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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2006-001260 09/17/2007

HONORABLE PETER SWANN

CLERK OF THE COURT
D. Monroe
Deputy

ARIZONA ASIAN AMERICAN MUSEUM FOUNDATION

CAROLINE A PILCH

v.

PHOENIX CITY, et al.

MARSHA HOULF WRIGHT

JEFFREY D GROSS

MINUTE ENTRY

Pending before the Court is the City of Phoenix' Motion for Summary Judgment that the City Was Not Improperly Biased. For the following reasons, the Motion is denied without prejudice.

The procedural history of this action is amply recounted in several earlier minute entries, including those of 11/30/2006 and 8/23/06. The instant motion concerns the question discussed in the November 20, 2006 Order whether the City Council acted properly in its quasi-judicial role, as the Historic Preservation Ordinance requires, or whether it acted in a legislative capacity. Based upon the facts presently of record, the Court cannot find as a matter of undisputed fact that the council (1) was free from the influence of ex pare contacts or (2) that such contacts were adequately disclosed at the public hearing.

It merits note at the outset that the Court does not hold or imply that the receipt of ex parte contacts by the Mayor, Council or city staff is inherently improper. Indeed, this case illustrates the extraordinarily difficult conflict that the City's ordinance imposes upon its own

council. While there are numerous quasi-judicial bodies and proceedings recognized under Arizona law, it is customary that those bodies are commissions or boards with very specific and limited subject-matter jurisdiction (e.g. the Industrial Commission). Where, as here, a single body properly charged with broad legislative and policymaking responsibilities is thrust into the confines of a quasi-judicial role, significant tensions are inescapable. The Court's role, however, is not to apply the City's ordinance as it might have been written, but as it is written.

The City's Motion depends upon two principal theories. First, the City advocates for the concept of the "quasi-judicial period" – an exclusive period of some three weeks between the time the Historic Preservation Commission rendered its decision and the time the Council held its quasi-judicial hearing during which ex parte contacts are material. Nothing in the Phoenix ordinance, statutes of this state or pertinent decisions of any other state creates such a conveniently narrow limitation.[1] Under the City's theory, council members are free to communicate ex parte with anyone they wish until an appeal is filed that triggers the quasi judicial role, and such communications – even if undisclosed -- are simply irrelevant to the integrity of the quasi-judicial process. Second, the City contends that only two of its council members may have been tainted by ex parte contacts, and that a majority would still have been available to support the challenged decision.[2] The Court disagrees with these contentions as a matter of fact and law.[3]

The Courts of other states have considered the problem faced by council members who receive ex parte contacts concerning a matter presented for quasi judicial review. *See, e.g., Eacret v. Bonner County,* 139 Idaho 780 (Id. 2004); *Idaho Historic Preservation Council v. City*

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[1] The City cites out-of-state authority for the proposition that ex parte communications can only occur while a proceeding is "pending." The argument misses the point. Mayor Gordon has stated in his affidavit that he met with Mr. Sarver concerning the process that was "pending" – albeit at a lower level. And nothing in those decisions suggests that a communication affecting the result is insulated from mandatory disclosure merely by virtue of the fact that an action was filed after the communication took place.

2 The City cites *Catchings v. City of Glendale*, 154 Ariz. 420 (Ct. App. 1987), for the proposition that "bias arising from extra-proceeding communication is not imputed to those members of the tribunal who did not receive the information. " That case, which dealt with a juror whi lied during *voir dire* is thoroughly inapposite here.

[3] The City also argues that the Court should somehow treat the issue less seriously because many of the ex parte contacts disclosed to date were sent by opponents of the development in question. It hardly merits discussion that the speculative effect of competing influences is not a proper subject for summary judgment.

Council of City of Boise, 134 Idaho 651, 8 P.3d 646 (2000). *Friends of Jacksonville v. City of Jacksonville*, 189 Or. App 283 (Or. App. 2003). The common thread that emerges in these decisions is that while *contacts* with interested parties are not prohibited or even undesirable, *disclosure* of those contacts (and the substance of the discussions) is essential to the preservation of fairness – which in turn is essential to preservation of public confidence in the decisionmaking process itself. In *Organization to Preserve Agr. Lands v. Adams County,* 913 P.2d 793 (Wash., 1996), the court explained:

> Quasi-judicial hearings, such as the permit application hearings at issue in this case, must be conducted so as to give the appearance of fairness and impartiality. This court has stated that the appearance of fairness doctrine is satisfied "if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial, and neutral hearing." A decisionmaker may be challenged under this doctrine for "prejudgment concerning issues of fact about parties in a particular case ... [or] partiality evidencing a personal bias or personal prejudice signifying an attitude for or against a party as distinguished from issues of law or policy...." Prejudgment and bias are thus to be distinguished from the ideological or policy leanings of a decisionmaker. A challenger must present evidence of actual or potential bias to support an appearance of fairness claim.

The factual record in this case reveals evidence of potential bias as that term is used in the case law. Most importantly, the Affidavit of Mayor Gordon confirms that he had numerous meetings with proponents and opponents of the development before the beginning of the City's "quasi-judicial period." The Court finds no merit in the notion that a communication on November 22 is subject to disclosure, but one on November 20 is not. ***The City is correct that neither communication is inherently improper. But both communications, if undisclosed, threaten the appearance of fairness of the quasi-judicial proceeding.*** Here, there can be no question that there was no meaningful disclosure at or before the hearing of the content or nature of any ex parte contacts. Mayor Gordon's admission that he met with Mr Sarver to discuss the project (and even the historic preservation procedure) but did not keep notes or records does not establish that the quasi-judicial process was free from traditional legislative influences. And the notion that neither Mayor Gordon nor the other council members passed communications concerning their contacts between themselves is also immaterial. Such communications between council members could have posed serious risks under the Open Meetings Law. But the affidavits say nothing of communications conveyed to or from staff. Indeed, nearly two years after the hearing, the Court has still not received disclosure of the nature of the communications between the Mayor and Mr. Sarver, nor has there been an explanation of the communications relayed to council members by staff concerning the COA. The record simply makes clear that such communications did occur, and that their substance has never been disclosed.

The ultimate question concerning the procedural propriety of the hearing is simple, and to borrow the city's term, is rooted in "common sense": when the council conducted the hearing and rejected the decisions of the Commission without debate or a statement of its reasons, was it sitting as a purely adjudicative body or was it implementing policy negotiated by council members and/or staff with stakeholders outside the quasi-judicial process? The Court here makes no finding as to the integrity of the quasi-judicial process – it merely determines from this record that a reasonable finder of fact might decide the question either way and that summary judgment is therefore inappropriate.