

**COUNTY OF SAN LUIS OBISPO BOARD OF SUPERVISORS
AGENDA ITEM TRANSMITTAL**

(1) DEPARTMENT Administrative Office	(2) MEETING DATE 6/2/2015	(3) CONTACT/PHONE Leslie Brown and Morgan Torell 781-5011	
(4) SUBJECT Submittal of a report on options for addressing ex parte communications for members of the Board of Supervisors. All Districts.			
(5) RECOMMENDED ACTION It is recommended that the Board: 1) Receive and file this report; and 2) Provide staff direction as necessary.			
(6) FUNDING SOURCE(S) N/A	(7) CURRENT YEAR FINANCIAL IMPACT N/A	(8) ANNUAL FINANCIAL IMPACT N/A	(9) BUDGETED? N/A
(10) AGENDA PLACEMENT <input type="checkbox"/> Consent <input type="checkbox"/> Presentation <input type="checkbox"/> Hearing (Time Est. ___) <input checked="" type="checkbox"/> Board Business (Time Est. <u>45 minutes</u>)			
(11) EXECUTED DOCUMENTS <input type="checkbox"/> Resolutions <input type="checkbox"/> Contracts <input type="checkbox"/> Ordinances <input checked="" type="checkbox"/> N/A			
(12) OUTLINE AGREEMENT REQUISITION NUMBER (OAR) N/A		(13) BUDGET ADJUSTMENT REQUIRED? BAR ID Number: <input type="checkbox"/> 4/5 Vote Required <input checked="" type="checkbox"/> N/A	
(14) LOCATION MAP N/A	(15) BUSINESS IMPACT STATEMENT? No	(16) AGENDA ITEM HISTORY <input checked="" type="checkbox"/> N/A Date: _____	
(17) ADMINISTRATIVE OFFICE REVIEW The Administrative Office prepared this item.			
(18) SUPERVISOR DISTRICT(S) All Districts			

County of San Luis Obispo



TO: Board of Supervisors

FROM: Leslie Brown, Administrative Analyst
Morgan Torell, Administrative Analyst

DATE: 6/2/2015

SUBJECT: Submittal of a report on options for addressing ex parte communications for members of the Board of Supervisors. All Districts.

RECOMMENDATION

It is recommended that the Board:

- 1) Receive and file this report; and
- 2) Provide staff direction as necessary.

DISCUSSION

Background

On March 10, 2015, the Board of Supervisors unanimously directed staff to bring an agenda item to the Board related to disclosure of ex parte communications for discussion. Ex parte contacts or communication are communications between a Board member and a party outside of a public hearing (*ex parte* is Latin for "from one side only"). It includes both written (i.e. e-mails, letters, texts, and instant messaging) and oral communications (i.e. face-to-face conversations and phone calls) not of public record.

The Board of Supervisors is a body that considers quasi-judicial (adjudicatory), administrative, and legislative matters. For example, the passage of a zoning ordinance is a legislative act which may be preceded by a public hearing, while the application of the zoning ordinance for an appeal of a use permit is a quasi-judicial hearing. Nuisance abatements, permit revocations, fee waivers, and appeals of use permits or subdivision maps are all examples of quasi-judicial hearings. They are known as quasi-judicial hearings because they mimic a judicial proceeding, with the Board sitting like a judge to hear and weigh evidence and testimony, resolve disputes, draw factual and legal conclusions and make findings.

The concern about ex parte communications in quasi-judicial proceedings flows from constitutional and statutory mandates that hearings be conducted fairly. Parties in quasi-judicial hearings have the right to State and Federal constitutional procedural due process. If outside information is relied upon for quasi-judicial proceedings and not all parties directly affected are made aware of that information, it can influence a decision without the opportunity for rebuttal or comment by other parties. This could constitute a violation of an applicant's due process rights.

Currently, the Board Rules of Procedure do not address ex parte communications. Should ex parte communications occur related to quasi-judicial matters, all such communications are to be disclosed on the record as required by law. The County Planning Commission is an appointed body and currently has a broad policy (shown below) related to reporting ex parte communication for all Planning Commission agenda items. However, the Planning Commission's role is primarily adjudicative, whereas the Board of Supervisors (an elected body) has a much broader role: administrative, quasi-judicial and legislative.

Planning Commission language related to ex parte communication:

“To the extent any member of the Commission has ex parte contacts, those contacts shall be reported to the Commission in open public session, including sufficient detail so as to provide adequate information to the other Commissioners and the public as to the substance of the contact. To the extent that a Commissioner deems it necessary, the Commissioner may also file with the Secretary to the Commission, a written statement explaining a public ex parte contact. This provision does not exempt the member from making a public ex parte disclosure.”

Ex parte communication policies in other counties

Staff obtained information from 37 of the 58 counties regarding the Rules of Procedure for their county boards of supervisors. The majority of these counties (81%) have rules in place that do not include explicit requirements related to disclosure of ex parte communications. Four of the 37 counties do not have Rules of Procedure for their board of supervisors in place. Three of the 37 counties do have rules regarding disclosure of ex parte communications associated with quasi-judicial matters before the Board; Fresno, Sonoma and Santa Barbara counties. Below are the three examples of boards of supervisors Rules of Procedure that address ex parte communications.

The County of Fresno Rules related to disclosure of ex parte communications apply to all planning, zoning, and subdivision matters of a quasi-judicial nature (or like judicial matters), and do not apply to matters of a broad legislative policy character. Furthermore, the Rules define ex parte communications as personal or telephone contacts by individuals, County staff members, or other agency representatives outside of the hearing where representations or arguments are made upon the specific proposal. Verbal communications are to be disclosed by each Board member at the hearing on the project, including the substance of the information obtained through ex parte communication and the source of such information. The Rules also state that written communications shall not be considered prior to the hearing (except for the staff report and correspondence by the Clerk). Instead, a member receiving a written communication not included within the packet will, upon realizing its content and purpose, place it on file with the Secretary or Clerk.

Sonoma County Rules of Procedure state that Board members may meet with interested parties or go on site visits prior to a public hearing related to a quasi-judicial matter, but Board members shall disclose these communications, and any material facts learned from the communications or site visits that are not in the staff report or public record, prior to the opening of the public hearing.

Santa Barbara County has policies and protocols related to agenda preparation, as well as separate Rules of Procedure governing planning, zoning, and subdivision hearings before the Board and Planning Commission. The Rules of Procedure for planning, zoning, and subdivision hearings before the Board require that any member who has received evidence outside of a hearing or has viewed the subject property, or is familiar with the subject property, fully disclose at the hearing such evidence and observations and familiarity with the property so that the applicant, opponent, interested persons, and other members of the decision-making body may be aware of the facts or evidence upon which the member is relying and have an opportunity to controvert them. Additionally, Santa Barbara County’s Rules of Procedure state that if site visits occur prior to a hearing, the member(s) making the visit shall publicly report such fact, and may be accompanied by a staff member for the purpose of pointing out material, physical characteristics only. No other evidence or argument may be received.

Options for the Board

Your Board could consider one of the following related to the disclosure of ex parte communication, defined as the receipt of information, oral or written, by a Board member, outside of a Board of Supervisors’ meeting.

- 1) **No change to Rules of Procedure, but continue to disclose ex parte communications on quasi-judicial matters as required by law.**

This option involves no change to the Rules of Procedure and continues the requirement that Board members disclose all ex parte communications related to the subject matter of a quasi-judicial hearing, as required by law. No additional action would be necessary if this option is chosen.

- 2) **Amend Rules of Procedure to require disclosure of ex parte communications for quasi-judicial matters only.**

This option involves incorporating specific language about disclosing ex parte communications related to the subject matter of a quasi-judicial hearing into the Board's Rules of Procedure. This option memorializes the process already in place. It states that Board members shall report ex parte communications for quasi-judicial matters.

Possible language for this option:

"To the extent any member of the Board has ex parte communications related to the subject matter of a quasi-judicial hearing before the Board, those communications shall be reported to the Board in open public session, including sufficient detail so as to provide adequate information to the other members of the Board and the public as to the substance of the communication. To the extent that a member deems it necessary, the member may also file with the Clerk of the Board a written statement explaining a public ex parte communication. This provision does not exempt the member from making a public ex parte disclosure."

3) **Amend Rules of Procedure to require disclosure of ex parte communication for all matters on the Board's agenda (regardless of whether quasi-judicial in nature or not).**

This option incorporates a new policy into the Board's Rules of Procedure that would require disclosure of ex parte communications for all matters on the Board's agenda. This option could result in a considerable amount of time at each Board meeting as the required disclosures would include Board member meetings with special interest groups, constituents, and service providers, as well as receipt of related written communications, to name a few.

Possible language for this option:

"To the extent any member of the Board has an ex parte communication related to matters before the Board, the communication shall be reported to the Board in open public session, including sufficient detail so as to provide adequate information to the other members of the Board and the public as to the substance of the communication. To the extent that a member deems it necessary, the member may also file with the Clerk of the Board a written statement explaining a public ex parte contact. This provision does not exempt the member from making a public ex parte disclosure."

These are three possible options on the spectrum between taking no action or including a rule requiring disclosure of all ex parte communications regarding all Board agenda items. Additional options may require further research in order to clearly define the scope of the requirement to disclose ex parte communications.

OTHER AGENCY INVOLVEMENT/IMPACT

Staff consulted with County Counsel in developing this report.

FINANCIAL CONSIDERATIONS

None

RESULTS

To provide discussion related to ex parte communications for members of the Board.