



OPEN GOVERNMENT TIPS FOR EFFECTIVE MEETINGS

DISCLOSE EX PARTE COMMUNICATIONS

BACKGROUND: In *quasi-judicial* matters, when the Council, Planning Commission, Historic Preservation Review Commission, Civil Service Commission or other Board or Commission is deciding the facts of a particular case applicable to a specific piece of property, an abatement matter, a use permit or variance, personnel appeals, license revocations, or an appeal of a lower level decision, it is extremely important for members of the decision-making body to refrain from contacting either party to the dispute or their attorneys. These types of ex parte (outside of the record) contacts can give rise to legal attack against the City for violation of due process rights. You are supposed to make your decision based solely on evidence produced at the hearing. If you have received evidence outside of the hearing, and the substance of that contact was not disclosed at the commencement of the hearing so as to give all parties an opportunity to respond and contest it, a court may find that the City's hearing violated the Constitutional due process rights of either party, thus subjecting the City to liability.¹ This policy applies to any *quasi-judicial* matter which is pending, or is reasonably expected to come, before the body on which the official sits.²

BEST PRACTICE – NO EX PARTE COMMUNICATIONS: In matters involving *quasi-judicial* decisions, particularly where the matter is controversial and being contested, and in any enforcement action or appeal of a prior decision, the best practice is for you to avoid all ex parte communications about the item. In these types of contested cases, you should refrain from contacting the parties or their attorneys, or getting involved in the dispute prior to the hearing, so as to preserve your ability to make your decision based solely on the evidence produced at the hearing.

DISCLOSURE OF EX PARTE COMMUNICATIONS: If you do get involved in an ex parte discussion, you must publicly disclose the substance of any such discussion at the start of the agenda presentation of the item. However, it is not enough just to indicate that you spoke to a party, such as the applicant, or to the neighbors who are contesting the application or project. To ensure due process, you need to disclose what was learned during the conversation so that all parties have an opportunity to respond.³

SITE VISITS: These types of matters should not be discussed during site inspections or field trips that are not part of an agenda meeting. Although individual site visits are allowed and encouraged, they should be disclosed so that your specific observations can be made part of the record.

LEGISLATIVE ACTS: In *legislative* actions, generally applicable to the city as a whole (such as most ordinances), not only is it appropriate to speak and receive information from your constituents, but that is part of your duties as elected and appointed officials. For Open Government purposes, it is suggested that you disclose the information you received outside of the hearing. This is because if the information is important for your decisionmaking process, it may also be important for the other decision makers to hear and consider.

¹ The concern regarding ex parte contacts only applies to *quasi-judicial* actions, where the decision making body is acting like a court.

² See also Benicia Municipal Code Section 4.08.160.

³ Any questions or concerns regarding ex parte communications and what should be disclosed on the record should be discussed prior to the meeting with the City Attorney.

OPEN GOVERNMENT TIPS FOR EFFECTIVE MEETINGS



HOW TO MAKE A MOTION

Background: In a public meeting, it is important for the public to understand what action is taken by the decision making body. It is not always easy to follow what action a public body is proposing if a motion is made that does not specify with sufficient detail the item and the actual action that is being proposed. This handout is designed to assist the public official in calling for action on both simple and complex items.

Simple Items With Little Or No Discussion: For certain items on the agenda, very little if any discussion is needed. Approval of the consent calendar is an example. If the mayor or chair asks for a motion to approve the consent calendar, an individual need merely to respond “so moved”¹ or “I move to approve the consent calendar.” This approach may be used for other actions by inserting the identity of the item to be approved.

More Complex Items With Discussion: For items involving a detailed staff report, complex issues, controversy or a great deal of public discussion, it is important for any motion to clearly identify what action is being proposed by the decision making body and the identity of the project or item. This eliminates confusion and allows anyone entering the meeting (or turning on the television) to understand what item is being discussed and the action that is being proposed. It also creates a clean record for the decision making body.

Staff reports generally include a “*recommendation*” section that can be read as an actual motion if this is the action that the decision making body wishes to follow. However, any deviation from the recommendation or changes in the conditions of approval must be cited. For example, a motion to approve a conditional use permit might be made as follows:

“I move to approve a conditional use permit for Good Grub Restaurant located at 360 Main Street to permit outdoor eating subject to the findings and conditions in the attached resolution, with the one change in condition #6 that the bar area must be closed at midnight.”

The illustrated motion contains the action, the description and location of the project, cites the resolution and the findings and conditions of approval, as well as a proposed change in one of the conditions of approval.

A decision not to follow a staff recommendation should include findings of fact to support the decision. For example, such a motion contrary to the one made above would be:

“I move to reject the application for a conditional use permit for outdoor eating to Good Grub Restaurant located at 360 Main Street based on the fact there are residential neighbors on two sides of the restaurant that are currently experiencing noise and other problems from the restaurant that would only increase if outdoor dining were permitted.”

If this motion were passed, staff would have sufficient information to prepare a resolution rejecting the application for a conditional use permit based on actual findings.

During a meeting, the City Attorney (or staff advisor if there is no City Attorney staffing the meeting) can assist in properly framing a motion if there is any question as to how an action should be proposed.

¹ This is because the motion requested has already been articulated.



OPEN GOVERNMENT TIPS FOR EFFECTIVE MEETINGS DISCLOSE A CONFLICT OF INTEREST

BACKGROUND: Government Code Section 87105 sets forth the requirements of what statements and actions a public official must take if he/she has a financial conflict of interest under the Political Reform Act on an item that is on the agenda for discussion or action.¹ This memo is intended to inform members of the City Council and other City Commissions and Boards when and how to properly disclose a conflict of interest on the record, as well as what to do when such an item is being considered.

WHEN TO DISCLOSE A CONFLICT OF INTEREST: A conflict of interest on an item must be disclosed as soon as the item is announced, but immediately prior to any presentation or consideration of the item. In such cases, it is best to inform the Mayor or Chairperson that you have a conflict of interest on a particular item so that they can make sure you have an opportunity to make your disclosure prior to any discussion of the item.

WHAT TO SAY/HOW MUCH TO DISCLOSE: It is not enough to state that you have a conflict of interest. Pursuant to Government Code Section 87105, you must provide *sufficient detail to inform the public why you have a conflict of interest.*

Conflict Due to Residence: If the conflict of interest is due to the location of your residence, you do not need to provide the address of your residence. However, you do need to state that you reside within 500 feet of the item under consideration.

Conflict Due To Business: If the conflict is due to the location of your business, you should disclose that reason and provide the address of your business.

WHAT TO DO DURING DISCUSSION OF THE ITEM: Once the conflict has been disclosed on the record, you must leave the room completely until after the discussion or action on the item is completed. You are not allowed to sit in the audience.

Exceptions: There are two exceptions to this requirement:

- 1) If the item is on the consent calendar, you may remain seated unless another member removes the item from the consent calendar for further discussion.
- 2) If you or an immediate family member have a personal interest in the item due to complete ownership of a residence or business that is impacted by the decision, you may speak during the public comment portion of the item.

¹ Any question regarding whether or not you may have a conflict of interest should be discussed prior to the meeting with the City Attorney.