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December 13, 2016

Anthony Wagner

Re: Your Recusal From December 15, 2016 Hearing

Dear Mr. Wagner:

This office is writing to you on behalf of members of the City Heights community that are opposed to the recommendation to transfer a liquor license to a proposed new 7/11 located at 3911 University Avenue. The Planning Commission is hearing this issue as a quasi-judicial body. Your role is akin to a judge. Given the record, I believe you must recuse yourself from the decision. The hearing should then be redone.

When approached by members of the community, I was initially surprised that there was even an issue with the transfer of this license. To my understanding, this particular census track has *twice* the number of liquor licenses it should. The current owner of the license is a market that is barely open.

While a transfer has been represented as substantially *improving the neighborhood*, that appears clearly false. It has been estimated that the current licensee might generate at most $200 to $250 a week in alcohol sales; even with restrictions at the new location, it appears likely to generate between $7,000 to $10,000 a week in sales. This license, all by itself, could result in a 30- to 40-fold increase in alcohol sales if approved.

I viewed a video of the December 1 hearing and now appreciate where perhaps the discussion became skewed. It would appear, Mr. Wagner, that you have become advocate, witness, and judge in an effort to guarantee the transfer. I am not sure why you are so dedicated to the transfer of this liquor license, given the unanimity of the community's opposition, but I believe you have gone too far and must recuse yourself. Most concerning was when you qualified yourself as an expert witness, provided what you contended was expert testimony, and then based your decision on your own expert testimony. It was a first. I have never heard of that in 39 years as a lawyer.

Let me explain why I believe recusal is mandated.

Your Process Is a Quasi-Judicial Proceeding – You Are Essentially a Judge

A decision by the Planning Commission is a quasi-judicial proceeding. As such, it is subject to federal and state due process. In California, it is subject to the Code of Civil Procedure section 1094.5, and additional requirements applicable to particular hearings. California courts have held that administrative hearings must be fair and that administrative decision makers *must be impartial*.

In *Matthews v. Eldridge* (1976) 424 U.S. 319, 331, the United States Supreme Court held:

> "The federal Due Process Clause imposes constraints on governmental decisions that deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth and Fourteenth Amendments."

In California, C.C.P. §1094.5(b) creates a statutory right to a fair administrative hearing, which must be conducted before an impartial tribunal. *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152. Under C.C.P. §1094.5, quasi-judicial proceedings are subject to review on administrative mandamus. *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514.

The most fundamental requirements of procedural due process are adequate notice and an opportunity to be heard *before a fair and impartial hearing body*. *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612.

"When...an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair tribunal." *Marengo Band of Mission Indians v. California State Water Resources Control Board* (2009) 45 Cal.4th 731, 737.

Constitutional due process principles require a decision-maker to be fair and impartial when the decision-making body is sitting in what is known as a "quasi-judicial" capacity. Quasi-judicial matters include variances, use permits, annexation protests, personnel disciplinary actions and licenses. Quasi-judicial proceedings tend to involve the application of generally adopted standards to specific situations, much as a judge applies the law to a particular set of facts.

Impermissible bias (see *Breakzone Billiards v. City of Torrance*, 81 Cal.App.4th 1205, 1234, n. 23, 97 Cal.Rptr.2d Distr. 2000)

1. **Personal Interest in the Decision's Outcome.** Personal interest bias can arise when hearing officers are selected and paid on an ad hoc basis, making their future work dependent on the public agency's goodwill. *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 119 Cal.Rptr.2d 341.

2. **Personal Bias.** Strong animosity or strong personal loyalty for/against a party as well as strong ideological reactions. See *Breakzone Billiards*, 81 Cal.App.4th 1234, n. 23, 97 Cal.Rptr.2d at 490.

3. **Factual Bias.** Information an officer may receive outside the public hearing that causes the official to have a closed mind to any factual information that may be presented in a hearing. All communications to decision-makers about the merits (or demerits) of an issue should occur in the context of the noticed hearing (as opposed to private meetings with either side of an issue). *Nightlife Partners, Ltd. v. City of Beverly Hills* (2d Distr. 2003) 108 Cal.App.4th 81, 89, 133 Cal.Rptr.2d 234.

4. **Dual Role Influence.** When someone plays multiple roles in a decision making process. A court concluded that due process was violated when a decision maker acted in multiple roles (advocate, advisor, expert, etc.). *Nightlife Partners*, 108 Cal.App.4th at 97-98, 133 Cal.Rptr. 2d at 248.

   When an official sits in a quasi-judicial capacity, that official's personal interest or involvement, either in a decision's outcome or with any participants, creates a risk that the agency's decision will be set aside by a court if the decision is challenged. Having the official disqualify himself removes the risk. *Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 122 Cal.Rptr. 543; *Mennig v. City Council* (2d Distr. 1978) 86 Cal.App.3d 341, 150 Cal.Rptr. 207.

   Decision makers are well advised to step aside from participating in a quasi-judicial matter when the decision-maker has prejudged the matter. Attributes of having "prejudged the matter" include having a closed mind or a preconceived and unalterable view of the proper outcome without regard to the evidence. *Cohan v. City of Thousand Oaks* (2d Distr. 1994) 30 Cal.App.4th 547, 46 Cal.Rptr.2d 782.

Additional Opinions From California Authorities

The California Attorney General has advised that if a situation arises where there is a Common Law Conflict of Interest, the official "is disqualified from taking ANY part in the discussion and vote regarding the particular matter." 29 Ops. Cal. Attorney General 5, 7 (1955); 64 Ops. Cal. Attorney General 795 (1981). I would also direct you to the City Attorney's office, which can provide you their Memo No. 10 of July 3, 2007. You should also review the *Mattas* opinion at the Fair Political Practices Commission Advice Letter A-L8-035 (April 8, 2008).

Evidence of Your Bias

On multiple occasions, you did not demonstrate the temperament expected from a judge or judicial officer. Throughout, it appeared to a reasonable observer that you had become an advocate for a certain position and essentially became an attorney, expert and judge, all wrapped into one.

One of the first segments I saw, before going back and watching all of your comments, was when you were reading qualifications into the record. I initially thought this must be for someone who had testified on the record; it turned out you were providing your own qualifications so as to qualify yourself as an expert and then testify as an expert. Later, you indicated that your decision was based on your own expert testimony that you had placed in the record. That is not what judges do.

In the proceedings you describe yourself as an "authority" and having "expertise" [2:43:57 to 2:46:04]. In the record at 2:46:04, you confess that your own expertise and experience is the "lens that guides my decision." In the record at 2:46:5-2:46:45, you provided your view of the law, arguing the Constitution, Preemption, and the B&P Code. At one point you argued with other members and the City Attorney over the effect of a motion (4:00:50-4:01:22).

At one point you read into the record Mr. Varnador's testimony and championed his testimony from personal experience (2:48:13-2:48:26). You quote the applicant/Davis at 2:50:57.

During the recess you were seen speaking to the applicant (1:58:24-1:59:24). You did not report the meeting on the record. You never spoke with the appellant or any of the public, to my knowledge.

After qualifying yourself as an expert to testify, you next called members of the public

and queried them, much as a lawyer would question witnesses before the court.

You introduced your "own experience" with a "deemed approved" ordinance for non-compliant establishments in the record a 2:54:39-2:55:23. You appeared to be arguing with the public from 2:56:20-2:56:30.

You testified that appellant Zakar's argument had "no merit" at 22:56:50. None? Every single public speaker spoke in favor of Mr. Zakar's proposal. This is just further evidence that you had lost impartiality and were considering other arguments.

Your Recusal is Dictated By Your Conduct

Let me review the four issues addressed above in the context of how you conducted yourself the first day of this hearing.

1. Personal Interest in the Decision's Outcome

I do not know if you have a personal interest. However, I have reviewed a web page that is copyrighted in 2016. In it, you suggest that you have a "small and growing consultancy." You state that at the state and municipal levels, "Wagner is considered an alcohol licensing and regulatory compliance expert."

Significantly, the first line on your firm resume states you have "served as a Planning Commissioner for the City of San Diego." You note that you and your fellow commissioners conduct hearings "on all special use permits, rezonings..."

You certainly have received a personal benefit in utilizing the dais at a meeting involving a liquor license to go through your own background for your "growing" consultancy.

2. Personal Bias

A reasonable observer could conclude that you are personally biased. You argued throughout the hearing that you wanted to "put this thing to bed" instead of simply allowing the record to develop, hearing evidence, and then making findings (for example, 3:53:20-3:53:25; 3:54:48-3:55:29). You argued with the public at 2:56:20-2:56:30 and 3:55:29-3:55:47. As noted above, you stated at one point that the community arguments had NO merit (22:56:40). You not only reread the testimony of Mr. Varnador, you championed it (2:48:13-2:48:36). You quoted the applicant (2:50:57). You spoke

harshly to fellow commissioners when your motion was denied (3:51:48-3:52-46).

3. Factual Bias

You were seen during the recess speaking to the Applicants. You apparently never spoke at all to the appellants or other members of the public who opposed the Applicants' position. You did not disclose your private conversation with the Applicant on the record. I would be distressed in court if I saw my judge having a private conversation with opposing counsel on a break (you might Google former San Diego Judge James Malkus, and attorney Pat Frega, on that one).

You relied on your own testimony and your own expertise (2:54:39-2:55:32 and 2:43-57-2:46:04).

4. Dual Role Influence

This is a significant issue on this record. You clearly wore many hats. You testified as an expert witness. You essentially acted as an attorney by calling witnesses for direct examination, providing your authority on a variety of subjects, arguing with the City Attorney, etc. You were way more an advocate than a judge. You never showed any impartiality. You dominated the hearing with your efforts to get to what appeared to be a predetermined conclusion.

Conclusion

To my knowledge, not a single person spoke in favor of this transfer. Several hundred members of the community opposed it.

It would be a shame to reach the end of this process only to have it end up in court on a C.C.P. section 1094.5(b) claim of procedural unfairness. It will take a long time to work through the courts (my last administrative case in San Diego took about two years from decision to trial, and even more time on appeal), just to have the matter returned for a "do over" because the court agrees that you had a conflict of interest or bias.

On behalf of the individuals I represent, I would appreciate if you would simply recuse yourself. At that time, the Commission would need to redo the hearing to cleanse the record of your prior involvement.

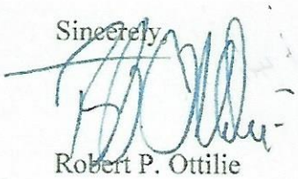
I know it is difficult to get to this point and realize that recusal may be necessary. I had a

similar case involving a member of the San Diego Ethics Commission where I conducted a 2-day hearing about 6 or 7 years ago. However, as soon as I raised the issue, the member quickly agreed, withdrew, and we scheduled a new hearing and started over. It was a much better option than years of litigation tied to a claim of procedural unfairness.

Please advise me that you have recused yourself. If not, I will take this to the full Commission.

Thank you very much.

Sincerely,



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RPO/sfm