MEMORANDUM OF LAW

DATE: September 7, 1990

TO: John W. Witt, City Attorney
FROM: Cristie C. McGuire, Deputy City Attorney
SUBJECT: Growth Management Consultant and Ex Parte Contact Guidelines

INTRODUCTION

By way of memorandum dated July 10, 1990, Mayor Maureen O'Connor has requested an opinion as to the propriety of a City consultant's participation in a private meeting with one Councilmember, advocates of the development community, and others. It is alleged that the substance of proposed legislation was discussed at this private meeting.

BACKGROUND

By Resolution R-274969 adopted on January 11, 1990, the City Council authorized the City Attorney to enter into an agreement with Professor Robert Freilich to work at the direction of the City Attorney for all issues connected with the preparation of a Planned Growth Management Ordinance and several plan updates. Pursuant to that resolution, the City Attorney, on behalf of The City of San Diego, and the law firm of Freilich, Leitner, Carlisle and Shortlidge, by and through its partner Robert Freilich ("Consultant"), entered an agreement for consultant services for the term of January 11, 1990, to July 11, 1990, attached as Exhibit A. Under terms of that agreement, the Consultant was to perform the following relevant services:

> . . .
>
> (4) Upon specific City Attorney authorization, shall meet with the City Departments, individual City councilmembers, and designated citizens and organizations on the determination and resolution of the issues to be included in the planned growth management ordinance and General Plan update,
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> including appearances at work sessions and public hearings of the City Council and Planning Commission.

With the City Attorney's knowledge, on June 27, 1990, the Consultant, Dr. Robert Freilich, attended a meeting called by Councilmember Robert Filner. The location and specific details of this meeting are set forth in a letter from Dr. Freilich to Assistant City Attorney Curtis M. Fitzpatrick dated July 18,

1990, a copy of which is attached as Exhibit B for your further reference. According to Dr. Freilich's letter, he advised the attendees on the current language of the proposed Transportation Congestion Management and Development Phasing Ordinance (Ordinance).

As part of the analysis, we reviewed carefully the Proposed Ordinance as well as Dr. Freilich's letter of July 18th.

QUESTIONS PRESENTED

1. Do discussions of proposed legislation amongst a Councilmember, a City consultant, and other interested parties outside of a noticed public hearing constitute ex parte communications?
2. Is a City consultant hired by contract bound by the same legal constraints upon ex parte communications as are Councilmembers themselves and their staffs?
3. Does a private meeting involving one Councilmember, a City consultant and other individuals constitute a violation of the Brown Act?
4. Also, was there was a violation of the consultant's agreement by virtue of the Consultant's attendance at a meeting at the private residence of one Councilmember?

DISCUSSION

The ex parte contacts, Brown Act, and contract issues raised by the Mayor's memorandum and the factual background are treated separately below.

A. Ex Parte Communications

It has long been the City Attorney's position that private contacts, oral or written, between anyone and a member of the City Council, a Council committee, or any City board or commission are inappropriate with respect to any quasi-judicial matter to be considered by the Council, committee, board or commission. Witt, To Ex Parte or Not to Ex Parte, 34 Dicta Vol. 7, 7 (1987). Thus, matters upon which a Councilmember is called upon to exercise quasi-judicial discretion should not be discussed outside of a noticed public hearing. This position is premised on individual rights of due process. Procedural due process guarantees an individual in a quasi-judicial proceeding the right to a fair hearing by a fair tribunal. This right encompasses both an individual's right to an impartial tribunal and the right to know what evidence is used by the Council in reaching a decision.

City Attorney Opinion No. 90-2, issued on June 15, 1990, explores in depth the complexities of the proscription of ex parte communications as applied to various hypothetical situations. That Opinion mentioned only briefly, however, the legal consequences of Councilmembers' staff engaging in ex parte communications. This memorandum will more fully develop this issue and that of limitations on consultants' ex parte contacts.

1. Legislative v. Quasi-Judicial Acts

It must be reemphasized at the outset of this memorandum that the proscription of ex parte communications only applies to matters upon which a Councilmember is required to exercise quasi-judicial discretion. There is no such proscription as to matters upon which a Councilmember is called to exercise legislative discretion. See Opinion No. 90-2; Memorandum of Law dated November 29, 1977. As stated in our Memorandum of Law dated November 29, 1977, all ordinances to be incorporated in the Municipal Code, as well as any election, appropriation, budgetary or taxing ordinance, are considered purely legislative matters. See also Opinion No. 90-2, pages 8-15, for a detailed discussion on the distinction between legislative and quasi-judicial acts.

For the following reasons, we conclude that the proposed Ordinance, if adopted, will be a legislative act by the City Council requiring only "legislative protections." We have reviewed the proposed Ordinance carefully and find it is one of general application. It contains some exceptions to the general rules established in the Ordinance, but none that pertain to discrete, identifiable parcels. If adopted, this Ordinance will be codified in the San Diego Municipal Code. Also, Dr.

Freilich's letter indicates that the discussions at the June 27th meeting of the proposed Ordinance and other topics remained very general in nature. There appeared to be no discussion of specific parcels which would trigger application of the quasi-judicial rules.

Since the proposed Ordinance would ultimately be a legislative act and therefore would require legislative proceedings for adoption, Councilmembers could themselves conduct discussions about the Ordinance with virtually anyone they choose without violating the principles surrounding ex parte communications. Despite this conclusion, from the Mayor's questions there appears to be a need to clarify the City Attorney's position regarding the legal constraints placed upon ex parte communications as applied to Councilmembers' staff and City consultants in quasi-judicial decisionmaking. Therefore, we explore these questions further.

2. Council Staff and Ex Parte Communications

It is the City Attorney's position that ex parte communications with the staff of a Councilmember have the same legal consequences as ex parte communications with the individual Councilmember. See Opinion No. 90-2, page 34, June 15, 1990; Witt, To Ex Parte or Not to Ex Parte, 34 Dicta Vol. 7, 7 (1987); unpublished City Attorney Opinions dated November 21, 1984; January 8, 1987; May 27, 1987 and September 22, 1988. Thus, a communication which would be legally inappropriate if made to a Councilmember is also inappropriate when made to one of the Councilmember's staff. Witt, To Ex Parte or Not to Ex Parte, 34 Dicta Vol. 7, 7 (1987).

The rationale for this position is that such ex parte contacts are presumably made to influence the Councilmember indirectly through his or her staff member. In quasi-judicial Council proceedings, this influence could bias the decisionmakers, denying an individual's rights of due process. The question then becomes whether a consultant hired on contract with the City would be bound by the same ex parte contact rules as are City Councilmembers and their staffs.

3. Consultants and Ex Parte Communications

Specifically, the Mayor's memorandum raises the question of whether the City's Growth Management Consultant, Dr. Freilich, is the functional equivalent to "staff" of the Council, and thus prohibited from participating in ex parte communications involving quasi-judicial decisions. This question requires a brief understanding of the nature of consultant agreements in this City.

a. Consultant Services Contracts Generally

The hiring of consultants for professional services in The City of San Diego is accomplished pursuant to the authority of Section 28 of the Charter. Under Section 28, the City Manager has the authority to employ consultants to give advice connected with the departments of the City. The City Manager need not get approval from the City Council unless the cost of employment exceeds $25,000.00, or if the total compensation paid to a consultant exceeds $100,000.00 during any twelve (12) month period. San Diego Municipal Code section 22.0226.

As shown above, the City Council does not approve all consultant contracts. Thus, in many situations the City Manager has the sole authority to hire consultants to advise many City departments. A consultant hired by the City Manager to advise City departments is not the functional equivalent to staff of the City Council.

However, if a consultant's cost of employment exceeds $25,000.00, or $100,000.00 in any twelve (12) month period, the

City Council must approve the consultant's contract. In this situation, the Council has authority and input as to who will be selected as a consultant. But a consultant should not be considered the "staff" of the City Council for ex parte purposes merely because the Council approves the consultant's contract.

b. Consultant Freilich's Agreement

In the present case, the City Council approved the consultant agreement with Dr. Freilich for fees not to exceed $80,000.00 plus $10,000.00 reimbursement for out-of-pocket expenses. The scope of services that were to be provided are described on pages 2 through 4 of the Agreement (Exhibit A) and will not be repeated here. Suffice it to say the services included advising City staff and attorneys regarding various growth management issues and participating and appearing at various work sessions and public hearings of the City Council and Planning Commission. The services were to be provided by the Consultant "solely through the City Attorney's office and only at the specific direction of the City Attorney or his authorized representative." (Exhibit A, page 2, paragraph 1.a.)

The "scope of services" language of the Consultant's contract plays a role in determining the limits on ex parte contacts of a consultant and is discussed below.

4. Consultant's Involvement in Decisionmaking Process

The dangers inherent in ex parte communications by or with a consultant are not addressed by the consultant's status as either an independent contractor (i.e., hired by contract or agreement) or Council "staff" (i.e., part of actual employee-employer relationship). For ex parte purposes, we must look to the functions of the consultant and the possibility of undue influence on the decisionmakers in a quasi-judicial proceeding. The inquiry is whether the consultant may be expected to be involved in the decisionmaking process. If the consultant's communications or opinions affect the way a given case is decided, the consultant is bound by ex parte constraints and must be impartial.

There exists, therefore, the real possibility that a consultant, like Council staff, could be used by an interested party to influence the Councilmembers indirectly. In addition, a consultant in certain situations may participate in the decisionmaking process. A consultant is a hired expert. The City Council and other City departments rely on a consultant's specific expertise when making their final decisions. Thus, the City Council or other City departments may supplant their decision for that of the consultant's. In this situation, the consultant would be an integral part of the decisionmaking

process. For this reason, a consultant should refrain from ex parte communications involving a quasi-judicial matter before the City Council, but he or she would not be required to refrain from ex parte contacts on a legislative matter.

The federal administrative scheme regarding ex parte communications is analogous to our position. 5 USCS section 557(d)(1),

Section 557(d)(1)(A) states as follows:

> No interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding (emphasis added).

Section 557(d)(1)(B) states as follows:

> No member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding (emphasis added).

the section of the Federal Administrative Procedure Act (APA) pertaining to ex parte communications, contains a broad proscription of ex parte contacts in federal administrative (quasi-judicial) proceedings. Congress enacted the provisions which prohibit ex parte communications to ensure that "agency decisions required to be made on a public record are not influenced by private, off-the-record communications from those personally interested in the outcome." Raz Inland Navigation Co. v. ICC, 625 F.2d 258 (1980).

The Civil Aeronautics Board ruled in Continental-Western Merger, Consultant's Analysis, 79-6-43, CAB Adv Dig, June, 1979, that a consulting firm is not a person outside the agency. See 58 ALR Fed 834, 836. The legislative history clearly states that a consultant advising an agency must be considered an employee for purposes of 5 USCS section 557(d). Thus, according to federal administrative law, a consultant is bound by the same legal constraints upon ex parte communications as other agency members. This conclusion rests on the expectation that the

consultant will be involved in the decisional process of the proceeding.

In the present case, the Consultant's "scope of services" clearly requires participating in the decisionmaking process. See Agreement, pages 2 through 4, Exhibit A. In fact, Dr. Freilich worked closely with the City Attorney and Planning staff to develop language for the proposed Ordinance. Since, however, the proposed Ordinance is a legislative act requiring only legislative protections, the quasi-judicial decisionmaking rules do not apply to prohibit the ex parte contacts he made at the June 27th meeting.

5. Conclusion Regarding Consultant's Limitations on Ex Parte Contacts

It is our conclusion that a consultant may be bound by the same legal constraints upon ex parte communications as the Councilmembers themselves if the consultant is involved in the decisional process of a quasi-judicial proceeding. A consultant's involvement in the decisional process is key for such legal constraints to apply. To be involved in the decisional process, a consultant's communications or opinions must affect the way a given case is decided. This analysis serves as guidance for the future. There is no need to decide whether Dr. Freilich was or is involved in the decisional process in this instance since his discussions with outside third parties involved a purely legislative matter.

B. The Ralph M. Brown Act

The question of whether the private meeting that took place at Councilmember Filner's residence constitutes a violation of the Brown Act was also raised by the Mayor's memorandum. The Ralph M. Brown Act ("Brown Act") requires local legislative bodies to give notice and publish agendas of their meetings, which are to be held in public with an opportunity for public comment. Government Code section 54950 et seq. The purpose of this open meeting law is to require that all aspects of the decisionmaking process of state and local legislative bodies be conducted in public. Open Meeting Laws, California Attorney General's Office (1989), at 7. Open meeting laws have been interpreted to mean that all of the deliberative processes by multi-member bodies, including discussion, debate and the acquisition of information, be open and available for public scrutiny. Open Meeting Laws, California Attorney General's Office (1989), at 7, citing Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 263 Cal. App. 2d 41 (1968); 42 Ops. Cal. Att'y Gen. 61, 63 (1963); 32 Ops. Cal. Att'y Gen. 240 (1958).

The term "meeting" is not defined by the statute. However, an interpretation of various court and attorney general opinions defines the term generally as "a gathering of a quorum of the legislative body, no matter how informal, where business is discussed or transacted." Open Meeting Laws, California Attorney General's Office (1989), at 15, citing 61 Ops. Cal. Att'y Gen. 220 (1978). Thus, meetings held by a quorum of a local legislative body, such as the San Diego City Council, must comply with the Brown Act.

There is a recognized exception to the meeting requirement known as the "less-than-a-quorum" exception. This exception provides that a meeting of a legislative body has not taken place

when less than a quorum of its members gather to discuss business. The Brown Act expressly recognizes this exception. See Government Code section 54952.3. This exception "contemplates that the part of the governing body constituting less than a quorum will report to the parent body where there will then be a full opportunity for public discussion of matters not already considered by the full board or a quorum thereof." Stockton Newspapers, Inc. v. Redevelopment Agency, 171 Cal. App. 3d 95, 103 (1985). Consequently, the public's right to participate in the decisionmaking process is still protected.

The "less-than-a-quorum" exception does not apply if members of the legislative body engage in what are known as seriatim or serial meetings. In other words, if a series of meetings are held, each of which technically comprise less than a quorum of a legislative body, but which taken as a whole, involve a majority of the legislative body's members, the legislative body must comply with the open meeting requirements of the Brown Act. Open Meeting Laws, California Attorney General's Office (1989), at 18-19.

Based on the above, the private meeting at Councilmember Filner's residence falls within the "less-than-a-quorum" exception to the Brown Act. Only one Councilmember was present at the meeting. This is clearly insufficient to constitute the necessary quorum. Thus, in absence of evidence that the isolated discussions at this meeting expanded into a series of collective conversations about official business between a quorum of Councilmembers, i.e., a serial meeting, the open meeting requirements of the Brown Act are inapplicable, and no violation of the Brown Act has occurred.

C. Breach of Contract

Although not asked directly in the Mayor's memorandum, one of her underlying questions is whether Dr. Freilich breached the Agreement (Exhibit A) by virtue of attending the meeting at Mr.

Filner's residence. As stated above, the Agreement required Dr. Freilich to work at the direction of the City Attorney or his designee, and to meet with individual City Councilmembers and designated citizens and organizations only with the City Attorney's specific authorization. As stated in Dr. Freilich's letter, Dr. Freilich informed the City Attorney of the invitation to meet with Mr. Filner prior to the meeting. The precise location of the meeting and the persons who would be present were apparently not known to Dr. Freilich, and therefore to the City Attorney, prior to the meeting. The purported topic prior to the meeting was a "state grant program designed to promote

alternative land use dispute resolution techniques." (Exhibit A, page 1, paragraph 2). Once at the meeting, however, apparently the discussion turned to the proposed Ordinance (Exhibit A, pages 2-4).

Under the Consultant's Agreement, Dr. Freilich was to obtain the City Attorney's authorization to meet with individual Councilmembers for "the determination and resolution of issues to be included in the Planned Growth Management Ordinance and General Plan Update" (Exhibit B, page 3, paragraph (4)). Although the meeting at Mr. Filner's residence was not intended to be on that topic, Dr. Freilich took the precaution pursuant to paragraph (4) of asking the City Attorney for authorization to attend that meeting. The authority was granted even though the subject matter was not a part of the services to be rendered by Dr. Freilich and therefore not governed by the contract. We note that the City Attorney has not authorized compensation to Dr. Freilich for attendance at that meeting.

In any event, because Dr. Freilich obtained the City Attorney's authorization to attend the meeting at Councilmember

Filner's residence prior to the meeting, we find there was no breach of the Consultant's Agreement.

SUMMARY

The proscription of ex parte communications applies to Councilmembers and their staffs in all quasi-judicial proceedings before the City Council. The proscription may also apply to City Consultants whose communications or opinions to the City Council may affect the way a quasi-judicial proceeding is ultimately decided.

There exists no violation of this proscription in the private meeting at issue since the matter before the City Council is legislative as opposed to quasi-judicial. In addition, there exists no violation of the Brown Act and no breach of the Consultant's Agreement.

JOHN W. WITT, City Attorney
By
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Deputy City Attorney

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Attachments
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