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STATE OF CALIFORNIA—NATURAL RESOURCES AGENCY

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105- 2219
VOICE (415) 904- 5200
FAX (415) 904- 5400
TDD (415) 597-5885

TO: Commissioners and Alternates

FROM: Hope Schmeltzer, Chief Counsel

DATE: August 1, 2014

SUBJECT: Question Tree to Determine When Ex Partes Concern Enforcement Items

The June 20, 2014 letter entitled "Coastal Commissioners and Ex Parte Communications in Enforcement Proceedings" from John Saurenman, Senior Assistant Attorney General to Dr. Charles Lester ("June 20 letter") gave advice about the permissibility of conducting ex parte communications concerning enforcement matters. As stated in that memo, ex parte communications are only permitted in the specific circumstances allowed by Article 2.5 of Chapter 4 of the Coastal Act. The Coastal Act does not authorize ex parte communications regarding enforcement proceedings. This memo provides advice about how to determine if a requested ex parte communication concerns an enforcement proceeding.

The question-tree below was created in consultation with permit and enforcement staff, as well as in conjunction with the Attorney General's Office, and should be used by commissioners as guidance when ex parte communications are requested.

I. EX PARTE COMMUNICATION QUESTION TREE:

1. Upon receiving a request for an ex parte communication, ask the person if the matter they wish to discuss involves an open Coastal Commission enforcement case, or if they have been contacted by Coastal Commission Enforcement staff about the matter for which an ex parte is requested.
2. If the answer is yes, decline the ex parte communication.
3. If the answer is no, you may proceed to have the ex parte communication and should disclose any ex parte communication as required under the Coastal Act.
4. If you proceed, but during the ex parte communication, it becomes clear that the matter involves an alleged violation or an open enforcement matter, end the ex parte communication and disclose it under the Coastal Act ex parte provisions, including the point at which you learned an enforcement matter was at issue.

If you have any question about whether there is an open Coastal Commission enforcement matter, please contact the Executive Director or the Chief of Enforcement. If you have any questions about the propriety of an ex parte communication, please contact the Chief Counsel or the Supervising Deputy Attorney General.

II. FOR EX PARTE COMMUNICATIONS RELATED TO MATTERS FOR WHICH A COASTAL DEVELOPMENT PERMIT APPLICATION HAS BEEN FILED, INCLUDING AFTER-THE-FACT PERMITS:

An ex parte may at times be requested related to a coastal development permit application when there are also related alleged violations of the Coastal Act. Alleged violations can take many forms, including, but not limited to, situations where:

(1) the violation is undisputed, and the permit application seeks authorization to restore the site to its pre-violation state;
(2) the application seeks after-the-fact authorization for some or all of the development that occurred, in order to legalize the alleged violation going forward;
(3) the application seeks to rely on the allegedly illegally altered state of the property as a baseline for further development; or
(4) the application for development is largely separate from the alleged violation but is simply on the same property.

In each of these situations, a coastal development permit application is involved, and as explained in the June 20 letter, Coastal Act sections 30321, 30322 & 30324 allow for disclosed ex parte communications on matters for which an application has been submitted. However, ex parte communications are not permitted on matters that will come before the Commission as enforcement proceedings. Because the Commission retains its ability to evaluate the violation in future enforcement proceedings, even when approving a permit for restoration or an after-the-fact (situations (1) and (2) above), Commissioners must be aware that an ex parte communication in the permit matter could later subject the commissioner to allegations of having had an improper ex parte communication on an enforcement matter. The June 20 letter advised against having ex parte communications in enforcement proceedings because the Coastal Act does not authorize them, because of the Commission's obligation to ensure a fair hearing for parties and the public, and because of the need to ensure the integrity of the administrative record.

After discussion with enforcement staff and the Attorney General's office, we provide the following advice:

- In permit matters where unpermitted development or other Coastal Act violations are alleged, the most conservative approach is to avoid the ex parte communication using the guidelines provided in the prior section. The staff report on the permit application will identify whether there is an alleged Coastal Act violation on the site.
- For permit matters where a violation is alleged, a commissioner choosing to have an ex parte communication may endeavor to limit the communication to the portions of the permit application which are unrelated to the alleged violations. This is because the alleged violations could come before the Commission as an enforcement proceeding.
    - Note: Avoiding any discussion of the alleged violation may be very difficult, or even impossible in the situations described in the second and third examples above. Even on items where an alleged violator receives a permit to restore a site or for after-the-fact authorization, the Commission findings typically retain the Commission's ability to evaluate the violation for enforcement proceedings later.
    - Note: Not all violations result in enforcement proceedings, and the issues discussed in this memo only apply when an enforcement proceeding occurs. For example, some unpermitted development involves the failure to engage in the permitting process, but the unpermitted development at issue does not raise any substantive Coastal Act problems (meaning that no resources were adversely affected). If the alleged violator in such a case applies for an after-the-fact permit, obtains a permit, and abides by the permit conditions, it is unlikely that the unpermitted development would result in an enforcement matter. Although there is no simple way to assess this in advance, ex parte communications about violations that do not result in enforcement proceedings do not present due process problems.
- For permit matters where a violation is alleged, ex parte communications can present particular problems if the determination about whether a violation occurred affects the "baseline" condition of the site, and thus, the analysis of whether the proposed development is consistent with Coastal Act requirements. For example, if alleged unpermitted development removed ESHA or wetlands, and the applicant now seeks approval of new development in the same location as the alleged violation (see example 3 above), then the proposed project is reliant upon the retention of allegedly unpermitted development that is inconsistent with the Coastal Act. An ex parte communication on this type of project is likely to present a problem; conversely, if the alleged violation does not affect whether the proposed application is consistent with Coastal Act or LCP requirements, an ex parte communication concerning the proposed new development is less likely to present a problem.

- Even after the Commission has held an enforcement proceeding, commissioners should not have ex parte communications about the item until the violation has been fully resolved. If the violation remains open and unremediated, and the party does not comply with any Order(s) issued by the Commission, there is a potential for the item to come back to the Commission for further enforcement action.

The purpose of the above bullet points is not to address every possible situation, but to protect commissioners from potential allegations about engaging in ex parte communications in enforcement matters, to protect Commission enforcement decisions from legal challenge, and to give commissioners a better understanding of the situations in which such ex partes can arise, as well as to give guidance about what the Attorney General's office considers to be within the scope of its June 20 letter.

* * * *

If a commissioner would like legal advice about conducting an ex parte on a particular matter, please feel free to contact me or Supervising Deputy Attorney General Jamee Jordan Patterson. The Attorney General's office agrees that a commissioner relying on the advice of staff or counsel in determining whether to have an ex parte communication is exercising due diligence and is within the scope of its advice.

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KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE

300 SOUTH SPRING STREET, SUITE 1702
LOS ANGELES, CA 90013

Public: (213) 897-2000
Telephone: (213) 897-2702
Facsimile: (213) 897-2801
E-Mail: John.Saurenman@doj.ca.gov

June 20, 2014

Dr. Charles Lester
Executive Director
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

RE: Coastal Commissioners and Ex Parte Communications in Enforcement Proceedings

Dear Dr. Lester:

On behalf of the Commission, you have requested the Attorney General's informal advice on whether it is permissible for members of the Coastal Commission to engage in ex parte communications in the context of Commission enforcement proceedings. As we explain in more detail below, our conclusion is that such communications are not permissible both because the Coastal Act does not authorize such ex parte communications and because such communications would deprive the alleged violator and/or the public of a fair hearing.

Our analysis begins with several general principles regarding administrative agencies and due process. First, it is well settled that where an administrative agency such as the Commission conducts adjudicative proceedings, the constitutional right to due process of law attaches. (*Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731, 737.) Second, because due process applies to such proceedings, there are certain fairness principles that the agency may not disregard. One of those principles is that "one adversary should not be permitted to bend the ear of the ultimate decision maker or the decision maker's advisors in private." (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1, 5.) With these general principles in mind, we turn to the legislation that addresses ex parte communications and then to issues relating to fair hearings.

The Legislature's Approach to Ex Parte Communications

Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board is a good place to begin because it involved ex parte communications in the context of the Administrative Procedures Act (APA). The Department has the exclusive licensing authority over entities that sell alcoholic beverages. And it has

procedures for adjudicating whether licensees have violated the terms of their licenses that include an evidentiary hearing before an administrative law judge where a department staff attorney serves as the prosecutor. (40 Cal.4th at pp. 4-5.) Following the hearing, the ALJ makes factual findings, prepares a proposed decision, and submits it to the Department. The Department's director or a delegate then considers the proposed decision and elects to adopt it, modify it or reject it. (*Id.* at p. 6.) In each of the cases in this combined appeal, at the close of the administrative hearing, but before the Department made its decision, the departmental prosecutor prepared a "report of hearing" which the prosecutor then sent to the Department's chief counsel (who was the final decision maker in the proceedings). In each report of hearing, the prosecutor summarized the issues and the evidence presented in the hearing and recommended a particular disposition of the case. However, neither the prosecutor nor the Department made the report of hearing available to the licensees who were facing the loss of their licenses. (*Id.* at pp. 6-8.)

The Supreme Court found that this procedure violated the ban on ex parte communications contained in the APA. In reaching that conclusion, relying on comments from Professor Asimow who chaired the California Law Revision Commission that developed the modern APA, the Court noted that an administrative agency's decision should be based on the record and not on off-the-record discussions from which one or more parties is excluded. (*Id.* at p. 11.) As the Court stated, "Principles of fairness dictate[ ] that the final decisions should flow exclusively from the record and not from off-the-record submissions by either side." (*Id.* at p. 13.) The Court also noted that the prohibition on ex parte communications preserves the integrity of the administrative record.

While the Court's discussion occurred in the context of the APA, and while it expressly declined to address the constitutional issues the case presented (*id.* at p. 17, fn.13), it noted that the APA rule at issue was adopted in response to recommendations of the Law Review Commission that were expressly based on principles of "[f]undamental fairness." (*Id.* at p. 9.) When an administrative decision maker engages in unauthorized ex parte communications in an enforcement proceeding, the resulting hearing is not fair. (*Id.* at p. 16.) The Legislature's ban on such communications in proceedings subject to the APA illustrates how seriously it views this issue.

While the APA does not apply to the Commission, these principles are relevant to understanding how the Legislature has addressed ex parte communications in the context of the Coastal Act. When the Legislature enacted Article 2.5 of the Coastal Act (Fairness and Due Process), it expressly stated that the APA ex parte communication provisions do not apply to the Commission. (Pub. Resources Code, § 30329.) Instead, in Article 2.5 the Legislature crafted a comprehensive scheme controlling ex parte communications with the Commission. In brief, Article 2.5 defines what an ex parte communication is (§ 30322, subd. (a)) and with whom an ex parte communication occurs (§ 30323). And, in

contrast to the APA, Article 2.5 permits ex parte communications with members of the Commission on specified matters within the Commission's jurisdiction under certain conditions.

Importantly for this discussion, the Legislature defined ex parte communications as being limited to communications about matters "within the commission's jurisdiction" (§ 30322, subd. (a)) and crafted a specific definition of the "commission's jurisdiction" that is applicable only to Article 2.5. In section 30321, the Legislature defined the Commission's jurisdiction for purposes of Article 2.5 as follows:

> "[A] matter within the commission's jurisdiction" means any permit action, federal consistency review, appeal, local coastal program, port master plan, public works plan, long-range development plan, categorical or other exclusions from coastal development permit requirements, or any other quasi-judicial matter requiring commission action, for which an application has been submitted to the commission.

This definition is important as much for what it does not say as for what it says. The actions it lists as being within the Commission's jurisdiction are all matters where an outside individual or party makes an application or other submission to the Commission seeking its approval or concurrence. By defining matters within the Commission's jurisdiction in this manner, the Legislature excluded other quasi-judicial matters such as enforcement matters, e.g., cease and desist orders and restoration orders. (See *Quarry v. Doe I* (2012) 53 Cal.4th 945, 970 ["It is a settled rule of statutory construction that 'where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed.'"] We note that there is no reasonable way to read section 30321 to include enforcement matters within the scope of the Commission's jurisdiction for purposes of Article 2.5.

We also believe that the Legislature knowingly omitted enforcement matters from the definition of the Commission's jurisdiction for purposes of ex parte communications. In September 1992, when the Legislature considered and adopted AB 3459 which added Article 2.5 to the Coastal Act, the Legislature also considered and adopted SB 1449 which added section 30811 (then section 30826) to the Act authorizing restoration orders. And in 1991, less than a year earlier, the Legislature adopted SB 317 adding sections 30809 and 30810 authorizing cease and desist orders. Thus, at the time the Legislature added Article 2.5, it was well aware of the enforcement order provisions, and given that awareness, we conclude that it consciously excluded enforcement orders from the scope of Article 2.5. (See *Singh v. Superior Court* (2006) 140 Cal.App.4th 387, 400 [the Legislature is presumed to know existing law at the time it enacts a statute].)

Our interpretation of Article 2.5 is consistent with the Legislature's approach to ex parte communications in the APA. Thus, the many agencies to which the APA applies

cannot engage in ex parte communications in their proceedings, such as the ones the Supreme Court addressed in *Department of Alcoholic Beverage Control.*

Therefore, we conclude that the Coastal Act prohibits commissioners from engaging in ex parte communications regarding enforcement matters. And we note that this prohibition applies to ex parte communications from any source. Thus, the fact that an ex parte communications comes from a legislator or from a representative of another agency does not make it permissible. The Act bars all ex parte communications in this context.

Fair Hearings

As noted above, the courts have found that improper ex parte communications compromise the fairness of the administrative hearing. Over 60 years ago, the California Supreme Court stated:

> The action of such an administrative board exercising adjudicatory functions when based upon information of which the parties were not apprised and which they had no opportunity to controvert amounts to a denial of a hearing. . . . Administrative tribunals which are required to make a determination after a hearing cannot act upon their own information, and nothing can be considered as evidence that was not introduced at a hearing of which the parties had notice or at which they were present. . . . [T]he 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.

(*English v. City of Long Beach* (1950) 35 Cal.2d 155, 158-159; citations omitted.) The courts have continued to rely on *English* for these propositions. (*Department of Alcoholic Beverage Control, supra*, 40 Cal.4th at p. 11; *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1171-1172.)

There are two points about this that we wish to emphasize. First, the limitations on ex parte communications preserve the integrity of the administrative record. (*Department of Alcoholic Beverage Control, supra*, 40 Cal.4th at p. 11.) By definition, those communications are not a part of the administrative record, and if such communications occur, the record cannot reflect fully the reasons for the agency's actions. We note that in allowing some ex parte communications under Article 2.5, the Legislature made provision for commissioners to disclose the substance of the ex parte communications, and those disclosures become a part of the administrative record. (Pub. Resources Code, § 30324.) However, those disclosures are only summaries of the communications, they are based on commissioners' recollection of the discussions that

occurred, and commissioners may neglect to make the disclosures. Therefore, in our view, in an enforcement proceeding, such disclosures would not be a substitute for testimony and discussion on the record.

Second, the right to a fair hearing does not belong to the alleged violator alone. The public has a right to a fair hearing as well. (See, e.g., *California Assn. of Nursing Homes, etc. v. Williams* (1970) 4 Cal.App.3d 800, 813 ["Private negotiations with selected members or representatives of an affected industry are no substitute for public hearings. There is a public interest in having the law obeyed."]; see also *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 90 [undeniable public interest in fair hearings in administrative adjudications].) One implication of this public interest is that in a Commission enforcement proceeding, the alleged violator cannot waive the right to a fair hearing so that the commissioners can engage in ex parte communications. Beyond the fact that Article 2.5 does not authorize such a waiver, if the commissioners were to allow the waiver and engage in such communications, they would be violating the public's interest in a fair hearing.

There is one other situation where commissioners need to exercise extreme caution. At times an enforcement order proceeding will be paired with the alleged violator's after-the-fact permit application that seeks to address the Coastal Act violations or with some other type of application. Or, in the context of processing a permit application, Commission staff will discover a violation As a theoretical matter, commissioners can engage in ex parte communications with regard to after-the-fact or other permit applications but not regarding the enforcement proceeding or the violation. In reality, maintaining a distinction between the two likely will be extremely difficult. In the past, Commission legal staff has recommended that commissioners be exceedingly careful in such situations. While we concur with that advice, we suggest that because segregating permissible communications from impermissible ones will be very difficult, commissioners would be better served to avoid all ex parte communications in such situations.

We wish to briefly address one other item which is whether the Legislature could enact legislation that would authorize ex parte communications in Commission enforcement proceedings. While the Legislature could enact such legislation, we believe that in the context of enforcement matters, and in light of the cases discussed above, the courts would find such legislation unconstitutional because it would violate the due process rights of the parties to the enforcement proceeding and of the public.

Conclusion

In sum, Article 2.5 can be interpreted in only one way. While it authorizes ex parte communications with commissioners in some situations, it does not authorize ex parte communications in Commission enforcement proceedings. Additionally, if

commissioners engage in ex parte communications in enforcement proceedings, they will deny the alleged violator and/or the public the right to a fair hearing. Thus, for the foregoing reasons, it is impermissible for commissioners to participate in ex parte communications regarding Commission enforcement proceedings.

Please feel free to contact me if you have any questions about the above.

Sincerely,

JOHN A. SAURENMAN
Senior Assistant Attorney General

For KAMALA D. HARRIS
Attorney General

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Subject: RE: invitation to comment

Hi Jana!

Thanks for sending this over to me. I've been out of the office quite a bit over the past week, since the grandbabies are visiting from New Jersey and playing with them is so much fun.

I've shared my thoughts on this subject with Mark Massara, and I believe he will be passing them along to you. In brief: The AG's position on ex parte communications may have the unintended consequence of depriving alleged violators of due process, unless the public hearing format is also adjusted to ensure that they have a "full and fair" opportunity to address the information and arguments offered by staff and the public, and to answer questions and comments from commissioners before a decision is rendered.

The AG's analysis is built on the comparison between CCC hearings and court proceedings. A superior court judge is prohibited from engaging in ex parte communications on a contested matter; at the same time, the parties to that matter have a relatively unfettered opportunity to present their cases to the judge, and to respond to the judge's questions and concerns. By contrast, Coastal Commission enforcement hearings are very short, and the time limits on all participants (including the alleged violator, who arguably has the most at stake) are very tight. The ex parte communication is an opportunity for a commissioner to ask questions and probe more deeply into various issues. True, everyone has a chance to submit written evidence and arguments, assuming that the staff report are issued early enough (note the problem of the supplemental staff reports that are issued the day before the hearing). But, is it reasonable to assume that all 12 commissioners read all of the written material submitted prior to a hearing?

In my opinion, any adjustment in Commission policies concern ex parte communications ought to be part of a larger discussion about the Commission's hearing procedures, with an eye toward transparent and fair decision making, and with particular regard for the rights of the applicants who have the most at stake.

Thanks for listening.

Steve

Steven Amerikaner
Brownstein Hyatt Farber Schreck, LLP
1020 State Street
Santa Barbara, CA 93101
805.882.1407 tel
SAmerikaner@bhfs.com

From: Jana Zimmer
Sent: Thursday, August 07, 2014 9:09 AM
To: Amerikaner, Steven; 'Alan Seltzer'; Mel Nutter; Mark Massara
Subject: invitation to comment

As you are long time practitioners representing local government, environmental interests, and/or applicants in the coastal zone, I would be interested in hearing your views on this item, especially on the

application of this advice through the 'decision tree' for Commissioners. Any questions, refinements or practical suggestions from your perspective which will help Commissioners and the Commission as a whole stay within the bounds of the law, while providing a meaningful opportunity for hearing the views of affected property owners and the public would be of interest.

From: Warner Chabot [warner.chabot@gmail.com]
Sent: Friday, August 15, 2014 7:45 AM
To: [Commissioners]
Cc: [Commission staff]
Subject: Why Three Legal Experts Say CCC Ex Parte Meetings w/Coastal Act Violators (on Enforcement Matters) is Bad Public Policy

Dear Commissioners -

In advance of today's briefing on Ex parte communications, I want to share the opinion of three additional legal experts on the topic. These opinions were offered last year when a new Assemblyman suggested a bill to allow such meetings. After feedback, the Assemblyman never drafted the bill.

The three experts are:

1) **Michael Asimow,** Professor of Law, Stanford Law School - (Author of a law school Casebook on CA Administrative Law)

2) **Meg Caldwell**, Past Coastal Commission Chair,

3) **Ralph Faust** - Coastal Commission General Counsel (20 years)

Respectfully,

Warner Chabot

Three Legal Experts Advise that Ex Parte Communications with Coastal Commissioners on Enforcement Cases is Poor Public Policy

1) Michael Asimow, Visiting Professor of Law, Stanford Law School

EX PARTE COMMUNCATIONS IN COASTAL COMMISSION ENFORCEMENT DECISIONS

You have asked me for my opinion about pending legislation that would allow ex parte communications to the members of the Coastal Commission from private parties in enforcement cases. I understand that the Commission staff members (such as investigators and prosecutors) would continue to be prohibited from making such communications.

My field of specialization is California administrative law. I have no clients; my sole interest in the subject is academic. I am the lead author of a forthcoming treatise on California Administrative Law to be published by the Rutter Group. I have previously published a law school casebook on this subject. I was the consultant to the California Law Revision Commission in its project to rewrite the Administrative Procedure Act. This legislation was enacted and signed into law. It includes a prohibition on ex parte communications in all administrative adjudications (unless otherwise provided by statutes relating to specific agencies). CA Gov't C. §11430.10 et. seq. I have also written several articles on this subject, including "Toward A New California Administrative Procedure Act: Adjudication Fundamentals," 39 UCLA L. Rev. 1067, 1124-1143 (1992).

In California administrative agency adjudication, ex parte communications to either hearing officers or agency heads, particularly in enforcement matters, are prohibited in nearly all agencies. The Public Utilities Commission permits ex parte contacts in ratemaking cases but not in other forms of adjudication. My understanding is that the members of the State Board of Equalization accept ex parte communications in tax cases from both its staff and from taxpayers. In Coastal Commission cases, ex parte communications from both the staff and private parties are permitted in permit application cases but not in enforcement cases.

A rule that allows ex parte communications in adjudication from the adversaries on either side of the case is bad policy. Such communications introduce facts or arguments that are not made during formal hearings and therefore violate the principle of the exclusive record. The opposing party cannot rebut the claims made in ex parte communication. Even if ex parte communications are disclosed, it is unlikely that the full details of an oral communication will be placed on the record in sufficient detail to permit rebuttal. Ex parte communications may be a vehicle for offering bribes or improperly introducing political calculations or promising campaign contributions in future elections. They essentially render the hearing process a sham.

In addition, I observe that Commissioners are extremely busy hearing cases and discharging their other functions. The last thing they need is a queue of lobbyists or private party owners besieging their offices to make impassioned off the record arguments. And if the Commissioners cannot hear everybody who wants to talk to them, they are most likely to talk to the lobbyists or lawyers they know or to wealthy and powerful landowners rather than to the little guys.

I observe that the Commission (unlike virtually all other California state agencies) conducts its hearings en banc (rather than before an administrative judge). This system makes ex parte communications to the Commissioners even more objectionable than in cases in which their function is to consider appeals from proposed decisions by administrative judges. If the commissioners have been biased by having received ex parte communications, it is easier for them to decide the case for the private party than to overturn a decision of an administrative judge imposing a sanction, since the latter action has to be explained.

I object equally to ex parte communications from adversarial staff members to the Commissioners. But I never imagined that anyone would seriously propose a scheme whereby private parties could talk off-the-record to Commissioners but the adversarial staff members (like investigators and prosecutors) could not. This would introduce a unique system of biased

decision making. It's like allowing criminal defense lawyers to whisper into the ear of the judges, but denying the same strategy to the prosecutors. No person sincerely interested in fair procedure and due process could be in favor of a system of one-way ex parte communication.

Please let me know if I can be of any further assistance.

Michael Asimow Asimow@law.stanford.edu 650-723-2431

2) From Meg Caldwell - Stanford Law Professor and Past Coastal Commission Chair:

EX PARTE Communication rules apply to people with applications for projects before the commission. These rules allow permit applicants to privately discuss their project with individual Coastal Commissioners as long as the Commissioners report that they had such communications when the Commission deliberates in public on the permit.

These EX PARTE rules do **NOT** apply and do not allow similar individual communications between Commissioners and property owners or their agents who have a Coastal Act enforcement action on file at the Commission.

Abiding with the California Supreme Court ruling on administrative agencies that handle both permitting and enforcement matters (these are called "**unitary agencies**"), the Commission separates its permitting functions from its enforcement functions to ensure procedural fairness and transparency. The Commission as a whole functions as a judge during enforcement hearings. As with hearings before judges, ex parte rules do not allow someone with an existing violation to communicate with individual commissioners to discuss, negotiate or attempt to resolve their violation. Procedural questions can and should be handled through the Commission's legal counsel (the Attorney General) and/or through the chair of the Commission.

Since the Commissioners act as "judges" in an enforcement action, the rule change advocated by Assemblymember Levine is the equivalent of allowing someone with a legal case to have separate, private conversations with the judge...as long as the judge reports that he had the conversation.

3) From Ralph Faust - General Counsel to the Coastal Commission for 20 Years:

The existing enforcement process assumes that that staff is a party (like a prosecutor) and the alleged violator is also a party. The Commission acts as a judge and the separation of the staff (as well as the alleged violator) from the Commission in these matters is strict (and fundamentally different from the other Commission processes). The Commission does not receive separate briefings from staff, but only hears about possible resolution of these matters in open session, when a cease and desist order or a restoration order is being considered. This is

done in public, and the alleged violator is of course also present at the hearing. Staff has no procedural or Commissioner access advantage as compared to the alleged violator.

To allow the alleged violator to have private communications with individual Commissioners has several structural problems. First, it gives the alleged violator an unfair advantage in pitching their view of the case to the Commissioners. The present system of only allowing communications in open session with all parties and the public present gives equal time and equal access to both sides. Second, communications with individual Commissioners can only serve as lobbying devices, because individual Commissioners have no authority to do anything. The Commission only exists as an entity when it is in public session with a quorum. Consequently, a conversation with an individual Commissioner is meaningless in the context of Commission action, but of course not meaningless in the context of seeking or offering campaign contributions or other benefits. The purpose of keeping the rules equal for all and doing it all in public is simply good government. On these serious matters the business of government should be conducted in public. There is no good government purpose that I can think of in allowing private conversations between alleged violators and individual Commissioners, particularly when this unfairly tilts the process in favor of the alleged violators.

You might ask: what about ex parte communications as they presently exist? These were not always permitted in their present form. In fact some of us at the Commission thought that they were illegal as a violation of due process, since the Commission makes most of its decisions in a quasi-judicial capacity. But the Legislative changes that permit ex part communications if they are reported (the ex parte communications provisions of the Coastal Act) created an exception for those. This exception is not allowed in enforcement actions, which, because of the prospect of penalties, carry a higher due process burden. It is not clear that the Legislature could not change the law in this manner (that it would be illegal/unconstitutional for it to do so). But it is clear that it is illegal now, and for the reasons above is bad public policy.

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Warner Chabot
Warner Chabot & Associates

Cell: 510 375-2141
warner.chabot@gmail.com
4053 Harlan St. #108
Emeryville, CA. 94106

From: Lamport, Stanley W.
Sent: Friday, August 15, 2014 01:18 AM
To: [Commissioners]
Subject: Ex Parte Communications in Enforcement Proceedings

Commissioners:

I've had a chance to review the memos regarding ex parte communications concerning enforcement proceedings. Unfortunately, I have to be in San Francisco today to see if we can settle the Stoloski lawsuit, among other things, and will not be at the Commission meeting when this item is discussed. However, I wanted offer the following thoughts.

I understand the basic argument in the memos to be that ex parte communications in an enforcement proceeding are not permitted because such proceedings are not included in the definition of "matters within the commission's jurisdiction" in Coastal Act Section 30320 et seq. I disagree with this argument for the following reasons:

First, there is no general prohibition in California law on ex parte communications in connection with an administrative enforcement proceeding. There are a number of cases in which courts have addressed ex parte communications in situations where the APA does not apply (and we all agree the APA does not apply to the Commission). None of those cases hold that the communication was not permitted. They all turn on whether the substance of the communication was disclosed at a time and in a manner that would allow an applicant or the public to comment on it. In fact, that is the very concern that comes out in the portions of the *Department of Alcohol Beverage Control* case quoted in the AG's memo.

But there is no law or constitutional provision that prohibits ex parte communications. Indeed, people have the right to petition and access government under Article 1of the California Constitution. The balance between allowing access and providing a fair hearing is struck by allowing the communication, but requiring sufficient disclosure of the substance of the communication to assure that the facts that are relevant to the decision are made known to and can be addressed by the affected parties.

Second, because ex parte communications are not generally prohibited, the Commission does not need statutory authorization in the Coastal Act to engage in ex parte communications. The APA codifies an ex parte prohibition, but, of course, the APA does not apply to the Coastal Commission. However, the fact that the APA prohibits ex parte communications is telling. Generally speaking, prohibitions are enacted to prevent something that otherwise would be permitted. You generally don't see the legislature enacting statutes to prohibit what is already prohibited. You see the legislature enacting laws to prohibit what otherwise could occur if the prohibition is not enacted. So the reference to the APA prohibition actually supports the point that ex parte communications are permitted in the absence of a statutory prohibition.

Third, Coastal Act Section 30320 et seq. is not an authorization to engage in ex parte communications. It does not say that it is authorizing ex parte communications. Nor does it say that any type of ex parte communication is prohibited. Generally, speaking, prohibitions on activities that are connected with the exercise of constitutional rights to petition and access government are not implied. They must be express and there is nothing in Section 30320 et seq. that expressly prohibits your participation in any type of ex parte communication.

Section 30320 et seq. sets forth procedures that apply in defined types of ex parte communications, which are referred to as "matters within the commission's jurisdiction." The statute says that when you engage in ex parte communications in circumstances that fall within the definition of "matters within the commission's jurisdiction" certain requirements must be met. I don't think it is the case that the subject matter of an enforcement proceeding ex parte is not a "matter within the commission's jurisdiction." However, assuming for the moment that enforcement proceedings are not "matters within the commission's jurisdiction," that still does not mean those communications cannot occur. It means that those ex parte communications are not subject to the specific requirements in the Coastal Act. Of course they are still subject to the due process disclosure requirement I mentioned above.

For these I reasons, I do not agree that ex parte communications in enforcement proceedings are prohibited because the Coastal Act Section 30320 et seq. does not specifically mention enforcement proceedings as "matters within the commission's jurisdiction." Nor do I agree with the claim that ex parte communications result in the denial of a fair hearing when the substance of the communication is disclosed. It has certainly been my experience that commissioners are capable of responsibly meeting the disclosure requirements for a fair hearing.

If the Commission intends to follow the advice in enforcement proceedings, I would like to suggest that the Commission lengthen the time allotted for the subject of an enforcement action to present their case at the Commission hearing. Ten to 15 minutes is often not enough time to address all of the issues in an enforcement case. Indeed, the staff presentations often take more time than the time afforded to an alleged violator. It is those kinds of disparities can lead some to perceive that Coastal Commission enforcement proceedings are not fair. Ex parte communications provide an avenue to remedy that concern. If those ex parte communications are not going to occur, the target of the enforcement action should be allowed sufficient time to fully address the issues in the hearing, particularly, although not exclusively, in access cases where the Commission can impose penalties.

I hope this helps.

STAN

Stanley W. Lamport

COX CASTLE NICHOLSON

Cox, Castle & Nicholson LLP
2049 Century Park East | 28th Floor | Los Angeles, CA 90067
direct: 310.284.2275
mobile: 213.393.2033 | *fax:* 310.284.2100

FORM FOR DISCLOSURE OF EX PARTE COMMUNICATIONS

Name or description of project: F 4.5 Attorney General Opinion on Ex Parte in Enforcement

Date and time of receipt of communication: August 11, 2014 10:00-10:30 a.m.

Location of communication: Santa Barbara

Type of communication (letter, facsimile, etc.): telecon

Person(s) initiating communication: Mark Massara

Massara has represented environmental organizations as well as permit applicants for many years. He is in strong support of staff's work and the program. He appreciated that the A.G. memo clarifies what can be done, and puts everyone on a level playing field. However, he expressed concern that the "losers" are the Commissioners themselves, who cannot participate in problem solving.

Historically, there was communication between affected parties and individual Commissioners in enforcement matters, including instances where individual Commissioners tried to help negotiate solutions. There were abuses but also good faith attempts to resolve problems. He believes that the parties, including an alleged violator/ property owner or members of the public who have reported a violation and want to know the status, not being able to talk to Commissioners may result in the "tail which wags the dog", and allow unresolved disputes which could be resolved to languish, for years, without coming for decision in a hearing, which does not serve anyone.

He believes that there are aspects to the proposed Commissioner decision tree that need to be better defined in light of how things really work. Often times, the Commission staff will 'open' an enforcement file based on a tip or complaint from a member of the public. A contact is made or an NOV letter may or may not be sent, and a property owner tries to respond in good faith. Sometimes there is a good explanation in response to the allegation of violation, but the Commission does not hear that. Many times, the resolution of a dispute over whether an activity was permitted, or exempt from permits, can involve complex analysis, and sometimes involves changing analysis from how a local agency has historically interpreted an LCP, in an enforcement action, and no one has any input. During a negotiation for resolution, although there is a separation on the supervisory level between permitting staff and enforcement staff, the technical people, such as biologists who have to review a report for a potential restoration, appear to serve both. Things get into a black hole, where there is not an opportunity to bring issues for resolution to the Commission as a whole. The Commission can go for years without ever being informed of a dispute.

In general, he does not understand why Coastal Commissioners should be 'trusted' to have and properly report communications in permit cases, but not in enforcement cases.

Date: 8/11/14 Jana Zimmer

Jana,

I will give the matter more thought, but since you have a meeting coming up in a couple of days, here are a few very quick thoughts.

The advice from the AG and the staff memo concerning ex parte communications and enforcement proceedings reminds me of the advice the AG used to provide concerning such communications before Terry Friedman's bill acknowledged that ex parte communications were proper if disclosed.
We used to be told that the better practice was to avoid all ex parte communications and that gave us a good reason to avoid them if we wished to do so.

It also occurs to me that a communication concerning a matter not pending before the Commission is not considered an ex parte communication. Perhaps it is unrealistic to think that someone or someone's agent, recognizing that a Coastal Act violation has occurred might seek advice from a Commissioner before being contacted by the staff about the matter or filing a CDP application. On the other hand, stranger things have happened and the memo does not deal with such a circumstance.

Likewise, someone seeking to discuss a matter with a Commissioner may not be candid about the status of a matter. What then? Although a Commissioner who ignores the ex parte disclosure rules may suffer certain penalties for not disclosing, the memo does not remind Commissioners of the financial risk to them personally for violating the rules.

The "decision tree" seems a bit complicated. Navigating a number of steps increases the risk that someone may trip. For instance, asking about contact by enforcement staff, rather than permit or other staff, raises questions. Rather than going through a series of steps it would be much simpler if the inquiry were whether any development or physical activity had occurred on the site. If so, since it would be unpermitted development, and the ex parte communication request should be declined.

Melvin L. Nutter

On Thu, 07 Aug 2014 09:09:02 -0700, Jana Zimmer