

OPEN MEETINGS & EX PARTE FROM A PLANNING COMMISSIONER'S PERSPECTIVE

Prepared for the
MARYLAND PLANNING COMMISSIONERS
ASSOCIATION

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by

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EX PARTE COMMUNICATIONS & OPEN MEETINGS

- **What are they? Why must we avoid them?**
- **Why are planning commissioners vulnerable to violations of both ex parte and open meetings?**
- **How can we prevent such violations in the first place?**
- **Scenario and discussion**

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THE MARYLAND OPEN MEETINGS ACT COMES FROM THE FEDERAL “SUNSHINE ACT”

First applied only to Federal Agencies, the 1976 Sunshine Act stipulated (with ten exemptions) that **'every portion of every meeting of an agency shall be open to public observation.'** (5 U.S.C. 552b(b))

It imposed procedural requirements on federal agencies and their meetings to ensure that **advance notice and to determine exemptions to the act.**

Natural Resources Defense Council, Inc., v. Nuclear Regulatory Commission, 216 F.3d 1180, 1182 (D.C. Cir. 2000).

OPEN MEETINGS ALLOW THE PUBLIC TO OBSERVE OUR DELIBERATIONS

The Act – its policy and purpose

When it adopted the Act, the Maryland General Assembly declared the goals to be achieved by ensuring that public business be conducted openly:

- (1) The ability of the public, its representatives, and the media **to attend, report on, and broadcast meetings of public bodies and to witness the phases of the deliberation, policy formation, and decision making** of public bodies ensures the accountability of government to the citizens of the State.
- (2) The conduct of public business in open meetings increases the faith of the public in government and enhances the effectiveness of the public in fulfilling its role in a democratic society.”

From the Open Meetings Manual (2015), “Introduction”:

OPEN MEETINGS ALLOW THE PUBLIC TO OBSERVE OUR DELIBERATIONS

The Maryland's Open Meetings Act requires State and local public bodies to hold their meetings in public, and stipulates a process:

- Give **reasonably adequate notice** of the meetings
- Publish an **agenda**—including any **intent to close** a portion of the meeting on the agenda
- Keep and make meetings **minutes** available
- Designate a **trainee**

MOST OF OUR MEETINGS ARE EXPRESSLY THE KIND THAT REQUIRE OPEN MEETINGS

No matter what function a public body performs, the Act applies whenever a public body is meeting to consider granting a **license or permit, or a **special exception, variance, conditional use, or zoning classification**, the **enforcement of any zoning law or regulation**, or any **other zoning matter**.**

EXCEPTIONS TO OPEN MEETINGS

- A. The “personnel matters” exception
- B. The “privacy or reputation’ exception
- C. The “real property acquisition” exception
- D. The “business location” exception
- E. The “investment of public funds” exception
- F. The “marketing of public securities” exception
- G. The “legal advice” exception
- H. The “pending or potential litigation” exception
- I. The “collective bargaining” exception
- J. The “public security” exception
- K. The “scholastic, licensing and qualifying examination” exception
- L. The “investigative proceeding regarding criminal conduct” exception
- M. The “other law” exception
- N. The “procurement” exception

OPEN MEETINGS FROM FREDERICK COUNTY

6.1 All agenda items that require an advertised public hearing shall be preceded by notices as prescribed by law and these Rules. Public notices shall appear in a local newspaper of general circulation at least 14 days before the meeting date unless otherwise specified by the law. Written notice, if required, shall be given to adjacent property owners at least 7 days before the hearing date. (04-12-77) (09-15-04)

OPEN MEETINGS FROM FREDERICK COUNTY

6.2 Commission meetings shall be public meetings and **subject to the Maryland Open Meetings Act. Any person is entitled to appear before and be heard by the Commission before it reaches a decision on any matter. **Except as otherwise permitted by the Maryland Open Meetings Act, voting shall be held during a public meeting and the Commission shall keep an open record of its resolutions, proceedings and actions, which shall be available for public inspection during business hours.** Nothing contained herein shall be construed to prevent the Commission from holding closed session meetings for discussion of items as permitted under the Maryland Open Meetings Act. (04-12-77) (01-20-99)**

OPEN MEETINGS FROM FREDERICK COUNTY

6.3 Recording of Proceedings — It shall be the duty of the Secretary, assisted by the Commission's staff, to keep a true and accurate record of all proceedings at all meetings and public hearings. A video or audio recording may be accepted as the official record. **Minutes shall be prepared, distributed to the individual members, and if approved by the Commission, placed in a record book or file. The Secretary or presiding officer at the meeting shall sign the minutes, resolutions, and other official documents, as adopted or approved.**

THE LEGAL DEFINITION OF EX PARTE

**Ex parte communication is:
“On one side only, by or for one party;
done for, in behalf of, or
on the application of, one party only.**

<http://www.courts.state.md.us/reference/glossary.html>

EX PARTE IS ONE-SIDED COMMUNICATION

According to MDP Commissioner Training, ex parte is important because:

- Citizens **have the right to expect fair dealings** by officials holding positions of public trust;
- Ex parte **involves not just an issue of impropriety, but also the appearance of impropriety;**
- And **it's the law!**

EXAMPLE FROM THE CITY OF FREDERICK

“6.5 Ex Parte Communications Prohibited: An ex parte communication includes an oral or written communication not on the public record to which reasonable prior notice to all parties is not given. Such communication between Commission members and interested persons is prohibited if relevant to the merits of a Commission proceeding. Members should not discuss applications with applicants or other interested persons outside the confines of a public meeting, but should recommend that the person(s) contact Staff with any questions or concerns.”

Planning Commission Rules of Procedure

[https://www.cityoffrederick.com/DocumentView.aspx?DID=3292.](https://www.cityoffrederick.com/DocumentView.aspx?DID=3292)

FROM CHARLES COUNTY

“An ex parte communication is a communication to a BCC member from any person about a BCC matter that occurs in the absence of other parties to the matter and without notice and opportunity for all parties to participate in the communication. People often refer to these communications as “one-sided,” “off-the record,” or private communications....One sided communications does not mean that the communication must occur in privacy or among two people in order to be an ex parte communication. Even a public communication before a large audience may still be an ex parte communication if other parties to the proceeding do not have notice of and an opportunity to participate in the communication.”

Boards, Committees, and Commissions (BCC) Manual

<http://bit.ly/1PGM0XI>

FROM MONTGOMERY COUNTY

3.2. Outside Communications.

3.2.1. Policy. To preserve public confidence in the fairness of Planning Board deliberations and decisions, **the Planning Board should ensure that the public and interested Persons have the opportunity to know, and respond to, all information that the Planning Board considers in making its decisions.** The Planning Board should also ensure that all members have the same opportunity to know and consider any relevant evidence provided to any other Planning Board member. The Board may take administrative notice of facts in common knowledge and matters falling within any member's experience and expertise...

FROM MONTGOMERY COUNTY

3.2.2. Planning Board's Obligation to Avoid Improper Contacts. When considering any matter decided under these Rules, the Planning Board deals with Persons who are directly affected by its decision (such as the Applicant and neighbors of a proposed subdivision site). **Each of these interested Persons needs the assurance that other interested Persons will not have an unfair** advantage in presenting their version of the relevant facts or concerns to the Board. To that end, Board members **must avoid communicating with Applicants or any other Persons about a pending Application except at Board meetings when the Application is considered.** The Planning Director must regularly publish a roster of pending Applications in appropriate detail to avoid violations of this Rule.

FROM MONTGOMERY COUNTY

3.2.3. Prohibitions. Each Planning Board member must not communicate with any Person, other than Planning Staff or another Board member, about the merits or facts of any pending Application or alleged Violation, **except during the Board meeting when the Application or alleged Violation is being considered.** If the Board finds that any Person has intentionally communicated or attempted to communicate with a Board member in violation of this Rule, the Board may **impose an appropriate sanction, including deferral of the Board Action concerning that Application for a period of up to 6 months or exclusion of any testimony by the Person from the record** of the matter to which the prohibited communication pertained.

QUICK SUMMARY: WHY WE MUST AVOID EX PARTE & OPEN MEETING VIOLATIONS

Ex Parte and Open Meetings violations are **like talking behind the public's back!**

These violations run counter to our responsibilities to:

- Ensure fair and impartial planning decisions!
- Honor the public's right to know!
- Allow public observation of our deliberations and decisions.
- Ensure due process for all parties!
- Maintain the completeness of the record!

Even the appearance of these violations can weaken public trust:

- ***Use the newspaper or reasonable person test.***
- ***"It doesn't have to be illegal to be ill-advised."*** (Schekell, 2012)

EX PARTE COMMUNICATIONS AND OPEN MEETINGS

- **What are they? Why must we avoid them?**
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BECAUSE HUMAN BEINGS HAVE LOTS OF CONNECTIONS!

- **family relationships**
- **neighborhood and homeowner associations**
- **religious affiliations**
- **civic affiliations and organizations**
- **professional relationships**
- **business relationships**
- **charitable groups**
- **social clubs and recreational groups**
- **educational and school affiliations**
- **advocacy groups**
- **and more**

EX PARTE COMMUNICATIONS AND OPEN MEETINGS CAN TAKE PLACE ANYWHERE AND ANYTIME!

- on your porch
 - in your backyard
 - on the street
 - in shops and grocery stores
 - in barber and beauty shops
 - at church or choir practice
 - in restaurants
 - at political events
 - at fundraisers
 - at county fairs or carnivals
 - at bridal and baby showers
 - at anniversary and birthday parties,
 - at neighborhood or block parties
 - at social club meetings
 - at the gym
 - at professional meetings and conferences
 - at PTO meetings and school games
 - at homeowner association meetings
 - via email or social media
- In other words, just about any place humans live, work, and play.**

NEXT, TAKE CIVIC ASSOCIATIONS, FOR EXAMPLE...

- They don't receive planning commissioner training, so
 - They may not understand the planning process for your jurisdiction,
 - They may not understand the way "the record" works, and
 - They may not understand that the rules against ex parte or the open meetings also apply to them.
- There are lots of them and they advocate.



MY RECIPE FOR LOTS OF EX PARTE AND OPEN MEETING CHANCES OF VIOLATIONS

1. Take a few trained planning commissioners and members of BZAs
2. Add lots of enthusiastic AND untrained advocates
3. Mix well in any large bowl of community activities.
4. Cooks on its own.

Yields lots of ex parte and open meetings violations! Works every time.



RELATIVELY FEW PEOPLE ARE TRAINED IN PLANNING ETHICS.

First, consider that Maryland has:

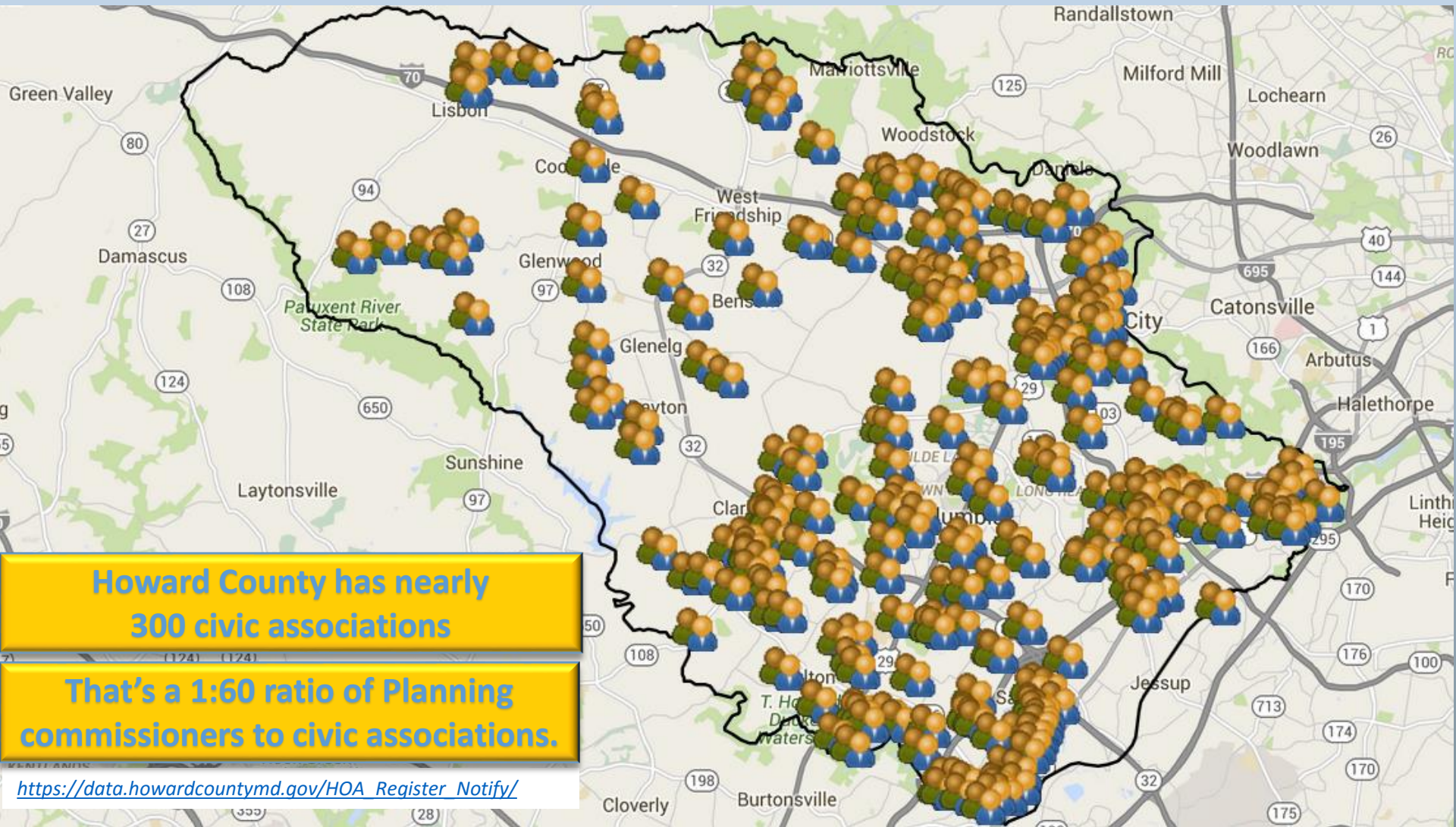
- **Fewer than two-dozen counties;**
- **Fewer than 160 incorporated cities towns and villages;**
- **The average planning commission has seven members.**
- **Statewide, about 1,400 Planning Commissioners & members of BZAs**

Maryland Counties	County Planning Boards & Commissions
Baltimore County	15
(Baltimore City)	(9)
Garrett County	9
Allegheny	7
Anne Arundel	7
Calvert County	7
Caroline County	7
Carroll County	7
Cecil County	7
Charles County	7
Frederick County	7
Kent County	7
Queen Anne's County	7
St. Mary's County	7
Somerset County	7
Washington County	7
Wicomico County	7
Worcester County	7
Dorchester County	5
Harford County	5
Howard County	5
Montgomery County MNCPPC	5
Prince George's County MNCPPC	5
Talbot County	5

<http://msa.maryland.gov/msa/mdmanual/01glance/html/county.html>



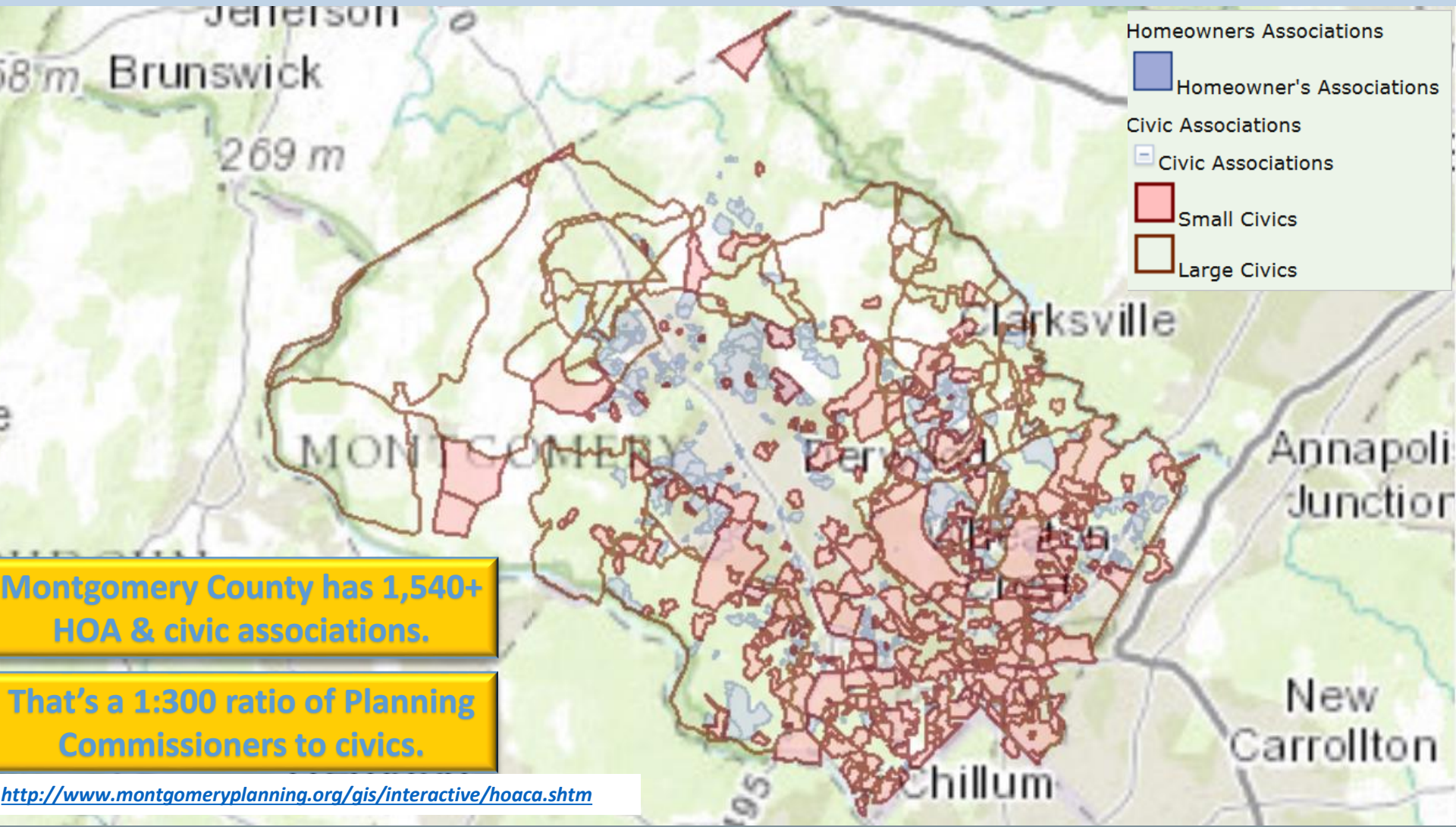
**Howard County has
5 Planning Commissioners**



Howard County has nearly 300 civic associations

That's a 1:60 ratio of Planning commissioners to civic associations.

https://data.howardcountymd.gov/HOA_Register/Notify/



Montgomery County has 1,540+ HOA & civic associations.

That's a 1:300 ratio of Planning Commissioners to civics.

<http://www.montgomeryplanning.org/gis/interactive/hoaca.shtm>

THEY ADVOCATE!

From the Prince George's Civic Federation website: "... Area homeowners were concerned about the increase in growth in the Washington suburbs. **They felt that through a strong alliance they could present a stronger voice in protecting their County from a type and rate of growth that might not be beneficial.** Since then, the Federation expanded into a county-wide umbrella organization made up of Civic organizations representing their communities and civic minded individuals. **Though land use and the environment continue to be significant, our issues have broadened to include education, public ethics, transportation and taxation.** Among our major accomplishments were: creation of the County Hospital and County Service building, a long battle for a Home Rule Charter, the right to vote on bonds and the ethics bill. We assisted the referendum for election of Council members by districts and for term limits."

Emphasis added.

<http://princegeorgescivicfederation.org/history-awards/>

THEY ADVOCATE!

From the Montgomery County Civic Federation website: “The mission of the MCCF is to preserve and improve the quality of life for all current and future residents of Montgomery County, Maryland. **Since its founding in 1925, the volunteers of the MCCF have committed themselves to providing an effective citizen voice to government policy makers, both elected and appointed....**The Civic Federation is a not-for-profit, county-wide umbrella group designed to promote cooperation, education, and effectiveness of civic and community associations in Montgomery County. It addresses a wide range of concerns in transportation, land use, environment, education, budget and finance, health and human services, public safety, and ethics. **With its strength of numbers and thoroughness of its deliberations, the Federation influences county policy and balances the activities of vested county pressure groups...**”
Emphasis added.

<http://montgomerycivic.org/aboutmccf.html>

THEY ADVOCATE!

- “The Worman’s Mill Civic Association of Frederick, MD **was created out of the need for an advocacy group** which would act as liaison between the Conservancy as well as the government....”

<http://www.wmcassn.com/>

- “The Mission of the Harwood Civic Association shall be to build community awareness and spirit in the geographical area known as Harwood (Anne Arundel County). Other purposes may include but are not limited to: a. Addressing the concerns and problems involved in matters pertaining to land and natural resource utilization in the Harwood area specifically and South County generally. **b. Advocate on behalf of the membership, the Association’s position concerning changes in zoning laws applicable to the greater Harwood area.** c. To seek cooperation and compliance with all zoning laws by all developers of real estate in the greater Harwood area. d. In general to promote the interest of the membership with respect to county and state planning, development, and use of real estate in the area so as to preserve our quality of life.”

<http://harwoodcivic.org/site/about.html>

CIVICS AREN'T THE ONLY ONES WHO GET CONFUSED ABOUT EX PARTE COMMUNICATIONS.



ACCORDING TO A 2007 ARTICLE IN THE MONTGOMERY COUNTY GAZETTE...

In 2006 “... two councilmen violated the ex parte rules by holding a meeting with a zoning attorney regarding development around Damascus. Councilman Michael J. Knapp (D-Dist. 2) of Germantown recused himself from that vote, and former councilman Steven A. Silverman — who initially planned to recuse himself entirely — voted on the final zoning decision. During committee votes, Silverman recused himself from the specific portion of the plans involving the meeting.” **The attorney in the case said “...he was unaware that county law prohibited that type of meetings.”**

Emphasis added.

http://www.gazette.net/stories/091907/montnew72621_32356.shtml

ACCORDING TO A 2007 ARTICLE IN THE MONTGOMERY COUNTY GAZETTE...



The article went on to explain that then Montgomery County Council President, Marilyn Praisner, was going to **have a refresher course on ex parte communications — or any communication, such as conversations, letters and e-mails, held outside the written record of a case.**

She also scheduled a briefing on the issue during the regular session which was televised in order to educate residents about their interactions with council members....

To prevent a negative perception, Praisner said she has abstained from writing for or against issues. “Once you start down that road, it becomes why one [issue] and not the other,” she said.

Emphasis added.

http://www.gazette.net/stories/091907/montnew72621_32356.shtml

BUILDERS AND REAL ESTATE PROFESSIONALS INVITE US TO HEAR ABOUT THEIR DEVELOPMENT PLANS.



<http://www.sandiegouniontribune.com/news/2015/aug/12/lilac-hills-valley-center-commission-tour/>

WE ATTEND MEETINGS ON MANY TOPICS.



<http://www.dnainfo.com/chicago/20140923/englewood/englewood-town-hall-meeting-discuss-healthy-eating-safety>

QUICK SUMMARY: WHY ARE PLANNING COMMISSIONERS VULNERABLE TO VIOLATIONS OF EX PARTE & OPEN MEETINGS?

- **We have lots of relationships and “connections” and ex parte communication and open meetings can take place just about anywhere humans live, work, or play.**
- **The public is often confused about our roles.**
 - **We work with them closely in a variety of off record settings during the preparation of the comprehensive plans, master plans, and crafting of subdivision and zoning ordinances.**
 - **Yet we cannot talk off the record during development review.**
- **Most advocates and civics are not trained in ex parte or open meetings rules.**
- **A small group of trained commissioners + many untrained advocates = likelihood of ex parte and open meeting violations**

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CLEAR UP THE CONFUSION!

- **Make the discussion of ex parte and open meetings an important part of the initial discussions between planning staff and applicants.**
- **Add the ex parte rule to the development application instructions.**
- **Make sure all the parties on the Planning Commission's "contact list" get the electronic a copy of your rules pertaining to ex parte and open meetings.**
- **Work with the civic associations to include a link to the planning commissions rules and procedures document, in addition to including the brief descriptions of the rules on their home page and social media.**
- **Send all the land use attorneys, engineering, architecture, and planning firms a copy of the rules for ex parte and open meetings, and ask them to make sure their clients are fully aware of it.**

BUILD YOUR COMMUNITY OF UNDERSTANDING!

Folks are more likely to understand what they help create.

- So, the next time you prepare or update rules, procedures, and ethics; **consider forming a committee** that includes a range of planning and land use entities.
- **Include reasons ethical issues are important**, especially for ex parte, open meetings, maintaining the record, and so forth. Relate these issues to concepts of **fairness and due process**.

Consider the power of stories. Work with your committee to create hypothetical examples to help people understand ethical issues.

Have the committee help **prepare a glossary** that explains planning terms **in plain language**.

USE PLAIN LANGUAGE!

DO YOU REALLY HAVE TO USE LATIN?

- **ex parte** – off the record communication between one party and a public official, intended to influence the public official without notice to other parties, etc.
- **imperium in sole** – government in the sunshine
- **custodes publicam fidem** – guardians of the public trust
- **In recordo** – on the record
- **per legem terrae** – the law of the land, also used to mean “fairness” under the law
- **aspectus impropriety** – the appearance of impropriety

KEEP EX PARTE & OPEN MEETING RULES ON THE FRONT BURNER!

Publish and publicize your Ex Parte rule.

- **Put it on the Planning Commission's website,**
- **Put in on your planning commission agendas**
- **Create a brief statement to be read at the beginning of the commission meetings – after the pledge of allegiance,**
- **Post both rules on the official planning website or social media site, blog, or feed.**
- **Encourage planning commissioners to post the ex parte rule on their personal or professional websites, social media sites, and emails.**

Here are some examples...

PUBLISH YOUR EX PARTE RULES ON YOUR PLANNING AGENDA, LIKE THE CITY OF ROCKVILLE DOES

At the bottom of EVERY Rockville Planning Commission Agenda is this statement:

“Maryland law and the Planning Commission’s Rules of Procedure regarding ex parte (extra-record) communications require all discussion, review, and consideration of the Commission’s business take place only during the Commission’s consideration of the item at a scheduled meeting. Telephone calls and meetings with Commission members in advance of the meeting are not permitted. Written communications will be directed to appropriate staff members for response and included in briefing materials for all members of the Commission.”

<http://www.rockvillemd.gov/index.aspx?NID=1622>



MY PERSONAL EMAIL FOOTER:

I currently have an ex parte statement in my email signature.

As a member of the Frederick County Planning Commission (FCPC), I must comply with the letter and spirit of the law governing ex parte communications. **Not only do I want to avoid ex parte communications, I also want to avoid even the appearance of them.**

I will share with other Planning Commissioners any messages I receive in my personal email, if I believe they may be related to projects, issues, procedures, or tools of the FCPC.

Please **help me ensure fair and impartial planning reviews and recommendations by sending such emails directly to**

PlanningCommission@FrederickCountyMD.gov instead of to me personally.

Thanks so much for your cooperation in this matter!

SHARE WHAT YOU LEARN.

Don't forget to reach out beyond your community for insights into ex parte, open meetings, and other ethical issues.

- the Maryland Planning Commissioners Association,
- The American Planning Association,
- the Maryland Department of Planning,
- Maryland Municipal League
- Maryland Association of Counties, and
- other jurisdictions in Maryland.

When something works well, let the rest of us know about it!

QUICK SUMMARY: PREVENT VIOLATIONS IN THE FIRST PLACE

- **Clear up the confusion** over the meaning and importance of ex parte and open meetings violations. Use strategies that build a community that understands our role to provide impartial and fair reviews and open meetings, so that the public helps us prevent violations in the first place.
- **Use plain language** as much as possible. Ask your attorney to come up with a plain language name for “ex parte” communication.
- **Keep ex parte on the front burner.** Publish your ex parte rule on agendas and social media.
- **Share what you learn** with the rest of us!

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SUNCREST JIM

AN ENTIRELY HYPOTHETICAL
SCENARIO ABOUT A DOGGED
CIVIC ASSOCIATION LEADER
AND
HIS PLANNING COMMISSIONERS

Written by Sharon Kemper Suarez, AICP, and based in part on an article entitled “The Cheese Counter Encounter, written by Ben Frost, AICP, Esq., and published on The Planners Web in March 2014.
<http://plannersweb.com/2014/03/cheese-counter-encounter/>

SCENE 1: AT THE CHEESE COUNTER

NARRATOR:

Commissioner Al is minding his own business, looking at the wonderful cheese display, and wondering which cheese to buy for the Art Gala tonight; when he hears a voice...



Anachondo, Rebecca (2014, July 29). Ferry Building Marketplace-San Francisco, California: Cheese Counter. Retrieved from Flickr.com: <http://bit.ly/1N6t6Y8>. Creative Commons free use license.



JIM:
"Hey, Commissioner Al, its me, Jim!"

NARRATOR:
Its Jim, President of the Suncrest HOA.

COMMISSIONER AL:
"Hey Jim! How are you?"

A man with a white beard and a blue shirt is standing in a grocery store aisle, smiling. He is surrounded by shelves of various products, including cheese and bread. The background shows more store shelves and a sign that says "Germany".

JIM:

“Boy oh boy, you are just the person I need to talk to. I am fit to be tied about the Evansdale PUD. Do you have a minute to talk about it?”

NARRATOR:

...In a flash, a nasty little wrinkle in Commissioner Al's brain unfolds and releases a reminder of an upcoming agenda item for the Evansdale PUD located north of the Suncrest HOA.

COMMISSIONER AL:

“Well, no, Jim, I can't talk to you now. Gotta get this cheese and head on home. It's my contribution to the buffet at the Art Gala tonight.”



JIM:

“But Commissioner, I just need a moment. Really. I want to let you know what my HOA members are saying about the Evansdale PUD. It will only take a few minutes...”

COMMISSIONER AL:

“No, Jim, I really can’t talk to you about it. I have to go. You take care now.”

NARRATOR:

Commissioner Al pays for the cheese and leaves the shop as quickly as he can. Jim is left scratching his head as Al hurries out the door.

SCENE 2: THE ANNUAL ART GALA THAT EVENING...



http://bmoreart.com/wp-content/uploads/2014/08/n1062763654_244216_6461-960x500.jpg

NARRATOR:

Commissioner Al takes the cheese he bought to the buffet line. He greets several friends and then sees Commissioner Mary at the buffet.

COMMISSIONER AL:

Hey there, Mary, nice seeing you here! Everything looks terrific. Have you seen all the exhibits yet?

COMMISSIONER MARY:

No, I just got here and decided to eat something first. Join me, why don't you, and then we can walk around and see things.



NARRATOR:
Mary leads the way to a table that is reserved for the commissioners.

COMMISSIONER AL:
Gee whiz, Mary, it looks like the entire planning commission is at this table.

COMMISSIONER MARY:
(laughing) Well, we are all here but one, Al. I was told that the Gala Committee thought we would appreciate being all together up near one of the buffet lines—a kind of honor I guess. They put several of the County Council together at a table near the other buffet line across the room.


Reserved for
Planning Commissioners



COMMISSIONER AL:

You know, I ran into Jim, the Suncrest HOA president, today. I was concentrating on buying some good cheese and I was in a rush, so I didn't really talk to him. He wanted to talk about the Evansdale PUD application. I told him I couldn't talk about it and that I had to get home. He was pretty persistent, though, and I didn't appreciate feeling cornered.

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Planning Commissioners



COMMISSIONER MARY: I understand. Jim has always been like that, and I've known him since high school.... Come to think of it, I ran into him last week at the grocery store. He started to talk about the Evansdale PUD with me, too. I tried explain that I couldn't talk to him about it, but he is really stubborn! I finally had to walk away and leave him standing there.

Reserved for
Planning Commissioners

COMMISSIONER AL:

Well, do you and I have to disclose anything? I mean he didn't really say anything to either of us—not anything significant.

COMMISSIONER MARY:

I don't think so. There really wasn't any discussion. Plus, I don't want to get any of the Suncrest folks in trouble. I know lots of them and they are all real sweet. One of my sisters lives in Suncrest.

Reserved for
Planning Commissioners



COMMISSIONER AL:

Oh my goodness! Don't turn around, but I see Jim at the table across the room. He is talking with one of the County Council, Ms. Peters!

COMMISSIONER AL:

I bet we can guess what he's talking about....



COMMISSIONER AL:

What are we going to do with him?

COMMISSIONER MARY:

Well, I surely don't know...He doesn't listen to me, that's for sure....

Reserved for
Planning Commissioners



COMMISSIONER AL:

Shoot! Suncrest Jim just waved at me. I bet he'll come over here...Maybe we ought to warn the other two planning commissioners.

COMMISSIONER MARY:

I agree! I think they need to be prepared.

Reserved for
Planning Commissioners





COMMISSIONER SHIRLEY:
Hey you two, I heard you.
Heck the whole room probably
heard you.

COMMISSIONER BOB:
Yeah, I heard you, too. Sounds like
Old "Suncrest Jim" is up to his old
tricks. He has always been a pesky
pain in the bee-hind. I swear he hides
in the bushes and jumps out at the
strangest times....



COMMISSIONER BOB, continues:

...Come to think of it, Suncrest Jim came out of nowhere when I left the barber shop last week. And, yes, he was fuming over the Evansdale PUD. But Jim has always had strong opinions...and so what?

(Bob pauses)

Frankly, I probably would never have mentioned seeing him outside the barber shop, because, in the end, he didn't say anything to change my mind about the application. In fact, he has never said anything that changed my mind about anything -- not one little bit!



COMMISSIONER SHIRLEY:

Well, I think he's been warned enough about talking to Planning Commissioners off the record. If he comes over here and brings up anything about Evansdale, then we should throw the book at him! The old coot!

COMMISSIONER BOB:

I hear you, but I'm not sure what we could do to him. I'll have to think about that...

Reserved for
Planning Commissioners



COMMISSIONER SHIRLEY:

There has to be something we can do to get him to follow the rules like everyone else! Just sayin'...

Reserved for
Planning Commissioners

COMMISSIONER AL:

“OK, guys, here comes Suncrest Jim...”

Oh no... Here comes Jim!

Oh no... Here comes Jim!

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Reserved for
Planning Commissioners



THE END – SORT OF...
AND
TIME FOR SOME
QUESTIONS...

Some “what next” scenarios and consequences

Scenario 1.

Suncrest Jim did come over the table in this scenario, and the planning commissioners told him to leave. They reasoned that Jim is a known advocate, and he had no business talking to them off the record. They refused to talk to him. He protested rather loudly, though, so they had to have the event’s security staff escort him out.

- 1. What are the most likely reasons Suncrest Jim continued to try to talk to the planning commissioners about the Evansdale PUD, despite the fact he had been previously warned about not talking to them about a pending application?**
- 2. What would the planning commission have to do in order to designate Jim to be a serial violator of the ex parte rule?**
- 3. Could they try to prevent him from testifying for the duration of the Evansdale PUD application review?**

Scenario 2.

Jim did come over to the planning commissioners' table, and he sat down chatted about the Gala. He had finally gotten it through his thick head that the planning commissioners were not going to discuss the Evansdale PUD application with him off the record – ever. Unfortunately, some folks who knew Jim saw the conversation take place and assumed Jim and the planning commissioners were having an off-the-record conversation about the Evansdale PUD. Afterall, its all Jim had been talking about for weeks.

- 1. If the newspaper ran a picture of the Planning Commissioners talking to Jim, what would the tag line have likely been? How can the planning commissioners assure the public they can still be open-minded and impartial?**
- 2. Since there were four planning commissioners present when Jim was talking, what other rule could reasonable people assume was violated?**
- 3. Should the planning commissioners have been sitting at the same table?**

Scenario 3.

Suncrest Jim did speak with a county commission and four of the planning commissioners at the Gala. But in this scenario, he only chatted about the Gala, not the Evansdale PUD.

Nevertheless, a newspaper photographer saw them talking. He knew Jim was upset over the Evansdale PUD. He smelled a story, and he took pictures of Jim talking to both the Planning Commissioners and the County Commissioner, and he ran both photos in the next day's edition of the paper.

- 1. What would the tag lines have likely been?**
- 2. Since only the Gala was discussed,**
 - a) What should the planning commissioners do to assure the public they can still be open-minded and impartial?**
 - b) What should the County Commissioner do?**

Ex parte violations:

(Multiple choice)

- A. Prejudice the minds of the decision-makers**
- B. Prevent full disclosure of information to all interested parties to the case.**
- C. Can invalidate a decision**
- D. Prevent a complete record**
- E. Violate the public's right to know**
- F. Prevent fair and impartial decisions.**
- G. Destroy the public confidence in planning commission decisions.**
- H. Must be disclosed and the issues discussed must be reported.**

Answers:

- 1. None of the above.**
- 2. A, B, and C**
- 3. F, G, and H**
- 4. All of the above**




Open Meeting violations occur when we:

(Multiple choice)

- A. Fail to give adequate notice**
- B. Fail to deliberate and vote in public**
- C. Fail to allow the public to speak**
- D. Fail to have a published agenda**
- E. Fail to have recorded and accessible minutes**

Answers:

- 1. None of the above.**
-  **2. A,B, D, and E**
- 3. All of the above**

RESOURCES

Barrett, Carol D., FAICP. *Everyday Ethics for Practicing Planners*. Chicago, IL: American Planning Association.

Dale, Greg, FAICP. (2014, March 13). Planners Web, “Behind the Scene’s Advocacy.” Retrieved from <http://plannersweb.com/2014/03/behind-scenes-advocacy/>.

_____. (2008, April 24). Planners Web, “Revisiting Ex Parte Contacts.” Retrieved from <http://plannersweb.com/2008/04/revisiting-ex-parte-contacts-2/>.

_____. (2002, September 20). Planners Web, “Who Shall Serve: Public Interest vs Special Interest?” Retrieved from <http://plannersweb.com/2002/09/who-shall-serve-public-interest-vs-special-interest/>.

Davidson, Michael and Fay Dolnick (Eds.) (2004). *A Planner’s Dictionary* (pp 166-7). Chicago, IL: American Planning Association.

Frost, Ben, AICP, Esq. (2014, March 10). Planners Web, “The Cheese Counter Encounter.” Retrieved from <http://plannersweb.com/2014/03/cheese-counter-encounter/>.

Shekell, Ted, AICP. (2012, October 8). Planners Web, “Talking Behind the Public’s Back – The Ex Parte Problem.” Retrieved from <http://plannersweb.com/2012/10/the-two-sides-of-one-sided-communication-the-ex-parte-problem/>.

Sanderson, Paul G., Esq. (2007, October). *New Hampshire Town and City*, “Ex Parte Communications and Land Use Boards.” Retrieved from New Hampshire Municipal Association: <https://www.nhmunicipal.org/TownAndCity/Article/261>.

Weinstein, Alan C., Esq. (2013, September 16). Planners Web, “Open Meetings Laws – Part 1: An Overview.” Retrieved from <http://plannersweb.com/2013/09/open-meeting-laws-part-1-an-overview/>.

_____. (2013, September 17). Planners Web, “Open Meeting Laws – Part 2: Avoiding Open Meetings Law Violations.” Retrieved from <http://plannersweb.com/2013/09/primer-on-open-meeting-laws-part-2-avoiding-open-meeting-law-violations/>.