

THE QUASI-JUDICIAL PROCESS AND CITIZEN ACCESS TO THE CITY COUNCIL

One of the most misunderstood aspects of local government is the Quasi-Judicial process, and the limits that process imposes on citizen access to their elected representatives. Residents who are active in their community and are accustomed to contacting City Council members to discuss local affairs often find it hard to understand why they cannot communicate with those same officials about certain types of public matters.

The purpose of this article is to provide answers to some of the most frequently asked questions about the quasi-judicial process.¹

The Definition of Quasi-judicial

Colorado courts have defined quasi-judicial actions as those which:

generally involve a determination of the rights, duties, or obligations of specific individuals on the basis of the application of presently existing legal standards or policy considerations to past or present facts developed at a hearing conducted for the purpose of resolving the particular interests in question.”²

In simpler terms, a quasi-judicial case is one in which the Council members are acting as judges rather than legislators; the Council is not making new laws, but rather applying existing laws to specific facts, concerning one person or a small number of people rather than the entire City, at a public hearing.

Quasi-judicial cases

The most common quasi-judicial cases are rezoning decisions affecting an individual property or a small number of properties.³ Subdivision applications, special use reviews and variances (heard by the Board of Adjustment) are other examples of quasi-judicial processes.

How quasi-judicial matters differ from legislative matters

The primary role of the City Council is legislative; i.e., the development and implementation of laws and policies that apply Citywide. Examples of legislative action include the adoption of new zoning regulations or amendments to Municipal Code provisions concerning parking restrictions on public streets.

With legislative actions, a public hearing is frequently held at which anyone can comment on the merits of the proposed law. However, the “legislators” on the City Council may also receive evidence from other sources, including citizen input received in person, by phone or by email, and may consider any of that evidence, as well as their own personal beliefs and biases in deciding whether to adopt the legislation.

¹ The Lakewood City Attorney’s Office prepared this article as a brief summary of relevant laws and judicial decisions. It is intended to be a general reference tool only, and should not be considered a comprehensive or detailed recitation of the law.

² *Cherry Hills Resort v. Cherry Hills Village*, 757 P.2d 622 (Colo. 1988).

³ The case that established rezoning cases as quasi-judicial in Colorado is a Lakewood decision, *Snyder v. City of Lakewood*, 542 P.2d 371 (1975). In addition to Colorado, Delaware, the District of Columbia, Florida, Idaho, Kentucky, Oregon and Washington consider rezoning cases to be quasi-judicial. 6-38 *Zoning and Land Use Controls* § 38.04 (2011).

On occasion, however, the City Council is confronted with a quasi-judicial matter, and is required to operate as a panel of “judges” rather than as legislators. In contrast to legislative actions, in quasi-judicial matters, all of the evidence that may be considered by the Council must be presented at the public hearing. This procedure is required in order to afford due process to those individuals who may be affected by the decision.⁴

Why the “judges” cannot discuss quasi-judicial matters

Just as a judge in a civil or criminal case cannot speak to one party without the other party or parties present,⁵ the “judges” on the City Council are prohibited from obtaining evidence from either side of the dispute outside of the public hearing.⁶ This rule, referred to in legal terms as regulating “ex parte” communication, has been developed over the years 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.⁷ Ex parte communication includes not only oral communication, but written, electronic, and graphic communication as well.

The rule prohibiting “ex parte” communication can be frustrating to citizens who assume that they always have access to their elected officials. However, it is important to remember that this rule is designed to protect the rights of all involved – applicants, opponents, and other interested parties – affording the opportunity for a fair hearing before unbiased decision makers.⁸

If and when a Council member does receive information about a case outside of the public hearing, the member is expected to disclose the communication, in as much detail as possible, to the entire Council at the beginning of the public hearing. If the Council member sincerely believes that the “ex parte” communication did not affect his or her ability to decide the case fairly, impartially and based solely on the evidence presented at the hearing, the member can participate in the hearing after the disclosure; otherwise, the member must “recuse” or remove him or herself from the discussion and the vote.⁹

⁴ “Quasi-judicial proceedings must be conducted in accordance with procedural due process, and fundamental fairness is the cornerstone of due process. *Scott v. Englewood*, 672 P.2d 225 (Colo.Ct.App. 1983).

⁵ The Colorado Code of Judicial Conduct, Canon 3(A)(4), provides that a judge should “neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding.”

⁶ See C.R.S., § 24-4-105(14), prohibiting ex parte materials in state administrative proceedings; *Colorado Energy Advocacy Office v. Public Service Co. of Colorado*, 704 P.2d 298 (Colo. 1985) (in quasi-judicial proceedings, agency may not base decision on ex parte information of which the parties are not given notice); *Zuvicoh v. The Industrial Comm. of Colorado*, 544 P.2d 641 (Colo. App. 1975) (case remanded because court could not determine whether quasi-judicial agency relied on ex parte communication); *Thompson v. Industrial Comm. Of Colorado*, 520 P.2d 139 (Colo. App. 1974) (court vacated decision based on claim that lower tribunal relied on ex parte communication).

⁷ Appellate decisions regarding ex parte contacts in municipal zoning cases are rare. 6-38 *Zoning and Land Use Controls* § 38.04 (2011). One state that has squarely addressed the issue, Idaho, ruled that ex parte contacts by city council members considering a quasi-judicial zoning matter violated the constitutional right to due process. *Idaho Historic Preservation Council, Inc. v. City Council of Boise*, 8 P.3d 646 (Idaho 2000).

⁸ “Ex parte contacts and communications related to the merits of an administrative zoning decision are considered highly improper and may be held sufficient to prejudice the affected person’s procedural due process rights to a ‘fair hearing;’ courts in some cases have extended the right to a fair hearing to not only applicants but to neighboring owners who object to the application. Rathkopf, *The Law of Zoning and Planning* § 32:13 (2010). “[Ex parte] 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-maker.” *Advising Quasi-Judges*, *The Colorado Lawyer* 33-3 March 2004.

⁹ Failure to properly disclose ex parte contact may result in the invalidation of the tribunal’s ultimate decision. *Booth v. Town of Silver Plume*, 474 P.2d 227 (Colo. App. 1970).

How citizens can communicate their concerns to the City Council in quasi-judicial cases

The public hearing is an opportunity for anyone to express his or her views to the City Council on a quasi-judicial matter. The City posts the date, time and place of every public hearing in the designated location at the Lakewood Civic Center, and also provides that information on this website, www.lakewood.org. If you are unable to attend the public hearing, you have the opportunity to submit your comments in writing, preferably at least seven days before the hearing. All written comments are conveyed to the City Council members and become part of the record of the case, alongside the testimony and other evidence presented at the public hearing.

The consequences of improper ex parte communication

The City's adherence to the rules governing quasi-judicial proceedings is not merely a matter of honoring long-standing legal traditions. When a decision-maker does engage in ex parte discussions about a case, and then proceeds to participate and vote on the matter without making the necessary disclosure, anyone adversely affected by the decision has the right to appeal the decision to district court. Appeals from quasi-judicial decisions can be difficult to win, because the court gives deference to the local government's interpretation and application of its own laws. Nevertheless, if the appealing party can produce evidence that the governing body failed to provide due process, the likelihood of the decision being vacated and the matter being sent back to the City Council for a second look increases dramatically. Holding a second hearing on a single matter obviously results in significant expense and delay for the City and for the applicant, to say nothing of the negative press the City would inevitably receive from local media outlets.

For more on the quasi-judicial process, please call the City Attorney's Office at 303-987-7460.