

CITY AND COUNTY OF SAN FRANCISCO



DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

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MEMORANDUM

TO: Charles Chase, President
Historic Preservation Commission
Members of the Historic Preservation Commission

FROM: Andrea Ruiz-Esquide *ARE*
Deputy City Attorney

DATE: June 8, 2010

RE: Options for Rules Regarding Ex-Parte Communications and Disclosure

In response to your request, we have prepared a summary of four options for the Historic Preservation Commission ("HPC") to consider regarding ex parte communications and disclosure. These options are based on the direction we received from the HPC at the public hearings where this issue has been discussed. They are designed to help you frame your discussion of the topic, and include:

- 1. Ex Parte Communications Not Allowed; Disclosure Required (Rule Adopted);**
- 2. Ex Parte Communications Allowed Only in the Presence of Planning Department Staff; Disclosure Required (Rule Adopted);**
- 3. Ex Parte Communications Allowed; Disclosure Required (Rule Adopted);**
- 4. No Change From Current Policy and Practice - Ex Parte Communications Allowed; Disclosure Required (No Rule Adopted).**

We summarize each option in turn below. The options are not listed in any order of priority.

In addition, we are including our office's advice to the Landmarks Preservation Advisory Board on site visits, dated April 19, 2006. This memorandum is attached as Attachment A.

Finally, for your information we are also including regulations from other agencies that have adopted similar rules regarding ex parte communications and disclosure. These rules are:

1. San Francisco Bay Conservation And Development Commission - Ex Parte Communications Rules (California Code of Regulations, Title 14, §§ 10280-10289);
2. San Francisco Redevelopment Agency, Resolution No. 10-2001; and
3. City of Berkeley, Resolution No. 62,571 - N.S.

These rules are included as Attachments B, C, and D, respectively.

Memorandum

TO: Charles Chase, President
Historic Preservation Commission
Members of the Historic Preservation Commission
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RE: Options for Rules Regarding Ex-Parte Communications and Disclosure

Option 1: Ex Parte Communications Not Allowed; Disclosure Required**ARTICLE VI – EX PARTE COMMUNICATIONS AND DISCLOSURE**

Section 1. Ex Parte Communications. While a matter is pending before the Commission, there shall be no communication related to that matter between any Commissioner and any party interested in that matter, other than at a public meeting of the Commission. This Section shall not apply to Commissioners who have recused themselves from participating in the matter. This Section shall not prohibit communications regarding purely procedural matters such as the scheduling of a hearing. For purposes of this Section, the following definitions apply:

1. A matter is pending before the Commission from the time an application is filed with the Planning Department until the time the Commission takes a final action on the matter.
2. A party interested in a matter means anyone who has an interest in such matter, including any employee, representative or consultant of the project sponsor for that matter, anyone who owns or rents property within 500 feet of the subject property, or any person or organization who appears before the Commission to oppose or support the project sponsor's application or otherwise actively opposes or supports such application. [OR: anyone who has a financial interest in such matter, including any employee, representative or consultant of the project sponsor for that matter and anyone who owns or rents property within 500 feet of the subject property.]

Section 2. Disclosure. If a Commissioner participates in an ex parte communication in violation of this article, or if a person participates in such a communication and later becomes a Commissioner, such Commissioner shall promptly disclose and make part of the public record the following:

1. If the communication is written, the writing and any written response of the Commissioner to the communication.
2. If the communication is oral, a description of the communication, stating the substance of the communication, any response made by the Commissioner, and the identity of each person from whom the Commissioner received the communication.

Section 3: Effect of Violation. Failure to comply with this Article does not invalidate a Commission action. However, in the Commission's discretion and upon its own motion, such failure may constitute a ground for reconsideration, or it may constitute a ground for the Commission to reprimand the offending Commissioner.

Memorandum

TO: Charles Chase, President
Historic Preservation Commission
Members of the Historic Preservation Commission
DATE: June 8, 2010
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RE: Options for Rules Regarding Ex-Parte Communications and Disclosure

Option 2: Ex Parte Communications Allowed Only in the Presence of Planning Department Staff; Disclosure Required

ARTICLE VI – EX PARTE COMMUNICATIONS AND DISCLOSURE

Section 1. Ex Parte Communications. While a matter is pending before the Commission, there shall be no communication related to that matter between any Commissioner and any party interested in that matter, absent the presence of Planning Department staff, other than at a public meeting of the Commission. This Section shall not apply to Commissioners who have recused themselves from participating in the matter. This Section shall not prohibit communications regarding purely procedural matters such as the scheduling of a hearing. For purposes of this Section, the following definitions apply:

1. A matter is pending before the Commission from the time an application is filed with the Planning Department until the time the Commission takes a final action on the matter.
2. A party interested in a matter means anyone who has an interest in such matter, including any employee, representative or consultant of the project sponsor for that matter, anyone who owns or rents property within 500 feet of the subject property, or any person or organization who appears before the Commission to oppose or support the project sponsor's application or otherwise actively opposes or supports such application. [OR: anyone who has a financial interest in such matter, including any employee, representative or consultant of the project sponsor for that matter and anyone who owns or rents property within 500 feet of the subject property.]

Section 2. Disclosure. If a Commissioner participates in an ex parte communication, whether in the presence of Planning Department staff as allowed by this rule or otherwise, or if a person participates in such a communication and later becomes a Commissioner, such Commissioner shall promptly disclose and make part of the public record the following:

1. If the communication is written, the writing and any written response of the Commissioner to the communication.
2. If the communication is oral, a description of the communication, stating the substance of the communication, any response made by the Commissioner, and the identity of each person from whom the Commissioner received the communication.

Section 3. Effect of Violation. Failure to comply with this Article does not invalidate a Commission action. However, in the Commission's discretion and upon its own motion, such failure may constitute a ground for reconsideration, or it may constitute a ground for the Commission to reprimand the offending Commissioner.

Memorandum

TO: Charles Chase, President
Historic Preservation Commission
Members of the Historic Preservation Commission
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Option 3: Ex Parte Communications Allowed; Disclosure Required**ARTICLE VI – EX PARTE COMMUNICATIONS AND DISCLOSURE**

Section 1. Ex Parte Communications. Commissioners may, at their individual discretion, engage in ex parte communications. Ex parte communications are communications received by Commissioners regarding matters pending before the Commission from any party interested in that matter, other than at a public meeting of the Commission, except communications regarding purely procedural matters such as the scheduling of a hearing. For purpose of this Section, the following definitions apply:

1. A matter is pending before the Commission from the time an application is filed with the Planning Department until the time the Commission takes a final action on the matter.
2. A party interested in a matter means anyone who has an interest in such matter, including any employee, representative or consultant of the project sponsor for that matter, anyone who owns or rents property within 500 feet of the subject property, or any person or organization who appears before the Commission to oppose or support the project sponsor's application or otherwise actively opposes or supports such application. [OR: anyone who has a financial interest in such matter, including any employee, representative or consultant of the project sponsor for that matter and anyone who owns or rents property within 500 feet of the subject property.]

Section 2. Disclosure. If a Commissioner participates in an ex parte communication, or if a person receives such a communication and later becomes a Commissioner, such Commissioner shall promptly disclose and make part of the public record the following:

1. If the communication is written, the writing and any written response of the Commissioner to the communication.
2. If the communication is oral, a description of the communication, stating the substance of the communication, any response made by the Commissioner, and the identity of each person from whom the Commissioner received the communication.

Section 3: Effect of Violation. Failure to comply with this Article does not invalidate a Commission action. However, in the Commission's discretion and upon its own motion, such failure may constitute a ground for reconsideration, or it may constitute a ground for the Commission to reprimand the offending Commissioner.

Memorandum

TO: Charles Chase, President
Historic Preservation Commission
Members of the Historic Preservation Commission
DATE: June 8, 2010
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RE: Options for Rules Regarding Ex-Parte Communications and Disclosure

**Option 4: No Change From Current Policy and Practice - Ex Parte
Communications Allowed; Disclosure Required.**

A fourth option would be to continue the unwritten policy and practice the HPC has been following, to allow ex parte communications and require prompt disclosure on the record when the matters to which the communications relate are discussed. This would operate in the same way as Option 3, but no rule would be adopted by the HPC.

If the HPC decides to pursue this option, the HPC should request disclosure of the names of the persons or organizations who have met with any Commissioners, along with a description of the subject matter of the communication. The disclosure should be sufficiently detailed to allow interested parties an opportunity to respond.

The HPC should consider when in the course of the public hearing on a particular matter disclosure would be required. We recommend that disclosure occur immediately preceding consideration of the matter in question, so that members of the public who may be present at the hearing only for that particular item are put on notice that the communication has taken place and have an opportunity to respond, before the HPC takes any action.

ATTACHMENT A

CITY AND COUNTY OF SAN FRANCISCO



DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

MARLENA G. BYRNE
Deputy City Attorney

DIRECT DIAL: (415) 554-4620
E-MAIL: marlena.byrne@sfgov.org

MEMORANDUM

TO: Bridget Maley, President
Landmarks Preservation Advisory Board

Mark Luellen, Preservation Coordinator
Planning Department

CC: Sonya Banks, Secretary
Landmarks Preservation Advisory Board

FROM: Marlena G. Byrne
Deputy City Attorney

DATE: April 19, 2006

RE: Landmarks Preservation Advisory Board Site Visits

You have asked our office for advice on procedures for planning and conducting guided site visits of properties that are the subject of pending matters before the Landmarks Preservation Advisory Board (the "Board"). If it appears likely that a majority of the Board will, together or separately, want to attend a guided tour of a project site, we recommend that the Board publicly notice and hold a single site tour, consistent with applicable open meeting laws. Likewise, if a majority of Board members will likely be at the project site at the same time whether or not the visit is guided, the Board should publicly notice and hold a single site visit.

Individual Board members could make separate, unguided visits and site inspections in the same manner as would be available to any member of the public, without participating in a guided site tour and without a majority of the Board participating in a single visit. Board members who make such individual inspections should announce on the record at the meeting on the project that they have visited the site and describe what they have seen.

Recommendations for Conducting Guided Site Visits

The Board must address the following issues when planning and conducting a special meeting for a guided site tour:

1. Notice and Agenda.

San Francisco's Sunshine Ordinance requires that special meetings of the Board held somewhere other than the location of its regular meetings (i.e. City Hall) be noticed at least 15 days in advance. (Admin. Code § 67.1(f).) Staff should provide notice in the same manner that it notices any special meeting.

The agenda need only contain one item: site visit and presentation by project sponsor. In addition to the form language that the Sunshine Ordinance requires for agendas, it would be desirable to include information regarding public transportation options for the special meeting location.

Memorandum

TO: Bridget Maley, President
Landmarks Preservation Advisory Board

Mark Luellen, Preservation Coordinator
Planning Department

CC: Sonya Banks, Secretary
Landmarks Preservation Advisory Board

DATE: April 20, 2006

PAGE: 2

RE: Landmarks Preservation Advisory Board Site Visits

2. Disability Access.

Site tours of historic buildings may raise disability access issues because the structures predate disability access laws. Although the site that the Board will visit need not comply with current building code accessibility standards, in general, City policy bodies, such as the Board, must conduct their meetings in accessible locations. (Admin. Code § 67.13(a).) When making initial arrangements for the site visit, staff, in consultation with the City Attorney's Office, should confirm the accessibility of the areas of the site that the Board will tour.

If all or portions of the project site may not be accessible, Board staff should work with our office and the project sponsor to arrange temporary site accommodations and tour modifications to meet accessibility requirements while providing necessary information about historic resources to the Board and the public.

3. Audio Taping and Minutes.

Because the Board is not a body created by the City Charter, it is not required to tape its meetings, although, in general, its practice has been to do so. In keeping with this practice, if it is reasonably feasible, staff should record the meeting. Staff should also keep minutes as they would for any regular or special meeting.

4. Public Comment.

The Board should provide an opportunity for public comment during the site tour on the subject of the site tour; however, it does not need to provide an opportunity for "general public comment," (i.e., public comment on anything within the Board's jurisdiction). (Cal. Gov't Code § 54954.3(a); Admin. Code § 67.15(b).)

Because the Board need only provide comment at some time during the meeting, the Board president may decide and announce when the Board will receive public comment on the tour. If the group is very small, the president may elect to invite the public to comment throughout the course of the tour. If the group is larger, the president may elect to allow public comment before or after the tour, with only the Board members asking questions, making remarks, or engaging in discussion during the course of the tour.

5. Lack of a Quorum.

If a quorum of Board members fails to show up at the appointed time for a site visit, the tour may still go forward, but it would no longer be a meeting of the Board. Alternatively, the Board could elect to reschedule the meeting. If the members who are present elect to take the tour, they should report back on the tour to the full Board at the next regular meeting that includes the project on the agenda.

I hope these guidelines are helpful in planning and conducting future site visits of the Board. If you have any questions or concerns, please feel free to contact me.

MGB

ATTACHMENT B

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

BARCLAYS OFFICIAL CALIFORNIA CODE OF REGULATIONS

TITLE 14. NATURAL RESOURCES

DIVISION 5. SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

CHAPTER 2. THE COMMISSION, THE STAFF, AND THE ADVISORY REVIEW BOARDS

ARTICLE 8. EX PARTE COMMUNICATIONS

§ 10280. Purpose.

Fairness and due process of law are essential elements of responsible government. Public confidence in government is highest when an agency conducts its adjudicatory business openly and impartially. This regulation supplements and helps explain minimum legal requirements concerning the disclosure of communications that occur outside of the normal hearing process and would therefore not be part of the administrative record when the Commission acts on permit applications and on enforcement cases and takes other adjudicatory actions. However, Commission members can, and are encouraged to, disclose more information relative to any communication that occurs outside of the public record to ensure that all Commission members can make informed decisions.

§ 10281. Definition of an Ex Parte Communication.

An ex parte communication is any oral or written communication regarding a pending adjudicatory proceeding between a member of the Commission and either any party to the pending Commission adjudicatory proceeding or a member of the public that does not occur in a Commission public hearing, Commission workshop, or other official Commission proceeding or on the official Commission record for the proceeding.

§ 10282. Definitions of a Quasi-Judicial Proceeding and of a Quasi-Legislative Proceeding.

All Commission actions are considered to be either adjudicatory or quasi-legislative. An adjudicatory action by the Commission affects specific rights or interests of an individual or business entity based on specific facts, such as the granting of a permit, the issuance of a cease and desist order, the issuance of a report to the California Energy Commission pursuant to California Government Code Section 66645(d), or Commission review of a federal consistency determination or certification. A quasi-legislative action generally applies to a given class or group of individuals or entities and usually takes the form of a Commission plan amendment, policy, or regulation.

§ 10283. General Policy and Disclosure of Ex Parte Communications.

(a) Ex parte communications are prohibited in adjudicatory actions. However, if such a prohibited communication occurs, any Commission member who receives an ex parte communication concerning any adjudicatory matter pending before the Commission shall disclose the content of the communication on the record.

(b) The disclosure shall occur prior to or at the same time as the Commission considers the matter that is the subject of the ex parte communication.

(c) Compliance with this disclosure requirement regarding the receipt of an ex parte communication in written form shall be accomplished by sending a copy of the written communication and any response to the communication to the Commission Executive Director as soon as practicable.

(d) Compliance with this disclosure requirement regarding the receipt of an ex parte communication orally shall be accomplished by submitting a memorandum to the Executive Director for inclusion into the record of the matter that is the subject of the ex parte communication.

(e) The memorandum required by paragraph (d) shall include the substance of the communication, any response by the recipient Commission member, and the identity of each person from whom the recipient Commission member received the communication.

(f) This policy shall not apply to quasi-legislative matters such as the adoption of or the amendment to a Commission plan, the adoption of or the amendment of a Commission regulation, and Commission comments on proposed or pending legislation.

§ 10284. Permissible Ex Parte Communications.

The following types of ex parte communications are not prohibited by these regulations and do not require any disclosure into the record:

(a) communications specifically authorized by statute and required for the disposition of an adjudicatory matter;

(b) the communication involves a matter of procedure or practice that is not in controversy;

(c) the communication is from an employee or representative of BCDC who has not served as an investigator, prosecutor, or advocate during the proceeding or pre-adjudicative state and whose purpose is to assist or advise the Commission;

(d) the communication is from an employee or representative of BCDC and concerns a settlement proposal advocated by the employee or representative; and

(e) the communication is from an employee or representative of BCDC and involves a non-prosecutorial proceeding.

§ 10285. When the Policy Applies.

(a) The policy established by Sections 10283 and 10284 shall commence to apply for a permit application or a federal consistency determination or certification when an applicant first submits an application, a consistency determination, or a consistency certification to the Commission.

(b) The policy shall commence to apply for a Commission enforcement action when the Commission staff mails either a violation report or a complaint for the imposition of administrative civil penalties.

§ 10286. Notification of Parties and Interested Persons.

(a) As soon as is practicable, the Executive Director shall notify in writing all parties to a proceeding and all persons interested in the proceeding that a Commissioner has received an impermissible ex parte communication.

(b) If the communication was received orally, the Executive Director shall include a copy of the memorandum and any response to the communication required by Sections 10283(d) and (e) with the written notification.

(c) If the communication was received in writing, the Executive Director shall include a copy of the written communication with the written notification.

(d) In either case, the notice shall also state that the party or person being notified must request an opportunity to address the Commission concerning the communication within 10 days of receiving the notice or the party or person shall waive the opportunity to address the Commission.

§ 10287. Party Opportunity to Respond to an Ex Parte Communication.

If a party requests an opportunity to address the Commission concerning the communication within 10 days as required by Section 10286, the Commission shall grant the request and may allow the requesting party to present rebuttal evidence concerning the subject of the ex parte communication.

§ 10288. Ex Parte Communications After the Close of the Public Hearing and After the End of the Time Period for Receipt of Written Communications; Public Comments and Responses.

(a) If an oral ex parte communication occurs after the close of the public hearing or a written ex parte communication occurs after the deadline for submitting written comments, the ex parte communication shall be disclosed as required by Section 10283.

(b) The Commission Chair or the Commission may determine that the communication contains new or different information pertinent to the decision being made. The Commission Chair or the Commission may also determine that reopening the public hearing is therefore necessary to protect the integrity of the decision-making process.

(c) If the Commission chair or the Commission makes both such determinations, it shall circulate the communication to the entire Commission and may reopen the public hearing to allow the public sufficient opportunity to comment on and to rebut the information contained in the communication unless a legal deadline for voting prevents reopening the hearing.

(d) If necessary, either the deadline for Commission voting shall be extended or the Commission shall deny the application because of the public's inability to comment on the new or different information.

(e) If a conflict occurs between this section and Commission Regulation Section 10430, this section shall take precedence.

§ 10289. Field Trips.

(a) A Commission member may take an individual field trip to the site of a proposed project or a pending enforcement action so long as the Commission member discloses the fact of the field trip and the substance of all that he or she observed to the Commission as soon as practicable afterwards.

(b) The Commission's policy on ex parte communications shall apply to any communication that involves a Commission member that occurs during a field trip either by an individual Commission member or by the Commission.

ATTACHMENT C

SAN FRANCISCO REDEVELOPMENT AGENCY

RESOLUTION NO. 10-2001

Adopted February 6, 2001

**ADOPTING POLICY FOR THE DISCLOSURE OF OUTSIDE
COMMUNICATIONS BY AGENCY COMMISSIONERS AND OFFICERS ON
MATTERS PENDING BEFORE THE AGENCY COMMISSION**

BASIS FOR RESOLUTION

1. Pursuant to California Health and Safety Code Section 33125, the Redevelopment Agency of the City and County of San Francisco (the "Agency") may adopt bylaws and regulations for to effectuate the powers and purposes of the Agency.
2. The Agency has determined that it is necessary to adopt certain policies and procedures regarding the meetings of the Agency.
3. The Agency has considered the proposal that individual Agency Commissioners and officers disclose their outside communications with all persons who have a matter or interest pending before the Agency Commission.
4. The Agency has determined that the policy will promote the public interest and principles of fundamental fairness and due process while maintaining the opportunity of the public to present their views and opinions to the Agency Commissioners.
5. The Agency has further determined that these disclosures can occur in a manner that does not infringe on the rights of citizens to petition their governments.
6. In order to implement this policy, the Agency By-Laws will be amended to include the disclosure in as an item of business on the Commission Agenda.
7. In the event that the City and County of San Francisco adopts a policy applicable to the City and its commissions, the Agency's policy may be reviewed and modifications considered.

RESOLUTION

NOW, THEREFORE, BE IT RESOLVED that the Redevelopment Agency of the City and County of San Francisco adopts the policy set forth in Exhibit A: Policy and Procedure, Disclosure of Outside Communications by Agency Commissioners and officers, adopts the written form for disclosure that is attached to the Policy and directs the Executive Director to prepare and

submit for the Agency Commission's consideration an amendment to the By-Laws of the Redevelopment Agency of the City and County of San Francisco as may be necessary to implement this policy.

APPROVED AS TO FORM:

Bertha A. Ontiveros
Agency General Counsel

POLICY AND PROCEDURE

DISCLOSURE OF OUTSIDE COMMUNICATIONS BY AGENCY COMMISSIONERS AND OFFICERS

1. Findings and Authority

The Agency finds that the public interest would be served by adopting policies and procedures regarding the disclosure and reporting of attempts to influence pending decisions. This policy and procedure will promote the open, objective and impartial conduct of Agency business while maintaining the opportunity of the public to present their views and opinions to Agency Commissioners. The public interest and principles of fundamental fairness and due process of law require that the Agency Commission conduct its affairs in an open, objective, and impartial manner free of undue influence and the abuse of power and authority. The Agency's redevelopment program requires public awareness, understanding, support, participation and confidence in the Agency Commission and its practices and procedures. This policy is necessary to preserve the public's welfare and integrity of, and to maintain the public's trust in, the Agency Commission and the implementation of this policy.

Due process, fairness and responsible exercise of authority are all essential elements of good government which require the public's business to be conducted in public meetings and on the official record, except as may be provided by law. Reasonable restrictions are necessary and proper to prevent future abuses and misuse of governmental power so long as all members of the public are given adequate opportunities to present their views and opinions to the Agency Commission through written or oral communications on the official record either before or during the public hearing on any matter before the Agency Commission.

2. Policy

No Agency Commissioner or Officer¹ shall make, participate in making, or otherwise attempt to influence a Commission decision about which the Agency Commissioner or Officer has knowingly had an Outside Communication that has not been reported as described herein.

3. Applicability

As used herein, "**a Matter within the Commission's Jurisdiction**" means any contract (including but not limited to a lease, loan agreement, guarantee,

¹ As defined by Section 21 of the Agency Bylaws, the Agency Officers are the President, Vice-President, Secretary, Treasurer, Executive Director, and Senior Deputy Executive Director.

purchase agreement, disposition and development agreement, owner participation agreement, regulatory and grant agreement, permit to enter, purchase order, public works or improvements agreement, personal services contracts), design approval or other matter pending before the Agency Commission for its consideration and approval.

4. Outside Communication Defined

(a) For purposes of this rule, except as provided in subdivision (b) below, an **“Outside Communication”** is any oral or written communication, or electronically transmitted communication, between a Agency Commissioner and Officer and any member of the public about a matter within the Commission’s Jurisdiction.

(b) The following communications are **not** an Outside Communication:

- (1) Communications occurring during a meeting of the Agency Commission which is open to the public.
- (2) Communications contained in, or reported in, Agency Commission agenda materials which are open to the public.
- (3) Communications between an Agency Commissioner or Officer and the Agency staff, where the staff member is acting in his or her official capacity.
- (4) Any communication limited entirely to procedural or ministerial issues, including but not limited to, schedule and location of Agency Commission meetings.
- (5) Any communication which takes place on the record during an official proceeding of a local or state governmental agency other than the Agency, when an Agency Commissioner or Agency Officer serves on the governing board of such governmental agency.
- (6) Any communication which takes place on the record during an official proceeding of a project area committee or citizens advisory committee for a redevelopment survey area or project area or during an official community meeting sponsored by the Agency, when an Agency Commissioner or Agency Officer attends and listens to the public and/or committee communications during the meeting.

- (7) Communications between or among Agency Commissioners which would not constitute a meeting for purposes of the Ralph M. Brown Act.
- (8) Communications which are privileged under California law.
- (c) Nothing in this Disclosure Policy prohibits any person from testifying at a Agency Commission hearing, workshop or other official proceedings, or from submitting written comments for the record on a matter before the Agency Commission. Written comments shall be submitted by mail or delivered to the Agency office, or may be delivered to the Agency Commission at the time and place of a scheduled hearing.

5. Outside Communication to be Reported

- (a) Each Agency Commissioner or Officer shall make public each Outside Communication to which he or she has been a party, by disclosure in the manner described in this section.
- (b) Each Agency Commissioner or Officer shall report, on the form approved by the Agency Commission, any Outside Communication and such completed form shall be delivered to the Agency Secretary within five (5) days after the communication. If, however, such delivery to the Agency Secretary would thereby occur fewer than five (5) days before the next Agency meeting, the report shall instead be made either orally on the record at such meeting or by distribution of the report form at the time of the meeting.
- (c) The report of Outside Communications by an Agency Commissioner or Officer shall at a minimum state the name of the person or organization making the Outside Communication, the date and subject matter of the Outside Communication, and the manner in which such communication was made (e.g. oral or written). A copy of written materials, if any, that was a part of the Outside Communication shall be attached or, if the disclosure is made orally, the materials shall be provided to the Agency Secretary on or before the meeting at which the disclosure is made.
- (d) The Agency Secretary will place all written reports so received on the Agency website and make them available for public inspection at the Agency's office.
- (e) Regular and special meetings of the Agency Commission shall include, on its noticed meeting agenda, an item in the Order of Business - prior to the Agency Commission's consideration of any other matter on its agenda - that permits the Agency Secretary to report on the written forms received

and permits Agency Commissioners to disclose orally any Outside Communications pursuant to this policy.

- (f) Communications shall cease to be an Outside Communication when fully disclosed and placed in the Agency Commission's official record.

7. Effect of Violation

Failure to make timely reports as required herein shall not invalidate an Agency action. However any failure hereunder may constitute a ground for reconsideration upon the Agency Commission's own motion and in its discretion. Further, in the Commission's discretion, a failure to comply with this policy may be the basis for the Agency Commission to consider whether to adopt a resolution reprimanding the Commissioner or Officer for such failure.

SAN FRANCISCO REDEVELOPMENT AGENCY

Report of Outside Communication

Commissioner/Officer Name: _____

Date of Communication: _____ Time: _____

Location: _____

Person or Persons Initiating Communication:

Subject:

Content of Communication:

(If written material was all or part of communication, attach a copy of written material.)

When this form is completed and placed in the Agency Commission's public record of lobbying communications, the Agency Commissioner or Officer has complied with the Agency's Policy and Procedure for Disclosure of Outside Communications and may participate in making a decision which was the subject of this communication or may attempt to influence the Agency Commission's decision on the matter which is reported herein.

Deadlines for filing:

For communications that occur 5 or fewer days before Agency Commission meeting, the Commissioner/Officer may file this form with the Agency Secretary before the beginning of the meeting or make an oral report at the Agency Commission meeting.

For all other communications, the Agency Commissioner/Officer must file this form with the Agency Secretary no more than 5 days following the communication.

Written material attached:

_____ Yes

_____ No

Signature:

Date: _____

Filing Stamp when received in Agency Secretary's Office:

ATTACHMENT D

RESOLUTION NO. 62,571-N.S.

ESTABLISHING FAIR PROCEDURES IN LAND USE QUASI-JUDICIAL PUBLIC HEARINGS BEFORE THE CITY COUNCIL, PLANNING COMMISSION, LANDMARKS PRESERVATION COMMISSION, ZONING ADJUSTMENTS BOARD AND HOUSING ADVISORY COMMISSION AND REPEALING SECTION I F OF THE COUNCIL RULES BY AMENDING RESOLUTION 62,420

WHEREAS, the City of Berkeley has adopted a range of regulations to regulate land uses in Berkeley; and

WHEREAS, these include the City's Zoning ordinance, Landmarks Preservation ordinance and Subdivision ordinance; and

WHEREAS, these regulatory schemes adopt procedures to guide the application of the standards contained in these regulatory schemes to particular land uses, structures and divisions of property; and

WHEREAS, these procedures generally provide for boards and commissions to implement these regulatory schemes in the first instance, with ultimate oversight and review by the City Council; and

WHEREAS, the purpose of Council review is to ensure adherence to the Council's legislative intent in enacting the regulatory scheme and because the Council is the elected body ultimately responsible to the voters for appropriate regulation of land uses; and

WHEREAS, the Council does not intend, by the procedural hearings and review established in the City's regulatory procedures, to adopt or utilize in any way the adversary criminal or civil justice system used in the courts, and indeed finds that such a system is completely unsuitable to making land use decisions at the local administrative level; and

WHEREAS, the City Council and its subordinate agencies and staff are not partisans on any side of any land use dispute but are charged with making land use decisions in the best interests of the entire City after weighing all input, and this process is in fact a form of mediation between divergent community interests; and

WHEREAS, the City staff and City Attorney are charged with assisting the City Council and subordinate City boards and commissions to adjust competing interests affecting land use decisions and are not advocates of any side, but play the role of providing technical assistance and advice to the decision making bodies; and

WHEREAS, the United States Supreme Court has noted that due process "unlike some technical rules, is not a technical conception with a fixed content unrelated to time, place and circumstances [citations omitted]." Mathews v. Eldridge, *supra*, 424 U.S. 319, 334 (1976). It is "flexible and calls for such procedural protections as the situation demands [citations omitted]." Id.; and

WHEREAS, the provisions of the California Administrative Act ("APA") regarding state adjudicatory proceedings properly have no application to local agencies in light of the very substantial difference in state agencies and local administrative procedures; and

WHEREAS, even the APA recognizes that its prohibition on combining prosecutorial and adjudicatory functions applies only to prosecutors and other advocates who are committed to specific result and have a will to win and not merely to staff providing professional recommendations who are accustomed to serving decision making bodies with views on matters that differ from one another and from recommendations of staff; and

WHEREAS, a unique aspect of land use decision-making and the administrative procedures of cities with subordinate citizen boards and an elected City Council is that City staff regularly provide technical assistance to boards and commissions that may disagree with one another, with the City staff and with the City Council; and

WHEREAS, the City planning and legal staff are not advocates for any party or body's position but merely provide expert technical advice and recommendations to each decision making body including the City Council; and

WHEREAS, when the differing perspectives of the different decision-making bodies and differing input at each stage of a decision-making process result in an approach which differs from that originally recommended by staff, City staff nonetheless regularly assist in implementing and guiding such changed approaches at successive stages of a decision-making process within the City; and

WHEREAS, in addition, the differing perspectives of the different decision-making bodies, as well as the differing input at each stage of a decision-making process, often results in City staff gaining an improved understanding of the nature and implications of development proposals, thus improving staff's ability to analyze such proposals under the applicable land use regulations, and make useful recommendations to decision-makers; and

WHEREAS, it is not uncommon for applicants or opponents of projects, or both, who come before the City Council to claim that the City staff and City Attorney are biased towards them; and

WHEREAS, because the City is largely built-out and its limited number of remaining developable sites are surrounded by existing uses, its land use regulations are detailed and complex, in order to allow flexibility to address the difficult issues sometimes raised by infill development, and as a result, consultations among planning, legal and other staff concerning the proper interpretation and application of the City's land use regulations is particularly vital; and

WHEREAS, consistency of technical and legal advice is critical to a coherent and consistent implementation of a local government's laws and regulations and this result cannot be achieved if different staff members who act wholly independently of one another provide conflicting technical and legal advice concerning a land use matter pending before the City; and

WHEREAS, resolving land use issues requires a unique appreciation of the context of the development, community values and similar considerations have historically been resolved through local government decision making procedures that are uniquely accessible to ordinary citizens and into which they expect and demand broad input; and

WHEREAS, the time which can be set aside by an elected or appointed body to conduct a hearing is inherently limited; and

WHEREAS, citizens expect to be able to contact their elected and appointed representatives on pending land use matters and find restrictions on their ability to do so artificial, confining and undemocratic and an impairment of their reasonable expectation to be able to communicate with their elected and appointed representatives; and

WHEREAS Council members can play a constructive role in facilitating public discussion and resolution of land use disputes through mediating seemingly irreconcilable positions; and

WHEREAS, most information gathered in these contacts usually results only in elaboration of issues already delineated in staff reports and other parts of the written and oral record; and

WHEREAS, even the state APA, in Government Code section 11430.30(c)(2) recognizes, as a policy matter, that land use determinations by members of state land use commissions such as the San Francisco Bay Conservation and Development Commission should not be subject to a prohibition on such contacts; and

WHEREAS while commissioners and Councilmembers often express tentative opinions on various projects pending before them, the expression of such opinions assists interested persons and the public to address the concerns expressed and makes for a robust and far-ranging exploration of the issues raised by a project, final decisions are nonetheless based upon the entire record, after all evidence and testimony has been considered, and such tentative opinions, even if expressed in strong language, are a necessary part of the review process and do not constitute prejudgment of the project.

NOW THEREFORE, BE IT BE RESOLVED by the Council of the City of Berkeley that the Council hereby establishes the following procedure for conduct of land use hearings in the City of Berkeley, in addition to any other procedure required by applicable federal state or local standards as follows:

1. Bodies such as the Planning Commission, Zoning Adjustments Board, Landmarks Commission and Housing Advisory Commission that make adjudicatory decisions shall withhold final judgment on such matters until the close of the hearing relating to the pending land use matter. Nothing in this section shall preclude a decision maker from articulating areas of concern for the staff or public to react to in the decision making process or to express tentative opinions on the matter.
2. City planning and legal staff are to provide their technical and legal advice and professional judgment to each decision making body and the Council and are not advocates of any party or position in a dispute, notwithstanding the fact that their

technical judgment may lead them to make recommendations concerning the matter. In the absence of clear evidence in the record that a staff member has lost his or her impartiality as a technical adviser, the City's need for consistent, coherent and experienced advisers outweighs any claimed bias from the adviser involvement at any earlier stage of the administrative proceeding.

3. Council members and Commissioners may receive information relevant to the land use decision by contacts with the parties, the public or staff and are not confined to reading the record or hearing presentations at public hearings.
4. Where information of a specific nature is gathered by a member of the City Council or a board or commission, through contacts outside the record, and the information is not already in the record, the member shall, to the extent feasible, keep contemporaneous notes of the substance of the contact and shall disclose the contact and its substance on the record prior to the commencement of the hearing to which such contact relates. Where the information is received during the pendency of a hearing the matter shall be disclosed prior to completion of the hearing and the parties and public shall have an opportunity to respond if the matter is substantially new information.
5. Where such contacts were made and information gathered prior to a pending decision by the Council or any decision making body whether or not to grant a hearing, the substance of the information shall be reported to the secretary of the relevant body as soon as it is made. The secretary shall maintain a file on such disclosed contacts for review by members of the public.
6. All written communications to the decision making body shall be submitted to the secretary of that body, or the City Clerk, in the case of a matter pending before the City Council.
7. Nothing in these procedures shall be construed as limiting any procedural protections that a party or the public may be entitled to by law over and above the protections of this resolution, based upon the facts of any particular proceeding.

BE IT FURTHER RESOLVED, that Section I F of the Council Rules of Procedure, Resolution number 62,420-N.S., is hereby repealed and Resolution 62,420-N.S. is so amended.


The foregoing Resolution was adopted by the Berkeley City Council on July 13, 2004 by the following vote:

Ayes: Councilmembers Breland, Hawley, Maio, Olds, Shirek, Spring, Worthington, Wozniak and Mayor Bates.

Noes: None.

Absent: None.

Attest:


Sherry M. Kelly, City Clerk


Tom Bates, Mayor