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California State Association of Counties

July 7, 2020

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The Honorable Tani Cantil-Sakauye, Chief Justice  
and Honorable Associate Justices  
Supreme Court of the State of California  
350 McAllister Street  
San Francisco, CA 94102-3600

Re: *Petrovich Development Co. v. City of Sacramento*  
Case No. S \_\_\_\_\_  
Third Appellate District, Case No. C087283 (Apr. 8, 2020)  
48 Cal.App.5th 963

REQUEST FOR DEPUBLICATION (Cal Rules of Ct, rule 8.1125(a)(1))

To the Honorable Chief Justice Cantil-Sakauye and Associate Justices:

The California State Association of Counties ("CSAC") and the League of California Cities ("League") hereby respectfully request the depublication of the published opinion in *Petrovich Development Co. v. City of Sacramento* ("*Petrovich*").

The *Petrovich* Opinion

In *Petrovich*, the Third Appellate District held that a city councilmember engaged in a series of activities and communications that resulted in an "unacceptable probability" of bias that invalidated the city council's decision on a conditional use permit. The plaintiff had applied for a conditional use permit to construct and operate a gas station in Sacramento. (48 Cal.App.5th at p. 965.) The Sacramento planning commission approved the conditional use permit, and a local neighborhood association appealed the planning commission's decision to the city council. (*Id.* at p. 967.) Prior to the city

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council's consideration of the appeal, councilmember Jay Schenirer communicated with other city councilmembers and city staff about the matter, prepared a written summary regarding his opposition to the project, and when the matter was before the city council, initiated the motion to overturn the planning commission's decision. (*Id.* at pp. 968-71.) Even though the councilmember's actions were relatively commonplace, the Court of Appeal concluded that councilmember Schenirer was impermissibly biased and invalidated the city council's decision. (*Id.* at p. 976.)

By issuing this opinion, the Court of Appeal made many local land use decisions - as well as other adjudicatory decisions - extremely vulnerable to legal challenges. The types of actions that the Sacramento councilmember took are not different in kind from those taken by similar local officials throughout California. While the Court of Appeal sought to address the "advocacy" engaged in by this particular councilmember, it unwittingly created grounds for litigation against local jurisdictions, where local officials often engage in more innocuous versions of the same actions.

### **CSAC's and the League's Interests in Making This Request**

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the State. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The League is an association of 478 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

County Counsels and City Attorneys routinely advise their clients – such as boards of supervisors, city councils, and other boards and commissions – about how they should approach conditional use permits and similar land use decisions. Likewise, local jurisdictions regularly hold other types of adjudicatory proceedings – employee discipline, licensing and permitting, conflict of interest and ethics enforcement – that are also subject to due process requirements. The *Petrovich* opinion creates substantial uncertainty about what circumstances show the presence of impermissible bias. Under the decision’s reasoning, commonplace behavior can potentially amount to impermissible bias – and at the very least, constitute sufficient grounds for litigation. At best, the decision threatens to chill ordinary dialogue among local officials about land use matters. At worst, it will spawn unnecessary litigation about whether these proceedings were infected by impermissible bias. Accordingly, CSAC and the League respectfully submit that the Court should order the *Petrovich* decision depublished.

### **Reasons for Depublication**

CSAC and the League seek depublication of the *Petrovich* opinion because its lack of clarity regarding appropriate procedures for adjudicatory proceedings will likely subject routine government decision-making to legal challenges. Specifically, *Petrovich* fails to define:

(A) the extent that local officials may communicate with fellow officials and city staff about pending adjudicatory decisions; and

(B) the extent that local officials may prepare for adjudicatory decisions before their bodies by preparing “talking points” or similar remarks prior to an adjudicatory hearing.

*Petrovich* also misinterprets and misapplies existing law in concluding that:

(C) the initiation of a motion regarding the subject matter of a hearing can be evidence of impermissible “bias,” where a member of the official body *must* make such a motion.

The decision suggests that local officials run afoul of due process requirements by engaging in these ordinary, common practices. The decision thus creates

unwarranted confusion about when this, or similar, behavior rises to the level of impermissible bias.

### **The Opinion Creates Confusion by Not Specifying When a City Councilmember's Communications with Other Councilmembers Creates Bias.**

The *Petrovich* opinion concluded that one of the “concrete” facts establishing bias was the city councilmember’s discussion of the pending conditional use permit with fellow councilmembers and a representative of the mayor. (48 Cal.App.5th at pp. 974-75.) But the opinion does not specify how many councilmembers were party to these problematic communications or offer any details of the content of these communications, and thus gives local officials and lower courts evaluating bias claims no guidance about when these communications demonstrate impermissible bias.

Of course, members of a multi-member body are already subject to other restrictions on their ability to communicate amongst each other outside of a public meeting. Under the Brown Act, California Government Code 54950 *et seq.*, a majority of a board of supervisors or city council cannot jointly discuss a matter scheduled to come before them at a later date. The plaintiff in *Petrovich* apparently did not allege a Brown Act violation, and thus the Court of Appeal could not account for this additional restriction that would have likely addressed many of its concerns.

Assuming that a public body abides by the Brown Act, *Petrovich* apparently instructs that discussion between *something less* than a majority of the body is impermissible. But *Petrovich* does not specify what number of officials are prohibited from these communications and whether *all* communications between the relevant number of public officials are strictly prohibited, under the decision’s reasoning. Likewise, *Petrovich* does not specify which communications are prohibited. It suggests that “counting” or “securing” is evidence of bias, but does not explain whether communications short of obtaining a commitment are allowed at all. The decision, if it remains published, creates unwarranted incentives for local officials to refrain from *any* communications with colleagues, to avoid the possibility of a bias allegation.

### **The Opinion Creates Confusion by Faulting a City Councilmember's Preparation of Written Remarks Before a Hearing.**

*Petrovich* concluded that the second "concrete" fact of bias was the city councilmember's "compilation of facts that amounted to a presentation against the gas station" - also referred to as "talking points" - that were circulated to the mayor and others. (48 Cal.App.5th at p. 975.) The Court of Appeal does not specify whether the impermissible bias arose because the city councilmember prepared talking points prior to the hearing, he distributed these points to others in the city, or both.

The decision's reasoning creates uncertainty, with negative consequences for common behavior. The decision leaves many important questions about due process requirements unanswered, such as: (1) whether local officials should avoid preparing factual summaries altogether prior to a hearing, (2) whether there is a difference between permissible talking points and impermissible talking points, or (3) if such summaries (or talking points) are allowed, whether local officials may circulate them to others. Public officials - especially those addressing issues in their own districts or issues of importance to their constituents - may want to prepare remarks prior to a hearing, and *Petrovich* unfortunately suggests that officials should avoid such preparation or risk a due process violation.

### **The Opinion Creates Confusion by Concluding that the Initiation of Motion Is Evidence of Bias.**

The third "concrete" fact of bias was that the city councilmember who opposed the project initiated the motion to reverse the planning commission's decision to grant the conditional use permit. (48 Cal.App.5th at pp. 975-76.) But this fact, by itself, *cannot* be evidence of bias.

At least one member of a board of supervisors or city council would need to make a motion to reverse a planning commission's decision. Under *Petrovich*, any member who makes such a motion is presumptively biased. If that is true, then a presumption of bias would be shown *every time* a local adjudicatory body makes a motion to reverse a local planning decision.

*Petrovich* cites two cases as supporting this improbable conclusion: *Woody's Group, Inc. v. City of Newport Beach* (2015) 233 Cal.App.4th 1012 and *Nasha LLC v. City of Los Angeles* (2004) 125 Cal.App.4th 470. But *Petrovich* incorrectly relies on *Woody's* and *Nasha*, as those cases did not cite the initiation of a motion as evidence of bias.

In *Nasha*, the Third District Court of Appeal held that a planning commission's decision should be set aside because one of its members was biased. (125 Cal.App.4th at p. 473.) The Court of Appeal's conclusion rested on the planning commissioner's decision to author a newspaper article taking a position against the proposed project. (*Id.* at pp. 483-84.) That this same planning commissioner made the motion against the project was not part of the basis for the court's holding that he was impermissibly biased. (See *id.*)

In *Woody's*, the Fourth District Court of Appeal held that a city council's decision was invalid due to the bias of one of its members. (233 Cal.App.4th at pp. 1016-17.) The Court of Appeal held that this councilmember was biased due to two factors: (1) he initiated the appeal of the planning commission's decision to the city council (the court described this email to the city clerk as a "notice of appeal"); and (2) that this "appeal" process was inconsistent with city law. (*Id.* at pp. 1023, 1027-28.) *Petrovich* erroneously describes the email sent to the city clerk as a parliamentary "motion." However, the problematic action taken in *Woody's* was not a "motion" initiated at the city council meeting, but the "notice of appeal" sent to the city clerk. (See *id.* at p. 1023.) The *Woody's* court actually never identified who made the motion against the plaintiff's project, when the appeal was in front of the city council. (See *id.* at p. 1019.)

In these cases, the officials' public statements regarding the matter at hand and violations of local procedures were the determinative evidence of bias. (See *Woody's*, 233 Cal.App.4th at pp. 1023-29; *Nasha*, 125 Cal.App.4th at pp. 483-84.) Neither identified a parliamentary motion made by a city councilmember as indicating bias at all. *Petrovich* thus misinterprets and misapplies existing law, with a thoroughly impractical result.

**Conclusion**

For these reasons, CSAC and the League request that this Court depublish *Petrovich* to avoid further confusion and uncertainty in the due process requirements that apply to adjudicatory proceedings and an open invitation to litigation against California counties and cities.

Respectfully Submitted,

/s/

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Litigation Counsel  
California State Association of Counties

Counsel for California State Association of Counties and  
League of California Cities

Proof of Service by Mail

*Petrovich Development Company, LLC, et al. v. City of Sacramento et al.*

Case No. S\_\_\_\_\_

I, Jennifer Henning, declare:

That I am, and was at the time of the service of the papers herein referred to, over the age of eighteen years, and not a party to the within action; and I am employed in the County of Sacramento, California, within which county the subject mailing occurred. My business address is 1100 K Street, Suite 101, Sacramento, California, 95814. I served the within **REQUEST FOR DEPUBLICATION** by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

**Proof of Service List**

<b>Party</b>	<b>Attorney</b>
Petrovich Development Company, LLC, et al. : Plaintiff and Respondent	C. Jason Smith Smith, McDowell & Powell 100 Howe Avenue, Suite 208 South Sacramento, CA 95825
City of Sacramento et al. : Defendant and Appellant	Susana Alcala Wood Brett Morgan Witter Office of the City Attorney 915 I Street Sacramento, CA 95814-1951  Amrit Satish Kulkarni Shaye Diveley Meyers, Nave, Riback, Silver & Wilson 555 12th Street, Suite 1500 Oakland, CA 94607
Eric Johnson et al. : Real Party in Interest and Respondent	Patrick M. Soluri Soluri Meserve, A Law Corporation 510 8th Street Sacramento, CA 95814



California Building Industry : Pub/Depublication Requestor	Andrew B. Sabey Cox Castle & Nicholson 50 California Street, Suite 3200 San Francisco, CA 94111
The California Black Chamber of Commerce; The California Hispanic Chamber of Commerce: Pub/Depublication Requestor	Isaac Ehrlich 410 12th St Sacramento, CA 95814
Court of Appeal	Clerk of the Court Third Appellate District 914 Capitol Mall, 4th Floor Sacramento, CA 95814

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 7, 2020, at Sacramento, California.

/s/

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Jennifer B. Henning, SBN 193915