

Councilmen

In the Memorandum from the City Attorney, Joel wrote

“While I believe the policy supported by Mr. Freytag would be legally permissible, it would be on the restrictive end of the spectrum for due process policies.”

After many E Mails, calls, meetings, Joel and I agree on over 99% of the proposed ordinance. There are 891 words in the Ord. and only 6 words we disagree on. They are *“disqualified from participating in the hearing”*.

These 6 words are not anywhere close to the restrictive end of due process. As noted in my memo to decision makers and public, I mention the recently passed Resolution 2016-096 (conflict of interest). In this Resolution, Council voted *“the Official shall not participate the official discussion, any executive session, or any vote on the matter”*.

So let me get this right. If a decision maker has a conflict of interest created by money or family, etc. The decision maker withdraws from voting.

But a violation of the citizens right to due process, not so. If the citizens hearing is compromised by ex-parte communications, all that is necessary is to say --- hey everyone, I had prior communications before this hearing and all you decision makers and the Applicant didn't know about it --- so I am telling you now that I did it, but so what, I am still going to vote on the matter.

If the decision maker can still vote, then why not just continue with all the things that hinder the citizens ability to have a **fair and unbiased hearing**. Withdrawing from voting like you do in the Conflict of Interest Resolution is not restrictive, it is absolutely fair.

Joel goes on to say --- *“The ordinance I have proposed follows a less restrictive approach in line with state statute”*.

He is absolutely right, his version is less restrictive, and he is absolutely wrong to say *“in line with state statute”*. Look at his memo and read the yellow highlighted part of SDCL 6-1-20.

Failure to make this disclosure may be grounds for the municipal, county, or township officer's **disqualification for that particular decision**, pursuant to the grounds for **disqualification** pursuant to § 6-1-21.

Disclosure by itself does not mean a decision maker has a magic covering for disqualification.

SDCL 6-1-21 --- Only by a showing of **clear and convincing evidence** that the officer's authority, statements, or actions regarding an issue or a party involved demonstrates prejudice or **unacceptable risk of bias** may an officer be deemed **disqualified in a quasi-judicial proceeding**.

Joel fails at this juncture to say the South Dakota Supreme Court case I provided in my memo is “LAW”. It is CASE LAW where SDCL 6-1-20 is written law. In the case law the supreme court clearly made to very large points.

1. Even the “PROBABILITY of UNFAIRNESS” --- the State endeavors to PREVENT
2. A FAIR TRIAL in a FAIR TRIBUNAL is a basic fundamental of a citizens right to Due Process

These basic fundamentals can be found through out the CASE LAW I provided in my memo. I have highlighted

- A. “shall not participate in the conduct of the hearing nor take part in rendering the decision thereon”
- B. ex-parte communications --- “except upon NOTICE AND OPPORTUNITY for all parties to participate”
- C. **The problem with ex-parte communications is that the opposing parties have no notice or opportunity to respond. We recently noted in the context of a judge’s ex parte communication that communicating with one party without giving the opposing party notice and an opportunity to be heard would “not comport with basic understandings of due process.”**

Joel will argue the Supreme Court didn’t really mean what they wrote in the Case Law 2009 Turner County Board of Adjustment. He will say they were not clear. He will say the written law they quoted in this Case is not the same.

I don’t buy that. I believe the Supreme Court knew what they were doing and saying.

On page 21 they wrote --- *Thus, while I agree with the Chief Justice that we should not fashion rules categorically precluding elected officials from performing any of their official duties, this is not a case in which we have fashioned such black letter rules. This is not an area of the law that permits black letter rules. Although local officials may prefer black letter rules to provide guidance in future cases, Strain and similar cases confirm that local officials must necessarily work within a more flexible but less certain framework.*

On page 13 --- *Determining disqualifying interest does not involve hyper technical analysis.*

Councilmen you owe the citizens a FAIR AND UNBIASED hearing. If you violate this process with ex-parte communications that do not provide all parties to opportunity to participate in, then you are obligated to disclose this behavior and disqualify your self from the proceeding.

Think about it. Before we had a hearing process, guns, fists, and knives were the methods used to settle matters. But now the people have decided a better method called a hearing process --- with an unbiased, fair minded, decision maker is far better.

One of the principles of your election is ---- You were not elected to protect the CORC from the citizen, you were elected to protect the citizen from the overwhelming power of the City. This is only one principle and I recognize there are many others, but this one is the most important.