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EX PARTE COMMUNICATIONS IN LOCAL LAND USE DECISIONS

*Jennie L. Pettit**

I. INTRODUCTION

Prior to the turn of the century, land owners were free to use their land for its economically best-suited purpose, provided they acted within the limitations of their estate and created no nuisance or trespass against their neighbor's property.¹ Today, land use ordinances restrict this freedom to use land for the best economic purpose. Instead, legislatures determine land use by the long-term interests of communities as a whole rather than as incidences of individual land ownership.² These land use regulations are ubiquitous, and often, in effect, sever development rights from land ownership by dictating how land can be used. The result is a conflict between the land owner's notion of property rights and the extensive statutory regulation of land use. Inconsistent judicial review of ex parte communications occurring in the land use context further complicates this conflict.

Within any given municipality, elected legislatures make land use decisions. Commonly, these legislatures enact and amend ordi-

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¹ *Fasano v. Board of County Commissioners of Washington County: Land Use Planning and Zoning in Oregon*, 10 WILLAMETTE L. REV. 95 (1973) [hereinafter *Fasano Comment*].

² See R. FREILICH & E. STUHLER, *THE LAND USE AWAKENING* 2, 281 (1981). The U.S. Supreme Court has upheld land use ordinances as an extension of the governmental power to abate nuisances. *Id.*

For cases supporting government power to regulate land use see *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887) (abating a nuisance by prohibiting the use of land for a certain purpose is a valid exercise of police power); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (ordinance prohibiting manufacture of bricks within specified areas of the city is a valid exercise of police power).

The Court then extended this police power to zoning and enabled local governments to restrict uses and intensities of uses in certain areas of their communities without a showing of nuisance. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

nances. Various types of elected and appointed land use boards³ administer the provisions of these ordinances.⁴ Land use statutes often require notice to interested parties about land use changes, public hearings,⁵ record keeping, and the opportunity for all parties to present and rebut evidence.⁶

An *ex parte* communication⁷ is a communication between the decisionmaker and an interested party that takes place without public notice and outside the record.⁸ *Ex parte* communications violate statutes and notions of fairness, and lead to the public's perception that land use boards are subject to special influence. These communications may actually encourage such influence. Courts create confusion between the administrative and legislative standards when they review an appealed land use decision and prohibit the *ex parte* communications of elected officials but do not object to those made by appointed officials.

Administrative land use decisions are subject to judicial review in all states.⁹ According to the Standard State Zoning Enabling Act, judicial review by a court of record is available to any person aggrieved by a decision.¹⁰ Depending on the jurisdiction, an aggrieved person may obtain this review by direct appeal to the courts, a certiorari proceeding, or through an action for a writ of mandamus.¹¹ While the procedure may vary, the essential character of judicial

³ This Comment will hereinafter use "board" to refer to city councils, planning and zoning commissions, boards of zoning adjustment and zoning appeals, county commissions, and pollution control boards as a group of local decisionmakers that deal with the interpretation and application of land use ordinances.

⁴ See 1 SOUTHWESTERN LEGAL FOUNDATION, INSTITUTE ON PLANNING AND ZONING 112-13 (1960).

⁵ The hearing is also where people develop attitudes toward the zoning process, depending upon their experience, of either respect, dislike, or disgust. *Id.* at 135.

⁶ A. Sirois, Conflicts of Interest Law as it Relates to Beacon Hill and Back Bay Architectural Commissions' Members 16 (April 21, 1986) (unpublished memorandum).

⁷ This Comment deals with *ex parte* "communications," where there is a verbal exchange between decisionmaker and interested party, as opposed to *ex parte* "contacts," which may include the mere presence of an influencing party or previous employment. Certain quotations used may refer to *ex parte* "contacts" but their intent also refers to the more narrow "communication" aspect; the word contact will be used in reference to these *ex parte* communications.

⁸ *Town of Ottawa v. Ill. Pollution Control Bd.*, 129 Ill. App. 3d 121, 126, 472 N.E.2d 150, 154 (1984) (telephone call that was inconsequential yet succeeded in transmitting influential information without notice to opposing parties was considered an *ex parte* communication).

⁹ 4 R. ANDERSON, AMERICAN LAW OF ZONING § 25.01 (3d ed. 1986).

¹⁰ STANDARD STATE ZONING ENABLING ACT § 7 (1926), reprinted in 4 R. ANDERSON, *supra* note 9, at § 25.02. Many states have adopted the main features of the Act. 4 R. ANDERSON, *supra* note 9, at § 25.02.

¹¹ *Id.* at § 25.01.

review of land use decisions is similar among the states.¹² None of the standards of review currently used by state courts to determine whether an ex parte communication is basis for vacation provides guidelines for elected and appointed officials to prevent appealable error.

A local government can increase both fairness and the perception of fairness by policing appointed land use board members to prevent ex parte communications and by allowing elected land use board members to communicate with any interested party. Courts create confusion by treating appointed administrative boards as legislatures and vice versa. This Comment proposes guidelines for land use decisionmaking and judicial review of land use decisions. These guidelines advocate applying traditional notions of legislative and administrative standards regarding ex parte communications to the area of land use law. Changes are needed in order to restore integrity and clarity to the land use decisionmaking process.

Ex parte communications become a serious problem when decisionmakers are uncertain of whether to function politically or adjudicatively. A primary goal of this Comment is to clarify the role decisionmakers perform in terms of the body that they serve. This clarification will prevent situations where a well-meaning decisionmaker has ex parte contacts and a court later overturns an otherwise valid decision. The proposed approach clarifies and protects developers', neighbors', and city officials' rights and duties, and allows the long-term interests of the entire community to play a role in resolving land use controversies.

Section II of this Comment outlines the traditional legislative, judicial, and administrative local government decisionmaking models. Each model is held to a standard of review regarding ex parte communications that best meets the requirements of each type of office. Section III then discusses each of the three current standards of review that courts use to decide whether an ex parte communication is basis for vacating a land use decision: the legislative/quasi-judicial distinction, clear showing of bias, and appearance of fairness. The conclusion of Section III is that the current standards do not reflect accurately the roles of elected and appointed officials. Section IV then advocates treating elected board members as legislators and appointed board members as administrators and holding each to their respective traditional standards in regard to ex parte communications.

¹² *Id.* at § 25.02.

II. TRADITIONAL MODELS OF LOCAL GOVERNMENT DECISIONMAKING

State and municipal decisionmaking is a function of legislatures, courts, and administrative bodies. The traditional legislative decisionmaking model involves elected representatives who enact statutory law.¹³ This model consists of a process of lobbying and bargaining where legislators speak with interested parties to determine their constituents' views.¹⁴ A legislator is likely to be voted out of office if he or she does not heed the public consensus. Therefore, reviewing courts consider *ex parte* communications a necessary part of the legislator's duties.¹⁵

In comparison, the traditional judicial decisionmaking model involves an impartial judge who applies pre-existing legal norms to a specific fact pattern.¹⁶ Although local judges may be elected or appointed, statutes prohibit all judges from speaking outside of the courtroom with parties interested in the outcome of a case.¹⁷ *Ex parte* communications are not necessary for an effective judiciary, whereas effective legislatures are dependent on such communications.

Traditionally, state and federal administrators act within a particular, defined area.¹⁸ At the local level, statutes create and govern administrative bodies. As with judges, administrative decisionmakers apply general rules to particular situations and rely on fixed decisionmaking procedures.¹⁹ According to the Revised Model State Administrative Procedure Act, to carry out this public duty administrators must not communicate, directly or indirectly, with any person or party except upon notice and opportunity for all parties to participate.²⁰

¹³ See generally H. READ, MATERIALS ON LEGISLATION, 1 (1973). Commentators consider legislation the most important instrument for law-making. *Id.*

¹⁴ *Id.* at 424-26.

¹⁵ *E.g.*, *City of Fairfield v. Superior Court*, 14 Cal. 3d 768, 780, 537 P.2d 375, 382, 122 Cal. Rptr. 543, 550 (1975) (council members have an obligation to discuss issues with their constituents); *Turf Valley Assoc. v. Zoning Bd. of Howard County*, 262 Md. 632, 644, 278 A.2d 581, 580 (1971) (campaign promise to support a position does not disqualify a board member from voting on that issue).

¹⁶ See M. SHAPIRO, COURTS, A COMPARATIVE AND POLITICAL ANALYSIS, 1 (1981).

¹⁷ ABA CODE OF JUDICIAL CONDUCT Canon 5 §A(4) (1983) ("[a] judge should . . . neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding").

¹⁸ For example, housing inspectors, zoning agencies, licensing officers, street authorities, and personnel boards all operate out of administrative agencies at the local level. Merrill, *The Local Administrative Agencies*, 22 VAND. L. REV. 775 (1969).

¹⁹ M. SHAPIRO, *supra* note 16, at 20.

²⁰ REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 13 (1970), reprinted in K.

Administrative bodies not only affect rights of private parties through adjudication but also through rulemaking.²¹ Unfortunately, courts have allowed this legislative-like function of rulemaking to affect adversely the way they review local land use decisions. For example, Oregon courts separate quasi-judicial actions from legislative actions and apply different standards when reviewing a land use body's ex parte communications.²² The court does not consider whether the board was elected or appointed.²³ Thus, administrative decisionmakers do not know how to act with regard to ex parte communications, because they do not know whether the reviewing court will consider a decision legislative or quasi-judicial²⁴ until after the decision is made and reviewed.

Legislatures, courts, and administrative agencies co-exist within the local government decisionmaking process. When land use decisionmakers adhere to traditional standards of review, judicial review of government decisions is unambiguous and predictable. In the area of land use law, however, when courts apply different standards of review based on the type of decision the board has made, instead of its traditional function, uncertainty is the result.

III. CURRENT STANDARDS OF REVIEW

Local land use controversies arise in a variety of contexts. Some controversies concern very large projects, such as urban renewal or freeway construction. Most local land use disputes, however, are on a much smaller scale.²⁵ One classic example of a local land use dispute involves a real estate developer who wants to install a gas station or apartment building where an existing house stands, and the neigh-

DAVIS, *ADMINISTRATIVE LAW* 584 (3d ed. 1972). About three-quarters of the states now have administrative legislation based on the Model Act. *Id.* at § 1.04.

²¹ K. DAVIS, *supra* note 20 at 1.

²² Sullivan, *From Kroner to Fasano: An Analysis of Judicial Review of Land Use Regulation in Oregon*, 10 WILLAMETTE L. REV. 358, 361 (1974).

²³ *Fasano v. Bd. of County Comm'rs of Washington County*, 264 Or. 574, 579, 507 P.2d 23, 25-26 (1973) (judicial review begins with a characterization of the nature of the decision).

²⁴ Quasi-judicial refers to functions that are not purely and completely judicial in nature but have qualities or incidents resembling a judicial setting. *Hyson v. Montgomery County Council*, 242 Md. 55, 62, 217 A.2d 558, 582-83 (1966). Differentiation between quasi-judicial and legislative decisions becomes even more difficult when functions are mixed, blended or combined within the same board. *Id.*

²⁵ Rose, *New Models for Local Land Use Decisions*, 79 NW. U.L. REV., 1155, 1156-57 (1984-85). The large projects are highly publicized, debated, and involve many different interest groups, thus, creating a relatively open process of local decisionmaking that is less subject to procedural criticism. *See id.* at 1159.

bors object.²⁶ The interested parties may include the developer and the neighbors, with some form of city board or official in the middle. Within this setting, ex parte communications between the city decisionmakers and the neighbors or developers are common practice.²⁷

Ex parte communications are a problem because state courts decide whether an ex parte communication is basis for reversal depending on the board's decision, rather than the type of decision-making body.²⁸ The courts' characterization of final decisions leads to uncertainty. Prior to making a decision, officials may be unsure of whether they should engage in communications with interested parties, and residents and developers are unsure of whether they can approach city officials without jeopardizing their case. Thus, judicial reviewers of land use decisions that are challenged on the basis of an ex parte communication are faced with balancing the desirability of protecting the rights of the individual land owner against the desirability of promoting the efficiency of government by granting its officers sufficient room to carry out their public functions.²⁹

Currently, state courts use three different standards of review in deciding whether an ex parte communication is basis for reversal. The standards are: the legislative/quasi-judicial distinction,³⁰ the clear showing of bias standard,³¹ and the appearance of fairness

²⁶ *Id.* at 1157. This smaller scale land use dispute has become typical in local courts partly because of the "Quiet Revolution" in which state or regional boards have removed a number of large scale land projects from the purely local arena. *Id.* at 1156. See U.S. COUNCIL ON ENVTL. QUALITY, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971), cited in Rose, *supra* note 25, at 1156.

²⁷ *Fasano Comment*, *supra* note 1, at 102. This observation is also a natural extension of the fact that these are small, local disputes where the people involved often know or seek advice from local officials.

²⁸ For a discussion of the distinction between quasi-judicial and legislative decisions made by the same decisionmaking body see Sullivan, *supra* note 22, at 361.

²⁹ Recent Decisions, *Public Hearings—An Appearance of Fairness*, 5 GONZ. L. REV. 324, 330 (1970). There is a present judicial trend favoring the rights of the individual. *Id.* This trend reflects less concern for efficiency of government. Maintaining the appropriate ex parte standard for legislative, administrative, and judicial decisionmaking bodies would insure governmental efficiency without jeopardizing individual rights.

³⁰ *E.g.*, *Hyson v. Montgomery County Council*, 242 Md. at 62, 217 A.2d at 582 (governmental bodies exercise executive, judicial, and legislative functions); *Fasano v. Bd. of County Comm'rs of Washington County*, 264 Or. at 580, 507 P.2d at 26 (rigidly viewing all zoning decisions by local governing bodies as legislative would be ignoring reality); *Fleming v. City of Tacoma*, 81 Wash. 2d 292, 298, 502 P.2d 327, 331 (1972) (a zoning decision may be administrative or legislative depending upon the nature of the act).

³¹ *E.g.*, *E & E Hauling, Inc. v. Pollution Control Bd.*, 116 Ill. App. 3d 586, 607, 451 N.E.2d 555, 571 (1983) (complaining party must suffer prejudice); *Neuberger v. City of Portland*, 288

doctrine.³² Courts applying the legislative/quasi-judicial distinction determine first whether a decision is legislative or quasi-judicial based on the nature of the decision and then apply one of two standards.³³ If legislative, the court grants the board considerable deference as to its decisionmaking process.³⁴ Passing an ordinance that lays down general policies without regard to specific property is an example of a legislative act.³⁵ Accordingly, the court will subject an *ex parte* communication to limited review and the decision will be overturned only for an arbitrary abuse of authority.³⁶ If quasi-judicial, the procedures must meet due process requirements that include an impartial tribunal free from pre-hearing or *ex parte* communications.³⁷ An example of a quasi-judicial act is granting permission to change the use of a specific piece of property.³⁸

The second standard of review disqualifies board members or legislators participating in *ex parte* communications only when there is a clear showing of bias and prejudice.³⁹ The appealing party has the burden of proving the decisionmaker's bias.⁴⁰

The third standard of review requires not only that the hearing be free of actual bias, but that the *ex parte* communication not cause the proceedings to appear unfair to the general public.⁴¹ Courts apply this standard, the appearance of fairness doctrine, to the legislative and quasi-judicial types of decisions.⁴²

Or. 585, 590, 607 P.2d 722, 725 (1980) (issue is whether evidence shows that the tribunal or its members were biased).

³² *Smith v. Skagit County*, 75 Wash. 2d 715, 733, 453 P.2d 832, 842 (1969) (a hearing must not only be fair but also appear to be fair to the public).

³³ See cases cited *supra* note 30.

³⁴ *Fasano v. Bd. of County Comm'rs of Washington County*, 264 Or. at 580-81, 507 P.2d at 26.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ See cases cited *supra* note 31.

⁴⁰ *E & E Hauling, Inc. v. Pollution Control Bd.*, 116 Ill. App. 3d at 607, 451 N.E.2d at 571 (complaining party must show prejudice suffered from *ex parte* contacts).

⁴¹ *Smith v. Skagit County*, 75 Wash. 2d at 733, 453 P.2d at 842.

⁴² *E.g.*, *Kovalik v. Planning and Zoning Comm'n of New Fairfield*, 155 Conn. 497, 499, 234 A.2d 838, 839 (1967) (the administrative power to limit an individual's free use of land demands the highest public confidence—whether the power is considered legislative or quasi-judicial); *Fleming v. City of Tacoma*, 81 Wash. 2d at 299-300, 502 P.2d at 331 (the appearance of fairness doctrine is applied to hearings which amend existing codes or reclassify land); *Smith v. Skagit County*, 75 Wash. 2d at 733, 453 P.2d at 842 (public hearings must be undertaken in a genuine effort to ascertain the wiser legislative course to pursue and appear to be done for that purpose).

A. Legislative/Quasi-Judicial Distinction

1. Case-By-Case Analysis

Many state courts decide how to review questionable *ex parte* communications in land use decisions on a case-by-case basis.⁴³ This case-by-case approach fails to establish overall standards for decisionmakers as to whether or not they may communicate with interested parties outside of official hearings. The legislative/quasi-judicial distinction for reviewing *ex parte* communication challenges is such a case-by-case analysis. This distinction is often so fact specific that it gives land use decisionmakers no notice of when a court might invalidate a decision because of *ex parte* communications.⁴⁴

In applying this standard, courts determine first whether the land use board's decision has produced a general rule or policy that is applicable to a class of individuals, interests, or situations, or whether the decision involves application of a general rule or policy to a specific individual, interest, or situation.⁴⁵ The former constitutes legislative action while the latter is adjudicatory in nature.⁴⁶ In practice, the distinction is less clear.⁴⁷ Courts have difficulty in applying the legislative/quasi-judicial standard consistently. For example, in *Smith v. Skagit County*, the Supreme Court of Washington held that amending a land use ordinance to rezone 470 acres of a 5,500 acre island previously wholly-zoned as residential-recreational so that an aluminum company could operate a plant on the island

⁴³ See cases cited *supra* note 30.

⁴⁴ Reviewing courts may differ in their interpretation of a land use decision. See, e.g., *Arnel Dev. Co. v. City of Costa Mesa*, 98 Cal. App. 3d 567, 159 Cal. Rptr. 592, 595 (1979) (Court of Appeal said the action was adjudicatory), *vacated*, 28 Cal. 3d 511, 514, 620 P.2d 565, 566-67, 169 Cal. Rptr. 904, 906 (1980) (supreme court said action was legislative); Glenn, *State Law Limitations on the Use of Initiatives and Referenda in Connection with Zoning Amendments*, 51 S. CAL. L. REV. 265, 299-300 (1978) (the author states that the weakness of characterizing final decisions is that no court has defined the situations in which the analysis applies).

⁴⁵ *Fasano v. Bd. of County Comm'rs of Washington County*, 264 Or. at 581, 507 P.2d at 27. The court gives as an example of an exercise of legislative authority "the passage of the ordinance by the Washington County Commission in 1963 which provided for the formation of a planned residential classification to be located in or adjacent to any residential zone." An example of judicial authority was "the county commissioners' determination in this particular matter to change the classification of [a] specific piece of property." *Id.* at 581, 507 P.2d at 26.

⁴⁶ *Id.* at 581, 507 P.2d at 27.

⁴⁷ According to Chief Judge Prescott in *Hyson v. Montgomery County Council*, "[u]p to the present time, no one has been able to delineate, with precision and accuracy, an exact formula for determining the line of demarcation between the differences between legislative and judicial functions. These differences, on occasions, are particularly difficult of determination when mixed, blended, or combined functions are given, and exercised by the same official, board, or agency . . ." 242 Md. at 62, 217 A.2d at 583.

was legislative in nature.⁴⁸ In a similar case, however, the same court reached a different result. In *Fleming v. City of Tacoma*, the court held that granting a land use change from single family residences to multiple family developments was subject to quasi-judicial review standards.⁴⁹ The land developers wanted to construct condominiums and the reclassification would have allowed construction of townhouses and retirement homes as well.⁵⁰

Thus, two attempts by the same court to reclassify residential land for a more commercial use were subject to two different standards of review. The situation in *Smith* involved the application of a general zoning plan to a specific situation. Such an action is quasi-judicial. Because the Skagit County Commissioners wanted to amend the plan, however, the court held the action legislative.⁵¹ In *Fleming*, the City of Tacoma also wanted to change the current land use requirements.⁵² However, the court said that amendment of a zoning code or reclassification of land was adjudicatory,⁵³ even though the building of multi-family dwellings involved many individuals. The decisions are thus inconsistent. Inconsistent results such as these are a current problem in land use decisionmaking because of courts' uncertainty in dealing with ex parte communications.

The distinction between decisions is important because when a state court concludes that a land use decision is legislative, the court does not require the decisionmaking body to adhere to technical rules of procedure and evidence during its proceedings.⁵⁴ The court presumes the land use decision is valid unless opponents can show that the land use board abused its authority arbitrarily.⁵⁵ In such cases, courts do not require the parties to put ex parte communications on the record. Furthermore, in instances where courts or statutes do not require zoning hearings to conform to fair trial standards, decisionmakers engage in ex parte communications without restriction.⁵⁶

⁴⁸ 75 Wash. 2d 715, 453 P.2d 832 (1969). Although deemed legislative, the decision to rezone was overturned because it favored a particular individual and not the welfare of the community as a whole, and the ex parte communications complained of were said to violate the "test of fairness." *Id.* at 741-43, 453 P.2d at 847-48.

⁴⁹ 81 Wash. 2d 292, 502 P.2d 327 (1972). The court distinguished zoning amendment decisions from legislative hearings and held the ordinance invalid because of ex parte communications. *Id.*

⁵⁰ *Id.* 81 Wash. 2d at 293, 502 P.2d at 328.

⁵¹ *Smith v. Skagit County*, 75 Wash. 2d 715, 453 P.2d 832 (1969).

⁵² 81 Wash. 2d at 293, 502 P.2d at 328.

⁵³ *Id.* at 298-300, 502 P.2d at 330-31.

⁵⁴ 8A E. MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 25.251 (3d ed. 1986).

⁵⁵ *Fasano v. Bd. of County Comm'rs of Washington County*, 264 Or. at 581, 507 P.2d at 26.

⁵⁶ Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130, 141.

In contrast, if state courts determine that the land use decision is quasi-judicial, then due process requirements prevail⁵⁷ and decision-makers must refrain from *ex parte* communications or include them in the record so that interested parties may present evidence in rebuttal.⁵⁸ This legislative/quasi-judicial distinction requires the courts to overlook the forum and instead analyze the fact pattern of each case and the effect of the decision after it has been made.⁵⁹ For example, the court in *Fasano v. Board of County Commissioners of Washington County* held that judicial review of a zoning decision must start with a characterization of the nature of the decision.⁶⁰ The court thus ignored the type of decisionmaking body.

2. Legislative Presumption for Land Use Decisions

Some courts adopt either the legislative or quasi-judicial characterization of land use decisions and apply the corresponding standard when reviewing all land use decisions, instead of reviewing them on a case-by-case basis.⁶¹ Many state courts as well as interested developers, neighbors, and board officials find that case-by-case analysis creates uncertainty and thus inefficiency in the development of land. This uncertainty prompts some courts to find that all zoning ordinances are legislative acts regardless of the individual circumstances.⁶² These courts give great deference to the decisions of their land use boards. Thus they apply the high degree of deference accorded legislative acts to both large-scale, highly publicized local land use decisions involving many different interest groups, and the more numerous small-scale disputes, involving single parcels and named parties.⁶³

If a court deems that a land use decision is legislative, the court reviews *ex parte* contacts only when there is a manifest abuse of

⁵⁷ See *supra* notes 37–39 and accompanying text.

⁵⁸ Comment, *supra* note 56, at 141–42.

⁵⁹ Glenn, *supra* note 44, at 295.

⁶⁰ 264 Or. at 579, 507 P.2d at 25–26 (emphasis added).

⁶¹ Rose, *supra* note 25, at 1157–64.

⁶² *E.g.*, *Arnel Dev. Co. v. City of Costa Mesa*, 28 Cal. 3d at 515, 620 P.2d at 566–67, 169 Cal. Rptr. at 906 (a decision that some zoning ordinances are adjudicative would create confusion “which would require years of litigation to resolve”); *City of Coral Gables v. Carmichael*, 256 So. 2d 404, 408 (Fla. Dist. Ct. App. 1972) (enactment of the original zoning ordinance was legislative so any amendment to it is also legislative in character).

⁶³ Rose, *supra* note 25, at 1158–60. Congressional acts are often thought of as model legislative acts. Courts that review congressional acts can presume that Congress acted reasonably toward all interested parties because of the process of coalition-building and logrolling for votes. *Id.* at 1158 (citing the *Federalist* No. 10 (J. Madison)).

discretion involving arbitrary and capricious conduct.⁶⁴ The reason courts give deference to land use decisions that are characterized as legislative is that the legislative process is designed to be highly visible, have a broad-based impact, and be self-remedying at the polls.⁶⁵ Thus, the legislative process needs less court intervention, because it responds to public concerns and not to conflicts between individual parties. Though courts do not generally review *ex parte* communications regarding a legislative decision, judges and commentators have warned that the legislative model is inappropriate for small-scale land use disputes which attract little publicity and involve few interested parties.⁶⁶ Applying the legislative model in such circumstances leads to impropriety and thoughtless local decisionmaking.⁶⁷

Although the courts may treat land use decisions as legislative, court opinions do not give board members guidelines in order to make land use decisions as effective legislators.⁶⁸ In the absence of adequate guidelines, board members do not know when courts will permit *ex parte* communications or when the communications will constitute grounds for vacating a land use decision.⁶⁹ As a result, the board members are not consistent in deciding whether to speak with people outside of a formal hearing. Therefore, local land use decisionmakers give the public the impression that land use decisions are susceptible to undue influence or outright corruption.⁷⁰

Without proper guidelines and standards for local land use boards to follow, rights of individual property owners are often sacrificed when *ex parte* communications occur in small-scale land use disputes that involve few interested parties, little publicity, and limited judicial review.⁷¹ Showing that allegedly improper *ex parte* communications motivated a board member will not enable an individual to challenge a land use decision unless that decision was arbitrary and capricious.⁷² Moreover, high visibility or amenability to elective rem-

⁶⁴ 1 R. ANDERSON, *supra* note 9, at § 3.14.

⁶⁵ See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955) ("For protection against abuses by legislatures the people must resort to the polls, not to the courts.").

⁶⁶ Rose, *supra* note 25, at 1158.

⁶⁷ *Id.*

⁶⁸ See generally R. BABCOCK, *THE ZONING GAME*, 156 (1969) (discussing attorney and taxpayer frustration when proceedings before boards and reviewing courts result in different decisions and eventually a remand to start all over again).

⁶⁹ Legislation could be used to prescribe rules regarding *ex parte* communications. *Id.*

⁷⁰ Rose, *supra* note 25, at 1158.

⁷¹ See generally Comment, *supra* note 56, at 131-32.

⁷² See generally *Fleming v. City of Tacoma*, 81 Wash. 2d at 298, 502 P.2d at 331; 1 R. ANDERSON, *supra* note 9, at § 14.20.

edies does not protect land use decisions between individual land owners, even though *ex parte* communications are subject to the same legislative standard of review.

3. Quasi-Judicial Presumption for Land Use Decisions

Some state courts have differed from those discussed above by characterizing all land use decisions that involve individual parcels of land as quasi-judicial.⁷³ Under this approach, parties at a hearing before a county governing body are entitled to an opportunity to be heard, to have a record made of the evidence and findings, and to present and rebut evidence before an impartial tribunal.⁷⁴ An impartial tribunal is one that is completely free from pre-hearings or *ex parte* communications.⁷⁵

Characterizing land use decisions as quasi-judicial instead of legislative has attracted commentary.⁷⁶ The American Law Institute's Model Land Development Code sets forth a quasi-judicial approach for administrative hearings⁷⁷ as a possible solution to the present legislative standard that gives too much deference to land use actions

⁷³ *E.g.*, Snyder v. City of Lakewood, 189 Colo. 421, 426, 542 P.2d 371, 375 (1975) (enactment of a rezoning ordinance pursuant to statutory criteria is a quasi-judicial function according to the modern trend in zoning law); *cf.* Margolis v. Dist. Court, 43 Colo. App. 480, 638 P.2d 297, 303-04 (1981) (zoning decision is legislative for purposes of referendum and initiative provisions of Colorado Constitution); Golden v. City of Overland Park, 224 Kan. 591, 597, 584 P.2d 130, 135 (1978) (a proceeding is quasi-judicial where the focus is a specific tract of land requiring a weighing of evidence, a balancing of equities, an application of rules, regulations and ordinances to facts, and a resolution of specific issues); City of Louisville v. McDonald, 470 S.W.2d 173, 178 (Ky. 1971) (decisionmaking body is acting quasi-judicially when determining whether a "particular individual by reason of particular facts peculiar to his property" is entitled to some form of relief); West v. City of Portage, 392 Mich. 458, 468, 472, 221 N.W.2d 303, 308, 310 (1974) (a zoning amendment affecting particular property is an administrative act; here it was rezoning 150 acres of land from single-family residential into sections allowing community business, multiple family, and office service).

⁷⁴ Fasano v. Bd. of County Comm'rs of Washington County, 264 Or. at 588, 507 P.2d at 30. The standard of review for quasi-judicial zoning decisions often involves conformance with the municipality's comprehensive plan. This reflects the court's position that the public interest is of primary importance. *Fasano Comment, supra* note 1, at 98-99. The plan is a general guideline to control and direct the use and development of property in a municipality. Nowicki v. Planning and Zoning Bd., 148 Conn. 492, 497, 172 A.2d 386, 389 (1961). Vagueness in a comprehensive plan complicates judicial review of zoning decisions because no genuine standards for individual decisions are provided. Rose, *supra* note 25, at 1162-63.

⁷⁵ Fasano v. Bd. of County Comm'rs of Washington County, 264 Or. at 588, 507 P.2d at 30.

⁷⁶ *E.g.*, Comment, *supra* note 56. The author proposes that "the procedural safeguards and standards of judicial review applicable to judicial functions" are adequate to protect the interests affected by rezoning. *Id.*; Rose, *supra* note 25, at 1160.

⁷⁷ MODEL LAND DEV. CODE § 2-304 (1975).

that are administrative in nature. The quasi-judicial model provides courts with specific standards to apply when reviewing questions of adequate notice, testimony, evidence, and fair hearings according to traditional due process standards.⁷⁸

For example, the Model Land Development Code requires individual notice to the developer, owners of land within 500 feet of the proposed development, neighborhood organizations within 500 feet, and any other person, agency, or organization requesting notice.⁷⁹ The notice must give the time and place of the hearing, describe the subject matter, and specify someone from whom interested parties may obtain additional information.⁸⁰ At the hearing all testimony must be under oath and the court must afford the parties an opportunity to present evidence and cross-examine witnesses.⁸¹ In addition, the land use board must make a full record of the hearing and make it available to the public on request.⁸² Decisionmakers can protect their decisions from judicial invalidation by following these well-established standards of due process.⁸³

The quasi-judicial characterization is not as clear regarding ex parte communications as it is regarding basic procedure. Legislation simply instructs decisionmakers that reviewing courts will not permit ex parte communications unless included in the record.⁸⁴

All three variations of the legislative/ quasi-judicial distinction—case-by-case analysis, legislative presumption, and quasi-judicial presumption—look to the facts of the situation, not to the decision-making body, to determine whether an ex parte communication is

⁷⁸ A. Sirois, *supra* note 6, at 16.

⁷⁹ MODEL LAND DEV. CODE § 2-304.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ A. Sirois, *supra* note 6, at 16.

⁸⁴

(9) A person who has been assigned to conduct a hearing or make a decision shall neither

(a) communicate, directly or indirectly, with any party or his representatives in connection with any issue involved except upon notice and opportunity for all parties to participate; nor

(b) use nor rely upon any communications, reports, staff memoranda, or other materials prepared in connection with the particular case unless made a part of the record; nor

(c) inspect the site with any party or his representative unless all parties are given an opportunity to be present.

MODEL LAND DEV. CODE § 2-304 (9) (1975).

basis for reversal. This emphasis on facts instead of the type of decisionmaking body is flawed because sometimes courts give deference to actions that are administrative in nature. Due process rights to a fair hearing, and the standard of review for that hearing with regard to ex parte communications, are too fundamental to our legal system to be determined solely by a process of labeling one decision legislative and another quasi-judicial.⁸⁵ By using this distinction courts draw an arbitrary line that a litigant must cross in order to get ex parte communications reviewed under the quasi-judicial standards.⁸⁶ The difficulty arises when a borderline act affects just enough people or property for the court to deem the act legislative.⁸⁷ Those affected are unable to bring their ex parte contentions to a court utilizing this legislative standard of review. For example, a court may treat a case of 842 acres owned by several dozen people legislatively,⁸⁸ while 601 acres with 3 owners and 90 concerned owners of adjoining property is treated quasi-judicially.⁸⁹ Basing a review on specific facts does not allow uniformity in the treatment of ex parte communication appeals.

Courts create uncertainty⁹⁰ about the finality of land use decisions when they apply a standard of review based on the nature of a specific land use decision rather than applying consistently a standard based on the nature of the decisionmaking body. A decision-based standard results in decisionmakers not knowing whether in a particular situation ex parte communications will form the basis for

⁸⁵ *Arnel Development Co. v. City of Costa Mesa: Rezoning by Initiative and Landowners' Due Process Rights*, 70 CALIF. L. REV. 1107, 1129 (1982) [hereinafter *Arnel Comment*]. The United States Supreme Court does not use this characterization test to adjudicate due process claims. Instead the Court has utilized an approach which depends on "(1) a showing that a protected interest has been abridged by state action; and (2) the . . . balancing [of] the size of the protected interest against the administrative costs involved in providing procedure safeguards." *Id.* citing *Bd. of Regents v. Roth*, 408 U.S. 564 (1972).

⁸⁶ *Id.* at 1129 n.132. The only threshold requirement under the Supreme Court balancing test is that a protected interest be shown. *Id.*

⁸⁷ *Id.*

⁸⁸ *Joyce v. City of Portland*, 24 Or. App. 689, 546 P.2d 1100 (1976) (since action of the city was legislative in nature it was not subject to judicial scrutiny in writ of review proceeding).

⁸⁹ *Neuberger v. City of Portland*, 37 Or. App. 13, 586 P.2d 351 (1978). A petition for rehearing was denied by the Oregon Supreme Court which also maintained that the decision was a quasi-judicial one but that there was no "mechanical" rule that any ex parte contact would render the decisionmakers unable to act in the matter. *Neuberger v. City of Portland*, 288 Or. 585, 607 P.2d 722 (1980).

⁹⁰ It is important for private property owners to have a set of expectations on which they can act to exercise choices concerning land use. JOINT CENTER FOR URBAN STUDIES OF THE MASSACHUSETTS INSTITUTE OF TECHNOLOGY AND HARVARD UNIVERSITY, *LAW AND LAND* 33-34 (C. Haar ed. 1964) [hereinafter *LAW AND LAND*].

a court challenge, or whether the public will view the communications as appropriate to the legislative decisionmaking process.⁹¹

An essential purpose of land use regulation is to stabilize use of property.⁹² Owners of property have a right to rely on the fact that existing regulations will control the use of land.⁹³ Neighbors and developers are unwilling to invest in land when they are unsure how land use issues that directly affect property value will be handled.⁹⁴

As long as courts continue to focus their review of questionable ex parte communications on the categorization of a board's final decision rather than on the nature of the board itself, the likelihood of courts applying different standards to similarly situated parties exists. Elected officials' decisions should be valid despite ex parte communications, absent evidence of conflict of interest or undue influence. Thus, courts should allow elected officials to make land use decisions in the political manner traditional to our legislative process.

B. Clear Showing of Bias Standard

When courts place ex parte communications on the record, two prevailing treatments of these communications occur. One requires

⁹¹ When the legislative and quasi-judicial standards are blurred together the administrative decisionmaker is confused as to "whether receipt of a communication should be condemned by standards comparable to those applied to judicial proceedings, or commended as the diligent action of a legislator or executive officer seeking to inform himself fully in order that he may better serve the public." Peck, *Regulation and Control of Ex Parte Communications with Administrative Agencies*, 76 HARV. L. REV. 233, 235 (1962).

Professor Peck suggests that the objective of federal agencies should be to set a standard of ethical not coercive behavior that will give the public confidence in administration. *Id.* at 274. This objective is just as relevant in local land use situations, but the current decision-based standards can not achieve the goal.

⁹² *Nowicki v. Planning and Zoning Bd.*, 148 Conn. at 496, 172 A.2d at 388. The comprehensive plan is the basic tool for local land use planning. It is a general plan to control and direct the use and development of property in a municipality. *Id.*; see *supra* note 74.

⁹³ *Nowicki v. Planning and Zoning Bd.*, 148 Conn. at 496, 172 A.2d at 389. In a specially concurring opinion for *Fasano v. Board of County Comm'rs of Washington County*, Justice Bryson pointed out "the prohibitive cost and extended uncertainty to a homeowner when a governmental body decides to change or modify a zoning ordinance or comprehensive plan affecting such owner's real property." 264 Or. at 589-90, 507 P.2d at 30. He said that the controversy at hand had passed through six steps from the respondent's first opposition before the planning commission to the supreme court's final decision. *Fasano* happened to be an attorney, but "no average homeowner or small business enterprise [could] afford [such] a judicial process . . . nor can a judicial system cope with or endure such a process in achieving justice." Justice Bryson claims that it is up to the legislative branch to devise statutory procedure to expedite finality of decisions. *Id.*

⁹⁴ For a good discussion on private property and planning see LAW AND LAND, *supra* note 90, at 31-34.

a clear showing of actual bias and prejudice.⁹⁵ The other will allow a court to overturn a decision if an *ex parte* communication creates merely an appearance of unfairness.⁹⁶

Oregon is one state that follows a clear showing of bias standard. For example, in *Neuberger v. City of Portland*, opponents of a rezoning argued on appeal that conversations and correspondence between the applicants and city representatives concerning a possible sale of property were improper *ex parte* communications.⁹⁷ The Supreme Court of Oregon held that the mere presence of *ex parte* communications would not render a decision void when the evidence did not show that the tribunal or its members were biased.⁹⁸

In contrast, the State of Washington follows an appearance of fairness standard. In *Smith v. Skagit County*, the planning commission met with advocates of a rezoning during an executive session, but excluded the opponents.⁹⁹ The Washington Supreme Court did not even address the issue of bias because the decision had lost its appearance of fairness, and "appearances are quite as important as substance."¹⁰⁰

Elected decisionmakers face a special problem when courts review their decisions for improper *ex parte* communications. The problem arises because the public expects elected officials to talk to their constituents and, as a result, candidates may campaign on the very issues they later decide as board members.¹⁰¹ An appealing party may point to instances where a board member spoke with a constituent regarding the pending action in an attempt to show bias that resulted in an unfair hearing. This constituent contact may take many forms. For example, an interested party may ask a decisionmaker to disqualify him or herself from participation in a decision based on a response to an audience question at a candidate's night meeting that expressed opposition to a proposed land use issue.¹⁰² Interested parties may also raise questions of bias to void an action of the decisionmaking body when members have made campaign

⁹⁵ See cases cited *supra* note 31.

⁹⁶ See cases cited *supra* note 42.

⁹⁷ 288 Or. at 590, 607 P.2d at 725.

⁹⁸ *Id.*

⁹⁹ 75 Wash. 2d at 742-43, 453 P.2d at 848.

¹⁰⁰ *Id.* at 733, 453 P.2d at 842.

¹⁰¹ Rose, *supra* note 25, at 1164.

¹⁰² *City of Fairfield v. Superior Court of Solano County*, 14 Cal. 3d at 772-73, 537 P.2d at 377, 122 Cal. Rptr. at 545 (when the councilman did not withdraw and the council denied the party's request for a development permit, the party filed a complaint contending that bias had denied it a fair hearing; the court did not overturn the decision).

promises "loudly and frequently" to vote against a certain issue.¹⁰³ Elected land use officials are torn between representing their constituency effectively and preventing courts from reversing their decisions due to bias.

The land use situation becomes even more uncertain when courts treat the decisions of an elected land use board quasi-judicially. The quasi-judicial standard should prohibit all *ex parte* communications.¹⁰⁴ Courts applying the quasi-judicial model to these situations, however, do not overturn the contested decisions on the grounds that a "crystallized point of view" is no ground for disqualification,¹⁰⁵ and decisionmakers have an obligation to discuss issues with their constituents.¹⁰⁶ This approach is not in line with the quasi-judicial model where land use decisionmaking should emulate courtroom proceedings with disinterested judges. Thus, by allowing elected officials the freedom to campaign and represent their constituency, the quasi-judicial standard does not apply the courts' declared policy accurately, and the result is uncertainty.

1. Considerations in Evaluating Ex Parte Communications Under the Clear Showing of Bias Standard

The clear showing of bias standard is attractive when used in conjunction with the quasi-judicial or legislative standards because an *ex parte* communication does not render automatically the tribunal, or its affected members, unable to act in that matter.¹⁰⁷ Instead, courts engage in a weighing of all relevant factors. Courts consider whether the decisionmaking process was so tainted by the *ex parte* communication that the ultimate judgment was unfair to an innocent party or the public interest.¹⁰⁸

¹⁰³ *Turf Valley Assocs. v. Zoning Bd.*, 262 Md. 632, 644, 278 A.2d 574, 580 (1971) (the court did not overturn the board's decision because of the campaign promises).

¹⁰⁴ The board, when acting quasi-judicially, should model its procedures on those of a court. *See Rose, supra* note 25, at 1161.

¹⁰⁵ *Turf Valley Assocs. v. Zoning Bd.*, 262 Md. at 644, 278 A.2d at 580.

¹⁰⁶ *City of Fairfield v. Superior Court*, 14 Cal. 3d at 781, 537 P.2d at 382, 122 Cal. Rptr. at 550 (city council in voting to deny permit application was acting in a quasi-judicial capacity).

¹⁰⁷ A court is not required to invalidate all land use decisions where *ex parte* communications are proven when the court applies a quasi-judicial standard. *See Neuberger v. City of Portland*, 288 Or. App. at 590, 607 P.2d at 725.

¹⁰⁸ *PATCO v. Fed. Labor Relations Auth.*, 685 F.2d 547, 564 (D.C. Cir. 1978) (allegations of impropriety arose during the Federal Labor Relations Authority's consideration of the air traffic controllers strike), *cited in E & E Hauling, Inc. v. Pollution Control Bd.*, 116 Ill. App. 3d at 606, 451 N.E.2d at 571.

Some courts that review land use decisions consider several factors to determine the significance of an ex parte communication.¹⁰⁹ When a court determines that an ex parte communication has been significant, it is basis for vacating the land use decision. One factor is the gravity of the communication.¹¹⁰ Usually, courts consider improper an ex parte communication that tampers with the adjudicatory process directly, such as a covert effort to influence a decisionmaking official.¹¹¹ A communication void of anything "savoring of corruption or attempt to corrupt,"¹¹² however, will not lead courts to vacate an administrative decision.¹¹³ Courts applying the clear showing of bias standard will not penalize a board member for making an unintentional or accidental communication to an interested party.

Two other factors that courts consider in deciding the significance of an ex parte communication are whether the communication influenced the board's ultimate decision, and whether the party making the communication benefited from that decision.¹¹⁴ Although it is impossible for judges to determine the precise influence of an ex parte communication, a change in an administrative board's decision after a communication between a board member and an interested party will raise the "spectre of a substantial influence."¹¹⁵ By considering whether ex parte communications influenced a decision, courts regard communications that were improper, but did not affect the land use boards' final decision, as immaterial procedural defects.¹¹⁶

Allowing parties to benefit from intentionally influential contacts outside formal hearings would encourage ex parte communications. Courts must also be aware of benefiting the communicating party when rendering a decision.¹¹⁷ The party actually may have wanted

¹⁰⁹ State courts such as Illinois have adopted factors of review from federal court cases dealing with ex parte contacts. *E & E Hauling, Inc. v. Pollution Control Bd.*, 116 Ill. App. 3d at 606, 451 N.E.2d at 571.

¹¹⁰ *Id.* quoting *PATCO v. Fed. Labor Relations Auth.*, 685 F.2d at 564.

¹¹¹ *WKAT, Inc. v. FCC*, 296 F.2d 375, 383 (D.C. Cir.), *cert. denied*, 368 U.S. 841 (1961) (ex parte contacts within a federal agency action).

¹¹² *United Air Lines v. CAB*, 309 F.2d 238, 241 (D.C. Cir. 1962) (communications to a federal agency had been placed in a public file that was available to petitioners).

¹¹³ *Id.*

¹¹⁴ *E & E Hauling, Inc. v. Pollution Control Bd.*, 116 Ill. App. 3d at 607, 451 N.E.2d at 571.

¹¹⁵ *United States Lines v. FMC*, 584 F.2d 519, 539 (D.C. Cir. 1978). In *United States Lines v. FMC* the agency was required to "adjudicate the rights of certain named parties to an exemption from the antitrust laws." *Id.* at 539-50.

¹¹⁶ An ex parte communication may be ill-advised but not require the reversal of a board's decision. *E & E Hauling, Inc. v. Pollution Control Bd.*, 116 Ill. App. 3d at 607, 451 N.E.2d at 571.

¹¹⁷ *See Home Box Office, Inc. v. FCC*, 567 F.2d 9, 58 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

the decision vacated. In addition, the board will know the same information on remand and so an unbiased decision may not be possible.¹¹⁸

The courts' consideration of whether a party has benefited by committing an ex parte communication is tied into a fourth consideration of whether vacation of the land use decision and remand for new proceedings would serve a useful purpose.¹¹⁹ Other action may be more appropriate, especially if a court looks at the length of time between the making of the original hearing record on a particular land use problem, and the court's initiation of judicial review. When the membership of the original board has changed, remanding the case may be a more appropriate action than vacating the decision.¹²⁰ In these two situations it is likely that the board has forgotten facts or the offender is no longer around. An inquiry into whether other proceedings or actions may be more appropriate devices to resolve land use decisions protects the local land use decisionmaking process from a needless backlog and loss of administrative integrity.

Finally, the reviewing court will consider whether the opposing party knew the content of the ex parte communication, and whether the opposing party had an opportunity to respond.¹²¹ Parties appearing before an administrative board may employ ex parte communications to introduce new arguments in support of their position or respond to the opposition's arguments.¹²² Local governments can-

¹¹⁸ *Id.*

¹¹⁹ *E & E Hauling, Inc. v. Pollution Control Bd.*, 116 Ill. App. 3d at 607, 451 N.E.2d at 571.

¹²⁰ *See Sangamon Valley Television Corp. v. FCC*, 294 F.2d 742 (D.C. Cir. 1961) (decision by FCC allocating television channels remanded to commission with new membership).

¹²¹ *E & E Hauling, Inc. v. Pollution Control Bd.*, 116 Ill. App. 3d at 607, 451 N.E.2d at 571.

Courts do not require a direct showing of prejudice to the party's interests under the clear showing of bias standard although this element is tied into the factors that are considered. As with conflicts of interest, an ex parte communication that is entirely too remote to be considered as improperly influencing the decisionmakers' official judgement will not cause a decision to be vacated. *See generally* 2 E. YOKLEY, *ZONING LAW AND PRACTICE*, § 11-2 (4th ed. 1979). Courts reviewing a bias contention are also concerned with majorities and whether the vote of a "tainted" member was necessary to the decision. 4 E. MCQUILLIN, *supra* note 54, at § 13.31b. This issue might be important in an ex parte communication situation, as a factor in the court's determining whether to overturn a board's decision.

¹²² *United States Lines v. FMC*, 584 F.2d at 538.

Ex parte communications that are not placed in the record will not establish a clear showing of bias if judicial review is limited to the board's record. *See Fasano v. Bd. of County Comm'rs of Washington County*, 264 Or. at 588, 507 P.2d at 30. Since ex parte communications are by definition "off the record," some courts hold a de novo hearing to prevent injustice. *See* 8A E. MCQUILLIN, *supra* note 54, at § 25.334. In many jurisdictions the court's scope of review is limited to the record of the board, see *id.*, so a party concerned about an ex parte

not permit these secret ex parte communications without the loss of public faith in government regulation of land use.¹²³

The clear showing of bias standard thus allows certain ex parte contacts to take place if the involved decisionmaker(s) can remain unbiased.¹²⁴ The clear showing of bias standard does not presume a conflict, but requires opponents to prove a conflict exists.¹²⁵ The model assumes administrators are of good conscience. Courts predicate an analysis of a decisionmaker's bias or interest "upon a realistic appraisal of psychological tendencies and human weaknesses."¹²⁶ For example, in *Turf Valley Associates v. Zoning Board of Howard County*, the Maryland Court of Appeals recognized that people who think about controversial issues necessarily have biases.¹²⁷ The court would not overturn the zoning board decision simply because two members had concluded that planned communities would not be good for Howard County and had campaigned for office on that issue.¹²⁸ There was no bias involved, only "sincere political and philosophical views."¹²⁹

The clear showing of bias standard allows board members and legislators to draw upon the technical expertise of other city officials or planning experts through informal meetings,¹³⁰ to work effectively with their staff,¹³¹ and to consider citizens' opinions on campaign

communication should get it placed on the record. However, some courts will admit evidence on judicial review that a party failed, without fault, to discover. *Id.* at § 25.335.

¹²³ Federal agencies are also concerned with the issue of public faith and system integrity. See *WKAT, Inc. v. FCC*, 296 F.2d at 382-83.

¹²⁴ The Wyoming Supreme Court has considered the issue of conflicts of interest and concluded that an inability to make an independent decision should not be presumed simply because of a relationship between a board member and an interested party. Case Notes, *Conflict of Interest—Legal Interests vs. Relational Interests*, 15 LAND & WATER L. REV. 349, 357 (1980).

¹²⁵ Local decisionmakers are often not paid for their long, hard work so it is their interest in the community that motivates them. An interest in many aspects of the community does not necessarily entail a conflict of interest. See generally *id.*

¹²⁶ Alkire, *Washington's Super-Zoning Commission*, 14 GONZ. L. REV. 559, 584 (1979) quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

¹²⁷ 262 Md. at 644, 278 A.2d at 580 (quoting K. DAVIS, ADMINISTRATIVE LAW TREATISE § 12.01 (1959)).

¹²⁸ *Id.*

¹²⁹ *Id.* at 646, 278 A.2d at 581.

¹³⁰ Kahn, *In Accordance with a Constitutional Plan: Procedural Due Process and Zoning Decisions*, 6 HASTINGS CONST. L.Q. 1011, 1044 (1979). Communication is enhanced and more information received when informal meetings are held because there is no need for formal written reports or prepared testimony. *Id.*

¹³¹ *The Appearance of Fairness Doctrine: A Conflict in Values*, 61 WASH. L. REV. 533, 567 (1986) (proposing that personal staff be exempt from ex parte recording requirement unless that person has a role in the proceeding) [hereinafter *Appearance Comment*].

issues that will later come before the decisionmaking body.¹³² Technically, courts could consider each of these situations an *ex parte* communication, but the communication would not result in vacation under the clear showing of bias standard.

It is possible that an absolute prohibition of *ex parte* contacts would actually have a greater tendency to inhibit rather than promote reliability of the local decisionmaking process.¹³³ In some situations, such as decisions on adopting annexation ordinances, the land use board must consider the relevant planning goals and apply those general standards to the specific facts of the case before it.¹³⁴ Prohibiting *ex parte* communications could prevent decisionmakers from discerning the broader issues involved.¹³⁵ The basic requirement is an impartial tribunal; *ex parte* communications are only one way in which a tribunal could compromise its impartiality. Prohibiting all *ex parte* communications may be more dangerous than the potential for bias.¹³⁶

2. Strengths and Faults of the Clear Showing of Bias Standard

The conflict resulting from dual roles for elected officials—representative of the people versus quasi-judicial decisionmaker—can be detrimental to the land use decisionmaking process. Courts create this conflict by not permitting *ex parte* communications in situations where elected officials make quasi-judicial decisions, and by allowing *ex parte* communications in legislative-type decisions.¹³⁷ If elected officials are unsure whether contact with constituents will constitute

¹³² See, e.g., *Turf Valley Assoc. v. Zoning Board of Howard County*, 262 Md. at 644, 278 A.2d at 580 (complainants said that campaign promises were *ex parte* communications denying them a fair hearing); *City of Fairfield v. Superior Court*, 14 Cal. 3d at 780, 537 P.2d at 382, 122 Cal. Rptr. at 550 (council members have an obligation to discuss issues with their constituents).

¹³³ *Petersen v. Mayor & Council of City of Klamath Falls*, 279 Or. 249, 257 n.8, 566 P.2d 1193, 1197 n.8 (1977) (dictum).

¹³⁴ *Id.* at 257, 566 P.2d at 1197.

¹³⁵ *Id.* at 257 n.8, 566 P.2d at 1197 n.8.

¹³⁶ *Tierney v. Duris*, 21 Or. App. 613, 629, 536 P.2d 435, 443 (1975).

¹³⁷ See *Rose*, *supra* note 25, at 1161 (the reviewing court can ask whether the decision met the model for a proper adjudication—even though the decisionmaking body is a group of elected politicians).

Whether a particular land use board is elected or appointed varies from jurisdiction to jurisdiction. Since state courts do not consider whether a land use board is elected or appointed when reviewing *ex parte* communications, it is difficult to tell from the opinions which type of land use board is being affected. The main point is that two standards are being applied to one decisionmaking body and its members do not know which standard to follow when making a land use decision.

an improper *ex parte* communication, then people who are most in need of help may be denied access to their elected representatives.¹³⁸ These people may not understand what a zoning change will mean to their property and may feel pressured by aggressive, outside development companies. Big money will always have influence over a community's economy. Furthermore, developers present most development proposals, such as shopping centers, as beneficial to the community. Many times such developments are beneficial, but either way, it is only fair that private individuals and neighborhood groups be able to express their opinions to their elected representatives regarding land use planning.¹³⁹ Even if the local elected government process accomplishes little more than giving citizens a forum to voice their opinions, it is still a worthwhile process.

At the same time, when *ex parte* communications transmit critical facts, the reviewing court is unaware of the decisionmaker's actual reasons for its ruling. This hampers effective judicial review.¹⁴⁰ Land use decisions that courts find to be unfair as a result of *ex parte* communications also violate statutory and due process requirements for public hearings, and further undermine the integrity of the land use system.¹⁴¹ Some *ex parte* communications, however, are bound to take place, especially in small communities. Such communications do not necessarily make the board's decision unfair. The clear showing of bias standard does not require the reversal of an otherwise fair land use decision when insignificant *ex parte* communications are present.

Elected decisionmakers will carry on *ex parte* communications even if they do not have guiding standards of behavior. These communications occur because legislators have an affirmative duty to consider the concerns of constituents.¹⁴² Unfairness is more likely to result where a conflict arises between the elected representative role and the quasi-judicial role.¹⁴³ The clear showing of bias standard

¹³⁸ The legislative process requires thorough knowledge of the situation, an ability to devise practical means for remedying the situation, and the skill to draft a rule stating the remedy in an understandable manner. H. READ, *supra* note 13, at 2.

¹³⁹ See *Tierney v. Duris*, 21 Or. App. at 627-29, 536 P.2d at 442-43 (court held that communications, where council members talked to constituents about a proposed shopping facility, were insufficient to establish a lack of impartiality).

¹⁴⁰ *PATCO v. Fed. Labor Relations Auth.*, 685 F.2d at 564 n.32 (considering the effect of *ex parte* communications on availability of meaningful judicial review).

¹⁴¹ *E & E Hauling, Inc. v. Pollution Control Bd.*, 116 Ill. App. 3d at 606, 451 N.E.2d at 571.

¹⁴² *Appearance Comment*, *supra* note 131, at 556.

¹⁴³ An elected public official has a duty to consider the concerns of constituents but as a

helps alleviate this danger of unfairness by permitting some ex parte communications in decisions free of bias, even if the court deems the land use decision quasi-judicial.¹⁴⁴

For all its strengths, the clear showing of bias standard has some faults. Courts applying the clear showing of bias standard do not give decisionmakers usable standards as to when and where they will permit ex parte communications. Court opinions that are by nature fact specific do not establish general rules. Instead, courts merely rule on whether or not the land use board was biased in each particular situation.¹⁴⁵ Reviewing courts make statements such as the petitioner's arguments were "unpersuasive,"¹⁴⁶ or that "[p]rejudgment of adjudicative facts is not necessarily a ground for disqualification."¹⁴⁷ Uncertainty does not give board members a reason to avoid ex parte situations. Specific guidelines would, however, promote useful dialogue between elected officials and constituents, and would restrict communications between interested parties and appointed officials.

In addition, the requirement that a court base its review solely on the board's record may become burdensome.¹⁴⁸ A board would find it difficult to admit all ex parte communications into the record,¹⁴⁹ especially in small communities where social contact is frequent. Thus, a court's traditional reliance on the record creates an incentive for the decisionmakers to include a great deal of extraneous material in the record.¹⁵⁰ This excess information slows the decision-

quasi-judicial decisionmaker every discussion with a constituent is possibly an improper ex parte communication. *Id.*

¹⁴⁴ *E.g.*, *Neuberger v. City of Portland*, 288 Or. at 590, 607 P.2d at 725 (an ex parte communication touching on a matter before a board acting quasi-judicially will not render its members unable to act if they were not biased).

¹⁴⁵ *See, e.g.*, *E & E Hauling, Inc. v. Pollution Control Bd.*, 116 Ill. App. 3d at 607, 451 N.E.2d at 571 (ex parte contacts were improper and ill-advised but the question is whether they require reversal in this situation); *Neuberger v. City of Portland*, 288 Or. at 590, 607 P.2d at 725 ("The issue is not whether there were any ex parte contacts, but whether the evidence shows that the tribunal or its members were biased. In this case it does not.").

¹⁴⁶ *Neuberger v. City of Portland*, 37 Or. App. at 25, 586 P.2d at 358 (negotiations between applicant and city for city's purchase of different parcel from one zoned, and participation by applicant's attorney in preparation of city council's findings after council had announced its decision).

¹⁴⁷ *Turf Valley Associates v. Zoning Bd. of Howard County*, 262 Md. at 645, 278 A.2d at 580 (emphasis added) (openly expressed interest of two board members in removing planned communities from the area) (quoting K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 12.06).

¹⁴⁸ *Peck, supra* note 91, at 266-67.

¹⁴⁹ The expense and time outweigh any enhancement of the ideal of pure, untainted justice by the vacation of every proceeding in which an ex parte communication is made. *Id.*

¹⁵⁰ Where there is a general provision for opportunity to rebut summaries of ex parte communications, much testimony is taken on the collateral issue of accuracy. *Id.* at 267-68.

making process and creates additional recording expenses. High deference to the land use body's decision and court reliance on the record create a situation where evidence not placed on the record is lost for judicial review.¹⁵¹ A court may consider independent evidence, however, when an aggrieved party raises questions concerning a decision's integrity, especially when the board's record is incomplete.¹⁵² If an *ex parte* communication is not on the record, then an appealing party cannot argue the issue during an appeal based on the record, even if the communication biased the decisionmaking body.¹⁵³

The clear showing of bias requirement is a much more realistic approach to the fact that *ex parte* communication is bound to occur and may even be beneficial. This approach is especially important if courts continue to view elected officials as adjudicators for whom *ex parte* communications are usually prohibited. Unfortunately, this standard has the same inherent weakness as the legislative/quasi-judicial distinction; it reviews *ex parte* communications by an ill-defined, subjective standard long after the communications have taken place. For example, a court may not even review an *ex parte* communication if the communication was not admitted to the record during formal proceedings. Statutorily-enacted guidelines of acceptable behavior for land use decisionmakers would be more beneficial to a board member than the murky standard of "bias" hovering over every communication.

Courts should not permit appointed officials, as opposed to elected officials, to engage in *ex parte* communications. For appointed officials, the clear showing of bias standard may not be sufficiently strict

¹⁵¹ See S. REIGEL & P. OWEN, ADMINISTRATIVE LAW, THE LAW OF GOVERNMENT AGENCIES § 5.2.1 (1982).

¹⁵² *Searles v. Darling*, 46 Del. 263, 83 A.2d 96 (1951) (the board's record contained no basis for review so the only thing the Superior Court could do was hear evidence); 8A MCQUILLIN, *supra* note 54, at § 25.335.

¹⁵³ In contrast, the inability to question *ex parte* communications on appeal does not exist where courts review land use decisions *de novo*. *De novo* review assures that a court will determine if the merits of the case substantiate the decision regardless of deficiencies in the record. See *Planning Bd. of Springfield v. Bd. of Appeals of Springfield*, 355 Mass. 460, 245 N.E.2d 454 (1969). In Massachusetts judges have a duty to determine the facts for themselves upon evidentiary introduction at trial, to apply governing principles of law and to inspect the board's decisions and enter a decree according to the dictates of justice and equity. *Id.*

The issue of *de novo* review is a delicate one because many people disdain an activist judiciary and feel that local decisionmakers are better able to understand and make the best decision on local issues. Thus, a court will not have the power to determine whether an act was wise or foolish, or question its ultimate effect on the public good. *Davidson County v. Rogers*, 184 Tenn. 327, 198 S.W.2d 812 (1947).

since these officials apply specific statutory regulations and have no constituents. An appearance of fairness standard, therefore, would be more appropriate for appointed officials.

C. Appearance of Fairness Doctrine

Under the appearance of fairness doctrine, a court can invalidate a land use decision under any fact pattern involving ex parte communications that casts an aura of improper influence, partiality, and prejudgment over the proceedings.¹⁵⁴ Not only must local boards' land use hearings remain free of actual interest, bias, or unfairness, but the general public must also perceive that the board undertook the hearing in a fair manner.¹⁵⁵

A perception of unfairness, for example, could result when an attorney, who is also a board member, carries on negotiations and other business transactions for a client who has an interest in a board's decision. A court may overturn the board's decision even though the attorney disqualified himself from taking part in the decision.¹⁵⁶ In fact, the showing of any interest which may have influenced an official suffices to invalidate a land use decision.¹⁵⁷ An ex parte communication is the most obvious way an official can manifest a possible interest to the general public. Although if no one observes the communication, the public will be unaware that it has taken place since it is by nature off the record.

Ideally, courts that use the appearance of fairness doctrine attempt to maintain public confidence in their appointed and elected officials who decide how individuals can use their land within the interests of the whole community.¹⁵⁸ The test of public perception considers whether a reasonably prudent and disinterested observer

¹⁵⁴ See, e.g., *Horn v. Township of Hilltown*, 461 Pa. 745, 747-48, 337 A.2d 858, 859-60 (1975) (same solicitor represented the zoning board and the township, no actual prejudice but susceptible to prejudice and therefore prohibited); *Smith v. Skagit County*, 75 Wash. 2d at 742-43, 453 P.2d at 848 (after close of public hearing, commission went into executive session but heard proponents, and opponents were not given opportunity to present views); "[F]actors in the zoning process more indefinite than the clear showing of bias can invalidate the zoning procedure . . ." Hillis, *Land Use Planning in Washington: Overdue for Improvement*, 10 WILLAMETTE L. REV. 320, 327 (1974).

¹⁵⁵ *Smith v. Skagit County*, 75 Wash. 2d at 741, 454 P.2d at 847.

¹⁵⁶ *Chrobuck v. Snohomish County*, 78 Wash. 2d 858, 866-67, 480 P.2d 489, 494-95 (1971).

¹⁵⁷ *Buell v. City of Bremerton*, 80 Wash. 2d 518, 523, 495 P.2d 1358, 1361-62 (1972).

¹⁵⁸ *Appearance Comment*, *supra* note 131, at 533. Members of land use decisionmaking bodies must be open-minded, objective, impartial, free of entangling influences, and capable of "hearing the weak voices as well as the strong." *Buell v. City of Bremerton*, 80 Wash. 2d at 523, 495 P.2d at 1361.

would conclude that all parties obtained a fair and impartial hearing.¹⁵⁹ The appearance of fairness doctrine does not depend on whether the decisionmaking board is elected or appointed.¹⁶⁰ Instead, courts subject any municipal body considering a land use issue to an appearance of fairness consideration.

Like the legislative/quasi-judicial distinction and the clear showing of bias standard, the appearance of fairness doctrine is ill-defined and difficult to assess.¹⁶¹ Courts make statements such as "the hearing must be so conducted as to demonstrate that the relevant opinions of all persons invited to attend will be considered and weighed,"¹⁶² and the minds of board members cannot be, nor appear to be, "foreclosed to reason and persuasion."¹⁶³ In addition, it is difficult for a court to determine when the doctrine applies. The Washington Supreme Court created the appearance of fairness doctrine to maintain public confidence in the governmental decision-making process.¹⁶⁴ Washington courts apply this doctrine only to proceedings which they label quasi-judicial.¹⁶⁵ Yet, courts and decisionmakers lack a clear definition of the term "quasi-judicial" and thus there is confusion as to when the appearance of fairness doctrine applies.¹⁶⁶

The appearance of fairness doctrine is built on general terminology and keyed to superficial external impressions.¹⁶⁷ It is, therefore, not an appropriate way to deal with ex parte communications. The standard places emphasis on appearances and not on the merits of the case.¹⁶⁸ Furthermore, application of this doctrine overlooks the po-

¹⁵⁹ *Smith v. Skagit County*, 75 Wash. 2d at 741, 453 P.2d at 847. "It is the possible range of mental impressions made upon the public's mind, rather than the intent of the acting governmental employee that matters." *Swift v. Island County*, 87 Wash. 2d 348, 361, 552 P.2d 175, 183 (1976).

¹⁶⁰ *Appearance Comment*, *supra* note 131, at 534.

¹⁶¹ Vache, *Appearance of Fairness: Doctrine or Delusion?*, 13 WILLAMETTE L. REV. 479 (1977).

¹⁶² *E.g.*, *Smith v. Skagit County*, 75 Wash. 2d at 742, 453 P.2d at 847.

¹⁶³ *Belsinger v. Dist. of Columbia*, 295 F. Supp. 159, 162 (D.D.C. 1969).

¹⁶⁴ *Appearance Comment*, *supra* note 131, at 533.

¹⁶⁵ *Id.* at 534.

¹⁶⁶ *Id.*

¹⁶⁷ *Recent Decisions*, *supra* note 29, at 329. This article likens the requirement of an appearance of fairness to the high duty of care required of a trustee. That standard, it says, is much stricter than "the morals of the market place." An appearance of fairness is also compared to the ethical requirements of a judge—conduct free from impropriety, and the "appearance" of being free from impropriety. *Id.* at 329–30.

¹⁶⁸ *See generally Zoning Amendments and the Doctrine of Apparent Fairness*, 10 WILLAMETTE L. REV. 348, 351 (1974) (the doctrine of apparent fairness is a departure from a

tential benefits of allowing persons to communicate expert opinions and expressions of community concern freely to a decisionmaker. Unlike the clear showing of bias standard, an informal meeting with other city officials or technical experts could create an appearance that a decision was unfair.¹⁶⁹ A concerned citizen, not party to a hearing, could not express an opinion to a land use decisionmaker, whether appointed or elected, without casting a shadow over a decision's appearance of fairness. Moreover, the court makes no inquiry into the effect of these communications.¹⁷⁰

In addition, many localities have part-time land use boards whose members must carry on other income-producing occupations. Holding these people to an appearance of fairness standard will discourage professionals from holding such positions. A similar problem arises under conflict of interest law. For example, in *Coyne, Swan & Renner v. Wyoming ex rel. Thomas*,¹⁷¹ a conflict arose because several of the school district's trustees were married to teachers in the district.¹⁷² Just because a public officer is related to someone, however, does not mean necessarily that he or she is incapable of making an unbiased decision even though it may not appear to be fair.¹⁷³ It is important not to discourage sincere, interested people from serving their communities. It is also important not to ignore the value of people with expertise holding land use decisionmaking positions.

Those courts that employ the appearance of fairness standard place great importance on whether people perceive the "system" as fair.¹⁷⁴ For example, in *Chrobuck v. Snohomish County*, the Wash-

consideration of the proceedings per se and a look at motives of the decisionmaking board instead) [hereinafter *Apparent Fairness Comment*].

¹⁶⁹ See *supra* notes 106-08 and accompanying text.

¹⁷⁰ Buell v. Bremerton, 80 Wash. 2d at 523, 495 P.2d at 1361-62 (no need to show that an interest actually influenced the decisionmaker).

¹⁷¹ 595 P.2d 970, 971 (Wyo. 1979).

¹⁷² *Id.*

¹⁷³ Case Notes, *supra* note 124, at 361.

¹⁷⁴ The courts are attempting to "uphold fairness and ward off unfair play in public hearings." Recent Decisions, *supra* note 29, at 330. However, this over-emphasis of appearances may have the opposite effect. In a system where every ex parte communication is grounds for vacating a land use decision, an unscrupulous party can cause such a communication to be made, thereby assuring vacation of a decision that he feels will go against him. Peck, *supra* note 91, at 266. A dependence on appearances will also upset otherwise carefully considered decisions that are blemished by a mere appearance of unfairness. See *Chrobuck v. Snohomish County*, 78 Wash. 2d at 874, 480 P.2d at 498 (Hill, J., dissenting) (the court overturned a local planning decision which accorded with the original zoning plan and which was reached after seven months of deliberations and special hearings).

ington Supreme Court held that the "evil" to be remedied was not only the elimination of actual bias, prejudice, or favoritism, but also the prevention of situations that create suspicion and generate misinterpretation.¹⁷⁵ No matter how innocent a circumstance actually might be, a court must scrutinize the situation with care when appearances might undermine confidence in the exercise of zoning power.¹⁷⁶

Many courts recognize implicitly that elected and appointed local decisionmakers possess considerable knowledge of community issues and thus deserve some judicial deference because of that knowledge.¹⁷⁷ The appearance of fairness standard ignores the value of such knowledge. Further, this standard allows a court to examine the decisionmaker's background, social contacts, and state of mind,¹⁷⁸ thus threatening the decisionmaker's ability to form an independent opinion. Yet, in the final analysis, the court's decision depends on the judge's perception of whether the public thought the board made its decision in a fair manner. As Judge Hill said in his dissent to *Chrobuck v. Snohomish County*, "[T]he 'appearances' can only be gleaned from each judge's personal interpretation of how things would look to the public if all members of the public thought as he did. That is a subjective and personal, not a legal, standard."¹⁷⁹

In contrast, the clear showing of bias standard presumes that a decisionmaker can disregard indirect but potentially prejudicial communications.¹⁸⁰ The appearance of fairness doctrine reverses this presumption and instead expands the scope of review. Yet the appearance of fairness doctrine fails to give board members guidelines to follow so that courts will not overrule their carefully considered opinions.¹⁸¹ Moreover, an appearance of fairness challenge is very difficult to overcome once it has been raised. Courts overturn decisions where the interested board member refrained from voting¹⁸² and where the interested board member voted against his own self-

¹⁷⁵ 78 Wash. 2d at 867-68, 480 P.2d at 495.

¹⁷⁶ *Id.*

¹⁷⁷ Judicial deference to the decisions of local decisionmakers prevents burdening the courts with litigation that does not increase administrative efficiency. The evils that may exist as a result of mistakes or errors of judgment are outweighed by the mischief and inconvenience of judicial supervision. 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 5.15 (1986).

¹⁷⁸ Vache, *supra* note 161, at 496.

¹⁷⁹ 78 Wash. 2d at 877, 480 P.2d at 500 (Hill, J., dissenting). "It requires no legal expertise to know that appearances are often misleading . . ." *Id.* at 875, 480 P.2d at 499.

¹⁸⁰ See *supra* notes 124-26 and accompanying text.

¹⁸¹ Vache, *supra* note 161, at 496.

¹⁸² Buell v. City of Bremerton, 80 Wash. 2d at 525, 495 P.2d at 1362.

interest.¹⁸³ Such courts find that the self-interest of one member of the decisionmaking body "infects" the action of the other members, regardless of their disinterestedness.¹⁸⁴ Therefore, courts will invalidate a decision that appears to be unfair even though the tainted member abstains from voting, or the vote was unnecessary for passage of the decision.¹⁸⁵

More importantly, the appearance of fairness doctrine is not appropriate for elected officials. The application of the doctrine hampers the electoral process and undermines the representative government's effectiveness.¹⁸⁶ People need to inform their elected board members about public concerns and opinions in order for officials to better serve their constituency.¹⁸⁷ The free flow of information regarding potential effects of land use decisions and the viewpoints of all interested parties, achieved through *ex parte* communications, assist in the formulation of general principles. The appearance of fairness doctrine hinders citizens running for office if every contact with constituents who appear before the board is subject to scrutiny, and if campaign promises can later overturn an otherwise valid decision.¹⁸⁸ Frustrating legislators in this manner may force them "underground" to meet with their constituents covertly in order to represent them effectively. This will encourage corruption and ultimately decrease public confidence in the land use process.

In contrast, appointed officials have no constituents to serve and no campaigning to do. They too are chosen because of their views and capabilities.¹⁸⁹ Appointed officials' work involves applying established rules or standards to specific facts.¹⁹⁰ They have limited discretion because, unlike legislatures, they do not possess the power to evolve and modify rules to suit particular situations.¹⁹¹ At the same time many appointed officials have authority to grant or deny land use requests.¹⁹² Therefore, courts should hold appointed land

¹⁸³ Hochberg v. Borough of Freehold, 40 N.J. Super. 276, 283, 123 A.2d 46, 49 (1956).

¹⁸⁴ *E.g., id.*; Buell v. City of Bremerton, 80 Wash. 2d at 525, 495 P.2d at 1362.

¹⁸⁵ *Apparent Fairness Comment*, *supra* note 168, at 349.

¹⁸⁶ *Appearance Comment*, *supra* note 131, at 558.

¹⁸⁷ *See supra* notes 101-03.

¹⁸⁸ *See* City of Fairfield v. Superior Court of Solano County, 14 Cal. 3d at 780-82, 537 P.2d at 382-83, 122 Cal. Rptr. at 550-52; *see also* Moskow v. Boston Redevelopment Auth., 349 Mass. 553, 210 N.E.2d 699 (1965). The court in *Moskow* refused to disqualify city council members who had expressed opinions or taken sides on the merits of a land use question. *Id.*

¹⁸⁹ Strauss, *Disqualifications of Decisional Officials in Rulemaking*, 80 COLUM. L. REV. 990, 1027 (1980).

¹⁹⁰ 8A E. MCQUILLIN, *supra* note 54, at § 25.238.

¹⁹¹ *Id.*

¹⁹² *Id.* at § 25.232.

use board members to the same standard regarding ex parte communications as judges.¹⁹³ The difficulty is that, unlike most judges, many board members do not understand the idea of judicial impartiality¹⁹⁴—especially the restricting of one's consideration in making a determination to "facts" within the scope of review.¹⁹⁵ The appearance of fairness doctrine may be too strict a standard for appointed land use board members given their lack of training and skills in comparison to that of judges. Nonetheless, it is more applicable to appointed administrators than to elected officials. It would be easier for appointed board members to comply with the appearance of fairness standard if given specific guidelines before courts expect them to act and think like judges.

Generally a court applying the appearance of fairness doctrine, when reviewing a land use decision challenged on the basis of alleged ex parte communications, will grant very little deference to a decisionmaking body's conclusion.¹⁹⁶ Under the appearance of fairness standard, an appellant need only show that a communication appeared to influence a board member, and not that actual bias existed.¹⁹⁷ Under this standard a single act or set of circumstances that casts suspicion on the proceedings can thus be as damaging as deciding a land use question without considering properly the merits of the case. Although increasing public confidence in the local land use decisionmaking process is a legitimate judicial interest,¹⁹⁸ the appearance of fairness standard is too strict to allow the proper functioning of a representative elected body. The standard is, however, probably the best measure for appointed officials.

¹⁹³ Due process requires that "adjudicators must not be prejudiced by conditions so destructive of their impartiality as to prevent a fair hearing." Merrill, *supra* note 18, at 796-97.

¹⁹⁴ "In too many municipalities the local tribunal looks upon itself as an advocate for a point of view." R. BABCOCK, *supra* note 68, at 154.

¹⁹⁵ Richard Babcock noted in *The Zoning Game* that "in zoning the layman is vested with the heady power of direct participation in decision-making . . . [and] [m]uch of the shouting by local decision-makers is phrased in economic terms . . ." *Id.* at 30. Twenty years later, in *The Zoning Game Revisited*, Mr. Babcock states that "localisms, fiscal appetites, and xenophobia remain pervasive" in land use issues. R. BABCOCK & C. SIEMON, *THE ZONING GAME REVISITED* 1 (1986). Although considering the economic interests and sociological makeup of a community may arguably be within the concerns of local legislators, the scope of inquiry of administrative board members is limited to facts specific to the particular land use question before the board.

¹⁹⁶ See *Fleming v. City of Tacoma*, 81 Wash. 2d at 300, 502 P.2d at 331-32 (trial judge believed that the ex parte communication did not influence the decision, but held the ordinance invalid even though the involved councilman's vote was unnecessary for passage; supreme court affirmed).

¹⁹⁷ *Swift v. Island County*, 87 Wash. 2d at 361, 552 P.2d at 183.

¹⁹⁸ Kahn, *supra* note 130, at 1026-27.

IV. PROPOSED STANDARD OF REVIEW FOR EX PARTE COMMUNICATIONS IN LOCAL LAND USE DECISIONS

The ex parte communication issue involves balancing the individual property owner's rights against the desirability of promoting government efficiency by granting its officers sufficient discretion to carry out their public functions.¹⁹⁹ California provides a good example of a state court struggling with the ex parte communication issue. Traditionally, California courts considered measures that zoned or rezoned property to be legislative with no distinction as to the size of the area or the number of owners.²⁰⁰ A California court would not set aside decisions of the land use authorities as to matters of opinion and policy unless the facts showed that there had been an unreasonable, oppressive, or unwarranted interference with property rights.²⁰¹ As a result, ex parte communications were almost unreviewable.

Then the California courts began to distinguish decisions involving individual parcels of land as adjudicative.²⁰² An adjudicative classification meant that courts could review ex parte communications and possibly reverse a board's decision since the board had to comply with adjudicatory standards.²⁰³ Most recently, the Supreme Court of California reiterated the traditional rule that land use ordinances are legislative,²⁰⁴ with one twist: variances, use permits, subdivision maps, and similar proceedings are adjudicative even when they involve a substantial area or affect the community as a whole.²⁰⁵ In this manner California has attempted to impose economy and certainty in the land use law treatment of ex parte communications.

Under the California example, decisionmakers have some guidelines for when to avoid ex parte communications, such as when

¹⁹⁹ Recent Decisions, *supra* note 29, at 330.

²⁰⁰ *E.g.*, Toso v. City of St. Barbara, 101 Cal. App. 3d 934, 162 Cal. Rptr. 210 (1980); Ensign Bickford Realty Corp. v. City Council, 68 Cal. App. 3d 467, 137 Cal. Rptr. 304 (1977); Hilton v. Bd. of Supervisors, 7 Cal. App. 3d 708, 86 Cal. Rptr. 754 (1970); Lockard v. City of Los Angeles, 33 Cal. 3d 453, 202 P.2d 38 (1949).

²⁰¹ Ensign Bickford Realty Corp. v. City Council, 68 Cal. App. 3d at 474, 137 Cal. Rptr. at 308.

²⁰² *E.g.*, Horn v. County of Ventura, 24 Cal. 3d 605, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979); Woodland Hills Residents Assn., Inc. v. City Council, 44 Cal. App. 3d 825, 118 Cal. Rptr. 856 (1975).

²⁰³ Horn v. County of Ventura, 24 Cal. 3d at 612-13, 596 P.2d at 721-22, 156 Cal. Rptr. at 596 (persons affected by quasi-judicial land use decisions are entitled to notice and an opportunity to be heard).

²⁰⁴ Arnel Dev. Co. v. City of Costa Mesa, 28 Cal. 3d 511, 620 P.2d 565, 169 Cal. Rptr. 904 (1979).

²⁰⁵ *Id.* at 518-19, 620 P.2d at 596, 169 Cal. Rptr. at 908.

deciding variances, use permits, subdivision maps, and like matters. This line-drawing does not take into account, however, the nature of the decisionmaker, that is, elected or appointed. Allowing the traditional decisionmaking models to work as they were intended would be a more effective way to balance property interests against government efficiency, instead of creating conflicting standards within the legislative and administrative models. When determining if an *ex parte* communication is basis for vacation, judicial reviewers should look at whether the decisionmakers were elected or appointed, rather than classify decisionmakers' final decisions as legislative or quasi-judicial.

Initially, however, courts must establish a workable definition of *ex parte*. In the strictest sense, *ex parte* communications may include communications with other government entities.²⁰⁶ Courts, therefore, need to define *ex parte* in terms of what it is and what it is not. *Ex parte* is not communication between decisionmakers and their staff, although courts must place investigatory reports by the staff member into the record.²⁰⁷ Elected and appointed administrators both need assistance in carrying out their duties. Courts should also not classify as *ex parte* visits to the site around which the land use decision centers.²⁰⁸ Board members can conduct these visits in a professional, investigatory manner that will allow for a more informed decision. The *ex parte* definition should also not include communications with other government entities.²⁰⁹ Local governments need unity and a sharing of technical expertise that persons can communicate without infringing on the rights of the involved parties.

Ex parte communications are communications with any party appearing before the board when the hearing is not in session. In addition, any communications with interested, or even relatively disinterested, members of the community are also *ex parte* communications. These communications may take place at parties, meetings, work, or within a family setting.

²⁰⁶ Kahn, *supra* note 130, at 1044.

²⁰⁷ *Appearance Comment*, *supra* note 131, at 567. For example, see Oregon Revised Statute § 215.422(4) "A communication between county staff and the planning commission or governing body shall not be considered an *ex parte* contact . . ." OR. REV. STAT. § 215.422(4) (1985).

²⁰⁸ Kahn, *supra* note 130, at 1044. *See also* Tierney v. Duris, 21 Or. App. at 629, 536 P.2d at 443 (no violation of impartiality requirement when the contacts only amounted to an investigation of the merits or demerits of a proposed change).

²⁰⁹ *See generally* Peck, *supra* note 91, at 245 (the free flow of information assists in the formulation of general principles in other forums).

The term *ex parte* need not carry a negative connotation. If the members of a land use board are appointed, they should refrain from *ex parte* communications. State enabling acts and other land use statutes do not require communication with interested parties for application of their provisions to specific situations.²¹⁰ Administrative decisionmakers can still keep the public interest in mind when developing rules and regulations to facilitate their specialized area without engaging in *ex parte* communications.

States have administrative procedure acts that outline requirements for administrative boards.²¹¹ The requirements usually include an impartial hearing examiner, an opportunity to present oral as well as written evidence, an opportunity to present rebuttal evidence, and an opportunity to cross-examine witnesses.²¹² States also have statutory guidelines for conflicts and ethical questions.²¹³ Furthermore, many zoning enabling acts include regulation of notice, record, hearing procedures, and appeals.²¹⁴ These statutes need to add a provision defining *ex parte* communication and stating that appointed land use officials must refrain from communicating with any interested party.²¹⁵

Since the public cannot vote appointed land use officials out of office, appointed officials' decisions should be subject to a *de novo* judicial review.²¹⁶ Under *de novo* review aggrieved parties may chal-

²¹⁰ A reading of the Standard State Zoning Enabling Act indicates that the duties of board members are limited to rendering a decision based on facts presented before the board. See STANDARD STATE ZONING ENABLING ACT §§ 1-9 (1926), reprinted in 4 R. ANDERSON, *supra* note 9, at § 30.01.

²¹¹ *E.g.*, MASS. GEN. L. ch. 30A (1984) (State Administrative Procedure); CAL. GOV'T CODE § 11370 (West 1980) (Administrative Law and Procedure).

²¹² *E.g.*, MASS. GEN. L. ch. 30A (1984) (Adjudicatory Proceedings; Conduct of Proceedings); CAL. GOV'T CODE §§ 11507.7, 11510-11514 (West 1980) (Administrative Adjudication).

²¹³ *E.g.*, MASS. GEN. L. ch. 268A (1984) (Conduct of Public Officials and Employees); CAL. GOV'T CODE §§ 8920-8922 (West 1980) (Code of Ethics).

²¹⁴ *E.g.*, MASS. GEN. L. chs. 40A:5, 40A:8, 40A:11, 40A:17 (1984) (Zoning); CAL. GOV'T CODE §§ 65351-65356.1, 65500-65507 (West 1980) (Planning and Land Use); STANDARD STATE ZONING ENABLING ACT (1926).

²¹⁵ For example, OR. REV. STAT. § 215.422(3) (1985) provides that [n]o decision or action of a planning commission or county governing body shall be invalid due to *ex parte* contact or bias . . . if the member of the decisionmaking body receiving the contact: (a) Places [the communication] on the record . . . ; and (b) Has a public announcement of the content of the communication and of the parties' right to rebut

This type of statute provides a manner in which land use decisionmakers can protect their decisions from invalidation because of an *ex parte* communication but does not define *ex parte* nor make a distinction between elected and appointed land use officials.

²¹⁶ This position represents a departure of the generally held principle that a court may not

lenge *ex parte* communications that are not part of the record. A more adequate record and findings resulting from such a review would also encourage more impartial, well considered decisions because of possible accountability.²¹⁷ Courts applying an appearance of fairness standard in this situation would promote public confidence in appointed land use decisionmakers and their decisions.

In contrast, if the members of a land use decisionmaking body are elected, then courts must allow them to act as legislators. The job of elected representatives is to represent the people who voted them into office.²¹⁸ Local politicians should be accessible and responsive to local sentiment to an even greater degree than congressional officials because local politicians do not have to consider national impact. *Ex parte* communication is one way for local land use officials to discover what their voters want. Knowing what voters want allows local elected officials to make land use decisions within the best interests of the community.

State statutes already set out regulations prohibiting fraud, criminal activity, and conflicts of interest.²¹⁹ In addition, personal ethics and the electoral process itself will regulate elected land use officials. If the public views an elected decisionmaker as unfair or not representing their best interests, then the public will vote that person out of office and will elect a better representative.

Upon judicial review, courts should give a great amount of deference to an elected land use board's decision. Overturning the decision would require a clear showing of fraud, criminal activity, conflict of interest, or lack of rational relationship. In this manner, courts would bring *ex parte* communications out into the open so elected land use board members and their constituents would know, from the outset, that communication is encouraged. Ultimately, consistent treatment of *ex parte* communications would strengthen public confidence.

Judicial review of *ex parte* communications is an area of confusion and uncertainty in local land use planning. California has attempted to bring order to the treatment of *ex parte* communications by defining the standard of review based on the type of decision made by a land use board. While California has a viable solution, this Comment suggests another alternative. Instead of a decision-based

go outside the administrative record in reviewing administrative agency action. S. REIGEL & P. OWEN, *supra* note 151, at § 5.2.2.

²¹⁷ Comment, *supra* note 56, at 141.

²¹⁸ See, e.g., *Fairfield v. Superior Court*, *supra* note 132 and accompanying text.

²¹⁹ See *supra* note 213.

standard, local governments should define *ex parte* communications and incorporate the definition into zoning legislation so that decisionmakers understand the issue. Then courts should base the standard of judicial review for *ex parte* communications on whether the land use board is elected or appointed. Courts should prohibit appointed land use board members from engaging in *ex parte* communications, and any violation should be subject to *de novo* judicial review where courts apply an appearance of fairness standard. Courts should encourage elected land use board members to engage in *ex parte* communications and hold them to a standard akin to the clear showing of bias standard, where only fraud, criminal activity or conflict of interest will cause the court to vacate a decision because of an *ex parte* communication. Unlike the current state court treatment of *ex parte* communications, this proposed standard of review is much less ambiguous and allows elected and appointed land use board members to carry out their traditional government functions.

V. CONCLUSION

The state courts' current treatment of *ex parte* communications in local land use decisions does not further public confidence in the decisionmaking process. Confidence becomes more important as municipalities enact land use ordinances to restrict landowners' personal freedom to use their land as they see fit. In effect, land use ordinances sever development rights from property rights, and this separation has created a system of land use controls that conflicts with our society's view of property rights. Property owners become discontented with the government when land use ordinances appear to be applied arbitrarily or inconsistently. Confusion creates an incentive to circumvent the system. Board member contact with interested parties outside of the hearing via *ex parte* communications adds fuel to the fire either way: cutting people off from talking to their representatives or giving people the inside track with "impartial" administrators. Severe and unjustified deprivation of property rights may result when a land use board does not make a carefully considered decision in a particular situation. Also, if the public does not see the fairness and necessity behind land use decisions, public disillusionment and discontentment increases.

Certainty is necessary to encourage people to invest in land. Developers and neighbors have a right to rely on the decisions of land use boards that affect their decisions to buy and sell property. State courts, however, fail to provide the certainty needed in the land use

area by applying a standard that allows or prohibits *ex parte* communications based on a land use board's final decision.

Land use board members and the public often do not know how a reviewing court will treat communications that take place outside of the formal land use hearing. Land use board members need clear standards and guidelines for their conduct in order to restore confidence and certainty in land use decisionmaking. This Comment thus advocates the application of the traditional notions of legislative and administrative standards regarding *ex parte* communications to the area of land use law. Because of the nature of their position, courts should encourage elected land use officials to communicate with individuals in the community. These elected officers will thus be able to make land use decisions with the best interests of the municipality in mind. The electoral process will monitor elected land use officials.

In contrast, courts should discourage appointed land use board officials from discussing board issues outside of their immediate staff. These officers do not have an affirmative elected duty to represent constituents, but can still work for the public good in applying land use statutes and developing regulations without engaging in *ex parte* communications. Judicial rules of due process, rather than the standards of elected officials, will guide appointed land use board members. This application of traditional legislative and administrative standards of *ex parte* review is essential to restore integrity and clarity to the land use decisionmaking process.