

Ex Parte Communications and the Quasi- Judicial Role

An overview for newly elected
officials

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November 30, 2022

Substance of the Ex Parte Prohibition

“One sided”

Contacts between one party and a decision-maker outside the presence of another party to the matter when a matter is pending

Our goals today

- ▶ What it means
- ▶ Why we have this rule
- ▶ How to recognize when it applies
- ▶ What to do when contact happens

“Quasi-Judicial”

- ▶ Decisions that have direct effects on the rights of an individual person
- ▶ Applies existing law rather than makes new law
- ▶ Requires a finding that from all of the evidence presented, the required standards have been met

Who are the players?

- ▶ Applicant
- ▶ Interested persons (the public, neighbors, members of other government agencies)
- ▶ Staff
- ▶ Board or city council members

Examples of QJ functions

- ▶ Boards of Adjustment (appeals)
- ▶ Board of Equalization
- ▶ Platting Board
- ▶ Certain procurement matters (suspension, debarment)
- ▶ Conditional use, variances, grandfather rights (land use) but not rezones

Legislative

- ▶ General policy or rights of individuals in the abstract
- ▶ Making new laws
- ▶ Funding decisions
- ▶ Taxpayers as a group (mill levy)
- ▶ Zoning, comprehensive plan
- ▶ Vacation of streets, rights of way

What are ex parte contacts

- ▶ Can be oral or written communications
- ▶ Rule of thumb: If you didn't find out the information while you were "on the record" in a meeting, it is likely an ex parte communication.

Procedural Due Process Rights

- ▶ Right to an impartial decision-maker
- ▶ Right to know what information the decision-maker is using to make a determination

Rationale

- ▶ Even playing field
- ▶ Unfair to take evidence from only one side at a hearing, also unfair to permit any side to present evidence to the decision makers in private
- ▶ Do not want one side influencing a vote outside the public forum

When is a matter “pending”?

- ▶ An application has been filed
- ▶ A matter appears on your agenda

- ▶ Beware:
 - Impending matters
 - ▶ Example: you speak to someone on Monday and they file an application the following day
 - Appeals
 - ▶ Example: a court remands a decision to you for re-hearing but you’ve spoken to one of the parties

What if....

- ▶ You get a phone call or email?
- ▶ You run into someone on the street?
- ▶ You are at a meeting and the matter comes up for discussion?
- ▶ You conduct a site visit and the applicant or a neighbor is there?
- ▶ You hear a discussion on a radio program or read an editorial in the newspaper?

General Rules

- ▶ **AVOID** the contact
- ▶ If you accidentally have an ex parte contact, **DISCLOSE** it on the record at the beginning of the meeting
- ▶ Discuss **WHAT** was related to you
- ▶ State whether you believe it has impacted your opinion or view of the matter and whether you can still be **UNBIASED**

What do you need to disclose?

- ▶ At a minimum, the substance of the outside contact and the identity of the person making the contact.
- ▶ If it is in written form, make the actual email, letter, photograph, facsimile, etc. a part of the record.

Example #1

You and your wife are at dinner with friends, Jack and Diane. One of them discusses a problem with the road in front of their home. The following week, at your municipal meeting, the same road is up for discussion as part of a permit application. Jack and Diane are there to testify but are not the applicant.

What do you do?

- A) Say nothing and pretend you don't know them so you look fair.
- B) Wave hello, and nod vigorously in agreement when they testify.
- C) Disclose the contact, and explain to the body if you can remain unbiased.

What should I say when I
disclose this?

“Mr. Chair, before we hear this matter I need to disclose an ex parte contact. Last week, Jack and Diane told me about a problem with this road. They said it is too narrow to handle any additional traffic. I did not know about this application at the time. I believe that despite this information, I can listen to all the evidence and this information has not impacted my ability to be impartial here tonight.”

Is your answer the same if:

1. Jack and Diane are not present at the meeting?

YES.

You still have information the other decision-makers do not have and it may appear it could influence your decision.

Is your answer the same if:

2. Jack and Diane are the applicant?

Is your answer the same if:

3. You did not hear about the road from Jack and Diane, but you regularly visit Jack and Diane's home and have personal opinions about their road conditions?

Example #2

You are at home eating dinner before your municipal meeting. Your phone rings, and as soon as you answer Tommy Tutone begins telling you why a permit application on that night's agenda should be denied.

What should you do?

You politely disconnect the call without offering an opinion on the matter.

Was this an ex parte contact?

YES. Even though you did not respond and terminated the call, Tommy provided information to you. Disclose the contact on the record with as much information as you received.

Your answer should be the same even if you did not answer and Tommy left a voicemail that you listened to; your assistant took a message that was relayed to you; or, you received an email message that you read but did not respond to.

Have a response ready

- Apologize for not being able to discuss the matter
- Provide information as to the appropriate time and place for Tommy to be heard
- Tell Tommy you will listen to what he has to say when you are on the record

Have a response ready

“Tommy, I’m sorry I can’t talk to you about that permit. It’s on Tuesday’s agenda. You can submit written comments to the clerk’s office or come testify in person on Tuesday. I will be at Tuesday meeting and will listen to what you have to say then.”

Example #3

Your city council meets on Tuesday night. After hearing a permit application regarding a school and evidence from the applicant, it is determined that a decision cannot be reached without comment from the school board. The council postpones its decision in order to provide the school board a chance to comment on the proposal.

In a formal letter, the school board submits written comments before your next meeting. Without reading the comments into the record or disclosing it to the applicant, the council votes to deny the application.

Has there been a violation?

YES!

Remember all evidence received must be made a part of the record and the applicant should be given an opportunity to respond to any evidence upon which you base your decision.

What if the letter had been
made a part of the record
and the applicant had been
given a chance to respond?

Example #4

You are hearing a permit application and realize the property involved is near your workplace. You drive by it daily.

As the applicant is describing the property as being on a quiet street with little traffic, you believe he is giving inaccurate information to the council. During deliberations, you state: “I plan to vote no because I drive this street every day and almost always get stuck in a traffic jam.”

EX PARTE???

But no one told me
anything!

Consider this...

- ▶ Is it information obtained outside a public meeting?
- ▶ Has it been determined that you can be fair and impartial despite this knowledge?
- ▶ Did you give the applicant a chance to address your observations?
- ▶ Are you basing your decision on information that was not available to your fellow council members?

It would have been different if you had traveled on the street for a site visit, disclosed this up front in the meeting, and explained what you observed while you were there.

Tips

- ▶ Be familiar with your upcoming agendas.
- ▶ As soon as you sense that you are about to be in an ex parte situation, stop the person from discussing it and tell them how they can be heard on the issue.
- ▶ Avoid putting personal mailing addresses on websites; instead, have your mail routed through your clerk's office.
- ▶ Note on agendas if an item is quasi-judicial.

Questions?

Always remember to check with your local attorney if you think you have been involved in an ex parte contact or if you are not sure if it is a quasi-judicial proceeding to which these rules apply.