

MEMORANDUM

TO: County Council

FROM:  Michael Faden, Senior Legislative Attorney
Jeffrey L. Zyontz, Legislative Attorney

SUBJECT: **Public Hearing:** 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 Management and Fiscal Policy Committee worksession is tentatively scheduled for June 15.

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. 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 or any other quasi-judicial agency.

Specifically, Bill 12-09 would:

- 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 record (see ©2, lines 10-18);
- 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);
- 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 to the decision-maker from the decision-maker's staff (which can be off-the-record) (see ©2, lines 19-22; ©3, lines 29-36).

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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:

Sec. 1. Section 19A-15 is amended as follows:

19A-15. Disclosure of confidential information; ex parte communications.

* * *

(b) (1) A public employee decision-maker must not consider any [ex parte or private] communication made outside of the record regarding any matter that must be decided on the basis of a record, [after giving interested parties an opportunity for a hearing] including any matter that would be subject to a future on-the-record proceeding which is reasonably foreseeable.

(2) Except as otherwise expressly authorized by law, any public employee decision maker, and any public employee who directly advises a decision maker, must not:

(A) initiate or participate in any communication outside the record with any person regarding a matter that must be decided on the basis of a record; or

(B) conduct an independent investigation of any fact in or related to a record of a matter that is before or will come before the decision-maker.

(3) The recipient of any communication made outside the record, including advice rendered by officials or staff of another government agency, must [incorporate any ex parte or private] promptly enter that communication in the record. If the communication was oral, the recipient must write down the substance of the communication and enter it into the record. The decision-making body may consider [ex parte or private communications] any communication made outside of the record

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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MF
CE
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LH
JZ

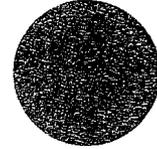
OFFICE OF MANAGEMENT AND BUDGET

Isiah Leggett
County Executive

Joseph F. Beach
Director

MEMORANDUM

April 17, 2009



APR 17 11 49 AM

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

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