

What the HEC is Going On?

The Subversion of the Housing Element Committee (HEC) Deliberation Process by Hidden Development Interests

by Alan Pryor and Rik Keller

The City of Davis's Housing Element Committee (HEC), which is supposed to represent a "diversity of interests" in the community, was instead co-opted by development and real estate interests. Two weeks ago, there were a last-minute series of policy recommendations that were sprung on the Committee by these same real estate and development interests in violation of Brown Act open meeting laws. The HEC then further violated these laws in considering and voting to adopt the recommendations. Furthermore, the development and real estate interests on the Committee failed to adequately disclose conflicts of interest in terms of their investments and holdings in the City that would be impacted by the favorable recommendations approved by the HEC.

This subverted process brings up important questions: Why has the City directed a process that has so little public input, especially from genuine affordable housing advocacy groups? How did the City staff allow so many violations of Brown Act laws regarding transparency and open government? Why did the City select HEC members with such a preponderance of real estate interests instead of appointing more representatives from the affordable housing community?

Background

Development of a current Housing Element as part of the General Plan is a requirement of the State of California which mandates such plans ostensibly to alleviate the housing shortage in California.

According to the City of Davis's website (<https://www.cityofdavis.org/city-hall/commissions-and-committees/housing-element-committee-2020>), the Housing Element Committee (HEC) in Davis was formed under City Council guidance to develop such a plan "...as a knowledgeable body which broadly represents a diversity of interests as well as the Davis community at large. The Housing Element Committee acts independently of the Planning Commission and City Council... The Housing Element Committee will be composed of seven members: 2 members from the Planning Commission, 1 member from the Social Services Commission, 1 member from the Senior Citizens Commission, 1 member from the Finance and Budget Commission, and five at-large members appointed by the City Council."

The Housing Element Committee held its first meeting in November 2020, and its 4th and final meeting at which the Housing Element was formally approved was on May 20, 2021. Agendas and some Minutes for the meetings can be found at the above-referenced City website. The following are the members of the Housing Element Committee (in alphabetical order) and the source of their appointments:

Council-Appointed Committee Members

Don Fouts
Don Gibson
Jonathon Howard
Karen Mattis
Dulce Ochoa

Commission-Appointed Committee Members

Doug Buzbee - Finance & Budget Commission

Caitriona Moloney - Senior Commission
Greg Rowe - Planning Commission
Darryl Rutherford - Planning Commission
Georgina Valencia - Social Services Commission

The Housing Element Committee's Outreach and Public Participation Process is Criticized by the Legal Services of Northern California and Others

Considerable criticism was recently leveled against the draft Housing Element Plan in a strongly-worded letter submitted to the City staff and Planning Commission from the non-profit tenant-rights advocacy group, Legal Services of Northern California (LSNC). The following are excerpts from their letter that addressed, among other shortcomings, the lack of public outreach and participation:

"We are writing to provide comments on the Draft Housing Element released for public comment and submitted to the California Department of Housing and Community Development (HCD) on May 3, 2021...Our comments cover areas where additional changes are needed to comply with the law and provide the most effective strategies to address the critical housing needs facing Davis residents with low incomes.

I. Public Participation

"We are concerned that the City did not make an effort to achieve public participation from all economic segments of the community in the development of the Housing Element. In fact, the draft Housing Element was not made available for public review until after it was submitted to HCD."

This criticism was echoed by HEC member, Georgina Valencia, in comments made in response to publication of the LSNC letter:

"I served on the Housing Element Committee and have been both Chair and member of the Social Services Commission for 6 years. When I saw this post of the letter from Legal Services of Northern California (LSNC) to City staff re the Housing Element draft and process I wanted to weigh in with a few thoughts.

Letter from LSNC page 2, paragraph 2:... "the City undercut the public's opportunity to participate meaningfully"... I completely agree with this statement, as do the members of the Housing Element Committee (HEC). We were selected to serve on the committee and it wasn't until the very last minute that we found when we would meet, how many meetings would occur and how long the process would take. All of the committee members felt that 4 meetings really undercut a meaningful contribution or deliberation. Our committee also questioned the actual outreach to the community and were very disappointed in that process as well. 4 meetings was not sufficient. Additionally, we were not allowed any review of the Housing Element draft prior to Housing and Community Developments' (HCD) official preliminary review."

Illegal Brown Act Violations by Developer Interests Repeatedly Occurred on the HEC

This lack of public outreach and participation, however, did not hinder last minute successful efforts by developer interests on the HEC to greatly modify the draft Housing Element plan by proposing additional developer-friendly "recommendations" to the plan which were subsequently adopted by the HEC. This was despite a complete lack of public notification of the submitted recommendations as otherwise required by law under the Brown Act. The Ralph M. Brown Act or "Brown Act," is a California

law (Government Code Sections 54950, et seq.) that, among other things, mandates transparency in California government through requirements for open meetings and timely public notification and disclosure processes.

While it is beyond the scope of this article to parse the benefits or lack thereof of these last-minute "recommendations", in our opinion they heavily favor developer interests in future Davis housing planning considerations at the expense of affordable low-income housing. But our complaint here is not that the "recommendations" were submitted by a developer-friendly advocacy group actually formed and run by one of the HEC members himself (even though they were). Anybody is free to make such recommendations on their own or on behalf of their constituents.

The problem is that these "recommendations" were submitted *directly* to the HEC members by one Committee member, Don Gibson, under the guise of a newly-formed, shadowy, AstroTurf lobbying group called Sustainable Growth Yolo, and he did so *after* public notification of the meeting and the meeting's agenda were already posted on the City's website. Because the "recommendations" were submitted directly to HEC members by HEC member Mr. Gibson less than 48 hours before the scheduled meeting at which they were approved but only after public notification for the meeting had already occurred, they were not subject to full public scrutiny *in advance* of the HEC meeting at which they were adopted. This is a clear violation of California's Brown Act that requires transparency and open meetings and prohibits non-public, internal communications within jurisdictional bodies. Because of these violations of the Brown Act by Mr. Gibson, the subsequent consideration and approval of the "recommendations" by the HEC should never have occurred and was thus illegal.

In particular, the Brown Act specifically requires all materials to be considered by a City-sponsored commission or committee to be placed in the public record at least 72 hours prior to a regular meeting. This disclosure requirement prevents last minute internal or "closed door" serial communications between members that skirts public scrutiny from even being considered by a council, commission, or committee. This legally mandated open process was *not* followed in this instance which, under the Brown Act, would have prohibited even discussion of the previously submitted "recommendations" by the HEC much less approval by the Committee.

Local viewers of Davis government processes know that the Brown Act is often invoked by City staff to prevent Commissions and Committees from advancing agendas and policies not particularly favored by staff or Council. Clearly, allowing this Brown Act violation by a developer-friendly HEC member provided favoritism that is never allowed or afforded to other commission or committee members and was a subversion of the due process required by the Brown Act.

Some have suggested that the provisions of the Brown Act are not applicable in this instance because of the temporary nature of the HEC. The City Attorney has otherwise clearly addressed how the Brown Act must be implemented in a letter to all City commissions and committees dated May 10, 2021. In that memo she states,

"The Brown Act creates a clear default that all city boards, commissions, committees, task forces, and subcommittees, should be presumed to be "legislative bodies" subject to the Brown Act unless they fall under one of the Act's narrow exceptions. The most important exceptions are as follows: (1) "Ad hoc committees" formed solely of less than a quorum of a legislative body; (2) Meetings between City staff; and (3) Advisory bodies formed by a public official (such as the mayor or city manager) to advise that official (note that this does not apply to any body formed by City Council or any advisory body that advises a legislative body such as

City Council). If a body is a "legislative body," all meetings of that body must be "open and public," with limited exceptions.

At "open and public" meetings, an agenda must be posted in advance (72 hours for a regular meeting), all members of the public may attend, and members of the public may comment on any item on the agenda.

The question of an email submittal of information by one committee member to the entire committee which could be further acted upon but which is provided after public notification is not specifically addressed in the City Attorney letter but other sources articulate the general prohibition of such communications. For instance, in a forum hosted by the League of California Cities in May of 2016, a presentation entitled *Avoiding the Perils and Pitfalls of Serial Meetings in the Digital Age*, the following was stated,

"A series or chain of individual e-mails that lead to a collective concurrence violates the Brown Act. In an Attorney General Opinion, counsel concluded that: A majority of the board members of a local public agency may not e-mail each other to develop a collective concurrence as to action to be taken by the board without violating the Ralph M. Brown Act even if the e-mails are also sent to the secretary and chairperson of the agency, the e-mails are posted on the agency's Internet website, and a printed version of each e-mail is reported at the next public meeting of the board.

The opinion noted that the use of e-mails to develop a "collective concurrence" for a future action item includes "any exchange of facts," "substantive discussions 'which advance or clarify a member's understanding of an issue, or facilitate an agreement or compromise amongst members, or advance the ultimate resolution of an issue' regarding an agenda item." 84 Cal. Op. Atty Gen. 30 (2001). The Attorney General opinion stated that there is "no distinction between e-mails and other forms of communication such as leaving telephone messages or sending letters or memorandums. Id. If e-mails are employed to develop a collective concurrence by a majority of board members on an agenda item, they are subject to the prohibition of section 54952.2, subdivision (b) [of the Cal Gov't Code].Id."

In addition to the illegal submission of his email with his "recommendations" to all other Committee members, the recommendations to be subsequently considered by the HEC email were not properly posted on the City's website in a timely manner thus not allowing proper public notification before discussion and consideration at the subsequent HEC meeting.

In addition to the wrongful submission of these "recommendations" directly to the HEC by Mr. Gibson, there is certainly also the appearance of impropriety in that Mr. Gibson did not fully disclose his extensive ties to and employment by developer interests in Davis in his application to the City for HEC appointment, which appointment was subsequently made by Councilmember Dan Carson. These applications were obtained by a Public Records Act request to the City.

Following is an excerpt of the biographical information submitted by Mr. Gibson in his application for appointment to the HEC.

"From 2016 to 2019, I was the Chair of the ASUCD-GSA Housing Task Force. In this role, I hosted renters rights trainings, advocated for housing for students on and off-campus, and organized students to engage in the public hearing process around housing. Most impactfully, in this role, I developed and implemented the first scientific

campus-wide housing survey where we quantified rates of overcrowding, rent affordability, and student homelessness. Because of my effective advocacy, Chancellor May's office appointed me to the UC Davis Affordable Student Housing Task Force in 2018....I would bring a collaborative voice to ensure a person can represent the student communities on the Housing Element Committee."

Not included in his application was disclosure of many other extensive and close developer ties and related interests of Mr. Gibson. Obtained from his personal resume from web-based sources, they are as follows.

*"Political Organizer - Brixmor Inc., Davis, CA (05/2020-08/2020)
Developed and managed the outreach and communication strategy leading to the approval of University Commons, a housing development in Davis. Mobilized community members and lobbied elected officials to support the project and counter anti-housing sentiment.*

*Political Organizer - Stafford [sic] and Lincoln, Davis, CA (09/2019-06/2020)
Supervised communications and outreach efforts to UC Davis to build coalitions to support the successful approval of Davis Innovation and Sustainability Campus project onto to general election ballot."*

Mr. Gibson was also active with Spafford and Lincoln during the previous Measure J/R for the Nishi development campaigns. It is telling Mr. Gibson chose to ignore these direct developer ties in his HEC application. While these omissions in an application for a City appointment might not be technically illegal under California law, they certainly present an obvious appearance of impropriety by not fully disclosing these conflicts of interest to the public and his fellow Committee members; even more so in light of his subsequent advocacy for developer-friendly recommended amendments to the Housing Element.

Additionally, the City of Davis did not require Mr. Gibson or any other Council-appointed members of the HEC to disclose potential conflicts of interest to the City by filling out a Form 700 which discloses potentially conflicting property holdings or employment. It was improper for the City to ignore potential conflicts of interest of HEC members by not requiring such disclosures. The City of Davis Resolution No. 17-008 - Resolution of the City of Davis amending the conflict of interest code provisions requires all "members of boards or commissions with decision-making authority" to complete a Form 700 conflict of interest filling before participating on the committee. This is standard practice at the City for all Commissions but was not done for the HEC. We therefore have no official accounting available to the City of what conflicts Mr. Gibson might have in employment or property involvements.

These developer-friendly interests of Mr. Gibson (compared to his self-proclaimed student housing advocacy in his application) became apparent on the HEC when Mr. Gibson was a deciding vote against a motion to add a statement to the Housing Element demanding more on-campus student housing by UCD. More on-campus housing is, of course, better for students but not for Davis property developers and apartment owners because it reduces the pool of available renters for future and existing development projects - so much for being a champion of housing needs for downtrodden and impoverished students. These incestuous relationships begs the question of how sufficient was the vetting process for HEC members when a paid developer lobbyist is appointed to a City Committee overseeing future housing plans in the City?

Another HEC member with strong developer ties also chose to send his last minute communications directly to all of the HEC members foregoing the normal submittal and public notification process for

Committee members. HEC member [Doug Buzbee's correspondence](#) was dated 5/20/2021 – again only 2 days before the HEC meeting. In this communication, Mr. Buzbee listed his personal policy positions and how he was actually going to vote against the Housing Element unless certain new developer-friendly features were incorporated in the Housing Element. These included increasing the required building of new housing and having existing property holders in Davis pay for increases in the City's Housing Trust Fund through property tax increases instead of requiring in-lieu fees paid by new property developments. These further violations of the Brown Act by another HEC member emphasize the illegality of the HEC's actions in considering and "recommending" these last-minute proposals.

Mr. Buzbee's LinkedIn page indicates he previously worked for Reynolds and Brown, a company that is a partner with Dan Ramos/Ramco Enterprises on the recent proposed Davis Innovation and Sustainability Campus (DISC) project. Mr. Buzbee also voted favorably for the DISC project in his role on the Finance and Budget Committee. Mr. Buzbee's Form 700 Conflict of Interest disclosure filed in conjunction with his appointment to the Finance and Budget Commission also list nine separate apartment projects in Davis in which the value of his personal stake ranged from \$100,000 to over one million dollars each.

Mr. Buzbee is also the owner of DBRE Consulting, a commercial property management and real estate consulting firm with offices in the Tandem Property building on Anderson Road. These relationships obviously constitute inherent conflicts of interest in the performance of his duties as a HEC member. Why Mr. Buzbee's communications with other HEC Committee members was allowed by City staff in direct violation of the Brown Act prohibition of such serial communication practices was not explained nor was his failure to recuse himself or even abstain from the final HEC vote on the Housing Element due to his extensive financial conflicts of interest.

A third HEC member with extensive real estate financial holdings in the City also weighed in with a letter to the City staff a week prior to the vote approving changes to the draft Housing Element. Dan Fouts is the principal of Fouts Homes and Fouts Construction, which has built or plans to build many new housing developments in Davis including Grande Village and Chiles Ranch. In addition to current and future development projects which might be conflicted by the Housing Element, Mr. Fouts would also directly benefit from the proposed "recommendations" by Mr. Gibson in which the property inside the Mace Curve (adjacent to Harper Junior High) is proposed to be put on a ballot measure to completely exempt it from all future Measure J/R votes without even specifying exactly what would be built there – in essence giving a blank check on development without any further voter review.

In his communication Mr. Fouts disparaged all infill sites suggested in the draft Housing Element as unrealistic and specifically touted the advantages of development of the property inside the Mace curve. Although Mr. Fouts abstained from voting on that specific recommendation because of his direct conflict of interest, he was in the room and involved in the conversations which was a clear violation of conflict of interest ethics rules.

Indeed, these conflicts of interest were explicitly acknowledged by Mr. Fouts' own application to be a part of the HEC in which he states, *"I know it is like the electric 3rd rail to put a developer on the Housing Committee..."*. But he was nonetheless appointed. As a Council-appointed HEC member, Mr. Fouts, like Mr. Gibson, did not disclose his specific conflicts of interest in a Form 700 filing before serving on the Committee.

Summary and Recommended Actions

Numerous Brown Act violations occurred with respect to HEC member communications prior to the latest May 20, 2021 meeting in which "recommendations" were wrongfully put forward by Mr. Gibson

and then subsequently and illegally approved by the HEC without proper public disclosure and recusal by members with conflicts of interest. The City needs to correct these process deficiencies in the following manner:

- The City needs to appoint new HEC members with a broader representation of community-based affordable housing advocates. The current makeup of the HEC is vastly tilted towards development and real estate interests and resulted in policy proposals that represent a massive giveaway to them.

- The City needs to reconvene the HEC for the purpose of allowing recusal of voting and discussion by certain members and disallowing the final HEC vote of approval of the Housing Element. It should begin the process anew with a substantially improved public review process while avoiding all of the attendant Brown Act violations and conflicts of interest.

- The City needs to reschedule the matter before the Planning Commission until such a vote is taken by the HEC that is compliant with all provisions of the Brown Act.