

# San Francisco Bay Conservation and Development Commission

455 Golden Gate Avenue, Suite 10600, San Francisco, California 94102 tel 415 352 3600 fax 415 352 3606

August 25, 2016

**TO:** Commissioners and Alternates

**FROM:** Larry Goldzband, Executive Director (415/352-3653; [larry.goldzband@bcdc.ca.gov](mailto:larry.goldzband@bcdc.ca.gov))  
Marc Zeppetello, Chief Counsel (415/352-3655; [marc.zeppetello@bcdc.ca.gov](mailto:marc.zeppetello@bcdc.ca.gov))  
John Bowers, Staff Counsel (415/352-3610; [john.bowers@bcdc.ca.gov](mailto:john.bowers@bcdc.ca.gov))

**SUBJECT:** Ex Parte Communications

Commissioners and Alternates:

In November 2012, former Chief Counsel Tim Eichenberg provided you with a summary of your responsibilities in the event that you participate in an *ex parte* communication. A copy of his memorandum is attached.

BCDC's regulations (14 CCR Section 10283(a) prohibit *ex parte* communications in adjudicatory actions, but go on to say that "...if such a prohibited communication occurs, any Commission member who receives an *ex parte* communication...shall disclose the content of the communication on the record."

Many of you will remember that an *ex parte* communication is a communication whose subject is a "pending adjudicatory proceeding" (i.e., permit application, consistency review, and enforcement action). Discussions about policy issues, such as state or federal legislation or the development of Bay Plan Amendments, are not subject to *ex parte* rules. Similarly, discussions about possible applications that have not been submitted to the Commission are not discussions about pending adjudicatory proceedings.

While it has been customary for BCDC Commissioners to report on *ex parte* conversations when asked by the Chair for such a report during his or her report, BCDC regulations require Commissioners to disclose such communications in writing.

Therefore, please find attached to this memorandum a copy of the *ex parte* disclosure form prepared by Staff Counsel John Bowers. Each Commissioner who has reported an *ex parte* communication on any adjudicatory matter must complete this form and provide it to Gregory Ogata of BCDC's staff, either by mail (at the address on this memo) or electronically ([exparte@bcdc.ca.gov](mailto:exparte@bcdc.ca.gov)). Gregory will keep the completed form in a secure place at BCDC and it will be made available at the appropriate time on the public record.

The completed form disclosing the *ex parte* communication should be provided to staff at or before the meeting when the communication is disclosed, but must be provided in all cases before a public hearing on the permit application, consistency review, or enforcement matter

that is the subject of the communication. *Failing to provide the written summary sheet may compromise the Commission's decision on permit matters, so submission of the written summary of an ex parte contact is important.* If Commissioners do not want to submit written disclosures of an *ex parte* contact, s/he should refrain from *ex parte* contacts on adjudicatory matters pending before the Commission. In addition, going forward, please note that staff will provide a Commissioner a copy of the disclosure form with instructions for returning it to BCDC any time a Commissioner reports an *ex parte* communication at a BCDC meeting.

Thank you very much for your cooperation.

# San Francisco Bay Conservation and Development Commission

455 Golden Gate Avenue, Suite 10600, San Francisco, California 94102 tel 415 352 3600 fax 415 352 3606

October 16, 2014

**TO:** Commissioners and Alternates  
**FROM:** Larry Goldzband, Executive Director (415/352-3653; [larry.goldzband@bcdc.ca.gov](mailto:larry.goldzband@bcdc.ca.gov))  
John Bowers, Staff Counsel (415/352-3610; [john.bowers@bcdc.ca.gov](mailto:john.bowers@bcdc.ca.gov))  
**SUBJECT:** Ex Parte Communications

Commissioners and Alternates:

In November 2012, former Chief Counsel Tim Eichenberg provided you with a summary of your responsibilities in the event that you participate in an *ex parte* communication.

Many of you will remember that BCDC's regulations are confusing on the matter of *ex parte* communications; while 14 CCR Section 10283 prohibits such communications in adjudicatory actions, it goes on to say that "...if such a prohibited communication occurs, any Commission member who receives an *ex parte* communication...shall disclose the content of the communication on the record..."

Also, you will remember that an *ex parte* communication is a communication whose subject is a "pending adjudicatory proceeding." Discussions about policy issues, such as state or federal legislation or the development of Bay Plan Amendments, are not subject to *ex parte* rules. Similarly, discussions about possible applications that have not been submitted to the Commission are not discussions about pending adjudicatory proceedings.

While it has been customary for BCDC Commissioners to report on *ex parte* conversations when asked by the Chair for such a report during his or her report, BCDC regulations require Commissioners to disclose such communications in writing. Unfortunately, BCDC's staff have not enforced this requirement as stringently as we should.

Therefore, please find attached to this memorandum a copy of the *ex parte* summary sheet prepared by Staff Counsel John Bowers. Each Commissioner who has reported an *ex parte* communication on any adjudicatory issue must complete this form and provide it to Reggie Abad of BCDC's staff, either by mail (at the address on this memo) or electronically ([reggie.abad@bcdc.ca.gov](mailto:reggie.abad@bcdc.ca.gov)). Reggie will keep the memoranda in a secure place at BCDC and the memoranda will be made available at the appropriate time on the public record.

The summary sheet disclosing the communication should be provided to staff at or before the meeting when the communication is disclosed, but must be provided in all cases before a public hearing on the permit matter that is the subject of the communication. *Failing to provide the written summary sheet will compromise the Commission's decision on permit matters, so submission of the written summary of an ex parte contact is important.* If Commissioners do not

want to submit written summaries of an *ex parte* contact, s/he should refrain from *ex parte* contacts on adjudicatory matters pending before the Commission. In addition, going forward, please note that staff will provide a Commissioner a copy of the summary sheet with instructions for returning it to BCDC any time a Commissioner reports an *ex parte* communication at a BCDC meeting.

Thank you very much for your cooperation.

# SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

50 California Street • Suite 2600 • San Francisco, California 94111 • (415) 352-3600 • Fax: (415) 352-3606 • www.bcdc.ca.gov

November 15, 2012

**TO:** Commissioners and Alternates  
**FROM:** Lawrence J. Goldzband, Executive Director (415/352-3653 lgoldzband@bcdc.ca.gov)  
Tim Eichenberg, Chief Counsel (415/352-3655 time@bcdc.ca.gov)  
**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.)

## Ex Parte Communication Disclosure Form

Name of Commission member:

Date of disclosure:

Sender of communication and affiliation, if any (§ 10283(e)):<sup>1</sup>

Date of communication:

Subject of communication (e.g.: name and number of permit, enforcement case, etc):

Summary of communication (if oral (§ 10283(e)), provide a) “substance of the communication” and b) “any response by recipient Commission member” below. If written (§ 10283(c)), attach a copy of the communication and any response. If both oral and written, summarize below and attach written materials:

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<sup>1</sup> References are to the BCDC’s administrative regulations, California Code of Regulations (CCR), Title 14, Division 5.