

Planning Commission Service Area Boards Advisory Planning Commission

Training Session

February 16, 2023

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Todd Sherwood

AGENDA

- **Welcome and Introductions – Robert Ruffner, Planning Director**
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Session I

- **Noticing a Meeting & Meeting Management – Michele Turner, Acting Borough Clerk**
- **Open Meetings Act – Sean Kelley, Borough Attorney**
- **Resignations & Filling a Vacancy – Michele Turner**
- **Conflicts of Interest – A. Walker Steinhage, Deputy Borough Attorney**
- **Q&A to end Session I**

Session II

- **Quasi-Judicial Hearings**
 - **PC Process, procedure, lessons learned – Robert Ruffner**
 - **Bias & Impartiality – Samantha Lopez, River Center Manager**
 - **Ex parte communications – Robert**
 - **Decision best practices – Walker**
 - **Q&A as time allows**

Notice a Meeting & Meeting Management

MEETING NOTICE REQUIREMENTS:

- ❖ The Open Meetings Act, AS 44.62.310-.312, requires that all meetings of a governmental body of a public entity of the state be open to the public, except when an executive session is warranted.
- ❖ Reasonable public notice shall be given for all meetings. The notice must include the date, time, and place of the meeting, and may be given using print or broadcast media. The governmental body shall provide notice in a consistent fashion for all its meetings.

[Note: It is recommended that notice be given no less than five days prior to a meeting whenever possible.]

- ❖ Be consistent in how you notice your meetings as well as when and where you meet.
- ❖ Public service announcements can be used as a form of notice; however, it is recommended you also post your notices in a consistent location.

See also, KPB 21.02.110 - Guidelines for APC Meeting Procedures

GENERAL MEETING PROCEDURES:

Quorum: No meeting may proceed in the absence of a quorum. A quorum is more than one-half of the board. In absence of a quorum, the only action allowed is to set a date and time for the next meeting. *[Exceptions may apply; please consult your specific section of the code, the Borough Clerk's Office, or the Legal Department as needed.]*

Agendas

- Board members should know how to add items to the agenda
- Agendas should be clear and easy to understand
- Agendas should have a set format (sequence) that is followed from meeting to meeting
- Agendas give the public notice of when and where the meeting will be held
- Agendas give the public notice of what will be discussed
- Agendas should give the public time to speak on both items on the agenda and items not on the agenda

Role of Chair

ROLE AND RESPONSIBILITIES OF THE CHAIR

- Every effective presiding officer should have the following qualities: leadership, credibility, neutrality, sound judgment, and fairness.

ROLE OF THE CHAIR

- Determines who has the right to speak.
- Explains/clarifies issues without bias.
- Should insist on decorum and order during debate.
- Ensures members keep to relevant discussion and discourages repetition.
- States the motion clearly.
- Restates the motion and puts it to a vote.
- Announces the result of the vote [EXAMPLE: The motion has passed; or The motion has failed]
- Calls members out of order.

Adequate notice & well run meetings serve the public's interest

- You are an elected board and your goal is to make the best decisions you can for your service area, APC, or Borough as a whole (PC)



Handling the Public at Meetings

- Have sign-up procedures and other rules (outlined in your policies)
- Have time limits – **Be Consistent And Stick To Those Time Limits**
- **REMEMBER: The public is there to comment only, public testimony is not a time for debate between the members and the public.**
- If you have a question, ask it but **DO NOT DEBATE.**

Decorum & Equal Opportunity To Be Heard

- All members of public should be treated with dignity and respect when providing public testimony on a matter
- Never make personal attacks, or tell a speaker he or she is being untruthful
 - If faced with personal attacks, remind the public that personalities should not be part of testimony and move on to next speaker. **Do not engage.**
- Do not exhibit favor toward one perspective of testimony over another. Allow all to speak. Enforce time limits uniformly and consistently.
- Be respectful



Alaska Open Meetings Act (OMA)

AS 44.62.310 – 44.62.312

THE PUBLIC'S RIGHT TO KNOW

A.S. 44.62.312. State policy regarding meetings

(a) It is the policy of the state that

(1) ... governmental units ... exist to aid in the conduct of the people's business;

(2) it is the intent of the law that actions of those units be taken openly and that their **deliberations be conducted openly**;

(3) the people of this state do not yield their sovereignty to the agencies that serve them;

(4) the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know;

(5) **the people's right to remain informed shall be protected** so that they may retain control over the instruments they have created;

...

(b) AS 44.62.310(c) and (d) **[exceptions] shall be construed narrowly** in order to effectuate the policy stated in (a) of this section and to avoid exemptions from open meeting requirements and unnecessary executive sessions.

Underlying state policies

- The governmental units mentioned in AS 44.62.310(a) exist to aid in the conduct of the people's business.
- It is the intent of the law that actions be taken openly and that deliberations be conducted openly.
- People do not yield sovereignty to agencies that serve them.
- The people do not give their public servants the right to decide what is good for the people to know and not know.
- The people's right to remain informed shall be protected so that they may retain control over the instruments they have created.

Who is covered?

- Assembly
- Service Area Boards
- Planning Commission
- Advisory Planning Commission
- Committees & Work Groups
- Subcommittees
- Task Forces, other advisory boards



Selected OMA Requirements

- All meetings of a governmental body of a public entity are open to the public, with some exceptions, and reasonable advance notice must be provided.
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- Attendance and participation at meetings by members of the public or by members of a governmental body may be by teleconferencing. Agency materials that are to be considered at the meeting shall be made available at teleconference locations if practicable.
 - Except when voice votes are authorized, the vote shall be conducted in such a manner that the public may know the vote of each person entitled to vote. The vote at a meeting held by teleconference shall be taken by roll call.

Rights of the public under the OMA

- Right to reasonable notice of the meeting
- Right to be present
- Right to listen
- Right to review any materials that will be considered by the public body
- Right to know how each person voted on each issue

WHO IS NOT COVERED?

- Private individuals lobbying members of the body
- **One** person with the authority to act
- Employees and staff
- A body meeting to make a decision in a quasi-judicial capacity
- Court Personnel
- Legislature
- U.S. Government, corporations, native entities

WHAT IS A “MEETING”?

- “Meeting” means a gathering of members of a governmental body (which includes “committees”) when **more than three (3) members or a majority of the members, whichever is less, are present and**
 - *For a policy-making body:* a matter upon which the governmental body is empowered to act is considered by the members collectively. or
 - *For an advisory body:* the meeting is prearranged for the purpose of considering a matter upon which the body is empowered to act.
- Different definition of “meeting” for OMA than in Roberts Rules. Quorum is not relevant.

Meeting Pitfalls

Telephone Polls/ Serial Meetings

A series of calls or contacts that circumvent the OMA by predetermining the outcome without public discussion (whether or not intended)

A Meeting within a Meeting

A private conversation taking place during a recess in a lawfully noticed meeting could itself be considered an illegal meeting

Facebook or Twitter Posts

Even a “Like” is considered conversation. An open forum where several members dialogue about an issue could be considered a meeting.

Avoid: Polling - Serial Meetings

- Polling occurs when members of the body or a staff person polls members individually on pending matter.
- A serial meeting occurs when an allowed number of individual members privately discuss a matter within the authority of the board to consider, and then some or all of these members privately discuss it with other members in turn. Can be by email, verbally, social media, etc.
- Circumvents act by predetermining vote without public process.
- NOT OKAY / NOT LEGAL.

Is public comment required?

- The OMA doesn't cover this aspect of your meetings, but
- However, AS 29.20.020(a) does:
 - “The governing body shall provide reasonable opportunity for the public to be heard at regular and special meetings.”
 - This section gives the public a “reasonable opportunity . . . to be heard” at public meetings.
 - This section further charges the governing body with the responsibility to provide reasonable opportunity for the public to be heard.
 - Remember, “reasonable opportunity” also means that “reasonable” restrictions are allowed, such as time limits and rules of decorum.

What happens if we violate the OMA?

- If you know a violation has occurred, attempt an informal cure.
- Action may be voidable only after a public interest analysis
- Cannot be named personally in a lawsuit / no personal liability but:
 - If elected, you may be subject to recall
 - If appointed, you may be subject to removal
- If you are an advisory only board, action taken may be voidable if your recommendation played a significant role in that body's decision-making process... most likely though if legal is made aware, then your recommendation will not make it to the decision-making body unless cured.

Resignations & Filling a vacancy

- In general, if a member resigns, the resignation should be accepted by the board and a vacancy should be declared for that seat. Typical process after that is a 30 day notice period, followed by appointment by Mayor and Assembly confirmation.
- Specific code provisions:
 - PC – KPB 2.40.015 and KPB 2.40.030
 - APC – KPB 21.02.070 and KPB 21.02.100 PC – KPB 2.04.030
 - SAB – Various code sections under Borough Code Title 16

CONFLICT OF INTEREST

Conflicts of Interest

Governed by common law, except where modified by legislation. Basically prohibits “divided loyalties”.

Under common law contracts between an official and the entity they represent are void, even if the official took no part in the vote on awarding the contract.

Public officials held to high standard as trustees of people. Appearance of impropriety must be avoided.

Common Law

Focus is on the relationship between the public official's financial interest and the possible result of the official's action, regardless of the official's intent.

State statutes and borough code supersede some aspects of common law.

State Statutes/Borough Code

AS 29.20.010 prohibits participation in official action where official has a “substantial financial interest.”

State statutes do not define substantial financial interest. Borough code has definition in 2.90.320:

“An interest that will result in immediate financial gain or financial gain which will occur in the reasonably foreseeable future.”

Borough Code provisions

KPB Chapter 2.58 governs conflicts of interest.

Basic rules:

Cannot enter into a contract with the borough unless code requirements are met.

Can never **participate in discussion/decision or vote** on a matter in which you have a substantial direct or indirect financial interest.

Contracts and Conflicts

Conflict Analysis For a Pending Contract

1. Do you have a substantial interest in a pending contract?
2. A “substantial interest” is a pecuniary (related to \$/financial) or material benefit accruing as a result of a private, business or professional transaction with the borough or service area.
3. You are deemed to have an interest in the business affairs of your spouse, spousal equivalency, minor children or dependents, companies of which you are a member, employee, officer or director, including director of a nonprofit corporation.

Exceptions to “Substantial Interest”

A contract where the official is only deemed to have an interest because they are an officer or employee of the contracting entity, but not when:

- Their pay will not be directly affected by the contract; and
- Their duties do not directly involve obtaining, preparing for, or performing the contract duties.
- A contract that was entered before the official’s election or appointment. This does not authorize renewing the contract.

Other limited exceptions in KPB 2.58.035 (stockholdings, unpaid directorships with nonprofits, etc.)

Filing Notice of Intent to Do Business

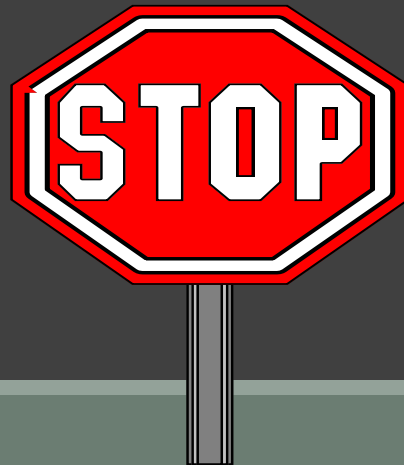
Although you cannot participate in consideration of, or vote on, a matter in which you have a substantial interest, the contract can be entered if you file a Notice of Intent to Do Business – Clerk's Office has the form.

Must be filed in the Clerk's Office at least ten days before bidding or entering the contract, whichever is earlier.

Must fully disclose the conflict and the nature of the proposed business relationship.

Prohibition of certain contracts

If the contract would create a situation where the official could not adequately perform the duties of his or her office, then the conflict is absolute and the contract must be awarded to someone else.



Other conflicts

Not all conflicts are financial. Some are based on other factors such as impartiality, accountability, integrity, etc.

Remember: You represent the government and the citizens of the Peninsula are trust you to do the right thing.

What if you can't be impartial? Should you vote on your favorite niece's property values? What about your mom's?

How would your actions look on the front page of the newspaper? While what you do is honorable and with the best of intentions, should you really accept a free lunch every time you go to the local restaurant simply because they like the way you vote?

Procedure if you suspect you have a conflict:

1. Fully and publicly disclose the nature of the potential conflict **before discussion begins on item.**
2. State whether or not you think you have a conflict, and request a ruling from the chair. Chair can either rule or refer it to the body to debate and the body decide.
3. If the chair rules, and any board or commission member disagrees with the chair, they may appeal that ruling to the full body. Requires a second.
4. The person with the alleged conflict may not vote on the question of whether they have a conflict.
5. If you have a conflict, you must “recuse” yourself—this means you may not participate in the discussion/debate prior to the vote.

BOTTOM LINE:

When in doubt...shout it out

You are in a position of public trust: So, when in doubt always **DISCLOSE, DISCLOSE, DISCLOSE.**

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Session II

QUASI-JUDICIAL HEARINGS

(Permits, Plats, Land Use, Etc.)

Lessons learned

- ❖ Public opportunity to be heard
- ❖ Handling personal attacks or emotional public comments
- ❖ Explaining the process
- ❖ Respectful deliberations
- ❖ Reaching a decision

Bias and Impartiality

- ▶ The due process clause of both the U.S. Constitution and Alaska Constitution requires fair hearings in proceedings affecting property rights.
- ▶ Commissioners who have prejudged the facts of an individual case pending before it to the extent that they can no longer be impartial are biased, and their participation in decisions may invalidate the commission's decision and violate the due process clause which requires fair hearings in proceedings affecting property rights
- ▶ A federal case addressing the administrative decision-making process states the test for disqualifying bias as “a disinterested observer may conclude that the agency has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it. .” This case and several zoning cases indicate that the appearance of bias, rather than actual bias, disqualifies the commissioner *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. 1970).

BIAS CONTINUED

- ▶ Example of Bias - “I AM PRO {Insert} so I’ll vote in favor every time”... then you aren’t acting as a neutral decision maker based on the facts before you in that specific case.
- ▶ The single most difficult issue for individuals that aren’t trained judges. Leave your bias at the door.
- ▶ THE GUIDING LIGHT: WHAT IF IT WAS YOU? You’d want to be heard respectfully and feel like equal consideration was given to your testimony and evidence. Nothing poisons the well more than clear apparent bias.
- ▶ The integrity required of public officeholders demands that even an “appearance of impropriety” be avoided.
- ▶ Land use/zoning decisions that are the result of prejudice, bias, or impartiality will be invalidated under Alaska law
- ▶ A judge must recuse himself or herself in a proceeding in which the judge’s impartiality may be question
- ▶ “The decisive question ... must be whether [the commissioners] actually have made up their mind ... regardless of any argument that might have been advanced at the hearing

Ex Parte Communications

- ▶ Ex parte communication = a communication with a party or non-party about the matter or relevant to the merits of an adjudicatory proceeding without proper notice all parties and not on the public record.
- ▶ Examples include:
 - ▶ Emails or calls specific to issue being heard
 - ▶ Hypothetical conversations that are really about issue to be heard
 - ▶ Visiting the property or site in question
 - ▶ “Friend of a friend” back channel communications

Ex Parte Contact

- If it's legislative you can talk to the public/constituents about it.
- If it's quasi-judicial, you are the judge; only evidence or information you can receive is in the due course of the proceeding or hearing

Note: this includes talking to planning staff about a land use permit or application outside the context of the hearing. Ask question on the record, for all to hear/know.

Also note: Because Borough staff is not the decision-making entity, it is acceptable for staff to talk with other parties, just not to individual board/commission members, regarding the case

- Ex parte contact renders a decision voidable.
- In the administrative or quasi-judicial context the Alaska Supreme Court has stated:

“It is difficult to imagine a more serious incursions on fairness than to permit...one of the parties of to privately communicate his [or her] recommendations to the decision makers... We are of the opinion that due process forbids it.”

Public awareness

- ▶ It can be difficult for the public to understand why they cannot talk to their elected or appointed board or commission members - especially since you were elected or appointed to help citizens with local, legislative, matters and advise the assembly regarding citizen concerns.
- ▶ It is important for board members to be able to tell the public there is a good reason for it being inappropriate to have ex parte contact on a quasi-judicial matter. Those reasons are founded in constitutional protections of individual rights, basic due process requirements of a fair & impartial decisionmaker, and the need for a transparent process that is free of even the appearance of impropriety. The answer to why a constituent cannot contact when you are sitting as the judge shouldn't be "I don't know, the legal department said you can't".
- ▶ **Contact and communications from the public are absolutely acceptable and encouraged in the legislative arena.**

“QUASI-JUDICIAL” REVIEW

- Quasi-judicial body has powers resembling those of a court of law or judge
- Adjudicative, not legislative
 - Members must be willing and able to **apply relevant law** to each case and set aside personal feelings/opinions and/or other outside concerns
- Quasi-judicial decisions: *General law or policy are applied or affect an individual's property interests.*
 - *Examples: Preliminary/final plat approvals, CUPs, exception and variance applications*

RESPONSIBILITIES: RELY ON THE EVIDENCE

Decisions must be:

- Analyzed in context of the relevant law—nothing more or less
- Based upon body's general knowledge; and
- Based upon evidence/facts presented during process

Decisions may not:

- Be based upon an individual member's specific knowledge
- Be based upon personal opinions/feelings/outside concerns
- Be based upon evidence introduced outside of process or by individual member
- Be based upon assumptions about evidence...so ask questions during hearing

RESPONSIBILITIES: DEVELOP THE RECORD

- May only decide a matter based upon the **evidence presented**
 - Ask questions! Don't wait until deliberations to realize you don't have all the information you need to make good findings
 - If there's an appeal, the hearing officer and/or superior court will likely rely entirely on your record so...

It must be clear from the record *why* you reached your decision.

QUASI-JUDICIAL DECISIONS

- In Writing
- Findings of Fact
- Adjudicative Session
- Conclusions of Law

MAKE A DECISION: GOOD FINDINGS

- Findings of fact need to be **specific and detailed**
 - What **evidence** did you rely on to reach your decision?
 - **List** or **describe** the **specific evidence** (or lack thereof) that you relied on to make your decision
- Not just a statement...there must be something in the record (photograph/plat/testimony/ etc.) to **support** the statement.
- Findings should be **customized** to each specific matter
- In certain cases (like preliminary plats) you may vote to adopt or to modify the suggested findings in the staff report...but must **expressly vote** to do so.

MAKE A DECISION: HOW TO GET THERE

- May decide immediately and deliberate in public
- Need more time? Take matter under advisement.
 - Motion to adjourn into **adjudicative session**
 - Deliberations **do not** need to be public...**exempt** from OMA
 - But don't leave adjudicative session without developing findings because **decision must be public**

CONCLUSIONS OF LAW

- These can be conclusory statements...obviously
- Conclusion that a **legal requirement** – like a standard – has been met based upon the evidence (findings!) presented.
- Essentially saying you've applied the facts/evidence to the relevant law (or, sometimes, vice-versa) and determined the relevant law has, or has not, been satisfied.

RESPONSIBILITIES: FINAL REMINDER

- Lawyer **can** help with wording/style/meeting legal criteria but **cannot** step into your role
- Lawyer cannot create findings or conclusions of law for you...especially if there is nothing in the record and/or has not been discussed

QUESTIONS?

THANK YOU FOR
ATTENDING!