City of Santa Clara
The Center of What's Possible

City Attorney's Office
Legal Memorandum

Date: December 21, 2018

To: Honorable Mayor and Council Members

From: Brian Doyle, City Attorney

Subject: Due Process Requirements in Multilevel Reviews of Decisions

SUMMARY

Current City of Santa Clara practices involving multiple levels of review of land use decisions where the same decision-maker is involved with reviewing a decision that he or she was involved in making may deprive an applicant of a due process right to an impartial hearing. This Office recommends amending the City Code to streamline the levels of review of land use decisions and to re-examine who sits on appellate bodies to ensure that due process is complied with.

BACKGROUND

The purpose of this memorandum is to provide advice regarding the due process issues relevant to a decision-maker's multiple decisions on a project in different stages of review or appeal.

Under § 18.76.020(a) of the Santa Clara City Code (SCCC) Santa Clara's Architectural Committee (AC) is composed of two Planning Commissioners and one "member appointed by the City Council." No subject matter expertise is required by Code for serving on the AC. The AC cannot grant approval of any application without first making findings and determinations that the proposal follows generally defined "standards of architectural design," that consider traffic and "character of the neighborhood," among other things. Within 40 days of the submission of the application, the AC must make a decision, unless the applicant consents to an extension, and the failure to render the decision is deemed a denial. The Code does not require that the AC conduct public hearings, though the AC as a practice does conduct hearings during its twice-monthly meetings.

Applicants and "others affected" can appeal a decision of the AC to the Planning Commission (PC). SCCC § 18.76.010(h). Procedures for all PC public hearings are posted to the City's website, which includes appeals of AC actions. A copy of PC "Procedural Items," including Hearing Procedures, is attached hereto as **ATTACHMENT 1**. PC hearing rules, which are ostensibly informal and not required by

Code, specify that the Chair of the PC has discretion to apply "special procedures/time limits … to any items." *Id.*, Hearing Procedures, (e).

Actions of the PC on AC application can be appealed "in writing" to the City Council, either by an applicant, "others affected [that] are not satisfied" or by the City Council itself. SCCC §§ 18.76.010(h), 18.108.060(a). An appeal is filed with the City Clerk and a hearing is then set with notice to the Applicant. Within 45 days of the hearing, the City Council must render a decision to affirm, reverse, modify or remand the decision, or else the failure to render a decision is deemed an affirmation.

In addition to applications concerning simpler projects that receive initial examination and action by the AC, the AC also often receives applications for projects that the PC and City Council have already taken action on. The Code does not require that the PC and City Council, when considering an appeal, apply any measure of deference to prior decisions, Planning Office staff reports, or the findings and conclusion of the AC. In practice, the PC and City Council often consider applications *de novo* (entirely new), and consider all evidence and arguments again. As a result, members of PC and City Council may consider the same application more than once if they serve on the AC that initially hears an application, and no deference or presumption of correctness is afforded.

ANALYSIS

I. Procedural Due Process as Applied in Local Government Land-Use

Government bodies that make quasi-judicial decisions, applying facts in individual cases to existing sets of rules or laws, must comply with constitutional procedural due process rights. (*Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 482.)

1. Property Owners Must be Given Sufficient Notice of a Hearing

A decision-making body reviewing a permit application must give the applicant sufficient advance notice of both the information and issues it will examine during a hearing, "so that he may have an opportunity to refute, test, and explain it." *Clark v. City of Hermosa Beach (1996) 48 Cal.App.4th 1152, 1171-1172, as mod.*; *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612. Where members of a decision-making body are required to "make a determination after a hearing," they "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." *Clark, supra*, at 1172. In *Clark*, the city council failed to give notice when it based its decisions on a permit on issues raised after it completed the public hearing.

2. Hearing Officers and/or Panels Must be Impartial and without Conflicts

Procedural due process in an administrative setting requires that the hearing be conducted "'before a reasonably impartial, noninvolved reviewer.'" *Nasha*, *supra*, at 483. When a city council acts in an adjudicatory capacity, such as when it makes a decision on land use permits, it must be neutral and unbiased in its decision-making. *Woody's Group, Inc. v. City of Newport Beach* (2015) 233 Cal.App.4th 1012, 1021. Public officials must not be influenced by their personal and/or private interests. See *Clark, supra,* at 1170-1171. "The standard of impartiality required at an administrative hearing is less exacting than that required in a judicial proceeding," particularly as administrative decision-makers are "drawn from the community at large" and therefore likely "have knowledge of and contact or dealings with parties to the proceeding." *Nasha, supra, at* 483, citing *Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 219.

a. Hearing Officers Are Not Impartial if they have Previously Expressed or Taken a Position

A decision-maker cannot be a "reasonably impartial, noninvolved reviewer" if he or she publically advocated for a specific position on an application before the hearing. *Nasha, supra*, at 483-484. In *Nasha v. City of Los Angeles*, a planning commissioner's involvement in the hearing on a specific project violated the applicant's right to a fair hearing because that commissioner had previously authored a persuasive "newsletter" advocating for the denial of the permit. That same commissioner also made the motion to review the planning department's decision. *Id.* In *Woody's Group*, a city council member had an unacceptable probability of actual bias as evidenced by his "taking a position" on the permit when he emailed a notice of appeal of the planning commission's decision, and expressed his strong opposition to the permit application. *Woody's Group, Inc., supra,* 1022-1023; see also *Clark*, *supra* [Council member's letter years earlier when he was a private citizen opposing a prior version of the project].

Here, because of the composition and review of the AC, there may be substantial risk that a decision-maker develops and expresses an opinion on an application at or around the time it receives consideration before the AC, such that he or she lacks impartiality if and when the application is appealed and subsequently reviewed by either the PC or City Council. It is foreseeable that a planning commissioner serving on the AC expresses an opinion or viewpoint regarding an application either during an AC meeting or in writing afterwards. Although such an expression would be reasonably within the deliberative process, it could nevertheless signal that the decision-maker's mind is already made up and the subsequent review will not be fair and impartial. The more instances a decision-maker participates in consideration of an application, the greater the risk to impartiality.

b. A Panel that Initiates an Appeal then Hears the Appeal Creates the Perception of Not Being Impartial

A city council that initiates the appeal of a subordinate commission's decision and then reviews that same decision creates at least the "appearance" of a conflict of interest. *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 559. But, it does not violate procedural due process as long as the superior body is authorized by statute or ordinance to initiate and hear the appeal. See § II, *infra*.

Here, the City Council as a body is explicitly authorized by the City Code to initiate the appeal of PC decisions. So long as the act of appealing follows the Code and is not combined with evidence of impartiality, such as biased statements, it does not violate procedural due process. However, it does create the perception of bias regarding the appealed decision, which could amplify other indications that the applicant will not receive a fair and impartial hearing, should other indications exist.

In *Cohan v. City of Thousand Oaks*, developers applied for a planning permit for a proposed 47-acre development. The city's planning commission approved the permit at a public hearing. After the ordinance-imposed deadline for an appeal passed, the city council received substantial public input opposing the project. Thereafter, the council itself appealed the planning commission's decision even though the city ordinance only permitted individual persons to appeal. A hearing was held on emergency notice under the Brown Act, and the council ultimately overturned the planning commission's decision and denied the permit. The applicant developers then petitioned for a writ of mandamus in Superior Court, which the trial court denied. The Court of Appeal ordered a writ of mandamus nullifying the denial of the permit because "the cumulative effect of Council's actions resulted in a violation of appellants' substantive and procedural due process rights":

- The council failed to give notice of the grounds for the appeal to the applicant.
- The council's appeal of the lower commission's decision, which violated the express review procedures of the city ordinances, created "at least the appearance of conflict of interest in the proceedings."
- The council failed to announce in writing its decision on the appeal within the period of time set forth in both the city ordinance and the Subdivision Map Act.

In *Clark v. City of Hermosa Beach*, the Clarks applied for a building permit to renovate their residence, including building a portion of their home up to 35-feet high. At the time, a neighbor who later served as a member of the city council who rented a home nearby wrote a letter to the city opposing the Clark's 1989 permit. The city approved the application and issued a permit, but it later expired. Thereafter, the city adopted a new set-back requirement.

In 1992, the Clarks revised their plans and reapplied with a similar proposed improvement that complied with the new set-back requirement. The 1992 application was approved by the planning commission. Neighbors appealed the decision to the city council. Around the same time the council heard the appeal, it had debated, but then failed to pass, a moratorium on buildings over 30-feet because it lacked the three fifths of votes needed.

At the hearing, following the public input portion, the council raised new issues of whether the proposed improvement left sufficient open space on the lot and whether it exceeded maximum lot coverage, which the council acknowledged as new issues that were not considered by the planning commission. The council ultimately reversed the planning commission's decision and denied the application without prejudice. At a subsequent council meeting, while considering whether to rehear the appeal, council members expressly recognized they had denied the Clark's permit because it exceeded the 30-feet limits of the failed moratorium, and that they had also denied permits for other buildings that would have similarly exceeded 30-feet. The Clarks petitioned the Superior Court for a writ, which the court granted and reinstated the planning commission's ruling. The city appealed.

The Court of Appeal held that the city deprived the Clarks of a fair hearing under the state standard for administrative writs. First, the council was not impartial. The individual council member who rented and resided at a home near the proposed project had a conflict of interest due to the potential personal impact of the proposed permit on his residence, even if he was not the owner, which was evidenced in part by his 1989 opposition letter. Second, the council failed to give the Clarks proper notice and an opportunity to be heard on the two issues of open space and lot coverage, which were decided against them. Third, the council had an institutional bias against the Clarks because it attempted to implement the 30-foot moratorium (by majority) against individual applicants rather than adopt it city-wide for which it lacked the necessary (three fifths) votes.

II. Appeals

1. Rules for Hearing Appeals

A quasi-adjudicative decision-making body should only employ a review process that is set forth in statute, and should not rely on informal policies and practices, however longstanding. *Woody's Group, Inc., supra*, at 1028. Review of an appeal either without clear authority to do so in the city's ordinance, or in direct violation of code-prescribed procedures, may be so arbitrary and highhanded as to violate an applicant's due process rights. *Id.* at 1029.

The City Council may only initiate the appeal of the decision of a subordinate board or commission, and review the decision itself, if the appeal is authorized by ordinance(s) or

rule(s) that govern appeals. Those same ordinances or rules should specify grounds for appeal and burdens of proof.

Here, vagueness and ambiguity in the City Code language that defines the appeals process and procedures could be problematic. The PC does not have separate bylaws for hearing appeals, and its posted rules for public hearings do not specify that appeals are heard differently. Its rules also allow that "[s]pecial procedures/time limits may be applied to any items as prescribed by the Chair." **ATTACHMENT 1**, Hearing Procedures, (e).

The Code allows for an appeal based on dissatisfaction with a decision by the AC and PC, and it defines who may initiate the appeal and how. It also states that the appeal is "written," and must be made within a specific timeframe. But beyond that, it does not specify upon what grounds the appellant must base their appeal (e.g., how the AC applied a City standard); whether deference is given to the decision being appealed, including that the appeal could be heard *de novo*; and that the applicant continues to carry the burden of proof in the subsequent review hearing regardless of who initiates the appeal. As a result, applicants and appellants, should they be different, may not be advised of their respective roles in the hearing, including sequence of arguments, and their right to present information (including types of evidence – e.g. testimony from other neighbors) and argument. Moreover, without clear guidelines, the PC or City Council considering an appeal is left to develop its own informal policies and customary practices, and also has substantial discretion to deviate therefrom.

CONCLUSION

The City's current procedures for appeal of land use decisions are in substantial need of revision to ensure adequate due process for parties to the appeal. This Office recommends the following:

1. Direct the City Attorney and City Manager to draft amendments to the City's Zoning Code to provide for improved due process of appeals and to ensure impartiality of the decision-making body by eliminating the possibility of the same person sitting on multiple levels of an appeal.

2. Consider revising procedures for appeals to create only one level of appeal and clearly define the required basis for appeal and the level of review, i.e. *de novo* or abuse of discretion, as well as clear written procedures for hearings on appeals.

Brian Doyle /CEE

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City Attorney

cc: Deanna Santana, City Manager
Manuel Pineda, Assistant City Manager
Andrew Crabtree, Director, Community Development Department

ATTACHMENT 1

City of Santa Clara
PLANNING COMMISSION

PROCEDURAL ITEMS

DATE, TIME, and LOCATION OF MEETINGS
The City of Santa Clara Planning Commission holds its regular meetings generally on the second (2nd) and fourth (4th) Wednesdays of the month, with some exceptions, at 7:00 p.m. in the Council Chambers, City Hall, 1500 Warburton Avenue. Please refer to the schedule of meetings available in the Planning Division office and as provided in the City calendar. From time to time the Commission may hold a study session on special items.

SUBMITTAL OF MATERIALS/AVAILABILITY OF STAFF REPORTS
Interested parties may submit materials for the Commission's consideration. Materials submitted by Thursday at 5:00 p.m. of the week prior to the meeting can be included in the Commissioners' packets. Materials received late or at the public hearing may not be considered due to time constraints, unless special circumstances apply. Staff reports for items being heard by the Planning Commission are available the week of the meeting at the Planning Division Office located in the West Wing of City Hall. The Division's hours are 8:00 a.m. to 5:00 p.m., Monday – Friday; please phone (408) 615-2450 for more information.

STATUS OF PLANNING COMMISSION ACTIONS
Recommendations to the City Council:
The Commission's decisions on rezoning, prezoning and subdivision applications, Ordinance amendments and certain other items are recommendations to the City Council, which will hold public hearings on these items, normally 13 days following the Planning Commission's decision.
Decisions final at the Planning Commission hearing:
Decisions by the Commission on use permits, variances and other applications that are final at the Planning Commission hearing are administrative decisions. However, an administrative decision by the Planning Commission:

1. may be appealed to the City Council by the applicant(s) or opponent(s) of the item by filing a written appeal at the Office of the City Clerk [City Hall, 1500 Warburton Avenue (East Wing)] **within seven (7) calendar days of the action**, or
2. may be appealed by the City Council on its own motion.

City Zoning Ordinance Article 54

JUDICIAL REVIEW/STATUTE OF LIMITATIONS
Administrative decisions granting, denying or revoking an application for a permit, license, or other entitlement are subject to a ninety (90) calendar day statute of limitations for judicial review pursuant to California Code of Civil Procedures Sec. 1094.6 (City Ord. No.1630). For purposes of commencement of the ninety- (90) calendar day statute of limitations, an administrative decision by the Planning Commission is final at the time it is announced. If the decision is continued to a later time upon the close of the Planning Commission hearing on the matter, the date, time, and place of the announcement of the decision shall be provided at this hearing.

SCOPE OF CHALLENGE TO A PLANNING COMMISSION DECISION
If you challenge land use decisions in court, you may be limited to raising only those issues you or someone else raised at this public hearing or in written correspondence delivered to the City at, or prior to the public hearing. (California Government Code Sec.65009)

HEARING PROCEDURES
Public hearings are conducted by the Chair in accordance with the following procedures:

a) The Chair of the Commission directs all activity during the hearings. All comments shall be addressed to the Commission.
b) Any item on this agenda may be continued to a subsequent hearing.
c) Applicants will be allotted up to ten (10) minutes to present and justify proposals, following staff presentation of the item; other speakers will be given up to four (4) minutes; the applicant is allotted up to five (5) minutes for rebuttal of comments.
d) No additional comments will be accepted upon the close of the public hearing, although the Commission reserves the right to direct questions to any speaker on any matter.
e) Special procedures/time limits may be applied to any items as prescribed by the Chair.
f) Appeal of Commission actions must be filed in writing within seven (7) calendar days.

ORAL PETITIONS and ANNOUNCEMENTS
(15 minutes maximum)
Members of the public are provided with an opportunity to address the Commission on unagendized items within the jurisdiction of the Commission. Each speaker may be allotted up to 4 minutes. The law does not permit agency action on or extended discussion of any item not on the agenda except under special circumstances. Matters may be agendized for a subsequent meeting.

AMERICANS WITH DISABILITIES ACT (ADA)
In accordance with the Americans with Disabilities Act of 1990, the City of Santa Clara will ensure that all existing facilities will be made accessible to the maximum extent feasible. Reasonable modifications in policies, procedures and/or practices will be made as necessary to ensure full and equal access for all individuals with a disability. Individuals with severe allergies, environmental illness, multiple chemical sensitivity or related disabilities should contact the City's ADA office at (408) 615-3000 to discuss meeting accessibility. In order to allow participation by such individuals, please do not wear scented products to meetings at City facilities. For individuals with a Hearing Impairment, the Council Chambers has a headset system, which allows one to hear more clearly from any seat in the room. Ask a City staff member for details.