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EX PARTE CONTACTS AND QUASI-JUDICIAL DECISIONS

WHAT IS AN EX PARTE CONTACT? Broadly defined, an ex parte contact is any written or verbal communication initiated outside of a regularly noticed public hearing between an official with decision-making authority and one or more of the parties, but not all of the parties, concerning a particular subject matter which is under, or which is about to become under, consideration by that official, and which seeks either to influence, or present information relating to, that matter which is the subject of the decision. The term is usually used in a courtroom context; the judge cannot discuss a case with either party or their attorney without the other party and the attorney being present. The term is also equally applicable to any quasi-judicial matter pending before a local governmental body. An ex parte contact may include discussing an upcoming hearing or decision with the staff.

WHY ARE EX PARTE CONTACTS BEFORE MAKING A QUASI-JUDICIAL DECISION IMPROPER?

1. All parties are entitled to have the matter heard by an impartial person or body. At the very least, ex parte contacts, whether the contacting person is an applicant or a protestant, call into question the impartiality of the decision maker.

2. Every quasi-judicial decision must be supported by findings of fact, and the findings of fact must be based solely upon the evidence as it appears in the record of the proceeding. The record of the proceeding consists only of matters presented at the hearing, not anything presented before or after the hearing. Therefore, to have a defensible record, only evidence presented during the hearing, on the record of the hearing, may be relied upon in reaching the body's decision.

3. In some instances, the parties have the right of cross-examination of the opposing side. They cannot cross-examine an ex parte contact.

4. In the event one party challenges the final decision, you can be sure any ex parte communications will be included as one of the grounds for reversing the decision.

WHAT DO I DO IF SOMEONE ATTEMPTS TO CONTACT ME BEFORE A HEARING?

1. Stop the Person. If it is a verbal contact, advise the person that you are sitting as a judge in the matter and you cannot listen to or review anything about the issue prior to the hearing.

2. Disclose the Contact. At the next public meeting or prior to the hearing on the public record, advise the remaining members of the board and the parties of the contact, your response, and whether or not you think you can make an impartial decision based on the evidence presented at the hearing despite the contact.

3. Consider Whether the Ex Parte Contact Requires Abstention. An ex parte contact, by itself, is usually not enough to reverse the final decision or require you to abstain from voting on the issue. Each individual contact must be reviewed to determine whether it affects your impartiality or ability to consider the matter fairly, whether it creates an appearance of impropriety, whether it creates a conflict such that you cannot participate in the decision-making process, or whether it otherwise affects the rights of the parties seeking the decision to "fundamental fairness" or due process in the decision-making proceedings.

4. Consider Adopting Formal Procedures. It is difficult to tell a neighbor or a constituent that you cannot talk to them about an issue that may be very important to them. Very often constituents are unable to understand why they cannot speak about particular issues to those who have been elected or appointed to represent those constituents. It may help to have specific procedures that the governing body or the planning commission has adopted that you can point to as the reason you cannot handle a quasi-judicial issue in the same manner as you do other legislative or administrative issues. This will also help to make sure all board members handle ex parte contacts in the same manner.