for collection and mailing, following the
28 ordinary business practices.

I am readily familiar with Jones & Mayer's practice for collection and processing
of correspondence for mailing with the United States Postal Service. Under that
practice, it would be deposited with the United States Postal Service on that same
day with postage thereon fully prepaid at Citrus Heights, California, in the
ordinary course of business. I am aware that on motion of the parties served,
service is presumed invalid if postal cancellation date or postage meter date is
more than one day after date of deposit for mailing affidavit.

XX (VIA ELECTRONIC SERVICE) By electronically transmitting the document(s)
listed above to the e-mail address(es) of the person(s) set forth above. The
transmission was reported as complete and without error. See Rules of Court,
Rule 2.251.

I declare under penalty of perjury under the laws of the State of California that the
foregoing is true and correct. Executed on September 27, 2022 at Citrus Heights, California.

Audrey Townsend

AUDREY R. TOWNSEND