California
Fair Political
Practices Commission

February 20, 1987

Wes Bannister
Huntington Beach
City Councilmember
15562 Chemical Lane
Huntington Beach, CA 92649

Re: Your Requests for Advice
Our File Nos. A-87-029 and
A-87-050

Dear Mr. Bannister:

This is in response to your requests for advice dated January 16, 1987 and February 3, 1987 concerning your duties under the conflict of interest provisions of the Political Reform Act (the "Act").[1]

QUESTIONS

1. Are you prohibited from participating in discussions with the city attorney or with various department heads for the purpose of attempting to resolve a lawsuit filed against the City of Huntington Beach by a client of your insurance agency?

2. Are you prohibited from participating in a decision regarding rezoning land owned by a client of your insurance agency?

428 J Street, Suite 800 • P.O. Box 807 • Sacramento CA 95804-0807 • (916) 322-5660

source of income to you of $250 or more in the preceding 12 months.

2. You may not participate in a decision regarding rezoning land owned by a client of your insurance agency if the client has been a source of income to you of $250 or more in the preceding 12 months.

FACTS

In the first situation, a lawsuit has been filed against the City of Huntington Beach by John J. Stanko in his capacity as trustee of the Stanko Trust. The lawsuit involves the Davenport Marina, which is owned and operated by the Stanko Trust. You own a 100 percent interest in an insurance agency which insures the Davenport Marina.

In the second situation, a client of your insurance agency is coming before the city council to request that certain property be rezoned from commercial to residential property.

ANALYSIS

Section 87100 prohibits a public official from making, participating in, or attempting to influence a governmental decision in which he knows or has reason to know he has a financial interest. A public official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on, among other [illegible] source of [illegible]

[illegible] example the sale of an insurance policy by a solicitor results in a $400 commission which is split 50/50 between the solicitor and your insurance agency, your insurance agency has earned $200 in commission income.

if the Stanko Trust or the client seeking the rezoning has provided $250 or more in commission income to your insurance agency in the preceding 12 months, you may not participate in any decision which will have a reasonably foreseeable material financial effect on that client.

As we have previously advised you, it is usually necessary to estimate the dollar value of the effect of a decision on an official's economic interest to determine whether the effect is material. (Advice Letter to Wes Bannister, No. I-86-327 (Jan. 8, 1987).) However, Regulation 18702.1 sets out certain special situations in which an effect is considered material regardless of its dollar value. In particular, Regulation 18702.1(a)(1) provides that a public official shall not participate in a decision if:

> (1) Any person (including a business entity) which has been a source of income (including gifts) to the official of $250 or more in the preceding 12 months appears before the official in connection with the decision;

A person or business entity "appears before an official in connection with a decision" when that person or entity, either personally or by an agent:

> (1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request;

[illegible] to you of $250 or more in the preceding 12 months.

By participating in discussions with the city attorney and various department heads for the purpose of resolving the

Stanko Trust lawsuit, you would be considered to be "using your official position to influence" a governmental decision regarding the lawsuit. (Regulation 18700.1(a), copy enclosed.)

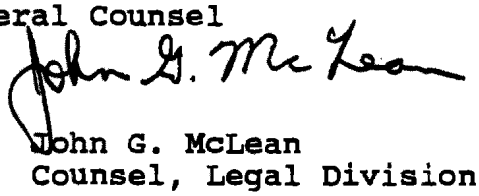
Rezoning

In the second situation you have presented, the request for rezoning constitutes an "application, ... appeal, or similar request." In addition, your client is undoubtedly a named party in the proceeding. Accordingly, you may not participate in the rezoning decision if the client has been a source of income to you of $250 or more in the 12 months preceding the decision.

If you have any questions, please contact me at (916) 322-5901.

Sincerely,

Diane M. Griffiths
General Counsel



By: John G. McLean
Counsel, Legal Division

DMG:JGM:plh
Enclosure

City of Huntington Beach
P. O. BOX 190 • 2000 MAIN STREET • CALIFORNIA 92648

MAYOR
Jack Kelly
MAYOR PRO TEMPORE
John Erskine
COUNCILMEMBERS
Wes Bannister
Ruth Finley
Peter Green
Tom Mays
Grace Winchell

February 3, 1987

Mr. John G. Mc Lean
Counsel, Legal Division
California Fair Political Practices Commission
P.O. Box 807
Sacramento, California 95804-0807

Re: Reasons for Disqualification

Dear Mr. Mc Lean:

It is a little early yet, but some where during the course of the next year, one of my insureds is going to be coming before the City Council requesting a rezoning of land currently owned. The zoning on that land, at this point in time, is commercial and at any time, basically, the insured could start building commercial sites under that coding. The insured, however, is not in the commercial building business, but has always been, and historically has involved himself in, joint ventures involving residential. For that reason, they are asking for a rezone to residential.

Again let me review with you the points involving me, which would have a direct bearing on this situation.

First, whether the land is zoned for commercial or residential would mean no change in income to me or change in my agency's gross receipts. Our premiums for our insurance coverages are not based on zoning, but on square footages, or acres. Therefore the reason for disqualification, as I understand it from your letter is eliminated as far as my involvement is concerned. It would not exceed $10,000 is gross receipts to my agency nor $250.00 to me personally.

Wes Bannister

Wes Bannister

WB/bu

cc: Gail Hutton
Huntington Beach City Attorney

TELEPHONE (714) 536-5553

California
Fair Political
Practices Commission

February 11, 1987

Wes Bannister
Councilmember
P.O. Box 190
Huntington Beach, CA 92648

Re: 87-050

Dear Mr. Bannister:

Your letter requesting advice under the Political Reform Act was received on February 9, 1987 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact John G. McLean, an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days. You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

428 J Street, Suite 800 • P.O. Box 807 • Sacramento CA 95804-0807 • (916) 322-5660

BANNISTER & ASSOCIATES
INSURANCE

JAN 19 10 04 AM '87

January 16, 1987

Attorney John G. McLean
Counsel, Legal Division
California Fair Political Practices Commission
P.O. Box 807
Sacramento, California 95804-0807

Re: Lawsuit
John J. Stanko, as Trustee of the
Stanko Trust, UDT 9/24/80,
Petitioner,
vs.
City of Huntington Beach, City
Council of the City of Huntington Beach
and Does 1 through X, inclusive

Dear Mr. McLean:

Attached to this letter please find a copy of a lawsuit which is being filed by one John J. Stanko against the City of Huntington Beach. The lawsuit clearly defines the reasons for action, and specifically, addresses the prior handling by the City Council of an action that the claimant feels was illegal.

In this particular case, I happen to know the parties who were involved in the action, and know that it was politically motivated, which is fully indicated by the lawsuit filed by Mr. Stanko.

My concern is that I insure Mr. Stanko [illegible]

[illegible] would reflect an amount suostantially under the $10,000 level, but in excess of the $1,000 level.

15562 Chemical Lane, Huntington Beach, California 92649, (714) 891-2351

A decision made by the Council that the action taken previously was invalid would in no way improve the use of the "land or other" since it is currently in use in the same manner as requested by the lawsuit. The loss of the end ties in the marina, would subject my client to a reduction in his ability to use land, but again, reflecting gross receipts as a factor, would not effect the gross receipts beyond the limits specified.

I would like to use the lawsuit document, and have the permission of the claimant, to discuss this action with the City Attorney and with the department heads that were previously involved in the program, however, am afraid that in so doing I could influence "legislation", which could conceivably be a conflict of interest according to your letter of January 8th.

Am I precluded from assisting this resident of Huntington Beach from resolving this problem and hopefully, reducing expenses to the City, and possible court action, by the conflict of interest laws in your judgement? Please advise as quickly as possible since this is a very serious situation and could be very expensive to all parties involved. It is my hope that I could use the knowledge I have of the risk, and the insured's desire to avoid legal action, to resolve this case in a way that would be equitable and fair to all.

Please advise.

Sincerely,

Wes Bannister

WB/bu

Encl.

AMERICAN STATES INSURANCE COMPANY
INDIANAPOLIS, INDIANA

COMMERCIAL INSURANCE POLICY

****
* COMMON POLICY DECLARATIONS *
****

POLICY NUMBER: 01-CC-04
RENEWAL OF: NEW

NAMED INSURED: DAVENPORT MARINA ,ETAL
(SEE NAMED INSURED END'T)
MAILING ADDRESS: P.O. BOX 2705
HUNTINGTON BEACH, CA 92649

AGENT: BANNISTER & ASSOC INSURA
15562 CHEMICAL LANE
HUNTINGTON BEACH, CA 926
04-03599 (384)
(714) 891-2351

POLICY PERIOD: FROM 06-20-86 TO 06-20-87
12:01 AM STANDARD TIME AT YOUR MAILING ADDRESS SHOWN ABOVE

****
*
* THIS POLICY IS SUBJECT TO FINAL AUDIT.
* TOTAL ESTIMATED ANNUAL PREMIUM
* DUE ON EFFECTIVE DATE: $ 3,198.00
*
****

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF
POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLIC

COMMERCIAL LIABILITY COVERAGE PART ..... $ 3

COUNTERSIGNED ----(DATE)---- BY ----(AUTHORIZED REPRESENTATIVE)----

AMERICAN STATES INSURANCE COMPANY
INDIANAPOLIS, INDIANA

BOAT DEALERS/MARINA OPERATORS

****
* DECLARATIONS *
****

POLICY NUMBER: 01-BD-
RENEWAL OF: NEW

INSURED NAME AND ADDRESS: JOHN J. STANKO,ET AL
~~17121 EDGEWATER~~ LANE
HUNTINGTON BEACH, CA 92649

AGENT: BANNISTER & ASSOC INSURA
15562 CHEMICAL LANE
HUNTINGTON BEACH, CA 926
04-03999 (384)
(714) 891-2351

LEGAL ENTITY: INDIVIDUAL

POLICY TERM: FROM 04-13-86 TO 04-13-87
12:01 AM STANDARD TIME AT ADDRESS OF INSURED

****
* TOTAL ANNUAL PREMIUM
* DUE ON EFFECTIVE DATE: $ 1,050.00
****

	LOCATION	OCCUPANCY
1.	4032 DAVENPORT HUNTINGTON BEACH, CA 92649	MARINA

COVERAGE(S)	SCH	LOC	LIMIT OF INSURANCE ($)	RATE	DEDUCT-IBLE ($)	PR
MARINA OPERATORS COVERAGE	NO	1	1,000,000		250	

TOTAL ..... $

ENDORSEMENTS ATTACHED: 9-CIM(0181) CIM001(0982) 9BDA(1281) CIM151(1281)

IN CONSIDERATION OF THE PREMIUM, INSURANCE IS PROVIDED THE NAMED INSURED TO AN AMOUNT NOT EXCEEDING THE AMOUNT(S) SPECIFIED, SUBJECT TO ALL THE PROVISIONS OF THIS POLICY INCLUDING FORMS AND ENDORSEMENTS MADE A PART HEREOF.

COUNTERSIGNATURE DATE_____ _____

LATHAM & WATKINS
Robert K. Break
Virginia P. Croudace
660 Newport Center Drive
Suite 1400, P.O.Box 2780
Newport Beach, CA 92660

(714) 752-9100

Attorneys for Petitioner

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

JOHN J. STANKO, as Trustee of The Stanko Trust, UDT 9/24/80, Petitioner, vs. CITY OF HUNTINGTON BEACH, CITY COUNCIL OF THE CITY OF HUNTINGTON BEACH and DOES 1 through X, inclusive, Respondents,	Case No. 46-75-77 NOTICE OF MOTION AND MOTION FOR PEREMPTORY WRIT OF MANDAMUS AND FOR ORDER ENFORING JUDGMENT, WITH POINTS AND AUTHORITIES Date: Time: Dept:

TO RESPONDENTS CITY OF HUNTINGTON BEACH and CITY COUNCIL OF THE CITY OF HUNTINGTON BEACH:

PLEASE TAKE NOTICE that on _____, 1986, at _____ a.m., or as soon thereafter as counsel can be heard, at Department ___ of the Superior Court of Orange County, 700 Civic Center Drive West, City of Santa Ana, California, petitioner will and hereby does move the Court for a peremptory writ of mandamus commanding respondents to set aside Resolution No. 5523 dated June 23, 1985, in the proceedings entitled "A Resolution of the City Council of the City of Huntington Beach establishing

a pier head line in the Davenport Marina." Petitioner will and hereby does further move the Court for an order enforcing its Judgment Granting a Peremptory Writ of Mandamus entered in Book No. 78, Page 373 on July 17, 1974 in Orange County Superior Court Case No. 211820. This motion is based on this notice, the verified petition filed in this action, all other papers and records on file in this action, the attached memorandum of points and authorities and any evidence that may be produced at the hearing.

Dated: _____, 1986

LATHAM & WATKINS
Robert K. Break
Virginia P. Croudace

By_____
Attorneys for Petitioner

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MEMORANDUM OF POINTS AND AUTHORITIES

I

INTRODUCTION

Either the Stanko Trust, petitioner, or Dr. John Stanko, the Trust's founder, has owned and operated the Davenport Marina in Huntington Harbour since 1975. Since 1975, boats lawfully have been moored at the ends, or "side-ties," of the four piers included in the Davenport Marina. On June 3, 1985, however, without affording petitioner a public hearing, without making any findings to explain or justify its actions, without any evidentiary showing of the need for its action, and contrary to the terms of the deed by which the channel adjoining the Marina was dedicated to the City of Huntington Beach, the Huntington Beach City Council voted to establish a "pierhead line" for the Marina that would eliminate side-tie moorings at the ends of two of the piers, and the revenues they yield to petitioner. Moreover, the pierhead line approved by the Council would, again without a hearing, findings, or evidentiary justification, eliminate what has been judicially adjudged to be the Marina owner's vested right to expand the Marina in accordance with an approved, valid, and vested permit previously issued by the City. In so doing, the City acted in violation of the due process rights of petitioner, in prejudicial abuse of its discretion, and in contempt of the prior judgment of this Court. The writ, and an order enforcing the Court's prior judgment, must be issued.

/ / /

/ / /

II

FACTUAL BACKGROUND

The Huntington Harbour adjoining the Davenport Marina (the "Marina") came into being in October 1962, when the Huntington Harbour Corporation (the "Corporation"), petitioner's predecessor in interest, dedicated the fee interest in the Harbour to the City. The deed also reserved to the Corporation and its successors in interest an easement to construct and operate a marina on a portion of the dedicated harbor, including the area on which improvements for the Marina have been constructed. (See Administrative Record ("A.R."), Exhibit 4, attachment 2.) In May 1964, the City issued Conditional Exception (Use Variance) No. 707 (the "Conditional Exception") allowing construction of 91 slips at the Marina, along with an adjacent parking lot. (See id., Exhibit 1.) The Corporation obtained the necessary permits and constructed the marina bulkhead and parking lot, gangways, and 26 boat slips. (Id., Exhibit 11, App. C, page 5.) In 1971, the Corporation decided to construct, and the City approved, 48 additional boat slips previously authorized by the Department of the Army, Los Angeles District Corps of Engineers. (See id., Exhibit 2.) By November 1972, the Corporation had constructed a total of 29 boat slips in the Marina. (Id., Exhibit 11, App. C, page 6.)

Before the slips could be completed, however, on or about November 14, 1972, the City ordered the Corporation to cease development of the Marina. (Id., pages 5-6.) Despite the City Attorney's opinion to the contrary, the City Council decided that an environmental impact report had to be certified

before the development could proceed. (See id., Exhibit 4, page 2.) Ultimately, on February 19, 1974, the Council revoked the Conditional Exception and the Corporation sued. (Id., and Exhibit 11, App. C, pages 5-7.)

The Corporation's petition for writ of mandate was tried before Judge Soden in Orange County Superior Court on July 16, 1974. Judge Soden entered his judgment (the "Judgment") commanding the Council to set aside its revocation of the Conditional Exception. Judge Soden found that the Corporation had a vested right to complete development of the Marina:

> "Huntington Harbour Corporation having made substantial [sic] expenditures, performed substantial [sic] construction, and incurred substantial liabilities in good faith reliance upon Conditional Exception (Use Variance) No. 707 and Harbor Permit No. 518 has a vested right to complete the Davenport Marina."

(Id., Exhibit 11, App. C, page 12, and App. D, page 2; id., Exhibit 5, pages 478-479.) The Council elected not to appeal and the Judgment became final.

In response to Judge Soden's Judgment, in 1975 the Council considered establishing a pierhead line in the Marina to circumvent the Judgment. It declined to do so, however, presumably in light of the City Attorney's opinion that any pierhead line requiring removal of existing docking opportunities as originally approved by the City would constitute inverse condemnation and would require the City to compensate the owner of the Marina. (A.R., Exhibit 7.)

In 1975, with the Judgment declaring that the right to expand the Marina as planned in 1964 was vested, John Stanko and Ken Thompson purchased the Marina from the Corporation. (Petition for Writ of Mandate (CCP §1094.5), filed August 30, 1985 ("Petition"), ¶ 19.) In December 1982, Mr. Stanko purchased Mr. Thompson's interest in the Marina and, in 1984, transferred title thereto to petitioner. (Id.) From and after 1975, the owners of the Marina have continued to moor boats at the side-ties of the ~~four~~ piers in the Marina. (See A.R., Exhibit 8, page 1, and Exhibit 9, page 1.)

In 1985, however, the City's staff, based upon complaints from a neighbor, again decided to recommend that the Council consider establishing a pierhead line in the Marina. The staff set forth three alternatives, identical to those proposed in 1975. (Compare A.R., Exhibit 8 (the "Staff Report"), Ex. "A", "B", and "C", with A.R., Exhibit 9, Ex. "A" and "C", and Exhibit 15, Ex. "B".) Despite the City Attorney's 1975 opinion regarding inverse condemnation, the City recommended adoption of proposal "B," which would eliminate two existing side-tie moorings at the Marina. (See A.R., Exhibit 7, page 2.)

Upon learning of the City's renewed interest in establishing a pierhead line in the Marina, on or about May 17, 1985, petitioner's attorney, Robert K. Break, telephoned the City Attorney to discuss the matter. (Declaration of Robert K. Break ("Break Decl."), ¶ ___.) Mr. Break was referred to Deputy City Attorney Robert Sangster. (Id.) On or about May 21, 1985, Mr. Break spoke with Mr. Sangster, apprising him of the

existence of the Judgment, identifying several material misrepresentations in and omissions from the Staff Report, and requesting an opportunity to meet with the City's staff to determine why the proposal was being made and whether a compromise pierhead line could be proposed instead. (Id., ¶ ___; see A.R., Exhibit 10.) Mr. Break subsequently reduced such concerns to writing in a May 23, 1985, letter to Mr. Sangster. (See A.R., Exhibit 10.)

On May 31, 1985, the Friday immediately before the June 3 Council meeting, at Mr. Break's request, petitioner and its representatives met with Mr. Sangster, Charles Thompson, the City Administrator, James Palin, Director of the City's Department of Development Services, and Paul Cook, the Director of the City's Department of Public Works. (Break Decl., ¶ ___.) At this meeting, Mr. Break specifically inquired of these City representatives whether any public health, safety, or welfare justification supported establishment of any pierhead line. (Id., ¶ ___.) All responded that no such justification existed. (Id.) At this meeting, Mr. Break also delivered to Mr. Sangster a position paper (A.R., Exhibit 11) outlining petitioner's major factual and legal arguments regarding its right to continue the existing operation of the Marina, including the utilization of all side-tie moorings. (Id., ¶ ___.) Finally, petitioner proposed a compromise pierhead line that the City representatives agreed to consider supporting. (Id., ¶ ___.) Immediately following this meeting, petitioner's representatives arranged for delivery of copies of the position paper to Council members prior to the June 3 meeting, and were assured by the Council's

clerk that the position paper would be delivered to the Council members for their consideration over the weekend prior to the June 3 meeting. (Id., ¶ ___.)

At the Council meeting on June 3, 1985, the proposal to establish a pierhead line at the Marina ("Resolution No. 5523") was calendared as an administrative item. It was not set for a public hearing. (See A.R., Exhibit 12, page 9, Exhibit 13, pages 116-117, Exhibit 14, page 1.) Petitioner's sole opportunity to address the proposal was during the "public comments" portion of the Council meeting. (Id., Exhibit 14, page 2.) Indeed, when Mr. Break addressed the Council during this portion of the meeting, the City mayor emphasized that Resolution No. 5523 was not set for public hearing, and therefore cut short Mr. Break's attempts to respond to a Council member's questions. (A.R., Exhibit 14, page 15.) To further complicate matters, the City Attorney, Gail Hutton, misrepresented to the Council that the City had received petitioner's position paper at 4 p.m. on June 3, the hearing date. (See id., pages 22-23, 26-28.)

Ultimately, no evidence was taken. The Council simply adopted Resolution No. 5523 as an administrative item, without a hearing, and without making any findings of public purpose or necessity. (See A.R., Exhibit 14, pages 19-31.)

On August 30, 1985 petitioner petitioned this Court for a peremptory writ of mandate commanding the City and the Council to set aside Resolution No. 5523. (See Petition.) Also on August 30, 1985, petitioner requested the City to prepare a record of the City's proceedings in adopting Resolution No.

5523. (See Request for Preparation of Administrative Record, filed in this action on August 20, 1985, and Proof of Service, filed on October 25, 1985.) Although the City was required to prepare and deliver the record to petitioner by November 28, 1985 (see Cal. Code of Civ. Proc., § 1094.6(b)), the City delayed for almost a full year before delivering to petitioner's attorneys an uncertified copy of the record on or about August 6, 1986. On August 20, 1986, petitioner returned the record to the City for certification. On August 21, 1986, the City certified part of the record and, as discovered in or about October 1986, returned an incomplete copy of the record to petitioner's attorneys. Petitioner's attorneys contacted the City in or about October 1986 and on or about each of November 19, 20 and 21, 1986 regarding omissions from the record, and finally received the missing documents from the City on or about December 4, 1986.

III

The City's Actions Denied Petitioner Due Process In Refusing To Allow Petitioner A Fair Trial

It has long been the law in California, and nationally, that a city cannot require a landowner to discontinue a prior lawful use of his property without first affording the landowner the constitutional protections of due process. (City of San Marino v. Roman Catholic Archbishop, 180 Cal.App.2d 657, 669-670 (1960); McCaslin v. City of Monterey Park, 163 Cal.App.2d 339, 347 (1958); Trans-Oceanic Oil Corp. v. Santa Barbara, 85 Cal.App.2d 776, 795-96 (1948).) Central to the protections of the due process clause of the Fifth Amendment

is the right, as codified in California Code of Civil Procedure Section 1094.5 (all further statutory references are to the Code of Civil Procedure unless otherwise specified), to a "fair trial," which is the right not only to be heard in a meaningful manner, but also to know beforehand the alleged bases for the contemplated action and be able to contest them. (Mathews v. Eldridge, 424 U.S. 319, 348-49 (1976); Morgan v. U.S., 304 U.S. 1, 18-19 (1938).) In administrative hearings, due process specifically includes the right to representation by counsel and the right to cross-examine witnesses. (See Borror v. Department of Investment, 15 Cal.App.3d 531, 540-41 (1971); Olive Proration Committee for Olive Proration Zone No. 1 v. Agricultural Prorate Comm'n, 17 Cal.2d 204, 210 (1941).) Here, not only was petitioner denied an administrative trial, but the City acted in a manner that only can be characterized as being fundamentally unfair.

The City did not afford petitioner any procedure that remotely resembled a hearing prior to imposing a pierhead line which revoked petitioner's rights to use side-ties at the Marina, and to expand the Marina west from the parking area located north of the existing docks. Despite its impact on petitioner's vested rights, Resolution No. 5523 was simply listed as an "administrative item" and enacted as such. (See A.R., Exhibit 10, page 9, and Exhibit 14, page 31.) This is not due process.

First, petitioner was never apprised beforehand of the basis for the Council's proposed action. (Break Decl., ¶ ___.) The Staff Report failed to set forth any justification for

creating the pierhead line. (See A.R., Exhibit 7, pages 1-2.) Mr. Break had specifically attempted to determine the basis for the City's action in his May 31 meeting with City representatives, and was unequivocally informed that there was no public health, safety, or welfare justification for the proposal. (Break Decl., ¶ ___.) Petitioner was therefore unable to prepare adequately to respond to the Council's concerns regarding placement of the pierhead line at the June 3 meeting.

Second, petitioner was not given any opportunity to confront issues regarding the proposed pierhead line in any meaningful way. For example, at the outset, petitioner was not afforded a hearing, but was merely given the right to speak for a limited time during the public comments portion of the Council meeting. (Id., Exhibit 12, page 9, Exhibit 14, pages 1-2.) This opportunity to speak was woefully inadequate, especially in view of the fact that the Council does not even consider in its decision on administrative items (such as Resolution No. 5523) any comments adduced during the public comments portion of a Council meeting. (Id., Exhibit 12, attachment 1.) Furthermore, petitioner's inability to present evidence regarding the Staff Report's errors as to the nature of petitioner's proposed compromise and the existing width of the channel at the Marina (see A.R., Exhibit 10, pages 1-2) was severely prejudicial in light of Ms. Houseal's and Council person's Green's subsequent testimony regarding the alleged necessary channel width, and Ms. Houseal's comments with respect to pierhead line placement. (Id., Exhibit 14, pages 16-19, 26.) Mr. Cook's failure to

augment the Staff Report to state that there was no public health, safety, or welfare problem when given the opportunity to do so (see id., Exhibit 14, pages 19-20) was equally prejudicial and inexcusable. Finally, the City's sloth in presenting petitioner's position paper (id., Exhibit 11) to the Council and the misrepresentations of City staff (see Break Decl., ¶ ___) prevented the arguments petitioner had previously submitted from being considered by the decisionmakers.

The City likewise denied petitioner the opportunity to rebut comments made during the public comments portion of the meeting. The mayor aborted petitioner's attempts to rebut the claim in the Staff Report attributing to Dr. Stanko the pierhead line proposal indicated on Exhibit C thereto: "Councilman Kelly, I am sorry[. T]his is not a public hearing . . . [I]ts public comments." (A. R., Exhibit 14, page 15.) In addition, petitioner had no chance to rebut the City Attorney's incredible representations to the Council that the City had no prior notice of petitioner's claims. (Id., Exhibit 14, at 20, 22-23, 26-27.) These misrepresentations severely prejudiced the Council against petitioner, as is evidenced by the following statement by a Council person:

> "Well, I have a problem with the tactic of going along and studying this issue for how long? The gentleman has been involved and all of a sudden his attorney throws paperwork at us. I've done it in the past and I call it the big smoke screen, and I have no problem with going with recommended action and which is item 3, I believe, and let the man do what he has to do. I

> make a recommended action; move the staff recommendation."

(Id., at 22-23.) Another Council person echoed the concern with what was perceived to be an attorney's attempt to sandbag the Council:

> ". . . I too am concerned from what I heard the legal person come down and indicate on this item was that the City does not have a right to change anything that has happened in the past and I just wanted our City Attorney to reaffirm that laws and things can change. We can zone, rezone, down-grade, up-grade and we have done it many times. And, I just, lawyers trying to scare us into doing something bother me greatly."

(Id., at 23.) Nothing could be further from due, fair process.

In short, the Fifth Amendment's requirement that no person be deprived of property without due process of law is intended to ensure fair play and stand as a shield against unfair or deceptive treatment by government. (See Hannah v. Larche, 363 U.S. 420, 442 (1960); see also U. S. v. Romano, 583 F.2d 1, 7 (1st Cir. 1978).) In this case, petitioner was not only denied the basic protection of a fair hearing with an opportunity to fairly understand and rebut evidence supporting any pierhead line that would adversely impact his vested and long established property rights, but petitioner was subjected to grossly unfair and deceptive treatment by the City. For this reason alone, the writ must be issued.

/ / /

/ / /

IV

The City Abused Its Discretion In Approving Resolution No. 5523

In addition to inviting inquiry whether there was a fair trial underlying any quasi-adjudicatory decision such as this, Section 1094.5(c) also provides that the writ shall issue if the decision constitutes a "prejudicial abuse of discretion," which ". . . is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." The City clearly did not proceed as required by law, as discussed above. It denied petitioner a fair hearing.

Equally fatal to the City's action is the fact that the City failed absolutely to make any findings supporting its actions. "[I]mplicit in Section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order." (Topanga Ass'n For a Scenic Community v. County of Los Angeles, 11 Cal.3d 506, 515 (1974).) The Topanga decision advanced a number of important policy reasons for this stark and unequivocal holding: "to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions"; to "enable the reviewing court to trace and examine the agency's mode of analysis"; and to ensure "that administrative decision-making is careful, reasoned, and equitable". (Citations omitted.)

Here, the Council declined to make any findings at all. The reasons are evident from the record as a whole. There was no "orderly analysis" leading to the adoption of the pier-

head line for the Marina. In fact, there was no analysis to speak of whatsoever. A review of the June 3 Council meeting transcript makes it abundantly clear that the City had, at best, an incomplete comprehension of the history of the Marina and petitioner's rights with respect thereto. (See generally A.R., Exhibit 14.) Moreover, the Council did not even have the benefit of the City Attorney's opinion regarding the legal issues involved. Gail Hutton claimed to have received petitioner's position paper at 4 p.m. on June 3, 1985, the day of the Council meeting (id., pages 22, 26-27), notwithstanding that petitioner's representatives had delivered the position paper to City representatives on May 31, 1986. (Break Decl., ¶ ___.) The Council therefore did not make an informed decision on the matter and should, at the very least, have deferred its decision until the City Attorney had an opportunity to evaluate any legal issues, as suggested by one Council member. (See A.R., Exhibit 14, at pages 27-28.) The City's decision-making was thus not "careful, reasoned, and equitable." It was careless and, as already discussed, unexcusably inequitable.

Having failed to make any findings supporting its decision establishing a pierhead line for the Marina, the City acted contrary to the requirements of Topanga, and has therefore abused its discretion. The writ must issue.

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V

Even Had There Been Findings, There Was
No Evidence That Could Support The City's Actions

Even if the Council had made findings, however, the administrative record does not contain evidence sufficient to support the Council's decision on Resolution No. 5523. The pierhead line established by the City operates to deprive petitioner of property rights in two ways: it eliminates side-ties on two piers in the Marina, which has been a legal use since 1975, and it revokes expansion opportunities at the end of the parking area, vested by the Judgment.

A prior lawful, vested use can be ordered discontinued upon a finding of public nuisance or upon payment of just compensation. (McCaslin v. City of Monterey Park, supra, 16 Cal.App.2d 339, 346-47, 350.) The City's staff, which proposed the pierhead line, even admitted that no public health, safety, or welfare consideration justifies the action. (See Break Decl., ¶ ___.) Moreover, there was no evidence before the Council of any nuisance resulting from either the use of the side-ties or the potential expansion, save Ms. Mary Ellen Houseal's lay opinion regarding the necessary width of the channel. (See A.R., Exhibit 14, pages 18-19.) Ms. Houseal's estimate of minimum width was, however, contradicted by Mr. Cook, the Director of the City's Department of Public Works (and author of the Staff Report), who stated at the May 31 meeting (but for some strange reason not at the June 3 Council meeting) that forty feet is a minimum safe width at the point where the Marina constricts the channel. (Break Decl., ¶ ___.) With use

of the side-tie mooring on Dock "D" which presently extends the farthest in the existing channel, the channel width is approximately sixty feet. (See A.R., Exhibit 9, Ex. "C.") Indeed, evidence available to the City which was referenced in the position paper submitted to the City by petitioner supports expansion of boating facilities in the Marina. (See id., Exhibit 11, page 14.) The Coastal Element of the City's General Plan in effect at the time of the Council meeting documents a shortage of boating facilities in the City. (Id., Section 2.2.8.) Thus, there neither was nor could be evidence of any public necessity or nuisance sufficient to justify the City's action.

A review of the evidence by this Court can lead only to the conclusion that the Council abused its discretion in making a decision that is not supported by the weight of the evidence (see § 1094.5(c)), and the writ must therefore issue.

CONCLUSION

For the reasons stated above, petitioner respectfully requests that this Court issue the peremptory writ and an order enforcing the Judgment, and remand the proceedings to the Council, commanding that it set aside Resolution No. 5523 and take whatever further action is deemed necessary or desireable consistent with this Court's judgment.

Respectfully submitted,

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By_____
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California
Fair Political
Practices Commission

January 21, 1987

Wes Bannister
Bannister & Associates
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Re: 87-029

Dear Mr. Bannister:

Your letter requesting advice under the Political Reform Act was received on January 20, 1987 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact John G. McLean, an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days. You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

Katherine E. Donovan for

Diane M. Griffiths
General Counsel

DMG:plh

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