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MEMORANDUM

TO: Honorable Mayor Tussing
City Councilmembers
Tina Volek, Acting City Administrator

FROM: Brent Brooks, City Attorney *BB*

RE: Ex Parte Communications on Quasi-Judicial Issues before the
Mayor and City Council

DATE: March 3, 2006

BACKGROUND

During recent email communications among interested citizens and the Mayor and City Council, a staff attorney from our office sent a brief communication advising against reading ex parte communications. A few points of clarification and elaboration upon the staff attorney advice are appropriate concerning ex parte communications on quasi-judicial decisions required of the Mayor and City Council. Immediately below is a summary of this memo, suggested alternatives, followed by a brief discussion of the issue of ex parte communications.

SUMMARY AND SUGGESTIONS

The preferred and strongly recommended action is:

If a person privately communicates with the Mayor or City Council on a quasi-judicial issue outside of a public hearing or meeting, Councilmembers should attempt to politely decline receipt of or discussion of the information or evidence at that time and instead, request the person to present the same information personally or through a representative at the designated public hearing when and where the issue will be decided.

ALTERNATIVE SUGGESTIONS

Ex Parte communication on quasi-judicial issues should be, but cannot always be, avoided. It is inevitable that sometimes such communications will occur despite

the best efforts of the Mayor and one or more City Councilmembers. There are alternative methods of handling such communication which can be utilized in such circumstances.

- 1) Tell the person to present the information in writing to the entire City Council before or at the hearing. This allows the information to be made a part of the public record. However, the information must be disclosed before the public hearing on that issue so that the public and all parties are not only aware of the communication, but have an opportunity to offer supporting or opposing views on that information before Mayor and City Council deliberation and final decision. Or,
- 2) If a person or group privately communicating to one or more City Councilmembers does not or cannot appear at a hearing or cannot or does not submit their view in writing as advised, the Mayor and or Council Member(s) who have received the communication should, before the public hearing begins, disclose the communication on the record by summarizing the private discussion and identifying from whom it was received; if that private communication was in writing, copies should be made available for the public to review before the hearing on the quasi-judicial decision and prior to Council deliberation and final decision.

This also applies if a Mayor or one or more Councilmembers inadvertently forgets and visits a location subject to a quasi-judicial decision land use issue with a party supporting or opposing the proposed decision. This type of visit with one party to the issue should be carefully avoided. It is permissible for the Mayor and/or one or more Councilmembers to visit the site but that visit should not include communication with an applicant or any supporting or opposing party during the site visit – maintaining fairness is essential. Councilmembers should in the interest of fairness disclose that they visited a site and provide an assessment to the other Councilmembers during the meeting and before the public hearing on the quasi-judicial issue and final decision.

DISCUSSION AND ANALYSIS

“Ex parte” communications have been and can be defined as a private, one-sided communication between a decision-maker and a party/person with an issue before that decision-maker. In decisions were the Mayor and City Council will decide property rights on land use issues such as zone changes, special reviews, variances and preliminary and final plat approvals, to name the most common, there needs to be caution and care when receiving and then dealing with ex parte communications.

"Quasi-judicial" functions can be generally defined as the exercise of judgment and discretion in making decisions on subjects that involve granting, denying or determining legal rights, privileges and other interests of adverse parties. In other words, the Mayor and City Council in this particular type of decision are applying the law – i.e. land use statutes and ordinances, versus making the law through the legislative acts of ordinances, resolutions and related policies, which do not involve the danger of ex parte communications. Ex parte communications are generally not prohibited when the Mayor and City Council are conducting business in their legislative capacity which typically do not involve a land use decision.

Maintaining the "appearance of fairness" and openness in the decision making process on quasi-judicial decisions is a crucial benchmark. The formal, legal principle of "procedural due process" applies to such situations. As applied here, the law of procedural due process says that a party to a quasi-judicial decision must:

- a) Have adequate notice of a proceeding/hearing;
- b) Have an opportunity to be heard; and
- c) Must be given a meaningful and fair hearing appropriate to the case.

Closely related to this fairness in the process principle is the public's right to know the information on which a decision is based, a right to observe deliberations based on that information and a right to participate and offer comment prior to a final decision based upon the public's knowledge of the same set of facts as the Mayor and City Council. MCA Sections 7-1-4131(3), 2-3-103(1) and 2-3-111 all provide that when a public hearing is required or held at the option of the Mayor and City Council, the meaningful opportunity for citizen participation is required prior to final decision.

The essence of these legal principles and specific state statutes is that there must be a level playing field for all involved where everyone including the Mayor and City Council have the same facts before them. Unless handled carefully, ex parte communications give the appearance of an unfair or unequal process to the public and parties affected by a decision. The "appearance of fairness" principle requires local governing bodies to rely upon and base their quasi-judicial decisions on the public record. Otherwise, the obvious danger is that the opposing persons or parties will not have the same opportunity for input nor an opportunity to rebut information that may be incomplete or erroneous if presented outside of the public hearing – i.e. ex parte.

It should also be carefully noted here that ex parte communications from one party are not "cured", offset, or otherwise remedied by having ex parte communications with the opposing party or parties – this simply compounds the problem.

Another important point to briefly note is that quasi-judicial decisions may be subject to challenge if those decisions are not based solely on evidence, and comments presented at a public hearing on the issue. A successful legal challenge could invalidate or nullify the Mayor and City Council's decision and also potentially incur liability to the City for violation of a property right or other civil right and could also be a violation of open meetings laws, all of which would also carry the potential assessment of attorneys' fees.

Although not applicable to cities and counties, the Montana Administrative Procedures Act is helpful in emphasizing the caution needed in quasi-judicial decision making. As part of that Act, MCA Section 2-4-613 prohibits state agencies who make quasi-judicial decisions from receiving or engaging in ex parte communications "except upon notice and opportunity for all parties to participate". This again indicates the intent of the state legislature to carefully control ex parte communications among state agencies who are making such decisions.

CONCLUSION

The law applicable to ex parte communication is developing in many states as more prevalent, alternative methods of communication become more universal. In Montana, there are few uniform methods or statutes addressing this form of communication on quasi-judicial matters before local city and county governing bodies. There is a wide variance in how specific states and local governments are currently handling this issue and therefore these suggestions may change as the law develops and emerges more concretely in Montana.

I realize that this is a sensitive issue to all concerned. It requires a balance between what the current and emerging law can be reasonably interpreted to require and a common sense, obvious need for the Mayor and City Council to represent citizens through input and public opinion. This memo is not intended to be a complete analysis of the issue. However, based upon correspondence from other City and County Attorneys who have provided advice on this topic, my recommendations to you here are very similar to those they have articulated to their respective governing bodies whom they advise.

If you see the need for such, I am certainly able and willing to present a more in depth discussion and analysis of other states' approaches through their case law and other resources. As always, do not hesitate to contact me if there are additional questions on this issue or if this memorandum has generated additional questions.