To: The NCRA Board April 4, 2008

From: Director Meyers

For inclusion in the material for the April 9, 2008 Board meeting

At the March 12 NCRA Board meeting, Counsel Neary suggested that we discuss and vote upon the following question at the April 9 Board meeting:

> May an appointee of Marin County participate in closed sessions of this Board, as I did through January, 2008, when the Board and its attorney discuss the Novato lawsuit?

If I continue to have no conflict of interest regarding the suit, I contend the answer must be "yes". In preparing this memo, I have not seen Counsel's papers on this issue (although I requested him to provide me with any authority in support of, or contrary to, his opinion on several occasions, starting in late January, 2008), nor have I had the assistance of paid counsel. I request the opportunity to argue this matter in open session, and, if need be, in closed session, on April 9. I speak for myself herein, but by parity of reasoning, Director MacDonald should be afforded the same result.

The Agency's attorney-client privilege does not bar my participation in the closed session. In Hamilton v. Town of Los Gatos, 213 Cal. App.3d 1050 (1989), the plaintiff, a member of the town council, sued for the right to listen to a tape recording of a closed session of the council. The session discussed a lawsuit filed against the town over a parking assessment district. The member's business location posed a financial conflict of interest. He voluntarily left the closed session due to the conflict. However, he later asked to listen to the tape recording of the closed session. The town objected on 2 grounds: (1)

the member had a financial conflict of interest, and (2) the town's attorney-client privilege. The trial court agreed with both of the town's contentions and refused to allow Hamilton to listen to the tape. The court of appeals agreed on the conflict issue, but it disagreed that the privilege would exclude him from gaining access *were there not a conflict*. It stated:

> *We believe that Hamilton's status as a council member would normally make him eligible to participate in any discussion between the town attorney and the town council*. As a council member, he and other council members effectively act as clients of the town attorney with regard to town business….If we had concluded that [the FPPC Act] did not bar Council Member Hamilton from obtaining the tape despite his disqualification from active participation in the closed session, *the attorney-client privilege would offer the town no further protection*… [He] would have had the right to be a silent spectator at the closed session, or to obtain the tape, simply by virtue of his membership on the council. The attorney-client privilege would not have come into play, as Hamilton would have stood, not in the shoes of the general public, but in the shoes of a full council member/"client." (Ftnt 7, p.1059, emphasis added)

Similarly here, I am a full member of the Board, and, as such, should be able to participate in the closed session discussion of the Novato suit.

Directors, like all public officials, are required to disqualify themselves if they have a conflict of interest under the FPPC Act, or under a common law "bias" conflict. Mr. Neary concedes that there is no conflict under the FPPC Act. Perhaps he is arguing that because I am an appointee of Marin County, I have a common law bias. If that is his argument, it is incorrect.

Board members, under California law, are bound to exercise the powers conferred upon them with disinterested skill, zeal and diligence, primarily for the benefit of the public. They should not place themselves in a position where their private interests conflict with

their official duties. For example, if a Board member is personally affected by the decision at issue, although in a non-pecuniary manner, there may be common law bias. (See, Clark v. City of Hermosa Beach, 48 Cal App 4th 1152, 1170-73 (council member whose view from his leased apartment would be obscured by applicant's condominium, has bias precluding him from voting on project); See also Cal. Attorney General Op. #04-502, March 28, 2005, p.8 (there must be some personal advantage or disadvantage at stake to rise to a common law bias)).

I know of no evidence showing any common law bias on my part. I am not affected by the rail line or by the Novato lawsuit in any way different from every other member of the Board. The only way I differ from most other members is that the county that appointed me in October filed an amicus brief in the case in December. However, that is not sufficient to bar me from closed sessions discussing the suit.

I am entitled to cast my vote on the Novato case in any way I see fit. I am not bound by any position Marin takes. In Attorney General Opinions # 00-708, December 8, 2000, 267, the AG stated that a member of an agency such as ours could cast a valid vote on a matter *even if the vote was inconsistent with the position taken by the legislative body which appointed the member*. The agency was a transit agency ("SCAT"). The Opinion stated that although the city that appointed one of the members instructed the member to vote in a given manner, he could validly vote differently. The city's contrary position "did not limit [the Director's] authority when he cast his vote. *His authority was to exercise his own discretion when voting*. Nothing… required that he vote only as directed

by the city council." (p.268, emphasis supplied). The SCAT case is all the stronger, for therein the agency members were appointed "at the pleasure" of their appointing agency. For NCRA appointments directors are appointed for a fixed term of 2 years (Gov. Code Sect. 93011(b)), giving the appointing county no authority over an appointee, unlike the potential authority appointing cities and the county had over SCAT directors.

Attorney General Opinion No. 03-604, Dec. 29, 2003, also involving a state commission, stated that "the statutes governing the [agency] do not authorize the participation of a city council or county board of supervisors in the actions taken by the Board. Such local bodies have no veto power or right of approval with respect to the [agency], which is an independent state commission…. Instead, each designated city council and the county board of supervisors is limited to appointing a single person to sit as a member of the Board. *Once such an appointment is made, the appointee may vote independently from - - and even contrary to the express wishes of - - his or her appointing power*…. The fact that the member is an appointee does not give the appointing power any standing to attend, participate in, or otherwise be involved in the Board's closed sessions. (pp 4-5, emphasis supplied) That is true of the NCRA as well (See, Gov. Code Sect. 93011).

In summary, each Board member has a duty to recuse him or herself if he or she has a conflict of interest. Absent that, each member may fully participate in the matters before the Board, whether in the public session or the closed session. Each member is entitled to do so whatever views their appointing agency may have. Each member can not be excluded from the Board's deliberations if his or her views differ from those of other

Board members, or if they are the same as – or contrary to – the views of any appointing agency. I therefore urge the Board to provide me with the opportunity to fully participate in, and vote upon, closed sessions involving the Novato suit.