

CLIENT NEWS BRIEF

Individual Councilmember's Conduct Found to Deny Fair Hearing

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It is sometimes difficult for elected officials to remain unbiased when considering controversial matters, while properly representing their constituents at the same time. Nonetheless, when acting in a quasi-adjudicatory capacity, elected officials must be "neutral and unbiased," and must recuse themselves if they are unable to do so. In *Petrovich Development Company, LLC v. City of Sacramento* (April 8, 2020, C087283) __Cal.App.5th __, the court found that a Sacramento City Councilmember was not neutral and impartial, necessitating his self-recusal from voting on an appeal for a conditional use permit. The court also provided guidance on actions that an elected official can take that would not create the "probability of actual bias."

Background

Petrovich Development Company, LLC (Petrovich) applied for a conditional use permit with the Sacramento Planning and Design Commission (Planning Commission) for a gas station in the shopping center zone of a local residential development. The Planning Commission approved the conditional use permit, however, representatives of the homeowner's association appealed the decision to the Sacramento City Council. On appeal, the City Council then denied the conditional use permit in a seven-to-two vote. Petrovich sued, alleging multiple claims, including being wrongfully deprived of a fair and impartial quasi-adjudicatory hearing and denial of due process of law. Specifically, Petrovich claimed that there was an unacceptable probability of actual bias by one Councilmember. The trial court held in favor of Petrovich and the matter was appealed to the Court of Appeal.

The Appellate Court's Decision

The Court of Appeal focused on whether there was a fair hearing. A councilmember must recuse themselves if there are sufficient facts to demonstrate an unacceptable probability of actual bias on their part. The Court of Appeal concluded that a number of factors that were raised did not constitute evidence of actual bias, including:

- The Councilmember's membership in the neighborhood association;
- The Councilmember's expression of public concern at a meeting of the neighborhood association. At that meeting, the Councilmember stated "I don't think a gas station fits in with what was originally proposed;" and
- The fact that the Councilmember lived in the residential neighborhood adjacent to the proposed gas station.

Nonetheless, the Court of Appeal found that Councilmember crossed the line and acted as advocate, not a neutral and impartial decision maker, based on the following actions:



Harold M. Freiman
Partner
Walnut Creek Office
hfreiman@lozanosmith.com



James Sanchez
Senior Counsel
Fresno & Monterey Offices
jsanchez@lozanosmith.com



Jayme A. Duque
Associate
Monterey Office
jduque@lozanosmith.com



As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

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- The Councilmember engaged in ongoing direct communication with the homeowner's association who appealed the Planning Commission's decision to the City Council, advising him on project "talking points," which in essence coached the appellant on how to prosecute the appeal to the City Council;
- There was evidence that the Councilmember was counting, if not securing, votes on the City Council against the gas station and communicating an "update" on that score to the Mayor; and
- The Councilmember prepared a compilation of "talking points" that amounted to a presentation against the gas station, which he emailed to the Mayor. The talking points were modified by the Mayor's staff to include a sequencing of the hearing and identified which councilmembers would move to deny the permit and second the motion, carried by a majority vote. This sequencing of events was what in fact occurred at the hearing.

The Court of Appeal found that the Councilmember should have recused himself from voting on the appeal. As stated by the Court:

These "concrete facts" establish that [the Councilmember] was biased. He took affirmative steps to assist opponents of the gas station conditional use permit and organized the opposition at the hearing. [The Councilmember] acted as advocate, not a neutral and impartial decisionmaker, and should have recused himself from voting on the appeal. Because he did not, Petrovich did not receive a fair hearing.

Takeaways

Elected officials face challenging circumstances when serving as a quasi-adjudicatory decision maker on a controversial matter. As we learn from *Petrovich Development Company, LLC*, the analysis of whether a fair hearing was conducted is fact driven. The Court of Appeal in this case outlined examples of facts that do and do not demonstrate an unacceptable probability of actual bias on the part of the decision maker. Elected officials facing such a complex process should consult with their legal counsel early in the process to ensure their ability to legally participate in the decision. The bottom line is that the more involved an elected official becomes in a matter that will be heard by the elected body prior that hearing, the greater chance that the official will be disqualified from participating in the hearing and the decision. Failure of an elected official to recuse themselves can result in invalidating the local agency's decision about a project.

If you have any questions about the *Petrovich* case and the issues raised by it, or to discuss any legal matters pertaining to public agencies, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcast](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

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