

1/12/21

Item # 3F

Julie Minot

From: Ken Kratz <kskratz@yahoo.com>
Sent: Friday, January 8, 2021 3:20 PM
To: Mayor and Council
Cc: Clerk
Subject: request removal of agenda item 3F. 21-897, BPAC member appointment, for discussion

3283 Benton Street
Santa Clara, Ca. 95051
January 8, 2021

Mayor and City Council
City of Santa Clara
1500 Warburton Avenue
Santa Clara, Ca. 95050

re: appointment of BPAC members, agenda item 3F. 21-897

Dear Mayor and City Council:

We request discussion on agenda item 3F. 21-897 regarding the appointment of Bicycle and Pedestrian Advisory Committee (BPAC) members; please remove that item from the Consent Calendar for discussion at your meeting scheduled for January 12, 2020. We have some concerns that we would like to bring to your attention regarding the BPAC voting process and will be asking you to postpone the seating of the new members until our concerns are addressed.

We will provide another e-mail to you, describing our concerns in more detail, that will expand an earlier e-mail and oral comments on this subject that we made at your last meeting in December.

Sincerely,

POST MEETING MATERIAL

Ken Kratz
Diane Harrison

BPAC members

1/12/21
Julie Minot

Item # 3.F

From: Ken Kratz <kskratz@yahoo.com>
Sent: Friday, January 8, 2021 5:00 PM
To: Mayor and Council
Cc: City Attorney
Subject: agenda item 3F. 21-897, BPAC member appointment, for discussion

Follow Up Flag: Flag for follow up
Flag Status: Flagged

3283 Benton Street
Santa Clara, Ca. 95051
January 8, 2021

Mayor and City Council
City of Santa Clara
1500 Warburton Avenue
Santa Clara, Ca. 95050

re: BPAC voting, election of members

Dear Mayor and City Council:

I have further comments and requests in regard to committee membership election processes in addition to my comments and requests sent in an earlier e-mail to you about the recent election of Bicycle and Pedestrian Advisory Committee (BPAC) members (e-mail dated December 15, 2020, attached). Because the City does not have any specific rules clearly defining the eligibility of members of the public to serve on boards, commissions and committees, I think the City Council should:

1. Require the City attorney who attended the December BPAC meeting to cite the City's "common law" that prohibits spouses serving concurrently on a city board, commission or committee and provide that citation to the BPAC for consideration; otherwise, require that attorney to publicly retract his statements on the subject.
2. Determine which social and financial ties among persons serving on a city council, commission, or committee are detrimental to the goals and ethics of the City of Santa Clara. Then codify them by putting them in writing and making those codes/rules widely available by placing them on the City's website. For example is there an issue with two members of a commission/committee being married to each other? Is there an issue with two members living together or living next door or living within 500' of each other or in the same district or working at the same company or in the same department of the same company? Is there an issue of two or more members belonging to the same social or political organization? Is there a similar issue if these two people are on different commissions/committees? Does it matter if there are financial ties between members of public bodies?

3. Require financial and social disclosure statements be submitted by elected members of all City boards/commissions/committees and those members of the public seeking to be elected to them. This should be a written city policy. The disclosure statements should be at least as thorough as those submitted annually by civil servants employed at the City; those are *financial* disclosures (investments in the stock market, business interests, etc. must be disclosed.). The city of Richmond, Ca. requires financial disclosure statements for members of their Boards, Commissions and Committees, as well as their civil servants. *Social* disclosures can, if desired, be included, such as name of a partner (married or other arrangement), names of related and unrelated people living in the same household. Names of people currently a member of the a public body who live within 500', work in the same business or company, belong to the same political or social organization should also be included. I would extend the disclosure statement policy to all members of the public seeking appointment to City boards, commissions and committees.
4. Do not seat new BPAC members until disclosure statements for elected members and those seeking to be elected to the committee have been submitted and made available to the public and current BPAC members. Provide those disclosure statements mentioned above to all members of the BPAC and other boards, commissions, and committees prior to voting on membership so that all candidates and members can be evaluated in terms of potential conflicts of interest.
5. Re-run the BPAC election under the rules that have been used in the past by the BPAC; those include secret ballots, ranked choice voting, and all current members allowed to vote. If Ken Kratz is re-elected, he be allowed to serve until a new policy prohibiting spouses from serving concurrently on boards, commissions and committees has been approved by the City Council.
6. Engage the BPAC in the revision of election rules and procedures. Councilperson and BPAC chairperson Hardy did not consult with BPAC members prior to her changing the BPAC election rules immediately prior to the December election.
7. For additional fairness in representation, consider changing the composition of the BPAC and other City Boards, Committees and Commissions to include a representative from each CSC District. Membership on BPAC should allow for some positions to be remain open to people who work in the City but do not reside in the City because some of the government grants available to the City for bicycle projects are tied to that membership stipulation.
8. Reprimand council member and BPAC chairperson Hardy for her independent and unauthorized conduct at the December meeting, in particular silencing dissent and changing election procedures on the fly.

Thank you for taking the time to review my concerns and requests.

Sincerely,

Ken Kratz
BPAC member

cc: City attorney

01-12-21

ITEM 3F
RTZ 21-897



**City of
Santa Clara**
The Center of What's Possible

City Attorney's Office
Memorandum

Date: January 4, 2021

To: Honorable Mayor Gillmor and City Council

From: Caio A. Arellano, Assistant City Attorney *CA*

Subject: Public Comment from Ken Kratz at December 16, 2020 Council Meeting

This memorandum responds to the Council's request for a response and clarification on a public comment from Ken Kratz at the Council's December 16, 2020 special meeting. Mr. Kratz expressed dissatisfaction with a statement I provided to the Bicycle and Pedestrian Advisory Committee, or BPAC, on December 10, 2020 which he described as "vague and erroneous statements about the propriety of spouses serving concurrently on the committee that were based neither in law nor City policy."

Contrary to Mr. Kratz's assertion, my statement did not address the question of spouses serving simultaneously on a committee. My statement addressed the BPAC's interview process, namely:

- (1) inconsistencies between the BPAC's process and the process followed by the other City boards and commission; and
- (2) legal analysis on potential of conflicts of interest affecting the interviews to be conducted at that meeting.

At the conclusion of my remarks, I advised Vice Mayor Hardy, who serves as BPAC Chair, that BPAC members Mr. Kratz and Diane Harrison should abstain from participating in the interview process to select members for the next term.

A video recording of the BPAC meeting is available on the City's website. My remarks begin at approximately 3:41:00 of the video.

Background

Mr. Kratz and his spouse, Diane Harrison both currently serve on the BPAC. Mr. Kratz's term expires in January 2021; he applied to serve another term. The BPAC did not nominate him for re-appointment.

POST MEETING MATERIAL

Under the interview policy BPAC adopted for itself in 2007 (and revised in 2008), the BPAC interviews applicants for the committee and then votes on which applicants to nominate for appointment by the City Council. The policy allows sitting members who are seeking appointment to participate in the interviews of other applicants. The policy also allows sitting members to vote for themselves.

Thus, under the selection policy that the BPAC had adopted for itself Mr. Kratz could interview the other applicants, and then vote for himself at the conclusion of the interviews. Furthermore, Committee member Harrison could also participate in the interviews and vote on applicants, including her spouse. On December 8, 2020, staff from the City Clerk's office and the Public Works Department contacted the City Attorney's office seeking advice on a potential conflict of interest. On December 9, 2020, I discussed the potential conflict with Vice Mayor Hardy, the BPAC Chair and Jonathan Yee, Public Works Transportation Manager.

Summary of Legal Analysis

Mr. Kratz's comment appears to respond to item (2) above, the legal analysis on potential conflicts of interests posed by the interviews being conducted at the BPAC meeting. The following paragraphs summarize that analysis.

Potential conflicts of interest

- Participation in the interview process by a Committee member who is seeking re-appointment
- Participation in interview process by a Committee member where the applicant is the Committee member's spouse

Neither of the potential conflict of interests involve conflicts stemming from financial or proprietary interests, which are governed by the Political Reform Act or Government Code section 1090. However, the situations do pose an issue of "common law" conflict of interest.

Common law conflict is based on the concept the decision makers should be fair, and unbiased. The notion of bias includes biases that have nothing to do with financial gain or losses, but nevertheless undercut the fundamental fairness of a proceeding. In the current context, the pertinent biases include:

- Personal bias. Loyalty (or animosity) to a person who is the subject of a decision which impedes a decision maker's ability to act fairly
- Dual role bias. An individual serves multiple roles in a proceeding, i.e. applicant and decision maker

Under the established case law, for a court to find a common law conflict, there must be "concrete facts showing an unacceptable probability of actual bias"¹. There are no cases directly on this point or involving similar facts as the present. Thus, absent concrete facts demonstrating such bias in the BPAC interview process a court probably would not find a common law conflict.

However, that conclusion is based on purely legal considerations, and the BPAC should also consider its ethical obligation to conduct the interview process in fundamentally fair manner without the appearance of favoritism. On that basis, I recommended that neither Mr. Kratz nor Ms. Harrison participate in the BPAC interview process.

Further, although I did not cite the City of Santa's Clara Code of Ethics and Values in my remarks to the BPAC, I would add Section 1c describes ethical behavior as follows: "I make impartial decisions, free of bribes, unlawful gifts, narrow political interests, and financial and other personal interests that impair my independence of judgment or action."

Indeed, Mr. Kratz's comment to the Council indicates some level of bias in favor of his re-appointment, as well as an apparent belief that his wife should have been able to participate in the interview process.

Caio Arellano
Assistant City Attorney

cc: Brian Doyle, City Attorney

¹ Petrovich Development Company, LLC v. City of Sacramento (April 8, 2020, C087283) ____ Cal.App.5th ____.