

MEMORANDUM

TO: Management and Fiscal Policy Committee

FROM: ~~MM~~ Michael Faden, Senior Legislative Attorney

SUBJECT: **Worksession 2:** Bill 12-09, Ethics – Ex Parte Communications

Bill 12-09, Ethics – Ex Parte Communications, sponsored by Councilmembers Floreen, Ervin, and Leventhal, Council Vice-President Berliner, and Council President Andrews, was introduced on March 31, 2009. A public hearing was held on April 28, at which the only speakers, both of whom opposed various elements of the Bill, were former Councilmember Esther Gelman and land use attorney William Kominers (see their testimony, ©6-11 and 17-19). A Management and Fiscal Policy Committee worksession was held on July 27 at which the two Committee members present (Councilmember Navarro was absent) discussed the issues listed in the staff memo but took no action.

Summary

Bill 12-09 would further define which communications are allowed when a decision must be made on the basis of a hearing record. It would apply to on-the-record proceedings before the Council, the Hearing Examiners, and other County government quasi-judicial bodies. These **quasi-judicial proceedings** include rezonings (sectional and local map amendments) and development plan amendments before the Council and other quasi-judicial proceedings before County boards and commissions, such as the Board of Appeals and the Commission on Common Ownership Communities. It would not apply directly to the Planning Board, but would govern County officials' and employees' conduct regarding on-the-record proceedings before the Planning Board and other non-County quasi-judicial agencies.

Specifically, Bill 12-09 would amend the current *ex parte* law to:

- apply the *ex parte* restrictions to “reasonably foreseeable” proceedings – i.e. an interested party can’t talk to a decision-maker today about a zoning application they expect to file next month (see ©2, lines 8-9);
- curtail off-the-record communications to and from a decision-maker’s staff as well as the decision-maker, except for non-substantive procedural issues, and preclude a decision-maker or their staff from independently investigating any fact in a hearing record (see ©2, lines 10-18); and
- treat advice from other government agencies (e.g. the Planning Board on a matter before the Council) the same as communications from the public, rather than the same as communications from the decision-maker’s staff (which can be off-the-record) (see ©2, lines 19-22; ©3, lines 29-36).

Issues

Overview In reviewing the following issues, Council staff concurs with the County League of Women Voters (see ©16) that the legislative goal should be to “come up with an appropriate balance” between the “two important principles” of **transparency** (putting communications on the record so that all participants in an on-the-record proceeding can see them) and **accessibility** (not unduly “restricting the ability of citizens to communicate in formal and informal settings about issues of concern” with their elected representatives). We would go a step further and advise Councilmembers that, **in an on-the-record proceeding, the right of the parties to be fully informed should take priority because the fairness of the proceeding depends on it.**

1) Anticipatory communications Bill 12-09 would clarify that a communication about “a future on-the-record proceeding which is reasonably foreseeable” is covered by the Ethics law’s restrictions on *ex parte* communications. This has been a recurring problem when, for example, an applicant for a zoning change attempts to skirt the law by seeking a meeting with a Councilmember before the zoning application is filed. *Council staff has consistently advised Councilmembers that the current ex parte law would apply to that kind of anticipatory communication.* Bill 12-09 (see ©2, lines 8-9) would simply codify the existing practice. As the County Attorney’s Office noted, “this proposed amendment would not make any substantive change to the ethics law.”

Several commenters, including prominent land use attorneys, former Councilmember and Planning Board member Esther Gelman, and the County chapter of the American Civil Liberties Union (ACLU) (see comments, ©6-14, 17-27), argued that this amendment could potentially, if not actually, restrict residents’ First Amendment rights to petition their elected officials. Some of this criticism, in staff’s view, is inapplicable because it fails to distinguish between legislative actions generally and the small number of on-the-record quasi-judicial proceedings, such as rezonings, where communications can be restricted without running afoul of the First Amendment because the *ex parte* law applies.¹

However, some critics also emphasized that, in their view, this restriction could be interpreted to extend to any topic which might eventually be involved in an on-the-record proceeding, such as elements of a master plan that could later become the subject of a rezoning.² Council staff does not think the restriction on *ex parte* comments would extend that far, but to make that interpretation clear the Committee could recommend either of the alternative approaches proposed in Options 3-4.

Options On this issue, the Committee could:

- 1) Keep the law effectively as it is by deleting the new language on ©2, lines 8-9. This would **let the law be interpreted as it previously had been, leaving room for case-by-case analysis.** Councilmember Floreen, lead sponsor of Bill 12-09, would

¹See the pithy summary of the First Amendment’s applicability to this situation by law professor/State Senator Raskin on ©13.

²Master plans themselves are not on-the-record proceedings. The distinction between a master plan and the follow-up rezoning by sectional map amendment, which is an on-the-record decision, is well-established, although it can be dicey in practice.

delete lines 8-9.

- 2) Clarify that **restrictions on *ex parte* communications only begin when an application is filed or an on-the-record proceeding is otherwise initiated**. In staff's view, this would significantly narrow the current law. It can be done by replacing lines 8-9 with: after an application is filed or a proceeding is otherwise initiated.
- 3) Retain lines 8-9 and **further define when an on-the-record proceeding is "reasonably foreseeable"**. To do this, as the County Attorney's Office suggested (see memo, ©28-29), we would insert after line 9:

A future proceeding is reasonably foreseeable if an interested party:

- (A) has engaged an attorney, expert, planner, architect, or other consultant to perform work on a specific matter that would be subject to a future on-the-record proceeding; or
- (B) has taken any other action to prepare to file an application or other document on a specific matter that would be subject to a future on-the-record proceeding.

For a broadly similar provision in the federal Administrative Procedures Act, see footnote 1 in the County Attorney memo on ©29.

- 4) **Specify when the *ex parte* restrictions triggered by an on-the-record proceeding begin to apply**. One alternative, suggested by land use attorney Robert Brewer (see ©23), is to answer the "how far in advance" question by identifying a pre-filing time, e.g. 30 or 45 days before an application is filed, that would function like a "cooling off period", when *ex parte* communications about a case to be filed would be prohibited and those already received would have to be inserted in the record. This would oblige Councilmembers, for example, to write down and submit to the Hearing Examiner any communication they received about a zoning application in the 30 or 45 days before it was filed. This option can be inserted by replacing lines 8-9 with: starting 45 days before an application is filed or a proceeding is otherwise initiated.

Council staff recommendation: by specifying which activities would make a proceeding "reasonably foreseeable", Option 3 provides the most effective deterrent to current methods of evading the *ex parte* rule. If Option 3 is not acceptable, Option 4 would alleviate the problem without entirely curing it.

2) Contact with direct advisers Bill 12-09 (see ©2, lines 11-12) specifies that "any public employee who directly advises a decision-maker" is subject to the same restrictions on receipt of *ex parte* communications as the decision-maker – that is, an adviser (such as a member of a Councilmember's personal staff) must not "initiate or participate in any communication outside the record" on any matter that must be decided on-the-record.

This amendment would expand the scope of the "cone of silence" to include direct advisers, such as staff to Councilmembers.³ Under the current law as Council staff interprets it, a party can talk with a Councilmember's staff about a pending case, but that staff member must not convey the substance of that talk to the Councilmember. This distinction is difficult to

³As the County Attorney's memo noted in fn. 2 on ©29, the federal APA has a roughly similar scope provision.

enforce or to justify to the parties and the public.⁴ The Bill would still allow the decision-maker's own staff and attorney to privately advise the decision-maker off the record (see ©3, lines 29-36), but narrows that authority to staff of the decision-maker's agency rather than *any* County or other government agency (see lines 34-36).⁵ It also exempts purely procedural discussions (e.g. when to schedule a hearing) from the ban on *ex parte* communications (see ©3, lines 37-38).

At the previous worksession, Committee members questioned who would qualify as an employee who directly advises the decision-maker – for example, would all members of a Councilmember's staff qualify, or only the chief of staff? Although this questions would need to be answered on a case-by-case basis, we would expect the term to cover any employee in a direct line of communication with the decision-maker. In a Councilmember's office, that could include each staff member since hierarchical chains-of-command are not usually employed.

Council staff recommendation: treat *ex parte* communications sent to advisers to a decision-maker the same as communications directly to the decision-maker.

3) Independent investigation Bill 12-09 (see ©2, lines 16-18) would prohibit a decision-maker or the decision-maker's staff from conducting an independent investigation of any fact in a hearing record. This kind of investigation would most likely take the form of a site visit. Council staff believes that this amendment would clarify but not change the current law. The ACLU (see ©14) argued that this amendment could restrict Councilmembers from observing traffic or talking to trail users. That would be accurate -- and appropriate -- in an on-the-record proceeding because the parties to that proceeding could not cross-examine the Councilmember after the record is closed. But for most legislative issues, which are not part of an on-the-record proceeding, this restriction is simply irrelevant.

Land use attorney Steve Robins (see ©24) objected that this amendment would restrict Councilmembers' "ability to independently investigate any fact in a hearing", such as to "go out and look at the area, property, intersection, *etc.* in question." That is precisely the purpose of an on-the-record proceeding: to limit the facts before the decision-maker to those which each party has had a chance to review and contest. Mr. Robins would no doubt strenuously object if his adversary in a zoning hearing invited one or more Councilmembers out for a private site viewing.

Council staff recommendation: restrict independent off-the-record investigations of facts in the record.

4) Off-record advice from other government agencies Bill 12-09 (see ©2, lines 19-21; ©3, lines 34-36) would limit the advisors who are allowed to give off-the-record advice to a

⁴The ethics law generally regulates government employees, rather than members of the public. Neither this Bill nor the current law make it a violation for the *sender* to send the improper communication, although the federal law apparently does. The County Attorney's memo on ©30 suggested such an amendment, as did former Councilmember Gelman (see ©6, 11), and also noted that another part of the current ethics law (the prohibition against influencing a public employee to violate the ethics law) might apply to the sender. Council staff does not recommend broadening the scope of any part of the ethics law to include non-employees without further study.

⁵As discussed below in Issue 4, this amendment would limit the ability of Planning Board members and staff, or the People's Counsel, to privately communicate with Councilmembers about rezonings or other on-the-record proceedings, but does not apply to off-the-record matters such as master plans or zoning text amendments.

decision-maker to those who are employed by the decision-maker's own agency. The primary effect of this amendment, in the context of proceedings before the Council, would be to curtail the ability of Planning Board members and staff, or the People's Counsel, to privately communicate with Councilmembers about rezonings or other on-the-record proceedings, but not about off-the-record matters such as master plans or zoning text amendments.

Former Councilmember and Planning Board member Esther Gelman argued that the Board is the Council's staff, and the Council should use them like staff. The counterargument is that the Planning Board and its staff are a (more or less) independent body and should have to present their facts and arguments in public like other parties and agencies, just as the Board does in proceedings before the Hearing Examiner.

The County Attorney's memo on ©29-30 noted some potential difficulties with this provision when an attorney serves first as advisor to a decision-maker and then may represent the County in litigation which arises from the same case. However, we think the exception for advice rendered by the decision-maker's attorney on ©3, lines 29-33, would cover this situation. The County Attorney memo also noted that experts from another County department could be precluded from offering off-the-record technical advice to a hearing officer in, for example, a road construction case. However, we think that kind of advice should have to be on-the-record so all parties can hear and cross-examine it.

Council staff recommendation: limit off-the-record advice to staff of the decision-maker's own agency.

5) Conforming amendment Council staff drafted a technical amendment (see ©32-34) requested by the County Attorney (see ©28) to conform the *ex parte* provisions of the County Administrative Procedures Act to the Ethics law as this Bill would amend it. **Council staff recommendation:** adopt this conforming amendment.

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Bill No. 12-09
Concerning: Ethics - Ex Parte
Communications
Revised: 3-23-09 Draft 3
Introduced: March 31, 2009
Expires: October 1, 2010
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: Councilmembers Floreen, Ervin, and Leventhal;
Council Vice-President Berliner, and Council President Andrews

AN ACT to:

- (1) further define which communications are allowed when a decision must be made on the basis of a record; and
- (2) generally amend the County law regarding communications to decision-makers.

By amending

Montgomery County Code
Chapter 19A, Ethics
Section 19A-15

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

27 if all parties are given [an appropriate] a reasonable opportunity
28 to respond.

29 (4) This subsection does not [apply to] restrict a communication that
30 consists solely of:

31 [(1)] (A) advice rendered to a decision-maker by an attorney [for
32 the County] employed or retained by the decision-maker's
33 agency;

34 [(2)] (B) advice rendered to a decision-maker by appropriate
35 officials or staff of [County or other government agencies]
36 the decision-maker's agency;

37 (C) a procedural question that does not involve the substance
38 of facts in a record; and

39 [(3)] (D) discussions between members of a decision-making
40 body.

41 *Approved:*

42

Philip M. Andrews, President, County Council

Date

43 *Approved:*

44

Isiah Leggett, County Executive

Date

45 *This is a correct copy of Council action.*

46

Linda M. Lauer, Clerk of the Council

Date

LEGISLATIVE REQUEST REPORT

Bill 12-09

Ethics – Ex Parte Communications

DESCRIPTION: Bill 12-09 would further define which communications are allowed when a decision must be made on the basis of a hearing record. Specifically, it would restrict communications to and from a decision-maker's staff as well as the decision-maker, except for non-substantive procedural issues. It applies the ex parte restrictions to "reasonably foreseeable" proceedings – i.e. someone can't talk to a decision-maker today about a zoning application they expect to file next month. And it treats advice from other government agencies (e.g. the Planning Board on a matter before the Council) the same as communications from the public, rather than the same as the decision-maker's staff (which can be off-the-record).

PROBLEM: Under current County law, communications about pending quasi-judicial proceedings before the proceeding begins are not expressly precluded, and communications to and from a decision-maker's staff may be conducted off-the-record.

GOALS AND OBJECTIVES: Further clarify which communications to decision-makers are permissible when a pending decision must be made on the basis of a hearing record.

COORDINATION: Office of Zoning and Administrative Hearings, Board of Appeals, other quasi-judicial Boards and Commissions, Council staff

FISCAL IMPACT: Minimal

ECONOMIC IMPACT: Minimal

EVALUATION: To be researched

EXPERIENCE ELSEWHERE: To be researched

SOURCE OF INFORMATION: Michael Faden, Senior Legislative Attorney, 240-777-7905

APPLICATION WITHIN MUNICIPALITIES: Applies only to County government proceedings.

PENALTIES: Not applicable
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B/12-09



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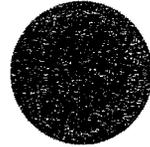
OFFICE OF MANAGEMENT AND BUDGET

Isiah Leggett
County Executive

Joseph F. Beach
Director

MEMORANDUM

April 17, 2009



TO: Phil Andrews, Council President
FROM: Joseph F. Beach, Director, Office of Management and Budget
SUBJECT: Council Bill 12-09, Ethics – Ex Parte Communications

APR 17 11 49 AM '09

The purpose of this memorandum is to transmit a fiscal impact statement to the Council on the subject legislation.

LEGISLATION SUMMARY

The proposed legislation further defines which communications are allowed when a decision must be made on the basis of a hearing record.

FISCAL AND ECONOMIC SUMMARY

The proposed legislation has no fiscal or economic impact.

The following contributed to and concurred with this analysis: Mike Coveyou and David Platt, Department of Finance, and Brady Goldsmith, Office of Management and Budget.

jfb:brg

- c: Kathleen Boucher, Assistant Chief Administrative Officer
- Dee Gonzalez, Offices of the County Executive
- Mike Coveyou, Department of Finance
- David Platt, Department of Finance
- Brady Goldsmith, Office of Management and Budget

ESTHER P. GELMAN

7904 Turncrest Drive ... Potomac, MD 20854

301-299-4490

fax 301-299-5775

Mr. Chairman and Members of the Council:

Although I tried to remain informed about various aspects of the County Government, I have not formally testified for many years -- I requested the Council to restore \$17,000 to Mobile Med's budget many years ago.

However, this Bill has raised a number of alarms in my mind.

I understand the impetus for the Bill -- an atty who has practiced for many years badgered staff.

This Bill will not eliminate the problem, but may accentuate it.

May I suggest 2 remedies:

1 -- your staff should have a list of filed cases. They must not be shy in stating that the speaker is breaking the law and will be reported.

2 -- Reported to whom? There are no teeth in either the existing law or this proposed one.

I suggest that an atty be reported to the Ethics Committee of the Bar Association as well as to the County Ethics Commission.

A too-persistent citizen should also be reported to the Ethics Commission. (I have heard citizens say that the law applies only to developers.)

My other concern is that the Bill treats the Planning Commission as an outside force. It is your Planning Commission. You make the appointments. You prepare the Work Agenda. I know because I caused this revolution when appointed to the Commission in 1970.

This current Commission is finest in years so do not ignore them.

And finally, the very idea of forbidding speech on the basis of a "probable" filing is an affront to the First Amendment. I have checked with Constitutional Scholars who assure me this Bill could not withstand a court test.

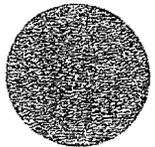
I was urged to call on the ACLU -- but I defer to your better judgment without all the publicity that would result from the entrance of the ACLU.

Esther P. Gelman
Bill 12-09

BILL 12-09

MF
ce
JZ

042070



ESTHER P. GELMAN

7904 Turncrest Drive ... Potomac, MD 20854

301-299-4490

fax 301-299-5775

May 1, 2009

Dear Chairman Andrews and Councilmembers:

I thank you for the opportunity to testify yesterday on Bill 12-09.

The more I think about it, and the more I consult constitutional scholars, I conclude that the Bill is inherently unreasonable. For example, if citizens cannot speak to you, how can you attend a Civic Association or a Chamber meeting where these potential land use matters can come up? You all will have to withdraw from society and live as monks – or be in violation of the spirit of this Bill.

And how can you raise money? Must you ask each donor if he has a “potential” interest in land use? How can you ask for endorsements from various groups in the County?

What led me to think of these extremes was the conversation in the hall after Bill Kominers and I testified. Members of your staff informed us that the “Councilmembers are like members of the Supreme Court when dealing with zoning.” That is not only a stretch; it is absurd!

In all my years on the Council, I never had a black robe, no one ever called me “Your Honor” or “Madame Justice”

As a Constitutional Scholar has written in response to reading Bill 12-09: An overly broad and indecipherably vague prohibition on speech with elected officials produces a severe chill on political expression that is inconsistent with the First Amendment’s protection of free speech and the right to petition government for redress of grievances. A narrowly tailored ban on ex parte contacts about the subject matter of a formal proceeding before a legislative body acting in a quasi-judicial capacity can likely withstand scrutiny. But a sweeping ban on any communication with an elected official on a matter that is not, but may become, the matter of a proceeding is far too stifling for our system of free speech and legislative democracy.

Since these Staff members are the only persons with whom you may speak during the time of “probable” filing and the end of the process, your information will certainly lack balance. Now it becomes clear why the Planning Commission is also forbidden to speak

ESTHER P. GELMAN
301-299-4490
301-299-5775

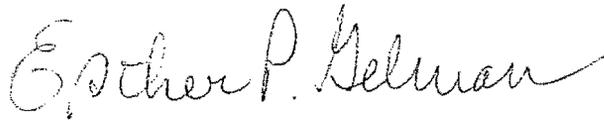
ESTHER P. GELMAN
301-299-4490
301-299-5775

Do you really believe that you are the first members of the Council, since the Charter was adopted, that cannot live with the ex parte rule beginning at time of a filing? Is there any case in which Councilmembers were charged with not sticking to the record?

I have more faith in all of you, your ethics, and the process which took so many years and so much effort. We are a model for the nation .

Please read case studies in Addendum enclosed.

Sincerely yours,

A handwritten signature in cursive script that reads "Esther P. Gelman".

Esther P. Gelman
County Council 1974-86

Esther Gelman
7904 Turncrest Drive
Potomac, MD 20854

Esther P. Gelman

Enclosure

ADDENDUM – E. Gelman

Let me share an important example of why the Council would be making a serious mistake in making it illegal for contact with Council members in advance of a filing.

Several years ago, the Howard Hughes Medical Institute asked me to help them with a planned expansion of their campus at Connecticut Avenue and Jones Bridge Road. In order for that expansion to proceed, HHMI required assurance that the Government would approve some changes in the law.

Their Board was not willing to spend the estimated \$350-400,000 for a site plan before the County agreed to basic changes.

HHMI already possessed an alternate property in Northern Virginia and the Institute's chief counsel favored an immediate move to that property because he was certain that Montgomery County's complicated approval process would not yield a favorable result. A shift to Northern Virginia by HHMI would have dealt a serious blow to Montgomery County's aspirations to be the national leader in bio-medicine.

The Institute's management allowed me to try to persuade the County Executive and the County Council to make changes in the law necessary to permit HHMI to expand the campus at its existing location in Montgomery Council. One change was in the definition of a national headquarters: HHMI required the change from 500 employees to 350.

We arranged for the County Executive, County Council, Planning Commissioners and staff to visit HHMI for a breakfast where a presentation of its plans and an explanation of why some provisions of the law would need to be changed before HHMI could go forward. That presentation saved the day for HHMI and for Montgomery County as well.

The Executive Branch and the Council definitely understood how much of an intellectual and scientific asset HHMI is and how central, in conjunction with NIH, the Institute is to Montgomery County's plans to become an unequalled center of bio-medical research and production.

The legal changes required were not all that significant but they were necessary for HHMI. Understanding the issues, the County Executive and the County Council unanimously agreed to do what was required to keep HHMI's headquarters and staff at its Montgomery County location. Without the pre-plan presentation and the assurances that were received as a result, HHMI would now be headquartered in Northern Virginia.

The County Council would be doing itself and Montgomery County a serious disservice if it forbids pre-plan conversations on complex projects. Developers of major projects need to know in advance whether the Council is generally -- not specifically -- in favor of what is being planned or generally opposed. Even if the Council is generally in favor, the developer needs to identify potential obstacles and make his plans accordingly. If the Council is generally opposed, the developer is likely to conclude that there is little point to going forward with the project.

In the case of Johns Hopkins development at Belward Farms, every serving member and candidate was briefed on plans because rumors were flying as soon as the owner passed away. Without these briefings, there would have been a lack of clarity in answers at forums and meeting—only rumors.

Although that is not its purpose, Bill 12-09 would prevent members of the Council from receiving information essential to Smart Growth in Montgomery County. The notion that the County Council, like the Supreme Court of the United States, should be unapproachable on matters that may eventually come before it for decision is incorrect as well as inappropriate.

Esther P. Gelman

Brogden, Karen

From: Andrews' Office, Councilmember
Sent: Tuesday, July 21, 2009 12:21 PM
To: Montgomery County Council
Subject: FW: Bill 12-09--Please distribute to all members of the Council

050379



-----Original Message-----

From: Esther Gelman [mailto:esthergelman@verizon.net]
Sent: Tuesday, July 21, 2009 10:35 AM
To: Andrews' Office, Councilmember
Subject: Bill 12-09--Please distribute to all members of the Council

After thinking about this Bill for several weeks, let me sum up what I think will solve the problem of "intruders" into ex parte period.

1 Put a Penalty Clause into current law: Send letter of admonishment to intruder with copies to Bar Association's Ethics Commission and to County Ethics Commission.

2 Instruct all Council staff on how to counter those who would discuss the matter. Instruct staff to say politely, but firmly, "I will not relay any of this conversation to the Councilmember. The matter is covered by the ex parte rule. Please discuss this no further."

Problem solved!
Esther Gelman
EstherGelman@verizon.net

2009 JUL 21 PM 4:10
MONTGOMERY COUNTY
CLERK OF COURTS

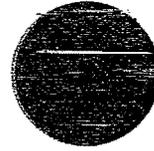
BILL 12-09

MF
JE

Guthrie, Lynn

From: Andrews' Office, Councilmember
 Sent: Friday, May 08, 2009 9:18 AM
 To: Montgomery County Council
 Subject: FW: Bill 12-09 and the First Amendment.

042276



-----Original Message-----

From: Mike Mage [mailto:magem65@hotmail.com]

Sent: Thursday, May 07, 2009 7:58 PM

To: Trachtenberg's Office, Councilmember; Floreen's Office, Councilmember; Knapp's Office, Councilmember; Andrews' Office, Councilmember; Berliner's Office, Councilmember; Leventhal's Office, Councilmember; Ervin's Office, Councilmember; Elrich's Office, Councilmember; Praisner's Office, Councilmember

Cc: Susan Goering; esthergelman@verizon.net; raskin@wcl.american.edu

Subject: Bill 12-09 and the First Amendment.

May 7, 2009

Dear Council members,

Please pardon this "ex parte" communication.

We have received this letter from former council member

Esther Gelman, who together with Senator Jamie Raskin raise serious civil liberties questions. We would appreciate hearing your take on these issues before your final action on bill 12-09.

Sincerely,

Mike Mage, Co-Chair
 Montgomery County Chapter, ACLU
 301-402-5537 W
 301-229-0470 H
 240-899-3312 C

From: EstherGelman@verizon.net
 To: goering@aclu-md.org; magem65@hotmail.com
 CC: raskin@wcl.american.edu
 Subject: Bill 12-09 before the Mont. Co. Council
 Date: Thu, 7 May 2009 17:24:48 -0400

Gentlemen: Art Spitzer sent you the material I had sent to him.

In short, there is a Bill before the Mont. Co. Council that prohibits contact with elected officials if there will be a "probable" filing. We have never had a problem before starting the ex parte silence AFTER the filing. How does a citizen know when the probability begins?

One atty. violated the rules – so my suggestion is to add a penalty to current law. Instead, the Council's bill blankets the county with a clear violation of citizens' First Amendment rights.

If you can weigh in, it would count for so very much, the sooner the better.

My phone no. is 301-299-4490

5/8/2009

12

Esther Gelman
EstherGelman@verizon.net

Planning Commissioner, 1970-74
County Council 1974-86

From: "Jamin Raskin" <raskin@wcl.american.edu>
To: "esther gelman" <EstherGelman@verizon.net>
Sent: Thursday, April 30, 2009 8:27 AM
Subject: Language for statement

- > An overly broad and indecipherably vague prohibition on speech with
- > elected officials produces a severe chill on political expression that is
- > inconsistent with the First Amendment's protection of free speech and the
- > right to petition government for a redress of grievances.
- > A narrowly tailored ban on ex parte contacts about the subject matter of a
- > formal proceeding before a legislative body acting in a quasi-judicial
- > capacity can likely withstand scrutiny. But a sweeping ban on any
- > communication with an elected official on a matter that is not, but may
- > become, the matter of a proceeding is far too stifling for our system of
- > free speech and legislative democracy.

Windows Live™: Keep your life in sync. [Check it out.](#)

Marin, Sandra

From: Mike Mage [magem65@hotmail.com]
Sent: Friday, June 05, 2009 3:28 PM
To: Montgomery County Council
Subject: Please add this email to the hearing record for bill 12-09 by COB today.

2009 JUN 5 PM 3:32
MONTGOMERY COUNTY COUNCIL

05 June 2009

Comments submitted for the hearing record for bill 12-09.

Bill 12-09 could benefit from some tightening up.

Comments of Mike Mage, Co-Chair,
Montgomery County Chapter, ACLU

Montgomery County Council Bill 12-09 serves an important interest — the preservation of the integrity of quasi-judicial proceedings and the quasi-judicial decision making process. But it must also be protective of First Amendment Rights.

The First Amendment clearly protects the right to lobby legislators and administrators. See e.g. California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972). The right to lobby or petition, moreover, "extends to all departments of the Government." Id. at 612. In a representative democracy, the branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. Eastern Railroad Conference v. Noerr Motor Freight, 365 U.S. 127, 137 (1961).

Where, as here, the regulation constitutes a significant interference with the public's right to petition the government, the regulation must survive strict scrutiny. Fair Political Practices Com v. Superior Court, 25 Cal. 3d 33, 48-49 (1979). That is, the requirements may be upheld only if the state demonstrates sufficiently important interests and the statute "is closely tailored to effectuate only those interest[s]." Zablocki v. Redhail, 434 U.S. 374, 388 (1978); Buckley v. Valeo, 424 U.S. 1, 25 (1976).

The current draft of the bill is worded too broadly to survive constitutional scrutiny. One problem is in section (b)(1). The phrase "reasonably foreseeable" is too vague. Another problem is in section (b)(2). The section prohibits any decision-maker or any public employee who advises him/her from communicating with any person regarding a matter that must be decided on the basis of a record. The bill's failure to accurately define what specific issues it refers to creates the potential for an unnecessarily broad and sweeping implementation. A third problem is the vagueness of "independent investigation" in (b)(2)(B). Does that mean, for example, that council members may not observe traffic on Jones Bridge Road, or talk to users of the Capital Crescent Trail, or talk to constituents at "town hall meetings" because topics may come up that may need decisions on the basis of a record at some time in the future?

I strongly recommend improving the bill by removing the phrase "reasonably foreseeable", by limiting the bill's application to those issues that are listed in the bill by name and by reference to statute, and by stating explicitly the point in time or in the process, when an issue becomes one that must be decided on the basis of a record.

Sincerely,

Mike Mage, Co-Chair
Montgomery County MD Chapter, ACLU
301-402-5537 W
301-229-0470 H
240-899-3312 C

5/12/09

MF
J2

Guthrie, Lynn

From: Andrews' Office, Councilmember
Sent: Monday, May 04, 2009 9:51 AM
To: Montgomery County Council
Subject: FW: Bill 12-09

042112



-----Original Message-----

From: MChasson@aol.com [mailto:MChasson@aol.com]
Sent: Sunday, May 03, 2009 2:11 PM
To: Andrews' Office, Councilmember
Subject: Bill 12-09

To Montgomery County Council
From: Margaret Chasson
Re: Bill 12-09

As a citizen who cares about local government, I am appalled that members of the County Council whom I respect should introduce legislation such as Bill 12-09. Communication with interested parties is a part of the interaction of citizens with their governing bodies. To restrict the public from discussing issues with elected officials and relevant staff on any issue that **may** become a matter to be decided on record is far too restrictive. I urge you to reconsider the scope of this legislation. We citizens of Montgomery County value the right to free speech and the ability to petition government for redress of grievances.

Margaret Chasson

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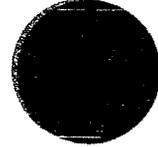
5/12/09 10:25 AM

Bill 12-09

Marin, Sandra

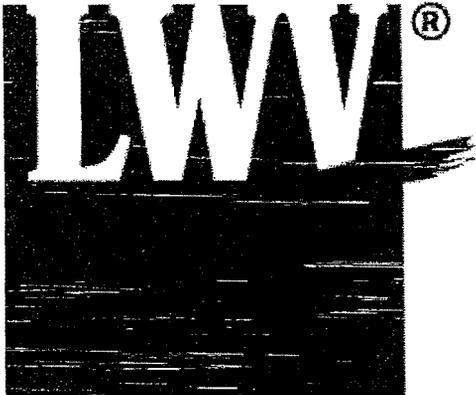
From: Andrews' Office, Councilmember
Sent: Wednesday, May 20, 2009 3:39 PM
To: Montgomery County Council
Subject: FW: Bill Number 12-09

042543



-----Original Message-----

From: LWV of Montgomery County, MD [mailto:lwvmc@erols.com]
Sent: Wednesday, May 20, 2009 3:37 PM
To: Berliner's Office, Councilmember; Knapp's Office, Councilmember; Andrews' Office, Councilmember; Ervin's Office, Councilmember; Floreen's Office, Councilmember; Leventhal's Office, Councilmember; Elrich's Office, Councilmember; Trachtenberg's Office, Councilmember
Subject: Bill Number 12-09



To: Members of the Montgomery County Council
From: Diane Hibino, President
Re: Bill Number 12-09

Since its founding, the League of Women Voters has worked to promote an open governmental system that is representative, accountable and responsive. We believe that democratic government depends upon informed and active participation by citizens in all levels of government. We further believe that governmental bodies must protect the citizen's right to know through adequate notice of proposed action, holding open meetings and making public records accessible.

While we can agree with the principle that all ex parte communication with public officials should be put "on the record" when a decision must be made on the basis of a record, we are concerned that Bill Number 12-09 may go too far in restricting the ability of citizens to communicate in formal and informal settings about issues of concern.

We hope that you will be able to come up with an appropriate balance between these two important principles. We will continue to monitor the progress of Bill 12-09. Thank you for your attention to our concerns.

The League of Women Voters of Montgomery County, MD, Inc.
 12216 Parklawn Dr., Suite 101
 Rockville, MD 20852-1710
 Tel: 301-984-9585 Fax: 301-984-9586
 lwvmc@erols.com www.lwvmd.org/mont

5/21/2009

(16)

Bill No. 12-09
Testimony of William Kominers
(April 28, 2009)

Good Afternoon President Andrews and Members of the Council. My name is William Kominers, an attorney in Bethesda, Maryland. I am here today testifying as an individual on Bill No. 12-09.

When I read this Bill, I felt a little bit of "if it's not broken, don't fix it". I am not certain which ills -- that are not already understood by everyone -- this Bill means to correct. However, I do have some concerns about the interpretation of the requirements of the Bill and some uncertainties as to how the Bill will operate.

1. **"Reasonably Foreseeable"**. The most critical issue is the concept of "reasonably foreseeable" in Lines 8-9 of the Bill.

The Bill restricts communications with decision-makers, such as all of you, on any matter that is subject to a future on-the-record proceeding, if that proceeding "is reasonably foreseeable." I just don't know when that time occurs. So I do not know when I can talk to you and when I cannot. The Bill gives no guidance about how far in advance is long enough to not be "reasonably foreseeable." I believe that this is a risk, and that you do yourselves and the public a disservice with vague restrictions on communications before an application is actually filed.

At present, limiting ex parte contacts based upon whether or not an actual application has been filed, provides a very clear, bright line for whether a conversation is allowed or prohibited. Bill No. 12-09 blurs that line into invisibility. In theory, the moment someone inquires about use of a property that could require rezoning, such an application could be considered "reasonably foreseeable." This seems to be an overly broad restriction that is fraught with retrospective subjective analysis. At that point, in theory, I would know too much, so I cannot discuss the matter with you. The result is that if I know anything, I can't speak with you. I can only speak with you if I know nothing. Probably not the most productive.

I confess, I have met with Councilmembers before filing a new rezoning application. I got a sense of whether the proposal made sense, whether it seemed beneficial, and how it related to the Master Plan. I got your suggestions of particular community groups for outreach. As written, this provision would preclude speaking to you on these issues and even speaking to your Staff members.

This new restriction not only has problems for me, but also for you.

A. If a prospective applicant holds a meeting with a community group or leaders before filing an application, Bill No. 12-09 would suggest that even Council Staff cannot attend. For an applicant to meet with a community on a prospective rezoning, and to have done enough work to make the discussion meaningful for the community, an application is certainly "reasonably foreseeable."

B. The restrictions of Bill No. 12-09 would apply to everyone, and in both directions. This means that citizens or community groups cannot contact Councilmembers or Staff, and vice versa, in advance of a filing. Unfortunately, neither the Council and its Staff, nor the community know when something is sufficiently "reasonably foreseeable" that it cannot be discussed. This uncertainty seems to place you, your Staff, and community members, citizens, and applicants all at risk of inadvertent violation.

In summary, there is no ready understanding of how much in advance of a filing something is considered "reasonably foreseeable" so as to preclude discussion. Right now, the bright line of "filed or not filed" is clear. Bill No. 12-09 renders the boundary between permissible and impermissible communication very elusive.

2. Intra-Government Communication.

A. Lines 19 – 21. The restriction on communication by officials or Staff of another government agency seems more limiting than necessary. This language suggests that the Council and Council Staff could not contact the Planning Board Staff. Likewise, the Board of Appeals Staff could not contact the Planning Board Staff. Is this the degree of limitation that you intend with this legislation?

For example, how will this Bill affect the People's Counsel? Could Bill No. 12-09 restrict the ability of the People's Counsel to discuss matters with Staff of the Council, Planning Board, Board of Appeals, or Executive?

Is the Staff of the Board of Appeals or the People's Counsel to be treated as "a public employee who directly advises a decision-maker"? If so, does this affect the ability of the public to interact with the People's Counsel or Board of Appeals Staff on any pending matter that has to be decided on the Record?

B. Lines 31 – 33. This portion of the Bill exempts communication between a decision-maker and an "attorney employed or retained by the decision maker's agency". How narrowly does "agency" get defined for this purpose?

This provision seems able to restrict the Council's contact with the County Attorney's Office -- as compared to the Council's legislative counsel. A similar restriction could be placed on counsel for the Planning Board. Clearly, the County Attorney is employed by the Executive Branch, and counsel to the Planning Board by the Board, different "agencies," but neither by the Council.

3. Independent Investigations, Lines 16 -18. This section precludes a decision-maker or employee from conducting independent investigations.

This clearly will restrict the ability of Councilmembers and your Staff to go out and look at the areas/intersections/streams/etc. in question. One could even argue, although I believe it is a stretch, that this could mean that decision-makers or Staff could not use knowledge or information that they already possess. Such information clearly comes from understandings or information that is outside of the Record. Currently, that issue operates under a "rule of reason" -- the Councilmembers cannot go out and make a site inspection in a rezoning case, but at the same time, no Councilmember need close his or her eyes as they drive through an intersection that is affected by a pending application, or feel compelled to strike the information from your memory banks, in making a decision.

4. Summary. Based upon the foregoing questions and uncertainties, I recommend that you either reject the Bill entirely or defer it substantially and allow a group of those who normally participate in on-the-record proceedings to work with your legislative counsel to develop clarifications to the ex parte communication rules that will be clear and effective, but not overbroad.

Thank you for your consideration of these thoughts. I will be happy to answer any questions.

ABRAMS & WEST, P.C.

ATTORNEYS AT LAW

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PRACTICING IN MARYLAND AND
DISTRICT OF COLUMBIA

WRITER'S DIRECT NUMBER
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May 6, 2009

Hon. Phil Andrews, President
Montgomery County Council
County Council Office Building, 6th Fl.
100 Maryland Avenue
Rockville, Maryland 20850

**RE: Bill No: 12-09
Ethic - Ex Parte Communications**

Dear President Andrews & Members of the County Council:

I have recently reviewed this proposed Bill No. 12-09 and find the proposed requirements vague and fraught with unintended consequences. As a land use practitioner in this County for almost forty (40) years including nine (9) years as a zoning hearing examiner, I have not found these draconian measures necessary or warranted. Ex parte communications with decision makers or hearing examiners involving quasi judicial proceedings are now prohibited involving substantive matters - Period! If a letter or petition came in after the record closed, it was either returned with a letter of explanation as to ex parte communication rules or held in a separate file by a staff member. Council members and members of the Board of Appeals and Planning Board advised persons seeking to communicate orally with those decision makers they could not talk about a pending matter and their staff's were instructed accordingly with respect to screening calls or requests for meetings and correspondence.

The Bill prohibits communications made outside the record involving any matter that would be subject "to a future on-the-record proceeding which is reasonably foreseeable." When is such a subject "reasonably foreseeable"? Are people prohibited from testifying or council members receiving testimony or letters at a master plan hearing or worksession because master plans are "reasonably foreseeable" as traditionally being implemented by sectional map amendments which are on the record proceedings?

Would companies seeking to relocate to the County be precluded from discussing or addressing such a move even with staff if a rezoning were required? Would Council

members have to determine in advance what matters were prohibited when meeting with civic groups or private citizens in a community meeting or when running for office and attending fund raisers?

This Bill would also seem to limit advice which you and your staff can receive from the Planning Board staff. If this is so, aren't the exercise of your planning functions unnecessarily impacted?

This legislation can turn into a lawyers relief act, with appeals and challenges to decisions on the basis that a "decision-maker" failed to include in the record an ex parte communication or failed to give a reasonable opportunity to all parties to respond because the matter should have been "reasonably foreseeable." What a field day the press and media could have because the decision maker guessed wrong as to whether the subject matter of the ex parte communication should be "reasonably foreseeable" and would end up as part of a future on-the-record proceeding. Good luck.

This Bill is unnecessary and creates more problems than what it seeks to resolve. It should be voted down.

Sincerely,

A handwritten signature in black ink, appearing to read "Stanley D. Abrams", written over a horizontal line.

Stanley D. Abrams

SDA:dw

cc: County Council Members
Michael Faden, Esq.



CC
JZ

ATTORNEYS

ROBERT G. BREWER, JR.

RGBREWER@LERCHEARLY.COM

May 19, 2009

Hon. Philip Andrews, President
Members of the Montgomery County Council
100 Maryland Avenue, 6th floor
Rockville, Maryland 20850

042524



Re: Bill 12-09: Ex Parte Communications

Dear Mr. Andrews and Members of the Council:

I am writing as a long time land use attorney to express concerns with the pending bill to further restrict ex parte communications. While I understand and sympathize with the objectives of the sponsors, I think the pending Bill goes too far and will stifle necessary and productive discussions in the land use arena.

My particular objection with the Bill is with proposed Section 19A-15(b)(1), "...including any matter that would be subject to a future on-the-record proceeding which is reasonably foreseeable." My concern is that this language is incredibly broad and conceivably extends to communications with Council members and Staff regarding proposed and pending master plans and master plan amendments, and all of the regulatory matters which follow them, including rezonings, subdivisions, and site plans. Rather than protect the transparency and integrity of the communications with Council members and Staff on these issues, these draconian restrictions will severely limit the flow of important information to Council decision-makers, making their difficult decision-making tasks even harder and leading to wasted time and energy by applicants and community members.

Good examples of the likely implications of this Bill are the three major master plans pending, or soon pending, before the Council for Germantown, Gaithersburg West, and White Flint. Each of these master plans is complex, requiring conscientious Council members and Staff to absorb voluminous amounts of information and sift varying policy objectives. Without the ability for stakeholders to meet with Council members and Staff during the long pendency of these master plans, because those same stakeholders may be involved months or years into the future with the Council on regulatory matters (including comprehensive rezonings arising from those master plans), the Council is deprived of the opportunity to engage in dialogues, analyses, and even negotiations with stakeholders to understand and shape the myriad of policy ramifications of master plans. This could even extend to precluding Council members and their Staff from seeking out information in response to community inquiries.



ATTORNEYS

Hon. Philip Andrews, President
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May 19, 2009
Page 2

Similarly, there should be some opportunities for stakeholders to discuss future regulatory applications with Council members prior to the time they are filed. This is in order to maximize the efficiency of the process by having Council members weigh in on the merits of applications being contemplated for filing. Often, regulatory applications are not filed because applicants learn through discussions with Council members and Staff that their proposals lack sufficient Council and public support. Without an opportunity for applicants to engage in these consultations with Council members and Staff in advance, the value of an important public policy objective—avoiding the waste of precious public agency and community time and resources—is diminished. If the Council is concerned about the proximity in time of applicant communications with Council members and Staff before applications are filed, it could consider a mandatory “cooling off” period of 30—45 days between the last Council communications and the filing of a regulatory application.

The Bill seems intended to address a rare instance of apparent abuse of the current ex-parte communication law. I believe that the proposed cure of the Bill is disproportionate to the problem, and is more easily addressed by better Council and Staff discretion in their communications with all stakeholders. To do otherwise is to validate the law of unintended consequences. I urge the Council to withdraw or reject the Bill for the reasons discussed.

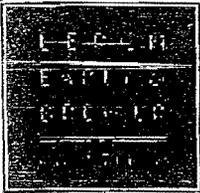
Thanks very much for your consideration.

Very truly yours,

Robert G. Brewer, Jr.

12-09

MIF
CC
J2



ATTORNEYS

STEVEN A. ROBINS
DIRECT 301.657.0747
SAROBINS@LERCHEARLY.COM

June 5, 2009

The Honorable Philip Andrews, President
Members of the Montgomery County Council
100 Maryland Avenue, 6th floor
Rockville, Maryland 20850

049467



2009 JUN -8 AM 7:47

MONTGOMERY COUNTY COUNCIL

Re: Bill 12-09: Ex Parte Communications

Dear President Andrews and Members of the Council:

I would like to provide you with comments on Bill 12-09: Ex Parte Communications. While I understand the objectives of the Bill, I think it goes too far and will unreasonably restrict necessary and productive discussions as it relates to certain matters that ultimately are on-the-record. I would like to address what I consider the most significant issues with the Bill. They are:

The Bill, as drafted, would likely restrict communications to and from a decision-maker's Staff as well as the decision-maker, except for non-substantive procedural issues, and restrict their ability to independently investigate any fact in a hearing. This could limit the flow of important information to Council decision-makers making their difficult decision-making tasks even harder. This provision of the Bill would clearly restrict the ability of a Councilmember and its Staff to go out and look at the area, property, intersection, *etc.* in question.

The Bill also applies the ex parte restrictions to "reasonably foreseeable" proceedings. Section 19A-15(b)(1) section states, "...including any matter that would be subject to a future on-the-record proceeding which is reasonably foreseeable." This provision is very troubling. How is "reasonably foreseeable" defined? There is no clarity on when that moment in time occurs. The Bill gives no definition or guidance as to how far in advance is long enough not to be "reasonably foreseeable." In theory, the moment someone inquires about the use of a property that could require rezoning, such an application could be considered "reasonably foreseeable." This requirement is overly broad and one that would be subject to much retrospective subjective consideration. The Bill, as drafted, would apply to everyone, and in both directions. Thus, citizens and community groups also could not contact Councilmembers or Staff, and vice versa, in advance of a filing. In summary, there simply is no clear and meaningful understanding of how much in advance of a filing something is considered "reasonably foreseeable" and thus compliance with the Bill always will be at issue.



ATTORNEYS

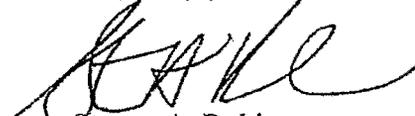
The Honorable Philip Andrews, President
Members of the Montgomery County Council
June 5, 2009
Page 2

The Bill also treats advice from other government agencies the same as communications from the public, rather than the same as communications to the decision-maker from the decision-maker's Staff. This seems problematic for a host of reasons. Also, how does this bill affect the People's Counsel and its role in cases? Could the Bill restrict the ability of the People's Counsel to discuss matters with Council Staff or other Staff?

The Bill contains too much uncertainty and, in my mind, raises more questions than answers. I would urge the Council to reject the Bill for the reasons discussed herein. At a minimum, the Bill should be deferred so that the Council's Legislative Counsel can work through the Bill and engage practitioners and others who participate in on-the-record proceedings to work together to formulate a clear and effective piece of legislation instead of one that is overbroad and flawed.

Thank you very much for your consideration.

Very truly yours,



Steven A. Robins

SHULMAN ROGERS GANDAL PORDY & ECKER, P.A.

Lawrence A. Shulman
Donald R. Rogers
David A. Pordy*
David D. Freishtat
Martin P. Schaffer
Christopher C. Roberts
Edward M. Hanson, Jr.
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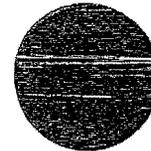
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Ira E. Hoffman
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* Virginia also * D.C. only
* Maryland only * VA only
† D.C. and VA only
† MD and VA only

Writer's Direct Dial Number:
(301) 230-5200

May 28, 2009

Hon. Phil Andrews, President
And Members of the
Montgomery County Council
Stella B. Werner Council Office Building
100 Maryland Avenue, 6th Floor
Rockville, MD 20850

042664



RE: Opposition to Bill No. 12-09, Ex Parte Communications

Dear President Andrews and Council Members,

This letter is submitted in opposition to the current draft of Bill No. 12-09 by all of the members of the Shulman Rogers Land Use Department. As explained below, it is our opinion that the proposed Bill, a copy of which is attached, is unconstitutionally vague and impractical.

At lines 8 and 9, the Bill prohibits extra-record communications "including any matter that would be subject to a future on-the-record proceeding which is reasonably foreseeable." This provision defies definition and is simply too nebulous to facilitate realistic compliance. The First Amendment prohibits vague laws that chill or intimidate one from exercising his/her First Amendment rights. Moreover, the Bill will result in the expenditure of substantial amounts of private and public sector time and money concerning potential rezoning applications which a decision maker knows to be unapprovable due to political, community or other reasons, but which information may not be discussed. Similarly, a decision maker's knowledge of alternative zoning scenarios which may be acceptable may not be communicated.

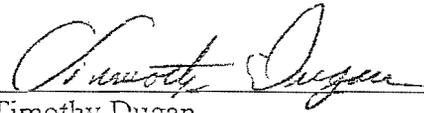
The preclusion at Lines 10 through 21 of decision makers and their advisory staff from engaging in extra-record communications or investigations goes well beyond the pale of reason. Advisory staff would be unable to discuss issues with Planning Board or other County staff members, thus creating scenarios where advisory staff might be advising their respective Council members based on incomplete information or inaccurate understandings of facts or proposals.

The likely ramifications are untenable and certainly outweigh any potential downsides associated with the limited, possible, ex-parte communications or activities they are intended to eliminate. For these reasons, we respectfully suggest that Lines 8 through 21 be removed from Bill No. 12-09 or, at the very least, substantially modified to address the First Amendment and practical concerns we raise.

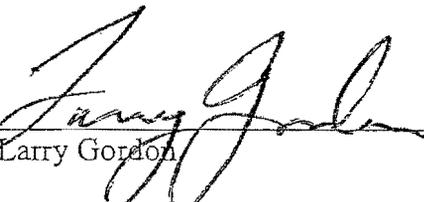
Kindly include this letter in the Council's public record on Bill No. 12-09. Thank you for your consideration of our concerns.

Very truly yours,

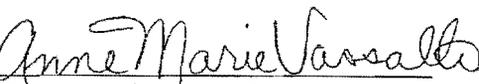
Shulman, Rogers, Gandal, Pordy & Ecker, P.A.

By: 
Timothy Dugan

By: 
David Freishtat

By: 
Larry Gordon

By: 
Nancy Regelin

By: 
Anne Marie Vassallo

Attachment

cc: Hon. Roger Berliner
Hon. Marc Elrich
Hon. Valerie Ervin
Hon. Nancy Floreen
Hon. Mike Knapp
Hon. George Leventhal
Hon. Nancy Navarro
Hon. Duchy Trachtenberg

g:\128\letter to phil andrews re opposition to bill no 12 09.doc



OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett
County Executive

Leon Rodriguez
County Attorney

MEMORANDUM

TO: Michael E. Faden, Senior Legislative Attorney
County Council

FROM: Edward B. Lattner *EBL*
Chief, Division of Human Resources & Appeals

DATE: June 19, 2009

RE: **Bill 12-09 (Draft 3): "Ethics - Ex Parte Communications"**

Bill 12-09 would amend a provision of the ethics law that prohibits an employee/decision-maker from considering an ex parte (or private) communication regarding any matter that the employee/decision-maker must decide on the basis of a record after giving interested parties an opportunity for a hearing. The bill would amend the law by: (1) prohibiting the employee/decision-maker, as well as any employee who advises the employee/decision-maker, from initiating or participating in any ex parte communication (2) extending the prohibition on ex parte communications to officials or staff of any County or other government agency other than the employee/decision-maker's own agency, and (3) prohibiting an employee/decision-maker from considering any ex parte communication made regarding "any matter that would be subject to a future on-the-record proceeding which is reasonably foreseeable."

I recommend the following amendments:

1. **Consistency with the APA.** Make companion amendments to § 2A-8(b)(2) of the County's Administrative Procedures Act (§§ 2A-1 to 2A-11), which similarly prohibits hearing authorities subject to the APA from considering ex parte communications. These two statutes (the APA and the ethics law) must be consistent.

2. **Prohibiting the employee/decision-maker from considering any ex parte communication when a proceeding is "reasonably foreseeable."** As an initial matter, this proposed amendment would not make any substantive change to the ethics law. The present law already contains a blanket prohibition against an employee/decision-maker from **considering** any ex parte communication, without limitation as to when the communication was made to the

employee/decision-maker. If the proposed amendment is retained, it would be helpful to clarify when a proceeding is to be considered “reasonably foreseeable.” Reasonable foreseeability may be a difficult standard to apply in this situation. Perhaps the law could provide criteria for determining when a future on-the-record proceeding is “reasonably foreseeable” (e.g., when a person reasonably anticipates filing an application or appeal before the employee/decision-maker, when a person has secured counsel to explore a possible application or appeal). Or perhaps the prohibition against the employee/decision-maker considering an ex parte communication **before a matter is even pending** could be limited to communications from an “interested person,” defined as a person from whom the employee/decision-maker would be precluded from accepting a gift under § 19A-16(c) (not including the exceptions in § 19A-16(d)).¹

3. Prohibition against an employee/decision-maker and advisor² from initiating or participating in any ex parte communication.

I assume the “reasonable foreseeability” test set out in subsection (b)(1) does not apply to this prohibition, which is set out in subsection (b)(2). Application of a reasonable foreseeability test to an advisor who is not involved in the day-to-day affairs of the employee/decision-maker might be especially problematic.

I also assume that an employee/decision-maker or an advisor who receives an unsolicited ex parte communication does not violate this proposed prohibition against initiating or participating in an ex parte communication, so long as the employee/decision-maker or advisor does not substantively respond to that communication. For example, there are times when a party, typically pro se, writes to the employee/decision-maker and fails to send a copy of that communication to the opposing party. The employee/decision-maker may either (1) forward a copy of the letter to opposing party or (2) return the letter to the sender with a request to refile the letter with a certificate of service (or a “cc”). I would not regard these actions as violating the proposed amendment.

The bill should make clear that the prohibition against an advisor to an employee/decision-maker only applies while the matter is pending before the employee/decision-maker and the advisor is acting in an advisory capacity. Example: an attorney in this office may advise the Animal Matters Hearing Board. While the matter is pending before the Board, the bill

¹ The federal APA prohibition against ex parte communications “apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.” 5 U.S.C. § 557(d)(1)(E).

² The federal APA prohibits ex parte communications with the employee/decision-maker “or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding.” It is unclear whether this prohibition applies to an employee who advises the employee/decision-maker.

would prohibit that attorney from initiating or participating in any ex parte communication with the parties. But, if the matter is appealed, the County might intervene and then that attorney would be representing the County in the appellate courts. While acting in that capacity, the bill would prohibit the attorney from discussing the appeal with the other parties because the court might remand the matter back to the Board.

4. **Do not remove advice from County staff from the list of permissible communications.** Under the present law, an ex parte communication does not include advice rendered to an employee/decision-maker by appropriate officials or staff “of County or other government agencies.” The bill proposes to remove “other government agencies” from this exception, thereby treating advice from other government agencies (e.g., Planning Board) as an ex parte communication. That does not present any legal issue. But the bill also proposes to remove advice from County agencies from this exception, limiting the employee/decision-maker to advice provided by the employee/decision-maker’s own agency. (Lines 34-36.) This is too narrow a restriction. For example, this would preclude the hearing examiner in a road abandonment or sidewalk/road construction case under Chapter 49 from obtaining technical advice from the Department of Transportation following the public hearing.³ The current exception permitting communications from appropriate officials or staff of County agencies should be retained. This would also be consistent lines 20-21 of the bill, which provides that “the recipient of any communication made outside the record, including advice rendered by officials of staff of **another government agency**, must promptly enter that communication in the record” (emphasis added).

The following items are policy issues for your consideration:

1. The Council might consider adding a prohibition against any **person** making an ex parte communication to the employee/decision-maker. The federal APA contains such a prohibition in 5 U.S.C. § 557(d)(1)(A). Presently, County law only prohibits **the employee/decision-maker** from participating in or considering any ex parte communication.⁴

2. If it is deemed desirable to extend the prohibition on participating in an ex parte communication to an employee who advises the employee/decision-maker, does it automatically follow that the requirement that the recipient of the ex parte communication promptly enter that communication in the record should be similarly extended to the employee who advises the employee/decision-maker? The current law already prohibits the employee/decision-maker from considering an ex parte communication and requires the employee/decision-maker to enter any

³ Although these types of hearings are legislative hearings, rather than quasi-judicial hearings, they are, at least arguably, instances where the employee/decision-maker must make a decision on the basis of the record.

⁴ Arguably, a person who makes an ex parte communication violates § 19A-14(f)’s prohibition against influencing or attempting to influence an employee to violate the ethics law.

Mike Faden
June 19, 2009
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ex parte communication received into the record. Does it make sense to require the advisor to make the employee/decision-maker aware of an ex parte communication directed to the advisor by entering it into the record?

3. Finally, I understand that this legislation was prompted by Council staff's experience during the consideration of a local map amendment. I am not aware of a similar issue involving other quasi-judicial bodies. Perhaps the Council should consider amending the local map amendment procedures rather than the ethics law.

ebl

cc: Kathleen Boucher, Assistant Chief Administrative Officer
Barbara McNally, Executive Secretary, Ethics Commission

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Staff technical amendment –

Conform Administrative Procedures Act to Ethics law

Amend §2A-8 as follows:

2A-8. Hearings.

* * *

(b) Official record.

- (1) The hearing authority must prepare, maintain and supervise the custody of an official record in each case. The record must include testimony, exhibits and verbatim transcript, if any, submitted during the hearing and at other times the record is open to receive evidence. Documentary evidence may be received in the form of copies, excerpts, photographic reproductions or by incorporation by reference. The hearing authority must make the official record available for inspection to all affected persons before any hearing.
- (2) [[a. This paragraph applies to any ex parte or private communication, written or oral, received by a member of a hearing authority if:
 - (i) the communication relates to a contested matter before the hearing authority;
 - (ii) all appellate rights regarding the contested matter have not been exhausted; and
 - (iii) the hearing authority is required by law to make a decision on the matter based on the record before it.

b. This paragraph does not apply to:

- (i) legal or technical advice rendered by government agency staff or an attorney for the County at the request of the hearing authority;
 - (ii) any communication about the status or procedure of a pending matter or;
 - (iii) any communication between members of the hearing authority.
- c. If a member of a hearing authority receives an oral ex parte or private communication, that member must reduce the substance of the communication to writing within a reasonable time after receipt of the communication.
- d. If a final administrative decision has not been made prior to receipt of the ex parte or private conversation, the hearing authority must send a written notice to all parties that discloses the contents of the communication and states whether the hearing authority will consider the communication as a basis for its decision under subparagraph e.]]

[[e.]] Section 19A-15(b) applies to any ex parte or private communications received by a member of a hearing authority The hearing authority must include the ex parte or private communication in the record and may:

- (i) consider the communication as a basis for its decision after giving all parties an opportunity to respond to the communication; or

(ii) decide the matter if the hearing authority expressly finds that it has not considered the communication as a basis for its decision.

[[f.]] The substance of an ex parte or private communication received after a final administrative decision and before appellate rights have been exhausted must be maintained in the case file and, in the event of any remand, treated [[in accordance with all other provisions of]] as required by this paragraph.

* * *