



Ex Parte

Planning Ethics & Communications

Salisbury University

MPCA Workshop February 21, 2020

What is Ex Parte Communications?

In Latin, Ex Parte means:

- “from one side only, with the other side absent or underrepresented”
- When decision-making processes (e.g., in local government) give the appearance, real or imagined, of being one-sided or prejudiced, and therefore, full due process is not provided to the public.



When Does Ex Parte Occur in Planning?

- When our behavior as local planners is not fully public and/or we actually consider less than all sides of the issue before us (or we're perceived to do so).

or

- We make up our mind prematurely about an issue either currently before the PC or about to come before us.



Why it matters

PCJ: OUR PLANNING RESPONSIBILITIES & OBLIGATIONS*

- To be fully aware of and follow state and local code
- To be well-informed about all aspects of the issues before us and to educate ourselves in advance of commission discussion
- To provide honest, open, equitable and respectful consideration for all public opinion and points of view
- To ensure our consideration & the commission's discussion is open & multi-sided, rather than one-sided

**A summary of priorities reflected in Planning Commissioners Journal articles over 25+ years*



Ethical Principles in Planning

As adopted by the APA Board, May 1992

Section I

- The planning process must continuously and faithfully serve the public interest

Section II

- PPP's continuously strive to achieve high standards of integrity & proficiency so that public respect for the planning process will be maintained

Section III

- PPP's continuously pursue improvement in their planning competence



Why it matters

LEGAL CONSIDERATIONS

- PC is a Governing Body which must abide by Maryland State Law
- Role of Planning Commission
 - Review of Development Plans
 - Commercial v. Residential
 - Signage and “look”
 - Transportation and other Public Facilities
- Quasi-Judicial Decisions
 - Appealable to the Circuit Court



Rules of Procedure

ADOPTION BY THE PLANNING COMMISSION

- **Land Use Article of the Maryland Code (“LU”) § 2-105(a)(1):**

A planning commission shall have the powers necessary to enable the commission to fulfill its functions, promote planning, and execute the purposes of this division.

- **Land Use Article of the Maryland Code (“LU”) § 2-105(c)(1):**

A planning commission shall **adopt rules** for the conduct of its business and keep records of its resolutions, transactions, findings, and determination.

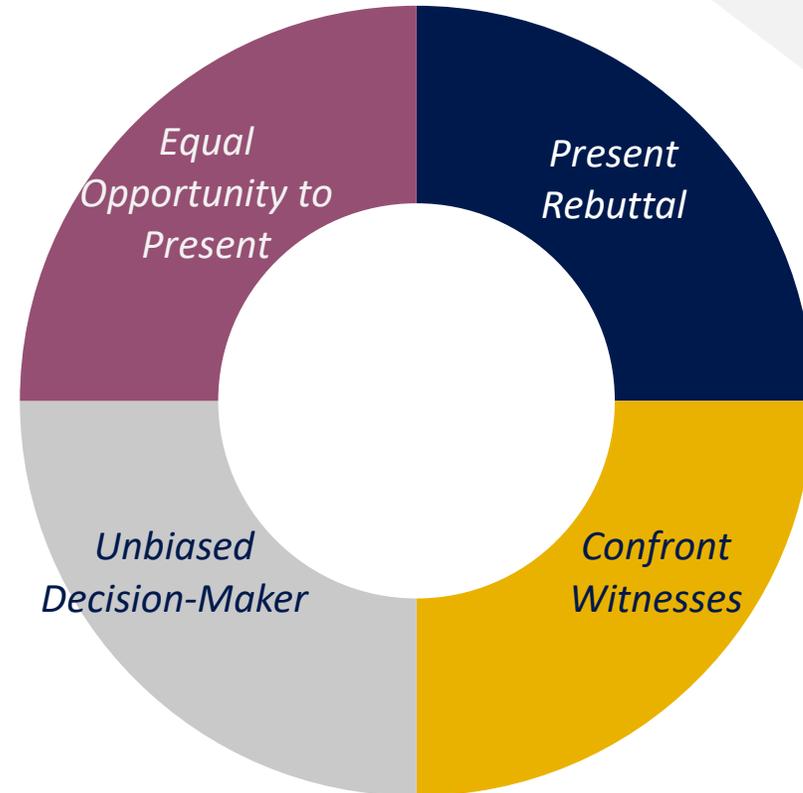


Fundamental Fairness

DUE PROCESS CONSIDERATIONS

“When the deprivation of a property interest is at stake, the deprivation must be preceded by notice and opportunity for hearing appropriate to the nature of the case [. . .] Moreover, procedural due process requires a fair trial in a fair tribunal. [...] Such principles apply to any tribunal, be it a judge, jury, or an administrative body...”

Regan v. Bd. of Chiropractic Examiners, 120 Md. App. 494, 510, 707 A.2d 891, 899 (1998), *aff'd sub nom. Regan v. State Bd. of Chiropractic Examiners*, 355 Md. 397, 735 A.2d 991 (1999)(internal citations and quotations omitted).



Fundamental Fairness

DUE PROCESS CONSIDERATIONS

The Supreme Court identified the three factors to be considered when courts address procedural due process issues in administrative settings. Courts must consider:

First, the private interest that will be affected by the official action;

Second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;

Finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976)

Fundamental Fairness

DUE PROCESS CONSIDERATIONS

However, the level of **due process** required must be decided based on the circumstances of each individual case.

Regan v. Bd. of Chiropractic Examiners, 120 Md at 899.

Moreover, Courts will not find a violation of due process solely because of the agency's failure to abide by procedural or statutory requirements absent a causal relationship between the failure and the alleged due process injury.

“[A statutory] violation, by itself, however, d[oes] not constitute a lack of due process or preclude the Commission from proceeding to carry out its public duties. Due process is concerned with fundamental fairness in the proceeding, not with whether the agency has failed in some way to comply with a statutory requirement.”

Calvert Cty. Planning Comm'n v. Howlin Realty Mgmt., Inc., 364 Md. 301, 322 (2001) (citing *Maryland State Police v. Zeigler*, 330 Md. 540, 559 (1993)).

Possible Ex Parte Situations – You Decide

- Example #1: The “Reasonable Person Test”
- Example #2: Behind the Scenes Advocacy
- Example #3: Two Planning Commissioners are Talking....
- Example #4: The Town Council liaison to your PC has historically been a voting member of the PC



The Verdict on Ex Parte: 8 Concerns

- Can prejudice the minds of decision makers
- Prevents full disclosure of information to all interested parties to the case
- Violates the public's right to know
- Prevents a complete record
- Can invalidate a decision
- Can destroy public confidence in PC decisions
- Must be disclosed and the issue(s) reported

Legal Concerns

WITH/WITHOUT EX PARTE RULE

Scope of Role

- Only in Quasi-Judicial capacity?
- Can you appeal on ex parte communications if no rule?
- Ex officio members?

When and What

- How recent?
- Exact subject matter or general ideas?
 - Same property?
 - Same Business or Development?
- Abuse of Rule by communicators/public

Conflicts of Interest

- How to determine existence?
 - What is the relationship between PC Member and ex parte communicator?
- Automatic Recusal or Disclosure?
 - Scope of Disclosure: Public, to all parties, to entire committee?

Enforcement/Remedy

- Self-policed voluntary recusal or committee discussion with potential consequences
- Disclaimer on communications?

Case Law

EX PARTE COMMUNICATIONS WITH PC

“Who” matters:

Applicant’s counsel recommended, in communications to Planning Board staff, language for a wetland variance in a resolution adopting a preliminary sub-division plan, which had been previously voted on and approved. Circuit Court ruled this was not an ex parte communication because it was made to Planning Board staff. Moreover, both the Applicant and Petitioner could have engaged in a discussion with the Planning Board regarding recommended language to go in the resolution.

CHARLES COLAO, M.D. v. PG Cnty. PLANNING BOARD: No. CAL03-23736, 2004 WL 5257865 (Md.Cir.Ct. Dec. 23, 2004)

Substance matters:

Planning Board submitted rezoning application. A Planning Board Member participated in public “work session” with the County Council to discuss reclassification of various parcels of land. “Work session” date and time was announced at the end of last Commission hearing. Member’s participation was not found to be a violation of appellant’s right to proper hearing, however, the Court did note that the Member’s participation was limited as it only “a review of the history of the application and some technical advice.”

Potomac Valley League v. Cty. Council for Montgomery Cty., 43 Md. App. 56 (1979)

Case Law

OTHER ADMINISTRATIVE AGENCIES

What's on the Record matters:

After holding a hearing, the Board of Zoning Appeals received a report from the Baltimore County Planning Commission which consisted of new and additional evidence (not on the public record) from an independent source. The Zoning Board admitted to relying most heavily on this report in making its decision. Court found that procedural due process was denied because the parties had no opportunity to challenge the reports opinions.

Temmink v. Board of Zoning Appeals, 205 Md. 489 (1954).

Classification of Action matters:

When Assistant Insurance Commissioner received charts from and engaged in a discussion with a staff specialist during a hearing on the validity of an insurance program, the Commissioner had not engaged in ex parte communications, even when the parties had not had an opportunity to review or rebut the information, because staff specialist did not represent either of the parties but was instead there to assist the Commissioner. Further, the Court found that the Insurance Commissioner had not engaged in an impermissible blending of his investigative, prosecutorial, and judicial functions.

Nationwide Mut. Ins. Co. v. Ins. Com'r, 67 Md. App. 727(1986).

Case Law

OTHER ADMINISTRATIVE AGENCIES

Action or Solution may vary:

When Secretary of the Department of Personnel of Maryland considered a letter which was not part of the hearing record in modifying a decision made by the Department of Health and Mental Hygiene prior to issuing a final order, improper ex parte communications had been considered and appellant was entitled to a hearing to determine the impact of the letter on the decision.

Eaton v. Rosewood Ctr., 86 Md. App. 366 (1991).

Enforcement/Remedy

HOW TO REVIEW AND RESOLVE CONFLICTS

- Should board members “disclaim” their obligations in written communications with constituents?
- Consider whether parties can raise the issue of board member recusal or impartiality based on relationship or ex parte communications
- How to determine impartiality:
 - Personal or familial relationship
 - Financial investment or relationship
 - Substantial knowledge or material witness
 - Public statements made by member



Enforcement/Remedy

HOW TO REVIEW AND RESOLVE CONFLICTS

To disclose, recuse, or disqualify...

- Public Officials must generally recuse themselves from participation in any actions to which they or their direct relative, have a financial, ownership, or employment interest. *See*. Md. Code § 5-501.
- Judges who inadvertently receive an unauthorized ex parte communication bearing on the substance of the matter shall notify all parties immediately of the substance of the communication and provide the parties with an opportunity to respond. ABA Rule of Judicial Conduct 2.9 (b).
- **What if communication was made knowingly and purposeful?**



Voting by *Ex officio* Member

Maryland Code, Land Use Article, § 2-102(a)

(a)(1) Except as otherwise provided in this division, a planning commission established under this subtitle shall consist of three, five, or seven members.

(2) One member of the planning commission may be a member of the legislative body, who serves as an ex officio member concurrent with the member's legislative term.

(3) *(i) An ex officio member of a planning commission may not vote on any question in the result of which the ex officio member has an immediate personal or financial interest.*

(ii) When an ex officio member abstains from voting on a question under subparagraph (i) of this paragraph, the ex officio member shall disclose the recusal.

- Rule discusses **conflicts of interest** but not necessarily **ex parte communications!**





Ex Parte Rule Survey

- Carroll County
- Charles County
- Eagle Harbor Township
- City of Frederick
- Frederick County
- Howard County

- Middletown
- Montgomery County
- Prince George's County
- Rockville
- Town of Cheverly
- Walkersville

<i>Jurisdiction</i>	<i>Planning Commission Rule</i>	<i>Language</i>
Carroll County	4.2 Ex Parte Communications	<p>A communications process in which an interested party is not informed of the time, or place, or location of the communication, or that a communication process was going to take place; consequently, the interested party is not afforded an opportunity to participate. These types of situations are typically viewed as showing favoritism or prejudice and can give rise to claims and/or perceptions of unfairness or bias.</p> <p>(a) When the Commission is adjudicating a matter in its quasi- juridical role, ex parte communications are strictly forbidden. The Commission is acting in a quasi-judicial role when it hears zoning map amendment petitions, text amendments, and reviews applications and requests under the provisions of Article XV: Land Use.</p> <p>(b) When the Commission is acting in its legislative role, ex parte communications are discouraged and should, to the extent possible, be avoided. The Commission is acting in its legislative role when it participates in plan development and implementation activities or when it reviews items or business not associated with the review or enforcement of the provisions of Article XV: Land Use. Members receiving ex parte communications shall advise all Commission members through the Secretary's office prior to the meeting or make a statement in person at the Commission meeting. An ex parte communication received relevant to the Commission's responsibilities shall be furnished to all Commission members and the public orally or in writing. As an alternative to ex parte communications, members should encourage the public to prepare written reports for all members through the Secretary's Office or to speak publically at the Commission meetings.</p>

<i>Jurisdiction</i>	<i>Planning Commission Rule</i>	<i>Language</i>
Charles County	2. Rules against Ex Parte Communications	<p>Ex Parte communication is improper and may provide legal grounds for overturning a decision.</p> <p>(a) Members receiving ex parte communications shall advise all Commission members through the Clerk's office prior to the meeting or make a statement in person at the Commission meeting.</p> <p>(b) Any ex parte communication received shall be furnished to all Commission members and the public orally or in writing.</p> <p>(c) As an alternative to ex parte communications, members should encourage the public to prepare written reports for all members through the Clerk's office or speak publicly at the Commission meetings.</p>
Eagle Harbor Township	H:1: Special considerations and duties for all member: Ex Parte	<p>(a) Members shall avoid Ex Parte contact about cases where an administrative decision is before the commission whenever possible</p> <p>(b) Despite one's best efforts it is sometimes not possible to avoid Ex Parte contact. When that happens, the member should report to the Commission at a public meeting or hearing what was said, so that every member and other interested parties are made aware of what was said.</p>
City of Frederick	6.5 Ex Parte Communications Prohibited	<p>An ex parte communication includes an oral or written communication not on the public record to which reasonable prior notice to all parties is not given. Such communication between Commission members and interested persons is prohibited if relevant to the merits of a Commission proceeding. Members should not discuss applications with applicants or other interested persons outside the confines of a public meeting, but should recommend that the person(s) contact Staff with any questions or concerns.</p>

<i>Jurisdiction</i>	<i>Planning Commission Rule</i>	<i>Language</i>
Frederick County	5.5 Ex Parte Communications	It is important to maintain the impartiality and integrity of the Commission; it is also important that Commission decisions be based on information presented in public documents and during open and public meetings. Therefore, Commission members shall refrain from ex parte communications . . . regarding matters that are likely to come before the Commission for decision. If a Commission member receives an unsolicited communication(s) about a pending application or decision outside of a Commission meeting, the member must disclose and describe the communications at the earliest opportunity during the Commission's consideration of the application or decision. . .
Howard County	9. Ex Parte Communication	Outside of the hearing, the Planning Board or its members may not communicate with any person who is a party or receive any communication from any such person regarding any matter relevant to the merits or the law of a pending or proposed petition. Any request for information concerning a pending or proposed petition should be directed to the Executive Secretary of designee.
Middletown	Ex Parte Communication	Maryland law and the Planning Commission's Rules of Procedure regarding an ex parte communication require all discussion, review and consideration of the Commission's business take place only during the Commission's consideration of the item at a scheduled meeting. Telephone calls and meetings with Commission members in advance of the meeting are not permitted. All communications will be directed to appropriate staff members for response and included in briefing materials for all members of the Commission.

<i>Jurisdiction</i>	<i>Planning Commission Rule</i>	<i>Language</i>
Montgomery County	3.2 Outside Communications	<p>3.2.1 Policy:</p> <p>To preserve public confidence in the fairness of Planning Board Deliberations, the Planning Board should ensure that the public and interested Persons have the opportunity to know and consider any relevant evidence provided to any of the other Planning Board members; provided that the Planning Board may take administrative notice of matters in common knowledge, or matters falling within the experience and expertise as disclosed by any member in reaching a decision on a case. The Planning Board’s ex parte rules do not apply to non-regulatory matters.</p> <p>3.2.2. Planning Board’s Obligation to Avoid:</p> <p>When considering any of the matters decided according to these Rules, the Planning Board deals with Persons who are directly affected by its decision. . . Each of these interested Persons needs the assurance that other interested Persons will not have unfair advantage in presenting their version of the relevant facts or concerns to the Planning Board. In such cases, therefore, Planning Board members must avoid communicating with Applicants or any other Persons about a pending Application except at the Planning Board meetings at which the Application is considered. . . .</p> <p><i>(continued on next page)</i></p>

<i>Jurisdiction</i>	<i>Planning Commission Rule</i>	<i>Language</i>
<p>Montgomery County <i>(continued)</i></p>	<p>3.2 Outside Communications <i>(continued)</i></p>	<p><i>(continued from previous page)</i></p> <p>3.2.3. Prohibitions:</p> <p>Planning Board Members are strictly prohibited from communicating with any Person other than Planning Staff or another Board Member about the merits of any pending Application or alleged Violation except during the Planning Board meetings at which the Application or alleged Violation is being considered. In the event the Planning Board attempted to communicate with a member of the Planning Board in violation of this Rule, the Planning Board may impose an appropriate remedy, including, without limitation, deferral of the Planning Board Action concerning that Application for a period of up to six months or exclusion of any testimony by the Person from the record of the matter to which the prohibited communication pertained.</p> <p>3.2.4 Disclosure of Unsolicited Communications:</p> <p>If a Planning Board member receives unsolicited communications about a pending Application or alleged Violation outside of a Planning Board meeting, the member has the duty to disclose and describe the communications during the public hearing for the Board’s consideration of the proposal.</p>

<i>Jurisdiction</i>	<i>Planning Commission Rule</i>	<i>Language</i>
Prince George's County	Section 9 – Ex Parte Communication	<p>(a) A member of the Planning Board may not communicate ex parte, or outside of the record, with any person regarding the merit of a pending contested case. The members may, however, communicate with each other, staff or with legal counsel.</p> <p>(b) Any member of the Planning Board who receives an ex parte communication in violation of subsection (a) shall place on the record all written communications received, a memorandum stating the substance of all oral communication received and responses made, and shall arrange notification to all parties of record that such communication has been filed. Any party desiring to rebut an ex parte communication shall be allowed to do so upon request made within five (5) days after notice of the communication. Any Planning Board member may, if he deems it necessary to eliminate the effect of a prohibited ex parte communication, withdraw from the proceeding.</p>
Rockville	N/A	Under Maryland Law, decisions on quasi-judicial matters must be based on information provided in the public record (written or oral testimony). Therefore no communication should be held outside of the public hearing.
Town of Cheverly	Limitations	2. All correspondence or communications with third parties proposed and/or generated by the Planning Board or its members as representative of the Town must be sent under the signature of the Mayor or approved by the Mayor.

<i>Jurisdiction</i>	<i>Planning Commission Rule</i>	<i>Language</i>
Walkersville	1.4 Ex Parte Communication Prohibited	<p>An ex parte communication includes an oral or written communication not on the public record to which reasonable prior notice to all parties is not given. Such communication between Commission members and interested persons is prohibited if relevant to the merits of a Commission proceeding. Members should not discuss applications with applicants or other interested persons outside the confines of a public meeting, but should recommend that the person(s) contact Staff with any questions or concerns.</p> <p>Disclosure of Ex parte Communication: If a member does inadvertently engage in an ex parte communication, the Member should, at the next meeting in which the relevant application is to be discussed, state the nature of the communication. The Member should submit for the record any written communication received and any written response given to a communication. He/she should state the substance of each oral communication received and the substance of any oral response given to a communication. Alternatively, the member may recuse himself or herself from voting on that specific application.</p>

Recommendations

LEGAL PRECAUTIONS AND RULES BY LOCALITY

- Every Planning Committee should have a rule on ex parte communications.
 - Consider ethics training for PC members so they can ID ex parte communications and determine why they are problematic.
- When drafting, consider balancing the needs of your community and committee members.
- Ex Parte Rule should at least apply to the committee's quasi-judicial actions, but should not interfere with their legislative or advisory role.
- Consider limitations on timing, subject matter, and medium of the communication to avoid abuses:
 - Only "ex parte" when a matter is up for voting/consideration
 - Only "ex parte" when communication is about the specific matter
 - If the communication's medium (in-person, email, letter, etc.) made consideration of the matter avoidable, only disclosure but not recusal
- Determine method of enforcement.

Recommendations

FOR PLANNERS

- 1. Avoid potential Ex Parte situations whenever possible
- 2. But if they do occur (it's going to happen), be sure to divulge
- 3. When in doubt, consult a local authority
- 4. Specifically address ex parte remediation as part of your locally-created (and required) local PC Rules of Procedure. Include the procedures your PC will follow for Disclosure and Recusal
- 5. Treat email, hard and social media copy communication the same as face-to-face





Thank you

Ex Parte Communications: MPCA Annual Conference