



EX-PARTE COMMUNICATIONS RELATED TO QUASI-JUDICIAL PROCEEDINGS

CITY ATTORNEY'S OFFICE

City Planning Commission
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BACKGROUND

At times, the Commission acts in an adjudicatory capacity, that is, the Commission sits in a role similar to judges, where a particular law is applied to the facts of a particular issue. Judging applications or appeals for land use permits, variances, and other project-specific approvals are some examples. This presentation will provide you with some general guidance as to the proper conduct for Commissioners regarding ex-parte communications when presiding over a quasi-judicial proceeding.



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DISCUSSION

1. What are quasi-judicial proceedings?
2. What are the due process requirements for quasi-judicial proceedings?
3. What is an ex-parte communication?
4. How can Commissioners protect the City against improper ex-parte communications?



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What are quasi-judicial proceedings?

1. The matter requires advance notice and a hearing.
2. The decision is predicated upon specific findings of fact.
3. The decision applies existing law to specific facts to make an individualized determination of a specific person's rights or interests in life, liberty, or property.

Example: The Planning Commission is holding a hearing for the revocation of a Conditional Use Permit for the operation of a nightclub



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Due Process Requirements For Quasi-judicial Proceedings

1. Due process principles apply to ensure fairness. The most fundamental requirements of procedural due process are adequate notice, and an opportunity to be heard before a fair and impartial hearing body.
2. Ex-parte communications may taint a fair hearing when a quasi-judicial body considers evidence outside the record to reach a conclusion.



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What is an ex-parte communication?

1. Any material and **substantive** oral or written communication, or sensory observation, with or by a decisionmaker, that is **relevant** to the merits of an adjudicatory proceeding, and which takes place outside of a noticed proceeding open to all parties to the matter.
2. Casual or non-substantive communications do not violate the due process rights of non-present parties.

Example: The Planning Commission is holding a hearing for the revocation of a Conditional Use Permit for the operation of a nightclub. Prior to the hearing, one of the Commissioners contacts the nightclub's owners to see if the problems can be remedied



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Fair Hearing

Administrative tribunals which are required to make a determination after a hearing cannot act upon their own information, and **nothing can be considered as evidence that was not introduced at a hearing** of which the parties had notice or at which they were present.

Example: The Planning Commission is holding a hearing for the revocation of a Conditional Use Permit for the operation of a nightclub. Prior to the hearing, one of the Commissioners contacts the nightclub's owners to see if the problems can be remedied. The meeting happens, and the nightclub's owners states that their operation is perfectly fine and no changes are needed. The Commissioner now wants to use that refusal to make changes as part of the findings for the revocation.



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Example

Petrovich Development Co., LLC v. City of Sacramento (2020) 48 Cal.App.5th 963, 975

Mr. Petrovich applied for a CUP for a gas station. The planning commission approved it, and it was appealed to the city council, which voted to deny the CUP.

Petrovich sued, alleging councilmembers were improperly influenced by inadmissible factors, including bias and hostility, ex parte communications, and other defects.

In finding the city's decision flawed, the trial and appellate courts cited texts and other communications between a councilmember and an opposition group, which were among the "concrete facts" demonstrating bias, tainting the city council's decision.

An administrative decision-maker's receipt of ex parte communication does not, by itself, create an actual bias or unacceptably high probability of actual bias that destroys the neutrality of the decision-maker. (BreakZone, supra, 81 Cal.App.4th at p. 1236; Mathew Zaheri, supra 55 Cal.App.4th at p. 1318.)

Instead, an administrative decision-maker who receives such communications may neutralize any bias by (1) "promptly disclos[ing] ... the substance of the ex parte communication[s]," and (2) giving the opposing party "an opportunity to respond." (Mathew Zaheri, at p. 1318; Flagstad, supra, 156 Cal.App.2d at p. 141-142.)

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Protect Against Improper Ex-parte Communications

- Prehearing Disclosure of Ex-Parte Communications
 - In the land use context, site visits are generally permitted prior to hearing provided that personal investigation by Commissioner is **disclosed at the outset of the hearing** so that other parties can contest the observations of the Commissioner.
 - Commissioners may receive information relevant to the decision by contacts with parties, public or staff and are not confined to reading the record or hearing presentations at public hearings; however, if ex-parte information is not already in the record, it must be **contemporaneously noted and disclosed at the start of the hearing**.



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General Rules

- Avoid discussing City decisions before a public hearing is held.
- If a communication occurs, disclose what was talked about during the meeting, before the public hearing is opened.
- After the hearing, if a decision is not final, don't have any discussions about the matter until after the final decision is rendered.



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