



## When an Elected Official Feels Passionately About An Issue: Fair Process Requirements in Adjudicative Decision-Making

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### QUESTION

*I am extremely upset. When I ran for office, one of my campaign promises was to do whatever I could to get adult entertainment establishments shut down in our area.*

*I have been an outspoken critic of the negative effects these businesses have on neighborhoods and I'm involved in national groups that conduct research to help local officials keep such establishments out of their communities.*

*When I receive information from such groups, I pass it along to my fellow elected officials. I have also encouraged my colleagues to check out the kind of activity that occurs around adult entertainment businesses by driving past existing establishments.*

*A permit for a new adult entertainment business is coming before us. Knowing of my interest in this area, the local newspaper interviewed me about the upcoming meeting, and I indicated I would never vote to issue the permit. Our agency counsel is now advising me that I cannot participate. She also learned about my efforts to bring my colleagues up to speed on these issues and has advised me to stop this immediately.*

*I can't believe this. Is there really a problem here?*

### ANSWER

There certainly could be. Your agency counsel is concerned that, if you were to participate in the hearing, the decision could be successfully challenged because of a perception that you would not be a fair decision-maker. She may also be concerned about decision-makers receiving what is called "*ex parte*" information outside the scope of the public hearing and potential open meetings law violations. Let's take a look at the law in this area.

## The Multiple Roles of Local Agency Decision-Makers Legislative Acts

Local elected officials are frequently asked to perform multiple functions. Sometimes they are asked to serve as legislative bodies when they enact policies that apply to everyone in the community (or at least a significant segment).

An example of a legislative act would be adopting an ordinance that regulates all sexually oriented businesses in a community. Certain baseline fair process requirements apply, of course. However, the standards that decision-makers need to be concerned about tend to emphasize the effects of the ordinance rather than the process by which it was adopted. For example, with adult business ordinances, the courts will usually look at whether the ordinance impermissibly treads on constitutional protections for free expression.

Of course, every governmental action is subject to certain minimum fair and open process requirements. There are certain procedural requirements for how ordinances are adopted.<sup>1</sup> Another source of procedural requirements is in the Brown Act and relates to open and public decision-making.<sup>2</sup>

Your agency's attorney may be concerned that by circulating materials to your colleagues outside a meeting, you are trying to develop a collective concurrence on the adult entertainment issue outside an open and publicized meeting. In advising you to discontinue this practice, your agency counsel is trying to protect any decision your agency makes from being subject to a Brown Act challenge.

## Adjudicative Acts

Sometimes local officials are asked to play more of a judge-like role (also referred to as an "adjudicative" or "quasi-judicial" role). This occurs when officials determine how already-adopted policies apply in a given situation. Examples include applications for permits like the one coming before your decision-making body. Presumably you will be determining whether the permit application complies with your agency's requirements.

When agency officials act in an adjudicative capacity, people such as the permit applicant have certain rights to fair processes.<sup>3</sup> These fair hearing requirements may not always rise to the level of constitutional protections related to due process,<sup>4</sup> but violating them can nonetheless invalidate the decision under state law fair hearing requirements.

This white paper is a service of the Institute for Local Government (ILG), whose mission is to promote good government at the local level. For more information and to access ILG's resources on public service ethics, visit [www.ca-ilg.org/trust](http://www.ca-ilg.org/trust).

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What is the policy rationale for this? One of the traditions of American democracy is to balance notions of majority rule with individual rights. Fair process protections are not intended to dictate the outcome of a decision-making process. They are, however, intended to ensure that decision-makers fairly apply policies to individual situations and base their decisions on a fair interpretation of the facts. Fairness is a key ethical value.

In the local agency context, the fair hearing requirements are not as strict as those used in a court.<sup>5</sup> They do, however, constrain decision-makers' activities in significant ways.

## Fair Process Concerns

When decision-makers are making adjudicative decisions, fairness requires that the hearing occur before a reasonably impartial, noninvolved decision-maker.<sup>6</sup> This is because of the important role such hearings play in determining the specific rights and responsibilities of individuals and businesses.<sup>7</sup>

What this means is that decision-makers cannot be biased<sup>8</sup> and courts will examine an agency's procedures to ensure that the process has been fundamentally fair.

What kinds of issues can be a problem? Decision-makers cannot:

- Have a personal interest in the decision's outcome;
- Be strongly biased against or in favor of one set of parties in the proceeding;
- Have undisclosed or unalterable notions relating to the facts relevant to the decision; or
- Be potentially unfairly influenced by staff who may play both an advocacy and advisory role before the agency.

There also can be issues related to the demeanor of decision-makers at the hearing.

When the issue is one of decision-maker bias, rest assured that someone wanting to challenge a decision because of such bias must produce concrete facts showing bias or an impermissible probability of bias.<sup>9</sup> In fact, courts generally ask whether there is an unacceptable probability that decision-makers who have power over their claims are actually biased.<sup>10</sup>

As an official who wants to participate in the decision and have the decision upheld, you need to avoid actions that would cause someone to question whether there's an "unacceptable probability" that you cannot be fair. Your announcement of how you intend to vote, before you heard the information presented at the public hearing, is a problem in this regard.

## Personal Interest in a Decision's Outcome

Having a financial interest in a decision, of course, creates an impermissible financial interest under the state's political reform laws, which usually require that you not participate in any way in a decision.<sup>11</sup> However, decision-makers should also consult with their agency counsel when they would be personally affected by a decision in other ways.

For example, an appellate court found that an elected official should not have participated in a decision on a permit application when there was evidence that the reason for his opposition to the project was that the project would block his apartment's ocean view.<sup>12</sup>

The elected official was a month-to-month tenant, so he did not have a disqualifying financial interest in property under the state's financial conflict-of-interest laws. The court nonetheless set aside the denial of the permit on the theory that there was evidence that the elected official could not be fair in applying the agency's standards to the application because of the project's effect on his residence.

Sometimes bias results from processes a local agency uses, not anything specific to an individual decision-maker. This issue arose in a county's effort to revoke a massage parlor's permit for impermissible activities. The operator challenged the fairness of the hearing before paid administrative hearing officers.<sup>13</sup> The court found that the county's practice of selecting and paying such hearing officers on an ad hoc basis created an impermissible prospect of bias in the hearing officer. Because the officers' income from future adjudicative work depended entirely on the government's goodwill, the court found that there was an objective risk that the officers would be tempted to favor the county's position.

## Party Bias

A strong animosity about a permit applicant based on conduct that occurred outside the hearing can be the basis of a claim of impermissible bias. Conversely, a strong personal loyalty toward a party could bias an official as well.<sup>14</sup>

A variation on this theme occurred in a case involving the dismissal of a police chief by the city council. The chief's position was civil-service protected, which meant that certain procedural protections applied. The court concluded that certain members of the city council could not serve as fair adjudicators of whether the chief's dismissal was warranted.

The court noted that the council members became "personally embroiled" in the controversy when the civil service commission determined that most of the charges made by city council members were unfounded. The court noted that this situation naturally created a situation in which the council members would seek vindication of their position.<sup>15</sup> This created an actual probability of bias that disqualified the council as a decision-maker on the issue of the chief's tenure with the city.

So far, the courts have rejected claims that receiving campaign contributions create an impermissible form of bias in favor of a party, but they have not ruled out the possibility.<sup>16</sup> This is a situation where it is wise to remember that the law creates a floor for ethical conduct, not a ceiling. When a major campaign contributor or very close friend comes before your decision-making body, a good question to ask yourself is whether a reasonable person in the community would question your ability to be fair. This gets to the issue of the public's trust in your leadership and integrity, above and beyond the minimum requirements of the law.

## **Factual Bias and *Ex Parte* Communications Issues**

Often the role of an adjudicative decision-maker involves determining certain facts and whether those facts meet standards set by law or local policy. Therefore, the process by which decision-makers reach factual conclusions is an important part of the fairness of any process.

A fair process issue can arise when decision-makers receive information outside the public hearing. For example, such an issue arose when members of a civil service board received evidence outside the administrative hearing and also had conversations with the independent medical examiners and employee's physician outside the hearing.

Attorneys often refer to such information as "*ex parte*" because it occurs outside the hearing and typically from one side only ("from one side only" is a loose translation of the Latin term *ex parte*). The court found that receiving information outside the hearing was unfair, because the decision-makers based their decision upon information that not all parties were aware of and therefore had no opportunity to challenge.<sup>17</sup>

Similarly, assertions related to facts should be made by those who are at the hearing, so the underpinnings of such assertions can be explored (a variation on prohibiting "hearsay" evidence).<sup>18</sup> When an official receives information outside the hearing, this kind of information testing is less likely to occur. If a decision is based on this kind of information, the decision is more vulnerable to legal challenge on fair hearing grounds.

This issue of factual bias is why providing information to your colleagues about adult businesses and encouraging them to perform their own investigations by doing site visits can create fair process issues. Many agency counsel will advise decision-makers to disclose any information they have received that may be relevant to their decision on the record at the hearing, so all parties have the opportunity to respond to that information.

Evidence that one has prejudged the facts of a situation can also be a problem, which may be why your agency counsel is concerned about the statement you made to the newspaper.

In another case, a court concluded that a planning commissioner had pre-judged an issue when the applicant presented evidence that the commissioner ghostwrote an article that

was critical of a project in a neighborhood newsletter.<sup>19</sup> According to the court, this action indicated that the commissioner could not reasonably be an impartial, noninvolved decision-maker. As a result, the court invalidated the planning commission's decision disapproving the project.

While it is inadvisable to make statements about how you will decide an adjudicative matter once in office, there may be an exception for statements made during a campaign.<sup>20</sup> Thus the fact that you made campaign promises may not, in and of itself, disqualify you from participating in the hearing.

This means you want to avoid any statements that would suggest that you cannot be a fair decision-maker, however. Another way to frame your concerns to the newspaper or your constituents is something along the lines of, "As you know, I am concerned about the impacts of adult businesses in our community. However, as required by the law, I look at every situation presented on a case-by-case basis, waiting to see all of the facts before I cast my vote." And you should in fact do so.

## **The "Dual Role" Fair Process Issue**

In some situations, the roles staff play in an adjudicatory proceeding can create fair process issues. The general principle is that agency staff who are on the "prosecutorial" side of an adjudicatory matter must be separated from decision makers and their advisers on the decision making side, so courts will not perceive staff as improperly influencing decision makers.

For example, in one case an adult entertainment business applied to the city for renewal of its regulatory permit. The court concluded the business owner's fair hearing rights were violated because the same assistant city attorney who made the initial decision to deny the renewal application subsequently acted as a legal adviser to the hearing officer reviewing that denial on an administrative appeal of the initial ruling.<sup>21</sup>

Another case involved a personnel action. An employee appealed his termination before a city personnel board; the board upheld the termination. An appellate court concluded that the employee's rights were violated because the deputy city attorney, who represented the city before the personnel board, had also acted as counsel for the personnel board on other occasions. Although there was no evidence the attorney acted in a dual role in this case (in other words, the attorney did not act as both prosecutor for the city and legal adviser for the personnel board on the particular termination matter), the attorney's ongoing relationship with the personnel board "[gave] the appearance of bias and unfairness and suggest[ed] the probability of his influence on the [b]oard."<sup>22</sup>

The California Supreme Court has since made it clear that "appearance of bias" is not the standard for judging the issue. Unless they have a financial interest in the outcome, decision-makers are presumed to be impartial.<sup>23</sup> However, this presumption of

impartiality can be overcome by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias.<sup>24</sup>

An agency does not have to have separate divisions dedicated to prosecutorial and advisory functions to avoid an unacceptable risk of bias; staff may play both advisory and prosecutorial roles in unrelated matters over time. Prosecutorial and advisory staff on the same matter, however, are well advised not to communicate with one another.

The League of California Cities' City Attorneys Department offers a number of papers that provide agency counsel analyses and advice on these issues. This in turn helps agency counsel provide advice that helps agencies avoid missteps in this area. These papers are available through the League.

## Other Fair Process Concerns

Another fair process issue that arose in one jurisdiction is whether decision-makers were truly paying attention at the hearing.<sup>25</sup> As the appellate court noted, a fundamental principle of due process is "he who decides must hear."<sup>26</sup> It also implicates ethical values relating to respect, even when one disagrees with a position being advocated.

The case involved an appeal of a zoning administrator's decision to loosen certain restrictions imposed on adult business operators. The adult business videotaped the hearing, which showed decision-makers talking with each other, talking on cell phones and otherwise not paying attention to either side that was speaking. The court concluded that the inattentiveness of decision-makers during the hearing prevented them from satisfying fair process principles and overturned the decision.<sup>27</sup>

Although this decision cannot be used as precedent in other cases, the appellate court's negative reaction suggests that inattentiveness is both a poor decision-making and legal strategy. Certainly a permit applicant who feels disrespectfully treated is more likely to challenge a decision.

### **The Difference Between Legislative and Adjudicative Decision-Making**

When an elected official acts in a *legislative* capacity, his or her decision-making is less constrained. For example, when one acts in a legislative capacity, one can review information submitted by interested parties and conduct one's own investigation;<sup>28</sup> investigating and determining facts as a basis for legislation is acceptable.<sup>29</sup> Also, courts generally won't inquire into what evidence was or was not examined or relied on by an elected official in reaching his or her decision.<sup>30</sup>

## Conclusion

What is a person who is passionate about an issue to do? Making sure that your agency's policies (adopted legislatively) reflect your and your colleagues' views on what best serves the community's interests is an important first step -- even before one is placed in the adjudicative role of determining how these policies apply in a given situation. If these standards are up to date, it should be possible for you to fairly apply them to the facts before you and reach a result that you feel good about.

Of course, such policies are subject to the constraints of constitutional protections and other state and federal law requirements. These constraints can keep your policies from going as far as you would like. The reality is that any decision that violates someone's legally protected rights won't get you very far.

As a decision-maker, however, you need to decide what is more important to you: being able to sound off on issues you care about or being able to participate in adjudicative decisions that involve those issues. If you want to participate in making these decisions, Shakespeare may have it right: Discretion can indeed be the better part of valor.

Reserving judgment until the hearing, fairly evaluating the information presented at the hearing and then making an honest determination whether certain standards have or have not been met is truly the best approach -- both legally and ethically.

### About This Resource

This document is a service of the Institute for Local Government (ILG) whose mission is to promote good government at the local level with practical, impartial, and easy-to-use resources for California communities.

ILG is the nonprofit 501(c)(3) research and education affiliate of the League of California Cities and the California State Association of Counties.

As part of its mission of promoting good government at the local level, the Institute tries to help local officials understand the rules relating to promoting public trust and confidence in local agency-decision-making. For more information and to access the Institute's resources on these kinds of issues, go to <http://www.ca-ilg.org/trust>.

These informational materials, however, are not legal advice. Attorneys can and do disagree on how to interpret the rules in this area. In addition, the rules can and do change over time.

Officials are encouraged to consult with an attorney or relevant regulatory authorities for up-to-date information and advice on specific situations.



## References and Resources

- <sup>1</sup> See Cal. Gov't Code §§ 25121 (county ordinance adoption procedures), 36932 and following (city ordinance adoption procedures).
- <sup>2</sup> See Cal. Gov't Code § 54950 and following. See also "The ABCs of Open Government Laws" published by the Institute for Local Government and available at [www.ca-ilg.org/abc](http://www.ca-ilg.org/abc).
- <sup>3</sup> Cal. Gov't Code § 1094.5. See also *Nasha L.L.C. v. City of Los Angeles*, 125 Cal. App. 4th 470, 482, 22 Cal. Rptr. 3d 772, 780 (2d Dist. 2004).
- <sup>4</sup> *Breakzone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205, 1223-24, 97 Cal. Rptr. 2d 467, 483 (2000) ("While Code of Civil Procedure section 1094.5 mandates that an applicant for a CUP receive a fair hearing (*Applebaum v. Board of Directors* (1980) 104 Cal. App. 3d 648, 657-658, 163 Cal. Rptr. 831), it does not automatically follow that the federal due process clause is always implicated.")
- <sup>5</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 334-35, 96 S. Ct. 893, 902-03 (1976) (observing that due process is flexible and calls for such procedural protections as a particular situation demands). See also *Binkley v. City of Long Beach*, 16 Cal. App. 4th 1795, 1807, 20 Cal. Rptr. 2d 903, 909-10 (1993).
- <sup>6</sup> *Gai v. City of Selma*, 68 Cal. App. 4th 213, 219 -20, 79 Cal. Rptr. 2d 910, 913 (1998), cited in *Nasha*, 125 Cal. App. 4th at 483, 22 Cal. Rptr. 3d at 780.
- <sup>7</sup> *Nightlife Partners, Ltd. v. City of Beverly Hills*, 108 Cal. App. 4th 81, 90, 133 Cal. Rptr. 2d 234, 242 (2003).
- <sup>8</sup> *Breakzone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205, 1234 n. 23, 97 Cal. Rptr. 2d 467, 490 n. 23 (2000).
- <sup>9</sup> *Breakzone*, 81 Cal. App. 4th at 1237, 97 Cal. Rptr. 2d 467 (noting that bias and prejudice are never implied and must be established by clear averments)
- <sup>10</sup> *Breakzone*, 81 Cal. App. 4th at 1236, 97 Cal. Rptr. 2d at 492.
- <sup>11</sup> See Cal. Gov't Code § 87100 and following.
- <sup>12</sup> See *Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152, 1172-73, 56 Cal. Rptr. 2d 223 (2d Dist. 1996) (finding common law bias).
- <sup>13</sup> *Haas v. County of San Bernardino*, 27 Cal. 4th 1017, 119 Cal. Rptr. 2d 341 (2002).
- <sup>14</sup> See *Breakzone*, 81 Cal. App. 4th at 1234 n.23, 97 Cal. Rptr. 2d at 490 n. 23.
- <sup>15</sup> *Mennig v. City Council*, 86 Cal. App. 3d 341, 351, 150 Cal. Rptr. 207, 213 (1978).
- <sup>16</sup> See *Woodland Hills Residents Assn., Inc. v. City Council*, 26 Cal. 3d 938, 944-946, 164 Cal. Rptr. 255, 255 (1980) (rejecting a contention that the fair hearing mandate of Code of Civil Procedure section 1094.5 means that city council members who receive campaign contributions from parties having a financial interest in a matter before a city council are disqualified in perpetuity from considering and voting on a matter affecting a campaign contributor). See also *Breakzone*, 81 Cal. App. 4th at 1226-29, 97 Cal. Rptr. 2d at 484-87 (finding that campaign contributions received from landlord of party seeking permit modification more than 12 months prior to hearing did not deprive applicant of fair hearing).
- <sup>17</sup> *English v. City of Long Beach*, 35 Cal. 2d 155, 157, 217 P. 2d 22, 24 (1950) (adjudicative body's acting on information of which parties were not apprised and which they had no opportunity to controvert amounts to a denial of a hearing).
- <sup>18</sup> *Desert Turf Club v. Board of Sup'rs of Riverside County*, 141 Cal. App. 2d 446, 455 296 P. 2d 882, 887-8 (1956).
- <sup>19</sup> *Nasha*, 125 Cal. App. 4th at 483-84, 22 Cal. Rptr. 3d at 780-81.
- <sup>20</sup> *City of Fairfield v. Superior Court*, 14 Cal.3d 768, 537 P.2d 375, 382-83, 122 Cal. Rptr. 543, 549-551 (1975) (noting that it would be contrary to democratic principles to disqualify those who made pre-election statements).
- <sup>21</sup> *Nightlife Partners, Ltd. v. City of Beverly Hills*, 108 Cal. App. 4th 81, 97-98, 133 Cal. Rptr. 2d 234, 248 (2003).
- <sup>22</sup> *Quintero v City of Santa Ana*, 114 Cal. App. 4th 810, 814, 7 Cal. Rptr. 3d 896, 899 (2003).
- <sup>23</sup> *Morongo Band of Mission Indians v. State Water Quality Resources Board*, 45 Cal. 4th 731,737, 88 Cal. Rptr. 3d 610, 614-15 (2009).
- <sup>24</sup> *Morongo*, 731 Cal. 4<sup>th</sup> at 737, 88 Cal. Rptr. at 615.

<sup>25</sup> *Lacy Street Hospitality Service, Inc. v. City of Los Angeles*, 125 Cal. App. 4th 526, 22 Cal. Rptr. 3d 805 (2 Dist. 2004), *decertified from publication* June 15, 2005.

<sup>26</sup> *Vollstedt v. City of Stockton*, 220 Cal. App. 3d 265, 276, 269 Cal. Rptr. 404 (1990).

<sup>27</sup> *Lacy*, citing *Haas v. County of San Bernardino*, 27 Cal. 4th 1017, 1024, 119 Cal. Rptr. 2d 341 (2002) ("due process requires fair adjudicators in administrative tribunals"); *Henderling v. Carleson*, 36 Cal. App. 3d 561, 566, 111 Cal. Rptr. 612 (1974) (takes as a given that administrative decision-maker listens at hearing), *disapproved on another point by Frink v. Prod*, 31 Cal. 3d 166, 180, 181 Cal. Rptr. 893 (1982); *Chalfin v. Chalfin*, 121 Cal. App. 2d 229, 233, 263 P.2d 16 (1953) (fact finder must listen to the evidence before making a decision).

<sup>28</sup> *See, e.g., Siller v. Board of Supervisors*, 58 Cal. 2d 479, 484, 25 Cal. Rptr. 73, 76 (1962) (supervisor may view project site and rely on personal knowledge in voting on project application).

<sup>29</sup> *City Council of the City of Santa Barbara v. Superior Court*, 179 Cal. App.2d 389, 393, 3 Cal. Rptr. 796, 798-99 (2d Dist. 1960).

<sup>30</sup> *Southern Cal. Underground Contractors, Inc. v. City of San Diego*, 108 Cal. App. 4th 533, 548, 133 Cal. Rptr. 2d 527, 538-39 (4th Dist. 2003).

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