



DATE: February 6, 2019

TO: Planning Commissioners

FROM: Russell Hildebrand, City Attorney

RE: Bias and Ex parte Communications

INTRODUCTION

I have been asked to provide guidance and information regarding ex parte communications. As a decision maker at a public hearing, your decision should be based on the information presented at the hearing. Two primary concerns arise from communications and investigations outside of the public hearing. First, you may find yourself basing your decision on factors that weren't presented to the other decision makers at the public hearing. Second, you may become biased in your opinion about a project, which can interfere with your duty to have an open mind, and fairly consider all testimony and information presented at the public hearing.

DISCUSSION

The public has a right to fair and unbiased decision makers. The decision maker should not be tempted by his or her own personal interest or pecuniary interest. Examples of bias which could create a common law conflict of interest are a personal, but not financial interest in the outcome. A people bias, where you hold strong personal feelings positive or negative about one of the parties involved in a proceeding or decision. Or a factual bias, whereby you have information not available to the other decision makers. The law does not require proof of actual bias; it is sufficient to invalidate a decision if "an unacceptable probability of actual bias" on the part of the municipal decision-maker is established. *Woody's Group, Inc. v City of Newport Beach* (2015) 233 CA4th 1012, 1031.

A case of note is *Clark v City of Hermosa Beach* (1996) 48 CA4th 1152, which provides the following discussion regarding fair and unbiased hearings and decision makers:

"Over 60 years ago, one Court of Appeal discussed the common law prohibition on conflicts of interest, stating: "A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public Actual injury is not the principle the law proceeds on. Fidelity in the agent is what is aimed at, and as a means of securing it the law will not permit him to place himself in a position in which he may be tempted by his own private interests to disregard those of his principal. This doctrine is generally applicable to private agents and trustees,

but to public officers it applies with greater force, and sound policy requires that there be no relaxation of its stringency in any case that comes within its reason" (Noble v. City of Palo Alto (1928) 89 Cal.App. 47, 51 [264 P 529], citations omitted.) "[T]he common law doctrine against conflicts of interest ... prohibits public officials from placing themselves in a position where their private, personal interests may conflict with their official duties." (64 Ops.Cal.Atty.Gen. 795, 797 (1981); accord, 70 Ops.Cal.Atty.Gen. 45, 47 (1987).) fn. 18

A leading treatise on municipal law acknowledges the same concept: "The public is entitled to have its representatives perform their duties free from any personal or pecuniary interest that might affect their judgment. Public policy forbids the sustaining of municipal action founded upon a vote of a council member ... in any matter before it which directly or immediately affects him or her individually.... A finding of self-interest sufficient to set aside municipal action need not be based upon actual proof of dishonesty, but may be warranted whenever a public official, by reason of personal interest in a matter, is placed in a situation of temptation to serve his or her own purposes, to the prejudice of those for whom the law authorizes that official to act.... [A]n individual member ordinarily cannot vote on a matter in which that member ... is interested. If the member does, the action taken by the body of which he or she is a member is invalidated.... Where the vote of a member interested is necessary to pass an ordinance or bylaw, such ordinance or bylaw is void, irrespective of how beneficial the ordinance may be." (4 McQuillin, *The Law of Municipal Corporations* (3d ed. rev. 1992) ¶ 13.35, pp. 840-841, italics added, fns. omitted.)

[6] Moreover, "[i]n conducting the hearing, the [Council] ... has power to make final adjudications of fact in connection with matters properly submitted to it. The action of such an administrative board exercising adjudicatory functions when based upon information of which the parties were not apprised and which they had no opportunity to controvert amounts to a denial of a hearing.... Administrative tribunals which are required to make a determination after a hearing cannot act upon their own information, and nothing can be considered as evidence that was not introduced at a hearing of which the parties had notice or at which they were present.... [Emphasis added] The fact that there may be substantial and properly introduced evidence which supports the [Council's] ruling is immaterial.... A contrary conclusion would be tantamount to requiring a hearing in form but not in substance, for the right of a hearing before an administrative tribunal would be meaningless if the tribunal were permitted to base its determination upon information received without the knowledge of the parties. A hearing requires that the party be apprised of the evidence against him so that he may have an opportunity to refute, test, and explain it, and the requirement of a hearing necessarily contemplates a decision in light of the evidence there introduced...." (English v. City of Long Beach (1950) 35 Cal.2d 155, 158-159 [217 P.2d 22, 18 A.L.R.2d 547], citations omitted.)"

Of particular relevance to the question of ex parte communications is the sentence I underlined in the court's decision in *Clark v. Hermosa Beach*. A Commissioner cannot act

based on their own information. Because ex parte communications may give rise to due process or fair hearing challenges, I recommend to members of a hearing body that you not engage in ex parte communications about, or conduct independent investigation into, the subject matter of the hearing.

In legislative actions, for example acting on a zoning code amendment, procedural due process does not prohibit city council members or planning commission members from making ex parte contacts on such matters pending before them. *City of Fairfield v Superior Court* (1975) 14 C3d 768, 780. In quasi-judicial actions, actions on permits and land use approvals, due process requires decision-makers to be fair and impartial, so as a best practice city council members and planning commissioners who have ex parte contacts or who have received other information on matters pending before them should disclose at the start of the public meeting all such contacts and any information received, with a statement indicating whether these contacts or information have biased them.

This allows the applicant and the public to respond or comment on the information as required for a fair hearing. (See *English v City of Long Beach* (1950) 35 C2d 155, 158; see also *Clark v City of Hermosa Beach* (1996) 48 CA4th 1152, 1171) (evidence that council members' analysis of facts was not disclosed before public hearing began was sufficient to reverse council's decision).

A majority of the members of the city council or planning commission must not hear, discuss, deliberate, or take action on a matter among themselves except at a meeting that meets the requirements of the Ralph M. Brown Act (Govt C §54950 et seq.), whether the members meet together or in seriatim meetings. Govt C §54952.2

CONCLUSION

Should you elect to meet with a project applicant, or interested proponent or opponent to the project, you should announce this fact at the start of the public hearing. You should also state on the record that you have made no decisions regarding the project prior to the public hearing. If there is any relevant information that was gleaned from the ex parte discussion, and that information was not presented in the written agenda materials, then you should disclose that information.

Similarly, if you chose to conduct a site visit in advance of the hearing, you should announce that fact and describe at the hearing the facts or conditions observed at the site that you consider significant.