

***If one member of the Planning Commission meets with a representative of an applicant and one interested party at a site visit, is this an ex parte communication?***

It certainly is. State law prohibits a local board member sitting in a contested hearing from speaking with an applicant on any of the merits of their application, unless it is during a public hearing on the matter, with the board present as well as any interested parties. 24 V.S.A. § 1207 (b). This law applies to all quasi – judicial boards, whether it be the planning commission, the development review board, or any board that makes a decision concerning the legal rights of a person. In this case, your planning commissioner should be joined by the entire commission and all interested parties at the site visit.

In a small Vermont town, it is easy to foresee situations where a member of a board runs into an applicant, say, at the local store. If the applicant asks the board member about an issue in the proceeding, the board member should simply say, “I’m sorry, but I cannot talk about the issues unless we are in a hearing.” If a board member receives any ex parte communications, such as written letters, or even oral statements made by an interested party, the board member should acknowledge at the hearing that this contact occurred and inform all parties of the information exchanged at the site. This way parties can address the information and it can be made part of the record of the proceeding.

There is one wrinkle in this issue that is important to be aware of. *Before* a hearing is “formally opened,” i.e., prior to an application being filed, it *is* acceptable for a member of a board to discuss, in very general terms, the requirements for an application. It is the practice in some municipalities to designate one member of a Board or Commission to meet with potential applicants to discuss application requirements and the application process before an application is actually filed. Such a practice would not constitute an ex parte communication as long as the merits of the application (whether the project meets with the applicable criteria) are not discussed. As you can see, the danger in engaging in this practice is that potential applicants may attempt to engage a board member about the merits of a proposed project at such a meeting. It takes discipline to avoid getting into such a conversation. Accordingly, such contacts must be handled with extreme care.

Notwithstanding this wrinkle, in our opinion, it is still not acceptable for Board or Commission members to conduct a site visit with an applicant before an application is filed. It would be virtually impossible to avoid discussing the merits of a project at a site visit, and to do so would prejudice those who may wish to participate in hearings on the application. Some local officials have said, “sometimes it is helpful for us to have a member do a preliminary site visit with the applicant and talk about the issues.” While it may seem helpful, we believe it is a violation of the rights of other, absent parties who do not get the chance to address the matter and have their side heard.