

Brown Act, Due Process, and Nexus for Conditions of Approvals

City of Lafayette
Transportation and Circulation Commission
July 24, 2019



Brown Act (Gov. Code 54950 et seq.)

The Brown Act applies to:

- Local agencies
- Legislative bodies
- Persons elected to legislative bodies, even prior to assuming office



Legislative Body Includes:

- Governing body
- Subsidiary body
- Private board, LLC, or other entity that:
 - Is created by the governing body; or
 - Receives funds and a designated member from the legislative body



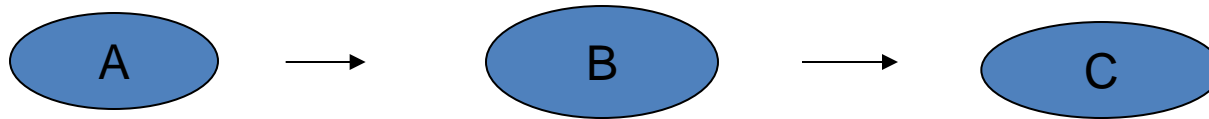
Meetings

- Gathering of majority
- Serial
 - Chain
 - Hub

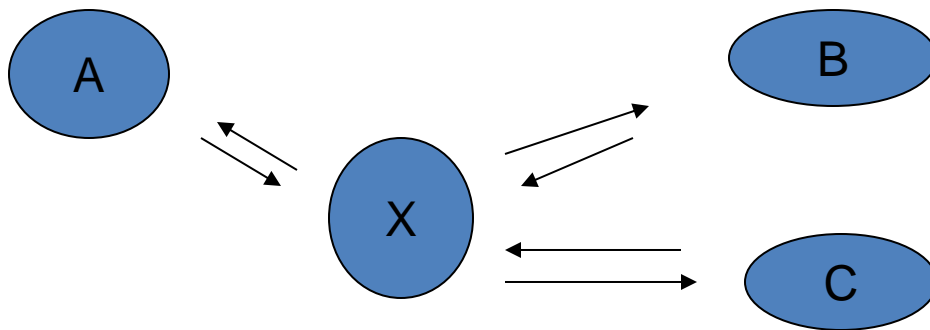


Brown Act – Serial Meetings

- Chain



- Hub and Spoke



The Brown Act does not apply:

- Contacts with public
- Conferences open to the public on issues of general interest to the public
- Open and publicized meeting on local topic originated by person or organization other than the agency



The Brown Act does not apply:

- Open and noticed meeting of another government agency
- Purely social or ceremonial occasions
- Committee of less than a quorum of the agency, without continuing jurisdiction (ad hoc committees)



No Action Allowed

No action or discussion allowed for any item not listed on agenda except for:

- Adding items by 2/3 vote because of need for immediate action that came to the attention after the agenda is posted
- Adding items by majority vote for emergency situation
- Item continued from another meeting within 5 calendar days



No Action Allowed

(cont'd)

No action or discussion allowed for any item not listed on agenda except for:

- Brief response to statement or question from public
- Questions to staff for clarification of a matter based upon public comment
- Brief announcement or report on member's or staff's own activities



No Action Allowed

(cont'd)

No action or discussion allowed for any item not listed on agenda except for:

- Provide reference or information to staff
- Ask staff to report back at a future meeting on any matter



Exceptions

Closed Sessions:

- Litigation – Existing, Anticipated and Initiation
- Real Property Transactions
- Personnel Issues – Appointment, Performance Evaluation, Discipline/Dismissal/Release



Remedies & Penalties

- Opportunity to Cure
- Injunction
- Court Costs & Attorneys' fees
- Misdemeanor



Role of Commissioners

To provide a framework for making principled decisions that are careful, reasoned, and equitable.

Commissioner's should be reasonably impartial, noninvolved reviewer, and attentive.



Procedural Due Process

Procedural due process is required for quasi-judicial decisions.

Procedural due process in the administrative setting requires that the hearing be conducted before a *reasonably impartial, noninvolved reviewer*.



Ex Parte Communications/Off Site Visits

Meetings with the public and/or the affected party should be disclosed along with the nature of the discussion. Statements that indicate that you have visited the site and/or made your own investigations should be noted so that the affected party can respond to the information.

The final determination must be based on evidence presented at the hearing and to which the affected parties had an opportunity to respond.



Actual Bias

To prevail on a claim of bias violating fair hearing requirements, there must be an unacceptable probability of actual bias on the part of those who have actual decisionmaking power over claims.

This must be established with concrete facts.



Commission Statements

A statement made by a Commissioner can be used to support a grant of a writ of mandate to overturn a decision.

In a denial of a subdivision, a council member stated, “I am kind of fishing around for a good legal reason to deny it, but so far I haven’t found it.”



Commission Statements

The court went on to state that, “Although the record discloses no reason, he later voted to deny the subdivision request . . . The city council based its decision on the sole ground that it was the apparent desire of the majority of the people in Shorecliffs to disallow the resubdivision request.”



Nasha L.L.C. v. City of Los Angeles

Actual bias based upon planning commissioner's authorship of an unsigned article attacking a project that was under consideration by the planning commission.



Nasha L.L.C. v. City of Los Angeles

The commissioner's vote was decisive in overturning the previous approval of the project.

The court stated that the commissioner “clearly should have recused himself from hearing this matter. His participation in the appeal to the planning commission requires the commission's decision be vacated.”



Woody's Group v. Newport Beach

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.



Woody's Group v. Newport Beach

Woody's has established an "unacceptable probability of actual bias" on Henn's part. Henn's "notice of appeal"-our term to describe his email-showed he was strongly opposed to the planning commission's decision on Woody's application. That is... he took "a position against the project."

Nasha L. L. C. vs. City of Los Angeles



Role of Commissioners

Fundamental principal of due process is that “he who decides must hear,” and that “the inattentiveness of council members during the hearing prevented the council from satisfying that principle.”

[Lacy Street Hospitality Service, Inc. v. City of LA](#)



Disqualification

Disqualification should occur if there is actual bias.

Disqualification may also be necessary if a situation exists where the probability of actual bias is too high to be constitutionally tolerable.



Avoid the Appearance of Bias

Avoid statements prior to close of hearing that suggest your mind is made up.

Don't pre-commit to decisions

If you think you cannot be fair, don't participate

Disclose ex-parte communications and site visits



Conditions of Approval

Requirements placed on discretionary projects (use permits, development plans, etc.) to implement the approved project.

Source of Authority

Police Power – a city may make and enforce within its limits all local, police, sanitary and other ordinances or regulations not in conflict with general laws (Article XI, Section 7, Cal. Const.)

Statutes - General Plan, CEQA, Mitigation Fee Act, state laws (Quimby Act), Subdivision Map Act (design/improvement).



Conditions of Approval

In general, a City may impose conditions if they are reasonable and have the required nexus to the impacts caused by the project.

But – some conditions require a greater degree of nexus:

Ex. Condition requiring land dedication:

1. Require that an “essential nexus” exist between a legitimate state/city interest and the permit condition; and
2. Whether the degree of the exactions demanded by the permit conditions are “roughly proportional” to the projected impact of the proposed development. (the Nollan/Dolan test)



Conclusion

Questions?

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