5 PITFALLS TO AVOID WHEN APPEARING BEFORE ADMINISTRATIVE HEARINGS

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The following are the top five reasons why anyone who appears at an administrative hearing, especially involving entitlements for potentially quite profitable development or remodeling, a professional license (e.g. brokers), or other significant right, should consider experienced legal counsel beside them during this process.

Reason #1: Admission of Evidence

A casual observer of an administrative proceeding or someone who reads about how such proceedings typically work would note that “the rules of evidence are not as formal as in court.” While this statement is true, it is often the undoing of administrative litigants who represent themselves and later try to appeal, as the cases discussed below make quite clear.

The main difference between court and administrative hearings is that in administrative hearings hearsay evidence is admissible. Hearsay evidence, simply stated, is a statement made outside of court that one of the parties is trying to introduce in court to show that the statement is true. Most often in administrative hearings hearsay evidence is presented in documents.

For example, if an adjoining property owner, Susan Smith, prepares a criticism or evaluation of Bob Smith’s application for a conditional use permit and does not appear to testify regarding the truthfulness or accuracy of her assessment of Bob’s project, the contents of the review are hearsay. In court such a document would not be admissible without Susan Smith testifying to “authenticate it.” In administrative law, the hearsay may come into evidence but a significant problem remains those who represent themselves overlook.

While hearsay evidence is admissible in administrative proceedings, the administrative law judge or hearing officer cannot base a finding upon it. So if the hearing officer wanted to conclude that Bob’s project terrible for the community based on Susan’s assessment, the administrative law judge or hearing officer could not do so if the performance review was admitted as hearsay. Both the California courts and the Administrative Procedure Act make quite clear that a party who fails to object to administrative hearsay cannot do so later.

In other words, unless there is a verbal or written objection on the record of the administrative proceeding, the evidence will likely come into evidence and the judge can premise a finding upon it. This is perhaps the most common error that Gray•Duffy sees regarding administrative litigants who represent themselves.

Reason #2: What evidence do you need?

It is essential to present evidence to refute and address the specific charges or allegations agency or private parties make during the administrative action. Most people understand presenting a defense or contesting
charges, but evidence of “mitigation” or “amelioration” is not so obvious and is essential to address any potential penalty, constraint or denial the hearing officer seeks to impose.

In other words, there are certain types of evidence the agencies expect you to produce. If you do not produce such evidence such as demonstrating “mitigation” or “amelioration” for perceived burdens an approved project may impose upon a community, how an issue has been addressed and will not recur, etc., the administrative law judge or hearing officer will impose a far more significant impediment than if you present proper evidence.

**Reason #3: Keeping track of all that is going on**

The point here is twofold. First, no one who does not have experience can possibly keep track of all that is going on in an administrative hearing that needs to be tracked. Second, even experienced legal counsel sometimes needs reinforcements with paralegals and other counsel during a big case with lots of documents and lots of information. By handling this case in this manner and being able to track every aspect of the agency’s case, legal counsel can keep out significant portions of damaging evidence simply by objecting and pointing out that the evidence was premised upon hearsay without other support.

**Reason #4: Knowing what the agency wants**

There is no substitute for experience. In addition to the stress and uncertainty of having to face an administrative hearing process and the significant issues it brings, experienced attorneys have been through these processes many times and this expertise can benefit you in several ways.

1. Know how to prepare and what to prepare for.
2. Can make the hearing officer’s job easier by concisely presenting the matter or parsing complicated issues, making it more likely that the agency will rule in your favor. An agency member who does not understand the issues will never rule in your favor—and if he or she does so, it will be subject to appeal.
3. Know what the agency can and cannot do.

In addition to the truth of the evidence presented to the agency by its counsel or third parties, there are many procedural issues and arguments that can sometimes completely defeat an agency’s adverse position. Many of these concern due process and notice to a hearing, but others include delay in bringing a case, bias or conflict of interest among the agency decision makers, etc., as the cases discussed below make quite clear.

**Reason #5: Perspective**

True of all types of litigation, he or she who is on the hot seat and the subject of the litigation does not have perspective. When your position and rights are the subject of the hearing, it is very difficult to sit through it, take good notes for cross examination, make timely objections, and dispassionately argue the merits of your case.
There are many more reasons to hire a competent counsel than the five discussed above. But all of these reasons have two goals in mind. The first goal is to achieve the desired outcome outright, if possible, or minimize the negative impact on our clients. The second goal is always to document all technical, evidentiary, and legal arguments for a potential appeal known as a petition for writ of mandate.

Again, many clients contact counsel who have represented themselves seeking to file a petition for writ of administrative mandate and they have severely harmed their case by not properly objecting during the administrative hearing or making other omissions that cannot be overcome.

**Illustrative Cases**

When a party suspects bias on the part of a member of an administrative hearing body (e.g., involving issuance of real property entitlements or permits (see charts at the end of this article, as well as other non-real property administrative hearings) the issue must be raised in the first instance at the hearing or the claim is waived. (*Franz v. Board of Medical Quality Assurance* (1982) 31 Cal.3d 124, 143.) The due process standards applicable to a public body in these circumstances were further established in *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470 (*Nasha*), in which a planning commission reversed the planning staff’s approval of a mitigated negative declaration for a locally controversial development. (*Id.* at pp. 477-478.)

After the vote, it was learned that a particular planning commission member had published an anonymous article hostile to the project in a local newsletter and introduced a person at a meeting of local residents who spoke against the project. (*Id.* at p. 476.) The *Nasha* court found the commission’s action to have been “quasi-judicial” and concluded that, “[p]rocedural due process principles” are applicable. (*Id.* at p. 482.) Among those principles, the court held, is the requirement of a “reasonably impartial, noninvolved” reviewer. While this standard does not demand the same degree of impartiality required of a judicial officer, the court held, it precludes participation by a person who has demonstrated actual bias. (*Id.* at p. 483.) In order to prevail on a claim of bias, the plaintiff “must establish ‘‘an unacceptable probability of actual bias on the part of those who have actual decision-making power over their claims.’’” (*Ibid.*)

More recently, in *Basurto v. Imperial Irrigation Dist.* (2012) 211 Cal.App.4th 866, a public agency employee challenged the termination of his employment on grounds it resulted from unlawful discrimination. In connection with that challenge, he also contended the agency board that reviewed his termination was biased and failed to provide him due process of law. (*Id.* at pp. 870-871.)

The *Basurto* trial court found these issues waived because they were not raised at the administrative hearing, and the Court of Appeal affirmed. (*Ibid.*) Although the plaintiff’s and the agency’s attorneys had exchanged letters regarding the issue of bias, this was held insufficient because the letters were not brought to the board’s attention at the hearing. As the court held, “due process and bias issues must be presented to the hearing officer or tribunal itself for the issue to be preserved.” (*Id.* at p. 892, fn. 6.)

The court deemed the plaintiff’s attorney’s “passing reference in his opening statement” to these concerns to be insufficient, noting, “‘[t]he mere allegation of bias in [an administrative hearing] without any evidence to support [it]’ is not enough.” (See similarly, *Southern Cal. Underground Contractors, Inc. v. City of San*)
The plaintiffs in the *Attard* case, Paul and Tamara Attard (Attards), formulated a creative solution to circumstances constraining development on their two properties in Contra Costa County (County), but they failed to obtain the necessary regulatory approvals for their plan. Notwithstanding that failure, the County issued them permits to develop the properties, including a permit for construction of an 8400-square foot home. By the time the County discovered its error and notified the Attards, they had made substantial progress toward installing a foundation for the new home on one of the properties. The county nonetheless revoked the permits, a decision that was affirmed by the County Board of Supervisors (Board).

The Attards filed a petition for writ of mandate challenging the revocation in which they contended in part that they were denied due process by the evident bias of one Board member. The trial court denied the writ petition, which the court of appeals affirmed. There was no dispute that the Attards did not raise the issue of a Board member’s possible bias at the March 2010 Board hearing. See 2017 WL 3711765 *9. Accordingly, the *Attard* court held that the Attards’ failure to raise this issue before the Board resulted in a waiver the claim of bias.

*See CEQA Flow Chart and Land Development Permit Process charts on pages 5 and 6.

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Simplified CEQA Flow Chart

Note: This chart illustrates the three common paths for project processing under CEQA. Processing times and the level of complexity of Negative Declarations and EIRs are not the same.

The Permit Streamlining Act

State law sets time limits for governmental action on some types of private development projects (see Government Code Sections 65920-65963.1). Failure to act within those time limits can mean automatic approval of a project under certain circumstances. The Permit Streamlining Act (PSA) applies to discretionary projects which are adjudicative in nature. An adjudicative decision applies existing policies and regulations to a particular situation. Use permits, subdivisions, and variances are all such actions subject to the PSA. The PSA does not apply to the adoption or amendment of a general plan or a zoning ordinance.

Generally speaking, the public agency must take action on private development projects within 180 days of the date upon which the project's final EIR is certified. This period is 60 days when a negative declaration is adopted or the project is exempt from CEQA. A project may be automatically approved under the PSA if the agency fails to make a decision within the time limit and the developer takes certain actions to provide public notice.