
City Attorney

City of Oakland
Public Ethics Commission
September 12, 2005

In the Matter of)
) Complaint No. 04-07
)

Denise Davila initially filed Complaint No. 04-07 on December 9, 2004. She filed a revised complaint on December 14, 2004. **Attachment 1A.** With Commission approval, the parties agreed to a mutual, temporary suspension of the complaint in January, 2005. Ms. Davila supplemented her complaint with additional information and allegations on August 5, 2005, and again on August 19, 2005. **Attachments 1B and 1C, respectively.**

I. SUMMARY OF COMPLAINT AND ALLEGATIONS

Ms. Davila filed Complaint No. 04-07 initially alleging that the Oakland Planning Commission and various City staff violated the Oakland Sunshine Ordinance by providing insufficient notice for a December 1, 2004, Planning Commission meeting and by failing to timely file all relevant agenda-related material with the Office of the City Clerk.

On August 5, 2005, and on August 19, 2005, Ms. Davila (along with Hugo Evans) supplemented the complaint with information and allegations that Planning Commission staff 1) posted a defective public notice of the work to be performed on several properties, 2) failed to permit timely copying of documents in connection with a permit and variance application, and 3) issued a letter approving an administrative permit and variance that demonstrated "inappropriate bias" on the part of the City's planning staff.

II. BACKGROUND

In 1998, rainstorms triggered unstable land conditions on several parcels located at or near Norton and Rettig Avenues in the City's "Laurel District." In June, 2004, City staff posted a public notice in the area to advise that several property owners were seeking permits and variances to perform work on the property. **Attachment 2.** At the request of some of the neighboring property owners, a revised public notice was posted in August, 2004. **Attachment 3.**

On July 28, 2004, Ms. Davila emailed City planning staff requesting information and documents pertaining to the proposed permit applications. According to Ms. Davila, some of the documents that were a part of the City's planning file had been

"checked out" by staff in the Public Works Agency and were not available the day she inspected the file. **Attachment 1B; see copy of 7/28 email.**

The following day, City engineer Dominic Ma emailed Ms. Davila inviting her to inspect documents in his office. He said he was still awaiting written permission from the authors and/or owners of some of the documents to permit them to be photocopied. By Monday, August 2, 2004, Ms. Davila had obtained copies of some of the documents pertinent to the permit application. She sent another email to Mr. Ma to request four additional documents that were "peer reviewed" by a professional engineer as part of the application process. Mr. Ma responded to Ms. Davila's request by stating that the City required written permission to release engineering drawings and documents for photocopying and would release them for duplication upon receipt of that permission. **Attachment 1B; see copy of 8/2 email.**

Ms. Davila states that it was not until Friday, August 6, 2004, that the technical documents became available for duplication in order to provide copies of those documents to a professional engineer. The public comment period for the proposed permit application reportedly ended on August 9, 2004. A letter from Ms. Davila's retained engineer dated August 8, 2004, indicates that he reviewed all but one of the requested documents (i.e., McNair Letter dated 7/2/04) in time before the close of the comment period. **Attachment 4.**

On October 29, 2004, City staff issued permits and a minor variance to allow grading and slope stabilization on parcels located at or near Norton Avenue and Rettig Avenue. On November 8, 2004, the Friends of Peralta Creek and Ms. Davila filed an appeal to the Oakland Planning Commission of the staff decision to grant the permit and variance.

On Monday, November 22, 2004, City planner Edward Manasse emailed Ms. Davila that her appeal would be heard by the Planning Commission at its regular meeting of December 1, 2004. **Attachment 1B.** The email apparently contained an attachment of a "revised" agenda for the December 1 meeting that contained Ms. Davila's item. The "hard copy" of the revised agenda sent to Ms. Davila was postmarked on November 23, 2004. **Attachment 1B.** Ms. Davila states she and her neighbors did not receive the hard copy agenda until Saturday, November 27, 2004. According to the Office of the City Clerk, a copy of the revised Planning Commission agenda, together with the agenda-related materials for that item, was not filed with the Clerk's Office until the following Monday, November 29, 2004, two days before the meeting. **Attachment 1B.** Ms. Davila also contends that the revised meeting agenda was not posted online 72 hours before the meeting nor was it filed with the City Library.

Ms. Davila requested that the appeal hearing be delayed until the Planning Commission's next regular meeting of December 15, 2004, but was told by then-Planning Commission chair Mark McClure that the agenda for that evening was "completely full."

Ms. Davila received her copy of the staff report to the Planning Commission regarding the appeal via email on Monday, November 29, 2004. Ms. Davila notes that the Planning Commission agenda contains a standing notice advising that staff reports for each agenda item are available on Wednesdays, one week before the regular meeting.

Attachment 1B. The staff report contained a large number of attachments that she contends she did not have adequate time to review. According to Ms. Davila, seven of the attachments to the staff report were documents she had never seen before.

The Planning Commission ultimately denied the appeal at its December 1, 2004, meeting. Ms. Davila attended the meeting but did not speak. She and others were represented by, and ceded their speaking time to, their attorney Stephen E. Velyvis. Mr. Velyvis requested 10 minutes of speaking time but was granted 6 minutes. During his comments Mr. Velyvis objected to the short notice and the resulting inability of his retained engineering expert to review all the materials in the agenda package.

On Thursday, December 9, 2004, the Planning Commission filed with the Office of the City Clerk a revised agenda for its December 15, 2004, regular meeting.

Attachment 5. The revised agenda contained the following new item:

"CURE AND CORRECT FOR ALLEGED IMPROPER POSTING OF AGENDA IN CITY CLERK'S OFFICE (LESS THAN THE REQUIRED 72 HOURS BEFORE THE MEETING) PURSUANT TO OAKLAND MUNICIPAL CODE SECTION 2.20.270(D)

Consideration of whether to "cure and correct" the Planning Commission's December 1, 2004 action, and, if so, whether to affirm or supersede the Planning Commission's denial of the appeal."

According to the staff report for the above item, Ralph Kanz wrote an email to City development director Claudia Cappio claiming that the revised agenda for the December 1, 2004, Planning Commission meeting was not posted at the City Clerk's office "until sometime on Monday, November 29 -- less than 72 hours before the meeting." The staff report stated that while the City was in "substantial compliance" with the noticing requirements of the Brown Act and the Oakland Sunshine Ordinance, it recommended that the Planning Commission cure and correct the actions taken at the December 1, 2004, meeting to achieve "full compliance" with those laws. **Attachment 6.** Ms. Davila was out of town on December 15 but was again represented at the meeting by her attorney. The Planning Commission took public comment before taking action to affirm its previous decision to deny the appeal.

III. ANALYSIS

A. Alleged Defects In The July/August 2004 Public Notices For Work To Be Performed On the Subject Properties

Complainants allege that the public notices posted in and around the area where the work was to be performed were defective because they improperly described the

nature and extent of the work to be performed. ***Attachment 1B -- Davila/Evans letter dated 8/4/05; Attachment 3.***

The public notices to which complainants refer are required under California's Planning And Zoning Law (Title 7 of the Government Code). The planning and zoning law creates the basic framework for local land use regulation. Applications for the kind of permits and variances sought in this matter must meet specific public notice requirements under the state's planning and zoning law and any local planning ordinances. These requirements are different from those required under the Brown Act or the Oakland Sunshine Ordinance.

The Commission does not have the authority to determine whether the public notices given to alert surrounding property owners under state and local planning law was adequate. Commission staff notes that judicial remedies exist for residents who contend that their rights to due process and fair hearing were compromised by inadequate planning notices. [See generally Drum v. Fresno County Department of Public Works (1983) 144 Cal.App. 3d 777] The proper forum to raise this issue was before or during the Planning Commission meeting of December 1 (as Ms. Davila's attorney did), and/or in court.

B. Alleged Failure To Provide Copies Of Requested Materials

Complainants allege that the City delayed in the timely production of records for photocopying in connection with the permit and variance application. Specifically they allege that the City required a written release from the owners of engineering documents already in the possession of the City before the City would permit them to be photocopied. They claim that the documents should have been available for photocopying at the time they were made available for inspection.

The California Public Records Act defines a "public record" as including "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." A "writing" expressly includes any form of communication or representation, including letters, words, pictures. . .and all papers, maps, magnetic or paper tapes. . ." With the exception of records exempted from disclosure by law, all public records must be made "promptly available" to any person upon the payment of duplicating fees. [See Government Code Section 6252] The Oakland Sunshine Ordinance, which this Commission has the authority to enforce, states that the release of records by Oakland's local bodies, agencies and departments "shall be governed by the California Public Records Act. . ." [See O.M.C. Section 2.20.190]

City staff contends that they acted properly when they required a written release before allowing the engineering documents to be photocopied. California Health and Safety Code Section 19851 states that the official copy of plans maintained by a City's building department shall be open for inspection only on the premises of the building department as a public record. The copy may not be duplicated in whole or in part without

the written permission of the "registered professional" who originally signed the documents **and** the original or current owner of the building.

Commission staff could find no case law interpreting the relationship between this section of the Health and Safety Code with the requirements of the Public Records Act. Section 6254(k) of the Public Records Act states that its provisions do not apply to any records that are "exempted or prohibited pursuant to federal or state law. . ." Arguably, Health and Safety Code Section 19851 operates as such an exemption or prohibition against the copying of building plans in the absence of written permission from the professional who created them and the owner of the building.

Commission staff reviewed two of the documents that Ms. Davila requested and for which City staff required written authorization before they would permit duplication. Both documents (Geotechnical Design Report For Landslide Stabilization/Cal Engineering and Geotechnical Engineering Report - Plans/Hallenbeck) appear to constitute proprietary building and grading specifications reasonably contemplated under the Health and Safety Code.

Commission staff notes that the above issue is probably moot for purposes of allegations under the Public Records Act and Sunshine Ordinance -- Ms. Davila ultimately obtained copies of the requested engineering documents. Commission staff also notes that the documents requiring a written release under the Health and Safety Code were photocopied within nine days of her initial request and immediately upon receipt of the written releases, thus complying with the minimum deadline for production of documents under the Public Records Act. There is no information or allegation suggesting that City planning staff unreasonably delayed in seeking releases for the building plans after she requested copies of them.

C. Alleged Failure To Provide Timely Notice And Copies Of Agenda-Related Materials For The December 1, 2004, Planning Commission Meeting

The Brown Act requires local bodies such as the Planning Commission to provide written notice of its regular meetings at least 72 hours before the meeting. In addition to this basic requirement, the Oakland Sunshine Ordinance requires all Oakland local bodies "to file a copy of the agenda and all agenda-related material with the Office of the City Clerk at least 72 hours before the time of any regular meeting." O.M.C. Section 2.20.080(C).

[As stated above, items appearing on a Planning Commission agenda may be subject to additional notice requirements arising under state and local planning law over which this Commission has no jurisdiction. In addition, the ten-day filing and posting requirement of the Sunshine Ordinance, including the requirement to post agendas on-line, apply only to meetings of the City Council, Redevelopment Agency, Port Board, and Public Ethics Commission. See O.M.C. Section 2.20.080(A).]

According to the City Clerk's records, it appears that the revised agenda and agenda-related materials pertaining to Ms. Davila's appeal were not filed with the Clerk's Office until the morning of November 29, 2004, less than 72 hours before the start of the meeting. This raises an issue of whether the Planning Commission conducted a meeting in violation of its minimum notice requirements under the Sunshine Ordinance. This issue, however, may be beyond the ability of the complainant to raise or the Commission to enforce for the reasons which follow.

1. The Complaint May Be Barred By Ms. Davila's Actual Notice Of The Meeting

Sunshine Ordinance Section 2.20.270(F) states that "[n]o person may file a complaint with the Public Ethics Commission alleging violation of the notice provisions of Section 2.20.080 if he or she attended the meeting or had actual notice of the item of business at least 72 hours prior to the meeting at which the action was taken." Ms. Davila acknowledges in her complaint that she received an email copy of the revised agenda on Monday, November 22, 2004, nine days before the meeting. **Attachment 1A.** The acknowledged receipt of this email constitutes, in Commission staff's opinion, enough "actual notice" of the item to prevent her from raising the issue in this complaint.

2. The Planning Commission's "Cure And Correction" At Its December 15, 2004, Meeting

On December 15, 2004, the Planning Commission scheduled a "cure and correction" of its alleged failure to timely file its revised December 1 agenda with the City Clerk. The Sunshine Ordinance expressly permits a local body to voluntarily cure and correct an action taken in alleged violation of the Sunshine Ordinance. The ordinance requires the local body to first determine whether to cure and correct the challenged action and, if so, whether to "affirm or supersede" the challenged action after first taking any new public testimony. O.M.C. Section 2.20.270(D).

The Planning Commission took additional testimony from 13 public speakers before unanimously deciding to affirm its December 1 action to deny Ms. Davila's appeal. Thus it appears that the Planning Commission has already performed the remedy which the Sunshine Ordinance provides for the alleged violation, making any formal action by the Commission on this issue moot.

(Commission staff noted that Planning Commission chair Mark McClure directed staff, in the future, to put-over any item that is challenged on grounds of inadequate public notice to avoid having to cure and correct those items at a later meeting.)

D. Alleged "Inappropriate Bias" In The City's Grant Of Administrative Permit And Variance

Complainant's letter dated August 19, 2005, provides specific instances in which they believe City staff made biased comments in the City's October 29, 2004, Approval Letter granting the permits and variance. **Attachment 1C.**

Without commenting on the merits of Ms. Davila's specific allegations, it does not appear that the City Charter nor the Commission's enabling ordinance [O.M.C. §§2.24.010 et seq] permits the Commission to determine issues of "bias." Allegations of bias are typically not enforced by governmental or law enforcement agencies -- they are private causes of actions that are asserted in court by the person whose rights to due process and fair hearing have allegedly been violated. The complainants may wish to consult with their attorney if they believe their rights have been violated.

III. STAFF RECOMMENDATION

Commission staff recommends that the Commission dismiss Complaint No. 04-07 on grounds that 1) the Commission does not have the authority to determine issues pertaining to state and local planning law; 2) Ms. Davila is precluded from raising issues pertaining to the adequacy of notice of the December 1, 2004, Planning Commission meeting under the Sunshine Ordinance because she received actual notice of her item nine days before the meeting and attended the meeting; and 3) the Planning Commission cured and corrected allegations of improper notice under the Sunshine Ordinance at its meeting of December 15, 2004.

Respectfully submitted,

Daniel D. Purnell
Executive Director

*** City Attorney approval as to form and legality elates specifically to the legal issues raised in the staff report. The City Attorney's approval is not an endorsement of any policy issues expressed or of the conclusions reached by staff on the merits of the underlying complaint.*