

## Scott Carey

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**From:** Paul Thorpe <paul.thorpe@legalprivilege.ch>  
**Sent:** Wednesday, November 2, 2022 8:57 PM  
**To:** Scott Carey  
**Subject:** NTRPA GB Meeting ITEM (2) Public Comment {Thursday, 11-03-2022}  
**Attachments:** South-Lake-Tahoe-Lodging-Association-May-13-2021\_Minutes\_Jerry Bindel.pdf; LTVA\_Lodging.pdf; SLTLA Ratfck.pdf; Rich Bodine Eliminates SLT affordable housing.pdf; Res 2020-074 Bijou Park Creek Restoration Project.pdf; RES 2018-047 Grant Augmentation-CTA 17014L.pdf; RES 2018-014 Grant-California Tahoe Conservancy-Woodbine Residential Property Acquisition.pdf; RES 2017-016 Bijou Park Creek Watershed Restoration Project Area.pdf; Whole Foods Scandal.pdf; 025-206-006-100\_ELDCO Recorder.pdf; 025-206-006-100\_HPI.pdf; CIV § 1213.pdf; CIV § 2934.pdf; GOV § 27233.pdf; GOV § 27297.7.pdf; GOV § 81002.pdf; GOV § 81008.pdf; GOV § 87206.pdf; GOV § 91000.pdf; SLTLA-LTVA Conflict-of-Interest.pdf; 63 FR 39571--SLTLA Admits to Federal Conspiracy Charges.pdf; South-Lake-Tahoe-Lodging-Association-Apr-8-2021.pdf; South-Lake-Tahoe-Lodging-Association-May-13-2021.pdf; Petrovich Development Company LLC v City of Sacramento\_48 Cal.App.5th 963.pdf; Woodys Group Inc v City of Newport Beach\_233 Cal.App.4th 1012 (2015).pdf; Clark v City of Hermosa Beach, 48 Cal.App.4th 1152 (1996).pdf

**WARNING** - This email originated from outside the State of Nevada. Exercise caution when opening attachments or clicking links, especially from unknown senders.

Dear Nevada Tahoe Regional Planning Agency,

With concern regarding [CEQA Negative Declaration: Bijou/Al Tahoe Community Plan Amendment](#):

PLEASE ADD THIS OPPOSITION TO THE "NEGATIVE CEQA DECLARATION" TO THE RECORD.

With regards to [the Special Use Permit for Lakefront Construction](#):

PLEASE ADD THIS OPPOSITION TO THE "SPECIAL USE PERMIT" TO THE RECORD.

Don't relocate the El Dorado Campground restrooms!!! Save this national campground asset!

**[Jerry Bindel](#) and [Margie Kovarik](#) needed and still need to recuse themselves from all participation over the 56-Acres project due to an outrageously egregious material conflict-of-interest. Devin Middlebrook must**

**recuse himself as well, for his lobbying activity on the matter.**

Don't let the [South Lake Tahoe Lodging Association](#)—a historically [criminal enterprise](#)—destroy the irreplaceable lake view campground above El Dorado Beach. The location and sitting of the recreation center is not about the public good, it is about a bunch of [unscrupulous business owners](#) fooling the public into destroying their own outdoor commons to advance an indoor [tourism amenity](#).



Read the attachments. We just fired [filthy dishonest](#) Timeshare Proponent [Tom Davis](#) from our City Council after his unconscionable raping and pillaging of the City treasury on behalf of the lodging industry which literally left our streets crumbling—*just as Nero fiddled while Rome burned*. Now this snake is slithering back-in to help himself and his cronies to the public spoils, using the Boys and Girls Club as a thinly veiled political shield to unnecessarily decimate the scenic corridor. The [SLT Lodging Association](#) has openly discussed how tourism "aquatics centers" can't make money, so they want us to build their indoor waterpark for them! This is corporate socialism: [getting the public to pay for entertainment venues, so that private hucksters can make lucrative profits](#).





**Mayor Pro-Tem, Devin Middlebrook, City of South Lake Tahoe, [dmi](#)**

- Governor Newsom set June 15<sup>th</sup> for the opening of CA businesses trends hold.
- May 1<sup>st</sup> Nevada is turning over rulemaking to the County.
- April 20<sup>th</sup> next City Council meeting. Discussing ban on temporary Fri Night Ski Run Farmers Market, and other events on City property possibly before.
- Another round of COVID relief funding, do you need more protection to get through COVID this summer?
- Hosted 1000 people vaccine clinic 2 weeks ago. Will do another session. What are the barriers to getting your employees vaccinated?
- Update on 56 Acres project and Rec Center. Measure P increase recreation center and other recreation improvements across the city. Updated recreation design. And 56 acres master plan, (broader area) the rec center LEED Gold Design, on the North side of 56 acres but would have roof top deck, lake views, lake view running track. Location center onto County Land. Looking at doing a land-swap.
- April 27<sup>th</sup> Joint City Council and El Dorado County meeting on 56 acres taking action and voting to adopt/endorse 56 acres master plan. It would really help to send a letter/email with your support of the the North Side location to County Board of Supervisors and City Council to: [PublicComment@cityofslt.us](mailto:PublicComment@cityofslt.us) and [edc.cob@edcgov.us](mailto:edc.cob@edcgov.us) Meeting to submit prior to the 27<sup>th</sup>.
- On track to break ground on the Rec Center in 2022.
- Jerry commented if anyone has not participated in the open forum project. One popular model has a little main street running through town environment. Marries with Lakeview Commons and Regan critical coming up to the 27<sup>th</sup> of April.

**As you can see Middlebrook lobbied for this location, and thus must recuse himself from any decision on the matter. See, *Petrovich Development Company, LLC v. City of Sacramento*, 48 Cal.App.5th 963 (2020)(City council member was impermissibly biased during vote on conditional use permit where council member was counting votes on the permit and communicating an update on that score to mayor, council member prepared a compilation of “talking points” that amounted to a presentation on the permit, council member coached association president on permit, and council member himself made the motion on the permit.)**

## Recreation Center Update, Jerry Bindel, [jbindel@fc](mailto:jbindel@fc)

- Jerry is on the South Lake Tahoe Parks and Rec new Recreation and Aquatics Center
- Link to presentation from January 2021, <https://content/uploads/2021/05/SLTLA-Rec-Center-Pr>
- Planning stages started in 2020
- Had multiple public polls and workshops
- Anticipating ground breaking June 2022. End o
- May start some underground utility work this f
- Site is on the 56 acre project
- Recommended and preferred site is just to the
- Will have views of the Lake and visible from the
- Ground floor, gymnasium, 2 full basketball cou
- Gymnasium Just under 14K Sq. Ft. Walking/Jog seating for approx. 150 people on each side.
- Track and fitness center on second floor.
- Aquatic center - 6 lane pool, 2 warm up lanes, a river.
- Second floor meeting room, 120 max, plus out
- Total project budget \$48 million.
- 2016 measure p passes at 2%. Budget was at \$ the last 2-3 years.
- Annual expenses expected to be \$2.4 million w
- Rec centers almost never make a profit. This is
- City and County working on agreement for the
- Discussion about the 56 Acres Project.

**We need to stop this profligate corruption. The SLTLA has crawled deep inside the City Manager's ear, and convinced him to have city residents pay for a profit-loosing SLTLA tourist attraction, and worse, to destroy national-class campsites which provide low cost lodging alternative to SLTLA's hotels!**

**We need to restore our open spaces to their natural state, not destroy them!**

Paul Thrope

233 Cal.App.4th 1012  
Court of Appeal, Fourth District, Division 3, California.

WOODY'S GROUP, INC., et  
al., Plaintiffs and Appellants,  
v.  
CITY OF NEWPORT BEACH et  
al., Defendants and Respondents.

G050155  
|  
Filed January 29, 2015

### Synopsis

**Background:** Restaurant owner brought action for administrative mandate to overturn city council resolution reversing city planning commission's approval of conditional use permit and variance to allow restaurant to have a patio cover, remain open late on weekends, and allow dancing inside the restaurant, and asserted § 1983 claim, while city filed cross-complaint for injunctive relief. The Superior Court, Orange County, No. 30–2013–00687091, [Derek W. Hunt, J.](#), granted preliminary injunction and denied application for writ of mandate. Restaurant owner appealed.

**Holdings:** The Court of Appeal, [Bedsworth](#), Acting P.J., held that:

[1] Court would exercise its power to consider appeal as a de facto petition for a writ of mandate;

[2] unacceptable probability of actual bias on part of city council member violated restaurant owner's right to a fair hearing; and

[3] council's "custom" of letting council members appeal planning commission decisions without complying with procedures required by municipal code violated fundamentally fair process.

Reversed with directions; petition granted.

West Headnotes (8)

[1] **Mandamus** 🔑 Decisions reviewable and proper mode of review

An order denying a petition for administrative mandate is not appealable when there are still causes of action that remain outstanding.

[2] **Mandamus** 🔑 Form, requisites, and sufficiency in general

Court of Appeal would exercise its power to consider restaurant owner's appeal from order denying petition for administrative mandate as a de facto petition for a writ of mandate seeking to vacate that order, even though order denying petition for administrative mandate was not appealable due to pending § 1983 cause of action; appeal of preliminary injunction was properly before the court, merits of that appeal were almost coterminous with the merits of the challenge to the denial of the administrative mandate petition, failure to consider the merits of the ruling on the administrative mandate petition would be unnecessarily circuitous and expensive, and the parties had briefed the merits and treated the appeal as an appeal. 42 U.S.C.A. § 1983; Cal. Civ. Proc. Code § 904.1(a)(6).

[3] **Municipal Corporations** 🔑 Powers and functions of council or other governing body

When functioning in an adjudicatory capacity, a city council must be neutral and unbiased.

[4] **Municipal Corporations** 🔑 Powers and functions of council or other governing body

The law does not require the disappointed applicant to prove actual bias on the part of a city council sitting in an adjudicatory capacity; rather, there must not be an unacceptable probability of actual bias on the part of the municipal decision maker.



5 Cases that cite this headnote

- [5] **Constitutional Law** 🔑 Impartiality  
**Municipal Corporations** 🔑 Duties and liabilities

Bias alone, either actual or an unacceptable probability of it, on the part of a municipal decisionmaker sitting in an adjudicatory capacity is enough to show a violation of the due process right to fair procedure. *U.S. Const. Amend. 14*.

2 Cases that cite this headnote

- [6] **Constitutional Law** 🔑 Proceedings and review  
**Zoning and Planning** 🔑 Voting; bias and disqualification

Unacceptable probability of actual bias on part of city council member who “appealed” city planning commission's approval of special use permit for restaurant violated restaurant owner's due process rights and right to a fair hearing in front of the council; council member's e-mail showed he was strongly opposed to the planning commission's decision on restaurant owner's application, council member proposed that commission's decision be overturned, and fact that his speech to the council had been written out beforehand belied his own self-serving comment at the hearing that “I have no bias in this situation.” *U.S. Const. Amend. 14*.

5 Cases that cite this headnote

- [7] **Zoning and Planning** 🔑 Administrative review

City council's “custom” of letting council members appeal planning commission decisions without complying with procedures required by municipal code violated fundamentally fair process; municipal code required appellants be “interested,” post a fee, and use the right form, code specifically required “compliance with this chapter,” and code did not contain any special rules for the special benefit of the council.

3 Cases that cite this headnote

- [8] **Judges** 🔑 Nature and effect in general

A person cannot be a judge in his or her own cause.

*See 7 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 657 et seq.*

1 Cases that cite this headnote

**\*\*320** Appeal from one order and purported appeal from another order of the Superior Court of Orange County, *Derek W. Hunt*, Judge. First order reversed with directions, purported appeal from other order treated as a petition for writ of mandate. Petition granted. (Super. Ct. No. 30–2013–00687091)

#### Attorneys and Law Firms

*Roger Jon Diamond* for Plaintiffs and Appellants.

*Aaron C. Harp*, City Attorney, *Michael Torres*, Assistant City Attorney; *Best Best & Krieger*, *Jeffrey V. Dunn* and *HongDao Nguyen* for Defendants and Respondents.

#### OPINION

*BEDSWORTH*, ACTING P. J.

#### **\*1016** I. INTRODUCTION

The language of the law is replete with synonyms for fairness: due process, equal protection, good faith, and harmless error are all ways of expressing our commitment to fairness. The City Council of Newport Beach violated at least two basic principles of fairness in overturning a permit application approved by the city's planning commission. It should come as no surprise, then, that their action also violated California law.

First basic principle: You cannot be a judge in your own case. In this case Councilmember Mike Henn, having already voiced his “strong[ ]” opposition to Woody's Group, Inc.'s application, was allowed to appeal the approval of Woody's application to the very body on which he sits, where he did



his best to convince his colleagues to vote with him against the application.

Second basic principle: You cannot change the rules in the middle of the game. The Newport Beach Municipal Code requires appeals from the city's planning commission to the city council be brought by "interested part[ies]," who pay a filing fee and submit their appeal on a form provided by the city. (Newport Beach Mun. Code, § 20.64.030.)<sup>1</sup> The Newport Beach Municipal Code makes no provision for appeals by council members acting in their role as council members. The city council violated its own municipal code by entertaining Henn's appeal even though he did not follow the procedures laid out in the code, and then retroactively tried to justify that violation by claiming the city has a custom of extending such lenity to council members.

As we explain in detail below, two cases requiring municipal governments to play fair are directly on point and require reversal here. **\*\*321** *Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, [35 Cal.Rptr.2d 782] invalidated a city council decision to reverse a planning commission decision after the council appealed the planning commission's decision to itself. *Cohan* held dispositive the fact the city council's initiation of an appeal from the planning commission decision was in violation of the city's own municipal code. *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, [22 Cal.Rptr.3d 772] held the prehearing bias of one planning commission member was enough, by itself, to invalidate a planning commission decision that had overruled a city planning director's approval of a project. **\*1017** Reading those two cases together we can only conclude the trial court erred in not granting Woody's request for an administrative writ of mandate restoring the original planning commission's grant of its application.

## II. FACTS

Woody's Wharf is a long-established restaurant overlooking the harbor in Newport Beach. It sits on the Lido Isle portion of Newport Beach, a strip of land that curves around Newport Harbor, which itself surrounds Balboa Island. In land-use jargon, the neighborhood is a "mixed use" one, but "mixed use" understates its nature. The restaurant is in a trendy marina area that includes a number of restaurants, bars, residences and condominiums. A diner at Woody's would likely be looking out at boats and boat slips in the harbor and a parade of residents, shoppers, and tourists. There was

testimony at the city council meeting that some customers come to the restaurant in their boats.

On September 5, 2013, the Newport Beach Planning Commission voted five to two to approve a conditional use permit and variance to allow Woody's to have a patio cover, remain open until 2:00 a.m. on weekends, and allow dancing inside the restaurant. The patio approval and 2:00 a.m. extension were, in fact, interrelated. The idea was to minimize, by the construction of the new patio cover, any noise that might be made by patrons talking on the patio after 11:00 p.m.

Four days later, on September 9, Newport Beach City Councilmember Mike Henn sent the city clerk an e-mail in which he made an "official request to appeal" the planning commission's decision because he "*strongly believ[ed]*" (italics added) the "operational characteristics requested in the application and the Planning Commission's decision are inconsistent with the existing and expected residential character of the area and the relevant policies of the voter approved 2006 General Plan."

The Newport Beach Municipal Code has a number of detailed requirements to appeal a planning commission decision. To be eligible to appeal at all, one must be an "interested party." (Newport Beach Mun. Code, § 20.64.030(A).) Appeals "shall" be filed on forms provided by the city clerk (see Newport Beach Mun. Code, § 20.64.030.B.1.b), and must be accompanied by a filing fee identified in the city's fee schedule. (Newport Beach Mun. Code, § 20.64.030.B.2.)

It is undisputed that Henn does not claim to have been an "interested party," as that term is typically used, did not use the city clerk's form, and paid no filing fee. It is a reasonable inference that the total cost of appealing a **\*1018** planning commission decision to the city council (not including attorney fees) can easily exceed \$1,000, and might even run as high, in a matter like Woody's application, as \$4,100.<sup>2</sup>

**\*\*322** The city council heard Henn's appeal on October 8, 2013. Woody's did not waive any challenges to the irregularity of Henn's appeal to a body on which he himself would sit. Woody's attorney took several minutes of his allotted time at the city council meeting to argue that Henn was not allowed to bring the appeal under the relevant municipal code provisions and that he was biased.<sup>3</sup> But he was rebuffed by the city

attorney who said “Well, the Code does provide that the city council member can basically call it up for review.”

It was a lively meeting, with a number of speakers on both sides. The case to reverse the planning commission's decision may be fairly summarized this way: While the area in which Woody's is located is a mix of residential and commercial uses including a number of bars, restaurants and marinas, the recent trend (apparently encouraged by a 2006 general plan adopted by the city) has been for more residential development. However, the aggregation of bars in the area has led to the problem of patrons who have had too much to drink leaving their respective establishments at 2:00 a.m. and sometimes vomiting and urinating in public. The point was perhaps best articulated by a resident of the 28th Street Marina, who asserted Woody's patrons are intoxicated when “they are all dumped onto the street at 2 a.m.” To let Woody's remain open until 2:00 a.m. would only exacerbate the problem of 2:00 a.m. inebriates. Residents complained that allowing Woody's such late hours would effectively convert it from a restaurant into a “nightclub.”

The case to affirm the planning commission was set out with equal fervor: Woody's is a longtime Newport Beach “institution” (the mayor's own characterization), once owned by actor Chuck Norris. It has been open late on weekends and has allowed interior dancing since its inception in the mid-1960's. It is located in a truly mixed-use area that appeals to urbanites seeking a “walk-to” social life, and opponents of the way it has always operated are simply trying to change the area into something less diverse than it has been historically. One 24th Street resident speaking on behalf of Woody's, in the process of praising the diversity of the area, went so far as to argue Woody's opponents were trying to change the character of the area into \*1019 something more like Irvine. Moreover, as a representative from the planning commission noted, noise is not a problem at all. While several residents complained of noise, the only evidence received by the council from actual noise *studies* (both Woody's and the city's) found that Woody's does not even marginally add to the area's ambient noise level, a fact specifically noted by the planning commission as well.

After the council concluded the public commentary portion of the meeting, councilmember Henn spoke first. Henn's speech takes up about 13 pages of transcript of the city council meeting. None of the other council members spoke for more than two or three paragraphs. Henn gave an extraordinarily well-organized, thoughtful and well-researched presentation

why the planning commission decision needed to be overturned. The speech, in fact, was so well-organized, well-researched, and thoughtful it seemed unlikely to be extemporaneous \*\*323 and Henn admitted that very fact at the end of the meeting. He said—when Woody's counsel pointed out his obvious premeeting preparation—that he had prepared his remarks before the meeting based on a “careful review and my own independent diligence before this meeting started.”

The council voted four to one to reverse the planning commission's decision, with a sixth member abstaining and the seventh recusing himself. The formal resolution reversing the city planning commission's decision was adopted November 12, 2013, as resolution No. 2013–75. With regard to the question of whether Henn's appeal was appropriate under the city's own municipal code, the resolution said: “Councilmembers are exempt from paying the filing fee provided by NBMC Section 20.64.030(B)(2) under the City's long-standing policy and practice of not requiring Councilmembers to pay a filing fee because their appeals are taken for the benefit of the City's residents. Since 2008, there have been eleven (11) appeals of Planning Commission decisions initiated by City Council Members and the City Clerk has not required the payment of an appeal fee under the City's long-standing policy and practice.”

The case segued rapidly into litigation. Woody's sought administrative mandate to overturn the resolution the next day (Nov. 13), also asserting a second cause of action for violation of civil rights (a 1983 claim). Less than 30 days later—before the administrative record had been completed—the city filed a cross-complaint for injunctive relief. In March 2014, the city requested, and in April obtained, a preliminary injunction which prohibited Woody's from operating after 11:00 p.m. or allowing dancing. And in May the court heard Woody's application for a writ of administrative mandate, which it denied. Woody's notice of appeal in May included both the April order granting the city its preliminary injunction and the May order denying Woody's administrative mandate.

### \*1020 III. DISCUSSION

#### A. Appealability

[1] There is a small procedural detour we need to make before we address the merits of this case. An order denying preliminary injunction is directly appealable. ([Code Civ. Proc.](#), § 904.1, subd. (a)(6); e.g., [Ragland v. U.S. Bank](#)

*National Assn.* (2012) 209 Cal.App.4th 182, 208, [147 Cal.Rptr.3d 41].) The appeal from the preliminary injunction in this case was timely, so there is no problem there. But an order denying a petition for administrative mandate is not appealable when there are still causes of action that remain outstanding. *Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 697, [107 Cal.Rptr.2d 149, 23 P.3d 43], made that clear in no uncertain terms: “When an order denying a petition for writ of administrative mandate does not dispose of all causes of action between the parties, allowing an appeal from the denial order would defeat the purpose of the one final judgment rule by permitting the very piecemeal dispositions and multiple appeals the rule is designed to prevent.” In that regard, Woody's second cause of action for damages under federal law (42 U.S.C. § 1983) has not been dismissed, a fact noted by the trial judge at the hearing on the administrative mandate. That means we have only one strictly proper appeal before us: the one involving the preliminary injunction.

[2] However, this is an appropriate case in which to exercise our power to consider the appeal from the order denying the petition for administrative mandate as a de facto petition for a writ of mandate seeking to vacate that order. There are **\*\*324** several reasons this case presents sufficiently unusual facts to justify such discretion. Mainly, we must address the merits of the preliminary injunction *anyway*, and, given the nature of the record here, those merits are almost coterminous with the merits of the challenge to the trial court's denial of the administrative mandate petition. *Not* considering the merits of the ruling on the administrative mandate petition would be unnecessarily circuitous and expensive to both parties, particularly if we were to conclude the preliminary injunction was improvidently granted. Furthermore, the parties have briefed the merits and treated the appeal as an appeal; no good purpose would be served by confining our review to the preliminary injunction. And not only does Supreme Court precedent support our conclusion (*Olson v. Cory* (1983) 35 Cal.3d 390, 401, [197 Cal.Rptr. 843, 673 P.2d 720] [treating appeal from a nonappealable order as a petition for an extraordinary writ because not doing so could lead to unnecessary trial proceedings and result in “ ‘unnecessarily dilatory and circuitous’ ” further litigation] ) but *Cohan*, *supra*, 30 Cal.App.4th 547, 35 Cal.Rptr.2d 782 is directly on point. That case likewise considered the merits of a petition for writ of mandate challenging a city council's reversal of a planning commission decision even though other causes of action remained. **\*1021** (See *Cohan*, *supra*, 30 Cal.App.4th at p. 554, 35 Cal.Rptr.2d 782 [“Judicial economy would not be served by awaiting the outcome of the trial on the other causes

of action if a procedural violation raised in an improvident appeal required reversal of the trial court's ruling.”].) So we proceed.

## B. Due Process

### 1. No Biased Adjudicators

[3] Most of us think of city councils as legislative bodies. But city councils sometimes act in an *adjudicatory* capacity, that is, they sit in a role similar to judges. Judging applications for land use permits is one of those times. (*Wiltshire v. Superior Court* (1985) 172 Cal.App.3d 296, 304, [218 Cal.Rptr. 199].) And, as recognized in *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, [97 Cal.Rptr.2d 467]—the main case on which the city relies—when functioning in such an adjudicatory capacity, the city council must be “neutral and unbiased.” (*Id.* at p. 1234, 97 Cal.Rptr.2d 467 [“The contention that a fair hearing requires a neutral and unbiased decision maker is a fundamental component of a fair adjudication....”].)

As it turns out, there is already a body of case law bearing on whether an applicant for a land use permit is afforded procedural due process when a member of the adjudicatory body considering the permit is, or may be, biased against the applicant. (See *Nasha*, *supra*, 125 Cal.App.4th 470, 22 Cal.Rptr.3d 772 [member of planning commission wrote article attacking project under consideration, member held biased and commission's decision reversed]; *BreakZone*, *supra*, 81 Cal.App.4th 1205, 97 Cal.Rptr.2d 467 [city council member exhibited no bias in asking for appeal of planning commission decision where the municipal code expressly provided for such action]; *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1173, [56 Cal.Rptr.2d 223] (*Clark*) [city council member should have recused himself because proposed project had “direct impact” on the “quality of his own residence”]; *Cohan*, *supra*, 30 Cal.App.4th 547, 35 Cal.Rptr.2d 782 [city council, acting as a whole, appealed decision it did not like to itself despite absence of authorization to bring such an appeal; city council decision reversed]; accord, *Gai v. City of Selma* (1998) 68 Cal.App.4th 213, [79 Cal.Rptr.2d 910] [member of personnel commission investigating **\*\*325** officer's discharge should have recused himself because he was actually biased against officer]; *Mennig v. City Council* (1978) 86 Cal.App.3d 341, 351, [150 Cal.Rptr. 207] [members of city council who became personally “embroiled” in conflict with police chief should have recused themselves on question of discipline of police chief].)

[4] [5] The generally accepted linguistic formation of the rule against bias has been framed in terms of *probabilities*, not certainties. The law does not **\*1022** require the disappointed applicant to prove actual bias. Rather, there must not be “an unacceptable probability of actual bias” on the part of the municipal decision maker. (*Nasha*, *supra*, 125 Cal.App.4th at p. 483, 22 Cal.Rptr.3d 772; *BreakZone*, *supra*, 81 Cal.App.4th 1205, 1236, 97 Cal.Rptr.2d 467 [“To prevail on a claim of bias violating fair hearing requirements, BreakZone must establish ‘an unacceptable probability of actual bias on the part of those who have actual decisionmaking power over their claims.’ [Citation.]”].) Thus bias—either actual or an “unacceptable probability” of it—alone is enough on the part of a municipal decision maker is to show a violation of the due process right to fair procedure. (E.g., *Cohan*, *supra*, 30 Cal.App.4th at p. 559, 35 Cal.Rptr.2d 782 [“A biased decisionmaker is constitutionally unacceptable.”].)

As *Nasha* made clear, allowing a biased decision maker to participate in the decision is enough to invalidate the decision. There, a city planning director approved a five-residence development project in the Santa Monica Mountains, subject to conditions. There was a properly authorized appeal by a neighbor and a conservancy to the planning commission. (*Nasha*, *supra*, 125 Cal.App.4th at p. 475, 22 Cal.Rptr.3d 772.) Prior to the hearing by the commission, however, one of the planning commission members wrote an unsigned article in a local residents association's newsletter advocating “a position against the project” because he perceived it to be a threat to wildlife migration patterns. (*Id.* at p. 484, 22 Cal.Rptr.3d 772.) He also spoke against the project at a neighborhood association meeting. While the commission member acknowledged, at the planning commission meeting, that he was the author of the unsigned article, he did not disclose that it was not “merely informational,” but rather “advocated a position against the project.” (*Id.* at p. 477, 22 Cal.Rptr.3d 772.) And at the meeting, the commission member was the one to bring the motion to grant the appeal from the director's decision, which was then carried on a three-to-one vote. (*Id.* at pp. 477–478, 22 Cal.Rptr.3d 772.) The developer subsequently sought a writ of mandate to overturn the planning commission decision, but the trial court denied it on the ground the developer should have known about the member's authorship of the article. The Court of Appeal reversed, concluding the planning commission's decision was “tainted by bias and must be vacated,” with directions to the trial court to issue an order to the planning commission to reconsider the appeal before “an impartial

panel.” (*Id.* at pp. 485–486, 22 Cal.Rptr.3d 772.)<sup>4</sup> The *Nasha* court held the developer had established “an unacceptable probability of actual bias” on the commission member's part. (*Id.* at p. 482, 22 Cal.Rptr.3d 772.)

**\*\*326** [6] We conclude Woody's has likewise established an “unacceptable probability of actual bias” on Henn's part. Henn's “notice of appeal”—our term to describe his e-mail—showed he was strongly opposed to the planning **\*1023** commission's decision on Woody's application. That is, as in *Nasha*, he took “a position against the project.” (*Nasha*, *supra*, 125 Cal.App.4th at p. 477, 22 Cal.Rptr.3d 772.) And also, like the biased member in *Nasha*, Henn was the one to propose the motion that the lower decision be overturned. Henn's speech to the council had been written out beforehand, wholly belying his own self-serving comment at the hearing that “I have no bias in this situation.” He should not have been part of the body hearing the appeal.

## 2. No Authority to Hear the Appeal

[7] The problem of bias is amplified when it is *combined* with the related phenomenon of a city violating its own procedure by initiating an appeal to itself. Both are present in the case before us, both occurred in *Cohan*, and *Cohan* augments *Nasha's* applicability to the council's decision here.

In *Cohan*, a property developer obtained approval from the planning commission of an application to develop a parcel of property, though myriad conditions were imposed. The project was slated for city council review on only one matter: a permit for tree removal. Even so, at the next city council meeting—held three days prior to the end of the appeal period—several local citizens spoke against the project, and others sent letters urging the city council to appeal the planning commission decision. (*Cohan*, *supra*, 30 Cal.App.4th at pp. 552–553, 35 Cal.Rptr.2d 782.) So the council voted to waive state statutory 72-hour notice provisions (part of the Ralph M. Brown Act (Brown Act); *Gov. Code*, § 54950 *et seq.*) and added the appeal to its agenda as an “urgency” matter, then voted to consider the *entire* project in about three weeks (the same time the tree permit was to be considered). (*Id.* at p. 553, 35 Cal.Rptr.2d 782.)

Three weeks later, the city council conducted a noticed hearing on its appeal of the planning commission decision, at which 20 residents spoke against or submitted statements against the project. The council meeting ended with the council “grant[ing] the appeal” which rejected the entire



project. (*Cohan, supra*, 30 Cal.App.4th at p. 553, 35 Cal.Rptr.2d 782.) The developer then filed a complaint seeking, inter alia, a writ of mandate. The trial court acknowledged that the city council had not followed its own code or the state statutory notice provisions—indeed, unlike our case, the trial court ruled that the city council's appealing a decision to itself was “void”—but nonetheless concluded the council's process was “adequate” because of the likelihood that someone in the large number of opponents of the project would have filed an appeal within the remaining three days anyway. The trial court's rationale was that the council would then have heard the matter anyway, the outcome would have been the same, so all errors were harmless. (*Id.* at pp. 553–554, 35 Cal.Rptr.2d 782.)

**\*1024** But the appellate court granted a writ of mandate ordering the trial court to reverse itself and enter a new order “nullifying” the “Council's appeal to itself.” (*Cohan, supra*, 30 Cal.App.4th at p. 561, 35 Cal.Rptr.2d 782.) It held the Brown Act notice violation was indeed harmless. (*Id.* at p. 556, 35 Cal.Rptr.2d 782.) But it zeroed in on the fact the city's municipal code did not entitle the council to bring an appeal to itself. In doing *that*, said the court, the council “acted in an arbitrary and high-handed manner.” (*Id.* at p. 558, 35 Cal.Rptr.2d 782.) It was the fact “the Council, in its zeal, made sure the decision did not **\*\*327** stand unchallenged,” in the context of the lack of authority to initiate the appeal in the first place, that constituted a violation of the due process right to a fair procedure. (*Id.* at p. 559, 35 Cal.Rptr.2d 782.) Said the court: “The Council ignored the very laws and regulations meant to ensure fair process concerning property development conflicts.” (*Id.* at p. 560, 35 Cal.Rptr.2d 782.)

There was a paragraph in *Cohan* qualifying its conclusion. Not surprisingly, Newport Beach relies on that paragraph in this appeal. It said, “Our holding should not be read as invalidating all appeals taken by a city council or other governing body to itself from a decision of a subordinate agency. We do emphasize, however, that if such a procedure is contemplated, *it should be authorized by the ordinances or rules which govern appeals to such entity, and some direction should be given in such ordinances or rules concerning specification of grounds and appropriate burdens of proof.*” No elected individual appealed here. The *Council* appealed. Had a single council member been the appellant (and complied with the municipal code), he or she might have been disqualified but the remainder of the City Council could have voted.” (*Cohan, supra*, 30 Cal.App.4th at p. 559, 35 Cal.Rptr.2d 782, second italics added.)

But the city reads too much into the *Cohan* caveat. When read in context, all it does is dispel any doubt the reader might have as to the appellate court's reasoning. *Cohan* found a violation of due process because the city council's appeal to itself was *not* authorized by the city's own ordinances or rules. The most that Newport Beach can validly wring out of *Cohan*'s qualifying paragraph is that the court was willing to say (and even this is arguably dicta) that a lone city council member *might* have validly appealed *if* such an appeal had “complied with the municipal code” (*Cohan, supra*, 30 Cal.App.4th at p. 559, 35 Cal.Rptr.2d 782) *and* the member was willing to be disqualified from his or her own appeal.

To apply *Cohan*'s analysis, we turn to the question of whether Henn's appeal was indeed authorized by the city's own municipal code. At the beginning of the council meeting in question, the city attorney confidently said, “the Code does provide that the city council member can basically call it up for review.” He could hardly have been more wrong.

**\*1025** As an appendix to this opinion we reproduce the entirety of the portion of the Newport Beach Municipal Code (ch. 20.64) dealing with appeals from planning commission decisions. We do so to demonstrate that there is no provision for free appeals by city council members. In fact, an ordinary reader of the city's code would conclude that council members were actually *affirmatively prohibited* from bringing appeals to themselves.

The relevant code provisions begin by telling the reader the purpose of the chapter is to provide procedures for appealing various decisions, including the planning commission's. (Newport Beach Mun. Code, § 20.64.010.) Then the code designates the city council as the body to hear appeals from the commission. (Newport Beach Mun. Code, § 20.64.020.D.)

Then comes a section called “Eligibility.” It is plain: “Appeals may be initiated by *any interested party.*” (Newport Beach Mun. Code, § 20.64.030.A., italics added.) Next comes a substantive notice requirement in writing. It requires that more than an issue must be stated; the appeal must be in writing and state *both* “the facts and basis for the appeal.” (Newport Beach Mun. Code, § 20.64.030.B.)

**\*\*328** A deadline is specified. Prospective appellants have only 14 days “following the date the action or decision was rendered” to file their appeal, unless there is a specific

provision in the municipal code to the contrary. (Newport Beach Mun. Code, § 20.64.030.B.1.)

A few more hoops to jump through are then enumerated. Appeals to the city council must be on “forms provided by the Clerk” (Newport Beach Mun. Code, § 20.64.030(B)(1) (b)) and accompanied by a filing fee as identified from the Clerk's “master fee schedule.” (Newport Beach Mun. Code, § 20.64.030(B)(2).)

Substantive rules of appellate review are next. If an appeal is taken, it means the decision from which it is taken has “no force of effect [*sic*: obviously “or” instead of “of” was meant] as of the date on which the appeal is filed,” and there is to be “de novo” review of any planning commission appeals. (Newport Beach Mun. Code, § 20.64.030.C.1., 3.a.) Significantly, the reviewing body hearing an appeal (in the case of an appeal from the planning commission, the city council) “shall”—suggesting it has no choice in the matter—“hear testimony of the appellant, the applicant, *and any other interested party* ” (Newport Beach Mun. Code, § 20.64.030.C.3.c., *italics added*), again stressing the restriction of appeals to interested parties.

The fact the reviewing body is acting in an adjudicatory capacity is then emphasized by language making clear that the body is to act as a *fact finder* in coming to one of three possible courses of action. (“As provided in this Zoning Code, the review authority may, based upon findings of fact about the particular case: [¶] \*1026 ....”) (Newport Beach Mun. Code, § 20.64.030.D.) The first three possible courses of action are broadly analogous to those available to an ordinary appellate court. The reviewing body may affirm or reverse or some combination of the two and must (as appellate courts in California are required to do (see [Cal Const., art. VI, § 14](#))) state its reasons. (Newport Beach Mun. Code, § 20.64.030.D.1.a.)

The reviewing body is also given two other options: (1) the adoption of additional conditions of approval to address issues “other than those that were the basis of the appeal” or (2) denial of the permit approved by the “previous review authority” or elimination of “one or more conditions of approval.” (Newport Beach Mun. Code, § 20.64.030.D.1.b. & c.) In the event “new or different evidence is presented on appeal,” the reviewing body also has the option of remanding the “matter to the previous review authority for further consideration.” (Newport Beach Mun. Code, § 20.64.030.D.2.)

There are two final provisions. The first is that a “tie vote by the review authority on an appeal” means “the decision being appealed shall stand.” (Newport Beach Mun. Code, § 20.64.030.D.2.) The second contains language that the municipal code's chapter on appeals is to be taken seriously—it is not just a series of hints. The provision says no person “shall” seek “judicial review of a City decision” until “all appeals to the Commission and Council have been first exhausted *in compliance with this chapter*.” (Newport Beach Mun. Code, § 20.64.040, *italics added*.)

The same rules applicable to statutes, said the courts in [Carson Harbor Village, Ltd. v. City of Carson Mobilehome Park Rental Review Bd.](#) (1999) 70 Cal.App.4th 281, 290, [82 Cal.Rptr.2d 569] and [County of Madera v. Superior Court](#) (1974) 39 Cal.App.3d 665, 668, [114 Cal.Rptr. 283], govern local ordinances as well. The Newport Beach Municipal Code clearly does not allow for city council members bringing appeals from city planning commission decisions to—literally—themselves. There is **\*\*329** absolutely no provision in the code for an exception for city council members to the code's rules requiring appellants be “interested,” post a fee, and use the right form. The city's response—that it has been violating this rule for a long time—is not convincing here.

Indeed, under the canon of *expressio unius est exclusio alterius*, the use of the phrase “interested party” without explicit provision for a city council member exception—indicates that city council members would have to be *disqualified* from participating in any appeal they brought. If the code says “interested person” under the heading of Eligibility, it is simultaneously **\*1027** conveying the thought that *disinterested* persons are not eligible. An “interested party” for purposes of *bringing* the appeal cannot simultaneously be a “disinterested person” for purposes of affording due process in the *hearing* of the appeal.

And that restriction is doubly emphasized by the provision at the end of the section saying that no attack is to be made on a decision in the courts *unless* there has been “compliance” with the chapter in the municipal code concerning appeals. (Newport Beach Mun. Code, § 20.64.040.) Obvious implication: There is no room for unwritten rules, policies or customs outside the municipal code or for the city council to give its members privileges to appeal *not* “in compliance with this chapter.”



[8] A person cannot be a judge in his or her own cause. (E.g., *Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 223, [159 Cal.Rptr.3d 358, 303 P.3d 1140]; *Bonham's Case* (K.B. 1610) 77 Eng. Rep. 646, 652.) Our Supreme Court uttered a very strong statement on that great rule a little more than a century ago: “By [section 170 of the Code of Civil Procedure](#) it is provided that no justice, judge, or justice of the peace shall sit or act in any action or proceeding to which he is a party *or in which he is interested*. This is but an expression of the ancient maxim that no man ought to be a judge in his own cause, a maxim which appeals with such force to one's sense of justice that it is said by Lord Coke to be a natural right *so inflexible that an act of parliament seeking to subvert it would be declared void*.” (*Meyer v. City of San Diego* (1898) 121 Cal. 102, 104, [53 P. 434], second italics added.)

Strong language. We will not assume that drafters of the Newport Beach Municipal Code intended to contravene a cardinal rule of justice in the absence of a clear statement of such remarkable intent. No such statement exists. In fact the “compliance with this chapter” language indicates the drafters of the Newport Beach Municipal Code did not envision any special customs (or rules or policies) for the special benefit of the city council itself. This appears to have just been a practice that was followed unthinkingly.

Several other passages in the ordinance similarly point to a lack of intent to make an exception for city council members. The need to state the “facts” in the notice of appeal is consistent with the prerequisite of being an interested party, i.e., someone who approaches the reviewing body with some knowledge of what has already happened based on the initial body's review of evidence. The short deadline likewise points to appeal by someone who is aggrieved by the planning commission decision.

Our remarks here on the question of authorization may in fact be overkill, since Newport Beach does not even purport to assert that its own municipal **\*1028** code allowed Henn's appeal. Rather, it points to a policy—custom would be a better word—of the city council letting its members appeal planning commission decisions. The only written authority for this custom, interestingly **\*\*330** enough, is the very document embodying the city's council's decision (res. 2013–75), which merely recites the city has a “long-standing policy and practice of not requiring Councilmembers to pay a filing fee because their appeals are taken for the benefit of the City's residents.”

We note in passing the obvious ipse dixit nature of the language in resolution No. 2013–75. The assumption that *by definition* a city council member who appeals is doing so “for the benefit” of the residents, as distinct from some personal bias, is certainly not based in logic. The *Clark* case, for example, convincingly demonstrates that council members can be very “interested” in their own appeals for reasons not related to altruistic concerns for other residents or the city as a whole. (See *Clark, supra*, 48 Cal.App.4th at pp. 1172, 56 Cal.Rptr.2d 223 [noting conflict of interest by city council member because his own view would be obstructed by project].)

In any event, the exemption does not withstand the proverbial smell test. There's a fancy Latin phrase for that sort of thinking—*Quod principi placuit, legis habet vigorem* (what pleases the prince has the force of law)—but it's not one that is consistent with due process. (See Amos, *The Common Law and the Civil Law in the British Commonwealth of Nations* (1937) 50 Harv. L.Rev. 1249, 1254.)<sup>5</sup>

So we conclude that the city's incantation of a “policy and practice” in direct violation of its own code cannot conform that alleged policy and practice to due process. *Cohan's* observation about a council acting in an “arbitrary and high-handed” manner is applicable in this case as well: The city council violated the rules laid down in the city's own municipal code, then purported to exempt itself from that code by invoking some previously undocumented custom of ignoring those rules when it comes to council members themselves. Needless to say, changing the rules in the middle of the game does not accord with fundamentally fair process. (E.g., *Buttram v. Owens–Corning Fiberglas Corp.* (1997) 16 Cal.4th 520, 532, [66 Cal.Rptr.2d 438, 941 P.2d 71] [noting, in context of prospectivity issue, that the unfairness of changing “‘the rules of **\*1029** the game’ in the middle of a contest” is a commonsense notion]; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1194, [246 Cal.Rptr. 629, 753 P.2d 585] [same]; *Rope v. Auto–Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 648, [163 Cal.Rptr.3d 392] [refusing to apply law to “conduct preceding its effective date” because that would be “tantamount to an unfair change in ‘the rules of the game’ ” in the midst of a contest].)

### 3. BreakZone Distinguishable

Newport Beach relies on *BreakZone, supra*, 81 Cal.App.4th 1205, 97 Cal.Rptr.2d 467 as its main authority to uphold the

trial court's decision to leave its city council's overturning of the planning commission intact. The case is distinguishable on crucial points.

In *BreakZone*, the Torrance City Planning Commission approved a project to **\*\*331** convert a previously youth-oriented pool parlor to an adult-oriented establishment able to sell alcohol. The city's police department, however, perceived trouble in the application, noting that even as a youth-oriented pool hall, *BreakZone* was a “gathering spot for gang members” and recommended against the application. (*BreakZone*, *supra*, 81 Cal.App.4th at pp. 1209, 1213, 97 Cal.Rptr.2d 467.) A city council member filed an appeal from the decision using the city's standard appeal form, saying he was appealing “[b]ased on Police Department recommendation” in order to “bring the matter in front of the entire Council.” (*Id.* at p. 1213, 97 Cal.Rptr.2d 467.) The city council then granted the appeal, and denied the application. (*Id.* at pp. 1219–1220, 97 Cal.Rptr.2d 467.) The trial court denied the ensuing petition for writ of mandate and the appellate court affirmed.

But *BreakZone's* main focus on the issue of the possible bias of the city council member who filed the appeal was on whether the *mere fact* the council member had filed an appeal was itself enough to show an unacceptable probability of actual bias. (*BreakZone*, *supra*, 81 Cal.App.4th at p. 1235, 97 Cal.Rptr.2d 467 [framing issue as whether “the fact that one council member filed the appeal and participated in and voted on that appeal is a violation of the common law of conflict of interest and requires issuance of a writ of mandate”].) After first framing the issue in terms of whether the fact the council member had filed the appeal was enough by itself to show a violation of due process, the *BreakZone* court spent some considerable space knocking down the applicant's reliance on *Withrow v. Larkin* (1975) 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712, a federal Supreme Court professional discipline due process case involving a doctor's license. The point of *that* discussion was to try to establish that for a due process violation in an adjudicatory context to occur, there must be a “commitment to a result”—though the *BreakZone* court **\*1030** allowed that “even a tentative commitment” might do. (*BreakZone*, *supra*, 81 Cal.App.4th at p. 1236, 97 Cal.Rptr.2d 467.) But, having made that concession, the *BreakZone* court added that “advance knowledge of adjudicative facts that are in dispute, as well as participation in the charging function” is not enough, alone, to show a due process violation. (*Ibid.*)

The applicant, naturally, also relied on *Cohan*, but the *BreakZone* court found *Cohan* distinguishable. And this is why *BreakZone* is so clearly not applicable to our case: At least twice, the *BreakZone* court emphasized that in contrast to *Cohan*, the Torrance Municipal Code allowed city council members to appeal from planning commission decisions. Said the *BreakZone* court: “In considering this question, we note first that, in contrast to the circumstances present in *Cohan*, the Torrance Municipal Code specifically permits the filing of an appeal from the decision of the planning commission by a member of the city council.” (*BreakZone*, *supra*, 81 Cal.App.4th at p. 1239, 97 Cal.Rptr.2d 467, second italics added.)

The *BreakZone* court emphasized that fact again several times: “We thus are confronted with the question left unanswered in *Cohan*: If an individual member of a city council follows a procedure set out in a properly drawn ordinance, is he or she disqualified from participating in the subsequent hearing and voting on the matter?” (*BreakZone*, *supra*, 81 Cal.App.4th at p. 1240, 97 Cal.Rptr.2d 467, some italics added.) *BreakZone* was thus based upon a city code that expressly allowed appeal by a city council member. That is not our case.

**\*\*332** Interestingly enough, the *BreakZone* court was willing to allow that the *Cohan* opinion at least “suggests” it is fundamentally unfair to have the person who files an appeal actually sit as an adjudicator of that appeal. (*BreakZone*, *supra*, 81 Cal.App.4th at p. 1240, 97 Cal.Rptr.2d 467.) But the *BreakZone* court did not feel that issue was properly before it. It asked, “Is it fundamentally unfair for the government official appealing the action to participate in the hearing on the appeal and vote on that appeal? [¶] *Cohan* suggests that it might be, but does not expand on that suggestion. Neither party cites cases that decide the question.” (*BreakZone*, *supra*, 81 Cal.App.4th at p. 1240, 97 Cal.Rptr.2d 467.)

With no guidance from the parties, *BreakZone* declined to attempt an answer to the question. Instead, the *BreakZone* court quoted a swath of the transcript of the city council meeting, its point being that the city council member who filed the appeal did *not*, contrary to the applicant's assertion, take “charge of and control[ ] the hearing.” Instead, the mayor “exercised a firm hand over the proceedings,” and there was “no indication in the record that [the city council member who filed the appeal] dominated the proceedings.” (*BreakZone*, *supra*, 81 Cal.App.4th at p. 1240, 97 Cal.Rptr.2d 467.) Just because that member was the first to speak did not show

unfairness, because, having filed the appeal, it was “logical” to call on him first. (*Ibid.*)

**\*1031** We have looked for an indication in the *BreakZone* opinion that the court considered the council member's reference to the police department's concerns as some intimation of actual bias. We have found none. (See *BreakZone*, *supra*, 81 Cal.App.4th at pp. 1233–1241, 97 Cal.Rptr.2d 467 [discussing issue of whether council member's “conduct” deprived applicant of “a fair hearing” (italics omitted) ].) It appears the precise point of the implication of citing the police recommendation as grounds for appeal was not raised by the applicant. Or, if raised, it was not considered by the *BreakZone* court. Or, perhaps the *BreakZone* court simply did not consider the issue worth the candle because it thought the city council member was simply *forwarding* on the police department's recommendation in a *disinterested* effort to give the city council its own chance to evaluate it. Indeed, some support for this reading of *BreakZone* may be found in the *BreakZone* court's implication that the council member had no “commitment to a result.” (See *id.* at p. 1236, 97 Cal.Rptr.2d 467.)

But we need not resolve that question. What is clear is that *BreakZone* would not apply in the case before us now, even if the *BreakZone* court *had* confronted the police department's connection to the issue. First, unlike *BreakZone* where authority of a council member to appeal a planning commission decision was specifically provided under the Torrance Municipal Code, the Newport Beach Municipal Code does not allow such appeals. Second, unlike *BreakZone* where the council member was at least arguably not committed “to a result” as shown in the notice of appeal, here Councilmember Henn was *strongly*—his word—committed to overturning the planning commission's decision. Third, unlike *BreakZone*, where the council member did not “control” the city council meeting on the hearing of his own appeal, here council member Henn's speech after the close of the public comment section dominated the deliberation. His presentation was orders of magnitude different from the other council members. All of this removes our case from the ambit of *BreakZone*.

### C. Disposition

If this case involved Henn's bias alone, *Nasha* would dictate simply telling the trial **\*\*333** court to grant the petition for writ of mandate and send the appeal back to the Newport Beach City Council with instructions to reconsider the appeal

of the planning commission's decision, sans Henn. However, as we have explained, and as *Cohan* instructs, the city's municipal code never allowed this appeal in the first place. Moreover, the *Cohan* court also specifically rejected the trial court's rationale that the improper appeal was harmless because interested parties (such as local residents) would surely have filed their own—proper—appeals. Under *Cohan*, a city council's taking an appeal that is *not* authorized by the city's municipal code requires that the council's decision be nullified, not just returned for reconsideration. (*Id.* at p. 561, 35 Cal.Rptr.2d 782 [directions to “enter a new order nullifying the Council's appeal to itself”].)

Based on *Cohan* and *Nasha*, the preliminary injunction was improvidently granted. It is hard to maintain the city's actions were likely to be upheld when it had no authority to act in the first place. So it seems to us the city council's decision must be nullified and the petition for writ of mandate granted.

Accordingly, the order granting the city's preliminary injunction is hereby reversed, and the trial court is further directed to vacate the order denying Woody's petition for writ of mandate and enter a new order granting it.

Woody's shall recover its costs in this combination appellate and writ proceeding.

WE CONCUR:

MOORE, J.

IKOLA, J.

**\*1032 \*1033** APPENDIX

## Chapter 20.64

### APPEALS

Sections:

20.64.010 Purpose.

20.64.020 Appeals.

20.64.030 Filing and Processing of Appeals.

20.64.040 Judicial Review of City Decision.

#### 20.64.010 Purpose.

The purpose of this chapter is to provide procedures for the appeal of determinations and decisions of the Director, Zoning Administrator, Hearing Officers, and Planning Commission. (Ord. 2010–21 § 1 (Exh. A)(part), 2010)

#### 20.64.020 Appeals.

A. Director. Interpretations of the Director may be appealed to the Planning Commission.

B. Zoning Administrator. Decisions of the Zoning Administrator may be appealed to the Planning Commission.

C. Hearing Officer. Decisions of a Hearing Officer may be appealed to the Council.

D. Planning Commission. Decisions of the Commission may be appealed to the Council. (Ord. 2010–21 § 1 (Exh. A)(part), 2010)

#### 20.64.030 Filing and Processing of Appeals.

A. Eligibility. Appeals may be initiated by any interested party.

B. Timing and Form of Appeal. An appeal shall be submitted in writing and shall state the facts and basis for the appeal.

1. Filing an Appeal. An appeal shall be filed with the Director or City Clerk, as applicable, within fourteen (14) days following the date the action or decision was rendered unless a different period of time is specified by the **\*1034** Municipal Code (e.g., **\*\*334** Title 19 allows ten (10) day appeal period for tentative parcel and tract maps, lot line adjustments, or lot mergers).

a. Appeals addressed to the Commission shall be filed with the Director on forms provided by the Department; and

b. Appeals addressed to the Council shall be filed with the City Clerk on forms provided by the Clerk.

2. Filing Fee. An appeal shall be accompanied by the filing fee identified in the City's master fee schedule.

C. Report, Scheduling, Noticing, and Conduct of Hearing.

1. The decision from which an appeal has been made has no force of effect as of the date on which the appeal is filed.

When an appeal has been filed, the Director shall prepare a report on the matter, including all of the application materials in question, and schedule the matter for a public hearing by the appropriate review authority identified in Section 20.64.020 (Appeals).

2. Notice of the hearing shall be provided, and the hearing shall be conducted, in compliance with Chapter 20.62 (Public Hearings).

3. Conduct of Hearing.

a. Review of an appeal from a decision of the Zoning Administrator or Commission shall be de novo. Review of an appeal from a decision of a Hearing Officer shall be whether the findings made by the Hearing Officer are supported by substantial evidence presented during the evidentiary hearing. On review, the Council may sustain, reverse, or modify the decision of the Commission or Hearing Officer, or remand the matter for further consideration, which remand shall include either specific issues to be considered or a direction for a new hearing.

b. The review authority is not bound by the decision that has been appealed or limited to the issues raised on appeal.

c. The review authority shall hear testimony of the appellant, the applicant, and any other interested party.

d. The review authority shall consider the same application, plans, and project-related materials that were the subject of the original decision, unless otherwise deemed relevant by the review authority.

#### **\*1035** D. Decision on Appeal.

1. As provided in this Zoning Code, the review authority may, based upon findings of fact about the particular case:

a. Affirm, affirm in part, or reverse the action, determination, or decision that is the subject of the appeal. Adopted findings shall identify the reasons for the action on the appeal;

b. Adopt additional conditions of approval that may address issues or concerns other than those that were the basis of the appeal; or

c. Deny the permit approved by the previous review authority, even where the appellant only requested a change or elimination of one or more conditions of approval.

2. If new or different evidence is presented on appeal, the Commission or Council may refer the matter to the previous review authority for further consideration.

3. In the event of a tie vote by the review authority on an appeal, the decision being appealed shall stand. (Ord. 2010–21 § 1 (Exh. A)(part), 2010)

A person shall not seek judicial review of a City decision on a permit or other matter until all appeals to the Commission and Council have been first exhausted in compliance **\*\*335** with this chapter. (Ord. 2010–21 § 1 (Exh. A)(part), 2010)

#### All Citations

233 Cal.App.4th 1012, 183 Cal.Rptr.3d 318, 15 Cal. Daily Op. Serv. 1162, 2015 Daily Journal D.A.R. 1285

#### 20.64.040 Judicial Review of City Decision.

#### Footnotes

- 1 We of course grant the city's request for judicial notice of portions of the city's own municipal code.
- 2 Woody's had spent \$4,100 on its own earlier appeal, so it seems reasonable to infer the cost of appealing to the city council this time around would be about as much. And that, as far as we can tell, does not include attorney fees.
- 3 Counsel even cited the Ninth Circuit's opinion in [Pacific Shores Properties v. City of Newport Beach](#) (9th Cir.2013) 730 F.3d 1142, which was not exactly complimentary concerning Henn's and his fellow council members' efforts to minimize group homes for drug and alcohol rehabilitation in the City of Newport Beach.
- 4 A portion of the opinion was devoted to showing that the developer did not waive his challenge by not having established, at the administrative level, that the commission member had written the article. (See [Nasha, supra](#), 125 Cal.App.4th at pp. 484–485, 22 Cal.Rptr.3d 772.)
- 5 “To all this the Roman law, as known and received by the Middle Ages, and as handed down to modern times, offers little or no counterpart. The public law of the Roman Republic had long been forgotten; the law set forth in Justinian's Corpus Juris was the law of an imperial dictatorship. Its most celebrated contribution to constitutional doctrine was the maxim *Quod principi placuit, legis habet vigorem* — ‘The commands of the prince have the force of law.’ Its reception involved the establishment of no institutions of independent judicature, of no guarantees for personal liberty, or for the due process of law.” (50 Harv. L.Rev., *supra*, at p. 1254, fn.omitted.)



# SACRAMENTO BUSINESS JOURNAL

From the Sacramento Business Journal:

<https://www.bizjournals.com/sacramento/news/2019/10/28/tahoe-whole-foods-building-sold.html>

## **Weeks before opening, Tahoe Whole Foods building sold in \$13.3 million deal**

Oct 28, 2019, 5:00am PDT

Weeks before it opens, the building housing the first Whole Foods store in South Lake Tahoe has sold to a buyer based in Roseville.

According to property records, Mercury TIC LLC bought the 25,000-square-foot store building and a 3,000-square-foot parcel on the same property for \$13.3 million in recent weeks. The buyer's address corresponds to a law office in Roseville, where



EMILY HAMANN | SACRAMENTO  
BUSINESS JOURNAL

Whole Foods in South Lake  
Tahoe.



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buyer subsequently bought the entire center that includes Whole Foods, at 3600 Lake Tahoe Blvd. The sales price for that property, about 12,067 square feet, was not available. Other center tenants include Panda Express, Chipotle and Five Guys.

“They were familiar with Tahoe and they were looking for a trophy asset,” said Chasin, whose firm handled the sale on behalf of the seller, listed in records as Bijou Marketplace LLC. “It’s the first and only Whole Foods in the Tahoe area.”

Whole Foods is scheduled to open Nov. 6 in South Lake Tahoe, after the center’s construction is finished on the former footprint of the Knights Inn. Two years ago, the city bought the Knights Inn property for \$5.9 million, then sold it for \$3.1 million to Halferty Development Co. LLC, which developed the center.

The address for Bijou Marketplace corresponds to Duckett-Wilson Development Co., in Los Angeles, while Halferty is in Pasadena. A representative for Duckett-Wilson said the company had no comment on the sale.

Chasin said he expects Whole Foods will benefit from a huge influx of Tahoe tourists during both the winter and summer, as well as locals. “As difficult as it is to build in Lake Tahoe, they’ll probably have limited competition for a long time to come,” he said.

In addition to Chasin, Pegasus Investments managing director Brad Kritzer also worked on the deal on behalf of the seller. Jeff Gates of The Kase Group represented the buyer.

**Ben van der Meer**

Staff Writer

Sacramento Business Journal



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Assessor Parcel Number	027040044000
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2019-0038878 • • GRANT DEED

Recording Date

**09/17/2019 02:04 PM**

Grantor

**BIJOU MARKETPLACE LLC**

Grantee

**MERCURY TIC LLC**

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Assessor Parcel Number

027040044100

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2020-0071750 • • GRANT DEED

Recording Date

**12/10/2020 08:33 AM**

Grantor

**MERCURY TIC LLC**

Grantee

**RIALTO STANTON TAHOE LP**

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Assessor Parcel Number

027690019000

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2019-0044327 • • GRANT DEED

Recording Date

**10/18/2019 02:52 PM**

Grantor

**BIJOU MARKETPLACE LLC**

Grantee

**MERCURY TIC LLC**

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Assessor Parcel Number

027690019000

---

2020-0070548 • • GRANT DEED

Recording Date

**12/04/2020 12:26 PM**

Grantor

**MERCURY TIC LLC**

Grantee

**MERCURY MGIT TIC LLC**

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Assessor Parcel Number

027690019000

---

2020-0070549 • • GRANT DEED

Recording Date

**12/04/2020 12:26 PM**

Grantor

**MERCURTY MGIT LLC**

Grantee

**TAHOE BIJOU LLC**

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Secretary of State  
Certificate of Limited Partnership  
(LP)

LP-1

**FILED**

Secretary of State  
State of California

202034300001

Filing Number

12/02/2020

Filing Date

Above Space For Office Use Only

**IMPORTANT — Read Instructions before completing this form.**

**Filing Fee** - \$70.00

**Copy Fees** - First page \$1.00; each attachment page \$0.50;  
Certification Fee - \$5.00

**Note:** LPs may have to pay minimum \$800 tax to the California Franchise Tax Board each year. For more information, go to <https://www.ftb.ca.gov>.

**1. Limited Partnership Name** (See Instructions — Must contain an LP ending such as LP or L.P. "LP" will be added, if not included.)

Rialto Stanton Tahoe, LP

**2. Business Addresses**

a. Initial Street Address of LP's Designated Office in California - Do not enter a P.O. Box	City (no abbreviations)	State	Zip Code
1187 Coast Village Road Suite 1 #561	Santa Barbara	CA	93108
b. Initial Mailing Address of LP, if different than item 2a	City (no abbreviations)	State	Zip Code

**3. Service of Process** (Must provide either Individual OR Corporation.)

**INDIVIDUAL** — Complete Items 3a and 3b only. Must include agent's full name and California street address.

a. California Agent's First Name (if agent is not a corporation)	Middle Name	Last Name	Suffix
John	D	Maxey	
b. Street Address (if agent is not a corporation) - Do not enter a P.O. Box	City (no abbreviations)	State	Zip Code
13 SierraGate Plaza, Bldg. B	Roseville	CA	95678

**CORPORATION** — Complete Item 3c. Only include the name of the registered agent Corporation.

c. California Registered Corporate Agent's Name (if agent is a corporation) — Do not complete Item 3a or 3b
---

**4. General Partners** (List the name and address of each general partner. Attach additional pages, if necessary.)

a. General Partner's Name			
Merc Properties, Inc.			
General Partner's Address	City (no abbreviations)	State	Zip Code
1187 Coast Village Road Suite 1 #561	Santa Barbara	CA	93108
b. General Partner's Name			
General Partner's Address	City (no abbreviations)	State	Zip Code

The information contained herein, including in any attachments, is true and correct.

General Partner Signature

Michael P. Mallery, CEO, Merc Properties, Inc.  
Type or Print Name

General Partner Signature

Type or Print Name



# California Secretary of State Electronic Filing



## General Stock Corporation - Articles of Incorporation

---

Entity Name: Merc Properties, Inc.  
Entity (File) Number: C4665867  
File Date: 11/19/2020  
Entity Type: General Stock Corporation  
Jurisdiction: California

---

### Detailed Filing Information

1. Corporate Name: Merc Properties, Inc.
  2. Business Addresses:
    - a. Initial Street Address of Corporation: 1187 Coast Village Road Ste 1 #561  
Santa Barbara, California, 93108  
United States of America
    - b. Initial Mailing Address of Corporation: 1187 Coast Village Road Ste 1 #561  
Santa Barbara, California, 93108  
United States of America
  3. Agent for Service of Process:  
Individual Agent: John D. Maxey  
13 SierraGate Plz. Bldg. B  
Roseville, California, 95678  
United States of America
  4. Shares: 10000
  5. Purpose Statement: The purpose of the corporation is to engage in any lawful act or activity for which a corporation may be organized under the General Corporation Law of California other than the banking business, the trust company business or the practice of a profession permitted to be incorporated by the California Corporations Code.
- 

The incorporator affirms the information contained herein is true and correct.

Incorporator: John D. Maxey



# California Secretary of State Electronic Filing

**FILED**

Secretary of State  
State of California

## Corporation - Statement of Information

---

Entity Name:

Entity (File) Number:

File Date:

Entity Type: Corporation

Jurisdiction:

Document ID:

---

### Detailed Filing Information

1. Entity Name:

2. Business Addresses:

a. Street Address of Principal  
Office in California:

b. Mailing Address:

c. Street Address of Principal  
Executive Office:

3. Officers:

a. Chief Executive Officer:

b. Secretary:

Document ID:



# California Secretary of State Electronic Filing

Officers (cont'd):

c. Chief Financial Officer:

4. Director:

Number of Vacancies on the Board of  
Directors:

5. Agent for Service of Process:

6. Type of Business:

By signing this document, I certify that the information is true and correct and that I am authorized by California law to sign.

Electronic Signature:

Use [bizfile.sos.ca.gov](http://bizfile.sos.ca.gov) for online filings, searches, business records, and resources.

Document ID:



# California Secretary of State

## Electronic Filing

### Corporation - Attachment to Statement of Information

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#### List of Additional Directors:

1.

2.

3.

4.

5.

6.

7.

Document ID:

201907010639



**Secretary of State**  
**Articles of Organization**  
 Limited Liability Company (LLC)

LLC-1

**IMPORTANT — Read Instructions before completing this form.**

**Filing Fee** - \$70.00

**Copy Fees** - First page \$1.00; each attachment page \$0.50;  
 Certification Fee - \$5.00

*Note:* LLCs may have to pay minimum \$800 tax to the California Franchise Tax Board each year. For more information, go to <https://www.ftb.ca.gov>.

**FILED** *DT*  
**Secretary of State**  
**State of California**

**MAR 11 2019** *cc*

**This Space For Office Use Only**

**1. Limited Liability Company Name** (See Instructions – Must contain an LLC Identifier such as LLC or L.L.C. "LLC" will be added, if not included.)

MERCURY MGIT TIC LLC

**2. Business Addresses**

a. Initial Street Address of Designated Office in California - Do not enter a P.O. Box 7108 N FRESNO STREET, SUITE 450	City (no abbreviations) FRESNO	State CA	Zip Code 93720
b. Initial Mailing Address of LLC, if different than Item 2a	City (no abbreviations)	State	Zip Code

**3. Service of Process** (Must provide either Individual OR Corporation.)

**INDIVIDUAL** – Complete Items 3a and 3b only. Must include agent's full name and California street address.

a. California Agent's First Name (if agent is not a corporation) MICHELE	Middle Name	Last Name NOLAND	Suffix
b. Street Address (if agent is not a corporation) - Do not enter a P.O. Box 7108 N FRESNO STREET, SUITE 450	City (no abbreviations) FRESNO	State CA	Zip Code 93720

**CORPORATION** – Complete Item 3c. Only include the name of the registered agent Corporation.

c. California Registered Corporate Agent's Name (if agent is a corporation) – Do not complete Item 3a or 3b
---

**4. Management** (Select only one box)

The LLC will be managed by:

☒ One Manager    ☐ More than One Manager    ☐ All LLC Member(s)

**5. Purpose Statement** (Do not alter Purpose Statement)

The purpose of the limited liability company is to engage in any lawful act or activity for which a limited liability company may be organized under the California Revised Uniform Limited Liability Company Act.

**6. The Information contained herein, including in any attachments, is true and correct.**

*[Signature]*  
 Organizer sign here  
 LLC-1 (REV 12/2018)

**ANDREW B. SELLERS**

Print your name here



**Secretary of State**  
**Statement of Information**  
(Limited Liability Company)

**LLC-12**

19-C15976

**FILED**

In the office of the Secretary of State  
of the State of California

JUN 04, 2019

**This Space For Office Use Only**

**IMPORTANT** — [Read instructions](#) before completing this form.

**Filing Fee – \$20.00**

**Copy Fees** – First page \$1.00; each attachment page \$0.50;  
Certification Fee - \$5.00 plus copy fees

**1. Limited Liability Company Name** (Enter the exact name of the LLC. If you registered in California using an alternate name, [see instructions](#).)

MERCURY MGIT TIC LLC

**2. 12-Digit Secretary of State File Number**

201907010639

**3. State, Foreign Country or Place of Organization** (only if formed outside of California)

CALIFORNIA

**4. Business Addresses**

a. Street Address of Principal Office - Do not list a P.O. Box

7108 N FRESNO ST STE 450

City (no abbreviations)

FRESNO

State

CA

Zip Code

93720

b. Mailing Address of LLC, if different than item 4a

7108 N FRESNO ST STE 450

City (no abbreviations)

FRESNO

State

CA

Zip Code

93720

c. Street Address of California Office, if Item 4a is not in California - Do not list a P.O. Box

7108 N FRESNO ST STE 450

City (no abbreviations)

FRESNO

State

CA

Zip Code

93720

**5. Manager(s) or Member(s)**

If no **managers** have been appointed or elected, provide the name and address of each **member**. At least one name **and** address must be listed. If the manager/member is an individual, complete Items 5a and 5c (leave Item 5b blank). If the manager/member is an entity, complete Items 5b and 5c (leave Item 5a blank). Note: The LLC cannot serve as its own manager or member. If the LLC has additional managers/members, enter the name(s) and addresses on Form LLC-12A ([see instructions](#)).

a. First Name, if an individual - Do not complete Item 5b

JOHN

Middle Name

Last Name

MAXEY

Suffix

b. Entity Name - Do not complete Item 5a

c. Address

7108 N FRESNO ST STE 450

City (no abbreviations)

FRESNO

State

CA

Zip Code

93720

**6. Service of Process** (Must provide either Individual **OR** Corporation.)

**INDIVIDUAL** – Complete Items 6a and 6b only. Must include agent's full name and California street address.

a. California Agent's First Name (if agent is **not** a corporation)

MICHELE

Middle Name

Last Name

NOLAND

Suffix

b. Street Address (if agent is **not** a corporation) - **Do not enter a P.O. Box**

7108 N FRESNO ST STE 450

City (no abbreviations)

FRESNO

State

CA

Zip Code

93720

**CORPORATION** – Complete Item 6c only. Only include the name of the registered agent Corporation.

c. California Registered Corporate Agent's Name (if agent is a corporation) – Do not complete Item 6a or 6b

**7. Type of Business**

a. Describe the type of business or services of the Limited Liability Company

HOLDING COMPANY

**8. Chief Executive Officer, if elected or appointed**

a. First Name

Middle Name

Last Name

Suffix

b. Address

City (no abbreviations)

State

Zip Code

**9. The Information contained herein, including any attachments, is true and correct.**

06/04/2019

Date

ANDREW B SELLERS

Type or Print Name of Person Completing the Form

AUTHORIZED AGENT

Title

Signature

**Return Address (Optional)** (For communication from the Secretary of State related to this document, or if purchasing a copy of the filed document enter the name of a person or company and the mailing address. This information will become public when filed. [SEE INSTRUCTIONS](#) BEFORE COMPLETING.)

Name: [ ]

Company:

Address:

City/State/Zip: [ ]





**Secretary of State**  
**Articles of Organization**  
 Limited Liability Company (LLC)

LLC-1

**IMPORTANT — Read Instructions before completing this form.**

**Filing Fee — \$70.00**

**Copy Fees —** First page \$1.00; each attachment page \$0.50;  
 Certification Fee - \$5.00

*Note:* LLCs may have to pay minimum \$800 tax to the California Franchise Tax Board each year. For more information, go to <https://www.ftb.ca.gov>.

**FILED**  
 Secretary of State  
 State of California

MAR 05 2019

*lpc* This Space For Office Use Only

**1. Limited Liability Company Name** (See Instructions — Must contain an LLC identifier such as LLC or L.L.C. "LLC" will be added, if not included.)

MERCURY TIC LLC

**2. Business Addresses**

a. Initial Street Address of Designated Office in California - Do not enter a P.O. Box 7108 N FRESNO STREET, SUITE 450	City (no abbreviations) FRESNO	State CA	Zip Code 93720
b. Initial Mailing Address of LLC, if different than Item 2a	City (no abbreviations)	State	Zip Code

**3. Service of Process** (Must provide either Individual OR Corporation.)

**INDIVIDUAL** — Complete Items 3a and 3b only. Must include agent's full name and California street address.

a. California Agent's First Name (If agent is not a corporation) MICHELE	Middle Name	Last Name NOLAND	Suffix
b. Street Address (If agent is not a corporation) - Do not enter a P.O. Box 7108 N FRESNO STREET, SUITE 450	City (no abbreviations) FRESNO	State CA	Zip Code 93720

**CORPORATION** — Complete Item 3c. Only include the name of the registered agent Corporation.

c. California Registered Corporate Agent's Name (if agent is a corporation) — Do not complete Item 3a or 3b

**4. Management** (Select only one box)

The LLC will be managed by:

☒ One Manager ☐ More than One Manager ☐ All LLC Member(s)

**5. Purpose Statement** (Do not alter Purpose Statement)

The purpose of the limited liability company is to engage in any lawful act or activity for which a limited liability company may be organized under the California Revised Uniform Limited Liability Company Act.

**6. The Information contained herein, including in any attachments, is true and correct.**

*[Signature]*  
 Organizer sign here  
 LLC-1 (REV 12/2018)

**ANDREW B. SELLERS**

Print your name here



**Secretary of State**  
**Statement of Information**  
(Limited Liability Company)

**LLC-12**

19-C16004

**FILED**

In the office of the Secretary of State  
of the State of California

JUN 04, 2019

**This Space For Office Use Only**

**IMPORTANT** — [Read instructions](#) before completing this form.

**Filing Fee – \$20.00**

**Copy Fees** – First page \$1.00; each attachment page \$0.50;  
Certification Fee - \$5.00 plus copy fees

**1. Limited Liability Company Name** (Enter the exact name of the LLC. If you registered in California using an alternate name, [see instructions](#).)

MERCURY TIC LLC

**2. 12-Digit Secretary of State File Number**

201906510098

**3. State, Foreign Country or Place of Organization** (only if formed outside of California)

CALIFORNIA

**4. Business Addresses**

a. Street Address of Principal Office - Do not list a P.O. Box

7108 N FRESNO ST STE 450

City (no abbreviations)

FRESNO

State

CA

Zip Code

93720

b. Mailing Address of LLC, if different than item 4a

7108 N FRESNO ST STE 450

City (no abbreviations)

FRESNO

State

CA

Zip Code

93720

c. Street Address of California Office, if Item 4a is not in California - Do not list a P.O. Box

7108 N FRESNO ST STE 450

City (no abbreviations)

FRESNO

State

CA

Zip Code

93720

**5. Manager(s) or Member(s)**

If no **managers** have been appointed or elected, provide the name and address of each **member**. At least one name **and** address must be listed. If the manager/member is an individual, complete Items 5a and 5c (leave Item 5b blank). If the manager/member is an entity, complete Items 5b and 5c (leave Item 5a blank). Note: The LLC cannot serve as its own manager or member. If the LLC has additional managers/members, enter the name(s) and addresses on Form LLC-12A ([see instructions](#)).

a. First Name, if an individual - Do not complete Item 5b

JOHN

Middle Name

Last Name

MAXEY

Suffix

b. Entity Name - Do not complete Item 5a

c. Address

7108 N FRESNO ST STE 450

City (no abbreviations)

FRESNO

State

CA

Zip Code

93720

**6. Service of Process** (Must provide either Individual **OR** Corporation.)

**INDIVIDUAL** – Complete Items 6a and 6b only. Must include agent's full name and California street address.

a. California Agent's First Name (if agent is **not** a corporation)

MICHELE

Middle Name

Last Name

NOLAND

Suffix

b. Street Address (if agent is **not** a corporation) - **Do not enter a P.O. Box**

7108 N FRESNO ST STE 450

City (no abbreviations)

FRESNO

State

CA

Zip Code

93720

**CORPORATION** – Complete Item 6c only. Only include the name of the registered agent Corporation.

c. California Registered Corporate Agent's Name (if agent is a corporation) – Do not complete Item 6a or 6b

**7. Type of Business**

a. Describe the type of business or services of the Limited Liability Company

HOLDING COMPANY

**8. Chief Executive Officer, if elected or appointed**

a. First Name

Middle Name

Last Name

Suffix

b. Address

City (no abbreviations)

State

Zip Code

**9. The Information contained herein, including any attachments, is true and correct.**

06/04/2019

Date

ANDREW B SELLERS

Type or Print Name of Person Completing the Form

AUTHORIZED AGENT

Title

Signature

**Return Address (Optional)** (For communication from the Secretary of State related to this document, or if purchasing a copy of the filed document enter the name of a person or company and the mailing address. This information will become public when filed. [SEE INSTRUCTIONS](#) BEFORE COMPLETING.)

Name: [ ]

Company:

Address:

City/State/Zip: [ ]



**Secretary of State**  
**Statement of Information**  
(Limited Liability Company)

**LLC-12**

20-A96465

**FILED**

In the office of the Secretary of State  
of the State of California

FEB 27, 2020

**IMPORTANT** — [Read instructions](#) before completing this form.

**Filing Fee – \$20.00**

**Copy Fees** – First page \$1.00; each attachment page \$0.50;  
Certification Fee - \$5.00 plus copy fees

**This Space For Office Use Only**

**1. Limited Liability Company Name** (Enter the exact name of the LLC. If you registered in California using an alternate name, [see instructions](#).)

MERCURY TIC LLC

**2. 12-Digit Secretary of State File Number**  
201906510098

**3. State, Foreign Country or Place of Organization** (only if formed outside of California)  
CALIFORNIA

**4. Business Addresses**

a. Street Address of Principal Office - Do not list a P.O. Box 13 SierraGate Plaza, Bldg. B	City (no abbreviations) Roseville	State CA	Zip Code 95678
b. Mailing Address of LLC, if different than item 4a 13 SierraGate Plaza, Bldg. B	City (no abbreviations) Roseville	State CA	Zip Code 95678
c. Street Address of California Office, if Item 4a is not in California - Do not list a P.O. Box 13 SierraGate Plaza, Bldg. B	City (no abbreviations) Roseville	State CA	Zip Code 95678

**5. Manager(s) or Member(s)**

If no **managers** have been appointed or elected, provide the name and address of each **member**. At least one name **and** address must be listed. If the manager/member is an individual, complete Items 5a and 5c (leave Item 5b blank). If the manager/member is an entity, complete Items 5b and 5c (leave Item 5a blank). Note: The LLC cannot serve as its own manager or member. If the LLC has additional managers/members, enter the name(s) and addresses on Form LLC-12A ([see instructions](#)).

a. First Name, if an individual - Do not complete Item 5b John	Middle Name D	Last Name Maxey	Suffix
b. Entity Name - Do not complete Item 5a			
c. Address 13 SierraGate Plaza, Bldg. B	City (no abbreviations) Roseville	State CA	Zip Code 95678

**6. Service of Process** (Must provide either Individual **OR** Corporation.)

**INDIVIDUAL** – Complete Items 6a and 6b only. Must include agent's full name and California street address.

a. California Agent's First Name (if agent is <b>not</b> a corporation) John	Middle Name D	Last Name Maxey	Suffix
b. Street Address (if agent is <b>not</b> a corporation) - <b>Do not enter a P.O. Box</b> 13 SierraGate Plaza, Bldg. B	City (no abbreviations) Roseville	State CA	Zip Code 95678

**CORPORATION** – Complete Item 6c only. Only include the name of the registered agent Corporation.

c. California Registered Corporate Agent's Name (if agent is a corporation) – Do not complete Item 6a or 6b
---

**7. Type of Business**

a. Describe the type of business or services of the Limited Liability Company  
Holding Company

**8. Chief Executive Officer, if elected or appointed**

a. First Name	Middle Name	Last Name	Suffix
b. Address	City (no abbreviations)	State	Zip Code

**9. The Information contained herein, including any attachments, is true and correct.**

02/27/2020

John D Maxey

Attorney

Date

Type or Print Name of Person Completing the Form

Title

Signature

**Return Address (Optional)** (For communication from the Secretary of State related to this document, or if purchasing a copy of the filed document enter the name of a person or company and the mailing address. This information will become public when filed. [SEE INSTRUCTIONS](#) BEFORE COMPLETING.)

Name: [ ]

Company:

Address:

City/State/Zip: [ ]

201716710447



Secretary of State

LLC-5

# Application to Register a Foreign Limited Liability Company (LLC)

**FILED**  
 Secretary of State  
 State of California

JUN 16 2017

**IMPORTANT — Read Instructions before completing this form.**

Must be submitted with a current Certificate of Good Standing issued by the government agency where the LLC was formed. See Instructions.

**Filing Fee** - \$70.00

**Copy Fees** - First page \$1.00; each attachment page \$0.50;  
 Certification Fee - \$5.00

**Note:** Registered LLCs in California may have to pay minimum \$800 tax to the California Franchise Tax Board each year. For more information, go to <https://www.ftb.ca.gov>.

This Space For Office Use Only

**1a. LLC Name** (Enter the exact name of the LLC as listed on your attached Certificate of Good Standing.)

Bijou Marketplace, LLC

**1b. California Alternate Name, If Required** (See Instructions – Only enter an alternate name if the LLC name in 1a not available in California.)**2. LLC History** (See Instructions – Ensure that the formation date and jurisdiction match the attached Certificate of Good Standing.)**a. Date LLC was formed in home jurisdiction (MM/DD/YYYY)**

6 / 14 / 2017

**b. Jurisdiction** (State, foreign country or place where this LLC is formed.)

Delaware

**c. Authority Statement** (Do not alter Authority Statement)

This LLC currently has powers and privileges to conduct business in the state, foreign country or place entered in Item 2b.

**3. Business Addresses** (Enter the complete business addresses. Items 3a and 3b cannot be a P.O. Box or "in care of" an individual or entity.)

<b>a. Street Address of Principal Executive Office - Do not enter a P.O. Box</b>	<b>City (no abbreviations)</b>	<b>State</b>	<b>Zip Code</b>
199 South Los Robles Avenue, Suite 840	Pasadena	CA	91101
<b>b. Street Address of Principal Office in California, if any - Do not enter a P.O. Box</b>	<b>City (no abbreviations)</b>	<b>State</b>	<b>Zip Code</b>
199 South Los Robles Avenue, Suite 840	Pasadena	CA	91101
<b>c. Mailing Address of Principal Executive Office, if different than Item 3a</b>	<b>City (no abbreviations)</b>	<b>State</b>	<b>Zip Code</b>

**4. Service of Process** (Must provide either Individual OR Corporation.)

**INDIVIDUAL** – Complete Items 4a and 4b only. Must include agent's full name and California street address.

<b>a. California Agent's First Name</b> (if agent is not a corporation)	<b>Middle Name</b>	<b>Last Name</b>	<b>Suffix</b>
James	L.	Halferty	
<b>b. Street Address</b> (if agent is not a corporation) - Do not enter a P.O. Box	<b>City (no abbreviations)</b>	<b>State</b>	<b>Zip Code</b>
199 South Los Robles Avenue, Suite 840	Pasadena	CA	91101

**CORPORATION** – Complete Item 4c only. Only include the name of the registered agent Corporation.

**c. California Registered Corporate Agent's Name** (if agent is a corporation) – Do not complete Item 4a or 4b

**5. Read and Sign Below** (See Instructions. Title not required.)

I am authorized to sign on behalf of the foreign LLC.

Signature

Thomas C. Foster

Type or Print Name

# Delaware

The First State

Page 1

I, JEFFREY W. BULLOCK, SECRETARY OF STATE OF THE STATE OF  
DELAWARE, DO HEREBY CERTIFY "BIJOU MARKETPLACE, LLC" IS DULY FORMED  
UNDER THE LAWS OF THE STATE OF DELAWARE AND IS IN GOOD STANDING AND  
HAS A LEGAL EXISTENCE SO FAR AS THE RECORDS OF THIS OFFICE SHOW, AS  
OF THE SIXTEENTH DAY OF JUNE, A.D. 2017.

AND I DO HEREBY FURTHER CERTIFY THAT THE ANNUAL TAXES HAVE BEEN  
ASSESSED TO DATE.



6445730 8300

SR# 20174788913

You may verify this certificate online at [corp.delaware.gov/authver.shtml](http://corp.delaware.gov/authver.shtml)

A handwritten signature in black ink, appearing to read "JBULLOCK", is written over a horizontal line. Below the line, the text "Jeffrey W. Bullock, Secretary of State" is printed.

Authentication: 202721414

Date: 06-16-17

201716710447



**Secretary of State**  
**Statement of Information**  
 (Limited Liability Company)

LLC-12

**FILED**  
 Secretary of State  
 State of California

SEP 11 2017

**IMPORTANT — Read instructions before completing this form.**

**Filing Fee — \$20.00**

**Copy Fees —** First page \$1.00; each attachment page \$0.50;  
 Certification Fee - \$5.00 plus copy fees

128

**This Space For Office Use Only**

**1. Limited Liability Company Name** (Enter the exact name of the LLC. If you registered in California using an alternate name, see instructions.)

Bijou Marketplace, LLC

**2. 12-Digit Secretary of State File Number**

201716710447

**3. State, Foreign Country or Place of Organization** (only if formed outside of California)

Delaware

**4. Business Addresses**

a. Street Address of Principal Office - Do not list a P.O. Box 11150 Santa Monica Boulevard, Suite 760	City (no abbreviations) Los Angeles	State CA	Zip Code 90025
b. Mailing Address of LLC, if different than Item 4a	City (no abbreviations)	State	Zip Code
c. Street Address of California Office, if Item 4a is not in California - Do not list a P.O. Box	City (no abbreviations)	State CA	Zip Code

**5. Manager(s) or Member(s)**

If no managers have been appointed or elected, provide the name and address of each member. At least one name and address must be listed. If the manager/member is an individual, complete Items 5a and 5c (leave Item 5b blank). If the manager/member is an entity, complete Items 5b and 5c (leave Item 5a blank). Note: The LLC cannot serve as its own manager or member. If the LLC has additional managers/members, enter the name(s) and addresses on Form LLC-12A (see instructions).

a. First Name, if an individual - Do not complete Item 5b	Middle Name	Last Name	Suffix
b. Entity Name - Do not complete Item 5a Halferty Development Company, LLC			
c. Address 199 South Los Robles Avenue, Suite 840	City (no abbreviations) Pasadena	State CA	Zip Code 91101

**6. Service of Process** (Must provide either Individual OR Corporation.)

**INDIVIDUAL** - Complete Items 6a and 6b only. Must include agent's full name and California street address.

a. California Agent's First Name (if agent is not a corporation) Robert	Middle Name S.	Last Name Wilson	Suffix
b. Street Address (if agent is not a corporation) - Do not enter a P.O. Box 11150 Santa Monica Boulevard, Suite 760	City (no abbreviations) Los Angeles	State CA	Zip Code 90025

**CORPORATION** - Complete Item 6c only. Only include the name of the registered agent Corporation.

c. California Registered Corporate Agent's Name (if agent is a corporation) - Do not complete Item 6a or 6b
---

**7. Type of Business**

a. Describe the type of business or services of the Limited Liability Company Real estate investment
---

**8. Chief Executive Officer, if elected or appointed**

a. First Name	Middle Name	Last Name	Suffix
b. Address			
City (no abbreviations)		State	Zip Code

**9. The information contained herein, including any attachments, is true and correct.**

[See Exhibit "A" attached hereto]

[See Exhibit "A" attached hereto]

[See Exhibit "A" attached hereto]

Date

Type or Print Name of Person Completing the Form

Title

Signature

**Return Address (Optional)** (For communication from the Secretary of State related to this document, or if purchasing a copy of the filed document enter the name of a person or company and the mailing address. This information will become public when filed. SEE INSTRUCTIONS BEFORE COMPLETING.)

Name: [ James L. Halferty ]  
 Company: Bijou Marketplace, LLC  
 Address: 199 South Los Robles Avenue, Suite 840  
 City/State/Zip: [ Pasadena, CA 91101 ]

12





**Attachment to  
Statement of Information  
(Limited Liability Company)**

**LLC-12A  
Attachment**

**A. Limited Liability Company Name**

Bijou Marketplace, LLC

This Space For Office Use Only

**B. 12-Digit Secretary of State File Number**

201716710447

**C. State or Place of Organization (only if formed outside of California)**

Delaware

**D. List of Additional Manager(s) or Member(s) - If the manager/member is an individual, enter the individual's name and address. If the manager/member is an entity, enter the entity's name and address. Note: The LLC cannot serve as its own manager or member.**

2a. First Name – Do not complete item 2b Christopher	Middle Name E.	Last Name Peto	Suffix
2b. Entity Name – Do not complete item 2a			
2c. Address 199 South Los Robles Avenue, Suite 840	City (no abbreviations) Pasadena	State CA	Zip Code 91101
3a. First Name – Do not complete item 3b	Middle Name	Last Name	Suffix
3b. Entity Name – Do not complete item 3a Robert S. Wilson, as Trustee of the Wilson Family 2004 Trust			
3c. Address 11150 Santa Monica Boulevard, Suite 760	City (no abbreviations) Los Angeles	State CA	Zip Code 90025
4a. First Name – Do not complete item 4b	Middle Name	Last Name	Suffix
4b. Entity Name – Do not complete item 4a Thomas B. Wilson, as Trustee of the Thomas and Paula Wilson Family Trust			
4c. Address 11150 Santa Monica Boulevard, Suite 760	City (no abbreviations) Los Angeles	State CA	Zip Code 90025
5a. First Name – Do not complete item 5b	Middle Name	Last Name	Suffix
5b. Entity Name – Do not complete item 5a Peter B. Nicholas, as Trustee of the Nicholas/Stigliano Family 2005 Trust			
5c. Address 11150 Santa Monica Boulevard, Suite 760	City (no abbreviations) Los Angeles	State CA	Zip Code 90025
6a. First Name – Do not complete item 6b Troy	Middle Name G.	Last Name Bemis	Suffix
6b. Entity Name – Do not complete item 6a			
6c. Address 11150 Santa Monica Boulevard, Suite 760	City (no abbreviations) Los Angeles	State CA	Zip Code 90025
7a. First Name – Do not complete item 7b David	Middle Name L.	Last Name Lam	Suffix
7b. Entity Name – Do not complete item 7a			
7c. Address 11150 Santa Monica Boulevard, Suite 760	City (no abbreviations) Los Angeles	State CA	Zip Code 90025
8a. First Name – Do not complete item 8b	Middle Name	Last Name	Suffix
8b. Entity Name – Do not complete item 8a			
8c. Address	City (no abbreviations)	State	Zip Code

2/2

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Assessor Parcel Number	02704007100
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2018-0002572 • • GRANT DEED

Recording Date

**01/24/2018 12:06 PM**

Grantor

**CITY OF SOUTH LAKE TAHOE**

Grantee

**BIJOU MARKETPLACE LLC**

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Assessor Parcel Number	02769008100
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2018-0002570 • • GRANT DEED

Recording Date

**01/24/2018 12:06 PM**

Grantor

**CITY OF SOUTH LAKE TAHOE**

Grantee

**BIJOU MARKETPLACE LLC**

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Assessor Parcel Number	02769009100
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2018-0002570 • • GRANT DEED

Recording Date

**01/24/2018 12:06 PM**

Grantor

**CITY OF SOUTH LAKE TAHOE**

Grantee

**BIJOU MARKETPLACE LLC**

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Assessor Parcel Number

02769018

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2019-0007679 • • GRANT DEED

Recording Date

**03/08/2019 09:44 AM**

Grantor

**BIJOU MARKETPLACE LLC**

Grantee (2)

**HUBERTY GRANT K TR  
HUBERTY GRANT K TRUST**

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Secretary of State  
Articles of Organization  
Limited Liability Company (LLC)

LLC-1

201703810575

**IMPORTANT** — Read Instructions before completing this form.

Filing Fee - \$70.00

Copy Fees - First plain copy free; Additional copies: First page \$1.00 & .50 for each attachment page; Certification Fee - \$5.00

**Important!** LLCs may have to pay an annual minimum \$800 tax to the California Franchise Tax Board. For more information, go to <https://www.ftb.ca.gov>.

**FILED**  
Secretary of State  
State of California

JAN 26 2017

1cc This Space For Office Use Only

**1. Limited Liability Company Name** (See Instructions — Must contain an LLC ending such as LLC or L.L.C. "LLC" will be added, if not included.)

Alamo Walker Ventures LLC

**2. Business Addresses**

a. Initial Street Address of Designated Office in California - Do not list a P.O. Box	City (no abbreviations)	State	Zip Code
150 Ridgeway Road	Woodside	CA	94062
b. Initial Mailing Address of LLC, if different than Item 2a	City (no abbreviations)	State	Zip Code

**3. Agent for Service of Process**

Item 3a and 3b: If naming an individual, the agent must reside in California and Item 3a and 3b must be completed with the agent's name and complete California street address.

Item 3c: If naming a California Registered Corporate Agent, a current agent registration certificate must be on file with the California Secretary of State and Item 3c must be completed (leave Item 3a-3b blank).

a. California Agent's First Name (if agent is not a corporation)	Middle Name	Last Name	Suffix
Grant		Huberty	
b. Street Address (if agent is not a corporation) - Do not list a P.O. Box	City (no abbreviations)	State	Zip Code
150 Ridgeway Road	Woodside	CA	94062
c. California Registered Corporate Agent's Name (if agent is a corporation) — Do not complete Item 3a or 3b			

**4. Management** (Select only one box)

The LLC will be managed by:



One Manager



More than One Manager



All LLC Member(s)

**5. Purpose Statement** (Do not alter Purpose Statement)

The purpose of the limited liability company is to engage in any lawful act or activity for which a limited liability company may be organized under the California Revised Uniform Limited Liability Company Act.

**6. The Information contained herein, including in any attachments, is true and correct.**

Organizer sign here

Grant Huberty

Print your name here



17-322257



**Secretary of State**  
**Statement of Information**  
 (Limited Liability Company)

106

LLC-12

**FILED**  
**Secretary of State**  
**State of California**

MAR 16 2017

21/20/PC

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IMPORTANT — Read instructions before completing this form.

Filing Fee — \$20.00

Copy Fees — First page \$1.00; each attachment page \$0.50;  
 Certification Fee — \$5.00 plus copy fees

1. Limited Liability Company Name (Enter the exact name of the LLC. If you registered in California using an alternate name, see instructions.)

ALAMO WALKER VENTURES LLC

2. 12-Digit Secretary of State File Number

201703810575

3. State, Foreign Country or Place of Organization (only if formed outside of California)

## 4. Business Addresses

a. Street Address of Principal Office - Do not list a P.O. Box

150 RIDGEWAY ROAD

City (no abbreviations)

WOODSIDE

State

CA

Zip Code

94062

b. Mailing Address of LLC, if different than item 4a

City (no abbreviations)

State

Zip Code

c. Street Address of California Office, if item 4a is not in California - Do not list a P.O. Box

City (no abbreviations)

State

CA

Zip Code

## 5. Manager(s) or Member(s)

If no managers have been appointed or elected, provide the name and address of each member. At least one name and address must be listed. If the manager/member is an individual, complete items 5a and 5c (leave item 5b blank). If the manager/member is an entity, complete items 5b and 5c (leave item 5a blank). Note: The LLC cannot serve as its own manager or member. If the LLC has additional managers/members, enter the name(s) and addresses on Form LLC-12A (see instructions).

a. First Name, if an individual - Do not complete item 5b

GRANT

Middle Name

K

Last Name

HUBERTY

Suffix

b. Entity Name - Do not complete item 5a

c. Address

150 RIDGEWAY ROAD

City (no abbreviations)

WOODSIDE

State

CA

Zip Code

94062

## 6. Service of Process (Must provide either Individual OR Corporation.)

INDIVIDUAL — Complete items 6a and 6b only. Must include agent's full name and California street address.

a. California Agent's First Name (if agent is not a corporation)

GRANT

Middle Name

K

Last Name

HUBERTY

Suffix

b. Street Address (if agent is not a corporation) - Do not enter a P.O. Box

150 RIDGEWAY ROAD

City (no abbreviations)

WOODSIDE

State

CA

Zip Code

94062

CORPORATION — Complete item 6c only. Only include the name of the registered agent Corporation.

c. California Registered Corporate Agent's Name (if agent is a corporation) — Do not complete item 6a or 6b

## 7. Type of Business

a. Describe the type of business or services of the Limited Liability Company

OWNERSHIP AND MANAGEMENT OF REAL PROPERTY

## 8. Chief Executive Officer, if elected or appointed

a. First Name

Middle Name

Last Name

Suffix

b. Address

City (no abbreviations)

State

Zip Code

## 9. The information contained herein, including any attachments, is true and correct.

2/8/17

Date

GRANT K. HUBERTY

Type or Print Name of Person Completing the Form

MANAGER

Title

Signature

Return Address (Optional) (For communication from the Secretary of State related to this document, or if purchasing a copy of the filed document enter the name of a person or company and the mailing address. This information will become public when filed. SEE INSTRUCTIONS BEFORE COMPLETING.)

Name: [ GRANT K. HUBERTY ]

Company: 150 RIDGEWAY ROAD

Address: WOODSIDE, CA 94062

City/State/Zip: [ ]

### **Board Members Present**

Doug Williams, Rich Bodine, Jerry Bindel, Kathleen Mason, Tom Davis and Ted Moorehead.

### **Call Meeting to Order**

Doug Williams called the meeting to order at 9:35 am.

### **Treasurer Report (Jerry Bindel)**

\$13,526.22 currently in bank accounts. Have received membership dues. Thank you for those who have sent them in. Accountant will reach out individually to those who have not paid.

### **Monthly Topics**

### **Recreation Center Update, Jerry Bindel, [jbindel@forestsuites.com](mailto:jbindel@forestsuites.com)**

- Jerry is on the South Lake Tahoe Parks and Rec commission, and Sub Commission for the new Recreation and Aquatics Center
- Link to presentation from January 2021, <https://tahoesouth.com/wp-content/uploads/2021/05/SLTLA-Rec-Center-Presentation-1.pdf>
- Planning stages started in 2020
- Had multiple public polls and workshops
- Anticipating ground breaking June 2022. End of 2023 to be completed.
- May start some underground utility work this fall
- Site is on the 56 acre project
- Recommended and preferred site is just to the west of the Library
- Will have views of the Lake and visible from the road. Across street from Hotel Azure
- Ground floor, gymnasium, 2 full basketball courts which are dividable
- Gymnasium Just under 14K Sq. Ft. Walking/Jog Track, Aerobics/Dance Studio. Spectator seating for approx. 150 people on each side.
- Track and fitness center on second floor.
- Aquatic center - 6 lane pool, 2 warm up lanes, an activity pool section, lazy river, resistance river.
- Second floor meeting room, 120 max, plus outdoor patio that overlooks the Lake.
- Total project budget \$48 million.
- 2016 measure p passes at 2%. Budget was at \$25 mil. Cost has gone through the roof in the last 2-3 years.
- Annual expenses expected to be \$2.4 million with expected revenues to be \$1.7 million. Rec centers almost never make a profit. This is similar to what the current rec center costs.
- City and County working on agreement for the Rec Center land.
- Discussion about the 56 Acres Project.
- Tom Davis commented this new location allows for the old rec center to stay open while new is being built.
- Approx. \$12 mil in measure P fund now. Fund will grow while construction is underway. Approx. \$2 mil a year.
- Discussion about sports tournaments.
- Forming a Parks & Rec Foundation. They will go out and get sponsorships for the new Rec Center. Sponsor meeting rooms, etc. Stay tuned in the next year or so.
- Tom Davis asked about Boys and Girls Club access to new center. Yes, they will have allocated space to use arts/crafts area, computers, etc.

**South Lake Tahoe Lodging Association (SLTLA) General Membership Meeting Minutes.**  
Thursday, May 13, 2021 via Zoom Call.

**Board Members Present**

Doug Williams, Rich Bodine, Jerry Bindel, Kathleen Mason, Tom Davis and Ted Moorehead.

**Call Meeting to Order**

Doug Williams called the meeting to order at 9:35 am.

**Treasurer Report (Jerry Bindel)**

\$13,526.22 currently in bank accounts. Have received membership dues. Thank you for those who have sent them in. Accountant will reach out individually to those who have not paid.

**Monthly Topics**

**Lake Tahoe Visitors Authority, Carol Chaplin, President/CEO, [Carol@LTVA.org](mailto:Carol@LTVA.org)**

- Launched spring campaign a couple weeks ago. No winter advertising. Shifted money to spring. Will roll into summer campaign. Markets this year are Las Vegas, Dallas, Houston, Orange County, and Burbank. Minimal approach in N. CA. Direct to Reno from Dallas/Houston and Orange Co/Burbank.
- Misc. links to check
  - Tahoe South Spring Campaign videos
  - Get your Spring on at Tahoe South – Yodel: <https://youtu.be/ls33ow9F5xs>
  - Get your Spring on at Tahoe South – Haiku: <https://youtu.be/-2d2NPelhu8>
  - Get your Spring on at Tahoe South – Serene: <https://youtu.be/3KcCb5BQSBi>
  - Meetings section of TahoeSouth.com - <https://tahoesouth.com/meetings/meeting-planners/>
  - Tahoe South Travel Responsibly Pledge - <https://tahoesouth.com/take-care-travel-pledge/>
- New website went live a couple months ago. Thanks to our digital committee, Tony Lyle, Stuart Maas and Anne Sutterfield. Take a look make sure your property info is up to date, images, content, etc. Stuart Maas will also be reaching out for updated meeting information.
- Summer campaign June 1 – Labor Day. Dark July.
- American Century Championship, July 7-11, is back with limited spectators. Limited ticket sales all online no gate sales this year. No spectators on Tuesday.
- Tickets on sale beginning May 17<sup>th</sup>, <https://www.eventbrite.com/e/american-century-celebrity-golf-tournament-at-edgewood-tahoe-golf-course-tickets-149954811879>
- Small allocation 5 Raley's, 2 at the Lake and 3 in Carson Valley.
- No lodging sales this year.
- Launched Travel Pledge with North Lake Tahoe and Truckee. Trying to change behavior. Respect destination. You can include in your email confirmations or at the Front desk, <https://tahoesouth.com/take-care-travel-pledge/>
- Events Center.

- Moving dirt from MontBleu parking lot to Edgewood Golf and Tahoe Beach Club. They needed dirt and we don't have to truck it out of basin. Win-win for everyone.
- Virtual tour of the Events Center at <https://tahoedouglasva.org/virtual-tour/>
- Will be expanding the <https://tahoedouglasva.org/> website.
- Stuart is traveling this year selling groups for events center and other smaller meeting properties.
- Hired a third party operator, Spectra, they are affiliated with NBC Sports. In the background now. Contract starts in September.
- \$80 million dollar project.
- 500 construction jobs coming and going.
- Edgewood Tahoe donated the land Events Center sits on \$10 million donation which made this project possible.
- Reno Airport
  - Carol on the Board of Trustees
  - More direct flight service than pre-covid
  - Charlotte
  - Dallas/Houston
  - JSX servicing Orange County, Burbank, Oakland and Las Vegas to Reno-Tahoe
- Summer Concert Series is back. Starting in late July and moving later into September. 14 concerts confirmed so far.
- Fireworks
  - Tahoe Douglas Visitors Authority – TDVA is the sponsor.
  - A lot of conversation whether or not to bring back the fireworks regarding safety issues with land managers. How to keep destination safe and clean.
  - TDVA Board Meeting on Weds. May 19<sup>th</sup> will be considering Fireworks contract.
  - Other fireworks show have been cancelled around the Lake. Had lots of calls and conversations about it.
  - Perhaps use the money we would have spent on a September push.
  - Water partner feedback, safety #1 issue. If we were to shoot, we would be the only show on the lake, concerning Coast Guard and Fire Dept. with more people coming from N Shore.

### **Recreation Center Update, Jerry Bindel, [jbindel@forestsuites.com](mailto:jbindel@forestsuites.com)**

- Jerry is on the South Lake Tahoe Parks and Rec commission, and Sub Commission for the new Recreation and Aquatics Center
- Link to presentation from January 2021, <https://tahoesouth.com/wp-content/uploads/2021/05/SLTLA-Rec-Center-Presentation-1.pdf>
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- Gymnasium Just under 14K Sq. Ft. Walking/Jog Track, Aerobics/Dance Studio. Spectator seating for approx. 150 people on each side.
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- Tom Davis asked about Boys and Girls Club access to new center. Yes, they will have allocated space to use arts/crafts area, computers, etc.

**Dreu with a "U" Murin, [dreu@dreumurin.com](mailto:dreu@dreumurin.com), Heavenly Village, [www.theshopsatheavenly.com](http://www.theshopsatheavenly.com)**

- Pulled off 3 successful events, Easter Egg Hunt, End of Season Party, Cinco de Mayo
- Announced Heavenly Concert Series
- Thank you to the Lodging Association for all your support
- Heavenly Village all about the Guest Experience

**Richard Dunne, New Desolation Hotel, [www.desolationhotel.com](http://www.desolationhotel.com)**

- Micro-Resort due to open in February or March
- Electric Charging garages
- 3 buildings, 21-22 rooms
- 3-story townhouses
- 11 suites
- Gym on second floor
- Swimming pool and Jacuzzi
- Maggie's restaurant, high-end. Named after Maggie's Peak. 65 patrons max. Looking to acquire a liquor license.

- Company purchased old Sorensen's. Now Wilder Resorts. Fully renovated cabins and 6 yurts. Looking to build more yurts. Boss is Chet Pipkin who was CEO of Belkin Electronics.

Meeting adjourned at 10:36 am.



**South Lake Tahoe Lodging Association (SLTLA) General Membership Meeting Minutes.**  
Thursday, April 8, 2021 via Zoom Call.

**Board Members Present**

Doug Williams, Rich Bodine, Jerry Bindel, Bill Cottrill, Randall Lambach, Kathleen Mason, Ted Moorehead, Chuck Randles and Nikki Verdile.

**Call Meeting to Order**

Doug Williams called the meeting to order at 9:32 am.

**Treasurer Report (Jerry Bindel)**

\$10,500 currently in accounts. Receiving 2021 dues. Thank you for those who have sent them in. Will have full update once dues come in.

**Monthly Topics**

**Dreu with a "U" Murin, [dreu@dreumurin.com](mailto:dreu@dreumurin.com), Heavenly Village, [www.theshopsatheavenly.com](http://www.theshopsatheavenly.com)**

- Looking forward to in-person meetings
- Movie theatre is back open
- Shops and restaurants packed. 3 hour waits this last weekend
- Successful Easter egg hunt. People traveled up to 3 hours to participate. 300 kids, Easter eggs, toys, candy, and over a \$1,000 cash prizes in eggs. Thanks to Jeremy Silpen, Club 100 and Casteel Family from the Village.
- Ice rink staying open until April 18<sup>th</sup>. They are covering it during the day.
- **Summer Events**
  - Summer Concert Series starting Memorial Day Weekend and going until Labor Day. Friday and Saturday Nights.
  - Closing Day Soiree, April 18<sup>th</sup>, 12-6 pm, Live music/DJ, Charity raffle, gift certificates, prizes, gift cards, baskets and 2 21/22 Heavenly Ski Passes.
  - Cinco de Mayo, May 5<sup>th</sup>, Mariachi band from Reno, Latino Dj's, Margaritas and tacos throughout the Village.
  - 2 Brewfests this year, June brew and jerky and September paired with chicken wings.
  - Bringing bloody mary element.
  - Art walk and festival with live auction.
  - Pushing charity angle. Donated 300 turkeys to Christmas Cheer.
  - Hard Rock, finalizing contract with Cabaret Burlesque, 3 month show.
  - Ace High Drift show in the Hard Rock parking lot, not to be confused with the Lake 2.0 disaster last year. Already sold out for June. Expect to see over 350 cars from all over.
- Question for Dreu about whether people are abiding by the mask ordinance?
  - Dreu responded, they are not the mask police, some are wearing their masks, and some are not. Pretty much 50/50 split. No controversies or confrontations.

- Planning to open the Tikki Bar at the beach behind Beach Retreat & Lodge (Timbercove) the second week in May.

**Mayor Pro-Tem, Devin Middlebrook, City of South Lake Tahoe, [dmiddlebrook@cityofslt.us](mailto:dmiddlebrook@cityofslt.us)**

- Governor Newsom set June 15<sup>th</sup> for the opening of CA businesses if current COVID-19 trends hold.
- May 1<sup>st</sup> Nevada is turning over rulemaking to the County.
- April 20<sup>th</sup> next City Council meeting. Discussing ban on temporary events. Live @ Lakeview, Fri Night Ski Run Farmers Market, and other events on City property. After June 15<sup>th</sup> possibly before.
- Another round of COVID relief funding, do you need more protective gear, masks, etc. to get through COVID this summer?
- Hosted 1000 people vaccine clinic 2 weeks ago. Will do another soon. What are some of the barriers to getting your employees vaccinated?
- Update on 56 Acres project and Rec Center. Measure P increased TOT to fund the recreation center and other recreation improvements across the City. Moving forward with updated recreation design. And 56 acres master plan, (broader area). Looking at building the rec center LEED Gold Design, on the North side of 56 acres by the Library. Rec center would have roof top deck, lake views, lake view running track. Looking at moving the Rec center onto County Land. Looking at doing a land-swap.
- April 27<sup>th</sup> Joint City Council and El Dorado County meeting on 56 acres project. Will be taking action and voting to adopt/endorse 56 acres master plan. If you haven't already, would really help to send a letter/email with your support of the 56 acres master plan and the North Side location to County Board of Supervisors and City Council, Send comments to: [PublicComment@cityofslt.us](mailto:PublicComment@cityofslt.us) and [edc.cob@edcgov.us](mailto:edc.cob@edcgov.us) Meeting is April 27. Please submit prior to the 27<sup>th</sup>.
- On track to break ground on the Rec Center in 2022.
- Jerry commented if anyone has not participated in the open forums, truly transformational project. One popular model has a little main street running through it. Creates a center town environment. Marries with Lakeview Commons and Regan beach. Support is really critical coming up to the 27<sup>th</sup> of April.
- Link to information on the 56 acres, [here](#).

**Hospitality Green, Lynne Barker, [lynne.c.barker@gmail.com](mailto:lynne.c.barker@gmail.com)**

- Hosting a Tahoe/Truckee Green Lodging Workshop for small to medium hotels and the hospitality industry. [Link to PDF](#)
- 2 half day virtual events, May 11 & 12, 2021 from 9:00 to 12:00 pm.
- Hosted by Green Up the Sierra Business Council, TRPA, Tahoe Water Suppliers Assoc, and Western NV College.
- The event has a great lineup of presenters and will address a range of issues including contributions to carbon emissions from the tourism industry and solutions that generate savings and offer a marketing advantage.
- Register at <https://tinyurl.com/TahoeGreenLodging>

- Green Business certification program has been adopted by 8 states.
- Event is covering Green Business certification program, hospitality's role in climate action, food waste diversion, sustainable region transportation, and overview on how to get certified and how to get your customers engaged in the program.
- Online program facilitates and helps get certified.
- Granlibakken first certified business in the Basin.
- Looking to partner with the Lodging industry.

**Boys and Girls Club, Jude Wood, [jwood@bgclt.org](mailto:jwood@bgclt.org)**

- Link to presentation, [here](#).
- Club will have been open for 30 years this summer.
- Only source of childcare 5 days a week, all children 5-18 years.
- 46% of families are employed in the lodging tourism and recreation industry.
- Each child has received over 650 online school help hours this year.
- Never had a building of their own.
- In 2016 informed by school district they would be reopening Al Tahoe School and they would have to find a new location.
- Received a \$3 mil donation from Lisa Maloff, Angel of Tahoe.
- Community raised 2 mil during the pandemic
- Mike Leeper with Lucky Beaver donated \$50k, Ian Seabright with MacDuffs donated \$50k, Embarc Cannabis Dispensary donated \$50k, Tahoe Green Cannabis Dispensary donated \$25k, and Jeff Tillman with Tahoe Refuse donated over \$100k.
- Free sewer units from City.
- 1 mil short of achieving full funding.
- If avoid break in funding will occupy the building in October.
- Looking to the community to get the last mile.
- Propose to the Lodging Association to do something similar to the Kiwanis Club organization. \$5k donation a year over 5 years = \$25k. Also get on the permanent donor wall.
- Invite the lodging association to do the same.
- Doug commented will take up with the board have to look at the budget.

**Expedia Group, Heather Roberts, [heroberts@expediagroup.com](mailto:heroberts@expediagroup.com)**

- Heather is a local, lives in Meyers. Oversees Tahoe and new market, Cedar City, UT.
- Changes in Expedia
  - Travis Weber New Tahoe area manager. Oversees and supporting Heather.
  - Nicholas Ogilvie Travel Ads, based in Texas.
- Booking trends in South Lake Tahoe, CA specifically, increase in demand by 20%.
- Growth of 9% with ADR.
- Average booking window, 33 days, with over half of booking coming in 0-6 days.
- Average length of stay is 2.5 days.
- Most of demand 0-1 to 2-6 days.
- Higher ADRs with 7+ day bucket. Lower ADR with shorter term.

- Drop in cancellations 16 points. 25% cancellation rate.
- Expedia Partner Central has a lot of information at your fingertips
  - Market insights tab
  - Health of market
  - Who is looking at Tahoe and booking
- Starting to see international demand return
- Expedia Guest insights
  - Key highlights how are you looking vs comp sets
  - Mobile and package share
- Expedia Rev Plus
  - Look deeper into daily market insights and comp sets
  - Future occupancy
- Opportunities
  - Value of packages, grow your length of stay and higher ADRs
  - On average partners offer average of 8% discount
  - Power promotion. Tahoe does really well. See better ADRs when properties offer discounts.
- Campaigns
  - Specific to Expedia, maximize promotions. Set up by Apr 14, dates (Apr 15-Oct 31)
  - No additional cost
  - Email blasts, TV ad exposure
- Travel Ads
  - Separate from partner portal
  - Pay per click, allows partner listing on first page
  - Top 15 listing get 75% of business
  - Special spots reserved for sponsored listing
- Top searches for Lake Tahoe:
  - Top state are Florida, followed by California
  - Top cities are Los Angeles and New York City
- Tahoe is one of the fastest rebounding markets
- Expedia members
  - Cancel on members slower
  - 5% specific to Tahoe
  - Longer length of stay
  - Expedia's goal is to incentivize people to travel
  - Loyalty programs
- Question about increase of YOY booking.
  - Pacing significantly over 2019
  - All shut down last year

- Brand new website, TahoeSouth.com, check your listing for accuracy, if need anything changed please let us know.
- Paid advertising started back up April 5 for spring. Will have summer push in June. Texas, So. Ca, Vegas.
- Planning to go forward with Golf Tournament with limited spectators and reduced attendance.
- 4<sup>th</sup> of July Fireworks up in the air. Wait and see mode. Make announcement mid-May hopefully. TDVA is sponsor.

Meeting adjourned at 10:36 am.



## LOCAL APPOINTMENTS LIST

Government Code 54972 (Maddy Act)

### AIRPORT LAND USE COMMISSION

(2 Year Term)

Meets as needed to review compatibility of land use plans and regulations around the airport.

<b>Name</b>	<b>Date Appointed</b>	<b>Term Expires</b>
Nicholas Speal	2/2/2021	2/2023
Stacey Ballard	3/16/2021	2/2023

### BUILDING BOARD OF APPEALS

(2 Year Term)

Meets as needed to hear appeals of Building Official determinations & monitor City building use, maintenance & construction requirements.

<b>Name</b>	<b>Date Appointed</b>	<b>Term Expires</b>
Keith Roberts	3/16/2021	2/2023
Frank Sylvester	1/18/2022	2/2024
Courtney Schmidt	3/1/2022	2/2024

### INDEPENDENT CITIZENS' OVERSIGHT COMMITTEE (MEASURE P)

(4 Year Term)

Meets as needed to provide direction to City Council & Staff regarding the use & accounting of Measure P funds.

<b>Name</b>	<b>Date Appointed</b>	<b>Term Expires</b>
Jerry Bindel	2/19/2019	2/2023
David Gregorich	2/19/2019	2/2023
Judith Wood	2/19/2019	2/2023
Marissa Fox	2/19/2019	2/2023
Christina Wilson	2/19/2019	2/2023

### PARKS & RECREATION COMMISSION

(Alternating 2 Year Terms)

Meets quarterly to advise City Council on policies and projects relating to city parks and recreation.

<b>Name</b>	<b>Date Appointed</b>	<b>Term Expires</b>
Margie Kovarik-Maxhimer	1/18/2022	2/2023 (limited term vacancy)
Greg Bergner	2/2/2021	2/2023
Kira Smith	2/2/2021	2/2023
Dan Thrift	2/2/2021	2/2023
Jerry Bindel	1/18/2022	2/2024
David Gregorich	1/18/2022	2/2024
Aricela Ramos	1/18/2022	2/2024

### PLANNING COMMISSION

(Alternating 2 Year Terms)

Meets monthly to assist in matters relating to the City's general plan, serve as Delinquent Refuse Hearing Board & perform duties set forth in Article 7 of the Government code.

<b>Name</b>	<b>Date Appointed</b>	<b>Term Expires</b>
Douglas Williams	2/2/2021	2/2023
Kili Rahbek	2/2/2021	2/2023
Natalia Wiczorek	2/2/2021	2/2023
Keith Roberts	1/18/2022	2/2024
Gavin Feiger	1/18/2022	2/2024

**Arts, Culture and Tourism Commission**

(Alternating 2 Year Terms)

Meets quarterly to advise City Council on policies and projects relating to Arts, Culture and Tourism.

<b>Name</b>	<b>Date Appointed</b>	<b>Term Expires</b>
Stacey Ballard	10/19/2021	2/2023
Eleanor Brennan	10/19/2021	2/2023
David Hamilton	10/19/2021	2/2023
Scott Forrest	1/18/2022	2/2024
Bryan Yerian	1/18/2022	2/2024
Tony Lyle	1/18/2022	2/2024 (non-voting representative)

**Police Advisory Commission**

(Alternating 2 Year Terms)

Meets quarterly to advise, assist, and collaborate on police/community issues.

<b>Name</b>	<b>Date Appointed</b>	<b>Term Expires</b>
Ayana Morali	8/3/2021	2/2023
Erika Gonzalez	8/3/2021	2/2023
Tom Davis	8/3/2021	2/2023
Claudia Anderson	1/18/2022	2/2024
Justin Zunino	1/18/2022	2/2024

**Council Commissions with citizen representation****EL DORADO COUNTY COMMUNITY ACTION COUNCIL** - Council Commission with citizen representative

<b>Name</b>	<b>Date Appointed</b>	<b>Term Expires</b>
Brian Conway	12/7/2021	Appointment considered annually

**EL DORADO COUNTY COMMISSION ON AGING** - Council Commission with citizen representative

<b>Name</b>	<b>Date Appointed</b>	<b>Term Expires</b>
Barbara Kaufman	12/7/2021	Appointment considered annually

**TRPA ADVISORY PLANNING COMMISSION** – Council Commission with citizen representative


<b>Name</b>	<b>Date Appointed</b>	<b>Term Expires (2 Year Term)</b>
Susan Chandler	12/15/2020	2/2023



**CITY OF SOUTH LAKE TAHOE**  
**VOLUNTEER COMMISSION/BOARD MEMBER APPLICATION**



Please Legibly Print or Type

NAME: FIRST		MIDDLE INITIAL	LAST	COMMITTEE AND/OR CATEGORY APPLYING FOR:	
Jerry		M	Bindel	Parks and Recreation Commission	
RESIDENCE:	STREET ADDRESS		CITY	STATE	ZIP CODE
			South Lake Tahoe	CA	96150
MAILING ADDRESS:	P.O. BOX		CITY	STATE	ZIP CODE
			South Lake Tahoe	CA	96150
RESIDENCY: (Please select one)					
CITY RESIDENT <input checked="" type="checkbox"/> EL DORADO COUNTY RESIDENT <input type="checkbox"/> DOUGLAS COUNTY RESIDENT <input type="checkbox"/> STATE OF NEVADA RESIDENT <input type="checkbox"/>					
PHONE NUMBER(S):	RESIDENCE:	BUSINESS:		EMAIL ADDRESS:	
EMPLOYER:					
Benchmark Hospitality, Forest Suites Resort					
EDUCATION/EXPERIENCE:					
BS in Hotel Administration, Cornell University, 35 years in hospitality industry in locations including Garmisch, Germany, Breckenridge CO, Aruba, Washington DC					
PLEASE LIST ANY PAST OR PRESENT COMMUNITY INVOLVEMENT AND/OR GROUP AFFILIATIONS:					
Current Rec Commissioner/Chair; Current LTVA/SLTTID Chair; Current SLTLA Treasurer; Current Valhalla Tahoe Treasurer;					
Current Community Disaster Resource Center Treasurer; Current SSTMA Treasurer; Serving on Rec Center Steering Group					
WHAT DO YOU SEE AS THE RESPONSIBILITIES OF THIS COMMITTEE AND WHAT DO YOU HOPE TO ACCOMPLISH IF APPOINTED?					
I would like to continue to serve on the Recreation Commission to support the new Recreation Center, as well as other Rec Commission priorities.					
I believe the responsibilities of the Recreation Commission are to support and assist City staff with access and improvement of all parks and recreation assets for our community					
Have you taken the opportunity to attend any previous commission meeting prior to the notice of this vacancy?					
YES <input checked="" type="checkbox"/> NO <input type="checkbox"/>					
Please list any potential conflict of interests that you may foresee if appointed to the Commission that you've applied:					
None					
If appointed to the Airport Commission, Planning Commission or Building Board of Appeals Commission, you will be required by the State of California Fair Political Practices Commission to file a Conflict of Interest Statement with the City Clerk. Will you be willing to comply with this requirement?					
YES <input checked="" type="checkbox"/> NO <input type="checkbox"/>					
CERTIFICATE OF APPLICANT:					
I certify that all statements made in this application are true and complete. I understand that any false statement or omission of material facts will subject me to disqualification.					
DATE: 12/1/2021		SIGNATURE: 			
Please note that the information provided on this application, including address, phone number and email address will become a matter of public record.					

**WHEN COMPLETED RETURN FORM**  
TO: Office of the City Clerk  
Attn: Susan Blankenship - City Clerk  
1901 Lisa Maloff Way, Ste 206  
South Lake Tahoe, CA 96150-6324  
PH: (530) 542-6005  
sblankenship@cityofslt.us



\*Late Submittal TR

**From:** Margie KOVARIK  
**To:** Susan Blakenship  
**Subject:** Parks and Rec Commission application  
**Date:** Wednesday, December 29, 2021 7:30:40 AM  
**Attachments:** [Application Parks Re.pdf](#)

---

Dear Susan Blakenship,

Attached is my application for the Parks and Recreation Commission. I realize my application was due yesterday at 5:00. I did not expect to be caught on the opposite side of town due to extreme weather conditions and traffic. I was without power for 3 days not long ago and have had trouble catching up.

I understand if this application does not qualify and am grateful for the opportunity to apply at all.

Sincerely,  
Margie Kovarik-Maxhimer

December 28, 2021

South Lake Tahoe City Council  
1901 Lisa Maloff Way, Suite 206  
South Lake Tahoe, CA 96150

Dear Council,

Please accept this application for the open seat on the Parks and Recreation Commission. I have been a resident of South Lake Tahoe for 34 years, and in that time have owned and operated several tourism related retail shops under the umbrella of Tahoe Summers Inc. Currently my husband I are in the rental housing business for mostly long term rentals.


I am confident that I would bring a new perspective based on my number of years in business and the diversity of my businesses in the South Shore. My involvement in the business community is far reaching and includes being the current Treasurer of the Kiwanis Club of Lake Tahoe.

I am a pickleball enthusiast, which brings me to the recreation center quite often. Over the decades of living in Lake Tahoe I have been active in all sorts of athletic activities such as mountain biking, skiing, snowshoeing, co-ed softball, hiking and a very long time ago, volleyball. This year the Rec Center has been a great partner in the Sock Drive sponsored by the Kiwanis Club of Lake Tahoe.

I have enjoyed watching the Recreation Center evolve over the past several years and am encouraged by the progress of moving forward on the new designs. Speaking with Dave Hamilton, a current member of the commission, I decided to apply for the open position.

Thank you for the opportunity to represent this important sector of the South Shore. I look forward to the opportunity to work with the other commission members and the city council on furthering the initiatives of the Parks and Recreation Commission for our entire community.

Best regards,

  
Margie Kovarik-Maxhimer

CITY OF SOUTH LAKE TAHOE  
VOLUNTEER COMMISSION/BOARD MEMBER APPLICATION



Please Legibly Print or Type

NAME: FIRST	MIDDLE INITIAL	LAST	COMMITTEE AND/OR CATEGORY APPLYING FOR:	
Margaret	L	Kovarik	Parks & Rec Commission	
RESIDENCE: STREET ADDRESS	CITY	STATE	ZIP CODE	
[REDACTED]	South Lake Tahoe	CA	96150	
MAILING ADDRESS: P.O. BOX	CITY	STATE	ZIP CODE	
[REDACTED]	South Lake Tahoe	CA	96158	
RESIDENCY: (Please select one)				
CITY RESIDENT <input checked="" type="checkbox"/> EL DORADO COUNTY RESIDENT <input type="checkbox"/> DOUGLAS COUNTY RESIDENT <input type="checkbox"/> STATE OF NEVADA RESIDENT <input type="checkbox"/>				
PHONE NUMBER(S): RESIDENCE	BUSINESS:		EMAIL ADDRESS:	
[REDACTED]	[REDACTED]		[REDACTED]	
EMPLOYER:				
Self employed				
EDUCATION/EXPERIENCE:				
BA Accounting & Business Carroll College				
Business owner 30 yrs				
PLEASE LIST ANY PAST OR PRESENT COMMUNITY INVOLVEMENT AND/OR GROUP AFFILIATIONS:				
LTVA - Marketing Committee 10 yrs				
Bread & Butter volunteer / B&B Backpack for kids volunteer				
Kiwanis Club of LT - 25+ yrs Sock Drive leader				
WHAT DO YOU SEE AS THE RESPONSIBILITIES OF THIS COMMITTEE AND WHAT DO YOU HOPE TO ACCOMPLISH IF APPOINTED?				
Responsibilities would be to attend all meetings, and any other relevant meetings. To move the rec center project forward				
Have you taken the opportunity to attend any previous commission meeting prior to the notice of this vacancy?				
YES <input type="checkbox"/> NO <input checked="" type="checkbox"/>				
Please list any potential conflict of interests that you may foresee if appointed to the Commission that you've applied:				
If appointed to the Airport Commission, Planning Commission or Building Board of Appeals Commission, you will be required by the State of California Fair Political Practices Commission to file a Conflict of Interest Statement with the City Clerk. Will you be willing to comply with this requirement?				
YES <input checked="" type="checkbox"/> NO <input type="checkbox"/>				
CERTIFICATE OF APPLICANT:				
I certify that all statements made in this application are true and complete. I understand that any false statement or omission of material facts will subject me to disqualification.				
DATE:	SIGNATURE:			
12.28.21	[REDACTED]			
Please note that the information provided on this application including address, phone number and email address will become a matter of public record.				

WHEN COMPLETED RETURN FORM

TO: Office of the City Clerk  
Attn: Susan Blankenship - City Clerk  
1901 Lisa Maloff Way, Ste 206  
South Lake Tahoe, CA 96150-6324  
PH: (530) 542-6005  
sblankenship@cityofsl.us



## City parks and recreation future is active

Earlier this year, City Council appointed our current parks and recreation commissioners group that includes a healthy mix of experienced and new commissioners.

We welcome new commissioners Aricela Ramos and Margie Kovarik-Maxhimer, along with veterans David Gregorich, Dan Thrift, Dr. Greg Bergner and Kira Smith to an exciting time for South Lake Tahoe relating to Parks and Recreation.

First and foremost on our commission radar is our new multi-generational recreation and swim complex, which will sit on the northeast side of the 56-acre project, directly adjacent to the El Dorado Public Library.

This 62,000-square-foot



**Jerry Bindel**  
Guest column

facility includes two full-size high school basketball courts (dividable into volleyball, pickleball, and indoor soccer courts), a quarter mile indoor running track, cardio and free-weight area, six-lane 25-meter swimming pool with two additional warmup lanes, kids play pool area, warm therapy resistance lazy river, community/senior/dance gathering and meeting rooms, and beautiful open lobby spaces for community enjoyment.

Groundbreaking begins this spring, with

underground utility work completed in 2022, and vertical construction starting in 2023 for a 2024 opening. This new center is being funded by a local lodging industry-supported and voter-approved 2% increase in transient occupancy tax in 2016. It is an exciting time for a center that our entire community supports for the benefit of locals and visitors alike.

The Parks and Recreation Commission is also tasked with the goal of equitable access to all parks facilities and is developing programs and services that will support access for all South Shore residents. We have a sub-committee working on programs that will allow for bike access, facility access and other benefits

for all our residents.

Another area on which we will be concentrating is city park enhancements. Our commissioners believe that a New Master Plan for the Bijou Park area is vital to the future planning of the assets in this area, including incorporating golf course access, disc golf, bike/skate areas and other gathering opportunities. Regan Beach/El Dorado Beach service areas are also discussed at each of our meetings, and we support city parks staff in their mission to provide the best possible product for our locals and visitors with an eye towards future improvements at those beach areas.

Last, our commission

**BINDEL, 25**

## LETTER TO EDITOR

**Tahoe Daily Tribune**

3079 Harrison Ave.  
South Lake Tahoe, CA 96150  
530-541-3880

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RGALLOWAY@TAHOEDAILYTRIBUNE.COM

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MPERON@SIERRANEVADAMEDIA.COM

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**Circulation** 530-273-9565  
CIRCULATION@THEUNION.COM

### Letters to the editor policy

The Tahoe Daily Tribune welcomes your thoughts and opinions in our opinion section. Email editor@tahoedailytribune.com and include the author's name, hometown and phone number for verification.

- Anonymous submissions will not be published.
- Form letters, libelous letters or letters in poor taste will be rejected.
- We reserve the right to edit all letters and columns.
- Letters must be 300 words or less. Guest columns must be 750 words or less.

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**Please note that severe weather conditions could impact delivery of the paper.**

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**BINDEL**

From page 15

will be continuing to be present at and support bike mobility and connectivity access throughout our community. With the help of former commissioner and bike guru Pete Fink, we are continuing to promote our bike paths, connectors, and best practices for path maintenance.

Not to be forgotten, our parks and rRecreation staff — led by Director Lauren Thomaselli, Kelley Edwards and James Steed — are great assets and have been working very hard during these challenging COVID times. Distancing requirements, regulations, closures/

reopening, and staffing challenges are daily hurdles.

As we move away from COVID restrictions, we still are seeing challenges attracting lifeguards and staff to keep our recreation areas open full hours. We encourage qualified interested persons to apply and hope to see you out at the city parks and recreation facilities.

For updates on all things parks and recreation or for staff contact information, visit [www.cityofslt.us/recreation](http://www.cityofslt.us/recreation).

*Jerry Bindel is a South Lake Tahoe resident, general manager of Forest Suites Resort and member of the Parks and Recreation Commission.*



## Aquatics Center (proposed)

Hotel Azure Tahoe  
4.3 ★ (635)  
3 star hotel

Hotel Azure Tahoe  
1010 Rufus Allen Blvd  
SLT, CA 96150



**Rich Bodine**  
**President**  
**SLT Lodging**  
**Association**

**&**  
**Owner of Hotel**  
**Azure**

The Aquatics Center is a thinly veiled tourist amenity for Hotel Azure and the SLT Lodging Association. Rich Bodine, Jerry Bindel, Doug Williams, and Tom Davis are all SLTLA directors who have control over City decision-making, through the Planning Commission, Parks and Rec commission, and Sub Commission for the new Recreation and Aquatics Center, and through the Boys and Girls Club. The proposed location and sitting will destroy the last large waterfront public open space in the city.



# SLT affordable housing eliminated for tourist units



A few empty trailers still occupy the parcel behind Hotel Azure. Photo/LTN

**Publisher's note: *This is one in a series of stories about affordable housing in the Lake Tahoe-Truckee region. All articles may be accessed via the home page under Special Projects, 2017 Affordable Housing.***

**By Kathryn Reed**

A few dozen South Lake Tahoe residents have been removed from their affordable housing units so more tourist accommodation units can be erected for a project that isn't even permitted.

The owners of Hotel Azure, who live in San Francisco, also own the mobile home park behind that property along Rufus Allen Boulevard. Today it is a skeleton of what was once a low key housing area. The trailer park has been vacant for about four months.



“There were only about six tenants left prior to closing. All were bought out at fair market value and agreed to sell,” Rich Bodine, director of operations for the hotel, told *Lake Tahoe News*.

Where they went is unknown.

The people living in the trailers were renting space from Azure, which used to be called Inn by the Lake.

The plan is to put tiny houses on that land. But instead of them being available for residents, they will be a variation on hotel lodging. They come premade and will be placed on a concrete slab.

“It will give them a sense of renting a home, but still have amenities of a hotel,” Bodine said. The company wants to compete with the Airbnbs of the world.

Bodine predicted everything will be in place by 2019. First up, he said, is getting the infrastructure in place.

Really, the first step is getting the permits.

According to Tom Lotshaw with the Tahoe Regional Planning Agency, “... in 2013 the owners of the mobile home park submitted an application to subdivide the existing mobile home unit spaced, but that application had issues and has been on hold ever since.”

The city doesn’t even know about these plans.

“The Development Services Department is not aware of the project and there is no pending application proposing such a project,” South Lake Tahoe planner John Hitchcock told *Lake*



*Tahoe News.*

With no project even being considered by the regulatory agencies, that 2019 date could be farfetched, and it means local residents could have still been in their homes.

## **Resolution 2020-074**

**Adopted by the City of South Lake Tahoe  
City Council**

**August 25, 2020**

### **Resolution Deobligating California Tahoe Conservancy Proposition 1 Grant Funding for the Bijou Park Creek Restoration Capital Improvement Project Budget (301-40051)**

#### **BACKGROUND**

- A. On March 14, 2017, the City Council established the three-phased Bijou Park Creek Watershed Restoration Project in Resolution No. 2017-16.
- B. On September 21, 2017, the California Tahoe Conservancy (Conservancy) Board Authorized the award of \$572,250 in Proposition 1 (Water Quality, Supply, and Infrastructure Improvement Act of 2014) grant funds for the acquisition of 3747 Woodbine Road for stream environment zone (SEZ) restoration purposes in Conservancy Board Resolution 17-09-02.1.
- C. The City Council accepted the grant and modified the Annual Operating Budget to add the Conservancy Proposition 1 grant funds totaling \$572,250 to the Capital Improvement Budget in Resolution No. 2018-14.
- D. On April 26, 2018, the Conservancy authorized a grant augmentation for an additional amount of \$793,991 for the acquisition and restoration of two additional properties in Conservancy Board Resolution 18-04-03.
- E. On May 15, 2018 the City Council accepted the grant augmentation and modified the Annual Operating Budget to add the Conservancy grant augmentation of \$793,991 for the Capital Improvement Budget in Resolution 2018-47.
- F. The California Tahoe Conservancy Grant funds are only allowed to be used for the specific purposes of water quality improvements and watershed restoration for properties included in the City's Bijou Park Creek Property Acquisition grant applications submitted April of 2017.

**BASED ON THE FACTS SET FORTH, BE IT RESOLVED**, that the City Council of the City of South Lake Tahoe hereby determines and finds as follows:

- 1. The recitals set forth herein are true and correct.

2. The City Council hereby modifies the Annual Operating and Capital Improvement Budget for Fiscal Year 2019-20 as follows:

**REVENUE**

(Upper Bijou Park Creek Restoration) 301-40051-33212 (-) \$855,241

**EXPENSE**

(Upper Bijou Park Creek Restoration) 301-40051-48040 (-) \$855,241

Adopted by the City of South Lake Tahoe City Council on August 25, 2020, by the following vote:

Yes: Bass, Collin, Laine, Middlebrook and Wallace

DocuSigned by:

\_\_\_\_\_

3679671408A34A2...

Jason Collin, Mayor

Date: 8/27/2020

Attest:

DocuSigned by:

\_\_\_\_\_

2D6FDBDD39A94AF...

Susan Blankenship, City Clerk

*The presence of electronic signature certifies that the foregoing is a true and correct copy as approved by the South Lake Tahoe City Council.*

**CITY OF SOUTH LAKE TAHOE**  
**RESOLUTION NO. 2018-47**

**RESOLUTION AUGMENTING CALIFORNIA TAHOE CONSERVANCY GRANT  
AGREEMENT CTA 17 014L AND APPROPRIATING \$793,991 FOR THE BIJOU  
PARK CREEK RESTORATION PRIORITY ACQUISITIONS – 3593 SHIRLEY  
AVENUE AND 3590 BILL AVENUE**

**WHEREAS**, the City of South Lake Tahoe is engaged in a collaborative interagency partnership to meet the Tahoe Regional Planning Agency thresholds and install Best Management Practices for the multi-benefit Bijou Park Creek Restoration Project; and

**WHEREAS**, on March 14, 2017, the City Council established the three-phased Bijou Park Creek Watershed Restoration project in Resolution No. 2017-16; and

**WHEREAS**, on September 21, 2017, the California Tahoe Conservancy (Conservancy) Board Authorized the award of \$572,250 in Proposition 1 (Water Quality, Supply, and Infrastructure Improvement Act of 2014) grant funds for the acquisition of 3747 Woodbine Road (APN 025-282-15) in Conservancy Board Resolution 17-09-02.1; and

**WHEREAS**, on February 6, 2018, the City Council adopted Resolution 2018-14, authorizing the mayor to execute Grant Agreement CTA 17 014L and appropriate the funds to the City's Capital Improvement Budget; and

**WHEREAS**, on September 21, 2017, the Conservancy authorized a grant augmentation for an additional amount of \$793,991 for acquisition of 3593 Shirley Avenue (APN 027-113-33) and 3590 Bill Avenue (APN 027-113-35); and

**WHEREAS**, the owners of 3593 Shirley Avenue and 3590 Bill Avenue are potentially willing sellers of the residential properties; and

**WHEREAS**, the California Tahoe Conservancy grant funds are to be used for the specific purposes of water quality improvements and watershed restoration.

**NOW, THEREFORE**, the City Council of the City of South Lake Tahoe does hereby resolve as follows:

1. The City Council of the City of South Lake Tahoe does hereby authorize the Mayor to execute a Grant Augmentation for Grant Agreement CTA 17 014L, accepting an additional amount of \$793,991 in California Tahoe Conservancy grant funding for the acquisition of 3593 Shirley Avenue (APN 027-113-33) and 3590 Bill Avenue (APN 027-113-35).
2. The City Council of the City of South Lake Tahoe hereby modifies the Annual Operating and Capital Improvement Budget for Fiscal Year 2017-18 as follows:

**REVENUE**

(Upper Bijou Park Creek Restoration)    301-40051-33212    (+) 793,991



**EXPENSE**

(Upper Bijou Park Creek Restoration) 301-40051-48040 (+) \$793,991

**PASSED AND ADOPTED** by the City Council of the City of South Lake Tahoe at a regular meeting of the City Council on May 15, 2018 by the following vote:

AYES: COUNCILMEMBERS: DAVID, DAVIS, COLLIN, LAINE, AND SASS

NOES: COUNCILMEMBERS: \_\_\_\_\_

ABSENT: COUNCILMEMBERS: \_\_\_\_\_

ABSTAIN: COUNCILMEMBERS \_\_\_\_\_

Wendy David  
Wendy David, Mayor

Dated: 5/15/18

ATTEST:

Susan Alessi  
Susan Alessi, City Clerk



**CITY OF SOUTH LAKE TAHOE**  
**RESOLUTION NO. 2018-14**

**RESOLUTION ACCEPTING AND APPROPRIATING CALIFORNIA TAHOE  
CONSERVANCY PROPOSITION 1 GRANT FUNDING (\$572,250) FOR THE  
WOODBINE RESIDENTIAL PROPERTY ACQUISITION**

**WHEREAS**, the City of South Lake Tahoe is engaged in a collaborative interagency partnership to meet the Tahoe Regional Planning Agency thresholds and install Best Management Practices for the multi-benefit Bijou Park Creek Restoration Project; and

**WHEREAS**, on March 14, 2017, the City Council established the three-phased Bijou Park Creek Watershed Restoration project in Resolution No. 2017-16; and

**WHEREAS**, the owner of 3747 Woodbine Road (Christina Borsos) is a willing seller of the residential property; and

**WHEREAS**, on September 21, 2017, the California Tahoe Conservancy (Conservancy) Board Authorized the award of \$572,250 in Proposition 1 (Water Quality, Supply, and Infrastructure Improvement Act of 2014) grant funds for the acquisition of 3747 Woodbine Road (APN 025-282-15) in Conservancy Board Resolution 17-09-02.1; and

**WHEREAS**, the California Tahoe Conservancy Proposition 1 Watershed Restoration grant funds are to be used for the specific purpose of ecosystem and watershed restoration.

**NOW, THEREFORE**, the City Council of the City of South Lake Tahoe does hereby resolve as follows:

1. The City Council of the City of South Lake Tahoe does hereby authorize the Mayor to execute Grant Agreement CTA 17 014L, accepting \$572,250, in California Tahoe Conservancy Proposition 1 Grant Program funding for the acquisition of 3747 Woodbine Road (APN 025-282-15).
2. The City Council of the City of South Lake Tahoe hereby modifies the Annual Operating and Capital Improvement Budget for Fiscal Year 2017-18 as follows:

**REVENUE**

(Upper Bijou Park Creek Restoration)    301-40051-33229    (+) \$572,250

**EXPENSE**

(Upper Bijou Park Creek Restoration)    301-40051-48040    (+) \$572,250

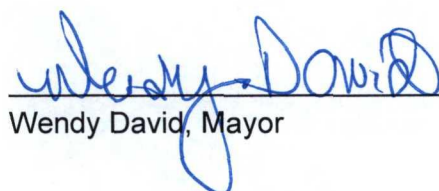
**PASSED AND ADOPTED** by the City Council of the City of South Lake Tahoe at a regular meeting of the City Council on February 6, 2018 by the following vote:

AYES: COUNCILMEMBERS: DAVID, DAVIS, COLLIN, LATNE AND SASS

NOES: COUNCILMEMBERS: \_\_\_\_\_


ABSENT: COUNCILMEMBERS: \_\_\_\_\_

ABSTAIN: COUNCILMEMBERS: \_\_\_\_\_

  
\_\_\_\_\_  
Wendy David, Mayor

Dated: 2/6/2018

ATTEST:

  
\_\_\_\_\_  
Susan Alessi, City Clerk



**RESOLUTION OF THE CITY COUNCIL OF THE CITY OF  
SOUTH LAKE TAHOE ESTABLISHING THE BIJOU PARK  
CREEK WATERSHED RESTORATION PROJECT AREA  
PHASES 1, 2 AND 3**

**WHEREAS**, Bijou Park Creek Watershed is an important watershed extending from Heavenly Mountain Resort in the upper watershed and encompassing upper Ski Run Boulevard, neighborhoods off Glenwood and Blackwood Avenues and Knights Inn Hotel area before connecting with Lake Tahoe at Ski Run Marina; and

**WHEREAS**, Bijou Park Creek was once a natural creek that flowed unobstructed into Lake Tahoe; and

**WHEREAS**, as noted by California Tahoe Conservancy (Conservancy) in a recent report, *"as this area was settled, most of the lower watershed, including meadows and marshes, was paved and developed [and] much of the SEZ in the lower watershed was lost to development, and opportunities to restore SEZ and improve water quality are currently limited;"* and

**WHEREAS**, development of residences located directly in the path of the creek and commercial development paving over the former Stream Environment Zone (SEZ) and associated habitat has effectively eliminated the natural flow and filtration of runoff; and

**WHEREAS**, the creek was eventually diverted into a 30" pipe that crosses under the Knights Inn Hotel and under Highway 50; the failing pipe and limited flow capacity increases localized flooding upstream; and

**WHEREAS**, the developed areas of the watershed include a high concentration of residential and commercial properties, which are heavily concentrated at the location of Highway 50, Herbert and Ski Run Boulevard, the area around the Knights Inn Hotel including Lloyd, Bill, Herbert and Shirley Avenues; and

**WHEREAS**, the developed areas historically experience significant amounts of flooding, which contains nutrients and sediment from the upper watershed, residential and commercial properties and runoff from roadways before discharging into the Ski Run Marina; and

**WHEREAS**, restoration and enhancement of the Bijou Park Creek Watershed has long been considered an important goal of local partner agencies and part of the Lake Tahoe Environmental Improvement Program (Project #01-01-01-0086).

**NOW, THEREFORE, BE IT RESOLVED**, the City Council does hereby resolve, declare, determine, and order as follows:

**Section 1.** That the above recitals are true and a substantive part of this resolution.

**Section 2.** That the City Council hereby establishes the Bijou Park Creek Watershed Restoration Project, Phases 1, 2 and 3 as a priority of the City Council.



**Section 3.** That Phase 1 of the Project will strive to achieve the necessary and critical balance between the economy and the environment by removing 110 old hotel units, a restaurant, a single family residence and conference center and replace it with restored and daylighted portions of the lost and paved-over Bijou Park Creek (SEZ), reduce fine sediments and nutrients flowing into Lake Tahoe, redevelop the site demonstrating the City Council's commitment to "Fixin' Highway 50" and reflecting the National Treasure in which we live as prioritized by the City Council.

**Section 4.** That Phase 2 of the Project will include an in-depth study of the Upper and Lower Watershed resulting from two planning grants awarded to the City from (1) the California State Water Resources Control Board in the amount of \$500,000 and (2) an award from the California Tahoe Conservancy in the amount of nearly \$300,000; these studies will produce recommendations to improve the functionality of the Watershed.

**Section 5.** That Phase 3 of the Project will include implementation of Bijou Park Creek Watershed Restoration Recommendations as identified in Phase 2.

**PASSED AND ADOPTED** by the City Council of the City of South Lake Tahoe at a Special Meeting on March 14, 2017 by the following vote:

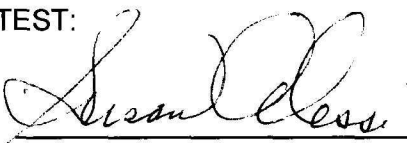
AYES: Councilmember(s): SASS, DAVID, COLLIN, DAVIS, LAINE


NOES: Councilmember(s): \_\_\_\_\_

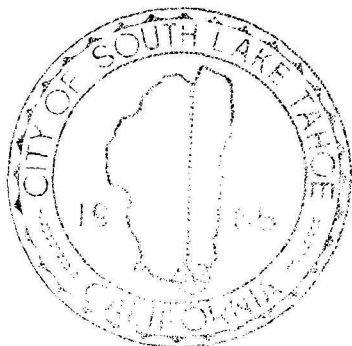
ABSENT: Councilmember(s): \_\_\_\_\_

ABSTAIN: Councilmember(s): \_\_\_\_\_

ATTEST:

By:   
Susan Alessi, City Clerk

By:   
Austin Sass, Mayor  
3-14-17



48 Cal.App.5th 963

Court of Appeal, Third District, California.

PETROVICH DEVELOPMENT COMPANY,  
LLC, et al., Plaintiffs and Respondents,

v.

CITY OF SACRAMENTO et al.,  
Defendants and Appellants;  
Eric Johnson Et al., Real Parties  
in Interest and Respondents.

Co87283

Filed 4/8/2020

### Synopsis

**Background:** Developers filed petition for writ of mandate to challenge city council's denial of conditional use permit for a gas station in the shopping center zone of a local residential development. The Superior Court, Sacramento County, No. 34-2016-80002289-CU-WM-GDS, [Michael P. Kenny](#), J., granted petition, and city appealed.

**[Holding:]** The Court of Appeal, [Raye](#), J., held that council member was impermissibly biased during vote.

Affirmed.

West Headnotes (16)

**[1] Zoning and Planning** 🔑 Nature and necessity in general

A conditional use permit is administrative permission for uses not allowed as a matter of right in a zone, but subject to approval.

**[2] Zoning and Planning** 🔑 Nature of proceedings; legislative, judicial, or administrative action

The issuance of a conditional use permit is a quasi-judicial administrative action reviewed under administrative mandamus procedures.

**[3] Municipal Corporations** 🔑 Powers and functions of council or other governing body

City council function as local legislators, but sometimes they act in a quasi-adjudicatory capacity similar to judges.

**[4] Zoning and Planning** 🔑 Nature of proceedings; legislative, judicial, or administrative action

Hearing and deciding an appeal of a conditional use permit is one of the times that a city council acts in a quasi-adjudicatory capacity.

**[5] Municipal Corporations** 🔑 Powers and functions of council or other governing body

When functioning in an adjudicatory capacity, the city council must be neutral and unbiased.

**[6] Zoning and Planning** 🔑 Voting; bias and disqualification

Allowing a biased decision maker to participate in the city council's zoning decision is enough to invalidate the decision.

**[7] Zoning and Planning** 🔑 Voting; bias and disqualification

The law does not require the disappointed conditional use permit applicant to prove actual bias; rather, there must not be an unacceptable probability of actual bias on the part of a municipal decision maker.

**[8] Administrative Law and Procedure** 🔑 Presumptions and burdens of proof

A party seeking to show bias or prejudice on the part of an administrative decision maker must prove the same with concrete facts.

[9] **Administrative Law and Procedure** 🔑 Evidence

Bias and prejudice on the part of an administrative decision maker are never implied and must be established by clear averments.

[10] **Administrative Law and Procedure** 🔑 Bias, Prejudice, or Other Disqualification to Exercise Powers

A party must show either actual bias on the part of an administrative decisionmaker or show a situation in which experience teaches that the probability of actual bias on the part of the decisionmaker is too high to be constitutionally tolerable.

[11] **Administrative Law and Procedure** 🔑 Evidence

Bias in an administrative adjudicator must be established with concrete facts rather than inferred from mere appearances.

[12] **Municipal Corporations** 🔑 Duties and liabilities  
**Public Employment** 🔑 Duties

When considering bias, a councilman has not only a right but an obligation to discuss issues of vital concern with his constituents and to state his views on matters of public importance.

[13] **Zoning and Planning** 🔑 Voting; bias and disqualification

City council member was impermissibly biased during vote on conditional use permit to allow gas station project; while membership in neighborhood association, statement that gas station did not fit into development, and fact council member lived in neighborhood adjacent to project did not establish bias, council member was counting votes against the permit and communicating an update on that score to mayor, council member prepared a compilation of

“talking points” that amounted to a presentation against the gas station, council member coached neighborhood association president on how to appeal Planning and Design Commission's initial grant of permit, and council member himself made the motion to reverse the decision of the Planning Commission.

[14] **Appeal and Error** 🔑 Briefs and argument in general

Failure to provide proper headings forfeits issues that may be discussed in the brief but are not clearly identified by a heading. *Cal. R. Ct. 8.204(a)(1)(B)*.

[15] **Zoning and Planning** 🔑 Waiver of error on review

City forfeited contention that, under harmless error standard, city councilmember's bias in connection with vote on conditional use permit was not outcome determinative, where argument was buried in city's opening brief on appeal. *Cal. Gov't Code § 65010; Cal. R. Ct. 8.204(a)(1)(B)*.

[16] **Zoning and Planning** 🔑 Voting; bias and disqualification

**Zoning and Planning** 🔑 Harmless error

Councilmember assistance to opposition to gas station in obtaining the city council's vote against conditional use permit for the project was not a mere technical error that could be deemed harmless or nonprejudicial, but rather was a fundamental flaw in the process, even if majority of council voted to deny the permit. *Cal. Gov't Code § 65010*.

**Witkin Library Reference:** 7 *Witkin, Summary of Cal. Law* (11th ed. 2017) *Constitutional Law*, § 738 [Bias.]

**\*\*332** APPEAL from a judgment of the Superior Court of Sacramento County, [Michael P. Kenny](#), Judge. Affirmed. (Super. Ct. No. 34-2016-80002289-CU-WM-GDS)

#### Attorneys and Law Firms

[Susana Alcala Wood](#), City Attorney, Brett M. Witter, Deputy City Attorney; Meyers, Nave, Riback, Silver & Wilson, [Amrit S. Kulkarni](#), Los Angeles, and Shaye Diveley, Oakland for Plaintiffs and Appellants.

Rutan & Tucker, [David P. Lanferman](#), San Francisco, [Mathew D. Francois](#); Smith, McDowell & Powell, [C. Jason Smith](#), Sacramento and [Brad A. McDowell](#) for Defendants and Respondents.

No appearance for Real Parties in Interest and Respondents.

#### Opinion

[RAYE](#), P. J.

**\*965** In this appeal we consider the restraints imposed on city council members, who are normally policymakers and voices of their constituents, when they act in a quasi-judicial capacity as adjudicators of matters on appeal from an administrative body. Here, the Sacramento City Council (City Council) was called upon to act in such a capacity following an eight-to-three vote by the Sacramento Planning and Design **\*\*333** Commission (Planning Commission) granting a conditional use permit for a gas station in the shopping center zone of a local residential development. Real parties in interest appealed the decision to the City Council.<sup>1</sup> In such matters council members must be neutral and unbiased. The developers sued, asserting in the **\*966** trial court that one City Council member was neither and entered deliberations on the issue with his mind already made up.<sup>2</sup> The trial court agreed and, upon review of the record, so do we. Accordingly, we affirm the order granting the petition for writ of mandate and ordering the city to rescind the decision on the appeal and hold a new hearing on the appeal at which the councilmember would be recused from participating.

#### FACTUAL AND PROCEDURAL BACKGROUND

On September 28, 2010, the City Council approved land use and zoning entitlements for the Curtis Park Village development. Curtis Park Village is a 72-acre planned unit

development located at the corner of Crocker Drive and Sutterville Road, bounded by the railroad to the west and the Curtis Park residential neighborhood to the east.<sup>3</sup> The development includes single- and multi-family residential housing plus retail and commercial areas, including a shopping center zone in the southern commercial area.

[1] On September 10, 2014, Petrovich applied for a conditional use permit to construct and operate a gas station in the shopping center zone. The proposed facility would have eight dispensers and 16 pumps, a covering canopy, and a convenience store kiosk. The gas station was to be an extension of the services offered by Safeway, the anchor tenant in the shopping center, and was a requirement of the lease between Petrovich and Safeway.<sup>4</sup> The shopping center zone allowed a gas station at this location subject to a conditional use permit.<sup>5</sup>

**\*967** In 2014 and 2015, Eric Johnson, president of the Sierra Curtis Neighborhood Association, submitted a series of letters to the Planning Commission on behalf of the association opposing the proposed gas station.<sup>6</sup>

In May and June 2015, Planning Commission staff submitted reports to the commission **\*\*334** recommending approval of a conditional use permit for the gas station. The reports noted that the Planning Commission had approval authority over the conditional use permit, but its decision could be appealed to the City Council. Early project notifications had been sent to local neighborhood and community associations, including the Sierra Curtis Neighborhood Association. Staff “received comments both in support of and in opposition to the proposed gas station. [Citation.] The key concerns of those who have contacted staff have been traffic, health and safety, land use, and aesthetics.” The reports analyzed each area of concern and concluded that the gas station would not have the negative impacts raised in comments opposing the application. Staff acknowledged that “[t]his item is considered to be controversial.”

On June 11, 2015, by an eight-to-three vote, the Planning Commission approved a conditional use permit to construct and operate a gas station with eight dispensers and 16 pumps in the shopping center zone of Curtis Park Village. Real parties in interest appealed the decision to the City Council asserting, among other grounds, that emissions from the gas station were detrimental to public health and the gas station was inconsistent with Curtis Park Village development

guidelines. Further, real parties contended that the “overriding goal of the development guidelines for this infill development was to ensure a high degree of compatibility with the existing neighborhood and to blend in as much as possible.” They maintained a gas station “contradicts the goal of maximizing opportunities for efficient transit provided by public transportation” and thwarts the goal of “an intimacy of scale and sense of community that will invite pedestrian use and interaction.” Acknowledging that a gas station is an allowed use in the shopping center zone, real parties insisted that fact was irrelevant: “A gas station requires a conditional use permit precisely so the City can judge each of these specific proposed uses on a site-specific basis.”

On June 29, 2015, Jacques Loveall, president of UFCW 8 - Golden State, the union representing grocery store employees in Sacramento, wrote the Sacramento city attorney regarding the proposed gas station. Loveall asserted that Safeway (1) needed the gas station to be competitive and pay union wages, (2) had conditioned its lease with Petrovich on a permit for the gas station, and (3) would not come to Curtis Park Village if the permit was \*968 denied. Loveall claimed that “Councilmember Jay Schenirer represents the Curtis Park neighborhood and opposes the Safeway fuel center” and “has taken unprecedented and aggressive steps to block the issuance of the [conditional use permit].” Loveall cited a statement by Councilmember Schenirer at a meeting of the Sierra Curtis Neighborhood Association, “‘I don’t think a gas station fits in with what was originally proposed,’ ” as quoted in Viewpoint, the association’s publication. Lovell concluded, given “that the City Council’s sole remaining role is to act in a quasi-judicial capacity as the body to hear the [conditional use permit] appeal filed by gasoline opponents, we seek your legal guidance as to whether the Councilmember must recuse himself from further engagement on the appeal now before the City Council.”

On July 2, 2015, the city attorney responded that Loveall had “not established an unacceptable probability of actual bias on the part of Councilmember Schenirer regarding the Safeway fuel center project, which is the legal standard for recusal when the City Council acts in a quasi-judicial capacity.” The city attorney continued that, “[w]hile Councilmember Schenirer did express an opinion about the project at the November 18, 2014, public meeting, \*\*335 he didn’t attack the project; he didn’t advocate against the project; he didn’t indicate that he had made up his mind about the project; and, he didn’t take a position against the project. In fact, at a public meeting that he organized several months later

to discuss the project, ‘[he] said that he couldn’t take a position on the merits of the gas station proposal “because I need to talk to my colleagues and vote on the issue when it comes to the City Council.” ’ ” These remarks were also published in Viewpoint. The city attorney concluded that Councilmember Schenirer was not required to recuse himself from participating in the appeal.

On November 1, 2015, Councilmember Schenirer sent a text message to Eric Johnson: “Can you get together tomorrow night at 7. I’d like to put a few heads together to talk thru cpv [Curtis Park Village].”

On November 3, 2015, Scott Whyte, an advisor to then-Mayor Kevin Johnson, sent an e-mail to the mayor providing a “[q]uick update” on Curtis Park Village. Whyte wrote, “JS is confident that he has the votes (if not a unanimous one) to deny the approval.” Whyte advised that “JS will be popping-in [*sic*] this morning to discuss with MKJ.”

On November 10, 2015, at a City Council proceeding, Councilmember Schenirer addressed statements attributed to him to the effect that he had spoken to all the other councilmembers, who assured him that they would vote as he wanted on the gas station permit appeal. Councilmember Schenirer acknowledged that he had been asked about other councilmembers at recent \*969 public meetings. He commented that what he said was Paul Petrovich had said that he had talked to other councilmembers, who said they would follow Councilmember Schenirer’s lead. Councilmember Schenirer concluded, “I never said that I’ve talked to all the councilmembers. I haven’t talked to all the councilmembers.” Councilmember Angelique Ashby added, “I think my colleagues would like to just say that it’s not predetermined. He [Councilmember Schenirer] hasn’t spoken to all of us.” Councilmember Ashby reiterated, “So anyway we want you to know it’s not predetermined. He [Councilmember Schenirer] hasn’t talked to everybody.”

On the same day, Councilmember Schenirer sent an e-mail to Mayor Johnson, copied to Whyte, titled: “Curtis Park Village Talking points.”

The e-mail included the following points:

“1. The Curtis Park neighborhood welcomes a Safeway grocery store and the council person stands ready to make the store successful. [¶] ... [¶]



“3. There was a deal between the developer and the neighborhood in 2010 that laid out the framework for agreed land uses. It was negotiated by the previous councilwoman and did not include a fuel center.... [¶] ... [¶]

“5. A Safeway representative ... told a crowded room of 400 neighborhood residents the need for the fuel center was because the new Raley’s would have one and Safeway would need it to remain competitive. Raley’s has submitted their plans to the City and the site does not include a fuel center.

“6. The recent organizing actions have attempted to divide a community along social economic and racial lines. Outreach was not done to or through the neighborhood association of Oak Park. Safeway and the developer have never been to the Oak Park community in the past.

“Bottom line - want to help Safeway be successful. Can we do this without the fuel center. [sic]”

**\*\*336** On November 11, 2015, Councilmember Schenirer texted Eric Johnson, “Are you all planning any visits to council members? If so, I have suggestions.” Johnson responded, “Suggest away!” Councilmember Schenirer texted back, “I’ll call you later.”

On November 12 and 13, 2015, Eric Johnson sent identically worded e-mails to Councilmembers Allen Warren, Rick Jennings and Jeff Harris, asking to speak with each of them in person about the gas station and “clear **\*970** up some misconceptions about the Sierra Curtis Neighborhood Association’s thoughts on the matter prior to the vote on the 17th.” Eric Johnson’s e-mails made points similar to Councilmember Schenirer’s “Talking points” sent to Mayor Johnson, including: (1) “we’d be thrilled to have Safeway in the shopping center”; (2) “the developer has attempted to pit one neighborhood against another”; (3) “the Curtis Park neighborhood had an agreement about the development, with the developer Paul Petrovich, five years ago” but “[o]nly recently, and with no warning, did he decide he wanted a gas station”; and (4) “[t]he Raley’s expansion on Freeport will not have a gas station.”

On November 15, 2015, Eric Johnson texted Councilmember Schenirer, “Will pdc [Petrovich] speak first on Tuesday, or us?” Councilmember Schenirer replied, “You. First staff then you then pdc.”

On November 16, 2015, Whyte sent an e-mail to himself attaching a document titled “Third-Party Appeal: Curtis Park Village Fuel Center|City Council Meeting.” The agenda of the document was referred to as a “Discussion Calendar” on the subject of the gas station.

Under the heading “Sequencing,” the document set forth the order of presentation at the appeal hearing on November 17, 2015: first city staff, then the Sierra Curtis Neighborhood Association, then Petrovich, followed by public comment periods for supporters and opponents of the gas station. The final step was: “JS punches up to make the motion, Hansen seconds: *I move to reject the staff recommendation and to deny the conditional use permit for the Curtis Park fuel center.*”

Next, the documents listed “Talking Points”:

“I think we’ve heard overwhelming sentiment tonight from the community that we all want Safeway to locate here locally in Curtis Park [¶] ... [¶]

“When we voted to approve this development 5 years ago, the neighborhood and the developer reached an important agreement

“That agreement did not include a fuel center

“Additionally, we’ve heard a lot tonight about the commitment of 200 jobs to the Oak Park community, one in [sic] which I obviously care dearly about

“However, as we’ve seen tonight, that commitment is not the hard and fast commitment that a lot of us we’re [sic] hoping for [¶] ... [¶]

“I’m still very hopeful that Safeway will end up choosing to locate here even without a fuel center and I think I can speak for all of my colleagues when I say we would welcome Safeway with open arms

**\*971** “Safeway’s main competitor, Raleys, is also building a store just down the road without a fuel center

“With that said, I will support the motion on the table as well.”

On November 17, 2015, the afternoon before the hearing that evening, Councilmember Schenirer texted Eric Johnson, “FYI. Just found out Paul [Petrovich] will go before you.

Probably good to be able to \*\*337 respond.” Johnson replied, “Great. I’ll be scribbling furiously,” to which Councilmember Schenirer responded, “As will I.”

At the outset of the hearing on November 17, 2015, Mayor Johnson explained the sequence of presentations—staff, then Petrovich, then real parties, then public comment from each side—as outlined in the document attached to Whyte’s e-mail from the previous day and Councilmember Schenirer’s text to Eric Johnson that afternoon.

At the end of public comments, Councilmember Schenirer spoke at length, concluding that “I just can’t support in any way, shape or form putting a gas station that close to a residential area, and frankly if we never have a new gas station again I would be okay with that, I would be okay with that.” He then made a motion to deny the conditional use permit for the gas station. Mayor Johnson called on Councilmember Steve Hansen, who, after his comments, seconded the motion. The City Council, including Mayor Johnson, voted seven to two to deny the conditional use permit.

Petrovich filed a petition for writ of mandate and complaint for declaratory and injunctive relief against the city and real parties to rescind the denial of the conditional use permit for the Safeway gas station. Petrovich alleged multiple claims, including that respondents “were improperly influenced by inadmissible factors, including bias and hostility, ex parte communications, arguments, political pressure, threats and inducements outside the public record, had improperly reached a decision before the public hearing was even opened, and wrongfully deprived Petitioners of their rights to fair and impartial quasi-adjudicatory hearing and to due process of law, with no rational basis or justification.”

In ruling on the petition, the trial court stated that Councilmember Schenirer’s membership in the Sierra Curtis Neighborhood Association was not evidence of bias. Further, the court said that, while the “talking points” authored by Councilmember Schenirer were “suggestive” that he considered voting “no” on the conditional use permit and Whyte’s similar e-mail was “suspicious,” these items fell short of “ ‘concrete facts’ demonstrating ‘unacceptable probability of actual bias.’ ”

\*972 However, considering the facts as a whole, the trial court found that “Councilmember Schenirer, in the days before the November 17, 2015 hearing, demonstrated an unacceptable probability of actual bias.” His “authoring a

‘Talking Points’ memorandum that suggests he intends to vote ‘no’ on the [conditional use permit], and his multiple text message exchanges with Eric Johnson, SCNA [Sierra Curtis Neighborhood Association] president, go beyond mere exchanges of information with a constituent. Instead, such activities suggest Councilmember Schenirer began coaching Eric Johnson on how to prosecute the SCNA appeal.... Further, the emails sent from Eric Johnson to Councilmembers bear a remarkable resemblance to the ‘Talking Points’ document authored by Councilmember Schenirer. These actions go beyond mere membership in an organization [citation] and instead are akin to advocating on behalf of an appellant [citation].” The trial court concluded that, “in the days preceding the hearing, Councilmember Schenirer was no longer a neutral, unbiased decisionmaker. [Fn. omitted.]”

The court granted the petition and ordered the city to rescind the decision on the conditional use permit and hold a new hearing. The court directed Councilmember Schenirer to recuse himself from participating \*\*338 in the new hearing.<sup>7</sup>

## DISCUSSION

### *Standard of Review*

[2] “The issuance of a conditional use permit is a quasi-judicial administrative action reviewed under administrative mandamus procedures. [Citations.]” (*Harrington v. City of Davis* (2017) 16 Cal.App.5th 420, 434, 224 Cal.Rptr.3d 351.) “The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; *whether there was a fair trial*; and whether there was any prejudicial abuse of discretion.” (Code Civ. Proc., § 1094.5, subd. (b), italics added.)

Whether Petrovich received a fair hearing before the City Council is a legal question which we review de novo. (*Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 482, 22 Cal.Rptr.3d 772 (*Nasha*); *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1169, 56 Cal.Rptr.2d 223 (*Clark*).) “ ‘ “There might be foundational matters of fact with respect to which the trial court’s findings would be conclusive on appeal if supported by substantial evidence. However, the ultimate questions, whether the agency’s \*973 decision was ... unlawful or procedurally

unfair, are essentially questions of law.” ” (Clark, *supra*, at p. 1169, 56 Cal.Rptr.2d 223, quoting *Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1443, 282 Cal.Rptr. 819.)

#### *Unacceptable Probability of Actual Bias*

[3] [4] City council members wear multiple hats. It is commonly understood that they function as local legislators. But sometimes they act in a quasi-adjudicatory capacity similar to judges. (*Woody's Group, Inc. v. City of Newport Beach* (2015) 233 Cal.App.4th 1012, 1021, 183 Cal.Rptr.3d 318 (*Woody's*)). Hearing and deciding an appeal of a conditional use permit is one of the times that a city council acts in a quasi-adjudicatory capacity. (*Ibid.*)

[5] [6] “[W]hen functioning in such an adjudicatory capacity, the city council must be ‘neutral and unbiased.’” (*Woody's, supra*, 233 Cal.App.4th at p. 1021, 183 Cal.Rptr.3d 318, quoting *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1234, 97 Cal.Rptr.2d 467 (*BreakZone*); see also Asimow et al., Cal. Practice Guide: Administrative Law (The Rutter Group 2019) ¶ 3:426, at p. 3-70 [“A decisionmaker must be unbiased (meaning that the decisionmaker has *no conflict of interest*, has *not prejudged* the specific facts of the case, and is *free of prejudice* against or in favor of any party)”].) “[A]llowing a biased decision maker to participate in the decision is enough to invalidate the decision.” (*Woody's, supra*, at p. 1022, 183 Cal.Rptr.3d 318; *Nasha, supra*, 125 Cal.App.4th at p. 484, 22 Cal.Rptr.3d 772; *Clark, supra*, 48 Cal.App.4th at p. 1171, 56 Cal.Rptr.2d 223.)

[7] [8] [9] [10] “The law does not require disappointed applicant to prove actual bias. Rather, there must not be ‘ ‘an unacceptable probability of actual bias’ ” on the part of a municipal decision maker.” (*Woody's, supra*, 233 Cal.App.4th at p. 1022, 183 Cal.Rptr.3d 318, citing *Nasha, supra*, 125 Cal.App.4th at p. 483, 22 Cal.Rptr.3d 772; *BreakZone, supra*, 81 Cal.App.4th at p. 1236, 97 Cal.Rptr.2d 467.) However, “a party seeking to show bias or prejudice on the part of an administrative decision maker [must] prove the same with **\*\*339** concrete facts.” (*BreakZone, supra*, at p. 1237, 97 Cal.Rptr.2d 467.) “ ‘Bias and prejudice are never implied and must be established by clear averments.’ ” (*Ibid.*, quoting *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 792, 171 Cal.Rptr. 590, 623 P.2d 151.) “A party must show either actual bias or show a situation in which ‘ ‘experience teaches that the probability of actual bias on the part of the ... decisionmaker is too

high to be constitutionally tolerable.’ ” (*Hauser v. Ventura County Bd. of Supervisors* (2018) 20 Cal.App.5th 572, 580, 229 Cal.Rptr.3d 159 (*Hauser*), quoting *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 737, 88 Cal.Rptr.3d 610, 199 P.3d 1142.)

**\*974** [11] As a threshold matter, we conclude, as did the trial court, that Councilmember Schenirer’s membership in the Sierra Curtis Neighborhood Association did not establish bias. “[B]ias in an administrative adjudicator must be established with concrete facts rather than inferred from mere appearances.” (*Independent Roofing Contractors v. California Apprenticeship Council* (2003) 114 Cal.App.4th 1330, 1340, 9 Cal.Rptr.3d 477; *Hauser, supra*, 20 Cal.App.5th at p. 578, 229 Cal.Rptr.3d 159; *Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 219-220, 79 Cal.Rptr.2d 910.)

[12] Equally, Councilmember Schenirer’s statement quoted in the letter from UFCW 8 - Golden State to the city attorney, i.e., that a gas station does not fit in the development as originally proposed, did not disqualify him from voting on the issue.<sup>8</sup> The decision on siting a gas station in Curtis Park Village was plainly a matter of concern for members of the local community. “A councilman has not only a right but an obligation to discuss issues of vital concern with his constituents and to state his views on matters of public importance.” (*City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 780, 122 Cal.Rptr. 543, 537 P.2d 375.)

In the same vein, that Councilmember Schenirer lived in the Curtis Park residential neighborhood adjacent to the proposed gas station was not a disqualifying fact. There was no evidence that Councilmember Schenirer’s particular residence would be impacted by the gas station more than any other in the neighborhood. In *Clark, supra*, 48 Cal.App.4th at page 1172, 56 Cal.Rptr.2d 223, the court held that the petitioners were deprived of a fair hearing in part because a councilmember voted against a construction project that would interfere with his ocean view. A similar state of affairs does not exist here.

[13] Were these the only “concrete facts,” they would not show an unacceptable probability of actual bias on the part of Councilmember Schenirer. (*BreakZone, supra*, 81 Cal.App.4th at p. 1236, 97 Cal.Rptr.2d 467.) However, in the run up to the City Council hearing and vote, Councilmember Schenirer crossed the line into advocacy against the project.



There was evidence that Councilmember Schenirer was counting—if not securing—votes on the City Council against the gas station and communicating an “update” on that score to Mayor Johnson. Whyte’s **\*\*340** statement to the mayor two weeks before the hearing that Councilmember Schenirer was **\*975** “confident” he had a majority, if not unanimous, vote to deny the conditional use permit shows his prehearing commitment to achieving that outcome. His denial a week before the hearing that he had not spoken to *all* his colleagues about voting against the gas station, which was echoed by Councilmember Ashby, was a “negative pregnant” that constituted an admission that he had spoken to less than all of them on the subject. (*Vogel v. Felice* (2005) 127 Cal.App.4th 1006, 1021, 26 Cal.Rptr.3d 350 [“a ‘negative pregnant’ ” is “ ‘a denial of the literal truth of the total statement but not of its substance’ ”].) The final vote by a majority to deny the permit confirms both Councilmember Schenirer’s statement to Whyte and the negative pregnant of his denial.

Councilmember Schenirer prepared a compilation of facts that amounted to a presentation against the gas station, which the councilmember referred to as “Talking points.” The only conceivable purpose for this list was to assist advocacy in opposition to the gas station. (Merriam-Webster’s Collegiate Dict. (11th ed. 2006) p. 1275, col. 1 [“talking point” defined as “something that lends support to an argument”]; Dictionary.com <<https://www.dictionary.com/browse/talking-point>> [as of Apr. 1, 2020], archived at <<https://perma.cc/BK7A-TY7S>> [“a fact or feature that aids or supports one side, as in an argument or competition”].) E-mailing the talking points to the mayor and his advisor Whyte suggests both behind-the-scenes advocacy against the gas station, as well as organizing the presentation at the hearing to obtain a “no” vote on the gas station. Councilmember Schenirer’s efforts to organize opposition to the gas station is further confirmed by Whyte’s document—also titled “Talking Points”—prepared the day before the hearing, which reflects elements of Councilmember Schenirer’s talking points in a format for the mayor to use at the hearing in order to carry a motion to deny the permit. Indeed, the “Talking Points” are preceded in the document with an outline of the “Sequencing” of the hearing, i.e., a motion to deny the permit made by Councilmember Schenirer, seconded by Councilmember Hansen, and carried by a majority vote (including Mayor Johnson), which is what in fact occurred at the hearing.

Moreover, following texts by Councilmember Schenirer to Eric Johnson in the weeks before the hearing asking him “to

put a few heads together to talk thru” Curtis Park Village and offering suggestions for prehearing presentations to other councilmembers, elements of Councilmember Schenirer’s talking points turn up in the substance of Eric Johnson’s letters opposing the gas station sent to other councilmembers. As the trial court put it, this was evidence that Councilmember Schenirer was “coaching” Eric Johnson on how to prosecute the appeal.

Finally, Councilmember Schenirer himself made the motion to reverse the decision of the Planning Commission. The court in *Woody’s*, determined that **\*976** this was another concrete fact indicating bias. “[L]ike the biased member in *Nasha*, Henn was the one to propose the motion that the lower decision be overturned.” (*Woody’s*, *supra*, 233 Cal.App.4th at p. 1023, 183 Cal.Rptr.3d 318, citing *Nasha*, *supra*, 125 Cal.App.4th at p. 477, 22 Cal.Rptr.3d 772.) In this instance, this fact is an even more compelling indication of probable bias, because the document prepared by Whyte the day before the hearing showed that this sequence was planned.

[14] [15] [16] These “concrete facts” establish that Councilmember Schenirer was biased. **\*\*341** He took affirmative steps to assist opponents of the gas station conditional use permit and organized the opposition at the hearing. Councilmember Schenirer acted as advocate, not a neutral and impartial decisionmaker, and should have recused himself from voting on the appeal. Because he did not, Petrovich did not receive a fair hearing.<sup>9</sup>

## DISPOSITION

The judgment is affirmed. Petrovich shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

We concur:

BLEASE, J.

KRAUSE, J.

## All Citations

48 Cal.App.5th 963, 262 Cal.Rptr.3d 331, 20 Cal. Daily Op. Serv. 4294, 2020 Daily Journal D.A.R. 4481

## Footnotes

- 1 Real parties in interest are Eric Johnson, Andrea Rosen, and Sierra Curtis Neighborhood Association.
- 2 We refer to the developer entities—Petrovich Development Company, LLC, PDC Construction Co., Inc., and Calvin & Elk Grove-Florin, LLC—as Petrovich.
- 3 Councilmember Jay Schenirer has been a resident of Curtis Park since 1990 and has represented this neighborhood as part of his district since his election to the City Council in 2010.
- 4 Safeway operates a loyalty program that rewards members with a discount on fuel price.
- 5 “A conditional use permit is administrative permission for uses not allowed as a matter of right in a zone, but subject to approval. [Citation.]” (*Sounhein v. City of San Dimas* (1996) 47 Cal.App.4th 1181, 1187, 55 Cal.Rptr.2d 290; *The Park at Cross Creek, LLC v. City of Malibu* (2017) 12 Cal.App.5th 1196, 1209, 220 Cal.Rptr.3d 393; see also Sac. City Code, § 17.108.040 [“ ‘Conditional use permit’ means a zoning instrument used primarily to review the location and conduct of certain land uses that are known to have a distinct impact on the area in which they are located, or are capable of creating special problems for bordering properties, unless given special attention. A conditional use permit is a discretionary permit and is not the automatic right of an applicant”].)
- 6 Councilmember Schenirer is a member and former board member of the Sierra Curtis Neighborhood Association.
- 7 In light of the ruling granting the petition, the trial court denied the complaint for declaratory relief. Also, since the court vacated the vote, it did not address Petrovich’s other arguments.
- 8 In addition, Councilmember Schenirer was careful to point out that he could not announce a definitive position before voting. However, his “Talking points,” a written compilation of facts militating against the gas station, contradicted prior comments attesting to his impartiality. (See *Woody’s, supra*, 233 Cal.App.4th at p. 1023, 183 Cal.Rptr.3d 318 [councilmember’s “speech to the council [in opposition to planning commission’s decision] had been written out beforehand, wholly belying his own self-serving comment at the hearing that ‘I have no bias in this situation’ ”].)
- 9 Buried in the opening brief, the city states: “Furthermore, in accordance with the ‘harmless error’ standard established by [Government Code section 65010](#), Councilmember Schenirer’s vote was not outcome determinative. Thus, even if, for sake of argument, his vote should have been disregarded, a clear majority of the City Council voted to deny the [conditional use permit] application.” The city has forfeited this issue on appeal. An appellant must “[s]tate each point under a separate heading or subheading summarizing the point ....” ([Cal. Rules of Court, rule 8.204\(a\)\(1\)\(B\)](#).) “Failure to provide proper headings forfeits issues that may be discussed in the brief but are not clearly identified by a heading.” (*Pizarro v Reynoso* (2017) 10 Cal.App.5th 172, 179, 215 Cal.Rptr.3d 701.) Moreover, the purpose of [Government Code section 65010](#), formerly section 65801, is to “terminat[e] recurrence of judicial decisions which had invalidated local zoning proceedings for technical procedural omissions.” (*City of Sausalito v. County of Marin* (1970) 12 Cal.App.3d 550, 557-558, 90 Cal.Rptr. 843.) Councilmember Schenirer’s assistance to opposition to the gas station in obtaining the City Council’s vote against the project was not a mere technical error that can be deemed harmless or nonprejudicial, but rather a fundamental flaw in the process. (*Sounhein v. City of San Dimas* (1992) 11 Cal.App.4th 1255, 1260, 14 Cal.Rptr.2d 656.)



## CALIFORNIA ACCOMMODATION

\* **Hotel Azure** ★★★★★ - [www.hotelazuretahoe.com](http://www.hotelazuretahoe.com) 1010 Rufus Allen Blvd, SLT, CA 96150

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**Rich Bodine** - [rbodine@hotelazuretahoe.com](mailto:rbodine@hotelazuretahoe.com)

\* **Forest Suites Resort** ★★★★★ - [www.forestsuites.com](http://www.forestsuites.com)

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Kathleen Bunnage, General Manager - [kathleen@coachmantahoe.com](mailto:kathleen@coachmantahoe.com)

**Ashley Rojas**, Sales Manager - [sales@coachmantahoe.com](mailto:sales@coachmantahoe.com)

**State of California**

**GOVERNMENT CODE**

**Section 91000**

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91000. (a) Any person who knowingly or willfully violates any provision of this title is guilty of a misdemeanor.

(b) In addition to other penalties provided by law, a fine of up to the greater of ten thousand dollars (\$10,000) or three times the amount the person failed to report properly or unlawfully contributed, expended, gave or received may be imposed upon conviction for each violation.

(c) Prosecution for violation of this title must be commenced within four years after the date on which the violation occurred.

(Repealed and added by Stats. 2000, Ch. 102, Sec. 73. Approved in Proposition 34 at the November 7, 2000, election. Operative January 1, 2001, by Sec. 83 of Ch. 102.)

**State of California**

**GOVERNMENT CODE**

**Section 87206**

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87206. If an investment or an interest in real property is required to be disclosed under this article, the statement shall contain:

- (a) A statement of the nature of the investment or interest.
- (b) The name of the business entity in which each investment is held, and a general description of the business activity in which the business entity is engaged.
- (c) The address or other precise location of the real property.
- (d) A statement whether the fair market value of the investment or interest in real property equals or exceeds two thousand dollars (\$2,000) but does not exceed ten thousand dollars (\$10,000), whether it exceeds ten thousand dollars (\$10,000) but does not exceed one hundred thousand dollars (\$100,000), whether it exceeds one hundred thousand dollars (\$100,000) but does not exceed one million dollars (\$1,000,000), or whether it exceeds one million dollars (\$1,000,000).
- (e) In the case of a statement filed under Sections 87203 or 87204, if the investment or interest in real property was partially or wholly acquired or disposed of during the period covered by the statement, the date of acquisition or disposal.
- (f) For purposes of disclosure under this article, “interest in real property” does not include the principal residence of the filer or any other property which the filer utilizes exclusively as the personal residence of the filer.

(Amended by Stats. 2000, Ch. 130, Sec. 8. Effective January 1, 2001. Note: This section was added on June 4, 1974, by initiative Prop. 9.)

**State of California**

**GOVERNMENT CODE**

**Section 81008**

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81008. A report or statement filed pursuant to this title is a public record open for public inspection and reproduction during the filing officer's regular business hours, commencing as soon as practicable, and no later than the second business day after the day it was received. A filing officer shall make electronically filed data publicly available on the Internet as soon as possible after it is received in compliance with Sections 84602 and 84615. Conditions shall not be imposed upon persons asking to inspect or reproduce reports and statements filed under this title, and information or identification shall not be required from these persons. Copies shall be provided at a charge not to exceed ten cents (\$0.10) per page. In addition, the filing officer may charge a retrieval fee not to exceed five dollars (\$5) per request for copies of reports and statements which are five or more years old. A request for more than one report or statement or report and statement at the same time shall be considered a single request.

(Amended by Stats. 2018, Ch. 662, Sec. 4. (SB 1239) Effective January 1, 2019. Conditionally operative on date prescribed by Stats. 2018, Ch. 662, Sec. 44. Note: This section was added on June 4, 1974, by initiative Prop. 9. )

**State of California**

**GOVERNMENT CODE**

**Section 81002**

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81002. The people enact this title to accomplish the following purposes:

(a) Receipts and expenditures in election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited.

(b) The activities of lobbyists should be regulated and their finances disclosed in order that improper influences will not be directed at public officials.

(c) Assets and income of public officials which may be materially affected by their official actions should be disclosed and in appropriate circumstances the officials should be disqualified from acting in order that conflicts of interest may be avoided.

(d) The state ballot pamphlet should be converted into a useful document so that voters will not be entirely dependent on paid advertising for information regarding state measures.

(e) Laws and practices unfairly favoring incumbents should be abolished in order that elections may be conducted more fairly.

(f) Adequate enforcement mechanisms should be provided to public officials and private citizens in order that this title will be vigorously enforced.

(Amended by Stats. 1980, Ch. 289. Note: This section was added on June 4, 1974, by initiative Prop. 9.)



**State of California**

**GOVERNMENT CODE**

**Section 27297.7**

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27297.7. (a) Following adoption of an authorizing resolution by the board of supervisors, the county recorder may, within 30 days of recordation of a deed, quitclaim deed, or deed of trust, notify by mail the party or parties executing the document. The recorder may require, as a condition of recording, that a deed, quitclaim deed, or deed of trust indicate the assessor's identification number or numbers that fully contain all, or a portion of, the real property described in the legal description. If the description contains more than one assessor's parcel, all assessor's parcels shall be indicated. The form of the entry shall be substantially as follows:

Assessor's Identification Number \_\_\_\_-\_\_\_\_-\_\_\_\_.

(b) This section shall not apply to the recordation of any document where the federal government, or state, county, city, or any subdivision of the state acquires title.

(c) The failure of the county recorder to provide the notice as permitted by this section shall not result in any liability against the recorder or the county. In the event that the notice is returned to the recorder by the postal service as undeliverable, the recorder is not required to retain the returned notice.

(d) Where the county recorder contracts with any party or parties for the performance of the processing or the mailing of the notice, or both, as authorized by this section, the contract shall be awarded by competitive bid. The county recorder shall solicit written bids for the contract in a newspaper of general circulation in the county, and all bids received shall be publicly opened and the contract awarded to the lowest responsible bidder. If the county recorder or his or her designee deems the acceptance of the lowest responsible bid is not in the best interest of the county, all bids may be rejected.

(Amended by Stats. 2010, Ch. 44, Sec. 1. (AB 2618) Effective January 1, 2011.)

**State of California**

**GOVERNMENT CODE**

**Section 27233**

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27233. The recorder shall keep an index of deeds, labeled "Grantees," each page divided into three columns, headed respectively: "Names of grantees," "Names of grantors," and "Where recorded."

(Added by Stats. 1947, Ch. 424.)

48 Cal.App.4th 1152

Court of Appeal, Second District, Division 1, California.

Douglas A. CLARK et al.,  
Plaintiffs and Respondents,

v.

CITY OF HERMOSA BEACH et  
al., Defendants and Appellants.

No. B089504.

|  
Aug. 21, 1996.

|  
Certified for Partial Publication.\*

|  
As Modified on Denial of Rehearing Sept. 11, 1996.

|  
Review Denied Nov. 13, 1996.

**Synopsis**

After landowners' application for development project permits was denied by city council, landowners filed action seeking writ of administrative mandate and alleging violation of federal civil rights. The Superior Court, Los Angeles County, No. YS002665, [Jean E. Matusinka, J.](#), granted writ petition, directed city to rescind council decision and reinstate planning commission's approval of project permits, found for landowners on civil rights claim, and awarded landowners damages, attorney fees, and litigation expenses. City appealed. The Court of Appeal, Masterson, J., held that: (1) landowners were deprived of fair hearing; (2) proper remedy was order requiring council to rehear matter and provide fair hearing; and (3) landowners' due process rights were not violated.

Reversed and remanded with directions.

West Headnotes (22)

- [1] **Mandamus** 🔑 [Matters of discretion](#)  
**Mandamus** 🔑 [Meetings and proceedings of boards or other bodies](#)  
 Trial court may issue writ of administrative mandate where agency has acted in excess of its

jurisdiction, deprived petitioner of a fair hearing, or committed prejudicial abuse of discretion. [West's Ann.Cal.C.C.P. § 1094.5\(b\)](#).

[8 Cases that cite this headnote](#)

- [2] **Mandamus** 🔑 [Scope and extent in general](#)  
**Mandamus** 🔑 [Questions of fact](#)

On review of mandamus proceedings, foundational factual findings must be sustained if supported by substantial evidence, but ultimate determination of whether administrative proceedings were fundamentally fair is question of law which is reviewed de novo. [West's Ann.Cal.C.C.P. § 1094.5](#).

[28 Cases that cite this headnote](#)

- [3] **Municipal Corporations** 🔑 [Appeal from decisions](#)

Where challenge to city council's decision involves one of procedural fairness, including potential bias of councilmember, appellate court is not necessarily limited to evidence that was before council.

[1 Cases that cite this headnote](#)

- [4] **Public Employment** 🔑 [Ethics and conflicts of interest in general](#)

Common-law doctrine against conflicts of interest prohibits public officials from placing themselves in position where their private, personal interests may conflict with their official duties.

[6 Cases that cite this headnote](#)

- [5] **Public Employment** 🔑 [Ethics and conflicts of interest in general](#)

Common-law doctrine against conflict of interest, prohibiting public officials from participating in governmental decision in which they know they have interest, extends to noneconomic conflicts of interest, while Political Reform Act focuses on financial conflicts of interest. [West's Ann.Cal.Gov.Code § 87100](#).

3 Cases that cite this headnote

[6] **Administrative Law and Procedure** 🔑 Conformity with pleadings, evidence, and findings

Administrative tribunals required to make adjudicatory determination after public hearing cannot act upon their own information and nothing can be considered as evidence that was not introduced at hearing of which parties had notice; fact that there may be substantial and properly introduced evidence which supports ruling is immaterial if tribunal considers information of which parties were not apprised and which they had no opportunity to controvert.

6 Cases that cite this headnote

[7] **Zoning and Planning** 🔑 Voting; bias and disqualification

Landowners, whose application for construction project permits to build 35-foot high condominium was denied by city council, were deprived of fair hearing; councilmember who voted to deny application had conflict of interest, council's concerns about excessive lot coverage and insufficient open space which were resolved against landowners and cited as grounds for denying permits were raised for first time after public portion of hearing was over, and council exhibited bias by denying permits on three projects involving 35-foot structures after unsuccessful effort to impose construction moratorium on buildings over 30 feet.

11 Cases that cite this headnote

[8] **Zoning and Planning** 🔑 Voting; bias and disqualification

Councilmember had conflict of interest in voting on landowners' application for development project permits to construct 35-foot condominium, where he lived one block inland from landowners, before becoming councilmember he had opposed landowners' earlier application on ground that project would

constrict ocean view from homes located behind landowners' lot, and he had personal animosity toward landowners; although councilmember did not own his residence, he stood to benefit personally by voting against project due to his interest in preserving his ocean view.

6 Cases that cite this headnote

[9] **Zoning and Planning** 🔑 Voting; bias and disqualification

Councilmember did not violate Political Reform Act by voting to deny landowners' application for development project permits to build 35-foot condominium, although councilmember was opposed on ground that it may block ocean view from houses in area and he lived one block inland from landowners, as he did not own his residence but leased it on a monthly basis. [West's Ann.Cal.Gov.Code §§ 87103\(b\), 82033](#); [Cal.Code Regs. title. 2, § 18233](#).

1 Cases that cite this headnote

[10] **Mandamus** 🔑 Proceedings to procure and grant or revoke licenses, certificates, and permits

Proper mandamus remedy for denial of fair hearing on landowners' application for development project permits was not to order city to reinstate planning commission's approval of permits, but to order city council to rehear matter and provide landowners with fair hearing, as mandamus could not limit legal discretion of council to deny permits. [West's Ann.Cal.C.C.P. § 1094.5\(f\)](#).

6 Cases that cite this headnote

[11] **Zoning and Planning** 🔑 Scope of review

On appeal from planning commission decision regarding conditional use permit, city council does not merely review commission's decision for error, but hears matter de novo, takes additional evidence at public hearing, and decides whether it should grant or deny permit. [Hermosa Beach, Cal., Mun.Code §§ 1411, 1412](#).

4 Cases that cite this headnote

**[12] Administrative Law and Procedure** 🔑 Voting; determination of will of agency

As general rule, an even division among members of administrative agency results in no action.

4 Cases that cite this headnote

**[13] Zoning and Planning** 🔑 Change of regulations as affecting right

Absent some state statute dictating otherwise, height ordinance in effect at time of city council's prior decision denying landowners' application for development project permits would apply to future development of landowners' project, where court ordered new hearing on ground that council had denied landowners a fair trial in denying permits.

**[14] Appeal and Error** 🔑 Plenary, free, or independent review

**Appeal and Error** 🔑 Application of law to or in light of facts

**Appeal and Error** 🔑 Judge as factfinder below

On review of trial court's decision following bench trial, appellate court applies substantial evidence test to findings of fact and independently review conclusions of law.

13 Cases that cite this headnote

**[15] Constitutional Law** 🔑 Administrative Agencies and Proceedings in General

If no protected interest in life, liberty, or property is involved in administrative proceeding, then procedural protections of due process clause do not come into play. *U.S.C.A. Const.Amend. 14*; 42 *U.S.C.A. § 1983*.

7 Cases that cite this headnote

**[16] Constitutional Law** 🔑 Zoning and Land Use

When analyzing whether plaintiff challenging municipal land use decision presents legitimate claim of entitlement that would constitute property interest entitled to due process protection, court focuses on degree of discretion given decision maker, and not on probability of decision's favorable outcome; cognizable property interest exists only when discretion of issuing agency is so narrowly circumscribed that approval of proper application is virtually assured. *U.S.C.A. Const.Amend. 14*.

11 Cases that cite this headnote

**[17] Constitutional Law** 🔑 Particular issues and applications

**Constitutional Law** 🔑 Proceedings and review

**Zoning and Planning** 🔑 Grounds for grant or denial in general

Landowners did not have federally protected property interest in development project permits to build structure with specific dimensions, and thus, city council's denial of permits did not violate landowners' procedural due process rights, although council deprived landowners of a fair hearing; council was vested with significant discretion in reviewing project applications and imposing conditions on development permits beyond minimum statutory standards, which would defeat any expectation that permits would be approved as submitted. *U.S.C.A. Const.Amend. 14*; *Hermosa Beach, Cal., Mun. Code §§ 29.5-5, 601, 606, 607, 1409, 1412, 1432(A), (B)(10), 1435*.

10 Cases that cite this headnote

**[18] Constitutional Law** 🔑 Reasonableness, rationality, and relationship to object

As substantive limitation on governmental action, due process clause precludes arbitrary and irrational decision making. *U.S.C.A. Const.Amend. 14*.

11 Cases that cite this headnote

**[19] Constitutional Law** 🔑 **Zoning and Land Use**

Even if substantive due process remains viable check on state and local land-use decisions, party asserting deprivation of substantive due process must first establish valid property interest within meaning of the Constitution, and if cognizable property interest is implicated, court must then determine whether government's action was arbitrary or irrational. [U.S.C.A. Const.Amend. 14](#).

[17 Cases that cite this headnote](#)

**[20] Constitutional Law** 🔑 **Particular issues and applications****Zoning and Planning** 🔑 **Grounds for grant or denial in general**

Even if constitutionally recognized property interest was involved in landowners' application for development project permits, city council did not engage in arbitrary or irrational conduct violative of substantive due process in denying permits; although city attorney's advice that councilmember did not have conflict of interest was incorrect and council erred in considering issues raised for first time after public hearing was over, advice was not irrational and council's decision to deny permits did not lack rational basis. [U.S.C.A. Const.Amend. 14](#).

[9 Cases that cite this headnote](#)

**[21] Zoning and Planning** 🔑 **Factors considered**

Opinion of area residents concerning neighborhood preservation is appropriate factor for consideration in zoning decisions.

**[22] Civil Rights** 🔑 **Rights Protected**

Only federal rights, privileges, or immunities are protected by [§ 1983](#); violations of state law alone or insufficient. [42 U.S.C.A. § 1983](#).

**Attorneys and Law Firms**

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**Opinion**

MASTERSON, Associate Justice.

Douglas and Cheryl Clark own a duplex in the City of Hermosa Beach, California (the "City"). In 1992, they applied to the Hermosa Beach Planning Commission for permits to demolish the duplex and replace it with a two-unit condominium. The commission approved the project. The matter was appealed to the City Council (the "Council"). By a 3–2 vote, the Council denied the permits, finding the size of the proposed structure to be excessive.

The Clarks filed this action, seeking a writ of administrative mandate ([Code Civ.Proc., § 1094.5](#)) and alleging a violation of federal civil rights ([42 U.S.C. § 1983](#)). The trial court granted the writ petition, directing the City to rescind the Council decision and to reinstate the planning commission's approval of the project permits. The court also found for the Clarks on their civil rights claim, awarding them \$213,300 in damages and \$133,895.21 in attorney fees and litigation expenses.

On appeal, the City challenges the trial court's determination of liability, the award of damages, and the calculation of attorney fees and costs. In the published portion of this opinion, we conclude that the Clarks were deprived of a fair hearing before the City Council and were accordingly entitled to a writ of mandate. However, the trial court erred in directing that the planning commission's decision be reinstated. Instead, the court should have ordered the Council to rehear the matter and provide a fair hearing. We further conclude that the trial court erred in finding that the City violated the Clarks' civil rights. In the unpublished portion of the opinion, we conclude that the trial court should not have awarded damages or attorney fees and should have disallowed certain cost items.

**BACKGROUND**

In 1982, the Clarks bought a duplex in the City, located at 2902 Hermosa Avenue, a block from the ocean. They rent out one of the units and use the other unit as their second home, making frequent visits to California from their primary residence in Phoenix, Arizona. The property is in an area designated as an R-3 zone, which is a multiple-family residential zone.

After purchasing the property, the Clarks hired an architect and developed plans to demolish the existing duplex and replace it with a two-unit condominium. In 1989, they applied to the planning commission for permits to **\*1160** build a structure 35 feet high, with lot coverage of 65 percent—the maximum height and lot coverage allowed under City law. (Hermosa Beach Mun.Code, §§ 601, 606.)<sup>1</sup> The commission approved the project, finding that “[t]he site is ... physically suitable for [the] type and density of the proposed development,” and “[t]he project will conform to all zoning and condominium criteria and will [be] compatible with adjacent residential properties.”

A local resident, Robert Benz, who lived a block inland from the Clarks, sought to overturn the commission's decision. He gathered signatures on five petitions, which stated that “the undersigned, being residents of the city of Hermosa Beach, hereby ... appeal the issuing of the building permit for the [proposed **\*\*227** project] on the basis that the construction of the building will adversely affect the views of neighboring homes.” In a letter to the Council dated February 11, 1989, Benz stated: “The action taken by the City Planning Commission ... is unacceptable to the wishes of the petitioners. The 35 foot height of the projected condominium proposal will further constrict the view of the ocean from homes that are located behind and to either side [of] the lot. [¶] ... [¶] There seems to be a wanton disregard for the rights of others in the City of Hermosa Beach when it comes to the building of homes and condominiums. For their own financial gain, developers and speculators have continually proposed the building of high structures in order to maximize the incident view of the ocean for their own projects. The building of these structures limits the view of the neighboring homes solely to the sight of these excessively high structures.... It is time to stop the issuing of building permits that ignore the restriction of the view of others.”

By letter of March 19, 1989, Benz requested that the City waive the fees for his appeal of the commission's decision. In a March 23, 1989 memo to the City Council, Planning Director Michael Schubach advised against granting Benz's

request: “Attached is a request to waive the fees for an appeal of a proposed 2 unit condo at 2902 Hermosa Avenue. [¶] The condo is in compliance with all zoning ordinance requirements; the City has no view ordinance, and the Planning Commission did not believe view blockage was so significant that conditions related to view should be imposed. [¶] ... [¶] The staff can find no grounds to waive the appeal fees....” Based on Schubach's memo, the Council declined to waive the fees, and Benz apparently did not further pursue the appeal.

After the approval of the Clarks' 1989 project, the City adopted a new setback requirement, necessitating that the Clarks revise their plans. In the **\*1161** interim, the 1989 permits expired. In January 1992, the Clarks submitted another application for the requisite “permits” (i.e., a conditional use permit, precise development plan, and tentative parcel map) and paid \$1,261 in processing fees. The proposed structure, a two-unit condominium, was—in the words of Planning Director Schubach—“very similar” to the one approved in 1989. For example, it had the same height (35 feet), though slightly smaller lot coverage (63.7 percent instead of 65 percent).<sup>2</sup>

By report dated January 28, 1992, the planning commission staff recommended approval of the project, noting that the Clarks' architect “consulted with staff early in the design process to ensure compliance with applicable code requirements.” According to the report, “[l]ot coverage is at 63.7%, all the required setbacks have been met, and the height on the sloped lot is held within the 35 foot limit.” The report concluded that the project complied with all planning and zoning conditions.

At the public hearing before the planning commission on February 4, 1992, Planning Director Schubach presented the staff report on the Clarks' plans and urged approval of the permits. Two City residents spoke against the project, arguing that new buildings should not exceed 30 feet in height. The commissioners then discussed the possibility of asking the City Council to adopt a moratorium on construction in R-3 zones until a decision could be made about reducing the 35-foot height limit to 30 feet. On that subject, one commissioner remarked: “I have somewhat of a problem with the idea that this project, which does conform to all the requirements, has been singled out.... I would much more favor dealing with this on its merits and recommending an action. I can understand the 30 ft. height limit as a policy. I think we should recommend action on that, but separate from action on this. I



think that we're holding the [project] hostage to the other and that doesn't seem equitable." Another commissioner stated: "I think what I see here is an applicant that responded to the guidelines that we developed over time, in fact, this is the best response I've seen in the time I've been here of somebody **\*\*228** really trying to do what we've asked them to do. I have a problem with trying to chang[e] the rules in midstream, that really creates a problem for me.... [W]e don't make zone changes based on an individual problem."

The commission ultimately voted, without dissent, to approve the Clarks' conditional use permit, tentative parcel map, and precise development plan. **\*1162** In doing so, the commission found that (1) the "[s]ite is zoned R-3 and is physically suitable for the type and density of the proposed development," (2) the "[d]esign of the proposed subdivision is compatible and consistent with the City's General Plan, and is compatible with the immediate environment," and (3) the "project will conform to all zoning and condominium criteria and will be compatible with neighboring residential properties." The commission also recommended that the City Council consider enacting a moratorium on construction in R-3 zones so that the planning staff could study the height issue.

On February 12, 1992, several residents appealed the commission's approval of the Clarks' project to the City Council. The appeal, accompanied by petitions bearing numerous signatures, objected to "the spread of condominiums, and the ability of these new developments to build higher than thirty feet."

On or about February 25, 1992, the Council debated whether to impose a moratorium on the construction of buildings taller than 30 feet in R-3 zones, pending further study of the height issue. To be approved, such an interim ordinance required a four-fifths vote of the Council. (Gov.Code, § 65858.) The measure garnered three out of the five possible votes and therefore failed. Absent a moratorium, the Council directed that the planning commission hold public hearings to determine whether the R-3 height limit should be reduced to 30 feet.

Meanwhile, in connection with the appeal of the commission's decision on the Clarks' project, the planning staff gathered additional information for the City Council. In a March 17, 1992 memo to the Council, the commission stated: "The subject location is in an area that has not had a considerable amount of development in the last 7 years. From staff's

research, the last 7 years is the approximate time frame that development projects started to be constructed to the maximum height allowed. [¶] Also, from a 'window survey' of this area, it is estimated that most development in this area is 30 feet, or under.<sup>3</sup> [¶] In regard to view blockage, staff is unable to determine whether views from development would be any less blocked at 30 feet than at 35 feet.... [¶] If a significant impact is noted, a finding could be made, and as a condition of approval, a reduction in height could be required. [¶] However, it should be considered that if the adjacent property were to be recycled and built also to 35', any view lost may be restored."

A follow-up memo dated March 24, 1992, provided more specific information on the Clarks' project: "The residence directly adjacent to the north **\*1163** [of the Clarks' property] reaches the 35' height limit at the east half of the property. [¶] The height of the structure directly to the east is between 25' and 30'.... [T]he dwellings in the general area are 30 feet or less. However, there are some dwellings that reach as high as 40'.... [¶] The R-3 area in question, between Manhattan Ave. and Hermosa Ave., **drops down an average of 24' below the R-1 and R-2 zones** that are east of Manhattan Avenue. Therefore, in this case, allowing a 35' height limit in front of areas with 25' and 30' limits would not necessarily create view blockage. [¶] In the particular case of 2902 Hermosa Avenue, the building only reaches the 35 foot limit at the west end along Hermosa Avenue, and the east end of the building is only 28' above grade." (Boldface in original.)

On March 24, 1992, the City Council held a public hearing on the appeal in the Clark matter. Present at the hearing were Councilmembers Robert Essertier, Sam Edgerton, **\*\*229** Albert Wiemans, and Robert Benz.<sup>4</sup> (Councilmember Kathleen Midstokke was absent.) At the beginning of the hearing, Planning Director Schubach spoke against the appeal and in favor of sustaining the commission's decision. Immediately thereafter, a resident (and apparently a former councilmember), Jim Rosenberger, raised a "point of order," asking whether Councilmember Benz should recuse himself because he lived in close proximity to the proposed project and had opposed the Clarks' 1989 plans. In response, City Attorney Charles Vose stated that the location of Benz's apartment did not create a conflict of interest because Benz leased, rather than owned, his residence. Nor, according to Vose, did Benz's opposition to the Clarks' 1989 project establish bias. After Vose rendered this advice, the hearing proceeded. Benz did not recuse himself.

From the audience, 13 individuals (including Mr. Clark) spoke in favor of the project; five spoke against it. Those opposing the project thought that the proposed structure was too high and did not “fit” into the neighborhood. Mr. Clark stated that if the Council imposed a 30-foot height limitation on the structure, it would be “impossible” to build and would have to be “completely redesigned.”

When the public portion of the hearing had concluded, Councilmember Essertier raised for the first time a concern with the lot coverage of the project. That issue is governed by section 229.1 of the Hermosa Beach Municipal Code, which states: “ ‘Lot coverage’ shall include the footprint of \*1164 the building plus cantilevers and decks higher than thirty (30) inches above grade....” Essertier believed that the planning commission had not included the Clarks’ “deck” in calculating lot coverage. Under his interpretation of the municipal code, the lot coverage for the structure, including the “deck,” exceeded the allowed amount (65 percent). In response to Essertier’s statement, Planning Director Schubach explained that for over seven years, the planning commission had not treated courtyards or landings above subterranean garages—like the Clarks’—as “decks” and had not included them in determining lot coverage.<sup>5</sup> Councilmember Essertier further expressed his view that the project did not have sufficient “usable open space.”<sup>6</sup>

Councilmember Wiemans summed up his position on the appeal as follows: “First, this is an R-3 neighborhood and we ought to consider it as R-3. We should not start to come up with a new method of prospective downsizing. What we need here is certainty of development, I mean, when people come here to build a home, they ought to know what they can expect. It shouldn’t get every time down to the same point that these same five illustrious people here are going to come up with different standards, this is absolutely asinine.”

At the end of the meeting, Councilmembers Essertier, Edgerton, and Benz voted to deny the permits without prejudice and to refer the matter back to the planning staff to develop findings consistent with the Council’s \*\*230 views on the height, lot coverage, and open space issues.<sup>7</sup> Councilmember Wiemans voted against the appeal. The Council scheduled final action on the permits for April 14, 1992, and so informed the Clarks in writing.

By letter dated April 10, 1992, the Clarks’ attorneys objected to the Council’s having considered new issues—lot coverage and usable open \*1165 space—after the close of the March

24 public hearing. The letter noted that the Council had not applied the lot coverage requirement in accordance with the seven-year interpretation adopted by the planning commission and that the Clarks had not been given an opportunity to address the Council on the issues of lot coverage or open space.

At the April 14, 1992, Council meeting, the Clarks’ attorney requested that the appeal be reheard. In a similar vein, Councilmember Wiemans moved to reopen the appeal and hold another public hearing. As Wiemans explained: “[Clark] was basically within the mill and then at the very tail end we, as a council, proposed additional requirements. Now, I’m suggesting to you that this is not the way to give people the benefit of the law—this is not the way to dispense equal justice.... I believe we are on the wrong side of the argument and my suggestion to this council would be we are to reconsider our entire line of reasoning.... [¶] ... [¶] ... [T]his applicant is in the final stages of what he wanted to do. He complied with what was the law at the time and what we are doing is taking away from him what the law provided.”

Councilmember Midstokke had this to say: “As you know, recently we did attempt to implement an urgency ordinance regarding not allowing height over 30 feet while we study the height issue to be implemented and it could not reach four votes with this council.... I see a terrible precedent being set by this council in that they couldn’t get four votes for an urgency ordinance so by a three vote majority on a project by project basis, they’re going to deny anything that’s 35 feet in the R-3 until they change the height down to 30 feet. They have denied this project. At the Planning Commission meeting last Tuesday night, two more projects were denied that were 35 feet in the R-3 zone. If the urgency ordinance had been adopted, all three of these projects would have been grandfathered. They would not have been stopped. The result of this council action and the action by the Planning Commission last Tuesday is that you are implementing an R-3 height change from 35 to 30 feet immediately. There is no notice, there’s no public hearings, there’s no urgency ordinance.... I think the Clarks deserve a rehearing on the issue of lot coverage and usable open space which was not brought up before, if they do not also deserve one on the height issue.”

The motion to rehear the appeal failed, with Councilmembers Essertier, Edgerton, and Benz voting against it. Those three councilmembers then approved a resolution denying the Clarks’ permits. The resolution stated in part that (1) “the

requested development at the height and lot coverage ratio proposed is likely to interfere with the property values in the vicinity or interfere with the use or enjoyment of property in such area,” (2) “[t]he **\*1166** project exceeds the permissible lot coverage,” (3) “the development, including, but not limited to, height and open space is not in character with the development standards of the surrounding area,” and (4) “[t]he type of development proposed ... would negatively impact the neighborhood's integrity and the character of the community.” The resolution stated that the permits were denied without prejudice to the Clarks' submitting revised plans correcting the alleged deficiencies in height, lot coverage, and open space. Councilmembers Wiemans and Midstokke voted against the resolution.

On July 13, 1992, the Clarks filed this action against the City, the Council, and Councilmembers Essertier, Edgerton, and Benz. Two weeks later, the Clarks filed an amended pleading asserting two claims: (1) a petition for a writ of administrative mandate, alleging that the City had deprived the Clarks of a fair hearing and had abused its **\*\*231** discretion ([Code Civ.Proc., § 1094.5](#)); and (2) a complaint alleging a violation of procedural due process ([42 U.S.C. § 1983](#)).<sup>8</sup> In September 1992, the Clarks dismissed the individual defendants without prejudice.<sup>9</sup>

On August 29, 1994, the trial court heard argument on the writ petition. The next day, after reviewing the administrative record and the parties' arguments, the trial court granted the petition on the grounds that: (1) the Clarks did not receive a fair hearing; (2) the City abused its discretion, in that it had not proceeded according to law and its decision was not supported by legally adequate findings, nor were the findings supported by the evidence; (3) the Clarks were denied due process; (4) Councilmember Benz had a conflict of interest under the Political Reform Act ([Gov.Code, § 81000 et seq.](#))<sup>10</sup> and under common law, such that “[h]e was legally precluded from participating in the decision on the Project [p]ermits”; (5) the City applied standards to the Clarks' project that were not in effect at the time their application was complete, thus violating the Subdivision Map Act ( **\*1167** [Gov.Code, § 66410 et seq.](#));<sup>11</sup> and (6) the City's actions against the Clarks were discriminatory. The trial court ordered the City to set aside the Council's resolution denying the Clarks' permits and to reinstate the planning commission's decision approving the project.

In early October 1994, the trial court, sitting without a jury, heard testimony on the Clarks' civil rights claim. Witnesses included the Clarks and Councilmembers Essertier, Edgerton, and Benz.<sup>12</sup> At the close of the evidence, the court took the matter under submission. By minute order dated October 20, 1994, the court found for the Clarks, ruling that their right to due process had been violated. The court also awarded \$213,300 in damages (\$93,300 for increased development costs, \$20,000 for emotional distress, and \$100,000 for loss in property value).

In its statement of decision, the court explained that the City had violated the Clarks' rights to procedural and substantive due process because it had arbitrarily denied their permit application without a fair hearing. The court also found that the City had violated the Brown Act ([Gov.Code, § 54950 et seq.](#)) since Councilmember Edgerton had held private discussions with three other councilmembers before the public hearing on **\*\*232** the appeal from the planning commission.<sup>13</sup> Consistent with its ruling on the writ petition, the trial court again found that Councilmember Benz had a conflict of interest (under the Political Reform Act and the common law) which disqualified him from voting on the Clarks' project. The court **\*1168** also found a violation of the Subdivision Map Act on the theory that the City had applied standards to the Clarks' project that were not then in effect (e.g., a more restrictive, 30-foot height limitation and a new interpretation of the lot coverage requirement). The trial court based its award of damages on federal ([42 U.S.C. § 1983](#)) as well as state ([Code Civ.Proc., § 1095](#)) law. It authorized the Clarks to recover attorney fees and other litigation expenses, including expert witness fees, pursuant to [title 42 United States Code, section 1988\(b\)](#), [Code of Civil Procedure section 1021.5](#), and [Government Code sections 800 and 91012](#).<sup>14</sup>

In October 1994, the Clarks filed a motion seeking attorney fees (in the approximate amount of \$180,000), expert witness fees (in the amount of \$6,762.50), and costs (in the amount of \$6,211.20).<sup>15</sup> The City opposed the motion. At a November 18, 1994 hearing, the trial court made clear that, despite its previous ruling in the statement of decision, it would not award attorney fees pursuant to [Code of Civil Procedure section 1021.5](#).<sup>16</sup> However, the court reserved decision on whether to award fees pursuant to the other statutes mentioned in the statement of decision. By minute order dated November 23, 1994, the trial court awarded the Clarks \$120,921.51 in attorney fees and the requested amounts for expert witness fees and costs. On November 14, 1994, the court entered

judgment in favor of the Clarks, incorporating the order granting the writ of mandate and awarding \$213,300 in damages and a total of \$133,895.21 in attorney fees and costs. The City filed a timely appeal from the judgment.

## DISCUSSION

The City contends that the trial court erred in issuing a writ of mandate and that, even if a writ were appropriate, the trial court should have sent the matter back to the City Council for another hearing instead of simply reinstating the planning commission's approval of the permits. We conclude that the Clarks were deprived of a fair hearing before the Council, and, thus, a writ \*1169 was proper. However, the trial court erred in reinstating the decision of the planning commission. Instead, the writ should have directed the City Council to provide a second, fair hearing on the matter.

As to the Clarks' federal civil rights claim, the City argues that it did not violate the due process clause. We agree. Because the Clarks did not have a protected property interest in the requested permits, the City did not violate the Clarks' right to procedural or substantive due process. In addition, as to the substantive due process claim, we find that the City did not engage in arbitrary or irrational conduct. Consequently, we reverse the finding of liability on the claim \*\*233 brought under title 42 United States Code, section 1983.

## I

### Writ of Mandate

[1] A trial court may issue a writ of administrative mandate where an agency has (1) acted in excess of its jurisdiction, (2) deprived the petitioner of a fair hearing, or (3) committed a prejudicial abuse of discretion. (Code Civ.Proc., § 1094.5, subd. (b).) “Abuse of discretion is established if the [agency] has not proceeded in a manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.” (*Ibid.*)

[2] [3] As we see it, this case concerns whether the Clarks received a fair hearing before the City Council. That question is one of law, which we review de novo: “ ‘There might be foundational matters of fact with respect to which the trial court's findings would be conclusive on appeal if supported

by substantial evidence. However, the ultimate questions, whether the agency's decision was ... unlawful or procedurally unfair, are essentially questions of law. With respect to these questions the trial and appellate courts perform essentially the same function, and the conclusions of the trial court are not conclusive on appeal.’ ... The review of procedural issues, whether presented in mandamus proceedings brought under Code of Civil Procedure section 1085 or 1094.5, should be the same. That is, foundational factual findings must be sustained if supported by substantial evidence; however, the ultimate determination of whether the administrative proceedings were fundamentally fair is a question of law to be decided on appeal.” (*Rosenblit v. Superior Court* (1991) 231 Cal.App.3d 1434, 1443, 282 Cal.Rptr. 819, citations omitted.) The trial court's “fair hearing finding \*1170 was a conclusion of law, not a finding of fact, and requires a de novo review of the administrative record.” (*Id.* at p. 1442, 282 Cal.Rptr. 819.)<sup>17</sup>

### A. Right to a Fair Hearing

By statute, a writ is appropriate where the petitioner has been deprived of a fair hearing. (Code Civ.Proc., § 1094.5, subd. (b).) In applying this statutory principle, courts have recognized that “an individual has the right to a tribunal ‘which meets ... standards of impartiality.’ ... Biased decision makers are ... impermissible and even the probability of unfairness is to be avoided.... The factor most often considered destructive of administrative board impartiality is bias arising from pecuniary interests of board members.... Personal embroilment in the dispute will also void the administrative decision ..., although neither prior knowledge of the factual background which bears on a decision nor prehearing expressions of opinions on the result disqualifies an administrative body from acting on a matter before it.... [¶] ... Our Supreme Court has declined to fix rigid procedures for the protection of fair procedure rights ..., but it is inconceivable to us that such rights would not include impartiality of the adjudicators.” (*Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648, 657–658, 163 Cal.Rptr. 831, citations omitted; accord, *Delta Dental Plan v. Banasky* (1994) 27 Cal.App.4th 1598, 1607–1609, 33 Cal.Rptr.2d 381 [writ of administrative mandate ensures right to “impartial tribunal”]; \*\*234 *Rosenblit v. Superior Court, supra*, 231 Cal.App.3d at p. 1448, 282 Cal.Rptr. 819 [“The right to a fair procedure includes the right to impartial adjudicators.”].)



[4] [5] Over 60 years ago, one Court of Appeal discussed the common law prohibition on conflicts of interest, stating: “A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public.... [¶] ... [¶] \*1171 Actual injury is not the principle the law proceeds on. Fidelity in the agent is what is aimed at, and as a means of securing it the law will not permit him to place himself in a position in which he may be tempted by his own private interests to disregard those of his principal. This doctrine is generally applicable to private agents and trustees, but to public officers it applies with greater force, and sound policy requires that there be no relaxation of its stringency in any case that comes within its reason....” (*Noble v. City of Palo Alto* (1928) 89 Cal.App. 47, 51, 264 P. 529, citations omitted.) “[T]he common law doctrine against conflicts of interest ... prohibits public officials from placing themselves in a position where their private, personal interests may conflict with their official duties.” (64 Ops.Cal.Atty.Gen. 795, 797 (1981); accord, 70 Ops.Cal.Atty.Gen. 45, 47 (1987).)<sup>18</sup>

A leading treatise on municipal law acknowledges the same concept: “The public is entitled to have its representatives perform their duties free from any personal or pecuniary interest that might affect their judgment. Public policy forbids the sustaining of municipal action founded upon a vote of a council member ... in any matter before it which directly or immediately affects him or her individually.... A finding of self-interest sufficient to set aside municipal action need not be based upon actual proof of dishonesty, but may be warranted whenever a public official, by reason of personal interest in a matter, is placed in a situation of temptation to serve his or her own purposes, to the prejudice of those for whom the law authorizes that official to act.... [A]n individual member ordinarily cannot vote on a matter in which that member ... is interested. If the member does, the action taken by the body of which he or she is a member is invalidated.... *Where the vote of a member interested is necessary to pass an ordinance or bylaw, such ordinance or bylaw is void, irrespective of how beneficial the ordinance may be.*” (4 McQuillin, *The Law of Municipal Corporations* (3d ed. rev. 1992) § 13.35, pp. 840–841, italics added, fns. omitted.)

[6] Moreover, “[i]n conducting the hearing, the [Council] ... has power to make final adjudications of fact in connection with matters properly submitted to it. The action of such an administrative board exercising adjudicatory functions when based upon information of which the parties were not apprised and which they had no opportunity to controvert

amounts to a denial of a hearing.... Administrative tribunals which are required to \*1172 make a determination after a hearing cannot act upon their own information, and nothing can be considered as evidence that was not introduced at a hearing of which the parties had notice or at which they were present.... The fact that there may be substantial and properly introduced evidence which supports the [Council's] ruling is immaterial.... A contrary conclusion would be tantamount to requiring a hearing in form but not in substance, for the right of a hearing before an administrative tribunal would be meaningless if the tribunal were permitted to base its determination upon information received without the knowledge of the parties. A hearing requires that the party be apprised of the evidence against him so that he may have an opportunity to refute, test, and explain it, and the requirement of a hearing necessarily contemplates a decision in light of the evidence there introduced....” (*English v. City of Long Beach* (1950) 35 Cal.2d 155, 158–159, 217 P.2d 22, citations omitted.)

\*\*235 [7] Applying these principles, we conclude that the Clarks were deprived of a fair hearing in three respects.

[8] [9] First, under the common law, Councilmember Benz had a conflict of interest in voting on the Clarks' project. In denying the requested permits, the Council majority (which included Benz) found that the height and lot coverage of the proposed structure would interfere with the use or enjoyment of other property in the area. Also, in opposing the Clarks' 1989 application, Benz stated his belief that the project would “further constrict the view of the ocean from homes that are located behind ... the lot.” Because Benz lived one block inland of the Clarks, he stood to benefit personally by voting against the Clarks' project. It is irrelevant that Benz did not own his residence; an interest in preserving his ocean view was of such importance to him that it could have influenced his judgment.<sup>19</sup> Of course, a public official may express opinions on subjects of community concern (e.g., the height of new construction) without tainting his vote on such matters should they come before him. (See *City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 780–781, 122 Cal.Rptr. 543, 537 P.2d 375.) Here, Benz's conflict of interest arose, not because of his general opposition to 35-foot buildings, but \*1173 because the specific project before the Council, if approved, would have had a direct impact on the quality of his own residence. In addition, Benz's personal animosity toward the Clarks contributed to his conflict of interest; he was not a disinterested, unbiased decisionmaker. (See fn. 12, *ante*.)<sup>20</sup>

The City committed a second procedural error in denying the Clarks' permits. The Council's concerns about excessive lot coverage and insufficient open space were raised for the first time *after* the public portion of the March 24, 1992 hearing was over. The Clarks were not permitted to adequately address the Council on those subjects, and their request to reopen the hearing was denied. Accordingly, the Clarks did not receive proper notice or an opportunity to be heard on those two issues, both of which were resolved against them and were cited by the Council as grounds for denying the permits.

Finally, the City exhibited bias in connection with its unsuccessful effort to impose a construction moratorium. In February 1992, the Council had attempted, but failed, to enact a moratorium on the construction of buildings higher than 30 feet. The measure fell one vote short of the four votes needed. (See [Gov.Code, § 65858](#).) Consequently, the City's 35-foot height restriction remained in effect in R-3 zones. Yet, shortly after the moratorium failed, the Council and the planning commission denied permits on three projects (including the Clarks') involving 35-foot structures. This sequence of events indicates that the City was attempting to do—by a majority vote on a project-by-project basis—what the law required a four-fifths vote of the Council to accomplish.<sup>21</sup> At a minimum, this evidence establishes that the **\*\*236** Council was not impartial to the Clarks' project.

In sum, because the City Council deprived the Clarks of a fair hearing, the trial court properly issued a writ of administrative mandate.<sup>22</sup>

#### **\*1174 B. The Remedy for Denial of a Fair Hearing**

[10] The trial court set aside the City Council's decision and ordered the City to reinstate the planning commission's approval of the Clarks' permits. This was error. The trial court should have ordered the Council to rehear the matter and to provide the Clarks with a fair hearing.<sup>23</sup>

The necessity of another hearing follows from the language of the statute authorizing a writ of administrative mandate: “The court shall enter judgment either commanding [the council] to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order [the council] to take such further action as is specially enjoined upon it by law, but the judgment shall not limit or control in any way the

discretion legally vested in the [council].” ([Code Civ.Proc., § 1094.5, subd. \(f\)](#).)

In [English v. City of Long Beach, supra, 35 Cal.2d 155, 217 P.2d 22](#), the petitioner, Henry English, was dismissed from his position as an officer in the Long Beach Police Department. During the subsequent civil service proceeding, the members of the board took evidence outside the hearing. The board upheld English's dismissal. He then sought a writ of administrative mandate.

The superior court found that the civil service board had deprived English of a fair hearing and issued a writ of mandate directing that he be reinstated. The Supreme Court agreed that the hearing had been unfair but disagreed with the trial court's remedy, stating: “Since the board, in arriving at its decision sustaining the order dismissing English, relied upon information taken outside the hearing, which English had no opportunity to refute, the trial court properly concluded that he was denied a fair hearing. The judgment, however, should not have ordered the reinstatement of English but instead should have remanded the cause to the civil service board for proper proceedings. ([Code Civ.Proc., § 1094.5\(e\)](#) [now subdivision (f) ];....) The fact that the board has heard and decided the matter does not preclude another hearing even though the charter does not provide for a rehearing, **\*1175** and the board cannot be said to have exhausted its power to act until it has given English a fair hearing.” ([English v. City of Long Beach, supra, 35 Cal.2d at pp. 159–160, 217 P.2d 22](#), citations omitted; accord, [Kumar v. National Medical Enterprises, Inc. \(1990\) 218 Cal.App.3d 1050, 1056, 267 Cal.Rptr. 452](#) [“the setting aside of a final administrative decision because of unfair hearing practices requires a remand for further proceedings”]; [Zurn Engineers v. State of California ex rel. Dept. of Water Resources \(1977\) 69 Cal.App.3d 798, 835–838, 138 Cal.Rptr. 478](#) [discussing cases], cert. den. 434 U.S. 985, 98 S.Ct. 612, 54 L.Ed.2d 479.)

We recognize that there may be situations in which a superior court can properly direct that a city council's decision be set aside and that no further administrative hearings be held in the case, e.g., where the council had no authority to hear an appeal in the first place **\*\*237** ([Cohan v. City of Thousand Oaks \(1994\) 30 Cal.App.4th 547, 556–559, 35 Cal.Rptr.2d 782](#)) or where the issuance of a building permit is a purely ministerial act, such that the council has no discretion in the matter ([Gabric v. City of Rancho Palos Verdes \(1977\) 73 Cal.App.3d 183, 190–191, 140 Cal.Rptr. 619](#)). However, neither of those

exceptions applies here. (See pt. II.A., *post* [discussing City's discretion in ruling on permit applications].)

Finally, the Clarks contend that another hearing before the Council would be improper because Councilmember Benz should have recused himself during the April 14, 1992 meeting, when the Council voted on the resolution denying the Clarks' permits. According to the Clarks, without Benz's participation at that meeting, the resulting tie vote (2–2) would have affirmed the planning commission's decision to approve their project. We disagree. While a tie vote might have affirmed the commission's decision to approve the tentative parcel map, it would not have had that effect as to the conditional use permit. This result is dictated by the different appeal provisions applicable to the two types of permits.

[11] [12] On appeal from a planning commission decision regarding a conditional use permit, the City Council does not merely review the commission's decision for error. Rather, the Council hears the matter *de novo*, takes additional evidence at a public hearing, and decides whether *it* should grant or deny the permit. (Hermosa Beach Mun.Code, §§ 1411, 1412; *Gabric v. City of Rancho Palos Verdes*, *supra*, 73 Cal.App.3d at p. 191, 140 Cal.Rptr. 619; *Lagrutta v. City Council* (1970) 9 Cal.App.3d 890, 894–895, 96 Cal.Rptr. 627.) In deciding an appeal, the Council “shall order that the conditional use permit be *granted, denied or modified*,” and “[t]he action by the city council ... shall be by *three (3) affirmative votes*.” (Hermosa Beach Mun.Code, §§ 1412, 1413, italics added.) In other words, the Clarks needed three affirmative \*1176 votes in the Council to obtain a conditional use permit. A tie vote would not suffice. “[A]s a general rule an even division among members of an administrative agency results in no action.” (*Graves v. Commission on Professional Competence* (1976) 63 Cal.App.3d 970, 976–977, 134 Cal.Rptr. 71.) Indeed, in construing an ordinance virtually identical to the one here, we have previously held that a city council's tie vote does not affirm the underlying decision of a planning commission. (*Anderson v. Pittenger* (1961) 197 Cal.App.2d 188, 194–195, 17 Cal.Rptr. 54 [on appeal from planning commission's decision to grant a zoning variance, city council's tie vote constituted “no action” and “was not an affirmance of the order of the commission”]; see also *REA Enterprises v. California Coastal Zone Com.* (1975) 52 Cal.App.3d 596, 605–609, 125 Cal.Rptr. 201 [on appeal from regional commission's decision to issue a development permit, state commission's tie vote was not an affirmative majority vote to approve permit and therefore constituted denial of permit].)<sup>24</sup>

The Clarks' reliance on *Woodland Hills Residents Assn., Inc. v. City Council* (1975) 44 Cal.App.3d 825, 830–831, 118 Cal.Rptr. 856, and *Pacific Palisades Property Owners Assn. v. City of Los Angeles* (1974) 42 Cal.App.3d 781, 786, 117 Cal.Rptr. 138, is of no avail. Those decisions construed provisions of the Subdivision Map Act which provide that a tentative map shall be deemed to be approved where (1) the city council has “failed to act” upon an appeal within the statutorily specified time period, and (2) the planning commission has already approved \*\*238 the map. (See former *Bus. & Prof.Code*, § 11553, as amended by Stats.1961, ch. 194, § 4, pp. 1202–1203, now *Gov.Code*, § 66452.4; former *Bus. & Prof.Code*, § 11552, as amended by Stats.1973, ch. 306, § 1, pp. 721–723, now *Gov.Code*, § 66452.5.) In both cases, the courts found that the city council's tie vote constituted a “failure to act” upon the appeal, thereby affirming the planning commission's approval of the tentative map.

Even assuming—as the Clarks contend—that the City Council's tie vote would have affirmed the planning commission's decision with respect to their \*1177 tentative parcel map *and* precise development plan, this argument overlooks the significance of the tie vote as to the conditional use permit. The language of the Hermosa Beach Municipal Code, not the Subdivision Map Act, would govern the outcome on that issue. As discussed above, a tie vote of the Council does not affirm the planning commission's decision on a conditional use permit, nor does it operate to grant the permit. The critical provision in the Subdivision Map Act—deeming the map approved if the council fails to act by a certain deadline—does not appear in the municipal code. Rather, City law mandates three affirmative Council votes for a conditional use permit; there is no “deemed approval” provision, nor is there a time limit for acting on the appeal.<sup>25</sup>

Unquestionably, the Clarks needed all three permits—a tentative parcel map, precise development plan, and conditional use permit—to proceed with the project. (See Hermosa Beach Mun.Code, §§ 7.2–4, 29.5–1 to 29.5–18, 1431.) Because a tie vote of the Council would not have affirmed the planning commission's decision as to all three permits, it follows that the Clarks' project would not have been approved even if Councilmember Benz had recused himself.

[13] Accordingly, on remand, the trial court shall direct the City Council (1) to vacate its decision on the appeal from the



planning commission and (2) to rehear the appeal and provide the Clarks with a fair hearing.<sup>26</sup>

## II

### Federal Civil Rights Claim

The trial court properly found that the City Council had deprived the Clarks of a fair hearing under state law (*Code Civ.Proc.*, § 1094.5, subd. \*1178 b)). The Clarks' civil rights claim was premised on the theory that the lack of a fair hearing also violated the due process clause of the United States Constitution.

[14] Given that state law mandates a “fair” administrative proceeding and that the due process clause is similarly based on the concept of fairness (*Applebaum v. Board of Directors*, *supra*, 104 Cal.App.3d at p. 657, 163 Cal.Rptr. 831), it may appear at first blush that a violation of state law in this case should give rise to liability under the federal Constitution. Obviously, this is not the first time a plaintiff has attempted to convert a state law claim into a federal case of constitutional proportions. (See, e.g., *Stivers v. Pierce* (9th Cir.1995) 71 F.3d 732, 740–741 & fn. 4 [applying due process clause where Nevada state law recognized property interest \*\*239 in occupational license].)<sup>27</sup> However, we conclude that while the City violated state law by failing to provide a fair hearing, it did not offend the federal Constitution, on either procedural or substantive due process grounds.<sup>28</sup>

#### A. Procedural Due Process

[15] A state law requirement that a public entity conduct hearings in a fair manner does not automatically implicate the federal due process clause. The Fourteenth Amendment provides that “[n]o State shall ... deprive any person of life, liberty, or property, without due process of law....” Nonetheless, before reaching any question about the fairness of a particular proceeding under the federal Constitution, we must first address whether a protected interest—life, liberty, or property—is implicated. If no such interest is involved, then the procedural protections of the due process clause do not come into play. (*Board of Regents v. Roth* (1972) 408 U.S. 564, 569–578, 92 S.Ct. 2701, 2705–2710, 33 L.Ed.2d 548; *Zorzi v. County of Putnam* (7th Cir.1994) 30 F.3d 885, 895.) Because the Clarks do not contend that the Council's decision implicated an interest involving life or liberty, we examine

whether they had a federally protected property interest in the development of their project.

\*1179 At the outset, we note that several federal courts have cautioned against applying [title 42 United States Code, section 1983](#) (“[section 1983](#)”) to state and local land-use disputes. As the Fourth Circuit Court of Appeals has noted: “‘[T]he regulation of land subdivision is ... a fundamental legal tool for municipal guidance of land development.’ ... Indeed, land-use decisions are a core function of local government. Few other municipal functions have such an important and direct impact on the daily lives of those who live or work in a community. The formulation and application of land-use policies, therefore, frequently involve heated political battles, which typically pit local residents opposed to development against developers and local merchants supporting it.... [¶] Resolving the routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is simply not the business of the federal courts. There is no sanction for casual federal intervention into what ‘has always been an intensely local area of the law.’ ... [A]llowing ‘every allegedly arbitrary denial by a town or city of a local license or permit’ to be challenged under [§ 1983](#) would ‘swell[ ] our already overburdened federal court system beyond capacity.’ ... Accordingly, federal courts should be extremely reluctant to upset the delicate political balance at play in local land-use disputes. [Section 1983](#) does not empower us to sit as a super-planning commission or a zoning board of appeals, and it does not constitutionalize every ‘run of the mill dispute between a developer and a town planning agency.’ ... In most instances, therefore, decisions regarding the application of subdivision regulations, zoning ordinances, and other local land-use controls properly rest with the community that is ultimately—and intimately—affected.” (*Gardner v. Baltimore Mayor & City Council* (4th Cir.1992) 969 F.2d 63, 67–68, followed in *Sylvia Development Corp. v. Calvert County, Md.* (4th Cir.1995) 48 F.3d 810, 828–829, citations omitted.)

Similarly, the First Circuit Court of Appeals has commented: “Virtually every alleged legal or procedural error of a local planning authority or zoning board of appeal \*\*240 could be brought to a federal court on the theory that the erroneous application of state law amounted to a taking of property without due process. Neither Congress nor the courts have, to date, indicated that [section 1983](#) should have such a reach. [¶] ... [¶] ... Plaintiffs would thus have us rule that the due process clause to the United States Constitution was violated when [the Town of] Bolton's Planning Board, for

the purpose of protecting what it viewed as the town's basic character, openly interpreted state subdivision laws and a state court decision in ways which frustrated plaintiffs' large-scale housing development of a particular design. [¶] ... Every appeal by a disappointed developer from an adverse ruling by a local ... planning board necessarily involves some claim that the board exceeded, abused or 'distorted' its legal authority in some manner, often for \*1180 some allegedly perverse (from the developer's point of view) reason. It is not enough simply to give these state law claims constitutional labels such as 'due process' or 'equal protection' in order to raise a substantial federal question under section 1983. As has been often stated, '[t]he violation of a state statute does not automatically give rise to a violation of rights secured by the Constitution.' ” (*Creative Environments, Inc. v. Estabrook* (1st Cir.1982) 680 F.2d 822, 831, 832–833, cert. den. 459 U.S. 989, 103 S.Ct. 345, 74 L.Ed.2d 385, followed in *Chesterfield Dev. v. City of Chesterfield* (8th Cir.1992) 963 F.2d 1102, 1104–1105.)

With these cautionary words in mind, we turn to the Supreme Court's analysis in *Board of Regents v. Roth*, supra, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548, to determine what qualifies as a property interest for due process purposes: “Certain attributes of ‘property’ interests protected by procedural due process emerge from [our] decisions. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.... Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” (*Id.* at p. 577, 92 S.Ct. at p. 2709.)

[16] “When analyzing whether a plaintiff presents a legitimate claim of entitlement, we focus on the degree of discretion given the decisionmaker and not on the probability of the decision's favorable outcome.” (*Jacobs, Visconsi & Jacobs v. City of Lawrence* (10th Cir.1991) 927 F.2d 1111, 1116.) “Under this approach, whether a property-holder possesses a legitimate claim of entitlement to a permit or approval turns on whether, under state and municipal law, the local agency lacks all discretion to deny issuance of

the permit or to withhold its approval. Any significant discretion conferred upon the local agency defeats the claim of a property interest. Under this standard, a cognizable property interest exists ‘only when the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured.’ ... Moreover, the standard focuses on the amount of discretion accorded the issuing agency by law, not on whether or to what degree that discretion is actually exercised. ‘Even if in a particular case, objective observers would estimate that the probability of issuance was extremely high, the opportunity of the local agency to deny issuance suffices to defeat the existence of a federally \*1181 protected property interest.’ ...” (*Gardner v. Baltimore Mayor & City Council*, supra, 969 F.2d at 68, citations omitted; accord, *Crowley v. Courville* (2d Cir.1996) 76 F.3d 47, 52; *Bateson v. Geisse* (9th Cir.1988) 857 F.2d 1300, 1303, 1305.)<sup>29</sup>

\*\*241 [17] In this case, we cannot say that the discretion of the City Council was so narrowly circumscribed that approval of the Clarks' application was virtually assured. The planning commission and the City Council were vested with sufficient discretion to defeat any expectation that the Clarks' application would be approved *as submitted*. In that regard, we think it important to define as precisely as possible the property interest at stake. The Clarks do not (and cannot) claim that the City has infringed their interest in constructing a home per se. The City did not bar the Clarks from building their condominium project altogether; it denied their application without prejudice to submitting a revised plan reflecting the Council's concerns about height, lot coverage, and usable open space. Thus, the interest at issue is not that of a landowner to construct a roof over his head; rather, it is the Clarks' interest in building a structure having the specific dimensions they find desirable. The due process inquiry therefore requires us to examine the discretion accorded the City in placing restrictions on the size of a structure.

As a prerequisite to building their project, the Clarks had to obtain a conditional use permit, a precise development plan, and a tentative parcel map. Under City law, a conditional use permit must “assure that the degree of compatibility shall be maintained with respect to the particular use on the particular site and in consideration of other existing and potential uses within the general area in which such use is proposed to be located.” (Hermosa Beach Mun.Code, § 1404.) A precise development plan is designed “to achieve a reasonable level of quality, compatibility, in harmony with the community's

social, economic and environmental objectives, and to protect existing and potential developments, and uses on adjacent and surrounding property.” (*Id.*, § 1430.)<sup>30</sup>

“All development shall be in compliance with minimum standards of the zoning ordinance.” (Hermosa Beach Mun.Code, § 1432(A).) However, **\*1182** “[o]n a case basis, the planning commission may impose standards *above the minimums* designated by the zoning ordinance to improve the quality of development and to mitigate any environmental impacts.” (*Ibid.*, italics added.) Further, the decisions of the planning commission are subject to appeal to the City Council. (*Id.*, §§ 29.5–5, 1409, 1435.) Where an appeal involves a conditional use permit, the Council “shall order the ... permit be granted, denied or modified *subject to such conditions or limitations that it may impose.*” (*Id.*, § 1412, italics added.)

Here, the Council's reasons for denying the Clarks' project concerned *minimum* standards, not absolutes or guarantees. Under City law, “[n]o building shall *exceed* thirty-five feet in height” (Hermosa Beach Mun.Code, § 601, italics added); “[a]ll buildings ... shall not cover *more than* sixty-five (65) percent of the area of the lot” (*id.*, § 606, italics added); and “there shall be a *minimum* of two hundred (200) square feet of usable open space per dwelling unit,” plus an additional 100 square feet per condominium unit (*id.*, §§ 607, 7.2–6(e) (1), italics added).

In our view, these provisions do not create a legitimate expectation or claim of entitlement to a structure having any particular dimensions. For instance, the municipal code does not create a *right* to a 35-foot structure; it simply allows a maximum height of 35 feet. In examining permit applications on a case-by-case basis, the City is expressly authorized to consider numerous factors in imposing more restrictive conditions on a specific project.<sup>31</sup> Moreover, **\*\*242** in this case, even if the Council misinterpreted or misapplied the ordinances concerning lot coverage and usable open space, nothing in the municipal code guaranteed that the Clarks could build to the maximum lot coverage of 65 percent or get by with the minimum open space of 300 square feet per condominium unit. Indeed, in hearing the appeal on the Clarks' project, the Council had the broad authority to modify the conditional use permit “subject to such conditions or limitations that it may impose.”

In sum, the municipal code vests significant discretion in the City in reviewing project applications and in imposing

conditions on development permits. (See *Smith v. County of Los Angeles* (1989) 211 Cal.App.3d 188, 197, 259 Cal.Rptr. 231 [“a conditional use permit ... is, by definition, **\*1183** discretionary”]; *Guinnane v. San Francisco City Planning Com.* (1989) 209 Cal.App.3d 732, 736, 257 Cal.Rptr. 742 [“compliance with the zoning laws and building codes did not entitle [plaintiff] to a building permit as a matter of course”], cert. den. 493 U.S. 936, 110 S.Ct. 329, 107 L.Ed.2d 319; *Gardner v. Baltimore Mayor & City Council*, *supra*, 969 F.2d at p. 67 [land-use control “is an inherently discretionary system”].)<sup>32</sup> We therefore join those federal courts recognizing that, in these circumstances, there is no federally protected property interest on which to base a procedural due process claim. (See, e.g., *Jacobs, Visconsi & Jacobs v. City of Lawrence*, *supra*, 927 F.2d at pp. 1115–1118; *Bateson v. Geisse*, *supra*, 857 F.2d at p. 1305; *Creative Environments, Inc. v. Estabrook*, *supra*, 680 F.2d at pp. 829–834; *Arroyo Vista Partners v. County of Santa Barbara* (C.D.Cal.1990) 732 F.Supp. 1046, 1052–1053.)

Accordingly, the trial court erred in finding a violation of procedural due process.

## B. Substantive Due Process

[18] As a substantive limitation on governmental action, the due process clause precludes arbitrary and irrational decisionmaking. (*Crowley v. Courville*, *supra*, 76 F.3d at p. 52; *Zorzi v. County of Putnam*, *supra*, 30 F.3d at p. 895; *Gardner v. Baltimore Mayor & City Council*, *supra*, 969 F.2d at p. 68.) However, not every governmental error constitutes a violation of substantive due process.

In fact, given the nebulous contours of substantive due process, courts have begun to restrict its reach to certain “core” values. The Supreme Court has noted: “ ‘As a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.’ The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity.” (*Albright v. Oliver* (1994) 510 U.S. 266, 271–272, 114 S.Ct. 807, 812, 127 L.Ed.2d 114.)

**\*1184** The Ninth Circuit Court of Appeals, sitting en banc, has recently echoed this same sentiment: “We are all painfully aware that the area of substantive due process ‘has at times been a treacherous field’ for the courts....

In an effort to scale back what had become an apparently unbounded source of judicial authority, the Supreme Court in recent decades has restricted the scope of substantive due process. [¶] There can be no doubt that the Due Process Clause of the Fourteenth Amendment confers both procedural and substantive rights.... *However, the use of substantive due process to extend constitutional protection to economic and property rights has been largely discredited.*

**\*\*243** ... Rather, recent jurisprudence restricts the reach of the protections of substantive due process primarily to liberties ‘deeply rooted in this Nation’s history and tradition.’ ... Thus, the Fourteenth Amendment protects against a State’s interferences with ‘personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,’ as well as with an individual’s bodily integrity.” (*Armendariz v. Penman* (9th Cir.1996) 75 F.3d 1311, 1318–1319, citations omitted, italics added.) Consequently, there is some question as to whether substantive due process even applies to the type of case before us.

[19] In any event, assuming that substantive due process remains a viable check on state and local land-use decisions, “a party asserting a deprivation of substantive due process must first establish a valid property interest within the meaning of the Constitution.” (*Crowley v. Courville*, *supra*, 76 F.3d at p. 52; accord, *Zorzi v. County of Putnam*, *supra*, 30 F.3d at p. 895; *Gardner v. Baltimore Mayor & City Council*, *supra*, 969 F.2d at p. 68.) If a cognizable property interest is implicated, a court must then determine whether the government’s action was arbitrary or irrational. (*Crowley v. Courville*, *supra*, 76 F.3d at p. 52; *Zorzi v. County of Putnam*, *supra*, 30 F.3d at p. 895; *Gardner v. Baltimore Mayor & City Council*, *supra*, 969 F.2d at p. 68.)

[20] As indicated in our discussion of the Clarks’ procedural due process claim, they have no protected property interest in their requested permits. (See pt. II.A, *ante*.) Accordingly, the substantive due process claim fails for that reason alone. Alternatively, even if a constitutionally recognized property interest is involved, we find that the City did not engage in arbitrary or irrational conduct.

In *PFZ Properties, Inc. v. Rodriguez* (1st Cir.1991) 928 F.2d 28, cert. dismissed, 503 U.S. 257, 112 S.Ct. 1151, 117 L.Ed.2d 400, a developer (“PFZ”) brought a section 1983 action against a Puerto Rico agency for refusing to process its building plans. In rejecting PFZ’s substantive due process claim, the First Circuit Court of Appeals stated: “[R]ejections

of **\*1185** development projects and refusals to issue building permits do not ordinarily implicate substantive due process.... Even where state officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation.... The doctrine of substantive due process ‘does not protect individuals from all [governmental] actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents “governmental power from being used for purposes of oppression,” or “abuse of government power that shocks the conscience,” or “action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests.”’ ” (928 F.2d at pp. 31–32, citations omitted, quoted with approval in *Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 709–710, 38 Cal.Rptr.2d 413, cert. denied, 516 U.S. 913, 116 S.Ct. 300, 133 L.Ed.2d 205.)

Applying these principles in *PFZ Properties*, the First Circuit concluded: “[W]e hold that PFZ’s allegations that [government] officials failed to comply with agency regulations or practices in the review and approval process for the construction drawings are not sufficient to support a substantive due process claim under the Fourteenth Amendment to the United States Constitution.... Even assuming that [the agency] engaged in delaying tactics and refused to issue permits for the ... project based on considerations outside the scope of its jurisdiction under Puerto Rico law, such practices, without more, do not rise to the level of violations of the federal constitution under a substantive due process label.” (928 F.2d at p. 32, citation omitted.)

In *Uhlrig v. Harder* (10th Cir.1995) 64 F.3d 567, cert. denied, 516 U.S. 1118, 116 S.Ct. 924, 133 L.Ed.2d 853, the Tenth Circuit Court of Appeals explained that “the standard for judging a substantive due process claim is whether the challenged government action would ‘“shock the conscience” of ... judges.’ ... [¶] ... [¶] ... [T]o satisfy the ‘shock the conscience’ standard, a plaintiff must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power. That is, the plaintiff **\*\*244** must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking. The level of conduct required to satisfy this additional requirement cannot precisely be defined, but must necessarily evolve over time from judgments as to the constitutionality of specific government conduct. We do know, however, that



the ‘shock the conscience’ standard requires a high level of outrageousness, because the Supreme Court has specifically admonished that a substantive due process violation requires more than an ordinary tort....” (*Id.* at pp. 573–574, citing \*1186 *Collins v. Harker Heights* (1992) 503 U.S. 115, 126, 128, 112 S.Ct. 1061, 1069, 1070, 117 L.Ed.2d 261.) As the high court has recognized, “The Due Process Clause ‘is not a guarantee against incorrect or ill-advised [governmental] decisions.’ ” (*Collins v. Harker Heights, supra*, 503 U.S. at p. 129, 112 S.Ct. at p. 1070.)

In this case, regardless of whether the City Council's decision was proper under state law, we cannot say that its conduct, for due process purposes, was arbitrary or oppressive or that it “shocks the conscience.” Although we have concluded that Councilmember Benz had a conflict of interest in voting on the project, the city attorney advised the Council at the public hearing that there was no conflict. That advice was incorrect, but it was not irrational. In light of the city attorney's opinion, the Council did not act irrationally by allowing Benz to participate in the proceedings.<sup>33</sup>

Plainly, the Council erred in considering and deciding issues raised for the first time after the public hearing was over. Further, it *may have* misconstrued or misapplied the provisions of the zoning ordinance concerning lot coverage and usable open space. Nonetheless, the Council's ultimate decision to deny the permits did not lack a rational basis.

[21] The Council's application of the zoning ordinance was not wholly without reason. With respect to limiting the height of the Clarks' structure to 30 feet, there was evidence that most of the homes in the area were 30 feet in height or lower. Similarly, the Council's interpretation and application of the provisions on lot coverage and usable open space were not irrational.<sup>34</sup> Moreover, we cannot overlook the fact that several members of the community opposed the Clarks' project, signing petitions to appeal the planning commission's decision and speaking against the project at the City Council

hearing. “After all, a legislator is supposed to respond to the concerns of his or her constituents.... Whether their concerns were proper or justified is not the issue here. The point is that their elected representative[s] decided to oppose the project.... ‘The opinion of area residents concerning neighborhood preservation is an appropriate factor for consideration in zoning decisions.’ ” (*Stubblefield Construction Co. v. City of San Bernardino, supra*, 32 Cal.App.4th at p. 711, 38 Cal.Rptr.2d 413.)

[22] \*1187 In sum, because the Council's decision did not implicate a protected property right, and because its conduct was not irrational, the trial court erred in finding a violation of substantive due process.<sup>35</sup>

\*\*245 III–IV\*\*

## DISPOSITION

The judgment is reversed. On remand, the trial court is directed to issue a writ of administrative mandate commanding the Hermosa Beach City Council (1) to set aside its decision overturning the planning commission's approval of the Clarks' project, (2) to rehear the appeal from the planning commission's decision, and (3) to provide the Clarks with a fair hearing on the matter. The trial court is further directed to recalculate the costs recoverable by the Clarks in accordance with [Code of Civil Procedure section 1033.5](#). The parties are to bear their respective costs on appeal.

[SPENCER](#), P.J., and [MIRIAM A. VOGEL](#), J., concur.

## All Citations

48 Cal.App.4th 1152, 56 Cal.Rptr.2d 223, 96 Cal. Daily Op. Serv. 6305, 96 Daily Journal D.A.R. 10,229, 96 Daily Journal D.A.R. 10,317

## Footnotes

- \* Pursuant to [California Rules of Court, rules 976\(b\)](#) and [976.1](#), this opinion is certified for publication with the exception of parts III and IV.
- 1 Unless otherwise indicated, we refer to section 601 of the Hermosa Beach Municipal Code as it existed from October 1986 to September 1992. It stated: “No building shall exceed thirty-five (35) feet in height....”
- 2 These figures on height and lot coverage were determined by the planning commission staff. We also note that, at the time of the Clarks' 1992 application, the maximum height and lot coverage allowed under City law had not changed since the approval of the Clarks' 1989 plans.

- 3 In the one block area east of the Clarks' property, approximately 75 percent of the houses are 30 feet in height or lower.
- 4 Benz was elected to the Council in 1990. He was the same person who, as a private citizen, had opposed the Clarks' 1989 permits by circulating petitions and attempting unsuccessfully to appeal the commission's approval of the project. As of March 1992, Benz still lived in the same location (2901 Manhattan Avenue), where he leased a three-bedroom apartment on a month-to-month basis.
- 5 According to the City, while the planning commission had consistently interpreted the lot coverage provision not to apply to "decks" like the Clarks', the Council had never reviewed or approved the commission's interpretation. Apparently, the Council had not considered the issue until the present case.
- 6 The municipal code requires a minimum of 300 square feet of usable open/private space per condominium unit. (Hermosa Beach Mun.Code, §§ 607(2), 7.2–6(e)(1).) That space "shall not be enclosed on more than two (2) sides." (*Id.*, § 607(2).) The planning commission determined that the Clarks' project had 300.5 square feet of open space per unit—just barely over the required minimum. However, Councilmember Essertier asserted that since the structure's courtyard was enclosed on three sides, the commission had erred by treating it as open space. Such an error would have reduced the open space per unit by 85 square feet, clearly below what City law required. Planning Director Schubach believed that the courtyard had not been counted toward the open space requirement.
- 7 By denying the permits "without prejudice," the City allowed the Clarks to submit revised plans (in accordance with the Council's height, lot coverage, and open space demands) without having to pay additional processing fees.
- 8 [Section 1983](#) provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."
- 9 On September 8, 1992, the City adopted a new ordinance restricting the height of buildings in R–3 zones to 30 feet unless specified conditions are satisfied, i.e., an extension above 30 feet is necessary to take advantage of a scenic view over surrounding structures *and* a substantial number of existing buildings in the vicinity are higher than 30 feet. (Hermosa Beach Ord. No. 92–1074, § 1.)
- 10 In part, the Political Reform Act prohibits public officials from making, participating in, or attempting to use their official position to influence a governmental decision in which they know or have reason to know they have a financial interest. ([Gov.Code, § 87100.](#))
- 11 With exceptions not applicable here, the pertinent section of the Subdivision Map Act provides that "in determining whether to approve or disapprove an application for a tentative map, the local agency shall apply only those ordinances, policies, and standards in effect at the date the local agency has determined that the application is complete...." ([Gov.Code, § 66474.2, subd. \(a\).](#))
- 12 A portion of the trial focused on Benz's personal animosity toward the Clarks, which developed before his election to the Council. For example, according to Mr. Clark, it was fairly common for Benz to run by their windows and yell "loud, obnoxious noises in the morning." On one occasion at the beach, Benz and some of his friends were "horsing around" near the Clarks' children. Concerned for the children's safety, Mrs. Clark asked Benz to stop or go elsewhere. Benz refused and began mocking her. Further, Mrs. Clark testified that on a Friday night, Benz "walked over to our house and urinated on the house and in the planter." She called the police, who arrived promptly and directed Benz toward his apartment. The local press (the Daily Breeze) ran an article on this incident and quoted Benz as saying that Mrs. Clark wanted to see him urinate. At trial, Benz stated that his comment in the newspaper had been taken out of context, and he denied having urinated on the Clarks' property. However, the trial court expressly found that Benz had engaged in such conduct.
- 13 In general, the Brown Act requires that all meetings of the legislative body of a local agency be open and public. ([Gov.Code, § 54953, subd. \(a\).](#)) To that end, the act prohibits "a series of nonpublic contacts at which a quorum of a legislative body is lacking at any given time ... if the contacts are 'planned by or held with the collective concurrence of a quorum of the body to privately discuss the public's business'...." ([Stockton Newspapers, Inc. v. Members of Redevelopment Agency](#) (1985) 171 Cal.App.3d 95, 103, 214 Cal.Rptr. 561.)
- 14 The prevailing party in a federal civil rights action is entitled to reasonable attorney fees. (42 U.S.C. § 1988(b).) Under [Code of Civil Procedure section 1021.5](#), fees may be awarded where the successful party has enforced an important right affecting the public interest. [Government Code section 800](#) permits an award of fees (not to exceed \$7,500) if a party establishes that a public entity has engaged in arbitrary or capricious conduct. Finally, [Government Code section 91012](#) authorizes the prevailing party in an action under the Political Reform Act to recover costs of litigation, including attorney fees.



- 15 The request for costs included expenses for photocopying, telephone calls, telecopier use, and computer-assisted research.
- 16 As the trial court stated, referring to [section 1021.5](#): “That doesn't apply. [CCP 1021.5](#), this is not attorneys fees in [the] public interest. This is not a public interest case. It was a private citizen situation. I will not grant attorney fees under that section.”
- 17 In reviewing the propriety of the trial court's writ of administrative mandate, the City contends that we cannot consider any evidence that was not before the City Council at the time of its decision, i.e., not part of the formal administrative record. In particular, the City objects to evidence concerning the approval of, and Mr. Benz's opposition to, the Clarks' 1989 permit application. Such an objection might be well taken if we were determining whether the Council's decision was supported by substantial evidence. (See [Housman v. Board of Medical Examiners \(1948\) 84 Cal.App.2d 308, 313, 190 P.2d 653.](#)) However, where the challenge involves one of procedural fairness, including the potential bias of a councilmember, we are not necessarily limited to the evidence that was before the Council. (See *Cal. Administrative Mandamus (Cont.Ed.Bar 1989) § 4.36, p. 120; id., § 4.120, pp. 171–172*; see also [Western States Petroleum Assn. v. Superior Court \(1995\) 9 Cal.4th 559, 573, 575, fn. 5, 578–579, 38 Cal.Rptr.2d 139, 888 P.2d 1268](#) [in reviewing quasi-legislative administrative decision, extra-record evidence may be admissible in determining issue of “procedural unfairness”]; [Code Civ.Proc., § 1094.5, subd. \(e\)](#) [court may consider extra-record evidence where trial court reviews agency decision under independent judgment test].)
- 18 While the Political Reform Act focuses on financial conflicts of interest, the common law extends to noneconomic conflicts of interest. (64 Ops.Cal.Atty.Gen., [supra](#), at p. 797; 70 Ops.Cal.Atty.Gen., [supra](#), at p. 47.) The common law may be abrogated by express statutory provisions (70 Ops.Cal.Atty.Gen., [supra](#), at p. 47; 67 Ops.Cal.Atty.Gen. 369, 381 (1984)), but that is not the situation here.
- 19 We disagree with the trial court's conclusion that Benz violated the Political Reform Act. That act generally prohibits public officials from participating in matters where they have a *financial* interest in the outcome. ([Gov.Code, § 87100.](#)) No such interest existed here because the act excludes any financial interest in real property leased by an official on a monthly basis. ([Gov.Code, §§ 87103, subd. \(b\), 82033; Cal.Admin.Code, tit. 2, § 18233.](#)) In addition, we reject the contention that Benz's rent was less than fair market value and that this alleged “gift” from his landlord created a conflict of interest under the act. (See [Gov.Code, §§ 87103, subd. \(e\), 82028.](#)) The Clarks' evidence that Benz's rent was discounted consisted of the rental figures for their respective dwellings. In this context, rental information on only two dwellings in the City does not establish the fair market value of either one.
- 20 We note that “[a] councilman who is disqualified by reason of a conflict of interest in any matter shall not, once the conflict is ascertained, participate in the discussion in any way or comment on the matter in any way to any person including any councilman and shall not vote on such matter.” (Hermosa Beach Mun.Code, § 2–2.19.)
- 21 Our conclusion that the City was implementing an unlawful “backdoor” moratorium is supported by the fact that two of the three grounds for denying the Clarks' permits—excessive lot coverage and inadequate usable open space—were first raised by the Council after the public hearing had concluded, without ever giving the public or the Clarks an opportunity to address those issues.
- 22 Because we find that the Clarks did not receive a fair hearing, we do not reach any alternative grounds for writ relief (e.g., whether substantial evidence supported the Council's decision or whether the Council violated the Subdivision Map Act ([Gov.Code, § 66410 et seq.](#))).
- 23 On remand, when the Council rehears the appeal from the planning commission, the requirement of a “fair” hearing necessarily precludes Councilmember Benz from participating in or voting on the matter. (See pt. I.A., *ante* [discussing disqualification based on conflicts of interest].) The Clarks urge us to find that, in addition to Benz, Councilmember Edgerton is biased against them and should be disqualified. However, because this issue was not raised below on the petition for writ of mandate, we decline to reach it on appeal. (See [California Indemnity Ins. Premium Finance Co. v. Fireman's Fund Ins. Co. \(1995\) 40 Cal.App.4th 1633, 1641, 47 Cal.Rptr.2d 743.](#)) If the Clarks believe that any councilmember other than Benz should be disqualified in connection with the new hearing, they can raise that point during the administrative proceedings after remand.
- 24 Under City law, “[t]he votes shall be lost motions and may be reconsidered.” (Hermosa Beach Mun.Code, § 2–2.21.) Here, a tie vote arguably would have been tantamount to “no action” on the appeal. With the votes evenly divided between granting and denying a conditional use permit, a motion either way would have failed for lack of a third vote. In this scenario, the appeal could have remained in perpetual limbo, absent a successful motion for reconsideration or a renewed motion. On the other hand, because the Council was hearing the matter *de novo*, a tie vote might have had the effect of denying the conditional use permit, assuming the Clarks had to prove they were entitled to it. (See [Committee for a](#)

*Rickel Alternative v. City of Linden* (1988) 111 N.J. 192, 196–203, 543 A.2d 943, 945–949 [where affirmative vote of majority of city council was required to reverse, remand, or affirm decision of board of adjustment, and council heard matter de novo with burden of proof on applicant, tie vote resulted in denial of use variance].) In any event, without deciding whether a tie vote would have *denied* the conditional use permit, we conclude that it would not have affirmed the planning commission's decision in that respect.

25 Although the Council is supposed to announce its decision within 60 days after the public hearing, it is authorized to give notice to the parties that the decision will be announced at some later time. (Hermosa Beach Mun.Code, § 1412.) The municipal code does not impose any ultimate deadline where the Council gives notice that the decision will take more than 60 days.

26 In September 1992, five months after the Clarks' permits were denied, the City Council enacted an ordinance imposing a 30-foot height limitation in R-3 zones. (See fn. 9, *ante*.) The question thus arises as to whether the new height restriction applies to the Clarks' project. Significantly, the new limitation was formally proposed and adopted after the Council heard the appeal on the Clarks' permits. To allow the City to invoke the new height limitation now would sanction the Council's mishandling of the administrative appeal and would leave the Clarks without a remedy. Accordingly, the height ordinance in effect at the time of the Council's prior decision should apply to the future development of the Clarks' project, absent some state statute dictating otherwise. (See *Ross v. City of Yorba Linda* (1991) 1 Cal.App.4th 954, 968–970, 2 Cal.Rptr.2d 638; *Gabric v. City of Rancho Palos Verdes*, *supra*, 73 Cal.App.3d at pp. 202–203, 140 Cal.Rptr. 619; *Keizer v. Adams* (1970) 2 Cal.3d 976, 980–981, 88 Cal.Rptr. 183, 471 P.2d 983; see also Gov.Code, §§ 66474.2, 65961; *Golden State Homebuilding Associates v. City of Modesto* (1994) 26 Cal.App.4th 601, 606–610, 31 Cal.Rptr.2d 572.)

27 The trial court's resolution of the Clarks' civil rights claim followed a three-day bench trial. Accordingly, we apply the substantial evidence test to its findings of fact and independently review its conclusions of law. (See 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, §§ 278–286, pp. 289–298; *Masonite Corp. v. Superior Court* (1994) 25 Cal.App.4th 1045, 1050–1051, 31 Cal.Rptr.2d 173.)

28 As the Supreme Court has explained: “This Court has held that the Due Process Clause protects individuals against two types of government action. So-called ‘substantive due process’ prevents the government from engaging in conduct that ‘shocks the conscience,’ ... or interferes with rights ‘implicit in the concept of ordered liberty,’ ... When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner.... This requirement has traditionally been referred to as ‘procedural’ due process.” (*United States v. Salerno* (1987) 481 U.S. 739, 746, 107 S.Ct. 2095, 2101, 95 L.Ed.2d 697, citations omitted.)

29 This standard “appropriately balances the need for local autonomy in a matter of paramount local concern with recognition of constitutional protection at the very outer margins of municipal behavior. The standard represents a sensitive recognition that decisions on matters of local concern should ordinarily be made by those whom local residents select to represent them in municipal government—not by federal courts. It also recognizes that the Fourteenth Amendment’s Due Process Clause does not function as a general overseer of arbitrariness in state and local land-use decisions.” (*Gardner v. Baltimore Mayor & City Council*, *supra*, 969 F.2d at p. 69.)

30 A tentative parcel map is required “to insure that the costs of land divisions and the burdens thereof are borne by the property owners and those interested in the land and not by the general public.” (Hermosa Beach Mun.Code, § 29.5–1.)

31 Some of those factors, as listed in the municipal code, include the distance of the project from existing residential uses and the impact of the proposed use to the City’s infrastructure. (Hermosa Beach Mun.Code, § 1432(B).) Of importance, the last of these “general criteria” reads as follows: “Other considerations that, in the judgment of the planning commission, are necessary to assure compatibility with the surrounding uses, and the city as a whole.” (*Id.*, § 1432(B)(10).) This language grants the City substantial discretion in deciding whether, and under what conditions, to approve a development project.

32 We reject the Clarks' argument that the City's discretion is substantially restricted by the municipal code's criteria for denying a precise development plan. The code states that such a plan can be denied where “[t]he proposed development would substantially depreciate property values in the vicinity or interfere with the use or enjoyment of property in such area, because of excessive dissimilarity or inappropriateness of design in relation to the surrounding vicinity, and *there are no known conditions of approval which can be imposed that could resolve such problems*.” (Hermosa Beach Mun.Code, § 1432(C)(1), *italics added*.) If anything, this provision indicates that the City has substantial latitude in developing and imposing restrictions on a project in order to avoid denying an application altogether.

33 The city attorney's advice was limited to whether there was a conflict of interest based on (1) the proximity of Benz's residence to the Clarks' property and (2) Benz's opposition to the Clarks' 1989 project. No one raised the issue of Benz's personal animosity toward the Clarks (see fn. 12, *ante*), and the city attorney, apparently unaware of that basis for disqualification, did not address it. As far as we can tell, none of the other councilmembers knew about that issue either.

34 We agree with the City that the planning commission's interpretation of the lot coverage provision is not binding on the Council. To hold otherwise would defeat the purpose of allowing an appeal from the commission to the Council.

35 As stated, in addition to finding that the Clarks' due process rights were violated, the trial court also found that Councilmember Benz had violated the Political Reform Act and that the Council had violated the Brown Act and the Subdivision Map Act. Even if these state statutes were violated, such misconduct would add nothing to the Clarks' [section 1983](#) claim. "Only *federal* rights, privileges, or immunities are protected by the section. Violations of state law alone are insufficient." (*Ybarra v. Bastian* (9th Cir.1981) 647 F.2d 891, 892, cert. den. 454 U.S. 857, 102 S.Ct. 309, 70 L.Ed.2d 153, italics added; accord, *Ebmeier v. Stump* (8th Cir.1995) 70 F.3d 1012, 1013 & fn. 6; *Love v. Pepersack* (4th Cir.1995) 47 F.3d 120, 124, fn. 5, cert. den., 516 U.S. 813, 116 S.Ct. 64, 133 L.Ed.2d 27.)

\*\* See footnote \*, *ante*.

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**State of California**

**CIVIL CODE**

**Section 2934**

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2934. Any assignment of a mortgage and any assignment of the beneficial interest under a deed of trust may be recorded, and from the time the same is filed for record operates as constructive notice of the contents thereof to all persons; and any instrument by which any mortgage or deed of trust of, lien upon or interest in real property, (or by which any mortgage of, lien upon or interest in personal property a document evidencing or creating which is required or permitted by law to be recorded), is subordinated or waived as to priority may be recorded, and from the time the same is filed for record operates as constructive notice of the contents thereof, to all persons.

(Amended by Stats. 1935, Ch. 818.)

**State of California**

**CIVIL CODE**

**Section 1213**

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1213. Every conveyance of real property or an estate for years therein acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with the recorder for record is constructive notice of the contents thereof to subsequent purchasers and mortgagees; and a certified copy of such a recorded conveyance may be recorded in any other county and when so recorded the record thereof shall have the same force and effect as though it was of the original conveyance and where the original conveyance has been recorded in any county wherein the property therein mentioned is not situated a certified copy of the recorded conveyance may be recorded in the county where such property is situated with the same force and effect as if the original conveyance had been recorded in that county.

(Amended by Stats. 1989, Ch. 698, Sec. 1.)

**application must be received not later than August 21, 1998.**

**B. Federal Reserve Bank of San Francisco** (Maria Villanueva, Manager of Analytical Support, Consumer Regulation Group) 101 Market Street, San Francisco, California 94105-1579:

1. *Zions Bancorporation*, Salt Lake City, Utah; to merge with The Commerce Bancorporation, Seattle, Washington, and thereby indirectly acquire the Commerce Bank of Washington, N.A., Seattle, Washington.

Board of Governors of the Federal Reserve System, July 17, 1998.

**Robert deV. Frierson,**

*Associate Secretary of the Board.*

[FR Doc. 98-19607 Filed 7-22-98; 8:45 am]

BILLING CODE 6210-01-F

**FEDERAL RESERVE SYSTEM****Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities**

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than August 6, 1998.

**A. Federal Reserve Bank of St. Louis** (Randall C. Sumner, Vice President) 411 Locust Street, St. Louis, Missouri 63102-2034:

1. *Arvest Bank Group, Inc.*, Bentonville, Arkansas; and its wholly owned subsidiary First Bancshares, Inc., Bartlesville, Oklahoma to acquire State Bank & Trust, Tulsa, Oklahoma, and

thereby engage in the operation of a thrift through the conversion of an existing national bank, State Bank & Trust, N.A., Tulsa, Oklahoma, to a federally chartered savings bank, to be named State Bank & Trust, pursuant to § 225.28(b)(4)(ii) of Regulation Y.

Board of Governors of the Federal Reserve System, July 17, 1998.

**Robert deV. Frierson,**

*Associate Secretary of the Board.*

[FR Doc. 98-19605 Filed 7-22-98; 8:45 am]

BILLING CODE 6210-01-F

**FEDERAL TRADE COMMISSION**

[File No. 971-0110]

**South Lake Tahoe Lodging Association; Analysis To Aid Public Comment**

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed consent agreement.

**SUMMARY:** The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint that accompanies the consent agreement and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

**DATES:** Comments must be received on or before September 21, 1998.

**ADDRESSES:** Comments should be directed to: FTC/Office of the Secretary, Room 159, 6th St. and Pa. Ave., NW., Washington, DC 20580.

**FOR FURTHER INFORMATION CONTACT:** William Baer, FTC/H-374, Washington, DC 20580. (202) 326-2932.

**SUPPLEMENTARY INFORMATION:** Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and Section 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for July 20, 1998), on the World Wide Web, at "http://www.ftc.gov/os/actions97.htm." A

paper copy can be obtained from the FTC Public Reference Room, Room H-130, Sixth Street and Pennsylvania Avenue, NW., Washington, DC 20580, either in person or by calling (202) 326-3627. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with Section 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

**Analysis of Proposed Consent Order To Aid Public Comment**

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("Order") from South Lake Tahoe Lodging Association ("SLTLA" or "Proposed Respondent"). The proposed Order is designed to prevent the recurrence of anticompetitive practices engaged in by SLTLA and its members in connection with an effort by the Proposed Respondent and its members to eliminate or restrict the use of signs advertising the prices at which its members provided lodging services in the South Lake Tahoe, California, area.

The Agreement Containing Consent Order, if finally accepted by the Commission, would settle charges that Proposed Respondent's conduct violated Section 5 of the Federal Trade Commission Act by eliminating one form of competition between lodging establishments in the South Lake Tahoe area and by making it more difficult for consumers to get accurate information about the prices for lodging in that area. The proposed complaint, described below, relates the basis for this relief.

The proposed consent order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

**The Proposed Complaint**

According to the Commission's proposed complaint, SLTLA is a nonprofit corporation whose members are operators of lodging establishments in the South Lake Tahoe, California, area. SLTLA's associate members include operators of lodging establishments and related businesses in the South Lake Tahoe, California, area and the adjacent areas of Nevada. According to the proposed complaint, SLTLA's members and associate



members constitute approximately 70 percent of the available lodging in the South Lake Tahoe area. The Commission's complaint alleges that SLTLA and its members entered into an agreement to suspend the use of signs advertising prices for lodging. The evidence also shows that the primary purpose of the agreement was to increase the room rates charged for lodging in the South Lake Tahoe area of Northern California and Nevada and to end what members saw as a "destructive" price war on motel rooms in the South Lake Tahoe area by eliminating the posting of signs advertising the prices at which its individual members offer such lodging.

According to the proposed complaint, the effects of the agreement are that price competition among providers of lodging in the South Lake Tahoe area has been reduced, and consumers have been deprived of the benefits of readily available information about the price for lodging.

#### The Proposed Order

The proposed Order contains provisions designed to remedy the violations charged and to prevent the respondent from engaging in similar acts and practices in the future. Part II of the proposed order would prohibit SLTLA from carrying out, participating in, inducing, suggesting, urging, encouraging, or assisting any agreement, combination or conspiracy with its members, or agreement, combination or conspiracy with some of its members, to restrict the posting of signs advertising the prices at which its individual members offer lodging. Part II would not bar SLTLA from exercising rights protected under the First Amendment to the United States Constitution to petition any federal, state or local government executive agency or legislative body concerning legislation, rules, programs, or procedures, or to participate in any federal, state or local administrative or judicial proceeding.

The proposed order also requires the respondent to amend its corporate by-laws to incorporate by reference Paragraph II of this Order; to distribute a copy of the amended by-laws to each of its members; to provide a copy of the consent agreement and complaint to all of its current members and to any new members for a period of five (5) years; and to file one or more reports detailing compliance with the order.

The purpose of this analysis is to invite public comment on the proposed order. This analysis is not intended to constitute an official interpretation of the agreement and proposed order or to modify their terms in any way.

By direction of the Commission.

**Donald S. Clark,**

*Secretary.*

[FR Doc. 98-19678 Filed 7-22-98; 8:45 am]

BILLING CODE 6750-01-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Agency for Health Care Policy and Research

#### Special Emphasis Panel Meeting

In accordance with section 10(a) of the Federal Advisory Committee Act (5 U.S.C., Appendix 2) announcement is made of the following special emphasis panel scheduled to meet during the month of August 1998:

*Name:* Health Care Policy and Research Special Emphasis Panel.

*Date and Time:* August 3-4, 1998, 8:00 a.m.

*Place:* Doubletree Hotel, 1750 Rockville Pike, Room TBA, Rockville, Maryland 20852.

Open August 3, 1998, 8:00 a.m. to 8:15 a.m. Closed for remainder of meeting.

*Purpose:* This Panel is charged with conducting the initial review of grant applications requesting dissertation support for health care research undertaken as part of an academic program to qualify for a doctorate. Also individual post-doctoral fellowship applications will be reviewed.

*Agenda:* The open session of the meeting on August 3, from 8:00 a.m. to 8:15 a.m. will be devoted to a business meeting covering administrative matters. During the closed session, the panel will be reviewing and discussing grant applications. In accordance with the Federal Advisory Committee Act, section 10(d) of 5 U.S.C., Appendix 2 and 5 U.S.C., 552b(c)(6), the Administrator, AHCPR, has made a formal determination that this latter session will be closed because the discussions are likely to reveal personal information concerning individuals associated with the grant applications. This information is exempt from mandatory disclosure.

Anyone wishing to obtain a roster of members or other relevant information should contact Jenny Griffith, Committee Management Officer, Agency for Health Care Policy and Research, Suite 400, 2101 East Jefferson Street, Rockville, Maryland 20852, Telephone (301) 594-1455 x 1036.

Agenda items for this meeting are subject to change as priorities dictate.

Dated: July 16, 1998.

**John M. Eisenberg,**

*Administrator.*

[FR Doc. 98-19553 Filed 7-22-98; 8:45 am]

BILLING CODE 4160-90-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Agency for Health Care Policy and Research

#### Special Emphasis Panel Meeting

In accordance with section 10(a) of the Federal Advisory Committee Act (5 U.S.C., Appendix 2), announcement is made of the following special emphasis panel scheduled to meet during the month of August 1998:

*Name:* Health Care Policy and Research Special Emphasis Panel.

*Date and Time:* August 6, 1998, 2:00 p.m.

*Place:* Agency for Health Care Policy and Research, 2101 E. Jefferson Street, Suite 400, Rockville, MD 20852.

Open August 6, 1998, 2:00 p.m. to 2:15 p.m. Closed for remainder of meeting.

*Purpose:* To review and evaluate grant applications.

*Agenda:* The open session of the meeting on August 6, from 2:00 p.m. to 2:15 p.m., will be devoted to a business meeting covering administrative matters. During the closed session, the panel will be reviewing and discussing grant applications. In accordance with the Federal Advisory Committee Act, section 10(d) of 5 U.S.C., Appendix 2 and 5 U.S.C., 552b(c)(6), the Administrator, AHCPR, has made a formal determination that this latter session will be closed because the discussions are likely to reveal personal information concerning individuals associated with the grant applications. This information is exempt from mandatory disclosure.

Any wishing to obtain a roster of members or other relevant information should contact Jenny Griffith, Committee Management Officer, Office of Research Review, Education, and Policy, Agency for Health Care Policy and Research, Suite 400, 2101 East Jefferson Street, Rockville, Maryland 20852, Telephone (301) 594-1455, x1036.

Agenda items for this meeting are subject to change as priorities dictate.

Dated: July 16, 1998.

**John M. Eisenberg,**

*Administrator.*

[FR Doc. 98-19554 Filed 7-22-98; 8:45 am]

BILLING CODE 4160-90-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

#### [Program Announcement 98101]

### Expanded Use of Rapid HIV Testing, and Barriers to HIV Testing; Notice of Availability of Funds

#### A. Purpose

The Centers for Disease Control and Prevention (CDC) announces the availability of fiscal Year (FY) 1998



Office of the Assessor

## Historical Property Information

Parcel Number: 025-206-06-100

Property Address: 1481 WALKUP RD

Assessor's information is for assessment and tax purposes only and should not be relied upon for status of development or building purposes.

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### Property Description:

Primary Use\*\*: 11, IMPROVED SINGLE FAMILY RESIDENTIAL TO 2.5 AC.

Subdivision Tract Number: 270

Subdivision Tract Name: WALK-UP WOODS SUBDIVISION

APN Status: 00, Active

Reference: L 15

Tax Rate Area: 002-002

School District:

Last Appraisal Effective Date: 6/8/1990

Last Appraisal Reason: CHG PORTION OF OWNERSHIP

Tax Exemptions: Homeowner Exemption: \$7,000 - Filed: 1991

MPR Card: 025-206-06

\*\*The USE is only reviewed at the time of the last taxable event, and may not be a legal use

### Associated Maps for: 025-206-06-100

Most Recent Plat: [Assessor's Plat 025-20](#)

Historical Plat: [Historical Plat 025-20](#)

Subdivision Maps: Walk Up Woods: C-104

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### 2020 - 2021 Taxable Property Values for: 025-206-06-100

Property	Value
Land	\$32,321
<b>Land Total</b>	<b>\$32,321</b>
Improvement Structures	\$239,128
<b>Improvement Total</b>	<b>\$239,128</b>
<b>Personal property Total</b>	<b>\$0</b>
<b>Total Roll</b>	<b>\$271,449</b>

Homeowner Exemption	\$7,000
(Exemptions Total)	\$7,000
Net Roll	\$264,449

Event List for: 025-206-06-100

Roll	Event Date	Bill Status	Event Status	Seq #	Event Type	Stmt. Status	ID	Tax Bill #	Value
2018	1/1/2018	Active	Annual Roll	1	Roll	Pending			\$271,449
2017	1/1/2017	Active	Annual Roll	1	Roll	Paid		012087	\$266,128
2016	1/1/2016	Active	Annual Roll	1	Roll	Paid		012095	\$260,911
2015	1/1/2015	Active	Annual Roll	1	Roll	Paid		012099	\$256,994
2014	1/1/2014	Active	Annual Roll	1	Roll	1st_Paid		012134	\$251,961
2013	1/1/2013	Active	Annual Roll	1	Roll	Paid		012129	\$250,824
2012	1/1/2012	Active	Annual Roll	1	Roll	Paid		012129	\$245,907
2011	1/1/2011	Active	Annual Roll	1	Roll	Paid		012139	\$241,086
2010	1/1/2010	Active	Annual Roll	1	Roll	Paid		012143	\$239,287
2009	1/1/2009	Active	Annual Roll	1	Roll	Paid		012141	\$239,857
2008	1/1/2008	Active	Annual Roll	1	Roll	1st_Paid		012131	\$235,154
2007	1/1/2007	Active	Annual Roll	1	Roll	Paid		012128	\$230,544
2006	1/1/2006	Active	Annual Roll	1	Roll	Paid		012007	\$226,024
2005	1/1/2005	Active	Annual Roll	1	Roll	Paid		012002	\$221,593
2004	1/1/2004	Active	Annual Roll	1	Roll	Paid		011996	\$217,249
2003	1/1/2003	Active	Annual Roll	1	Roll	Paid		011992	\$213,269
2002	1/1/2002	Active	Annual Roll	1	Roll	Paid		011987	\$209,088
2001	1/1/2001	Active	Annual Roll	1	Roll	Paid		011992	\$204,989
2000	1/1/2000	Active	Annual Roll	1	Roll	Paid		012003	\$200,971
1999	1/1/1999	Active	Annual Roll	1	Roll	Paid		011969	\$197,031

1998	5/11/1998	Inactive Suppl	Not to be billed	1	Change in Ownership		<a href="#">0025429</a>		
1998	1/1/1998	Active	Annual Roll	1	Roll	Paid		011980	\$193,448
1997	5/11/1998	Inactive Suppl	Not to be billed	1	Change in Ownership		<a href="#">0025429</a>		
1997	1/1/1997	Active	Annual Roll	1	Roll	Paid		011988	\$189,656
1996	3/1/1996	Active	Annual Roll	1	Roll	Paid		011996	\$185,939
1995	3/1/1995	Active	Annual Roll	1	Roll	Paid		012018	\$183,899
1994	3/1/1994	Active	Annual Roll	1	Roll	Not_Avl			\$181,739
1993	3/1/1993	Active	Annual Roll	1	Roll	Not_Avl			\$178,176
1992	3/1/1992	Active	Annual Roll	1	Roll	Not_Avl			\$174,683
1991	3/1/1991	Active	Annual Roll	1	Roll	Not_Avl			\$171,258
1990	6/8/1990	Active Suppl	Billed	1	Change in Ownership	Not_Avl	<a href="#">3366591</a>	304371S	\$167,900
1990	3/1/1990	Active	Annual Roll	1	Roll	Pending			\$95,408
1989	6/8/1990	Active Suppl	Billed	1	Change in Ownership	Not_Avl	<a href="#">3366591</a>		\$167,900
1989	3/1/1989	Active	Annual Roll	1	Roll	Pending			\$93,539
1988	3/1/1988	Active	Annual Roll	1	Roll	Pending			\$91,706

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Property Characteristics for: **025-206-06-100**

Property Characteristic	Description
Square Foot Range	10,001 - 25,000 sqft
Topography	Level
Irregular Lot	Y
Ground Cover	Spaced Pine Trees
Water Source	Public Water Service
Sewer Service	Y
Natural Gas Service	Y
Access Type	County or City Road
Road Type	Asphalt
Architectural Attractiveness	Average

Building Type	Modern
Building Shape	More Complex - 6 Corners
Construction Type	Wood Frame
Construction Quality	7.5/10
Percent Good	99%
Year Built	1965
Effective Year Built	1968
Approximate Area of Improvements	2484 sqft
Total Units	1
Stories	1.5
First Floor Square Feet	1451 sqft
Bedrooms	4
Bathrooms	3.0
Bathrooms on First Floor	3.0
Total Rooms	7
Fireplace and Wood Stove Count	3
Building Design	Single Family Residence
Functional Plan	Average
Building Use	Single Family Residence
Proper Building Use	Yes
Workmanship	Above Average
Building Condition	Average
Garages	1
Garage Converted To Living Area	No
Garage Shape	Attached
Garage Area	528 sqft
Garage Stalls	2
Book Category Number	2025
Air Conditioner	No
Conformity Code	Average
Corner Parcel	Y
Cost Table Year	0774

Current Record Flag	Yes
Replacement Cost Less Depreciation	0
Miscellaneous Cost	13780

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Parcel Split Background for: 025-206-06-100

This Parcel Has No Split Background Records.

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Related Accounts for: 025-206-06-100

Account Number	Property Type	Status
<a href="#">2-003-899-0030</a>	Boat	Active, Non-Billable

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Owner Change History for: 025-206-06-100



**Recorded Document: 1998-0025429**

Record Change Date: 5/11/1998

Effective Owner Change Date: 5/11/1998

Preliminary Change of Ownership: **1998-0025429**

**Recorded Document: 1990-3366591**

Record Change Date: 6/8/1990

Effective Owner Change Date: 6/8/1990

Proposition 13 Appraisal: Yes

Value Change: 100%

Document Transfer Tax: \$184.80

Preliminary Change of Ownership: **1990-3366591**

**Recorded Document:**

Recorder's Book and Page: 1489-349

Record Change Date: 4/14/1977

Effective Owner Change Date: 4/14/1977

Preliminary Change of Ownership: **1-1489349**

**Recorded Document:**

Recorder's Book and Page: 1002-329

Record Change Date: 8/12/1970

Effective Owner Change Date: 8/12/1970

Preliminary Change of Ownership: **1-1002329**

**Recorded Document:**

Recorder's Book and Page: 0935-389

Record Change Date: 6/11/1969

Effective Owner Change Date: 6/11/1969

Preliminary Change of Ownership: **1-0935389**

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Assessor Parcel Number 02520606100

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1998-0025429 • • GRANT DEED

Recording Date  
**05/11/1998 01:39 PM**

Grantor (3)  
**DAVIS THOMAS H**  
**DAVIS MARY G**  
**DAVIS MARY GAIL**

Grantee (2)  
**DAVIS THOMAS H**  
**DAVIS MARY G**

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