



# Memorandum

## OFFICE OF THE COUNTY COUNSEL

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DATE: July 2, 2007

TO: Chris Bazar, Planning Director

FROM: Brian E. Washington, Assistant County Counsel

SUBJECT: Planning Commissioner Bias Allegations Regarding the Boundary Between the Castro Valley and Eden General Plan Areas

### ISSUE

Can Planning Commissioners Hancocks and Ready participate in Planning Commission decisions regarding the General Plan Boundary between the Castro Valley and Eden planning areas?

### SUMMARY ANSWER

Due to the political nature of land use decisions, California law generally allows public officials to hear matters in their official capacity even when they have pre-determined views regarding the subject matter. However, strong statements of opinion indicating that an official cannot be an "impartial reviewer" can lead to disqualification. Evidence submitted to the Office of the County Counsel to date suggests that Commissioners Hancocks and Ready may be ineligible to participate in future decisions, and should consider recusing themselves.

### DISCUSSION

California law generally allows public officials making land use decisions wide latitude to some pre-determined opinions about land use matters that will come before them. The following statement from a leading treatise provides a fair synopsis of case law in this area:

Generally speaking, in light of the fundamentally political nature of land use decisions, there is no denial of a fair hearing when council members come to the hearing with pre-determined notions regarding the desirability of the type of project before them. Even when council members have publicly announced their opposition to the very project such as the one being considered, there is no denial of a fair hearing...."

*Curtin's California Land Use and Planning Law*, at 528 (2007), citing *City of Fairfield v. Superior Court*, 14 Cal.3d 768, 780 (1975).

In rare instances, cases have determined that a decision-maker's animus towards a project is extreme enough to constitute bias that would deny an applicant a fair hearing. *Clark v. City of Hermosa Beach*, 48 Cal.App.4<sup>th</sup> 1152, 1173 (1996)(council member's bias against applicant and personal interest in the issue and deprived applicant of a fair

hearing); *Nasha v. City of Los Angeles*, 125 Cal.App.4<sup>th</sup> 470 (2004)(planning commissioner writing article prior to the hearing demonstrated that he did not have an open mind deprived applicant of a fair hearing).

In the present controversy, a number of members of the public have asserted that Commissioners Hancocks and Ready are biased on the General Plan boundary issue due to their advocacy for having the El Portal Ridge area placed in the Eden General Plan and due to certain statements that they have made in support of their position.<sup>1</sup> This Office has been referred to a number of newspaper articles that contain statements by Commissioners Hancocks and Ready on the General Plan boundary. One article, dated May 18, 2007, raises concerns. The article quotes Commissioner Hancocks as stating the following regarding concerns raised by Castro Valley/El Portal residents regarding the boundary change: "Four and a half years of planning gets put on hold because Castro Valley's ego gets in the way.... If Castro Valley continues to put the plan on hold, both plans suffer and are on hold. To be sidetracked is really unfair." The comment raises concerns about impartiality/bias going forward since it appears to oppose hearing about the Castro Valley/El Portal residents' concerns.

Similarly, in the same article, Commissioner Ready is quoted as saying the following: "I personally don't understand how one person can put a halt to 130,000 people set to go ahead.... I'm very offended. Why would the county even contemplate this? What makes one area more special?" Again, this comment raises concern since it appears to reflect a desire not to hear opposing views.<sup>2</sup>

At a bare minimum, in order to participate in deliberations regarding the boundary issue, Commissioners Hancocks and Ready need to describe their previous actions and positions on the boundary issue and state their ability to hear the matter impartially. Given the statements above (if accurate), the more prudent course may be for the Commissioners to recuse themselves from the item based on a perception of bias. Prior to this item coming before the Planning Commission and after receiving the additional information that Mr. Friedman has indicated he will bring forward, I will update the conclusions in this memorandum.<sup>3</sup>

You may make this memorandum publicly available.

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<sup>1</sup> Lester Friedman, BZA member, has indicated to me that he plans to submit written argument and evidence regarding the alleged bias. That information has not yet been submitted as of the drafting of this document.

<sup>2</sup> It is important to note that I have not had an opportunity to discuss the accuracy of these quotes with the Commissioners.

<sup>3</sup> You also indicated that questions have been raised about whether a planning commissioner owning property in El Portal would disqualify them from participating. As you know, as a general rule, planning commissioners cannot participate in decisions that have a material financial effect on them or their families. See Government Code Section 87103. Ownership of real property, however, is not a "material financial effect" for general plan decisions that do not directly affect an individual property. 2 Cal. Code of Regulations 18705.2.