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City Attorney's Office
**Memorandum**

**Date:** June 11, 2020

**To:** Honorable Mayor and Members of the City Council
Honorable Chair and Members of the Planning Commission

**From:** Alexander Abbe, Assistant City Attorney

**Subject:** Recent Court of Appeal Case Involving Councilmember Impartiality: *Petrovich Development Co. v. City of Sacramento*

The purpose of this memorandum is to advise you regarding a recent court of appeal opinion, which overturned an administrative appeal decision by the Sacramento City Council based upon the apparent bias of one of the Councilmembers.

## Summary

In *Petrovich Development Company v. City of Sacramento*,[1] issued on April 8, 2020, the Sacramento City Council on a 7-2 vote disapproved a Conditional Use Permit (CUP) for a proposed gas station on appeal. The developer brought a challenge in court of the Council's decision, alleging that one of the Councilmembers was not impartial because he had communicated with several other Councilmembers about the merits of the appeal prior to the Council meeting, and because he had worked with the leaders of a neighborhood association to lobby other Councilmembers.

The Court of Appeal agreed with the developer, concluding that the Councilmember's actions demonstrated an unacceptable probability of bias, and therefore violated the developer's due process rights. The Court ordered the City to rescind its decision, and reconsider the CUP without the participation of that Councilmember.

The case highlights the importance of avoiding demonstrations of bias, including pre-decisional statements, about **quasi-judicial governmental decisions**, such as the issuance or denial of permits, variances, and code violations, whether to members of the public or to other public

[1] *Petrovich Development Co., LLC v. City of Sacramento*, No. C087283, 2020 WL 2306073 (Cal. 3d. App. Dist. Apr. 8, 2020).

officials. It is important to note that this ruling does **not** apply to legislative decisions such as the adoption of ordinances.

## Background Facts

The *Petrovich* case concerned an application for a CUP to construct a gas station at a proposed Safeway supermarket. A local group of residents, the "Sierra Curtis Neighborhood Association," had expressed opposition to the gas station, based on concerns over traffic, health and safety, and aesthetics. The Planning Commission granted the CUP, however, by a vote of 8-3. Members of the neighborhood association appealed the decision to the Sacramento City Council.

Sacramento Councilmember Jay Schenirer lived near the project site, and it was his impartiality that was challenged in the lawsuit. Mr. Schenirer was a member of the Sierra Curtis Neighborhood Association. Prior to the City Council hearing, the Councilmember appeared at an Association meeting and stated, "I don't think a gas station fits in with what was originally proposed" for the project site, a statement that was then reprinted in the Association newsletter.

The Councilmember's involvement with the Association went significantly beyond that one statement, however. The Councilmember prepared a list of "talking points" he sent to the Association president, accompanied by a message, "Are you all planning any visits to council members? If so, I have suggestions." The Association president then sent virtually identical emails to three of the Councilmembers, lobbying against the project, and using the talking points Councilmember Schenirer had provided.

The Councilmember apparently also spoke directly to several other Councilmembers about the project prior to the hearing, a fact that was brought up at the Council meeting. In response, Councilmember Schenirer stated, "I never said that I've talked to *all* the councilmembers. I haven't talked to *all* the councilmembers." He did, however, talk directly to the Mayor, sending him a "talking points" list of opposition points, similar to what he sent to the Association president. Through an intermediary, he told the Mayor he was "confident that he has the votes (if not a unanimous one) to deny the approval."

At the hearing, the Council voted 7-2 to disapprove the gas station. The developer filed a petition for writ of mandate to rescind the Council action, alleging that Councilmember Schenirer was biased.

## Discussion

*Due Process and Quasi-Judicial Decisions*

At the outset, the court of appeal observed that the approval of a Conditional Use Permit is a "quasi-judicial" decision, where the City Council essentially acts as a panel of judges, applying pre-existing policies and rules to a specific fact situation. This is to be contrasted from a "legislative" action, when the Council frames a rule or policy to be applied to a range of future cases.[2]

The distinction is important because for quasi-judicial acts, Constitutional due process protections apply. An applicant for a permit has a due process right to reasonable notice, a reasonable opportunity to be heard, and most relevant here, a hearing before an *impartial* decision-maker.[3] Due process for legislative matters, in contrast, is conducted at the ballot box.

The developer in the *Petrovich* case alleged that his due process rights had been violated, because Councilmember Schenirer had not been impartial.

*Impartiality*

To determine whether a public official acted with impartiality, a court will examine whether the evidence demonstrates "an *unacceptable probability* of actual bias."[4] Historically, courts required proof of *actual* bias, premised on the principle that there is a strong presumption of honesty and integrity by public officials.[5] But beginning in 2004, the courts began using a less deferential standard.[6] Now, "[a] party must show either actual bias or show a situation in which

[2] *Petrovich*, 2020 WL 2306073, at *5 - *6.
[3] *Mathews v. Eldridge*, 424 U.S. 319 (1976).
[4] *Petrovich*, 2020 WL 2306073, at *6.
[5] *Withrow v. Larkin*, 421 U.S. 35 (1975); *BreakZone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205, 1236-37 (2000); *Howitt v. Superior Ct. (County of Imperial)*, 3 Cal. App. 4th 1575, 1591 (1992).
[6] *Nasha LLC v. City of Los Angeles*, 125 Cal. App. 4th 470 (2004).

experience teaches that the probability of actual bias on the part of the decisionmaker is too high to be constitutionally tolerable."[7]

As a threshold matter, the court concluded that three pieces of evidence, by themselves, were *not* sufficient evidence to establish an unacceptable probability of bias:

- **The Councilmember's membership in the Neighborhood Association**. "Bias in an administrative adjudicator must be established with concrete facts rather than inferred from mere appearances."[8] Belonging to a neighborhood association, by itself, only presents an inference of bias, rather than concrete facts establishing bias.
- **The Councilmember's statement in the Association newsletter**. The court concluded that by itself, a statement that a "gas station does not fit in the development as originally proposed" was not sufficient evidence of bias to disqualify the Councilmember; the statement stopped short of an affirmative commitment to disapproving the gas station at Safeway. The Court reasoned that the Councilmember had also tempered his newsletter statement by stating that he "could not announce a definitive position before voting."[9]
- **The Councilmember's proximity to the project site**. The Councilmember's home was apparently far enough from the project site to not disqualify him under the Political Reform Act, but it was still in the neighborhood adjacent to the site. The Court concluded that this was insufficient evidence of bias, because there was "no evidence that Councilmember Schenirer's particular residence would be impacted by the gas station more than any other in the neighborhood."[10]

If the evidence above had been the only facts in the case, the record would not have established an "unacceptable probability of bias." But when the court considered the rest of the Councilmember's behavior, it concluded that he had crossed the line into advocacy against the project:

- **The Councilmember's direct contacts with other Councilmembers.** The Court was unimpressed by the Councilmember's statement that he hadn't contacted "all" of the

[7] *Petrovich*, 2020 WL 2306073, at *6.
[8] *Id.* at *6.
[9] *Id.* at *6 & n.8.
[10] *Id.* at *7.

other Councilmembers, when questioned about those contacts at the Council hearing. The court called this denial a "negative pregnant," which is "a denial of the literal truth of the total statement but not its substance." His direct attempts to influence the other Councilmembers was concrete evidence of bias.[11] (Note also that if the Councilmember's contacts reached a majority of the Council, this was a Brown Act violation as well.)

- **The "Talking Points" Given to the Mayor**. The Councilmember also demonstrated bias by preparing the compilation of facts he gave to the Mayor, which amounted to a presentation against the gas station. "E-mailing the talking points to the mayor . . . suggests both behind-the-scenes advocacy against the gas station, as well as organizing the presentation at the hearing to obtain a 'no' vote on the gas station."[12]
- **Helping the Neighborhood Association Lobby Other Councilmembers**. The Councilmember's communications with the president of the Neighborhood Association, which included a similar list of "talking points" to oppose the gas station, "was evidence that Councilmember Schenirer was 'coaching' [the president] on how to prosecute the appeal."[13]
- **The Councilmember made the motion to overturn the Planning Commission.** Finally, the Court found it relevant that Mr. Schenirer was the Councilmember who made the ultimate motion to overturn the Planning Commission decision and disapprove thee gas station; the documents showed that this had been choreographed in advance. "[T]his fact is an even more compelling indication of probable bias, because . . . this sequence was planned."[14]

The sum of these facts, combined, resulted in an "unacceptable probability" of actual bias, and the court ordered the City to rescind its decision, and reconsider the CUP without the participation of that Councilmember. "These 'concrete facts' establish that Councilmember Schenirer was biased. He took affirmative steps to assist opponents of the gas station conditional use permit and organized the opposition at the hearing. Councilmember Schenirer

[11] *Id.* at *7.
[12] *Id.* at *7.
[13] *Id.* at *7.
[14] *Id.* at *8.

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."[15]

*Off-The-Record Communications*

One additional takeaway from the case is the fact that most of the evidence demonstrating the Councilmember's bias took place outside of a public meeting. The court cited to the "ex parte communications, arguments, political pressure, threats and inducements *outside the public record*."[16] Although such "ex parte" communications are sometimes necessary, they can lead to the appearance of prejudgment or unfairness, and due process requires that quasi-judicial decisions are based upon the evidence presented at a hearing, to which affected parties have the opportunity to respond.[17] In the *Petrovich* case, it was only after two years of litigation and protracted discovery battles that the full extent of the off-the-record communications was revealed.

Consequently, we continue to recommend that a public official who receives relevant information outside of a hearing about a quasi-judicial decision should state those facts before the start of a public hearing. Due process requires that the City explain the basis for its decisions, and disclosing the information obtained outside a public hearing is a part of that process. This allows the affected parties to react to the information the public official has heard, give any relevant background, and sometimes, correct erroneous information.

## Conclusion

The *Petrovich* case stands out because there was such a significant amount of evidence establishing the Councilmember's bias, which the court found had violated the applicant's due process rights. In order to avoid a challenge to a quasi-judicial decision based on a lack of impartiality, we advise you to steer clear of any demonstration at any point before the close of a public hearing at a noticed public meeting that you have already made up your mind.

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[15] *Id.* at *8.
[16] *Id.* at *4.
[17] *Desert Turf Club v. Board of Supervisors of Riverside County*, 141 Cal. App. 2d 446, 455 (1956).

When hearing a quasi-judicial matter, take care when making statements to other public officials, statements to neighborhood associations, statements to developers, statements to the press, and statements during the hearing itself before all the evidence has been presented.

In addition, at the start of a public hearing, we recommend that you continue to disclose any contacts you have with project applicants or opponents about a quasi-judicial decision, and the nature of any unique information you obtained from such contacts.

If you have any questions about impartiality and due process based on this memo, or in connection with any future governmental decision, please feel free to reach out to our office.

**cc:** Brian Doyle, City Attorney

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