KROB LAW OFFICE, LLC
Attorneys at Law

MEMORANDUM

To: **Palmer Lake Planning Commission**

From: **Matthew Z. Krob, Town Attorney**

Date: **June 10, 2022**

Re: **Planning Commission Training**

OPEN MEETING REQUIREMENTS[i]

1. Sec. 24-6-402(l)(a), C.R.S.:

> (a) "Local public body" means any board, committee, commission, authority, or other advisory, policy-making, rule-making, or formally constituted body of any political subdivision of the state and any public or private entity to which a political subdivision, or an official thereof, has delegated a governmental decision-making function but does not include persons on the administrative staff of the local public body.

2. Sec. 24-6-402(1)(b), C.R.S.:

> (b) "Meeting" means any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication.

3. Sec. 24-6-402(2)(b), C.R.S.:

> All meetings of a **quorum or three or more members** of any local public body, whichever is fewer, at which any public business is discussed or at which any formal action may be taken are declared to be public meetings open to the public at all times.

4. Exceptions?

5. Adjourned or continued meetings

- Is a continuation of the first meeting - not a new meeting
- Cannot add new agenda items to the adjourned meeting without a new public notice
- Procedure: move to continue the meeting or hearing to a date, time, and place certain.

6. Work sessions may be conducted regularly but cannot be used as a substitute for a regular meeting. *Bagby v. School District No. I,* 528 P.2d 1299 (Colo. 1974); *Walsenberg Sand & Gravel Co. v. City Council of Walsenberg,* 160 P.3d 247 (Colo.App.2007)

7. **Executive sessions**

- Two-thirds vote of the quorum required to convene
- The topic and specific statutory citation must be publicly announced before the session begins, and identification of the particular matter to be discussed in as much detail as possible without compromising the purpose for which the executive session is authorized. Sec. 24-6-402(4)
- Only the body can waive the executive session privilege, individual members may not. Sec. 24-6-402(2)(d.5)(11)(D); See also, *Kleitman v. Superior Court,* 74 Cal.App. 4th 324 (1999). ("... statutes authorizing closed sessions and malcing records thereof 'confidential' would be rendered meaningless if an individual member could publicly disclose the information he or she received in confidence." at 334).

CHAIRING AND PARTICIPATING IN PUBLIC MEETINGS

1. Importance of strong chair or presiding officer

- Sticks to the agenda
- Focuses discussion on the topic
- Reminds members of the time ("It is 9:00 p.m. and we are on item 2 of 10.")
- Expedites discussion and action (example: "I'll entertain a motion on that" or "Is that a motion?")
- Knows the art of suggesting when the time is right to act
- Leads the meeting rather than simply attending it.

2. Leads by example:

- Doesn't tell jokes or make unnecessary asides, or encourage others in doing so.
- Doesn't repeat what has been said, unless it is to encourage discussion
- Doesn't wait for someone else to speak up asks if there's anything else; if not, entertains a motion.

3. Being ready to act is not the same thing as having nothing more to say: there is always more which can be said.

4. Recognizes when there is disagreement and knows when to suggest that more discussion won't change the outcome.

5. As participants in the meeting rather than as the chair, other members have the opportunity to exercise some of the same leadership roles.

CONDUCTING PUBLIC HEARINGS

Goal: That members and public attendees leave the hearing feeling that it was fair and that their views were heard and appreciated.

1. Important to explain the rules of conduct for the hearing at the outset

2. Some suggested rules:

    - Can require those wishing to speak to sign up
    - Ask each person to state their name and address for the record
    - Suggest speakers don't repeat prior testimony if they can state they agree with an earlier speaker; but understand that it will happen anyway.
    - "Mr. _____, I am sorry, but that topic is simply not before us tonight; we are only concerned with ___; do you have anything else to say about _____?"

3. Stick to your rules

4. Pay attention to the persons giving testimony.

5. Make sure that attendees at the public hearing know they have the right to speak

6. Thank all the speakers for appearing

7. Policy questions

    - Whether to permit submission of written materials after the hearing (will delay the decision)
    - Whether to (a) act at the end of the hearing; (b) continue the hearing to a date certain, or (c) continue for action only.

QUASI-JUDICIAL MATTERS

One of the greatest challenges facing local government attorneys is guiding elected and appointed decision making bodies when they act in a quasi-judicial capacity. Members of the board of county commissioners and planning commission are typically lay people. They have no judicial experience and often little government experience. Yet, they are expected to act with much of the dignity and formality of judges when conducting public hearings and deciding quasi-judicial matters.

Is the Action Quasi-Judicial?

The first task of the local government attorney is to determine whether the matter to be considered is quasi-judicial. If, instead, it is administrative or legislative, the due process and deliberative protections listed below will not apply. Quasi-judicial actions have these characteristics:

- a state or local law requiring that notice be given before the action is taken;
- a local or state law requiring that a hearing be conducted before the action is taken; and
- a state or local law directing that the action results from application of prescribed criteria to the individual facts of the case. *Baldauf v. Roberts,* 37 P.3d 483 (Colo.App. 2001)

Legislative matters affect large areas, multiple parcels of property and/or set broad policy directives. Examples include adopting an entire land use code or general amendment thereto, a comprehensive plan, or a general parking regulation. Quasi-judicial actions apply general rules to a specific interest, such as a zoning change affecting a single piece of property. Rezonings in Colorado are quasi-judicial,Snyder *v. City of Lakewood,* 542 P.2d 371 (Colo.1975) and constitute one of the largest categories of such actions considered by local government decision making bodies. Other examples include approval of subdivisions, historic preservation district permits, conditional and special use permits, and variances. *Van Huyson v. Board of Adjustment,* 550 P.2d 874 (Colo.App.1976); *Moschetti v. Board of Adjustment,* 574 P.2d 874 (Colo.App.1977).

The next task is to insure (to the degree within your control) that due process requirements have been and are met:

1. Notice as required by any state statute and applicable local regulations has been given;
2. An adequate right to present evidence and cross examine witnesses has been given; *LAPP v. Village of Winnetka,* 833 N.E.2d 283 (Illinois 2005).
3. Any bias, prejudgment, conflict of interest, or *ex parte contact* problems have been resolved prior to the hearing and, if necessary, members of the body engaging those contacts have recused themselves;
4. An adequate record of the proceedings is made; and
5. The decision is supported by adequate findings.

Bias and Conflicts of Interest

Fortunately for the local government attorney, there is a presumption that quasi-judicial hearings are conducted impartially. *Soon Yee Scott v. City of Englewood,* 672 P.2d 2225 (Colo.App.1983); *Hadley v. Moffat County School District,* 681 P.2d 938 (Colo.1984). This presumption can be overcome by evidence of actual bias or conflict of interest which creates an appearance of impropriety. *Stivens v. Price,* 71 F.3d 732 (9th Cir. 1995).

A charge of bias or conflict of interest is a difficult challenge. At the local level, particularly in small communities, it is common for members of the decision making body to personally know the applicant and the opponent and perhaps have pre-existing relationships with them. This does not by itself create a bias, prejudgment or conflict of interest sufficient to exclude that member from the decision. While it may be politically popular to bring the charge, the question is evaluated against the relevant statute and local regulations.

Standards of Conduct C.R.S. 24-18-101 *et. seq.*

The first step is to review any local regulation governing conflicts of interest. Next, look to state law. In 1988, the General Assembly enacted a comprehensive code of ethics for both state and local government officials, entitled "Standards of Conduct" (the "Act"). C.R.S. §§ 24-18-101 et seq. The Act establishes recommended guidelines as well as mandatory rules of conduct. The Act prohibits public officials or employees from:

- performing an official act [such as voting to approve] directly and substantially affecting a business to its economic benefit in which the official has a substantial financial interest or is engaged as counsel, consultant, representative or agent. C.R.S. §§ 24-18-108(2)(d); 24-18-109(l)(b).

The Act requires a member of the governing body having a "personal or private interest" in any matter proposed or pending before that body to disclose the interest, not vote tl1ereon and also to refrain from attempting to influence the decisions of the other members. C.R.S. § 24-18-109(3)(a). The Act prohibits a local government official or employee from accepting a gift of substantial value or a substantial economic benefit which:

- would tend to improperly influence a reasonable personal to depart from faithful and impartial discharge of public duties; or

- which a reasonable person in the same position should know under the circumstances is primarily for tl1e purpose of rewarding official action the official has taken. C.R.S. § 24-18-104(1)(b).

TI1ere are exceptions for campaign contributions, occasional nonpecuni$_{ary}$ gifts of insignificant value, payment or reimbursement for travel expenses for attendance at a convention in which the official is participating, items of perishable or nonpermanent value including meals, lodging, travel expenses or tickets to sporting, recreational or cultural events. C.R.S. § 24-18-104(3).

Personal and Private Interests

A key phrase in the Act is "personal or private interest," likely taken from the Colorado constitutional provision applicable to members of the General Assembly. Colo. Const. Art. V, §43. To the extent the local government attorney can determine that a board member has a personal or private interest in the subject matter of the hearing, it may be necessary to advise the member to step down. Some examples of a personal or private interest that might require recusal include:

- A zoning matter in which the board member is or represents the applicant, or attempts to represent him or herself at the hearing.
- The board member owns or has an interest in a business which is making the application or which is a consultant to the applicant.
- The board member has financial dealings with the applicant.
- The board member has a financial interest in a business which 1s a competitor of the business making the application.
- The board member is a creditor of the business malcing the application.

It is helpful to also describe for our government clients what is not a "personal or private interest." Very often, opponents or proponents in a public hearing will accuse a board member of having a private interest or conflict simply because of his or her acquaintance with the applicant. The following are examples of relationships which, absent other factors, should not disqualify the board member from acting:

- member is related by blood or marriage to the applicant but has no financial connection or potential of experiencing financial gain or loss. Note: to the extent the blood or marriage relationship is immediate (husband and wife, father and son, etc.), the member should step down. Even though there may be no financial connection, the relationship is so close as to presume one exists, or at the least, to presume prejudgment or bias.
- member is the next door neighbor of applicant
- member and the applicant know each other, are friends, go to the same church, are members at the same club, play golf together, like each other, or dislike each other

It is important that these fact patterns lack the potential of personal financial gain or loss. They reflect the practical reality of life in a small community and should not, standing alone, prevent a board member from voting on an application. The Act focuses primarily on financial relationships in determining whether an impermissible personal or private financial interest exists.

Prejudgment

The truth is that elected officials as members of the community have opinions and prejudices and they bring these into the hearing room. As counsel to these quasi-judges, our task is not to convince them not to have opinions, but instead to simply have an open mind and above all, to refrain from expressing their opinions until the close of the hearing. The appearance of fairness is equally important as being unbiased.

Board members must exercise extreme caution in their activities and statements outside of the public hearing. While the case law is largely fact-specific, the best advice for the local government attorney to is not to participate in any public dialogue or discussion on the matter prior to the hearing. The fact that a committee of the town board of trustees investigated an application for a liquor license prior to the hearing and recommended against issuance of the license, combined with other facts, convinced the court that the applicant had been denied a fair and impartial hearing. *Booth v. Trustees of the Town of Silver Plume,* 474 P.2d 227 (Colo.1970). The Booth case is the poster child in Colorado for prejudgment.

Finally, it is important to bear in mind that local government officials are also policy makers who are called upon to express public policy positions. In fact, this activity is one of their most important obligations. The Colorado Supreme Court recognized this role in *Mountain States Telephone & Telegraph v. Public Utilities Commission,* 763 P.2d I 020 (Colo. I 988) holding that a decision maker is not disqualified on due process grounds simply for having taken a position, even in public, on a policy issue related to a dispute, if there is no showing that the decision maker is incapable of judging a particular controversy fairly on the basis of its own circumstances. The real challenge for the local government attorney is helping elected officials do both their legislative and quasi-judicial jobs.

Ex parte Contacts

Ex parte contacts are communications between a board member and a party or member of the public that take place outside a noticed public hearing. These contacts deny due process to both applicants and opponents of the application because the other party is not present to hear and rebut statements made to the decision-malcer. An *ex parte* contact may not necessarily result in invalidation of the ultimate decision. Nevertheless, the appearance of impropriety undermines the integrity of the governing body itself. Thus, the local government attorney should advise quasi-judicial decision-maker to avoid *ex parte* contacts in quasi-judicial matters.

Board members and constituents are accustomed to using private conversations to communicate public policy information. This is perfectly acceptable when the matter is legislative. However, this is not pern1itted in quasi-judicial matters, as it violates the due process rights of the applicant and opponent. Constituents are not expected to learn the distinction between legislative and quasi-judicial matters. Thus, counsel should stress the following points to board members:

- Problems Arising from Ex Parte Contacts. The consequence of engaging in *ex parte* contacts can invalidate the action of the body. *Ex parte* contacts can deny due process to the applicant and the opponents.
- Ways to Avoid Personal Ex-Parte Contacts: If a board member is called or personally contacted by the applicant, a supporter, or opponent and the matter is identified, he or she should immediately state that, as a board member, it is improper to talk about the case outside of the hearing room. The board member should urge the person initiating such contact to bring his or her points of view and testimony to the public hearing. Finally, the board member should stress that by listening now, he or she might have to step down and not vote at the hearing. If all else fails, the member could explain, "The county attorney told me I had to hear all testimony only in the public hearing."
- Written Materials: Board members should be advised to make sure any materials they receive outside the hearing are given to staff to be copied and shared with everyone at the time of hearing. This rule extends to email correspondence as well.
- Dealing with ex parte contacts after the fact: If an *ex parte* contact occurs, the board member should:(1) promptly inform the attorney for the body; (2) disclose the contact to the body at the beginning of the hearing; and (3) describe its content as completely as possible. In an extreme case, the board member may be required to step down and not participate further.

The local government counsel should be prepared to define at what point a matter becomes quasi-judicial such that *ex parte* contacts are disallowed. It is asking too much to expect that a board member cannot talk with the owners of a property just because that owner is thinking of applying for PUD approval. A reliable, but not uniform rule, is to use the date a formal application is received in the planning department.

Avoiding Ex-Parte Contacts In Site Visits

Board members often are asked to visit the site of a land use application prior to the public hearing. Site visits are valuable in allowing the board to get a physical sense of the property involved in the application. The challenge is to prevent the body from having impermissible *ex-parte* contact with the applicant or members of the public during the visit. Here are some suggested guidelines:

- If the site visit does not need to take place in an organized fashion, and if access to the property is not an issue (for example, the property is a single lot on a public street and can be observed from the public street or otherwise easily accessed, without the necessity of having a applicant representative present to unlock gates, etc.), the members of the body can individually visit the site on their own at any time prior to the public meeting or hearing.

- Ideally, staff will have been able to visit the site with the applicant to learn about the layout, etc., such that the staff can adequately brief the body without the necessity of the applicant being in attendance. It is permissible to allow the applicant to stake building locations, etc., on the site prior to the visit such that it is easier for the members of the body to understand what the development involves.

- Site visits are open meetings under the Colorado Open Meetings Law if a quorum or three members, whichever is less, of the body is in attendance. C.R.S. § 24-6-402(2)(b).

- Publish or post the time and place of the meeting as for any other meeting, but emphasize that no testimony will be taken from any party.

- Avoid permitting the applicant or members of the public to answer "simple informational questions" such as where property boundaries lie, etc. The next step on this slippery slope is for the applicant to add his or her opinion. Instead, if there are questions of information, have board members ask the staff. Avoid asking the staff to "ask the applicant the following question." The public body may not use the staff as a "human telephone" to conduct what would otherwise be an *ex-parte* contact with the applicant or members of the public. **[citation]**

Disclosure and Recusal

In the event any of the above grounds for recusal exist (conflict of interest, prejudgment, bias or *ex-parte* contact), the obligation of the local government attorney is to advise the board member whether he or she should step down. If the conflict is minor or the board member refuses to step down, the attorney should at least make a record at the outset at the public hearing, by arranging to question the board member along the following lines:

- please describe the contact [or interest that you had with] the applicant, opponent, etc.
- do you believe that you can render a fair and impartial decision in this matter?

This exercise has the dual benefit of: (I) curing minor *ex-parte* contacts or claims of prejudgment, bias or conflict of interest by putting all of the board members, the applicant and the opponents on the same level of knowledge about what was said, and (2) to the extent the board member affirms that he or she can render an impartial decision, the statement must be given weight by the reviewing court. This on-the-record-dialogue is <u>not</u> adequate to remedy more serious *ex-parte* contacts or other evidence of bias, such as the applicant taking board member to lunch for a substantive discussion of the application. Similarly, this exercise cannot cure a clear conflict of interest that would require recusal under the statute or where the totality of the circumstances indicate that they cannot act impartially. For example, recusal would be appropriate where the board

member is a partner in the business or undertaking that is making the application to the decision-making body. Instead, it is designed to address the brief encounter in the grocery store, where, for example an opponent of a rezoning stops to express his or her opinion to the board member before the member is able to stop them and urge that they attend the meeting in person.

Here is a checklist of advice which the local government attorney should consider in advising the decision making board about serious *ex-parte* contacts, a conflict of interest, bias or prejudgment:

- Make sure disclosure precedes discussion on the matter.
- Establish the nature of the conflict, bias contact or prejudgment on the record.
- Disclose, don't vote, and don't influence others. C.R.S. § 24-18-109(3)(a).
- Probably the best way to insure that a recused board member who has stepped down does not influence other members of the body is to advise that board member to leave the room. In particular, it is not appropriate for the board member to remain in the room and vote. The temptation is simply too great for the board member to offer opinions "for information only," and to otherwise exercise the influence a board member has but should not use in this case.
- If the board member must vote, because his or her participation is necessary to achieve a quorum or otherwise enable the body to act, C.R.S. § 24-18-109(3)(b), the disclosing member must comply with the voluntary disclosure procedures of C.R.S. § 24-18-110 and make written disclosure prior to, not after taking action; to the clerk to the board C.R.S. § 24-18-110 and to the Secretary of State. C.R.S. §§ 24-18-110; 18-8-308(1).

The statute does not specify a particular format for this disclosure. Presumably a letter identifying the board member, the body, the member's interest, and the application would be sufficient.

- A potential consequence of failing to properly address bias, prejudgment or conflict of interest is invalidation of the action taken by the entire body. *Booth v. Silver Plume,* supra.

Findings & Decision

You have successfully guided your quasi-judges through the minefields of bias, prejudgment, conflict of interest and *ex-parte* contacts. The public hearing has been conducted. You have one final task: satisfying the C.R.C.P. 106(a)(4) standard: that competent evidence exists in the record to support the decision of the local governing body. *Save Park Co v. BOCC,* 990 P.2d 711 (Colo.App.1998), affd on other grounds, 990 P.2d 35 (Colo.1999). The case law is clear that this need not be a preponderance of the evidence presented; the reviewing court's role is simply to determine that adequate evidence supporting the local governing body's decision is present. *Bauer v. Wheat*

Ridge, 513 P.2d 203 (Colo.1973). While written findings are not required where the reviewing court can find the support somewhere in the record, *Sundance Hills Homeowners Assoc. v.* BOCC, 534 P.2d 1212 (Colo.1975); *Hudspeth v. BOCC,* 667 P.2d 775 (Colo.App.1983); *Fire House Car Wash v. Board of Adjustment,* 30 P.3d 262 (Colo.App.2001) chances of being upheld are materially increased if findings are adopted. If a local code or resolution requires written findings, failure to comply is grounds for reversal. *Bauer v. Wheat Ridge,* supra.

For cases which are controversial or which might otherwise be subject to challenge, the easiest approach is to provide written findings as a part of the board's hearing packet, in at least the form of alternative motions to approve or deny, "based upon the following, established in evidence presented at the hearing: [insert short list of items; always include 'for the reasons set forth in the staff report dated_.']"

Many local government planning staffs provide the board with two options: the staff recommendation which includes reasons for the decision, and the non-recommended option which often includes no such reasons. If the board decides against the staff recommendation, this approach leaves the defending attorney without any documented reasons for that decision. Instead, encourage reasons for the non-recommended option as well as the recommended option to be in written form and available as a part of the motion. In serious cases, immediately after the decision, ask the decision making body to adopt a further motion directing that you prepare written findings and decision for its consideration at the next meeting.

Understanding the distinction between legislative and quasi-judicial matters

1. Legislative matters are matters of general concern or applicability throughout a municipality or certain portions thereof. Examples of legislative acts include adoption of a master plan, imposition of a fire ban or watering limitations, adoption of a junk ordinance, enactment of a tap or impact fee, etc.

2. Quasi-judicial matters are somewhat more difficult to identify. They often relate to only a specific individual or a piece of property and usually involve applying specified standards to a particular person, entity or property. To be considered quasi-judicial, a matter must satisfy three criteria:

    a) Notice is required before action may be taken

    b) A hearing must be conducted before action may be taken

    c) The body sitting as the quasi-judicial body must apply specified criteria to a particular person, property or circumstance.

    See *Baldauf v. Roberts*, 37 P.3d 483 (Colo. App. 2001)

    Examples of quasi-judicial matters include liquor license applications or show cause hearings, rezonings, special or conditional use permits, variances, etc.

Constituent contacts regarding legislative matters

For an elected official to be contacted by an elector or constituent regarding a legislative matter is not only proper from an ethical standpoint, but it is one of the common and endearing characteristics of local government. Local government is often the only level citizens feel they are able to contact with any degree of effectiveness.

Constituent contacts regarding quasi-judicial matters

The more problematic area from an ethics standpoint involves contacts by constituents regarding quasi-judicial matters. The source of limitations in this area comes not from local law or state statute, but rather from the case law relating to due process of law under the state and federal constitution. In general, a party appearing before a quasi-judicial body, such as the Board of Trustees when it is acting in its quasi-judicial capacity, is entitled to a fair and impartial tribunal, just as a party before a court would expect to receive. It is this entitlement that limits what the "quasi-judges" can and cannot do.

An elected official should base his/her decision on matters presented during the hearing.

An elected official sitting in a quasi-judicial capacity should not discuss a pending quasi-judicial matter with any of the parties involved in the matter, outside the hearing.

An elected official sitting in a quasi-judicial capacity should not discuss a pending quasi-judicial matter with a member of the public outside the hearing.

An elected official sitting in a quasi-judicial capacity should not discuss a pending quasi-judicial matter with staff or other members of the quasi-judicial body outside the hearing. Staff reports and application materials may be received by the Board of Trustees in advance of a quasi-judicial hearing provided those materials are also made available to the applicant and any opponent at or before the hearing.

To the extent an elected official sitting in a quasi-judicial capacity has discussions with parties or citizens prior to a quasi-judicial hearing, the official should fully disclose such discussions at the outset of the hearing. The official should give any of the parties to the application or opposing the application an opportunity to request that the official not participate in the hearing if they feel his or her *ex parte* discussions prejudiced their ability to be fair and impartial. The official is not required to refrain from participation merely because such a request is made.

To the extent an elected official sitting in a quasi-judicial capacity receives written materials or documents relating to the application, the official should fully disclose such documents and, unless they are likely to prejudice the rest of the tribunal, should provide them with copies.

In cases, where the official's *ex parte* discussions or review of documents outside the hearing renders them unable to be fair and impartial, they should refrain from participating.

Constituent contacts in e-mail, electronic media times

In recent years, the explosion of e-mail communications and social media contacts have made it even more problematic to avoid *ex parte* communications. Many elected officials make their official e-mail address available to the public. Upon receiving an e-mail, it may be difficult to determine whether it relates to a legislative matter or a quasi-judicial matter pending before the Board of Trustees or Commission until you open it. Such communications require added vigilance in considering whether to open the communication, whether and how to respond to it, and disclosures that may need to be made to the remainder of Board of Trustees regarding information received.

Applying evidence presented to relevant criteria

The task of a Board of Trustees member sitting as quasi-judge is to determine whether the relevant criteria that apply to a particular application or matter (liquor license, rezoning request, etc.) have been satisfied based on the evidence and documents presented.

Easy electronic access to information has again made a Board of Trustees member's task more problematic. Board of Trustees members are discouraged from seeking answers regarding factual issues they may see through their own efforts, rather than by inquiring of the parties. No matter how easy it might be to find information through the internet or otherwise, the fundamental rules governing conduct in quasi-judicial matters remain the same: You are to consider what the parties present to you. YOU ARE THE JUDGE, NOT THE INVESTIGATOR. Unilateral searches by Board of Trustees members in a quasi-judicial setting may create due process and notice problems, as well as creating unnecessary grounds for judicial challenges to the Board of Trustees' ultimate decision.

Honoring the Quasi-Judicial Rules of Engagement[b]

Governing body activities can be pigeonholed broadly into two areas: legislation and quasi-judicial decision-making. The rules of engagement differ depending on which pigeonhole fits. For legislative matters, the rules of engagement are free-wheeling. Think of the state legislature when it's in session, and the lobbying that goes on there. **But for quasi-judicial matters, the rules of engagement have a basis in constitutional due process requirements: when you are making a decision that affects individual property rights, the constitution requires a properly noticed and fair hearing before a neutral decision maker— you.** Thus, in quasi-judicial matters, you must conduct yourself similarly to the way judge does in deciding a case.

No doubt your municipal attorney has discussed the quasi-judicial rules of engagement with you. The attorney is trying to protect the integrity of the hearing process, the defensibility of the outcome, and your prerogative to participate as a decision-maker.
These rules of engagement include:

- You will follow the applicable legal criteria and apply those criteria to the evidence you hear at the hearing, to arrive at your decision.
- You will refrain from "ex parte" or "outside the hearing" contacts regarding a pending quasi-judicial matter.

- You will not participate in decision-making in a quasi-judicial matter in which you have a conflict of interest.

These rules flow from constitutional due process requirements, so they are most certainly a part of your oath. Following these rules is also a way to avoid or reduce liability. **In quasi-judicial matters, the process by which you arrive at a decision is at least as important as the substance of the decision itself.** If you've ensured that the process is letter-perfect, then you have eliminated a huge portion of the possible quarrels that could turn into a claim. And it's a best practice, because following the rules of engagement will enhance the reality and the perception that all who come before you with quasi-judicial matters will be heard and treated fairly.

Honoring Standards of Personal Conduct

The way you conduct yourself in relation to other members of the body, staff, and the community greatly impacts your effectiveness as an elected official. No matter where you are on the political spectrum, you can probably agree that politics today are infected with divisiveness and incivility. Municipal government being non-partisan, its elected officials should, at least in theory, be able to rise above the nastiness of partisan politics!

With respect to the governing body, do all members understand that governance is a team activity? An individual elected official does not have the power to accomplish anything on his or her own. Rather, the allocation of responsibilities to the governing body is to the body as a whole. Only through collaboration and consensus-building can an individual's priority become the priority of the governing body. While the governing body is comprised of individuals and will "deliberate with many voices," all members must recognize the governing body "acts with one voice."

Has the governing body been able to "gel" as a team, or are members viewing one another with a sense of distrust? Are you lining up along the same divisions on every issue? Are you unable to disagree without being disagreeable? Perhaps some team building is in order if these things are happening.

With respect to staff, is an incoming council or board viewing staff as the "enemy"? **A staff exists to carry out the goals set by the governing body.** Sometimes, with the changing of the guard at the governing body level, there's an assumption that there needs to be a changing of the guard at the staff level, too. But if this staff faithfully carried out the goals of the prior governing body, why wouldn't you expect that they will be equally able and willing to carry out the goals of the new body?

With respect to the community, are public comment periods turning into "public inquisition" or "public argument" periods? Is "staff bashing" or "elected official bashing" happening at meetings? Perhaps another look at your rules of order, and your approach to meetings, would be appropriate. Certainly, the public has every right to appear at meetings and make complaints. It's a sign of faith in local government that people care enough to complain! But the manner in which those complaints are made, and the manner in which you respond, can mean the difference

between a constructive, productive exchange or a nasty, embarrassing, unproductive, or morale-crushing attack.

Is the observance of personal conduct standards part of your oath? At least arguably, yes. After all, the oath implies faithfully performing a role where you must work with others. And you have a fiduciary duty to act in the best interests of your municipality. It doesn't seem a far stretch to impute to your oath a commitment to respectful conduct towards one another and the best interests of the municipality.

Is it a best practice to observe personal conduct standards? It certainly seems so. Maintaining harmonious and productive working relationships with your fellow elected officials, staff, and the public can only increase your effectiveness. And keep in mind that harmony doesn't mean you all have to agree all the time. Indeed, healthy discussion, debate, and disagreement are the engine for understanding issues and solving problems. But the idea of disagreeing without being disagreeable is important to keep in mind.

Does the observance of personal conduct standards help with liability reduction? We think so. In CIRSA's experience, turmoil at the top levels of the municipality means turmoil throughout the organization. After all, you know what rolls downhill. Over and over, we've seen that disharmony and dysfunction at the top means claims throughout the organization. These types of claims not only cost dollars to defend, but also can sap the governing body's energy, destroy staff morale and cause reputational harm, all with long lasting impacts.

CAUTIONARY TALES: SELECTED CASES OF INTEREST

Hughes v. Monmouth University, 925 A. 2d 741 (New Jersey 2007): ***Alumni of university not disqualified.***

Zoning board approved university site plan and variances for dormitory, tennis court, and parking lots. Neighboring residents appealed, claiming that several board members should have been disqualified for conflicts of interest, as they were alumni of the university and had participated in various university events (which are otherwise open to the public). The statute in question provided in part that "no member of the Board of adjustment shall be permitted to act on any matter in which he has, either directly or indirectly, any personal or financial interest." The court found tl1at none of the "intangible relations such as a friendship or being an alumnus of the same school" constituted disqualifying contacts because they could not "reasonably be expected to impair [the board member's] objectivity or independence of judgment."

Schupak v. Zoning Board of Appeals of Town of Marbletown, 31 A.D. 3d.1018 (New York, 2006): *It's still okay to be a realtor.*

In this appeal of a zoning board of appeals decision upholding the grant of a building permit, tl1e court rejected the petitioner's claim that the board's determination should be annulled because one of the board members was employed by a real estate firm that had a business relationship with tl1e applicant: "The mere fact of employment or similar financial interest does not mandate disqualification of the public official involved in every instance." The

board member in question admitted tl1at as an independently licensed real estate broker she had associations with a real estate agency that had listed properties for both the applicant and the petitioner, but she had no ownership interest in the real estate agency, received no salary or employee benefits from it, and had no direct dealings with eitl1er the petitioner or tl1e applicant.

Dowling Realty v City of Shawnee, 83 P.3d 716 (Kansas 2004): *What not to do.*

The facts of this case contain an almost incredible wealth of cautionary tales: a member of the city's planning commission, Kevin Tubbesing, became the 55% owner of a company (Midwest), which in turn was the contract purchaser of a property. Midwest filed a development application for the property and its representatives proceeded to have conversations with each member of the planning commission prior to its public hearing on the application. The application was placed on the planning commission's consent agenda for the September 17, 2001, immediately after a controversial landfill project application. In a conversation witl1 a city council member prior to the hearing, Tubbesing said, "that's my strategy, to put it on at tl1e end of tl1e meeting and they'll be tired and [it will] sail right through." At the hearing, Tubbesing did not step down from the commission bench until after the staff recommendation and opponent testimony. Tubbesing then stepped down and argued to the rest of the commission in favor of the application. Tubbesing did not identify himself for the record as a member of tl1e commission nor did he disclose his 55% ownership in Midwest. On the transcript he stated only that he was "general managing member of Midwest" and "developer of the project." While he did not vote on the application, he never left the room during any of the proceedings.

A member of the city council observed the September 2001 meeting and "was left with the impression that the approval of Midwest's proposal was *not exactly kosher.* " The council member found it troubling that a commissioner would address his own deal and believed the process seemed "hurried up." The council had a "call-up" process for commission consent items and this was done. At trial, Tubbesing testified that prior to the Council hearing, he encouraged several council members and the mayor to support the project. A majority vote was required to send the application back to the commission. The council's motion to do so failed 4-to-4 because the mayor, who had recommended Tubbesing for his position on the commission, declined to vote.

The relevant Kansas statute provided that "any local government officer or employee who has not filed a disclosure of substantial interests shall, before acting upon any matter which will affect any business in which the officer or employee has a substantial interest, file a written report of the nature of the interest with the county election officer of the county in which it is located all or the largest geographical part of the officer's or the employee's governmental subdivision."

While the court recognized that subsequent to the filing of the application it was necessary and proper for Tubbesing to discuss the matter with the city's planning staff, Tubbesing should not have presented Midwest's site plan for approval. The court noted that "twice during his testimony before the commission, Tubbesing referred to the commissioners as 'we'." The court remanded the case to the trial court with directions to send it back to the commission to "redo the entire process since it was tainted from the very beginning. All

future proceedings must be conducted without Tubbesing as long as he remains on the commission."

Things Tubbesing did wrong:

1. Engaged in *ex parte* contacts with commission members and council members before each hearing.
2. Failed to disclose his interest to the commission chair on the record at the outset of the hearing.
3. Failed to step down at the outset of the hearing and leave the room.
4. Presented the case on behalf of (his own) application to the commission.
5. Failed to malce the required written disclosure of a substantial interest as required by the Kansas statute.
6. Clearly used his position on the commission to advocate for the project.
7. Possibly misused his relationship with the head of the city's planning department, although that individual had an independent obligation to ensure that the conflict of interest was timely disclosed.

LAPP v. Village of Winnetka, 833 N.E. 2d 983 (Illinois, 2005): *Right to cross- examine.*

Citizens filed a complaint challenging village ordinance granting historical society a special use permit and zoning variance to use a single-family residence and garage as the permanent home for the society's offices. Among other claims, the citizens alleged a Jack of due process in that "approval of both ordinances was infected by a conflict of interest on the part of a village trustee." The court distinguished its earlier decision in Klaeren v. Village of Lisle, 78I N.E. 2d 223 (Illinois 2002), holding that the council's hearings were procedurally defective where they denied the right to cross examine a witness. In Klaeren, the mayor declared at the beginning of the hearing that "This is a public hearing. It is not a debate. There will be no attempt at tonight's hearing to answer any question raised by the audience." Further, the mayor limited audience comments to two minutes each and cut off speakers as their time expired or warned others their time was about to expire. The court held in Klaeren that the particular situation there demanded more than what was afforded under the procedures set forth by the mayor during the joint hearing:

> "It would be a denial of due process not to afford interested parties the right to cross examine adverse witnesses". In Klaeren, the village attorney announced at the beginning of the hearing that it was "quasi-judicial" in nature. The plaintiffs were permitted to cross examine applicant's witnesses at the ZBA meeting, and apparently did not make a similar request at the public hearing before the council.

David Eacret v. Bonner County, 86 P.3d 494 (Idaho, 2004): ***When in doubt, listen to your lawyer.***

Board of county comm1ss10ners voted 2 to 1 grant a variance for construction of a boathouse. The board reached exactly the opposite conclusion as the planning and zoning commission on each of the five standards applicable for a variance. The record disclosed that one commissioner, Mueller, indicated a personal interest in promoting a blanket variance to allow

the people to build their boathouses "as everybody else in Bottle Bay has been doing for 50 years," and, alluding to the variance application, suggesting that "in the end he's going to get it approved and all he's doing is spending tons of dollars." The court noted that these comments "elicited an admonishment from the attorney for the board." The commissioner had also talked to the applicant prior to the hearing and had driven to tl1e site of the boathouse.

Commissioner Mueller commented in his opening remarks that he believed that "if the planning commission had known all the facts they would have given us a recommendation to pass this." The court affirmed the district court's decision remanding the matter back to the board for a new decision, concluding that the district court properly held that commissioner Mueller's comments and *ex parte* contacts violated plaintiffs' due process rights. The court held that any view of a parcel of property in question must be preceded by notice and opportunity to be present to the parties in order to satisfy procedural due process concerns and that Mueller's comments "not only created an appearance of impropriety but also underscored the likelihood that he could not fairly decide the issue in the case." The totality of these factors support the trial court's conclusion "that Mueller's mind was irrevocably closed on the subject of the setback variance."

---

[i] Portions of this training material are from "Creative Public Meeting Issues: Advising the Quasi-Judges" by Gerald E. Dahl, June 3, 2010.

[b] Excerpt from "Ethics, Liability & Best Practice for Elected [or Appointed] Officials Handbook", CIRSA in conjunction with Colorado Municipal League, Second Edition 2019. A copy of this full publication is available from the Town Administrator/Clerk.