



01/24/2017

To: Gearhart Planning Commissioners / City Council
From: Chad
RE: Site visits

After the last planning commission meeting I was curious to know more about site visits. I found the attached article and thought it was good. Even though the article was written 16 years ago the concepts and caveats still apply. After reading the article I did a little more research to get the League of Oregon Cities take on the issue. I found the case law below:

- From the League of Oregon Cities handbook: "A site visit by the governing body is not technically an ex-parte contact, but will be treated like one if not disclosed because a decision based on a site visit is otherwise impermissibly based on evidence outside of the record. See *McNamara v. Union County*, 28 Or LUBA 396, 398, fn. 1 (1994); *Angel v. City of Portland*, 21 Or LUBA 1, 8-9 (1991)."

Site visits are important and valuable. The attached article will help you treat them appropriately.

Regards,

A handwritten signature in black ink, appearing to be "CS" with a stylized flourish underneath.

Chad Sweet
Gearhart City Administrator

Site Visits: Necessary But Tricky

by C. Gregory Dale, AICP

Consider this scenario. As part of your preparation for an upcoming planning commission meeting, you accept an offer from an applicant to tour a site that is subject to a zone change request. After all, how can you make a decision about a zone change without seeing the property, and who is better able to show you the property than the owner? However, as you are touring the site, you notice nearby residents suspiciously watching the tour from driveways and back yards. For reasons that you cannot fully explain, you feel guilty, as if you were doing something improper. Are you doing anything wrong?

In previous articles, I have discussed the concept of "ex-parte" contacts. Ex-parte contacts are those communications that occur outside the public forum. Before discussing site visits, it is helpful first to review the ex-parte issue, because it has a bearing on how to deal with site visits.

From a due process standpoint, planning commissions must provide equal access to information to all interested parties. If you are going to consider information in making a decision, then that information must be in the public realm, so that anyone has the opportunity to agree with or dispute it. As importantly, planning commissions must be careful not to give even the *impression* that they have information not available to the public.

Ex-parte contacts inevitably result in individual commissioners obtaining information that affects their decision making process. Simply disclosing the nature and content of the contact at a commission meeting does not solve the problem; no matter how complete your disclosure, it is unlikely to convey the full extent of the ex-parte discussion. Nor will disclosure erase the suspicions that many people have when they hear

about these contacts. For these reasons, I have always urged commissioners to avoid ex-parte contacts entirely. People should be encouraged to attend commission meetings to present their opinions in public.

LET'S FACE IT: WHEN SOMEONE WANTS TO GIVE YOU A GUIDED TOUR, THEY ARE DOING SO TO TRY TO CONVINCE YOU TO AGREE WITH THEIR POINT OF VIEW.

This is not to suggest that ex-parte contacts are necessarily illegal. In some states, under some circumstances, they may be. As always, I urge you to first check with your legal counsel to understand the law in your state or community. My concern is more with the *appearance* of impropriety. The integrity of your commission is paramount, and it does not take much for that integrity to be damaged.

What does this have to do with site visits? The answer is that site visits are, in fact, a form of ex-parte contact, in that they occur outside the public forum. On the other hand, they are a unique type of ex-parte contact, for several reasons. I believe that any reasonable person would agree that in order to make an intelligent decision about a particular property, a commission member must not only view the property, but the surrounding area as well. While many planning staff provide photographs or video of property and surrounding areas as part of their staff reports and presentation, this still cannot duplicate the personal experience of a site visit.

Thus, the issue becomes how to

conduct site visits while respecting the sensitivities of ex-parte contacts. My experience is that communities have successfully handled site visits in several ways.

First, the most straightforward approach is to conduct your own site visit alone. In most cases, a site visit can be done from the public right-of-way (i.e., from a car or the sidewalk). There is no need to take a guided tour of the neighborhood by a resident, or a guided tour of the property by the owner. Let's face it: when someone wants to give you a guided tour, they are doing so to try to convince you to agree with their point of view. Similarly, when someone sees you on the "guided tour," they are going to be suspicious, and that suspicion will reflect poorly on your role as an objective commissioner. If you walk the area and are approached by the applicant or neighbors, handle it in the same manner that I suggest you handle any other ex-parte contact: politely explain that you are not able to discuss a matter pending before the commission and encourage them to appear before the commission to express their viewpoint.

Also, take a moment at your meeting to disclose for the record that you made a site visit. It only makes you look that much more prepared.

In those cases where the size or features of the property, or the nature of the use makes it necessary to go onto the site, I suggest you have your staff make arrangements for a site visit. The staff should accompany you without the owner/applicant.

Some communities organize group site visits for their commissions. This can be helpful in that it ensures that everyone is seeing the same thing. However, this would typically be considered a public meeting that is subject to public notice. If your community is interested in this

approach, I urge you to work with your legal counsel to structure it in a legally defensible manner. For example, if you travel to a site in a single vehicle, you should not be discussing the merits of the case with each other. Also, you may need to make provision to allow others (such as the applicant, neighbors, and other interested citizens) to accompany you at the site. There are many "open meetings" aspects to group site visits that must be considered.

While site visits are a critical part of your preparations, like all matters of government they must be handled with caution. Be guided by two principles. First, understand what is legally acceptable in your community. Second, avoid any action that creates even an impression of impropriety. ♦

C. Gregory Dale is a Principal with the planning and zoning firm of McBride Dale Clarion in Cincinnati, Ohio. Dale manages planning projects and conducts training for planning officials throughout the country.



He is also a former President of the Ohio Chapter of the American Planning Association.

Site Visit Guidelines

by Ken Lerner

Site visits are a critical part of the review process for major projects. Here in Burlington, Vermont, we formally announce the time and place of any site visit during the public hearing on a project. Members of the public are welcome to attend. In order to help avoid ex-parte contacts and inappropriate comments during the site visit, we have prepared "site visit guidelines" which are distributed to all those attending the site visit. In addition, either the commission chair or a staff member verbally summarizes the guidelines at the start of the visit.

Site Visit Guidelines:

1. Site visits should be conducted with a staff person in charge not the applicant, commissioner, or neighbor.
2. The commission chair and/or staff should explain the purposes and rules of the site visit at the beginning of the site visit to prevent misunderstandings.
3. The purpose of the site visit is to familiarize the commissioners with the site and how the proposed project fits into the site; it is not a hearing; statements and questions from neighbors should be presented at the hearing so that these can become part of the record; if the appli-

cant is willing, questions can be addressed to him or her at the end of the site visit.

4. Neighbors should refrain from side conversations with commissioners; this could be considered an ex-parte contact and result in a commissioner not being able to act on a project.
5. Commissioners should refrain from offering suggestions or opinions about the project during the site visit; such discussions should occur at the specific meeting or hearing scheduled on the project.
6. Specific commission concerns should be directed to staff so these concerns can be researched and addressed prior to action by the commission.
7. Abutters and other neighbors are encouraged to put their concerns in writing for the commission in advance of the scheduled meeting or hearing.
8. Staff should prepare a brief summary of the site visit as part of the record (which commissioners attended, etc.).

In conclusion, it might be helpful to keep in mind what a commissioner wisely stated on a recent site visit; that the applicant and interested parties should consider her a video camera and point and describe what they felt should be seen.

Ken Lerner is Assistant Planning Director for the City of Burlington, Vermont.



Online Comments:

"The distinction between commissioners and staff members is important to keep in mind. Typically, the staff's whole job is to engage in "ex-parte" contacts and information gathering, and then to help bring it into the public realm for commissioners (the decision makers) to deliberate on. Staff, applicant, and interested public at the hearing can be seen as the lawyers in a court case; the Board/commission is to act as judge/jury, and only respond to the "facts" as presented. Just as judges should not bring their own prejudices to a legal case, so too should a commissioner be wary about forming opinions based on information that is not presented to them (or by them) in the public forum."

— Ezra Glenn, Editor, *New England Planning*, Boston, MA

"Bully for Dale! The perception of impropriety is usually the murderous culprit that undermines the integrity of government; local, state and federal. Site visits are a must — that's a given.

If you can't learn to be an expert horseman by reading a book, how can you plan a quality community from behind a desk? The issue then becomes, 'How do you perform a site visit appropriately?' A governing body, and its appointed officials, get very few opportunities with the public trust — once that is violated you can't easily regain it. Be careful, deliberate and honest; to yourself and the process."

— J. Martin Sanchez, Senior Planner, City of McKinney, TX

"I frequently conduct site visits alone to observe conditions or issues expressed in the staff reports such as traffic, parking, road and drainage requirements, proximity to other uses and topography. I find I get a better feel for how a proposed use might perform if I can see the location three-dimensionally.

I avoid contact with anyone and don't enter the property. If an applicant or opponent tries to lobby me, I tell them it's not appropriate for me to receive information away from the other commissioners and that they need to bring any doc-

uments, photos, videos, neighbor's corroboration, etc., to the public hearing where all commissioners, the media and the public can hear it together. If a commissioner conducts a site visit, our legal counsel advises us to put it into the record up front, stating what we 'saw, did, heard, said or smelled,' as an observation, not a conclusion. In one instance a commissioner stated what he had seen only to discover he was looking at the wrong property! This just underscores the importance of disclosure. Opinions are to be formed or fine tuned after the public hearing."

— Frieda Camotta, Planning Commissioner, Lake County, California

"I found the article to be very informative and enlightening in that I don't think that the typical Plan Commissioner would consider a site visit ex-parte communications. It is important to bear in mind that ex-parte communications includes the neighbors and general public as well as the land owner or developer."

— Theresa R. Koehler, AICP, Planning Consultant, Peoria, Illinois