



## PROVIDING DUE PROCESS AND AVOIDING BIAS IN QUASI-JUDICIAL HEARINGS

Office of the City Attorney  
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### Introduction

At the Board's last meeting, the Board requested that the City Attorney's Office provide a training on conflicts in order to understand when a member may want or need to recuse themselves from a hearing. This presentation is meant to address this issue.



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## ACTS IN AN ADJUDICATORY CAPACITY

Where a particular law is applied to the facts of a particular issue.

This applies to the City Council and certain Boards and Commissions may also sit in an adjudicating capacity and should also be aware of these rules!



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## CHARACTERISTICS OF AN ADJUDICATORY OR QUASI-JUDICIAL PROCEEDING



- Does the matter require **advanced notice** and a **hearing**?
- Must the decision be **predicated upon specific findings of fact**?
- Does the decision **apply existing law to specific facts** to make an individualized determination of a specific person's rights or interest in life, liberty or property?



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## POSSIBLE PROBLEMS CONCERNING QUASI-JUDICIAL HEARINGS

### Ex Parte Communications

- Definition: Any **material and substantive** oral or written communication or sensory observation, with or by a decision maker, that is **relevant to the merits** of an adjudicatory hearing, and which **takes place outside of a noticed proceeding** open to all parties to the matter.
- (See, e.g. Government Code sect. 11430.10)
- Must be **substantive and relevant** to the matter before the Council to impact due process rights.
- Examples:
  - Speaking privately with a party to an appeal from a Planning Commission decision **about the merits** of that party's position prior to the hearing of the matter.



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## WHAT IS NOT EX PARTE COMMUNICATION?

- **Casual or non-substantive** communications.
- **Concerns and complaints** expressed by constituents.
- **Mere expression of support or opposition** to a particular decision does not raise due process concerns.
  - Unless it is accompanied by substantial factual information that influences the decisionmaker's analysis and conclusions.



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## WHY IS THE LAW CONCERNED WITH EX PARTE COMMUNICATIONS?

- Ex parte communications with or by City decisionmakers can **violate the constitutional and statutory due process rights** of the parties to a quasi-judicial City proceeding.
- Because these communications **create an appearance** that the decisionmakers are **not impartial**, and;
- They **deprive** the non-present parties of their **opportunity to challenge evidence** in an adversarial proceeding.
- Obtaining information about an issue outside a public hearing is **unfair** to the people whose rights are being determined by the City.



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## HOW TO REMEDY A SITUATION WHERE AN EX PARTE COMMUNICATION HAS OCCURRED



- California case law is clear that **pre-hearing disclosure** of ex parte communications adequately protects the due process interests of the non-present party to the matter.
- The disclosure should be **complete, detailed, and as early in the process as is reasonable.**
- Many agencies and some cities require **written disclosure.**



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## EX PARTE COMMUNICATIONS ARE PROHIBITED AFTER QUASI-JUDICIAL HEARING IF THE DECISION IS NOT FINAL

- There must be **no** ex parte communications during the period after the hearing closes but **before a final decision is adopted** because there is no opportunity for rebuttal.
- This scenario arises most often when a City **decisionmaker closes a quasi-judicial hearing** and directs staff to **prepare written findings**.
- Cities have differing approaches to ex parte communications during post-hearing Brown Act public testimony.
  - An on the record admonition advising the decisionmakers not to consider Brown Act-required public comment should be sufficient



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## BIAS



- When functioning in an adjudicatory capacity, a City Council must be “**neutral and unbiased.**” (*Woody's Group v. City of Newport Beach* (2015) 233 Cal.App.4<sup>th</sup> 1012).
  - A fair hearing requires a **neutral and unbiased decision maker.**
- Freedom from bias is important enough that the law does not require proof of actual bias; instead, “An unacceptable **probability** of actual bias” on the part of the municipal decision maker is enough to taint the process. (*Tumey v. State of Ohio* (1927) 273 U.S. 510).



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## HOW TO AVOID BIAS PROBLEMS



### General Rules

- Avoid discussing City decisions before a public hearing is held.
- If a discussion does happen, disclose what was talked about during the meeting before the public hearing is opened.
- After the hearing, if a final decision was not reached, do not have any discussions about the matter until a final decision has been rendered.



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## GENERALLY ACCEPTABLE ACTS

- **Expressing opinions** on community concerns
- **Attending community meetings** on matters of interest
- **Prior knowledge** of factual background
- **Campaign statements**  
(*Hauser v. Ventura County Bd. of Supvrs.* (2018) 20 Cal.App.5th 572;  
*City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768).
- **Membership in a neighborhood association** adjacent to where a project is located
- **Residing in a neighborhood adjacent to the project**, providing the member's residence/property is not impacted more than any in the neighborhood.  
(*Petrovich Dev. Comp. v. City of Sacramento* (2020) 48 Cal.App.5th 963)



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## ACTS GENERALLY NOT ACCEPTABLE

- Voting on a project having a **direct impact** on decisionmaker's personal or rental residence
- **Showing personal animosity** to a party to a quasi-judicial hearing  
(*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152)
- Writing a newsletter article attacking the project before the City Council  
(*Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470)
  - Social media posts would likely receive the same treatment from a court
- Becoming "**personally embroiled**" in the matter subject to the hearing
- **Counting votes** before the hearing and communicating updates about votes to the Mayor
- **Advocating** to fellow members **before** the hearing
- **Compiling talking points** against the project and emailing them to the Mayor's adviser
- Sending texts to opponents of the project suggesting pre-hearing presentations to other Council members. (*Petrovich, supra.*)



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## OTHER CONFLICTS THAT CAN LEAD TO BIAS PROBLEMS

- Financial interests/relationships
- Business relationships
- Personal Friendships



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## THE BOTTOM LINE

When sitting in an adjudicatory or quasi-judicial capacity, decision-making bodies such as the Board of Ethics must take steps to ensure the parties receive a fair hearing by unbiased decision makers and that due process is afforded to them.

**Those steps include:**

- Disclosure of any ex parte communications before a hearing;
- Preventing ex parte communications after the public hearing is closed;
- Avoiding bias, or even the appearance of bias, which can taint the process.

Following these simple rules and procedures will ensure **due process** and **avoid bias problems**.



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## CONCLUSION



**Discussion, Questions,  
& Answers**



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