MEMORANDUM

DATE: August 22, 1996

TO: Bill Agnello, Sr. Vice President

FROM: Sandy Sloan

RE: Citizens' Contact with Councilmembers

You have asked whether councilmembers are allowed by law to discuss any city business with either a developer or a private citizen, especially if they are aware that the developer or private citizen is attempting to discuss that matter with a quorum of the council. Specifically, your question concerns the circumstances under which serial communications with councilmembers constitute a meeting.

This issue stands at the intersection of two significant public policies. First is the constitutional right of citizens to raise issues and communicate with their elected representatives. Second is the Brown Act's[1] policy favoring public deliberation by multi-member boards, commissions and councils.

On the one hand, an elected official has the right, if not the duty, to meet his or her constituents to address their grievances and concerns.[2] But if such a practice constitutes a serial or seriatim meeting, such contact would be improper.

A serial meeting may be a daisy-chain, in which member A contacts member B, B contacts C, C contacts D and so on, until a quorum has been involved. Or, it may be a hub-and-spoke in which an individual contacts members of an agency one by one for a decision on a proposed action or, through this contact, reveals information about the agency members' respective views.[3] Both these types of serial meetings violate the Brown Act because they deprive the public of an opportunity for a meaningful contribution to the decision-making process.

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[1] Government Code Section 54950 et seq.

[2] City of Fairfield v. Superior Court (1975) 14 Cal. 3d 768 at 780.

[3] Stockton Newspapers, Inc. v. Members of the Redevelopment Agency of the City of Stockton (1985) 171 Cal. App. 3d 95.

The purpose of the serial meeting prohibition is not to prevent citizens from communicating with their elected representatives, but rather to prevent public bodies from circumventing the requirement for open and public deliberation of issues. When viewed from this perspective, it makes sense to focus on who initiated the communications, the presence of communications between members of the body, and the goals of the communications.

It is clear that if the result of the communication is that a quorum of the council reaches a decision, the Brown Act has been violated. In Stockton Newspapers, Inc. v. Members of the Redevelopment Agency of the City of Stockton, the attorney for the Redevelopment Agency initiated a one-to-one telephonic poll for the commonly agreed purpose of obtaining a collective commitment by the Redevelopment Agency boardmembers to approve the transfer of certain property. The court had no problem finding the series of conversations a "meeting" at which "action" was taken.[4] It is also clear that a meeting consists not only of decisions, but also informal discussion and information-gathering. "Deliberation" has been broadly construed to connote not only collective discussion, but the collective acquisition and exchange of facts preliminary to the ultimate decisions.[5] The key to these decisions is the collective purpose and/or exchange of information.

No reported court case has dealt with a situation where councilmembers are aware one person is contacting each of them but no information is exchanged among councilmembers. However, informal attorney general opinions have concluded that a developer or a citizen lobbying members of a city council would not violate the Brown Act, as long as the developer or citizen initiates the contact, there is not an understanding or agreement among the councilmembers to meet with the developer or citizen, and a quorum of the councilmembers, as a group or serially, do not discuss among themselves the content of their communications.[6] [7] Therefore, it is important in contacting a councilmember not to share any information or comments from other councilmembers, so as not to expose councilmembers to a possible Brown Act violation.

Because the line between listening to citizens' concerns and participating in a

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[4] Ibid.

[5] Rowen v. Santa Clara Unified School District (1981) 121 Cal. App. 3d 231.

[6] Memorandum from Deputy Attorney General to Attorney General, November 14, 1986 and letter from Deputy Attorney General to Harron, City Attorney of Chula Vista, March 26, 1987.

[7] Attorney General opinions do not have the same authoritative weight as court cases, but the opinions (even informal ones) are often deferred to by the courts.

serial meeting is a blurry one, each councilmember will decide on his or her own whether he or she is comfortable discussing issues with anyone outside a public meeting. Some councilmembers might not wish to speak with an applicant or other citizen outside of a formal meeting, because of the possibility that unwanted information could be conveyed. Others will believe it important to be available to constituents and should keep in mind the guidelines outlined above.

In addition to the public meeting issue, another issue involved in discussions with applicants or citizens is whether the subject discussed will be the subject of a quasi-judicial proceeding. "Quasi-judicial" proceedings are ones in which the city council determines the application of an ordinance or statute to a specific set of existing facts, such as in subdivision map, variance and use permit applications. In contrast to quasi-judicial matters, "legislative" actions are the actual formulations of ordinances or statutes, such as zoning or general plan amendments.[8]

When a proceeding is quasi-judicial, the fair hearing requirement mandates that all parties, or their designated representatives, be afforded an opportunity to examine, explain or rebut evidence introduced at a hearing and that the decision be based upon findings of fact supported by competent evidence.[9]

Courts have determined that a decision based on considerations outside of the hearing will result in a denial of due process, because "the right of a hearing before an administrative tribunal would be meaningless if the tribunal were permitted to base its determination upon information received without the knowledge of the parties.[10] Courts have found, though, that it is proper for an agency to consider information outside the hearing if this information is introduced on the record at the hearing and an opportunity to discuss the information is presented to all at the hearing.[11] Thus, if a councilmember discusses an application, such as a subdivision, which will be the subject of a quasi-judicial hearing with the applicant or another citizen, the councilmember must reveal any information received outside of the hearing at the hearing itself.

On the other hand, discussion of a legislative change, such as a rezoning or general plan amendment, is not subject to the requirement of placing the "extra-record" information on the record at a hearing. If discussion with a developer or citizen involves both a legislative change (e.g., general plan amendment) and a quasi-judicial matter (e.g., subdivision), to be prudent, the councilmember should disclose any information received off- record which is related to the quasi-judicial matter at the quasi-judicial

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[8] Strumsky v. San Diego City Employees Retire. Assn. (1974) 11 Cal. 3d 28, fn. 2.

[9] La Prade v. Department of Water & Power (1945) 27 Cal. 2d 47, 51-52.

[10] English v. City of Long Beach (1950) 35 Cal. 2d 155 at 159.

[11] See, e.g., Candlestick Properties, Inc. v. San Francisco BCDC (1970) 11 Cal. App. 3d 557 at 570.

hearing.