But We’re Legislators, Not Judges: City Council Fair Process Requirements

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Goals of the Presentation

• Provide a basic knowledge of fair process principles that apply to quasi-adjudicatory proceedings

• Attempt to answer questions you may have about the practical application of these principles

• Discuss best practices that promote public confidence in how quasi-adjudicatory processes are conducted

• Encourage you to always consult the city attorney when questions arise
Today’s Approach

- We will begin by discussing in general terms the fair process principles.
- We will then conduct a mock city council meeting, and stop at various points to discuss issues raised by the conduct of the councilmembers.

When Do Fair Process Requirements Apply?

City Councils sometimes make “quasi-adjudicative” decisions.

For example:
- Land use decisions, such as an appeal of a planning commission decision
- Permit decisions

“Adjudicative” decisions are different than “legislative” decisions:

They generally involve applying the governing law to the facts regarding the rights or interests of a specific party or parties.
Overview: Fair Process Requirements

WHEN ADJUDICATING, YOU MUST ACT LIKE A JUDGE

• The Council should adopt reasonable procedural rules and follow them in an even-handed manner
• Listen carefully to evidence
• Base decision solely on evidence
• Avoid and disclose ex parte communications
• Give all parties reasonable opportunity to present their case
• Biased councilmembers must recuse themselves

Minimum Standards

• The principles set the minimum standards for ensuring a fair process in quasi-adjudicatory proceedings where fair process rights are at stake.

• How will my actions be perceived by the public?

• But first . . .
The City Council Should Adopt Reasonable Procedural Rules & Follow Them

• It is important to adopt reasonable rules that govern quasi-adjudicatory matters
• Once you have such rules, you must follow them strictly, consistently and impartially
THE “USUAL” CONFLICT OF INTEREST RULES APPLY: THE POLITICAL REFORM ACT AND COMMON LAW CONFLICT OF INTEREST DOCTRINE

PRA: What is a Financial Interest?

An official may not participate in a government decisions in which they have a financial interest if:

• it is reasonably foreseeable;
• that the decision will have a material financial effect;
• distinguishable from its effect on the public generally;
• on the official, the official’s immediate family, or on specified economic interests

This includes property interests, which are often involved in quasi-adjudicatory proceedings
Real Property Interests

• Direct or indirect investment of $2000 or more in fair market value
• Leases (other than month-to-month leases)
• In the city and within 2 miles of the city

DISCUSS ANY POTENTIAL PROPERTY INTERESTS WITH YOUR CITY ATTORNEY WELL BEFORE THE PROCEEDING IS TO BEGIN

Common Law Conflicts of Interest

• California courts have also established a common law conflict of interest doctrine
• A common law conflict exists where an agency official cannot exercise an undivided duty of loyalty in favor of the agency
• A common law conflict may arise where the official also owes a fiduciary duty to a party that would be affected by the decision, or where some significant personal interest – which need not be financial – would preclude the official from acting in the best interest of the agency
You Must Recuse Yourself From a Decision if You Are Biased Against a Party

- Applies even if you have no financial interest under PRA or common law conflict of interest!
- Generally, a decision-maker may be impermissibly biased where due to personal feelings or interests in the matter, there is a significant risk that the decision-maker would be unable to make an impartial decision based on the evidence and governing law.
- This is a complex area where courts have been less than consistent.
- Always consult the city attorney about potential bias issues.

Circumstances Where Impermissible Bias May Be Found

- Where the official has a personal interest in the decision, even they have no financial interest at stake.
- Where there is some personal animus of the decision-maker toward a party.
- Where the evidence demonstrates the decision-maker will make the decision on some basis other than on the evidence and governing law.
Bias: Rehabilitation

- There may be situations where a decision-maker can be "rehabilitated" to cure a potential claim of bias
- This can be accomplished by reading a statement on the record at the proceeding rejecting the claim of bias, and stating the official can and will make their decision based solely on the evidence and governing record.

You Must Listen Carefully to Evidence

- A fundamental principle of due process is "he or she who decides must hear"
- That means paying attention to the evidence and argument throughout the hearing.
Give All Parties Reasonable Opportunity to Present Their Case

- The key is to be even-handed
- For example, you should not allow one party to introduce new evidence at the hearing while precluding another party from doing so
- It may be a better practice to wait until the end of a party’s presentation before asking questions, rather than constantly interrupting the party from making its case within the prescribed time limit

You Must Avoid Ex Parte Communications

- You should not discuss a pending quasi-adjudicatory proceeding with a party or its representative (or other persons) before the hearing
- Such discussions may provide evidence or legal arguments outside the proceeding’s record, and deny the other party an opportunity to respond to such evidence or arguments
You Must Base Your Decision Solely on Evidence Presented at the Hearing

- A fundamental rule of due process is that parties be provided notice of the proceeding, the evidence before the decision-maker, and an opportunity to respond.
- Considering evidence outside of the record may violate this principle.

Additional Resources
Institute For Local Government

[www.ca-ilg.org/](http://www.ca-ilg.org/)
Thank You!

Additional Questions?

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