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Work Session on Ex Parte Communications

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- Questions have come up from staff and public officials re: their role when approving agenda items.
- Additional questions have been raised about what communications public officials can have with staff, each other and the public.

Role of Town Council / Planning Commission

Councilmembers and Commissioners Wear Many Different Hats

- Depending on the action in front of them, they may be acting in a legislative, quasi-judicial, or administrative capacity.
- The type of action will determine: 1) whether there are restrictions on conversations with the public, 2) the information and criteria that can be considered by the Council / Planning Commission, and 3) how appeals can be made of the decision.
- No statute sets forth the types of actions, but instead case law provides direction on whether a particular action is legislative, quasi-judicial or administrative. Therefore, if you are unsure, ask your attorney.

Legislative Actions

The Town Council acts legislatively when it acts as a policy-making body. Legislative or quasi-legislative action is usually:

- reflective of some public policy relating to matters of a permanent or general character
- is of general application, not normally restricted to identifiable persons or groups
- usually prospective in nature
- requires the balancing of questions of judgment and discretion
- concerns an area usually governed by legislation.

Public hearings can be legislative or quasi-judicial. There are few limits on communication with decision makers.

Quasi-judicial Decisions

When the Town Council or Planning Commission acts in a quasi-judicial capacity when it is applying the facts to existing legal standards and making a determination on the rights, duties, or obligations of individuals.

Quasi-judicial actions generally involve:

- State or local law requiring notice and a public hearing
- State or local law requiring the body to make a determination by applying facts of a specific case to certain criteria established by law
- Decision-making on the rights, duties, or obligations of individuals or special property.
- Requirement to base decision-making on information presented in the public hearing.

EXAMPLES

Legislative Function	Quasi-Judicial Function
Adoption of Ordinances amending Town Code	Land Use Approvals: Subdivision Plat and PUD Plan
Adoption of Comprehensive Plan	Special Exceptions
Annexation	Variances/Conditional Use Permits
Comprehensive Zoning	Special Use Permit Issuance
Setting Impact Fees	
Piecemeal Rezoning	

How Does a Quasi-Judicial Hearing Work?

- When acting in a quasi-judicial capacity, the Town Council / Planning Commission can only consider evidence and testimony that it receives at the public hearing on the matter.
- The applicant has a right to due process (a constitutionally guaranteed fair procedure), including notice, hearing, and right for the decision to be made based on the record at the public hearing and based on criteria set out in advance (by land use code, ordinance or statute).
- The testimony and evidence at the hearing make up the record of the proceeding.
- If there is an appeal of the Town Council's / Planning Commission's decision, the reviewing court will look to see if evidence presented at the public hearing supports the decision.
- The Town's decision can be appealed (Rule 106(4)(b)) if decision is arbitrary and capricious or an abuse of discretion.
- No ex parte communications are allowed.

What Is Ex-Parte Communication?

- In regards to quasi-judicial proceedings, information received by any member of the Town Council or Planning Commission outside of the public hearing is considered "ex-parte communication."
- An ex-parte communication could include any oral, written or electronic communication with a public official about a quasi-judicial matter on which they will be making a decision. The communication may directly or indirectly relate to the matter at issue and that could influence the outcome.
- The rule against ex-parte communications protects against real and perceived threats of bias, and a public official who participates in ex parte communications may need to recuse him/herself from the final decision making.

What Is Ex-Parte Communication? (Continued)

- Such communication is improper and may provide legal grounds for overturning a decision, especially if the communication is not disclosed.
- The rule against ex-parte communication ensures impartial decisions by requiring public disclosure of all evidence and arguments presented to the Town Council or Planning Commission. The rule also ensures that all Councilmembers / Commissioners receive the same information, and that the applicant has a chance to respond to any information presented.

Actions to avoid:

- Talking with citizens or communicating via email, text or letter with citizens on quasi-judicial matters that will come before the governing body.
- A matter becomes pending for purposes of quasi-judicial proceedings as soon as an application is submitted to the appropriate Town staff members. Because you may not know whether an application has been submitted or is pending, if you are unsure, the best practice is to avoid such communications and check with Town staff.
- Attending Developer Neighborhood meetings, required by Town Code.
- Town Council generally should not attend Planning Commission meetings on matters scheduled to come before council, unless fully disclosed.

What Do I Do If I Am Approached Or Receive Ex-Parte Communications?

First, ask yourself - is the issue legislative or quasi-judicial in nature? If the issue is legislative, there are very few rules against ex-parte communications (ban on bribery being one of them), and you can most likely engage in conversation.

But, if the issue is quasi-judicial in nature, then you should follow the steps below:

1. In Person: Kindly tell the individual that it is not appropriate for you to discuss the matter outside of a public hearing and that they should make their comments on the record at the next hearing or submit comments in writing to the Town Clerk.
2. Electronic Communications: Kindly respond to the individual and let them know that it is not appropriate for you to discuss the matter outside of a public hearing and that they should make their comments on the record at the next hearing or submit comments in writing to the Town Clerk. Also tell them that the electronic communication you received will be disclosed at the next public hearing. Forward the email to the Town Manager and Town Clerk. Do not read or respond to any further messages.

How can the Public provide their opinions to public officials?

- Town Council members and Commissioners are free to discuss *legislative* matters with citizens or staff.
- They should not discuss any quasi-judicial matters with Council members and Commissioners from and after the date that a land use application has been filed with Town staff.
- Citizens are free to provide public comment during the public comment period on any matter not set for a public hearing on that agenda. The best practice is for the officials to avoid responding to such public comments during the public comment period.

How can the Public provide their opinions to public officials? (Continued)

- Citizens may also submit public comments in writing in advance of a meeting. Written comments regarding a quasi-judicial matter should later be submitted on the record at the public hearing on that matter.
- On quasi-judicial matter, members of the public can make comments during the public hearing before the Planning Commission and/or Town Council or submit written comments in advance to be entered into the record at the public hearing.
- On a legislative matter, if there is a public hearing, such as on second reading of an ordinance, members of the public can make comments during the public hearing.
- If citizens have any questions about the applicable procedures or how or when they may make your views known, they should contact the Town Clerk.

Special Considerations - Ballot Issues / Questions

- Under the Fair Campaign Practices Act (FCPA), the Town shall not expend any money from any source or make any contributions, to urge electors to vote in favor or against any local ballot issue or referred measure after the ballot title has been fixed, with very limited exceptions. Sec. 1-45-117(1)(a)(I)(B), C.R.S.
- Use of Town resources, such as paper, ink and staff time may be considered an in-kind contribution, which is also prohibited.
- Town officials can express their own opinion, as long as no Town resources are used or spent to do so.

Special Considerations - Ballot Issues / Questions (Continued)

- Other exceptions include:
 - a Town official or employee can respond to questions regarding a ballot question, as long as he/she has not solicited the question and does not specifically encourage voting a particular way.
 - The Town can produce and distribute a factual summary of the ballot questions that includes arguments for and against the proposal, on an issue of official concern to the Town (i.e., on the ballot in the Town and concerning the duties or powers of the Town).
 - The Town Council can pass a resolution in support of or opposition to a ballot question, and circulate it in the same manner as other resolutions are typically circulated.