

# SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

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November 15, 2012

**TO:** Commissioners and Alternates  
**FROM:** Lawrence J. Goldzband, Executive Director (415/352-3653 lgoldzband@bcdc.ca.gov)  
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**SUBJECT: Memorandum on Ex Parte Communications**  
(For Commission information only)

## Summary

Ex parte communications raise due process and fair hearing concerns because Commission decisions must be based on information that has been provided to all parties and the public, and also must be based on material contained only in the administrative record. This memorandum explains the prohibition on ex parte communications, and Commissioners' duties to disclose and report such communications if they occur to preserve the integrity of the Commission's decision-making process. The Commission's regulations prohibit ex parte communications in adjudicatory actions (permit, consistency and enforcement actions) before the Commission. (Cal Code Regs., tit. 14, § 10283(a).) If a prohibited ex parte communication nevertheless occurs, the regulations require Commissioners to disclose the content of the communication on the record, and submit a memorandum to the Executive Director that identifies the party(s) involved, the substance of the conversation, and any response to the communication. (*Id.*)

## Background

**Ex Parte Communications:** An ex parte communication is any oral or written communication regarding a pending adjudicatory proceeding between a Commissioner and a party to the proceeding or a member of the public that does not occur at a Commission public hearing, Commission workshop or other Commission proceeding, or on the official Commission record for the proceeding. (Cal. Code Regs, tit. 14, § 10281.) An ex parte communication does not include communication between a Commissioner and a member of the Commission's staff. (Gov't Code §11430.30.)

**Adjudicatory Proceedings:** The prohibition on ex parte communications applies only to adjudicatory proceedings pending before the Commission. Adjudicatory proceedings, also called "quasi-judicial proceedings," are proceedings that affect the rights of a specific party, such as permit proceedings, enforcement actions, and federal consistency determinations or



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certifications. (*Id.*, § 10282.) A proceeding is pending when a permit application is filed or an enforcement action is initiated. (Gov't Code §11430.10(c).)

Permitted Communications: Ex parte communications are not prohibited for quasi-legislative proceedings before the Commission. Quasi-legislative proceedings are proceedings that affect the rights of a class of parties, such as Bay Plan amendments, legislation, or the adoption of Commission regulations. (*Id.*, § 10283(f).) However, because quasi-legislative proceedings must also be based on a public record, ex parte contacts made during quasi-legislative proceedings also should be fully disclosed on the record so that the record for the proceeding is complete.

Prohibited Communications: Commissioners are prohibited from engaging in ex parte communications for adjudicatory proceedings pending before the Commission, and must make every effort to refrain from such communications. (*Id.*, § 10283(a).) However, if an ex parte communication nevertheless occurs, BCDC regulations require disclosure of the content of the oral or written communication on the record before or during the Commission's consideration of the matter. (*Id.*) In the case of written ex parte communications, Commissioners must send a copy of the communication and any response by the Commissioner to the Executive Director as soon as practicable. (*Id.*, § 10283(c).) In the case of oral communications, Commissioners must send the Executive Director a memorandum for the record that identifies the party(s) who made the communication and describes the substance and any response to the communication. (*Id.*, §§ 10283(d) and (e).) The form for reporting oral ex parte communications is attached to this memorandum. The report also may be provided to the Executive Director electronically. The Executive Director is required to notify all parties to or interested in a proceeding that a Commissioner has engaged in an impermissible ex parte communication, provide copies of the report or written communication to the parties or interested persons, and provide those parties or persons an opportunity to address the Commission concerning the communication within 10 days. (*Id.*, §§ 10286, 10287.)

Penalties: Ex parte communications, if prejudicial, can lead to the invalidation of a Commission permit or enforcement decision for failure to provide due process of law, and a fair and unbiased administrative process that is not based on evidence in the record. (Code of Civil Pro. § 1094.5.)

Site Visits: Commissioners may take individual field trips to the site of a proposed project or pending enforcement action if they disclose the substance of what they observed on the trip to the Commission as soon as practicable after the visit. Any ex parte communications that occur during a field trip trigger the disclosure duties noted above. (*Id.*, § 10289.)