

RESOLUTION NO. 62,571–N.S.

ESTABLISHING FAIR PROCEDURES IN LAND USE QUASI-JUDICIAL PUBLIC HEARINGS BEFORE THE CITY COUNCIL, PLANNING COMMISSION, LANDMARKS PRESERVATION COMMISSION, ZONING ADJUSTMENTS BOARD AND HOUSING ADVISORY COMMISSION AND REPEALING SECTION I F OF THE COUNCIL RULES BY AMENDING RESOLUTION 62,420

WHEREAS, the City of Berkeley has adopted a range of regulations to regulate land uses in Berkeley; and

WHEREAS, these include the City's Zoning ordinance, Landmarks Preservation ordinance and Subdivision ordinance; and

WHEREAS, these regulatory schemes adopt procedures to guide the application of the standards contained in these regulatory schemes to particular land uses, structures and divisions of property; and

WHEREAS, these procedures generally provide for boards and commissions to implement these regulatory schemes in the first instance, with ultimate oversight and review by the City Council; and

WHEREAS, the purpose of Council review is to ensure adherence to the Council's legislative intent in enacting the regulatory scheme and because the Council is the elected body ultimately responsible to the voters for appropriate regulation of land uses; and

WHEREAS, the Council does not intend, by the procedural hearings and review established in the City's regulatory procedures, to adopt or utilize in any way the adversary criminal or civil justice system used in the courts, and indeed finds that such a system is completely unsuitable to making land use decisions at the local administrative level; and

WHEREAS, the City Council and its subordinate agencies and staff are not partisans on any side of any land use dispute but are charged with making land use decisions in the best interests of the entire City after weighing all input, and this process is in fact a form of mediation between divergent community interests; and

WHEREAS, the City staff and City Attorney are charged with assisting the City Council and subordinate City boards and commissions to adjust competing interests affecting land use decisions and are not advocates of any side, but play the role of providing technical assistance and advice to the decision making bodies; and

WHEREAS, the United States Supreme Court has noted that due process "unlike some technical rules, is not a technical conception with a fixed content unrelated to time, place and circumstances [citations omitted]." Mathews v. Eldridge, *supra*, 424 U.S. 319, 334 (1976). It is "flexible and calls for such procedural protections as the situation demands [citations omitted]." Id.; and

WHEREAS, the provisions of the California Administrative Act (“APA”) regarding state adjudicatory proceedings properly have no application to local agencies in light of the very substantial difference in state agencies and local administrative procedures; and

WHEREAS, even the APA recognizes that its prohibition on combining prosecutorial and adjudicatory functions applies only to prosecutors and other advocates who are committed to specific result and have a will to win and not merely to staff providing professional recommendations who are accustomed to serving decision making bodies with views on matters that differ from one another and from recommendations of staff; and

WHEREAS, a unique aspect of land use decision-making and the administrative procedures of cities with subordinate citizen boards and an elected City Council is that City staff regularly provide technical assistance to boards and commissions that may disagree with one another, with the City staff and with the City Council; and

WHEREAS, the City planning and legal staff are not advocates for any party or body’s position but merely provide expert technical advice and recommendations to each decision making body including the City Council; and

WHEREAS, when the differing perspectives of the different decision-making bodies and differing input at each stage of a decision-making process result in an approach which differs from that originally recommended by staff, City staff nonetheless regularly assist in implementing and guiding such changed approaches at successive stages of a decision-making process within the City; and

WHEREAS, in addition, the differing perspectives of the different decision-making bodies, as well as the differing input at each stage of a decision-making process, often results in City staff gaining an improved understanding of the nature and implications of development proposals, thus improving staff’s ability to analyze such proposals under the applicable land use regulations, and make useful recommendations to decision-makers; and

WHEREAS, it is not uncommon for applicants or opponents of projects, or both, who come before the City Council to claim that the City staff and City Attorney are biased towards them; and

WHEREAS, because the City is largely built-out and its limited number of remaining developable sites are surrounded by existing uses, its land use regulations are detailed and complex, in order to allow flexibility to address the difficult issues sometimes raised by infill development, and as a result, consultations among planning, legal and other staff concerning the proper interpretation and application of the City’s land use regulations is particularly vital; and

WHEREAS, consistency of technical and legal advice is critical to a coherent and consistent implementation of a local government’s laws and regulations and this result cannot be achieved if different staff members who act wholly independently of one another provide conflicting technical and legal advice concerning a land use matter pending before the City; and

WHEREAS, resolving land use issues requires a unique appreciation of the context of the development, community values and similar considerations have historically been resolved through local government decision making procedures that are uniquely accessible to ordinary citizens and into which they expect and demand broad input; and

WHEREAS, the time which can be set aside by an elected or appointed body to conduct a hearing is inherently limited; and

WHEREAS, citizens expect to be able to contact their elected and appointed representatives on pending land use matters and find restrictions on their ability to do so artificial, confining and undemocratic and an impairment of their reasonable expectation to be able to communicate with their elected and appointed representatives; and

WHEREAS Council members can play a constructive role in facilitating public discussion and resolution of land use disputes through mediating seemingly irreconcilable positions; and

WHEREAS, most information gathered in these contacts usually results only in elaboration of issues already delineated in staff reports and other parts of the written and oral record; and

WHEREAS, even the state APA, in Government Code section 11430.30(c)(2) recognizes, as a policy matter, that land use determinations by members of state land use commissions such as the San Francisco Bay Conservation and Development Commission should not be subject to a prohibition on such contacts; and

WHEREAS while commissioners and Councilmembers often express tentative opinions on various projects pending before them, the expression of such opinions assists interested persons and the public to address the concerns expressed and makes for a robust and far-ranging exploration of the issues raised by a project, final decisions are nonetheless based upon the entire record, after all evidence and testimony has been considered, and such tentative opinions, even if expressed in strong language, are a necessary part of the review process and do not constitute prejudgment of the project.

NOW THEREFORE, BE IT BE RESOLVED by the Council of the City of Berkeley that the Council hereby establishes the following procedure for conduct of land use hearings in the City of Berkeley, in addition to any other procedure required by applicable federal state or local standards as follows:

1. Bodies such as the Planning Commission, Zoning Adjustments Board, Landmarks Commission and Housing Advisory Commission that make adjudicatory decisions shall withhold final judgment on such matters until the close of the hearing relating to the pending land use matter. Nothing in this section shall preclude a decision maker from articulating areas of concern for the staff or public to react to in the decision making process or to express tentative opinions on the matter.
2. City planning and legal staff are to provide their technical and legal advice and professional judgment to each decision making body and the Council and are not advocates of any party or position in a dispute, notwithstanding the fact that their

technical judgment may lead them to make recommendations concerning the matter. In the absence of clear evidence in the record that a staff member has lost his or her impartiality as a technical adviser, the City's need for consistent, coherent and experienced advisers outweighs any claimed bias from the adviser involvement at any earlier stage of the administrative proceeding.

3. Council members and Commissioners may receive information relevant to the land use decision by contacts with the parties, the public or staff and are not confined to reading the record or hearing presentations at public hearings.
4. Where information of a specific nature is gathered by a member of the City Council or a board or commission, through contacts outside the record, and the information is not already in the record, the member shall, to the extent feasible, keep contemporaneous notes of the substance of the contact and shall disclose the contact and its substance on the record prior to the commencement of the hearing to which such contact relates. Where the information is received during the pendency of a hearing the matter shall be disclosed prior to completion of the hearing and the parties and public shall have an opportunity to respond if the matter is substantially new information.
5. Where such contacts were made and information gathered prior to a pending decision by the Council or any decision making body whether or not to grant a hearing, the substance of the information shall be reported to the secretary of the relevant body as soon as it is made. The secretary shall maintain a file on such disclosed contacts for review by members of the public.
6. All written communications to the decision making body shall be submitted to the secretary of that body, or the City Clerk, in the case of a matter pending before the City Council.
7. Nothing in these procedures shall be construed as limiting any procedural protections that a party or the public may be entitled to by law over and above the protections of this resolution, based upon the facts of any particular proceeding.

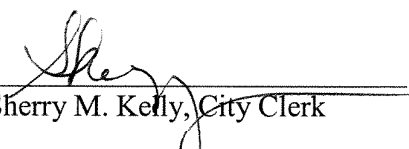
BE IT FURTHER RESOLVED, that Section I F of the Council Rules of Procedure, Resolution number 62,420-N.S., is hereby repealed and Resolution 62,420-N.S. is so amended.

The foregoing Resolution was adopted by the Berkeley City Council on July 13, 2004 by the following vote:

Ayes: Councilmembers Breland, Hawley, Maio, Olds, Shirek, Spring, Worthington, Wozniak and Mayor Bates.

Noes: None.

Absent: None.

Attest: 
Sherry M. Kelly, City Clerk


Tom Bates, Mayor