



COMMITTEE FOR
GREEN FOOTHILLS



March 15, 2013

Dear Ms. Prevetti,

We appreciate the opportunity to comment on the proposed modification to the San Jose Planning Commission's by-laws. Our organizations have a strong interest in ensuring that the Planning Commission's decisionmaking process is as fair and equitable as possible, and is guided by policies that promote the best interests of the public and the residents of San Jose.

The proposed new language is unclear and ambiguous, is inconsistent with San Jose City Council policies, and will not promote good decisionmaking. We propose that the sentence concerning independent fact-finding investigations and site visits be deleted, as follows (deletions shown in strikeout):

In connection with administrative or quasi-judicial hearings conducted by the Planning Commission, the decision of the Planning Commission is to be based on testimony, evidence and other information received from any person at or in connection with a public hearing or contained in the public record for a public hearing before the Commission. ~~A Planning Commissioner shall not conduct independent fact-finding investigations related to a matter coming before the Commission; provided, however, that a site visit by an individual Planning Commissioner to generally familiarize that Commissioner with the real property that is the subject of the matter to be considered by the Planning Commission is allowed.~~ If a Planning Commissioner becomes aware of information relevant to a matter coming before the Commission that was not made a part of the public record for that matter before the Commission, the Commissioner shall disclose that information to the Planning Commission in the manner described in City Council Policy 0-32: Disclosure of Material Facts and Communications Received During Council Meetings, as the same may be amended from time to time.

This will provide due process protection by ensuring that decisions are to be made based on the evidence in the public record, and by requiring disclosure of any information received outside the hearing process. The language we propose to delete does nothing to ensure greater due process; it merely creates confusion and restricts the flow of information that is necessary for good decisionmaking.

Our reasoning is as follows:

1. The language concerning independent fact-finding does not ensure due process.

The stated goal of these modifications to the Planning Commission's bylaws is to ensure due process to the parties to a hearing. Due process in an administrative proceeding requires that parties to the proceeding have a fair hearing with the opportunity to present evidence and to be aware of evidence presented by other parties. This can be achieved here, as in many other jurisdictions, by requiring Commissioners to disclose all communications received outside of the public hearing process. Once disclosure has been made, the

information disclosed is known to all the other Commissioners and becomes part of the public record. Thus, the interests of transparency and fairness are addressed.

The argument has been made that due process requires that a “quasi-judicial” proceeding exclude all information other than oral testimony during the hearing and written comments submitted prior to the hearing. This fails to take into account the fundamental differences between a “quasi-judicial” proceeding before the Planning Commission, and an actual courtroom proceeding. Courtroom proceedings before a judge are governed by strict rules of evidence pertaining to such things as hearsay, expert testimony, authentication of evidence, etc. By contrast, the information presented in front of the Planning Commission is not subject to any rules of evidence, and the Commissioners routinely hear testimony that would never be admissible in a court of law. Since the testimony heard at the Commission’s hearings is not subject to evidentiary rules intended to ensure reliability and veracity, it makes no sense to exclude other information simply because it was received outside of the public hearing process.¹

Finally, an important distinction between Commissioners and a judge of law is that Commissioners act in the best interests of the public, whereas judges in civil proceedings adjudicate disputes between private parties. Both parties in a courtroom proceeding are given ample opportunity to argue their case, present evidence, cross-examine witnesses and otherwise vigorously prosecute their claim. An administrative hearing before the Commission, on the other hand, involves the Commission representing the public interest in deciding whether to grant a permit application or certify an EIR. It is not possible for Commissioners to act in the best interests of the public if the public’s access to the Commissioners is restricted. Members of the public may not be able to attend Commission hearings and may not have access to email to submit written comments. A Commissioner, by attending a meeting of a neighborhood association and hearing residents’ concerns about a proposed development, can gain valuable information that they would never have received through written comments or oral testimony. As long as due process requirements are met through disclosure of such communications, the result can only be increased benefit to the public interest.

2. The proposed language is unclear and ambiguous:

We appreciate that the language that was originally proposed in October 2012 has been modified to remove the clause specifically prohibiting “conversations with interested parties . . . outside of the public hearing.” To the extent that this change indicates the intent to remove the specific prohibition against such conversations, we thank the Planning Commission for the revision. However, the language that remains is still unclear and ambiguous as to whether such conversations are in fact prohibited. As it now reads, the prohibition against “independent fact-finding investigations” has only one exception: a site visit to the property under consideration. The legal principle of “*Expressio unius est exclusio alterius*” (to include one thing is to exclude all others) indicates that the inclusion of site visits as an exception may be interpreted as forbidding all other methods of gaining information about a project. Thus, if it is the intention of the Planning Commission not to

¹ It is unclear why the language prohibiting independent fact-finding was included. Although at the November 7, 2012 hearing on the bylaws changes, there was mention that it would be undesirable for Commissioners to act as detectives or private investigators, we are unaware of any evidence suggesting that any Commissioners have actually done this, or even expressed a desire to do this.

forbid conversations concerning projects before the Commission, simply removing the deleted clause may not accomplish this.

In addition, the language is unclear on its face. What is the definition of “independent fact-finding investigations”? Can a Commissioner look at a Google map to see a proposed project site in a regional context? Can he/she look online for photos of wildlife species mentioned in an Initial Study? Can Commissioners independently educate themselves about how air pollution affects children's health? Can they meet with a citizen's group at a coffee shop to learn about the community's perception? Can they go to a library to read historical background on a proposed development site? The term “fact-finding investigation” could mean anything from an in-depth detective-style investigation, to a minimal inquiry into some basic facts concerning the project. When legislative language is unclear, those affected tend to assume that their actions are more restricted than they in fact are.

The exception solely for site visits is particularly troubling because it essentially allows developers access that the public does not have. For a Commissioner to conduct a site visit to a private real property, they must coordinate with the land owner or developer and usually be accompanied by said land owner/developer. A project applicant can provide a tour of the site seen from their own perspective, emphasizing those aspects most flattering to the project and minimizing any evidence of impacts to the environment or the surrounding community. This is hardly an objective and unbiased source of information about the project for Commissioners.

In addition, the proposed language applies only to matters “coming before the Commission.” By the time a project application is on the Planning Commission's agenda, a project proponent has had ample time to influence the decisionmaking process, if desired. In contrast, community members often do not even know that a project is happening until they see the item listed on the Commission agenda.

The citizens of San Jose have a right to expect their elected and appointed decisionmakers to act in the best interests of the public and the community. This often requires them to make an effort to inform themselves about proposed projects. It is hardly in the best interests of the public if the Commission is unaware of important facts during decisionmaking, and this problem is not remedied by every Commissioner being equally ignorant of such facts. Prohibiting Commissioners from informing themselves denies the Commissioners the ability to fulfill their obligations to the community.

3. Inconsistency with City Council policy:

City Council Policy 0-31: “Council-Staff Interaction,” specifically encourages City Councilmembers to meet with interested parties, including community representatives:

As part of the review process for development proposals, meetings between the Council Member from the affected district and his or her staff, the landowner, the developer, community representatives, professional consultants retained by the City or by other parties to the proposal, and City staff are encouraged. (emphasis added)

It is inconsistent and inappropriate for the Planning Commission's bylaws to impose greater restrictions on the Commissioners' ability to receive information about a project than are in effect for the City Councilmembers. Again, even though the specific language forbidding conversations with interested parties has been removed,

nevertheless the remaining language is focused entirely on restricting Commissioners' access to outside information, with the sole exception of site visits. This is completely at odds with the express intent of the City Council policy.²

Thank you for your consideration of these comments.

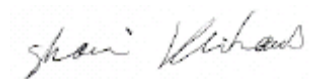
Sincerely,



Alice Kaufman
Legislative Advocate
Committee for Green Foothills



Michele Beasley
Senior Field Representative, South Bay
Greenbelt Alliance



Shani Kleinhaus
Environmental Advocate
Santa Clara Valley Audubon Society

Heyward Robinson
Conservation Chair
Sierra Club Loma Prieta Chapter

² As a side issue, the proposed new language cites to and incorporates City Council Policy 0-32 with regard to disclosure requirements. However, that policy only refers to communications received during a Council meeting. The Planning Commission's bylaws should instead incorporate the disclosure requirements stated in City Council Policy 0-31, section 9:

Whenever the Mayor or Councilmembers have had communications with any of the parties, their representatives or agents regarding the subject matter, facts or the issues of an administrative action such as the actions listed above, the communication shall be noted on the record of the administrative action or proceeding. This can be accomplished either by a memorandum in advance of the Council hearing or by disclosure at the hearing itself.