Arellano, Humberto Jr.

From: Lemos, June
Sent: Thursday, February 9, 2023 1:57 PM
To: Arellano, Humberto Jr.
Subject: FW: Public Comment -- 2/8/2023 PC Meeting, Item No. 7B, PC Bylaws

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From: **Jacob Patterson** <jacob.patterson.esq@gmail.com>
Date: Wed, Feb 8, 2023 at 12:37 PM
Subject: Public Comment -- 2/8/2023 PC Meeting, Item No. 7B, PC Bylaws
To: CDD User <cdd@fortbragg.com>
Cc: <cityclerk@fortbragg.com>, Ducey, Peggy <pducey@fortbragg.com>, McCormick, Sarah <SMcCormick@fortbragg.com>, Peters, Sarah <speters@fortbragg.com>

Planning Commission & City Team,

I am submitting these comments concerning the draft revisions to the PC bylaws for your consideration tonight or at future meetings when the bylaws are actually going to be revised. My observations and recommendations are presented in the order the corresponding content shows up in the current draft provided by staff.

First, I think many of the recommended changes make sense and I commend the City team for their efforts. In particular, I appreciate removing the odd references to the relevant ordinances and corrections to the code references (although some code citations remain incorrect). Actually, I am not sure why any code references are included in the bylaws at all, particularly since sometimes the reference is the direct source of what is in the bylaws but other times the connection is unclear and the bylaws are the source of the existing or proposed rules and procedures rather than the Muni Code. Fort Bragg Municipal Code § 2.20.100 provides the overall basis for the Planning Commission adopting any rules at all so it doesn't necessarily make sense to constantly refer to it when the broad category doesn't actually require or even suggest that these particular provisions of the bylaws need to be included. In fact, many portions of the bylaws are unnecessary because they are mere recitations of the existing Municipal Code section within Chapter 2.20 about the Planning Commission. There is no need to include redundant content that is already in the Municipal Code because the Planning Commission is already bound to follow the Municipal Code. The purpose of rules of procedure in these bylaws is to clarify how the Planning Commission itself operates and extraneous content like how the Planning Commission is formed or how the City Council appoints or removes members are not germane to what the Planning Commission does. As such, I recommend removing anything from the PC Bylaws that is not a rule or regulation that is being promulgated under the authority of Fort Bragg Municipal Code § 2.20.100 (i.e., anything that isn't directly related to the purpose described in Section I). [Note that actual adoption or revision would require a formal resolution.]

As another introductory matter, it is important to recognize that the California Government Code (and other federal and state laws including both constitutions) need to be followed so the bylaws need to be consistent with outside legal requirements or they won't be able to be implemented anyway. This is described in California Government Code § 65102.

GOVERNMENT CODE - GOV
TITLE 7. PLANNING AND LAND USE [65000 - 66499.58]
(Heading of Title 7 amended by Stats. 1974, Ch. 1536.)

DIVISION 1. PLANNING AND ZONING [65000 - 66301]
(Heading of Division 1 added by Stats. 1974, Ch. 1536.)

CHAPTER 3. Local Planning [65100 - 65763]
(Chapter 3 repealed and added by Stats. 1965, Ch. 1880.)

ARTICLE 1. Local Planning [65100 - 65107]
(Article 1 repealed and added by Stats. 1984, Ch. 690, Sec. 2.)

65102.
A legislative body may establish for its planning agency any rules, procedures, or standards which do not conflict with state or federal laws.

(Repealed and added by Stats. 1984, Ch. 690, Sec. 2.)

I think it is critical that you keep this in mind as you think about how to revise these bylaws, particularly when some rules or regulations have the potential to implicate the constitutional rights of applicants or other meeting participants.

Specifically, I recommend you consider the following as you review the current draft.

II. Meetings, Part B:

This part should be revised to list hybrid meetings that are not subject to virtual meetings pursuant to AB 361 by adding ", in hybrid format for public participation purposes," immediately prior to "or virtually if resolved..."

I suggest this because we will shortly lose our ability to hold virtual meetings when the Governor's emergency declaration ends on the 28th but we can (and should) continue to offer hybrid-format meetings for purposes of public participation, which is distinct from fully virtual or hybrid-format meetings concerning Planning Commissioner attendance. Planning Commissioners attending remotely trigger the special noticing and related procedural requirements but that doesn't apply to when the City offers remote public participation options.

II. Meetings, Part D:

I would delete this part because it is unnecessary and already required by state law and relevant constitutional provisions.

II. Meetings, Part F:

The new additional final sentence is partially advisable but I would delete the word "certain" because the Planning Commission may continue a public hearing item to a date certain or a date uncertain (you don't want to limit the Planning Commission's options by excluding continuances to a date uncertain) but you don't "continue" an entire meeting to a date certain. Continuing a meeting to a different future date is called "adjourning" the meeting, which always requires a specific date and time. Continuing a public hearing agenda item is technically different and the future meeting is a new meeting rather than an adjourned meeting to finish up the unfinished business. In fact, this same section earlier uses the phrase "continue the meeting" to mean continuing to actively hold the meeting past its usual adjournment time on the same day and it is important to use the same terms in a consistent manner to avoid internal inconsistencies or ambiguity.

III. Operations, Parts A & B:

Rather than worrying about the omitted "er" concerning the procedures of removing a particular commissioner, which, based on my recent review of the legislative history appears to be an unintentional error in how the adopting ordinance was drafted, the better approach is simply removing current parts A and B in their entirety. The PC Bylaws are about how the Planning Commission operates (i.e., actions taken by the PC itself) but the makeup of, appointment to, and removal from the Planning Commission are all actions taken by the City Council. There is no reason to include these two parts because they have nothing to do with how the Planning Commission itself operates. Also, deleting these irrelevant parts removes the technically incorrect reference to the language of § 2.20.020, subd. B., which literally reads "any Planning Commission" rather than "any Planning Commissioner" based on the adopting ordinance that has not yet been formally updated through action of the City Council even if in applying it--something that I don't think has ever happened--would likely involve relying on the legislative history to show the actual intent related to an individual commissioner rather than the entire commission.

III. Operations, Part E:

Although not technically a revision other than pointing out that the meeting schedule is governed by Municipal Code § 2.20.060 not § 2.20.100, which only talks about rules of procedure not meeting schedules, I want to draw your attention to the language of this part. IMO, the City has recently been conflating two things: establishing a meeting schedule pursuant to § 2.20.060 and a work plan/work schedule, which is actually about the substance of what the Planning Commission wants to work on in the coming year. Doing that is actually a power and responsibility that comes from the Government Code and not the Municipal Code. In fact, § 2.20.100 (the cited reference) is solely about rules of procedure and a meeting schedule and work plan are not rules of procedure (i.e., how the PC conducts its activities during meetings). IMO, the development of a work plan is about what policy matters the Planning Commission wants to substantively work on, not simply when it plans to hold its upcoming meetings. Deciding both are important tasks but they aren't the same thing. By not proactively developing a work plan for the Planning Commission, you become beholden to what policy priorities staff presents for your consideration or what the Community Development Committee of the City Council directs you to work on--also both important considerations but not the same activity as proactively addressing Planning Commission priorities for long-range planning activities that staff can use to help develop their own work plans and schedules.

III. Operations, Part P:

This part includes recommended revisions but it is unnecessary or should be revised to reflect what criteria the chair should use to make a determination of when to excuse an absence for cause to avoid arbitrary and capricious decision-making by the PC Chair. The Planning Commission itself holds no collective role in enforcing the provisions of Municipal Code § 2.20.080, which is self-operative (ipso facto means automatic or self-operating, technically "by that very fact or act") and reappointment or a new appointment would be handled by action of the City Council or Mayor. This part would better be used to define the standards and procedure for requesting an excuse for cause from the PC Chair. I have no specific recommendations on what that should be but the way it is written now provides no guidance and is thus likely unnecessary as currently drafted except as a reminder of the effect of missing meetings

IV. Public Hearings, Parts E & F:

These parts should be expanded or combined to explicitly cover hybrid-format meetings (for public comment purposes) in addition to in-person or virtual meetings. Current practice is usually to hear from members of the public in person first, followed by remote participants, and then any additional in-person attendees who did not speak when public comments were first solicited by the Chair. I recommend memorializing that as a revision to both E and F by replacing "For meetings held" with "For comments made" and adding in additional text describing the order comments will be solicited from the different categories of speaker (or being silent and

leaving that to the Chair's discretion). It might be advisable to expand Part F to include the legal requirement to pause the meeting discussion during any technical difficulties that prevent virtual attendees from making their comments or to make it explicit that remote-participation is at the attendee's own risk--this wouldn't apply to fully virtual meetings, where the pause to resolve technical difficulties is legally required--and that technical difficulties during optional hybrid-format meetings related to public participation are not subject to the need to pause the proceeding to allow for the remote participation. That is a major policy consideration but one that some cities are employing for timing and meeting efficiency purposes to not have to be beholden to technical difficulties that would otherwise interfere with the City continuing to conduct business. That risk virtual participants may be subjecting themselves to would obviously need to be disclosed on the meeting agendas themselves so this issue may need further thought and legal counsel input.

IV. Public Hearings, Part G:

This part of the PC Bylaws needs the most attention and will probably require substantial revision.

The addition of the new content about written comments or emails should be removed or moved to its own part. It is not actually related to how the Planning Commission itself conducts meetings but in how the City staff administers public comments. This is also an area that is fraught with legal compliance considerations and, if implemented literally as it is written without additional actions, would not be sufficient to meet the City's legal obligations regarding how written public comments and other information about agenda items need to be processed (IMO). In fact, because City Hall is closed on Wednesdays, which is the day of regular Planning Commission meetings, following just these practices would likely violate the Brown Act as discussed below.

[If you are interested, you may want to review Government Code § 54957.5, particularly subdivisions (b) and (c), which I pasted at the end of my comment, although there is also a lot of case law that explains the scope of what is required that is not necessarily obvious just by reading the statutory language.]

My recommendation is to either delete the references to how staff will deal with written public comments because it is not technically a rule of procedure for how the Planning Commission itself will conduct its meetings and operations or to substantially revise this section--that would be handled in an administrative regulation adopted for staff implementation. If you want to keep the content in the PC bylaws, I am not sure if how written public comments are processed is related to spoken public comments, which is what this part starts with, so it makes more sense to have another part for written public comments rather than being combined in a single part as it is now.

The language should be clarified to state that the submitted comments will be available for public inspection at City Hall during normal business hours and at Town Hall or other meeting locations during the meeting itself. The meeting location part is currently omitted but it is critically important to minimize potential due process and Brown Act violations by not having all relevant information that is being considered by the Planning Commission also be available to the applicant and other public participants in the public hearing prior to and during the public comment period of the public hearing. For example, if written comments are forwarded to all or a quorum of the Planning Commission, they need to be made immediately available for public review or the City likely would have violated the Brown Act based on recent case law. Full compliance could involve having the written comments available at a publicly-accessible location in hard copy at the same time (and likely thereafter) when they have are made available to the commissioners for their consideration. Since City Hall is closed to the public on Wednesdays and regular Planning Commission meetings are held on Wednesdays, the City is not currently meeting this requirement for written comments received on the day of the meeting and then forwarded to the commissioners by staff rather than waiting to distribute them to the commission and public at the meeting itself (likewise for after-hours or weekend comments that are forwarded as they are received).

Finally, the concluding sentence should be deleted because it is not related to how the commission operates and timely written submissions are technically part of the agenda packet and the administrative record for the planning review as they are submitted to the City and processed by staff, not simply when electronic soft copies are published online by staff, potentially the day after the meeting.

IV. Public Hearings, Part I:

This part is somewhat redundant and ambiguous. For example, there is no need to include "if there are issues raised during the hearing that need further clarification or information for application review" and that language is too limiting because there are other reasons to continue a public hearing (e.g., needing more time to digest the relevant materials or more time to solicit additional comments from the public or applicant for complex or controversial items). Moreover, a public hearing may need to be continued when complex or voluminous written comments are submitted and staff or legal counsel needs time to review the submissions, particularly late-submitted comments or applicant/appellant submissions. Finally, the same language is listed in both option 1 for a date certain and option 2 for a date uncertain and that creates ambiguity because including the modifying language suggests the listed situation serve as criteria that must be met to justify that type of the continuance. Alternatively, the first two options could be condensed simply refer to a "future date certain or uncertain" or "future date". I think deleting the modifying language, which is too limiting and not expansive enough is the better option. For land use public hearings, you don't want to unintentionally generate allegations of process violations should the Planning Commission arguably fail to follow its own rules and regulations.

IV. Public Hearings, Part J:

The current wording is somewhat inaccurate and should be revised. This part is written to assume that the recommended action will be an approval. That is too limiting and there are numerous reasons why an application might warrant a denial rather than stacking the deck in favor of approvals through how the rules of procedure are worded. In fact, procedural step 4 under this Part concerns when the Planning Commission is going to deny an application so the introductory language should be revised to include both approvals and denials or step 4 should be removed to its own part dealing with denial motions for planning applications. I recommend the latter because it requires less revision overall.

Regardless, the introductory language for approval motions should be revised to state "For staff-recommended planning approvals" or "For motions to approve planning permits" rather than the awkward and inaccurate "For current planning approvals". Likewise, "shall" should be replaced with "may" because shall is mandatory and thus not accurate unless strictly limited to the process to approve rather than deny a planning application.

Further revisions to the procedural steps are also recommended because it is clear that multiple successive motions will be required to deal with the different resolutions so it should read "make motions to" (and to address other issues). For example, all projects require CEQA review, the issue is if further environmental review under CEQA will be required through a CEQA document like an IS/MND or EIR when an exemption doesn't apply to the project so 1 should read "if further environmental review under CEQA is required" not "if CEQA review was required". If an exemption applies, there is no need to adopt two successive resolutions and a single approval resolution is fine provided it includes a determination by the Planning Commission that the cited exemption or exemptions apply and an adequate explanation of why that is the case is also included. (The proposed actions should be appropriately described in the agenda description for the public hearing in order to avoid Brown Act compliance issues.)

Current step 4 for denials should be revised (or moved to its own part and revised) to make clear that the Planning Commission can also adopt a denial resolution if one was already included in the agenda materials or that they also have the option of having a commissioner or ad hoc committee of two commissioners prepare the denial resolution--Chair Logan prepared a revised draft denial resolution for a particular application in the past

and it was the basis for what the commission adopted rather than the resolutions prepared by staff. It is normal practice for staff or the City Attorney to prepare draft resolutions but that is not a requirement and there are instances when it makes sense for a commissioner or the entire commission itself during a properly noticed meeting to draft their own resolutions or revised resolutions--the commissioners better understand their own reasoning, after all--so it doesn't make sense to limit the commission's options through rules of procedure that only allow staff to perform those tasks or to provide artificially narrow procedures.

IV. Public Hearings, Part K:

Replace "After the motion" with "After a motion" to reflect that some items involve multiple motions.

Best regards,

--Jacob

GOVERNMENT CODE - GOV
TITLE 5. LOCAL AGENCIES [50001 - 57607]
(Title 5 added by Stats. 1949, Ch. 81.)

DIVISION 2. CITIES, COUNTIES, AND OTHER AGENCIES [53000 - 55821]
(Division 2 added by Stats. 1949, Ch. 81.)

PART 1. POWERS AND DUTIES COMMON TO CITIES, COUNTIES, AND OTHER AGENCIES [53000 - 54999.7]
(Part 1 added by Stats. 1949, Ch. 81.)

CHAPTER 9. Meetings [54950 - 54963]
(Chapter 9 added by Stats. 1953, Ch. 1588.)

54957.5.
(a) Agendas of public meetings are disclosable public records under the California Public Records Act (Division 10 (commencing with Section 7920.000) of Title 1), and shall be made available upon request without delay and in compliance with Section 54954.2 or Section 54956, as applicable. However, this section shall not apply to a writing, or portion thereof, that is exempt from public disclosure.

(b) (1) If a writing is a public record related to an agenda item for an open session of a regular meeting of the legislative body of a local agency and is distributed to all, or a majority of all, of the members of a legislative body of a local agency by a person in connection with a matter subject to discussion or consideration at an open meeting of the body less than 72 hours before that meeting, the writing shall be made available for public inspection pursuant to paragraph (2) at the time the writing is distributed to all, or a majority of all, of the members of the body.

(2) (A) Except as provided in subparagraph (B), a local agency shall comply with both of the following requirements:

(i) A local agency shall make any writing described in paragraph (1) available for public inspection at a public office or location that the agency shall designate for this purpose.

(ii) A local agency shall list the address of the office or location designated pursuant to clause (i) on the agendas for all meetings of the legislative body of that agency.

(B) A local agency shall not be required to comply with the requirements of subparagraph (A) if all of the following requirements are met:

(i) An initial staff report or similar document containing an executive summary and the staff recommendation, if any, relating to that agenda item is made available for public inspection at the office or location designated pursuant to clause (i) of subparagraph (A) at least 72 hours before the meeting.

(ii) The local agency immediately posts any writing described in paragraph (1) on the local agency's internet website in a position and manner that makes it clear that the writing relates to an agenda item for an upcoming meeting.

(iii) The local agency lists the web address of the local agency's internet website on the agendas for all meetings of the legislative body of that agency.

(iv) (I) Subject to subclause (II), the local agency makes physical copies available for public inspection, beginning the next regular business hours for the local agency, at the office or location designated pursuant to clause (i) of subparagraph (A).

(II) This clause is satisfied only if the next regular business hours of the local agency commence at least 24 hours before that meeting.

(c) Writings that are public records described in subdivision (b) and distributed during a public meeting shall be made available for public inspection at the meeting if prepared by the local agency or a member of its legislative body, or after the meeting if prepared by some other person. These writings shall be made available in appropriate alternative formats upon request by a person with a disability, as required by Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof.

(d) This chapter shall not be construed to prevent the legislative body of a local agency from charging a fee or deposit for a copy of a public record pursuant to Section 7922.530, except that a surcharge shall not be imposed on persons with disabilities in violation of Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof.

(e) This section shall not be construed to limit or delay the public's right to inspect or obtain a copy of any record required to be disclosed under the requirements of the California Public Records Act (Division 10 (commencing with Section 7920.000) of Title 1), including, but not limited to, the ability of the public to inspect public records pursuant to Section 7922.525 and obtain copies of public records pursuant to either subdivision (b) of Section 7922.530 or Section 7922.535. This chapter shall not be construed to require a legislative body of a local agency to place any paid advertisement or any other paid notice in any publication.

(Amended (as amended by Stats. 2021, Ch. 615, Sec. 208) by Stats. 2022, Ch. 971, Sec. 1. (AB 2647) Effective January 1, 2023.)