



DUE PROCESS, FAIR HEARINGS,
EX PARTE COMMUNICATIONS,
&
CALIFORNIA PUBLIC RECORDS
LAW



A Presentation for the Humboldt
County Planning Commission

April 20, 2023

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DUE PROCESS

“Due Process” does not have a precise definition but refers to the collective of fundamental justice principles as to the administration of laws applying equally to all under established rules to protect private rights.

Traditional Western notions of Due Process have existed since the charter of the Magna Carta in 1215.

Among various other laws, Due Process is embodied in both the 5th and 14th Amendments to the U.S. Constitution: “No person shall be . . . deprived of life, liberty or property without due process of law.”

Due process is “the law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial.”—Daniel Webster, *Trs. of Dartmouth College v. Woodward*, (1819) 17 U.S. 518, 624.

Basic Principles of Procedural Due Process



A fair trial, properly noticed, in a fair tribunal by a fair decisionmaker



Hearing, especially that involving finding of fact, must occur before a reasonably impartial, noninvolved decision-maker



Free exchange of information is necessary to the truth-seeking/information-testing process foundational to our legal system

NOTICE OF PUBLIC HEARING HUMBOLDT COUNTY PLANNING COMMISSION

On Thursday, April 20, 2023, at 6:00 p.m., or as soon thereafter as the matter can be heard, the Humboldt County Planning Commission will hold a public hearing in the Board of Supervisors' Chamber, Humboldt County Courthouse, 825 Fifth Street, Eureka, California, and virtually via Zoom to consider the matter listed below.

HOW TO LISTEN OR WATCH THE PLANNING COMMISSION MEETING:

Listen or Watch the live stream of the Planning Commission Meeting in three ways:

1. <https://zoom.us/j/87544807065> Password: 200525
2. Call in via telephone at 346 248-7799, enter meeting id 875 4480 7065 Password: 200525
3. A live stream of the meeting can be found by using the following link: <https://humboldt.legistar.com>, or by watching Access Humboldt on cable channel 11

PUBLIC COMMENT INSTRUCTIONS DURING THE MEETING:

Participate in the public comment period of the meeting in the following three ways:

1. **In Person:** Any person may appear and present testimony in regard to this matter at the hearing located in the Board of Supervisors' Chamber, Humboldt County Courthouse, 825 Fifth Street, Eureka, California. The Planning Commission needs 15 COPIES of any materials submitted at the meeting.
2. **Via Computer as an attendee:** To raise your hand click the Raise Hand icon on the bottom of the Zoom window. When you click the Raise Hand icon, a hand icon will appear next to your name that will notify the host your hand is raised. You will also see the hand icon turn green. When you want to lower your hand, you can click the hand icon again and your hand will be lowered. When you are called upon to speak the Zoom platform will ask you for permission to unmute your mic. **If you encounter any issues, please use the call-in option below.**
3. **Via phone call using cellphone or landline:** When the Planning Commission meeting begins, call in to the conference line. When the Planning Commissioner starts to discuss the item you wish to comment on, **Press *9 to raise your hand**. When you are called upon to speak, you will be prompted to unmute your mic, press *6 to unmute.

PUBLIC COMMENT PRIOR TO THE MEETING:

Public comments may be submitted via email to Planningclerk@co.humboldt.ca.us. Please provide the project title, record or case number and date of the hearing. The deadline for submitting written comments is **12:00 p.m. Wednesday, April 19, 2023**. After the deadline, written comments may be submitted to the commission in person during the meeting. Verbal comments may be made in person, or on zoom. Comments received after the agenda is posted on **Friday, April 14, 2023**, can be found at the "Attachments" section of the "Meeting Details" link next to the posted Agenda at: <https://humboldt.legistar.com>, and will be included with the administrative record. If you do not have access to email, contact the planning clerk at 707-267-9409. Please note that each Zoom meeting has a unique meeting ID and password. Any item on this agenda that is continued to a future date will use the meeting ID and password applicable to the date the agenda item is to be heard again.

California Code of Civil Procedure §1094.5

- (a) Where the writ is issued for the purpose of inquiring into the **validity of any final administrative order or decision made** as the result of a proceeding in which by law **a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts** is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury. All or part of the **record** of the proceedings before the inferior tribunal, corporation, board, or officer may be filed with the petition, may be filed with respondent's points and authorities, or may be ordered to be filed by the court. . . .
- (b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a **fair trial**; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.
- (c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not **supported by substantial evidence in the light of the whole record**.

Adjudicative Acts vs. Legislative Acts

Due Process on a Spectrum

Adjudicative (Quasi-Judicial) Acts

- Occurs when officials determine how already-adopted policies apply in each given situation affecting specific private individuals
- When the Commission considers whether an application complies with County requirements
- I.e., Conditional Use Permits, Special Permits, Zoning Clearance Certificates, Licenses
- Must afford higher due process and fair hearing—officials are conducting a “Public Hearing” BUT NOT rising to same level as constitutional due process

Legislative Acts

- Occurs when officials decide whether to adopt a policy which would apply broadly to all and not just to one individual
- When the Commission considers whether to adopt an ordinance to add to County Code
- I.e., Ordinances, General Plan Elements, Planning Commission Rules
- Can afford to be less constrained—officials can review information submitted by interested parties and conduct one’s own investigation as this is NOT a “Quasi-Judicial Public Hearing”

Possible Decision-Maker Bias

Personal Interest in the Outcome of a Decision (I.e., Financial interest or affect on one's residence)

Strong Bias in Favor or Against an Applicant (I.e., close friend or family member*)

Campaign Contribution**

Dual (Incompatible) Office Holding

Undisclosed or unalterable notions relating to the facts relevant to the decision

Unfair advocacy and influence by staff or outside agency members (non-constituents)

Factual Bias and Ex Parte Communications

- Factual Bias occurs when there is an appearance that a decision-maker has prejudged facts and is not open to a change of opinion based on actual evidence presented at the hearing.
- Ex Parte (Latin for “from one side only”) Communication occurs when a decision-maker receives information and/or evidence from outside the public hearing.
- Decision-makers cannot base their decision upon information that not all “parties” are aware of and therefore have no opportunity to challenge.
- Parties in the context of Planning Commission meetings includes: (1) fellow commissioners, (2) the applicant, and (3) the public.



“In conducting the hearing, the board [and/or planning commission] acts as a local administrative tribunal, and it has power to make final adjudications of fact in connection with matters properly submitted to it. The action of such an administrative board exercising adjudicatory functions when based upon information of which the parties were not apprised and which they had no opportunity to controvert amounts to a denial of a hearing. Administrative tribunals which are required to make a determination after a hearing cannot act upon their own information, and nothing can be considered as evidence that was not introduced at a hearing of which the parties had notice or at which they were present. A contrary conclusion would be tantamount to requiring a hearing in form but not in substance, for the right of a hearing before an administrative tribunal would be meaningless if the tribunal were permitted to base its determination upon information received without the knowledge of the parties. A hearing requires that the party be apprised of the evidence against him so that he may have an opportunity to refute, test, and explain it, and the requirement of a hearing necessarily contemplates a decision in light of the evidence there introduced.”

English v. City of Long Beach, (1950) 35 Cal. 2d 155 (California Supreme Court)

What is an Ex Parte Communication?

1. Oral Information about a Project
2. Written Information about a Project
3. Sensory information such as visual or auditory information obtained during a site visit

Ask yourself, are there persons being denied the opportunity to consider, comment on, or challenge the information upon which (even if in part) you are basing your decision?

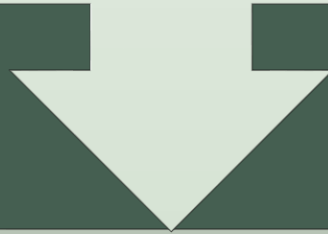
What is NOT Ex Parte Communication?

- Mere casual or non-substantive communications do not violate the due process rights of non-present parties to a quasi-judicial matter
- I.e., the mere expression of support or opposition by a constituent to a particular decision does not raise due process concerns when it is not accompanied by substantial factual information that influences the decisionmaker's analyses or conclusions.

Curing Ex Parte Communications

Because some ex parte communications are not recorded, they cannot be rebutted by the non-present party or given adequate appellate review. For this reason, in general, Ex Parte Communications should be avoided. If not avoided, the decisionmaker can attempt to cure by making prompt and full disclosure of the ex parte communication BEFORE the public hearing starts.

(1) Complete (2) Detailed (3) As early in the process as reasonable



The reasonableness of timely disclosure can be fluid based on the extent and complexity of the ex parte information received.

Humboldt County Planning Commission Rules on Ex Parte Communications

Site Visits by Individual Commissioners.

- Site visits by individual commissioners are encouraged prior to public hearings. Commissioners shall describe for the record any individual site visit and summarize any observations made during the course of the site visit. Commissioners engaging in any ex-parte communications or making individual site visits should refrain from discussing how they intend to vote on the matter, and should defer judgment until they have heard all the evidence at the public hearing.

Other Ex Parte Communications

- Commissioners will exercise care in personal contacts and telephone calls concerning substantive issues relating to administrative adjudication matters outside of the public hearing and should inform persons contacting them to make their information or objections known at the public hearing, orally or in writing to the Commission. Commissioners will inform those present prior to the opening of a public hearing of any independent contacts they have had on a matter before the Commission and the content of communication and information exchanged during such contacts.

Other Fair Process Concerns: Attentiveness of the Decisionmaker

Failure of the decisionmaker to truly pay attention at a hearing can result in a denial of a fair hearing.



Example 1: Planning Commissioner A is not in attendance at the first Thursday of the month Planning Commission meeting. During that hearing, the attending commissioners opened a public hearing on a project and took into evidence (e.g., staff report, applicant testimony, public comments). The public hearing is then continued to the next meeting. Planning Commissioner A attends the next third Thursday of the month Planning Commission meeting, Planning Commissioner A sits for the remainder of the public hearing, makes comments and discuss the hearing facts with fellow commissioners, and ultimately votes on the project. Can Planning Commissioner A have truly paid attention when Planning Commissioner A did not attend the first part of the public hearing?

Other Fair Process Concerns: Attentiveness of the Decisionmaker

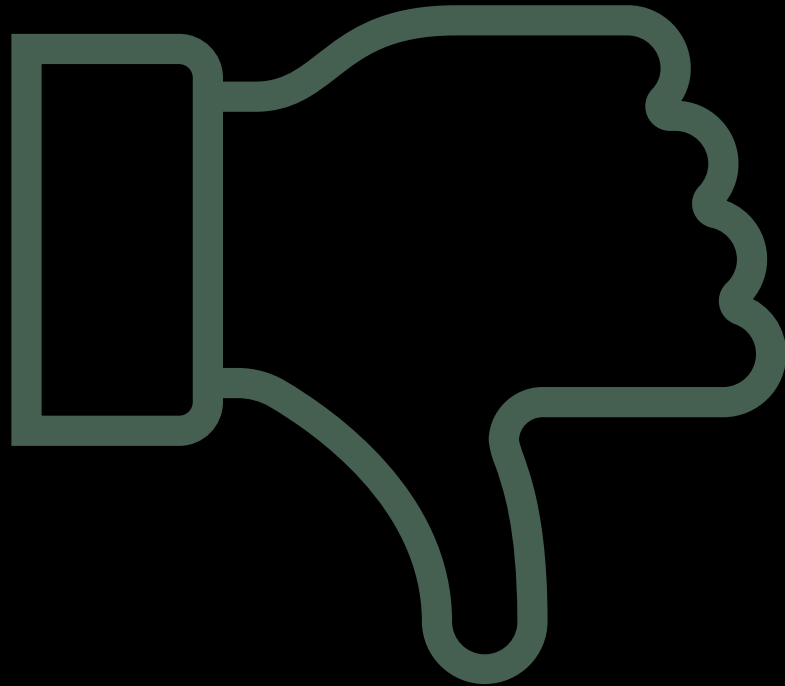
Failure of the decisionmaker to truly pay attention at a hearing can result in a denial of a fair hearing.



Example 2: Planning Commissioner B seems distracted during a meeting. Planning Commissioner B is texting excessively and using multiple devices during the presentation of evidence. Planning Commissioner B decides, in the middle of the hearing, to go to the bathroom, grab a snack, and talk to a friend. By the time Planning Commissioner B returns, its time to vote. Can Planning Commission B have truly paid attention when Planning Commissioner B was at the meeting by not actively observing and participating?

Failure to Afford Due Process and Fair Hearing Principles

- Failure to afford due process and avoid ex parte communications effectively results in the denial of a fair hearing. This can result in the following:
 - Appeal of the decision of the Planning Commission to the Board and/or the Judiciary
 - Invalidation of the decisionmaker's action
 - Loss of faith in the decisionmaker



Public Records Act

The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny. California Constitution, Article 1, §3(b)

Rules and statutes regarding access to public records are broadly construed while those restricting access must be narrowly construed.

“In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.” Cal Gov Code § 7921.000 (formerly Government Code §6250)

- Writings “means any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.”

Cal Gov Code § 7921.000

What is a
“writing”?

- “A writing prepared by a public employee [or official] conducting agency business has been “prepared by” the agency within the meaning of [the Public Records Act], even if the writing is prepared using the [official’s] personal account. A document’s status as public or confidential does not turn on the arbitrary circumstance of where the document is located. If public officials could evade the law simply by clicking into a different e-mail account, or communicating through a personal device, sensitive information could routinely evade public scrutiny. The [opposite] interpretation of CPRA would not only put an increasing amount of information beyond the public’s grasp but also encourage government officials to conduct the public’s business in private.”

City of San Jose v. Superior Court, (2017) 2 Cal. 5th 608, 608 (also explaining whether a personal email qualifies as a public record under CPRA that the writing must, at a minimum, relate in some substantive way to the conduct of the public’s business and is fact dependent)

Public Officials’ Personal Devices and Accounts

Rights under the California Public Records Act (CPRA)



Under the CPRA, every person has the right to inspect, and receive a copy of, any public record in the possession of the County, unless the record is exempt from disclosure.



If the County fails to produce public records which it should have produced, the requestor can file a lawsuit against the County seeking a court order to force their production.

Penalty: A requestor who goes to court and is successful is entitled to recover their attorney's fees and costs (for a public entity to be awarded such fees and costs, the request must have been "clearly frivolous").

- Intentional spoliation or deletion of records can also result in sanctions against the Commissioner who deleted such information.
- CPRA is not a record retention statute, but records should be kept on County server pursuant to Government Code § 26202, which requires certain public records to be kept for **at least two (2) years**.
- Retention statutes do not address records stored on personal accounts or devices, nor do they provide a specific retention period for emails, texts, or other forms of social media.
- The advice of this office is if you cannot store information for this long, then best policy is to not use private communications or to forward the information to the County for storage on the County's server.

Intentional Spoliation or Deletion of Public Records

The difference between Public Record and Hearing Record

Record of Proceedings

- The entirety of the information, evidence, and audio/visual documentation submitted to the decisionmakers, applicant, and public for purposes of making a project specific determination at the time of a public hearing.
- In order to meet substantive due process requirements, the law requires that the determination of the decisionmakers must reflect their independent judgement and be supported by substantial evidence in light of the whole record.

Public Record

- Public record is ANY record whether actually or constructively within the government's, in this case the County's, possession.
- Cal Gov Code § 7920.530
 - (a) As used in this division, "public records" includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.
 - (b) "Public records" in the custody of, or maintained by, the Governor's office means any writing prepared on or after January 6, 1975.



QUESTIONS?

~Additional Resource Quick-Links Sheet is Appended to this Agenda Item~