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STATE OF CALIFORNIA—THE RESOURCES AGENCY PETE WILSON, *Governor*

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MEMORANDUM

December 30, 1992

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Ans'd.....

TO: Coastal Commissioners

FROM: Ralph Faust, Chief Counsel
Dorothy Dickey, Deputy Chief Counsel

SUBJECT: Summary of Major Issues Concerning Commissioners' Reporting of Ex Parte Communications (AB 3459, Friedman)

INTRODUCTION

This memorandum summarizes the major issues concerning Commissioners' reporting of ex parte communications that are discussed in the staff reports provided to the Commission at the November and December 1992 meetings. The reporting requirements are imposed by a new law that governs ex parte communications. It also includes the form adopted by the Commission that must be used by Commissioners to report ex parte communications.

The law goes into effect on January 1, 1993, and imposes important responsibilities on Commissioners, including alternates and non-voting Commissioners, with respect to reporting communications with applicants and other "interested persons." The requirements are somewhat complicated and may be difficult to implement. It is important to note that the law imposes serious penalties on both applicants and Commissioners for violation of the new requirements.

If Commissioners have questions, please contact either Dorothy Dickey or Ralph Faust at (415) 904-5220.

1. Are non-voting Commissioners and alternates subject to the ex parte requirements?

   The laws applies to all "member[s] of the Commission", including non-voting Commissioners, as well as alternates.

2. What types of proceedings are affected?

   The law applies to almost every action that the Commission takes, with limited exceptions such as actions on regulations, reviews of the Executive Director's performance, positions on legislation and adoption of scientific reports.

This requirement applies to "matters within the Commission's jurisdiction" which are identified to be permits, federal consistency, appeals, local coastal programs, port master plans, public works plans, long-range development plans, categorical exclusions, "other exclusions from coastal development permit requirements" and "any other quasi-judicial matter requiring Commission action." (Sections 30321 and 30322.)

3. When does the law become applicable?

The law is effective on January 1, 1993 and applies to communications after that date concerning the above types of proceedings after an application is submitted to the Commission. (Section 30321.)

4. What is an ex parte communication?

An ex parte communication is defined in relevant part in the law to be "any oral or written communication between a member of the Commission and an interested person about a matter within the Commission's jurisdiction and which does not occur . . . in a public hearing . . . or on the official record of the proceeding on the matter." (Section 30322(a).)

A. Who is an "interested person"?

The law provides for various categories of interested persons:

- applicant, agent[2/] or employee of the applicant, or a person who receives consideration for representing the applicant,

- participant in the proceeding,

- person[1/] with a financial interest in the matter before the Commission, or an agent[2/] or employee of the person with a

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1/ Public Resources Code section 30111 defines "person" to mean "any individual, organization, partnership, or other business association or corporation, including any utility, and any federal, state, local government, or special district or an agency thereof."

2/ Black's Law Dictionary defines "agent" in relevant part to be a "person authorized by another to act for him . . ." Neither the definition nor the statute require that compensation be provided to an agent.

financial interest, or a person receiving consideration for representing the person who has a financial interest.

("Financial interest" is defined to be the same as that applicable to Commissioners pursuant to the State's conflict of interest laws, which are set forth at Government Code section 87100 et seq.),[3/]

- "representative acting on behalf of any civic, environmental, neighborhood, business, labor, trade, or similar organization who intends to influence the decision of a Commission member on a matter before the Commission." (Section 30323.)

B. Are there exceptions to the definition of ex parte communications?

(1) Exceptions in the statute

The law expressly provides for three exceptions:

- written communications between an interested person and a Commissioner, when the Commission staff is also listed as having received a copy. (Providing a copy to the staff makes the communication part of the record of the proceeding.),

- communication between a Commission staff member acting in his or her official capacity and a Commission member or interested person, and

- communication limited entirely to procedural issues. (Section 30322(b).)

(2) Attorney-client privileged communications

In addition, attorney-client privileged communications are exempt, based upon existing laws:

- attorney-client privileged communications between a Commissioner and a Deputy Attorney General or other attorney assigned or retained to represent the Commission,

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[3/] The Commission has previously received separate briefing materials on what constitutes a financial interest. Additional copies can be requested from the legal office.

- attorney-client privileged communications including but not limited to those involving a Commissioner who is an official of a local, regional, or other state agency provided that the communication occurs between the Commissioner and an attorney representing the other agency and concerns an action of that agency.

(3) Other exceptions

Although the law does not expressly exempt any of the following communications, they do not appear to be covered by statute:

- communications between Commissioners who are acting in their official capacity (subject to the other limitations under the law, such as the Open Meetings Act),

- communications between a Commissioner who is a locally elected official and an "interested party" who is also his or her constituent, provided that the communications concern the Commissioner's actions as a locally elected official or occur prior to the time that the quasi-judicial matter has been submitted to the Commission. (Thus, after a matter has been submitted to the Commission, a conversation with a constituent who is an interested person would be an ex parte communication if it concerns the official's actions as a Coastal Commissioner on the "matter within the Commission's jurisdiction".),

- any communication which takes place during an official proceeding of a local, regional or state agency that involves a Commissioner who also serves as an official of that agency, and

- any communication between a Commissioner, regarding an action of a local or regional government or another state agency of which he/she is an official, and other officials or staff of that agency.

C. Are there special considerations for a Commissioner who is a locally elected official whose local government is an "interested party"?

- A communication between a Commissioner who is a locally elected official whose local government is an "interested party" and local government staff would be an ex parte communication if the communication occurs after the quasi-judicial matter has been submitted to the Commission and concerns the "matter within the Commission's jurisdiction". (Sections 30321 and 30322.)

- It may be inferred that the law would allow such a Commissioner to communicate with other Commissioners, without regard to the ex parte requirement, despite the fact that the Commissioner may technically be an "employee" of the applicant local government. This inference is based upon the assumption that the Commissioner would be acting as a Commissioner rather than a local official at the time of the communication. (Section 30323(a).)

5. <u>What requirements apply once an ex parte communications has occurred</u>?

There are two major requirements. First, the Commission member must notify the interested person "that a full report of the ex parte communication will be entered in the Commission's official record." This notice must be provided by the Commissioner, regardless of whether the Commissioner or the interested party initiates the communication. (Section 30324(a)(1).)

Second, an ex parte communication must be reported by the Commissioner. Once such a communication is reported, it is no longer an ex parte communication. (Section 30324(a)(2).)

6. <u>Is there a specific form for the notice to the interested party</u>?

The law does not include any specific requirements for the notice to the interested party other than that quoted immediately above. Thus, it may be inferred that either an oral or a written notice would be appropriate.

7. <u>How does a Commissioner report an ex parte communication</u>?

There are two ways in which an ex parte communication must be reported, depending upon when it occurs. If the communication occurs seven or more days in advance of the meeting at which the item will be considered by the Commission, the Commissioner must report the communication in writing to the Executive Director within seven days after the communication occurs. If the communication occurs within seven days of the hearing on the matter, the Commissioner must make an oral report "on the record of the proceeding at that hearing". (Section 30324(a)(2).)

8. Is there a specific form for reporting the ex parte communication?

Attached is a copy of the disclosure form adopted by the Commission. (We have made some minor revisions to simplify the wording.)

The information required on the form must be filled in and provided to the Executive Director or provided orally on the record at the meeting. (Section 30324(b).) Regardless of whether the Commissioners report a communication in writing or orally on the record, the law requires that Commissioners report the substance of the communications in a sufficiently detailed manner such that interested persons can address the substance of the communication on the record.

A. Does a phone message constitute an ex parte communication? What is the time of receipt for purposes of filling out the form required by the statute?

A phone message is an ex parte communication if it conveys a substantive or non-procedural message. The time of receipt is the time that the message is actually received by the Commissioner.

B. Reimbursement for photocopying and mailing.

Commissioners may request reimbursement of expenses for photocopying and mailing at the time they submit forms for reimbursement of other expenses.

9. Can a Commissioner decline to open the mail? What happens if a Commissioner refuses to sign for a Federal Express package?

Commissioners can decline to open mail or receive packages. In that event, the communication would not be ex parte because the message would not actually be received.

10. Must communications with public officials be disclosed?

Communications with public officials need not be disclosed unless the official meets the definition of an "interested person." (See discussion above of the definition of an "interested person.")

11. How should written reports be transmitted to the Executive Director?

The bill clearly intends that ex parte communications be reported so as to allow public response either before or during the hearing on the matter; thus, the law should be interpreted to require that Commissioners

use a means of transmission which will ensure that the Executive Director has actual knowledge of the communication prior to the commencement of the hearing. Thus, if it is reasonable to believe that the communication will not arrive by U.S. mail prior to the meeting, other means of delivery should be used, such as facsimile, overnight mail, or personal delivery by the Commissioner to the Executive Director at the meeting prior to the time that the hearing on the matter commences.

12. At what point during a Commission meeting must a Commissioner disclose an ex parte communication?

Disclosure of ex parte communications should be at the beginning of the hearing so that parties and other interested persons can address the substance of the communications in their oral presentations.

13. If all Commissioners receive a letter that has not been forwarded to staff, are all Commissioners required to notify the interested party and to report it either to the Executive Director or on the record to the Commission?

The law imposes the requirement that each Commissioner who has an ex parte communication shall notify the interested party of the obligation to file a report on the communication and provide a report, including the text of a written communication to the Executive Director or on the record to the Commission. (Section 30324(a)(1) and (b)(1)(C).)

14. What penalties apply to violation of these requirements?

A. Prohibition on participation

The law provides that a Commissioner who has knowingly had an unreported ex parte communication shall not "make, participate in making, or [in] any other way attempt to use his or her official position to influence a Commission decision about which the member or alternate" had the communication. (Section 30327.)

B. Revocation

An aggrieved person may sue the Commission to obtain a writ of mandate requiring that the Commission "revoke its action and rehear the matter" if a violation occurs and a Commission "decision may have been affected by the violation." (Section 30328.)

C. Civil fines

If a Commissioner knowingly violates either the requirement to notify the interested party or the requirement to report the communication as described above, the Commissioner may be subject to a civil fine of up to $7500 plus attorney's fees and costs. (Section 30824.)

Attachment

FORM FOR DISCLOSURE OF EX PARTE COMMUNICATIONS

Name or description of project, LCP, etc.: _____

Date and time of receipt of communication: _____

Location of communication: _____

Type of communication (letter, facsimile, etc.) _____

Person(s) initiating communication: _____

Person(s) receiving communication: _____

Detailed substantive description of content of communication:
(Attach a copy of the complete text of any written material received.)

_____

_____

_____

_____

_____

_____

_____

_____

_____ _____
Date Signature of Commissioner

If the communication was provided at the same time to staff as it was provided to a Commissioner, the communication is not ex parte and this form does not need to be filled out.

If communication occurred seven or more days in advance of the Commission hearing on the item that was the subject of the communication, complete this form and transmit it to the Executive Director within seven days of the communication. If it is reasonable to believe that the completed form will not arrive by U.S. mail at the Commission's main office prior to the commencement of the meeting, other means of delivery should be used, such as facsimile, overnight mail, or personal delivery by the Commissioner to the Executive Director at the meeting prior to the time that the hearing on the matter commences.

If communication occurred within seven days of the hearing, complete this form, provide the information orally on the record of the proceeding and provide the Executive Director with a copy of any written material that was part of the communication.