

June 15, 1990

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL
CITY COUNCIL GUIDELINES ON EX PARTE
COMMUNICATIONS BY COUNCILMEMBERS

The following is a list of guidelines formulated from City Attorney Opinion No. 90-2, regarding limits on ex parte communications by councilmembers. This list should help councilmembers determine if and when it is legally appropriate to involve themselves in the development approval process.

1. The councilmember must first determine what type of project is at issue. The type of project dictates the level of councilmember involvement that is legally permissible without raising substantial questions of due process. If the project is of a quasi-judicial nature (see "ATTACHMENT A"), then a councilmember should not get involved in the development approval process. This prohibition includes any involvement, other than mere inquiry, in the development phase of a project. Thus, a councilmember should not direct, or take actions tantamount to directing the Planning Department regarding a specific project. Direction includes, but is not limited to, requests to alter or change recommendations, comments on draft Environmental Impact Reports (EIR's), and express disapproval of a Planning Department recommendation.

In addition, a councilmember should not communicate with outside groups, such as developers, special interest or citizen groups, community planning groups and other interested citizens, regarding a project that will later come before the Council for final approval, if such communication biases the councilmember and taints his or her final decision. Such communications with outside third parties, include, but are not limited to, negotiations and the exchange of draft proposals, attempts to renegotiate an application to rezone a parcel of property, and undisclosed meetings regarding a particular project.

This involvement is impermissible in a quasi-judicial project that will or may come before the Council for approval or disapproval. In such a situation, councilmembers are required by

law to be impartial, noninvolved decisionmakers. Prior participation in the development approval process impairs a councilmember's impartiality. Thus, prior participation in the development approval process can disqualify a councilmember's

vote or result in a remand or reversal of the Council's decision. More seriously, however, is that a legal action could be brought against a councilmember individually or against the City based upon 42 U.S.C. section 1983 for violation of an individual's constitutional right to a fair and impartial tribunal. Damages and attorneys fees may be levied against an individual councilmember for this violation.

2. Councilmembers should not contact lower level planning staff except for factual inquiries which have broad application. Even when making factual inquiries of lower level planning staff, councilmembers must be careful not to pressure or influence lower level decisions. Whether intended or not, such pressure can bias the lower level decision and taint the entire project.

3. Councilmembers must disclose all evidence received outside of the hearing considered in reaching a decision in a quasi-judicial proceeding. This includes independent fact-gathering and evidence gathered from viewing a location. In addition, communications with third parties regarding a particular project must be disclosed if a councilmember relies on them and uses them as a basis for decision.

Councilmembers are required by law in a quasi-judicial proceeding to disclose all evidence used in reaching a decision. Failure to disclose such evidence can result in a remand or reversal of the Council's decision. In addition, an individual may bring an action against an individual councilmember or the City based on 42 U.S.C. section 1983 for violating his or her constitutional right of procedural due process, for example, for violating the right to be apprised of all the evidence upon which the decisionmaker is relying and to have an opportunity to controvert it. Damages and attorney's fees may be levied against an individual councilmember as well as the City for this constitutional violation.

4. Councilmember must not interfere with the administrative affairs of the City Manager, aside from inquiries. This is the mandate of San Diego City Charter section 22. Violation of this Charter provision is a misdemeanor punishable by removal from office.

5. A majority of Council is needed to do business. Charter section 15. Thus, if an individual councilmember directs Planning Department staff, in either a legislative or quasi-judicial proceeding, he or she is exceeding their authority by doing business without a majority of Council. This violates Charter section 15.

Respectfully submitted,
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Attachment

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