

# Bending Your Ear

By C. Gregory Dale, AICP

Consider the following scenario: you are approached by a developer who is considering acquiring a large parcel for development into a major retail facility. He asks if he can “bend your ear” a bit, and gain an understanding of how you might view a zone change on this property to permit the facility. Since he has not yet purchased the property, he requests that you keep his inquiry confidential so as not to inflate the asking price for the property. In the interest of wanting to be helpful, you agree to keep the information confidential. During the conversation, you indicate your belief that the zone change is a good idea.

Several weeks later, and before any application has been submitted by the developer you spoke with, a different developer applies for a zone change for property across the street from the parcel the first developer spoke with you about.

What are your ethical obligations when you participate in the review of this proposed zone change?

There are several issues. The first relates to the right of people to have full access to information that is the basis of a decision by a public official. Whether one is in favor of, or opposed to, a particular development, people whose rights are potentially affected by your decision have a right to access the same information that you, as a planning commissioner, will rely on as a basis for your decision. They have a right to either agree with or dispute that information.

Second, individuals whose rights may be affected by your decision have the right to an unbiased decision maker. Reliance upon “inside information” is something that could create a bias in your own mind. Similarly, taking a position on a matter before it comes to a public hearing may reflect an inherent bias.

The first mistake made by the planning commissioner in our scenario was to agree to meet with the developer. This meeting

would be considered an “ex-parte” contact, meaning that it occurred outside the public realm. As I indicated in a previous column [*“Ex-Parte Contacts” in PCJ #2*], ex-parte contacts should be avoided, particularly when they relate to matters that are likely to appear before the commission for action.

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Obviously, commissioners can and do have outside contacts with many members of the community, including developers. While such contacts are often appropriate, a line must be drawn when they involve matters which the commission is likely to act on in its capacity as a review body (e.g., when reviewing development proposals or rezoning requests). Moreover, the fact a contact occurs on a matter that is not yet formally before the commission does not eliminate the problem.

The second mistake was to accept something as confidential information. Planning commissioners are, in fact, public officials. Any public official, including those serving on commissions, should as a general rule consider information provided them to be public information. [Note: I do not mean to include information that the commission, as a body, is legally authorized to treat as confidential — such as discussion of pending litigation or personnel matters. Your commission’s attorney can brief you on when it’s appropriate for the commission to treat

information as confidential].

If information you obtained through a confidential discussion ends up having relevance to a public matter before the commission, you will have an ethical obligation to disclose it. There is little reason to place yourself in the potentially awkward and embarrassing position of having to breach a promise of confidentiality — it’s best simply not to make such a promise to begin with.

The situation described above is different than a situation where you have knowledge about a particular property or development from previous experience through non-confidential sources. As a member of a community you often have relationships or contacts that reveal relevant information. Certainly this cannot be avoided and presents no particular problem as long as you disclose that information for public consideration. For example, if you are aware from earlier experience that a property is subject to soil erosion, simply disclose that knowledge and let the experts either confirm or dispute it.

The third, and final, mistake made by the “helpful” commissioner in our hypothetical situation was to give an opinion about the merits of the possible rezoning. A commissioner’s credibility is undermined by announcing a position on a matter before the public hearing occurs. Moreover, prejudging matters harms the credibility of the commission as a whole by raising doubts about the integrity of the decision-making process. ♦

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