

Revisiting Ex Parte Contacts

by C. Gregory Dale, FAICP

Fifteen years ago, one of my first *Planning Commissioners Journal* articles dealt with the topic of “ex parte contacts.” I defined this as any contact that you have with the party involved, or potentially involved, in a matter before the planning commission outside of the public hearing process. I pointed out the perils of ex parte contacts, both from a legal and an ethical perspective.

As I revisited this topic, I was struck by the fact that my article acknowledged that ex parte contacts will occur. I cautioned that if you are going to engage in ex parte contacts, you make yourself available to all sides and disclose any information that you learn as part of the public record. In re-reading my article, I was frankly surprised at how soft I was on the issue and realized that over time my personal position on ex parte contacts has hardened. As I think further about the issue, there are several reasons why I feel more strongly about the problems with ex parte contacts.

First, over the last fifteen years, I have continued to conduct numerous planning commission training sessions at the local, state, and national level. I always discuss ex parte contacts with commissioners and it is striking how almost universal their reaction is against allowing them. Perhaps I am just preaching to the choir at planning commissioner workshops, but there appears to be a very broad recognition that ex parte contacts are potentially damaging to the process.

Second, public interest in planning and development decisions has increased as development pressures in many places have continued to mount. At the same time, local governments have become more sophisticated in planning for and regulating growth. As many of us realize, development decisions are being made

under increasingly intense scrutiny. This often includes a focus on the fairness of the process.

Quite simply, in my opinion, ex parte contacts are a bad idea and ought to be avoided. I say this not so much for legal reasons as for “good government” reasons. Let me be clear: some lawyers will argue that ex parte contacts do not create legal problems. Some will even argue that when planning commissions are providing advice to elected officials on matters

DISCUSS THE PUBLIC PERCEPTION, PUBLIC TRUST, AND PLANNING COMMISSION CREDIBILITY ASPECTS OF EX PARTE CONTACTS AND MAKE A GROUP DECISION AS TO HOW TO HANDLE THESE SITUATIONS.

such as zoning map amendments, they are acting in a “legislative” and not a “quasi-judicial” capacity, and that ex parte prohibitions do not necessarily apply. My concern is not so much with the legality of ex parte contacts in this situation – that is for your legal counsel to address – but with how the public is likely to perceive such contacts even if they are legally permissible.

I urge you to apply what I refer to as the “reasonable person” test. Imagine a person attending a planning commission meeting who has not already made up his mind about a project on the agenda, who is not connected to local government, and who is not part of either an applicant or an opponent group. Then imagine that person learning that private discussions had been held between

individual members of the planning commission and either those promoting or opposing the proposed development. Very simply, is the reaction of that hypothetical, reasonable person likely to be positive or negative? When I ask this question at planning commission workshops around the country, the response is always the same – ex parte contacts are likely to create suspicion in the minds of the average citizen.

My advice is that your planning commission discuss the matter of ex parte contacts before they arise in specific cases. Make sure you understand the legal issues based on advice from your legal counsel, but recognize that just because something might be legal does not mean it is a good idea. Discuss the public perception, public trust, and planning commission credibility aspects of ex parte contacts and make a group decision as to how to handle these situations.

From my own years of experience in the planning arena, I believe that the simplest, clearest, and best policy is for a commission to agree not to engage in ex parte contacts. That means telling people who contact you that you cannot talk to them about a matter pending before the commission, while encouraging them to come to the commission meeting to ask their questions or give their opinion. But I understand that some communities may conclude that some level of ex parte contacts are acceptable, or can be addressed by commissioners disclosing the nature of their contacts at the hearing. Again, at the very least, make a conscious and informed decision as a group on how your commission will handle ex parte communications.

One other caution on ex parte contacts that illustrates the way in which this issue has changed over the years: treat email communications just as you

continued on page 8

Revisiting Ex Parte Contracts...

continued from page 7

would hard copy or oral communications. It is amazing to me how people tend to view emails as somehow being under the radar screen.

The reality is that email communications between you and other commissioners or interested parties about matters before you are likely to be considered public record, and you may be required to produce them. Think about that before you hit the send button. Plus, once emails are gone, they can very easily make their way to hundreds of people you never intended or expected to see them.

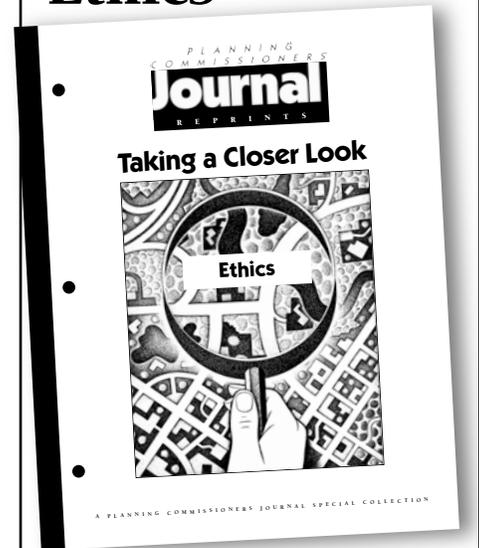
Remember that your job is to make decisions or recommendations based on the evidence presented to you during the

public review process, and that the public has a right to know what information you use as the basis for your decision. Gaining information outside the public process threatens this principle. Perhaps more importantly, it runs the risk of creating the impression of a “good old boy” system. ♦

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An Important Distinction

It might seem to some that the concerns I've expressed in this article about ex parte contacts would result in planning commissioners being insulated from the community, at the same time that we are asking them to reflect its planning values. *Here is an important distinction to make:* ex parte concerns relate primarily to matters that are pending before the commission, primarily related to requests for development approvals such as zone changes, planned unit developments, site plan approvals, and other similar requests that involve a specific, legally prescribed process of review.

On the other hand, we *do* expect planning commissions to concern themselves with long range, community-wide planning policies and issues outside the development review process. This requires planning commissioners to be in tune, and in touch, with citizens who are interested in planning issues. In order to do this, commissioners must be out in the community to keep their fingers on the pulse of the public.

It is entirely appropriate for commissioners to participate in community organizations and to use those opportunities to discuss planning issues. For example, speaking at clubs or civic functions can be

a valuable way to encourage broader dialogue on planning issues and can provide commissioners with valuable knowledge. As long as these do not involve specific case matters pending before the commission, I do not consider these to be in the category of inappropriate ex parte contacts.

Things get a little more complicated when the commission is considering new plans or policies, such as an update to the comprehensive plan. Is there a value in reaching out to the community to solicit input? Absolutely. Is there a potential concern that some groups or individuals are getting special access to commissioners when these contacts occur outside the public process? Perhaps.

I have much less concern about ex parte contacts when there is no application before the board, but commissioners should still be sensitive to the creation of perceptions that they are favoring certain interests in the planning process. The question to ask yourself is whether these types of contacts create the perception of “insider access.” Access to decision makers should occur on a level playing field.

As I always encourage, use good common sense on these gray area issues. If certain behavior feels questionable, it probably is. At the same time, you need to be connected to the community, and that can involve tough balancing calls.