



COMMISSIONER WORKSHOP & REFRESHER



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Quasi-Judicial and Ex Parte:

De-mystifying Latin terminology

Quasi-Judicial versus Legislative

- **Legislative:** Broad application, announcing policy, making law
 - Amending municipal code, resolutions and proclamations
 - Examples: Short term rental ordinance; nuisance, building, zoning and land use codes
- **Quasi-judicial:** Narrow application, does not make policy, applies policy
 - Applies existing law to a specific set of facts (and specific property)
 - Examples: Specific land use approvals, historic preservation decisions, licensing hearings, nuisance abatement



Quasi-Judicial and Ex Parte:

De-mystifying Latin terminology

Why is this so important?

- “No state shall deprive any person of life, liberty or property without Due Process of law”
(14th Amendment of the United States Constitution)
- So that everyone with an interest in the case, and all members of the decision-making body, hear the *same* evidence at the *same* time from the *same* sources
- To ensure opportunity for fair hearing before unbiased decision makers and that each of the members have the benefit of the same input
- Final decisions can be appealed by anyone adversely affected by decision (with legal standing)

Quasi-Judicial and Ex Parte:

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Impartiality is the standard. May be affected by:

- 1) **Ex parte Communications:** *defined as* communications between the Council/Commission/Board and one party, outside the presence of the other parties to the case, or affected individuals.
 - Eg) a neighbor comes up to you at Sweetie's to express their concern with a certain development application
- 2) **Pre-judgment or bias:** You gave a speech or signed a petition advocating for a specific land use approval. You posted on Facebook that you will never approve any application with affordable housing. You have made clear that all your votes will be "anti" developer
- 3) **Conflict of Interest:** You (or immediate family) have a personal or private interest in the matter proposed (pecuniary interest, financial benefit)
 - Eg) Your spouse owns a restaurant seeking a liquor license

Quasi-Judicial and Ex Parte:

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How do you cure?

Either:

- 1) Recusal - or
- 2) Disclosure (on the record)

Ask yourself:

- Is your ability to decide the case fairly, impartially and based solely on the evidence presented at the hearing affected?
- Does an actual legal conflict exist?
- Does a perceived conflict exist?
- Did you express a pre-judgment bias?



Pro Tip: When in doubt, ask your City Attorneys!

Quasi-Judicial and Ex Parte:

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Suggestions:

- Follow the process set out in Code
 - Analyze, review and apply those factors or standards in an objective manner
Versus: personal opinions, subjective feelings or individual preferences
- Base your decisions on the facts, law, evidence and testimony in front of you
- Public hearing creates and completes a “record”
 - Which a judge reviews (should your decision be appealed to District Court)
 - Deliberation is important
 - Consider “thinking out loud” – so your reasoning is included in the record



Reminder: In quasi-judicial proceedings, you serve as the judge!

A CONVERSATION ON QUASI-JUDICIAL AND EX PARTE ISSUES

The following is a transcript of a real-life (imaginary) conversation between a newly appointed municipal commission member and her municipal attorney, meeting over coffee for a little legal training. (It could happen. And, if it did, it might go something like this.)



My son has some Nike Kwazi high-tops; loves 'em.

Right. This is a little different. Quasi-judicial issues are those that apply or vary the legal requirements for a specific project, individual or property. Quasi-judicial issues involve the determination of the rights, duties, or obligations of specific people or property by applying the code or other law to the unique set of facts, all in the context of a hearing.

In contrast, think of an issue that affects the entire municipality, or a substantial portion of the population — that sort of issue is legislative — making law. Then, think of an issue that affects one homeowner, or one business owner, one particular party, or a singular piece of property — that sort of issue is quasi-judicial — applying the law to particular facts. For example, an ordinance authorizing short-term rentals in the municipality is a legislative issue. Your neighbor requesting a variance to build an addition to her home is a quasi-judicial issue.

It also may help to picture your commission acting as a judge, rather than as a legislator. The commission is not making or recommending new laws when it reviews a quasi-judicial issue, but it is rather applying existing laws to specific facts concerning one person or a discrete group of people rather than the entire neighborhood.

The most common quasi-judicial issues are zoning and land use decisions affecting an individual property. Other examples are

licensing hearings, for liquor licenses and marijuana business licenses, and hearings concerning nuisance abatement, towed vehicles, and tax liabilities.

I thought I was now a commissioner, not a "judge."

Well, think of it as if the entire commission is the judge, not just one single member. The decisions you make are important and can have a significant impact on your neighbors. Also, the commission's decision may be appealed to and reviewed by a higher court, just like a real judge's decision.

So, every time that we meet, we are having a public "hearing"?

Not necessarily. Sometimes the commission can be meeting to discuss and address a larger issue affecting the community, such as affordable housing or a change to a particular portion of the land use code. Often, the governing body will seek the input of the commission on these sorts of legislative issues, even though the ultimate authority to change the laws remains with the governing body. The commission acts as the "land use advisor" to the governing body, so they welcome your input on legislative topics. Meetings on these general topics are not "hearings," but they are open to the public. All of your meetings are open to the public. But when a meeting does include a public hearing, the commission is required to give a certain amount of notice prior to the hearing; the notice period may depend on the type of quasi-judicial issue being considered. Also, all evidence that the commission considers must be presented at the public hearing.

OK. So now I know what a quasi-judicial issue is. Why is it important that I know that?

Because if an issue is "quasi-judicial," there are certain procedures required to afford due process to those individuals who may be affected by the decision.

You also need to make sure that with quasi-judicial public hearings, you aren't having any ex parte communications.

A party at a commission meeting? Now we're talking! Tell me more about that.

Ha! I wish. It is not as fun as it sounds. Ex parte is an old Latin term meaning "from one part," or "concerning one party alone." An ex parte decision would be one decided by the judge or commission without requiring that all parties to the controversy be present. An ex parte communication is between the judge or commission and one party, and outside the presence of the other parties to the case, or affected individuals.

The prohibition against ex parte contacts in quasi-judicial hearings was developed to ensure that everyone with an interest in the case, and all members of the decision making body, hear the same evidence at the same time, from the same sources. It is to ensure basic notions of fairness and justice.

Wait. You're telling me that I have to block out my neighbors and friends who want to talk to me about something important? That seems wrong. I thought it was a good thing to talk to people, get the community sentiment — do my "homework" on an issue.

I know this all sounds frustrating, especially to a well-intentioned active community volunteer such as yourself. However, it is important to remember that this rule is designed to protect the rights of everyone involved: applicants, opponents, and other interested parties and residents who may be ultimately affected by your decision. It also ensures the opportunity for a fair hearing before unbiased decision makers, and that each of the other commissioners have the benefit of the same input.

I am still skeptical. What is the worst that could happen if I have an ex parte conversation?

Please don't give your lawyer a heart attack. This is actually a very important rule to follow. When a decision maker engages in ex parte discussions about a case, and then proceeds to participate and vote on the matter, anyone adversely affected by that decision (with legal standing, which we don't need to get into) could

appeal the decision to district court. If the appealing party proves that the commission failed to provide due process, the decision can be vacated and the matter sent back to the commission for a second look. Holding a second hearing is obviously costly, and creates a long delay for the applicant and for the community. And we did not even mention the negative press the city would inevitably receive.

Yikes! I wouldn't want to jeopardize the commission's decision. But what if someone says something to me before I tell them that I cannot talk about it? I cannot "un-hear" what I have already heard.

First, you would need to disclose the communication on the record, in as much detail as possible, at the beginning of the public hearing. If you truly and sincerely believe that the ex parte communication did not affect your ability to decide the case fairly, impartially, and based solely on the evidence presented at the hearing, you may be able to participate in the hearing after the disclosure. You and I should consult on this topic prior to the hearing. If you know that the ex parte communication has biased you, despite the fact that you have openly disclosed and discussed it, you should "recuse" or remove yourself from the hearing, discussion, and the vote.

What if I have a question before a hearing that I really want answered going into the hearing? Is there anything I can do to try to get it answered?

You can contact staff, me, or your other municipal attorneys. We can determine the best way to address the question.

Anything else you think I should know?

Please know that your attorneys are not trying to be annoying or needlessly picky when we bring up these distinctions or cautions. These rules exist not only to protect you, but more importantly, they are in place to ensure the kind of fairness and due process our constitution was built upon.

And I forgot my wallet. How much cash do you have?

Open Meetings Law (C.R.S. 24-6-402)



Public Hearing Outline

1. Open Public Hearing
2. City Staff report
3. Applicant presentation
4. Public Comment
5. Applicant rebuttal, closing statement
6. City Staff rebuttal, closing statement
7. Commission questions
8. Close public hearing
9. Commission Deliberation
10. Call for Motion. Final decision/Action



Conducting Public Hearings

Goal:

- That Commission members and public attendees leave the public hearing feeling it was fair and their views were heard and appreciated.

Some Suggestions:

- Announce the rules, order of hearing, and applicant's rights at the beginning, then stick to them.
- If a large number have signed up, divide the available time and assign it at the beginning.
- Suggest speakers do not repeat prior testimony if they can state they agree with an earlier speaker.
- Public testimony is to be directed to the Commission – speakers may not ask questions to staff or the applicant or the Commission (both staff and applicant will have an opportunity at the end of the testimony to answer questions from the Commission)
- Make sure that all attendees at the public hearing know they have the right to speak.
- Give witnesses your full attention.
- Thank all the speakers for appearing.
- Don't discuss other applications that are in process.

Applicant Rights:

- To make a full presentation
- To present multiple witnesses
- To respond after public comment closes

Taking Action



"I move to recommend approval/denial to City Council for ... based upon..." (and with the following conditions

- You must take some kind of action (make a motion and vote on it)
- Cannot refuse to make a motion or do anything, and move on (applicant has the right that their application moves on and is considered)
- Amendments: must be germane to the main motion; good way to add one or a series of conditions



Importance of "Findings" and reasons for Approval or Denial

- "[A] record of proceedings before the Board must contain details of the evidence presented and proper grounds and reasons to support its decision." *Murray v. Board of Adjustment of Larimer County*
- Draw conclusions based upon evidence in the record and made during the hearing
- Decisions should be based upon objective Code criteria, factors or requirements (compliance w/ Code)
- Decisions should not be based upon preferences or personal opinions, fit



Vote on the application/request before you

- The Applicant is in charge of application. If request is for rezoning to C1, that is what you vote on
- You must take some kind of action (make a motion and vote on it)
- Cannot refuse to make a motion or not do anything and move on (applicant has the right that application moves on and is considered)



Failed motions

- Means no recommendation to City Council
- If a motion fails, someone on the "prevailing side" should immediately move to recommend the opposite position

Grounds for Denial

Appropriate grounds for denial:

- Anything in the applicable portions of the City's Land Use Code.

Inappropriate grounds for denial:

- Failure of developer not to volunteer a condition which could not independently be imposed by the City; Commissioner's personal belief/opinion that the project is the wrong use or density, when the zoning in place allows for it

Conditions of Approval

- **Acceptable Conditions:**
 - Conditions which support enforcement of the technical requirements of City Code
 - (eg: drainage easements)
 - Corrections to the plat
 - Requirements for maintenance of common elements (eg: to establish HOA)
 - Preservation of trees and vegetation
 - Redirecting traffic patterns
 - Conditions offered voluntarily by the applicant
- **Unacceptable Conditions:**
 - Density restrictions (where inappropriate; where Code doesn't allow)
 - Matters outside scope of the applicable portions of Chapter 16
 - Conditions which have no Code basis
- **Technical Requirements:**
 - City has professional staff to review drainage plans and development design
 - Trust your staff!
 - Good time to ask staff technical questions: before the hearing

HPC: Review Standards and Criteria (historic landmark or contributing building, structure or site)

All work performed in completion of an approved certificate of approval shall be in conformance with the most recent edition of the Secretary of Interior's *Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring and Reconstructing Historic Buildings*, published by the U.S. Department of the Interior

City of Salida Downtown Design Standards

Architectural Character. Whether and/or to what extent the proposed work will preserve, protect, change, diminish, disguise, obscure, detract from or destroy the appearance or structural integrity of the historic features, design, materials, character or value of the structure or site.

Original Materials. Whether original designs, materials, finishes and construction techniques that characterize the historic value and appearance of a structure or site can be retained, restored or repaired as opposed to replaced, and whether replacement designs, materials or finishes can match and/or accurately replicate the originals.

Minimum Change. Whether and/or to what extent the proposed work will require more than a minimal change to the historic appearance, materials or integrity of the structure or site.

New Construction. New additions, exterior alterations and related work shall not destroy or detract from the existing historic structure and materials to the maximum extent feasible, and such new work or alterations shall be differentiated from, but compatible with, the existing size, scale and exterior architectural features of the structure or site so as to protect its historic identity and integrity.

Historic Appearance. Work that will protect or return the original historic appearance of a structure or site, especially where documented by photographs, historic research or other credible evidence, shall be encouraged and favored.

Work Necessary. Whether the proposed work is required or necessary to comply with a building, fire or other health/safety code.



QUESTIONS?

