



TO: Mayor and Town Councilors

FROM: Thad W. Renaud,
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RE: Quasi-Judicial Decision Making and *Ex Parte* Communications

Two issues that often arise in the course of planning and land use decision-making are the nature of quasi-judicial decision making and *ex parte* communications during the course or in the context of that decision-making process. I have prepared this memorandum on these subjects to assist you in considering these issues as they arise in the future.

I. Quasi-Judicial Decisions

A “quasi-judicial” decision is a decision that involves the application of existing legal standards to a particular property or application to use property in a way that affects the property rights of one individual, but not others. The Town Council makes quasi-judicial decisions when it considers subdivision applications, rezoning applications, development applications and other similar site specific land use or development applications. These sorts of decisions should be thought of as distinct from “legislative” decision-making, which is the making of decisions about the adoption or modification of laws and regulations of general applicability; being laws that apply equally to all similarly situated properties or individuals.

From a legal standpoint, the primary difference between a “quasi-judicial” and a “legislative” decision is the standard under which the decision will be judged by a court of law if challenged. Legislative decisions are typically challenged as be “*ultra vires*” (beyond the legal authority of the legislative body to have adopted) or as a procedural or substantive due process violation. These sorts of challenges to legislative actions can be the topic of a future work session. A quasi-judicial decision, on the other hand, is subject to challenge under an “arbitrary and capricious” standard that is set forth in Colorado Rule of Civil Procedure 106(a)(4) and defined by the case law of Colorado.

Under Colorado case law, a decision is not “arbitrary and capricious” if it is supported by “competent evidence on the record” that was before the decision-making body. In turn, “competent evidence on the record” has been defined to mean enough evidence to make the issue at hand “fairly debatable” by reasonable people. There need not be a “proof beyond a reasonable doubt” nor even a “preponderance” of evidence in support of a given proposition to meet the

competent evidence standard. In this sense, the arbitrary and capricious standard is fairly deferential to the decision making body.

It is not without its limits, however. To be upheld on appeal, a quasi-judicial decision must express its findings of fact as they relate to the criteria or standards under which the decision is made, and those criteria or standards must be sufficiently specific to avoid a challenge on grounds of vagueness. In other words, those standards must be specific enough to give a property owner reasonable notice of what will or will not be allowed in terms of the use or development of a particular piece of property.

In making a quasi-judicial decision, the decision-makers are expected to take on the role of a judge. They are expected to come to the decision-making process without any bias as to the outcome of the proceeding and are to make their decision based only on the evidence presented to them in the hearings held concerning the matter. The reason for the rule as to bias is that constitutional "due process" requires an unbiased decision-maker (one without what the case law describes as "pre-judgment bias"). The reason for the rule as to the making of a decision based only on evidence presented at a hearing is two-fold. First, constitutional "due process" requires that the parties to a proceeding (be they an applicant or neighbor) must have the opportunity to rebut or otherwise respond to whatever arguments may be made to a decision-maker concerning the matter at issue. The second is that, because a court in reviewing a quasi-judicial decision must determine whether the decision is supported by competent evidence on the record, the court expects that all matters that were considered in making that decision be a part of the record of the proceedings.

II. Ex Parte Communications.

Ex parte communications are not in and of themselves illegal, or unethical. However, ex parte communications are not fair to anyone who is not a party to them, and they can also adversely affect the very result which the decision-making body seeks to cause.

An ex parte communication is a communication made to the decision-maker, outside of the public hearing and not on the record, by a party to a transaction. Ex parte communications typically arise when either developers or development opponents contact Planning Commissioners, City Councilors or Board of Adjustment members in advance of a hearing, to explain their position, offer comment, criticize the other side's position, seek a "reading" on what the decision-making board might think about a particular issue, etc. Reliance by the decision-making board, or a member thereof, on any ex parte communication taints the hearing process. This is because ex parte communications are made without notice to the other side. They are therefore, by definition, unfair to the other side, because they do not afford the other side an opportunity to respond. In conducting a hearing, the decision-maker may not consider ex parte communications without giving notice thereof to all parties. See *Hartley v. City of Colorado Springs*, 764 P.2d 1216 (Colo. 1988); *Whelden v. Board of County Commissioners of Adams*

County, 782 P.2d 853 (Colo. App. 1989); *Sclavenitis v. City of Cherry Hills Village Board of Adjustment and Appeals*, 751 P.2d 661 (Colo. App. 1988). Ex parte communications are particularly insidious because they do not form a part of the record and therefore their effect on the decision-making process cannot be measured or ascertained.

A council or planning commission or board of adjustment must conduct its consideration of land use matters in a manner which affords all of the parties due process. This means that fairness to all parties must be maintained. *Sclavenitis*, supra. The applicant in any land use decision is clearly a party in interest. However, other landowners adjacent to or near the property which is the subject of the land use decision are also parties in interest and have a right to be heard. *Snyder v. City Council of the City and County of Denver*, 531 P.2d 642 (Colo. App. 1975).

Over years of representing municipalities, I have consistently advised planning commissions, councils and boards of adjustment making land use decisions to strongly discourage all ex parte communications. Individual members should not engage in conversations or meetings with developers or citizens to discuss a matter which will be before the planning commission, council or board of adjustment for decision. Rather, all persons should routinely be referred to the staff so that the staff may incorporate their comments into the publicly circulated staff report. All persons should also be encouraged to attend the hearing and to express their views at the hearing. Again, the rationale for this is that publicly expressed views will be heard by all, and any parties in interest with opposing views will have the opportunity to make their objections known in the public forum.

There are, of course, occasions when an ex parte communication cannot be avoided. In such cases, the recipient of the ex parte communication should always announce, at the hearing, the nature, source and content of the communication. Again, the purpose of this is to make the communication public, and to afford all parties in interest the opportunity to make comment on it. It also affords all of the other members of the decision-making body the opportunity to consider the same information made available to an individual member.

In conclusion, I realize that councilors, planning commissioners and members of a board of adjustment are subjected to pressures in this area. However, if a decision-maker wants to preserve the effectiveness of his or her vote, that decision-maker should never engage in conduct which could risk that person's vote being negated, and perhaps even the very decision which the decision-maker supported being overturned.

As always, I am happy to answer any questions or discuss further any of the issues addressed in this memorandum.