

Project Denial Invalidated Where Councilmember's Actions Crossed the Line Into Advocacy Against the Project

The Court of Appeal held that where a city councilmember's actions evinced bias toward the project, the applicant did not receive a fair hearing and the City Council's denial of a conditional use permit would be set aside. *Petrovich Development Co. v. City of Sacramento*, No. C087282 (3rd Dist., May 8, 2020).



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The appellate

court agreed. The court observed that city councilmembers wear "multiple hats," sometimes serving as local legislators, but also occasionally acting in a quasi-adjudicatory capacity similar to judges, as in the case of a hearing on a conditional use permit. In making such a decision, councilmembers must be "neutral and unbiased." Bias and prejudice cannot be inferred from mere appearance (such as likelihood that a vote was influenced by personal interests), but must be proven with "concrete facts." Applying these principles, the court concluded that the councilmember's residence in the same neighborhood as the project or membership in the area homeowner's association (which actively opposed the project) did not establish bias. Nor did the councilmember's prehearing public comments that a gas station "did not fit" in the shopping center amount to unacceptable bias, since a councilmember "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." But the councilmember's actions went beyond legitimate representation and "crossed the line into advocacy against the project." There was evidence the councilmember

was actively lining up votes of other councilmembers against the project, as well as advising the president of the HOA on how to lobby the council. The councilmember prepared and sent to project opponents "talking points" whose "only conceivable purpose," the court said, was to assist in advocacy against the project. The councilmember also sent the mayor what amounted to a script for orchestrating a "no" vote on the project, including a proposed statement by the mayor to be made after the motion to deny the project had been made and seconded. These activities, the court found, evidenced both behind-the-scenes advocacy and organization of the presentation at the hearing, including orchestrating the very sequence of actions —the motion and second — that occurred at the hearing. These "concrete facts" showed that the councilmember acted as an advocate, not an impartial decisionmaker, and should have recused himself from voting on the appeal. His actions demonstrated an unacceptable probability of actual bias and denied Petrovich a fair hearing.

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