

PROFESSIONAL LIABILITY UPDATE

CONFLICTS DISQUALIFICATION

By Jennifer Becker

Drakes Bay Oyster Company v. California Coastal Commission (2016) 4 Cal.App.5th 1165

The First District holds due process requires individual attorneys from the same government agency not serve as both advocates and advisors. Agency attorneys acting in these roles must be screened from each other, and advocates from the decision makers, to avoid biasing an impartial decision maker. However, once the decision is final, and the agency itself becomes a party to litigation, the agency may rely on the advice of its advocacy staff to defend its position.

Drake's Bay Oyster Company operated on federal land within the California Coastal Commission's permitting jurisdiction. The Commission issued an order to the prior owner to cease unpermitted development on the site. After the Company took over, it addressed these development issues, but the Commission repeatedly found the Company's applications incomplete.

The Commission held a hearing on unresolved development issues. Commission Enforcement Staff attorneys advocated for orders to prevent development they maintained violated the California Coastal Act. The Commission voted unanimously to issue the orders advocated by its Enforcement Staff.

The Company filed a petition for writ of mandate challenging the Enforcement Orders, and claims alleging its due process rights were violated by Commission policy to allow Enforcement Staff to advise the Commission on permit applications. The

Company also objected to Enforcement Staff attorneys defending the litigation as a due process violation under the "advocate-witness rule."

The trial court denied injunctive relief. Enforcement Staff was not acting as the Commission's legal counsel in the litigation, and the "advocate-witness" rule was not violated. The Company failed to prove Enforcement Staff advised the Commission or its permitting staff on the Company's permit applications. The Company did not show the Commission's procedures or policies deprived coastal development permit holders a fair hearing required by due process.

The Court of Appeal determined only one issue was dispositive: whether the Enforcement Staff's participation in the litigation after they had prosecuted the Company violated the Company's due process rights. The Court observed the Enforcement Staff's participation was to

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assist the Commission in its role as a party in litigation; the Commission did not act as a decision maker in any capacity.

Parties in quasi-judicial administrative proceedings, such as Coastal Commission enforcement hearings, have a due process right to an impartial review and decision by the administrative decision maker. Agency staff may not create unacceptable risk of or actual bias by a decision maker. An advocate's role is inconsistent with true objectivity, a constitutionally necessary characteristic of an adjudicator. A single law office acting as both advisor to an administrative decision maker, and as an advocate for the administrative agency's position, must screen its attorneys serving in these separate roles from each other.

However, due process does not call for complete separation of an agency's enforcement and advisory functions in all cases. Agencies that follow rules mandating internal separation of functions, and prohibiting *ex parte* communications, do not violate due process. The presumption of impartiality can be overcome only by specific evidence demonstrating actual bias, or a particular combination of circumstances creating an unacceptable risk of bias. One example of an unacceptable risk of bias would be evidence a single attorney's involvement with a tribunal is so extensive and ongoing that his or her prosecutorial and advocacy roles are blurred.

The potential the Commission may further address the prior Enforcement Orders did not change the analysis. Speculation about potential future proceedings should not bar the Enforcement Staff from assisting the Commission in defending itself in present litigation.

Comment: The practicalities imposed by

limited resources mandates flexible rules that allow public agencies to function on limited budgets, but respect the due process rights of parties.