Architectural Review Board
Staff Report (ID # 11824)

Report Type: Study Session **Meeting Date:** 12/3/2020

Summary Title: Ex-parte Communications: Study Session

Title: Study Session on Ex-parte Communications Between Architectural Review Board Members and Applicants, Developers and Other Persons (Continued from November 19th)

From: Jonathan Lait

Recommendation
Staff recommends the Architectural Review Board (ARB):

1. Discuss Board policies regarding ex-parte communications

Background and Discussion
The ARB Chair recently requested a study session to discuss ex parte communications and their effect on communicating ARB's feedback to applicants, developers and architects. Staff has provided legal boundaries governing ex-parte communications. However, the ARB may adopt more stringent local rules in its procedural rules or bylaws.

Ex parte is a Latin phrase that literally means "from one party". Generally, an ex-parte communication is:

- any material or substantive oral or written communication with a decision maker that is relevant to the merits of adjudicatory or quasi-judicial decision-making matters, and
- communication which takes place outside of a noticed proceeding that is open to all parties to the matter.

The ARB's current practice is that individual board members are open to meeting with applicants and neighbors before the first public hearing. In this way, ARB members can better understand the proposed project before deliberations begin. The legal requirements of due process simply require that any member who has obtained information about the project in an ex-parte manner disclose that information at the start of the public hearing. That way, the information is available to all parties and board members. Some of the City's board and commission members have adopted personal rules against ex-parte communications to simplify

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the issue; however, this is not legally required, nor is it included in the ARB's Procedural Rules or Bylaws.

After the first public hearing has begun, the ARB's Procedural Rules are more restrictive. The Procedural Rules state that Board members "will refrain from any contacts pertaining to the item, other than clarifying questions directed to City staff" following closure of the hearing and prior to a final decision. Due process concerns are especially present when a hearing is continued, and the applicant, appellant, or public will not be afforded a subsequent opportunity to speak. In such circumstances, mere disclosure of information acquired ex-parte may not be sufficient, as such information will be introduced into the record without an opportunity for the parties to respond.

A different set of issues is implicated when a Board member provides ex-parte feedback to a party but does not receive any information in return. In that situation, the excluded party may argue that unequal access to a Board member is unfair or that the Board member's ex-parte communication indicates some form of bias. Even if these sorts of objections are unfounded, the Board may wish to discourage such ex-parte communications because they have the potential to confuse the opinions of an individual Board member and those of the Board as a body.

The ARB's By-laws and Procedural Rules can be found on the City's webpage at http://bit.ly/paloaltoARB and in Attachment A and B. Minutes from the ARB's previous discussion on ex-parte communications are provided as Attachment C.

The procedural rules also require ARB members to track their ex-parte contacts and disclose their occurrence and the substance of the information conveyed. Disclosures should be made in writing or orally as early in the proceeding as possible.

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Attachments:

- Attachment A: ARB By-laws (PDF)
- Attachment B: ARB Procedural Rules (PDF)
- Attachment C: November 1, 2018 ARB Excerpt Minutes (DOCX)

[1] Emails may be sent directly to the ARB using the following address: arb@cityofpaloalto.org

RULES AND REGULATIONS AND BY-LAWS OF THE PALO ALTO ARCHITECTURAL REVIEW BOARD

ARTICLE I

NAME

Section 1.0 The name of this board shall be the PALO ALTO ARCHITECTURAL REVIEW BOARD (ARB)

ARTICLE II

Section 2.0 This board shall perform any duties imposed upon it by Ordinances of the City of Palo Alto and by applicable State and Federal law, or as requested by the City Council of the City of Palo Alto.

ARTICLE III

Officers

Section 3.0 The officers of the Board Shall consist of a Chairperson, a Vice Chairperson, and a Secretary who shall be a non-voting member.

Section 3.1 The offices of Chairperson and Vice Chairperson shall be elected from among the appointed members of the Board, and the person so elected shall serve for a term of one year or until a successor is elected. Elections shall be held at the first organizational meeting of the Board in 1973, and at the first meeting in October of each subsequent year.

Section 3.2 The Director of Planning and Community Environment of the City of Palo Alto or his/her designated representative shall be the Secretary of the Board.

Section 3.3 The duties of the offices of the ARB shall be as follows:

Section 3.31 It shall be the duty of the Chairperson to preside over all meeting of the Board, to appoint committees and to serve as an ex-officio member of the committees so appointed, to call special meetings of the Board and to designate the time and place of such meeting, to set the date and time for the public hearing held by the Board, to sign documents and correspondence in the name of the Board, and to represent the Board before the City Council, its commissions and committees, and such other groups and organizations as may be appropriate. The Chairperson may designate the Vice Chair, or in the Vice Chairperson's absence, another member of the Board to act in his/her stead.

Section 3.32 It shall be the duty of the Vice Chairperson to assist the Chairperson and to act in his/her stead during his/her absence.

Section 3.33 It shall be the duty of the Secretary to keep a record of all meeting of the Board, to accept in the name of the Board documents and correspondence addressed to it, to present such correspondence to the Board, and perform other staff functions as deemed necessary by the Board. The Secretary will determine the agenda for all public meeting of the Board, based upon an assessment of the applications made to the City requiring architectural review, and based also upon the desirability of hearing such other matters as may be deemed, by the Chairperson or by the Secretary, to be of concern to the Board.

ARTICLE IV

Committees

Section 4.0 The Chairperson shall appoint special committees as they be desired or required.

ARCTICLE V

Quorums and Voting

Section 5.0 Three members of the Board shall constitute a quorum for the purposes of conducting business.

Section 5.1 All actions taken must be by affirmative vote of majority of those Board members present, except to adjourn or continue for lack of a quorum.

A tie vote constitutes a denial of an item, except that a member of the Board may then move that the item be reconsidered or continued to another meeting. A majority of the Board may then vote to reconsider or continue the item to another meeting

ARTICLE VI

Meetings

Section 6.0 Regular meetings of the ARB shall be held not less than twice a month. The Chairperson shall establish the dates of the meetings. Meetings shall be held on Thursday at 8:30 A.M. in the Palo Alto City Hall. Regular meetings may be adjourned and reconvened upon a majority vote of the members present.

Section 6.1 Special meetings may be called at any time by the Chairperson, or at the request of three members, by a written or oral notice given to each member at least 48 hours before the time specified for the proposed meeting.

ARTICLE VII

Rules

Section 7.0 All meetings of the Board shall be conducted in accordance with a modified Robert's Rules of Order.

ARTICLE VIII

Design Awards

Section 8.0 Design Awards for outstanding built projects may be awarded every five years beginning in 2005. Award-winning projects shall be selected from those reviewed by the ARB, and completed since the last awards were made.

Section 8.1 Criteria and number of awards shall be determined by the awarding board.

Section 8.2 Winning projects may be displayed in the City Hall lobby for one month following the presentation of awards. The ARB shall request that the Mayor of the City of Palo Alto issue an appropriate proclamation.

THE FOREGOING BY-LAWS WERE ADOPTED BY A MAJORITY VOTE OF THE PALO ALTO ARCHITECTURAL REVIEW BOARD THE 28TH DAY OF JUNE, 1973.

Amended: July 3, 1974
May 19, 1977
August 4, 2005
February 5, 2015

ARCHITECTURAL REVIEW BOARD
PROCEDURAL RULES

Introduction & Contents

These Procedural Rules supplement the Bylaws of the Architectural Review Board ("Board") and are to be construed consistent with those Bylaws. In the event of any conflict between these Rules and the Bylaws, the Bylaws shall prevail.

These rules are organized in three sections:

I. Public Participation in Board Meetings

This section explains the basic rules for speaking to the Board. The Board follows a modified Roberts' Rules of Order.

II. Motions, Debate & Voting

This section explains the simplified rules of parliamentary procedure the Board follows (like Roberts' Rules of Order, but simpler!).

III. Quasi-Judicial Proceedings

This section explains the special way the Board handles hearings that raise constitutional due process concerns. These are usually hearings that seriously impact someone's life, liberty or property.

ARCHITECTURAL REVIEW BOARD PROCEDURAL RULES

I. Public Participation in Board Meetings

A. Policy. It is the policy of the Board to assure that members of the public have the opportunity to speak to any regular or special meeting agenda item before final action. In addition, an opportunity will be provided for members of the public to address the Board on items within its purview but not on the agenda at each regular or special meeting. These rules establish the rights and obligations of persons who wish to speak during Board meetings.

B. General Requirements.

1. Accessibility. Palo Alto makes every reasonable effort to accommodate the needs of the disabled. Persons with disabilities who require auxiliary aids or services in using City facilities, services or programs or who would like information on the City's compliance with the Americans with Disabilities Act (ADA) of 1990, may contact (650) 329-2364.

2. Presiding Officer's Permission Required. The presiding officer at Board meetings (usually the Chair or Vice-Chair) is responsible for preserving strict order and decorum. This is important in order to assure a fair opportunity for everyone to participate in an open and civil setting.

a) Any person desiring to address the Board must first get the permission of the presiding officer by completing a speaker card and handing the card to the Secretary.

b) The presiding officer shall recognize any person who has timely given a completed card to the Secretary.

c) Except as provided by these rules, no person shall be permitted to enter into any discussion without the permission of the presiding officer.

3. Recording and Identification. Persons wishing to address the Board shall comply with the following:

a) Use the microphone provided for the public and speak in a recordable tone, either personally or with assistance, if necessary.

b) State their name and address if presenting evidence in a hearing required by law.

c) Other speakers should state their name and address, but cannot be compelled to register their name or other information as a condition to attendance at the meeting.

4. Specific Requirements and Time Limits.

a) Oral Communications. Oral communications may be limited to three minutes per speaker and will be limited to a total of thirty minutes for all speakers combined.

1) Oral communications may be used only to address items that are within the Board's subject matter jurisdiction, but not listed on the agenda.

2) Oral communications may not be used to address matters where the receipt of new information would threaten the due process rights of any person.

3) All remarks shall be addressed to the Board as a body and not to any *individual* member.

4) Board Members shall not enter into debate or discussion with speakers during oral communications.

5) The presiding officer may request that City staff respond to the person speaking and/or the Board at a later date.

b) Other Agenda Items. Public comments or testimony on agenda items other than Oral Communications shall be limited to a maximum of three minutes per speaker unless additional time is granted by the presiding officer. The presiding officer may reduce the allowed time to speak to two minutes if necessary to accommodate a larger number of speakers.

1) Spokesperson for a Group. When any group of people wishes to address the Board on the same subject matter, the presiding officer will inform the group that a spokesperson

may be chosen by the group to address the Board. Spokespersons who are representing a group of five or more people who are identified as present at the Board meeting at the time of the spokesperson's presentation will be allowed up to fifteen minutes at the discretion of the presiding officer, provided that the non-speaking members agree not to speak individually.

2) Quasi-Judicial Hearings. In the case of a quasi-judicial hearing, applicants and/or appellants, as applicable, shall be given ten minutes each for their opening presentation and ten minutes for rebuttal before the hearing is closed. When the appeal is brought by a party other than the applicant, the appellant's opening statement should precede the applicant's opening statement and the appellant's rebuttal should follow the applicant's rebuttal. In the event a request is made and the need for additional time is clearly established, the presiding officer shall independently, or may upon advice of the Board's attorney, grant sufficient additional time to allow an adequate presentation by the applicant or appellant in a hearing required by law. A person who participates during the ten minute period allotted for appellants and/or applicants may not speak during the time allotted for public comment without first securing the permission of the presiding officer.

3) Addressing the Board after a Motion. Following the time for public input and once the matter is returned to the Board no person shall address the Board without first securing the permission of the Board, subject to approval of the Board's Attorney with respect to any hearing required by law.

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ARCHITECTURAL REVIEW BOARD PROCEDURAL RULES

II. Motions, Debate & Voting

A. Policy. It is the policy of the Board to follow simplified rules of parliamentary procedure for motions, debate and voting. These rules focus on the types of motions the Board can debate and when those motions are properly used.

1. Purpose. The purpose of these rules is to facilitate orderly and thorough discussion and debate of Board business. These rules shall not be applied or used to create strategic advantage or unjust results.

2. Summary of Rules. Palo Alto does not follow Roberts Rules of Order. See the Summary Table below.

B. Motions. A motion is a formal proposal by a Board Member asking that the Board take a specified action. A motion must receive a second before the Board can consider a matter.

1. Types of Motions. There are two kinds of motions. These are the "main" motion and any secondary motions. Only one main motion can be considered at a time.

2. Procedure.

a) Get the Floor. A Board Member must receive the permission of the presiding officer before making a motion.

b) State the Motion. A motion is made by a Board Member (the "maker") stating his or her proposal.

c) Second Required. Any other Board Member (including the presiding officer) who supports the proposal (or who simply wishes it to be considered) may "second" the motion without first being recognized. A motion to raise a question of personal privilege does not require a second.

d) Motion Restated. The presiding officer should restate the motion for the record, particularly if it is long or complex.

e) Lack of a Second. If there is no second stated immediately, the presiding officers should ask whether there is a second. If no Board Member seconds the motion the matter will not be considered.

f) Discussion. The maker shall be the first Board Member recognized to speak on the motion if it receives a second. Generally Board Members will speak only once with respect to a motion. If the presiding officer or Board permits any Board Member to speak more than once on a motion, all Board Members shall receive the same privilege.

g) Secondary Motions. Secondary motions may be made by a Board Member upon getting the floor.

h) Action. After discussion is complete the Board will vote on the motion under consideration.

3. Precedence of Motions. When a motion is before the Board, no new main motion shall be entertained. The Board recognizes the following secondary motions, which may be considered while a main motion is pending. These motions shall have precedence in the order listed below. This means that a secondary motion that is higher on the list will be considered ahead of a pending secondary motion that is lower on the list:

a) Fix the time to which to adjourn;
b) Adjourn;
c) Take a recess;
d) Raise a question of privilege;
e) Lay on the table;
f) Previous question (close debate);
g) Limit or extend limits of debate;
h) Motion to continue to a certain time;
i) Refer to committee;
j) Amend or substitute;

4. Secondary Motions Defined. The purpose of the allowed secondary motions is summarized in the following text and table.

a) Fix the time to which to adjourn. This motion sets a time for continuation of the meeting. It requires a second, is amendable and is debatable only as to the time to which the meeting is adjourned.

b) Adjourn. This motion ends the meeting or adjourns it to another time. It requires a second and is not debatable except to set the time to which the meeting is adjourned, if applicable. A motion to adjourn shall be in order at any time, except as follows: (a) when repeated without intervening business or discussion; (b) when made

as an interruption of a member while speaking; (c) when the previous question has been ordered; and (d) while a vote is being taken.

c) Take a recess. This motion interrupts the meeting temporarily. It is amendable, but is not debatable.

d) Raise a question of personal privilege. This motion allows a Board Member to address the Board on a question of personal privilege and shall be limited to cases in which the Board Member's integrity, character or motives are questioned, or when the welfare of the Board is concerned. The maker of the motion may interrupt another speaker if the presiding officer recognizes the "privilege." The motion does not require a second, is not amendable and is not debatable.

e) Lay on the table. This motion is used to interrupt business for more urgent business. A motion to lay on the table requires a second, is not amendable and is not debatable. It shall preclude all amendments or debate of the subject under consideration. If the motion prevails, and the subject is tabled, the matter must be reagendized in the future if further consideration is to be given to the matter.

f) Previous question. This motion "calls the question" by closing debate on the pending motion. A motion for previous question requires a second, is not debatable and is not amendable. It applies to all previous motions on the subject unless otherwise specified by the maker of the motion. If motion for previous question fails, debate is reopened; if motion for previous question passes, then vote on the pending motion. A motion for previous question requires a two-thirds vote of those Board Members present and voting.

g) Limit or extend debate. This motion limits or extends the time for the Board or any Board Member to debate a motion. It requires a second, is amendable and is not debatable. The motion requires a two-thirds vote of those Board Members present and voting.

h) Continue to a certain time. This motion continues a matter to another, specified time. It requires a second, is amendable and is debatable as to propriety of postponement and time set.

i) Refer to a city agency, body, committee, board, commissioner or officer. This motion sends a subject to another city agency, body,

committee, board, commissioner or officer for further study and report back to the Board, at which time subject is fully debated. It requires a second, is amendable, and is debatable only as to the propriety of referring. The substance of the subject being referred shall not be discussed at the time the motion to refer is made.

j) Amend or substitute. This motion changes or reverses the main motion. It requires a second, is amendable, and is debatable only when the motion to which it applies is debatable. A motion to amend an amendment is in order, but one to amend an amendment to an amendment is not. An amendment modifying a motion is in order but an amendment raising an independent question or one that is not germane to the main motion shall not be in order. Amendments take precedence over the main motion and the motion to postpone indefinitely.

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Motion	Description	2nd Req'd	Debatable	Amendable	2/3 Vote
Fix the time to which to adjourn	Sets a next date and time for continuation of the meeting	X	Only as to time to which the meeting is adjourned	X	
Adjourn	Sets time to adjourn. Not in order if (a) repeated without intervening business (b) made as an interruption of a member while speaking; (c) the previous question has been ordered; and (d) while a vote is being taken	X	Only to set the time to which the meeting is adjourned		
Take a recess	Purpose is to interrupt the meeting	X		X	
Raise a question of privilege					
Lay on the table	Interrupts business for more urgent business	X			
Previous question (close debate or "call the question")	Closes debate on pending motion	X			X
Limit or extend limits of debate	Purpose is to limit or extend debate	X		X	X
Motion to continue to a certain time	Continues the matter to another, specified time	X	X	X	
Refer to committee	Sends subject to another city agency, body, committee, board, Board or officer for further study and report back to the Board, at which time subject is fully debated	X	Only as to propriety of referring, not substance of referral	X	
Amend or substitute	Modifies (or reverses course of) proposed action. Cannot raise independent question. Can amend an amendment, but no further.	X	Only if underlying motion is debatable	X	

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Summary of Key Motions			
Type of Motion	**2nd Req'd**	**Debate**	**Order of Debate**
Main Motion	Yes	Yes	Mover & 2nder speak first
"Friendly" Amendment	No, but must be accepted by mover and 2nder of main motion	No	
Amendment (If friendly amendment not accepted)	Yes	Occurs with main motion BUT Chair has discretion to bifurcate issues/questions	
Substitute Motion	Yes	Yes, Debate & vote occurs before main motion	Mover & 2nder of substitute motion speak first

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ARCHITECTURAL REVIEW BOARD PROCEDURAL RULES

C. Debate and Voting.

1. Presiding officer to state motion. The presiding officer shall assure that all motions are clearly stated before allowing debate to begin. The presiding officer may restate the motion or may direct City staff to restate the motion before allowing debate to begin. The presiding officer shall restate the motion or direct City staff to restate the motion prior to voting.

2. Presiding officer may debate and vote. The presiding officer may move, second and debate from the chair, subject only to such limitations of debate as are by these rules imposed on all Board Members. The presiding officer shall not be deprived of any of the rights and privileges of a Board Member.

3. Division of question. If the question contains two or more divisible propositions, each of which is capable of standing as a complete proposition if the others are removed, the presiding officer may, and upon request of a Board Member shall, divide the same. The presiding officer's determination shall be appealable by any Board Member.

4. Withdrawal of motion. A motion may not be withdrawn by the maker without the consent of the Board Member seconding it.

5. Change of vote. Board Members may change their votes before the next item on the agenda is called.

6. Voting. On the passage of every motion, the vote shall be taken by voice and entered in full upon the record.

7. Silence constitutes affirmative vote. Board Members who are silent during a voice vote shall have their vote recorded as an affirmative vote, except when individual Board Members have stated in advance that they will not be voting.

8. Failure to vote. It is the responsibility of every Board Member to vote unless disqualified for cause accepted by the Board or by opinion of the Board’s Attorney. No Board Member can be compelled to vote.

9. Abstaining from vote. The abstainer chooses not to vote and, in effect, "consents" that a majority of the quorum of the Board Members present may act for him or her.

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10. Not participating. A Board Member who disqualifies him or herself pursuant to the Political Reform Act of 1974 because of any financial interest shall disclose the nature of the conflict and may not participate in the discussion or the vote. A Board Member may otherwise disqualify him or herself due to personal bias or the appearance of impropriety.

11. Tie votes. Tie votes may be reconsidered during the time permitted by these rules on motion by any member of the Board voting aye or nay during the original vote. Before a motion is made on the next item on the agenda, any member of the Board may make a motion to continue the matter to another date. Any continuance hereunder shall suspend the running of any time in which action of the Board is required by law. Nothing herein shall be construed to prevent any Board Member from agendizing a matter that resulted in a tie vote for a subsequent meeting.

12. Motion to reconsider. A motion to reconsider any action taken by the Board may be made only during the meeting or adjourned meeting thereof when the action was taken. A motion to reconsider requires a second, is debatable and is not amendable. The motion must be made by one of the prevailing side, but may be seconded by any Board Member. A motion to reconsider may be made at any time and shall have precedence over all other motions, or while a Board Member has the floor, providing that no vested rights are impaired. The purpose of reconsideration is to bring back the matter for review. If a motion to reconsider fails, it may not itself be reconsidered. Reconsideration may not be moved more than once on the same motion. Nothing herein shall be construed to prevent any Board Member from making a motion to rescind such action at a subsequent meeting of the Board.

13. Appeal from the decision of presiding officer. When the rules are silent, the presiding officer shall decide all questions of order, subject to appeal by a Board Member. At the presiding officer's discretion, the presiding officer may submit the question to the Board, in which case a majority vote shall prevail. Any decision or ruling of the presiding officer may be appealed by request of any member. A majority vote is required to reverse the decision of the presiding officer.

14. Getting the floor; improper references to be avoided. Every Board Member desiring to speak shall address the chair and, upon recognition by the presiding officer, every Board Member shall be confined to the question under debate, avoiding all indecorous language and personal attacks.

15. Interruptions. Except for being called to order, a Board Member once recognized, shall not be interrupted when speaking, except as otherwise provided for in these rules. A Board Member called to order while speaking shall cease speaking until the question or order is determined, and, if in order, said Board Member shall be permitted to proceed.

III. Additional Requirements for Quasi-Judicial Hearings and Planned Community Zoning Applications

A. Policy. It is the policy of the Board to assure that the due process rights of all persons are protected during City hearings. A "quasi-judicial" hearing is a hearing that requires a higher level of procedural due process because of the potential impact on life, liberty or property. Usually, quasi-judicial hearings involve a single parcel of land and apply facts and evidence in the context of existing law. Findings must be stated to explain the evidentiary basis for the Board's decision.

1. Purpose. These rules are intended to assure that Board decision-making on quasi-judicial matters is based upon facts and evidence known to all parties and to support the role of the Board in making independent recommendations to Council.

B. General Requirements.

1. Quasi-Judicial/ Planned Community Proceedings Defined. Quasi-judicial/planned community proceedings subject to these procedural rules include hearings involving the following matters:

a) Design Enhancement Exceptions
b) Subdivisions, other than final map approvals
c) Architectural Review
d) Planned Community Zoning
e) Other matters as determined by the Board's Attorney
f) Appeals related to any of the above
g) Environmental Review relating to any of the above

2. Restrictions on Board Communications Outside of Quasi-Judicial and Planned Community Zone Hearings. The Board deliberates and makes all decisions in public, however the Board recognizes there may be circumstances where one on one conversations with applicants or community members may be useful and informative. The following procedural guidelines are intended to implement the Board's policy on such

ex parte contacts, but shall not be construed to create any remedy or right of action.

3. Identification of Quasi-Judicial/Planned Community Matters. The City Attorney, in conjunction with the Planning Director, will identify agenda items involving quasi-judicial/planned community decisions on both the tentative and regular Board agendas. This identification is intended to inform the Board, interested parties, and the public that this policy will apply to the item.

4. Board Members to Track Contacts. Board Members will use their best efforts to track contacts with owners, developers, applicant representatives and members of the public pertaining to such identified quasi-judicial/planned community decision items. Contacts include conversations, meetings, site visits, mailings, or presentations during which substantial factual information about the item is gathered by or submitted to a Board Member.

5. Disclosure. When the item is presented to the Board for hearing, Board Members will disclose any contacts which have significantly influenced their preliminary views or opinions about the item. The disclosure may be oral or written, and should explain the substance of the contact so that other Board Members, interested parties, and the public will have an opportunity to become apprised of the factors influencing the Board's decision and to attempt to controvert or rebut any such factor during the hearing. Disclosure alone will not be deemed sufficient basis for a request to continue the item. A contact or the disclosure of a contact shall not be deemed grounds for disqualification of a Board Member from participation in a quasi-judicial/planned community decision unless the Board Member determines that the nature of the contact is such that it is not possible for the Board Member to reach an impartial decision on the item.

a) If a Board Member receives any written materials in connection with these types of discussions, a copy of those materials shall be made a part of the public record.

b) At the beginning of any such meeting or discussion, Board Members are strongly encouraged to review these Guidelines with the party they are meeting.

c) Board Members shall endeavor to always keep an open mind, and not rush to pre-judge any matter, until after all concerned parties

(including but not limited to applicants, members of the public and Staff) are heard during the public hearing.

d) Board Members shall refrain from coming to a conclusion on the item until the public hearing is closed.

6. No Contacts after Hearings. Following closure of the hearing, and prior to a final decision, Board Members will refrain from any contacts pertaining to the item, other than clarifying questions directed to City staff.

7. Written Findings Required. On any matter for which State law or City ordinance requires the preparation of written findings, the staff report and other materials submitted on the matter will contain findings proposed for adoption by the Board. Any motion directly or impliedly rejecting the proposed findings must include a statement of alternative or modified findings or a direction that the matter under consideration be continued for a reasonable period of time in order for staff to prepare a new set of proposed findings consistent with the evidence which has been presented and the decision which is anticipated.

8. Rules of Evidence. Board hearings need not be conducted according to formal rules of evidence. Any relevant evidence may be considered if it is the sort of evidence upon which responsible persons rely in the conduct of serious affairs. The presiding officer may exclude irrelevant or redundant testimony and may make such other rulings as may be necessary for the orderly conduct of the proceedings while ensuring basic fairness and full consideration of the issues involved. Evidentiary objections shall be deemed waived unless made in a timely fashion before the Board.

9. Burden of Proof. The applicant and appellant shall bear the burden of proof on all aspects of the action or relief they seek. The person with the burden of proof must offer evidence to the Board to support his or her position.

10. Board Members Who are Absent During Part of a Hearing. A Board Member who is absent from any portion of a hearing conducted by the Board may vote on the matter provided that he or she has watched or listened to a video or radio broadcast, or video or audio recording, of the entire portion of the hearing from which he or she was absent and if she or he has examined all of the exhibits presented during the portion of the hearing from which he or she was absent and states for the record before voting that the Board Member deems himself or herself to be as familiar with the record and with

the evidence presented at the hearing as he or she would have been had he or she personally attended the entire hearing.

10. Appeals. Appeals to the Board and requests for hearings of minor staff architectural review shall be conducted *de novo*, meaning that new evidence and arguments may be presented and considered.

C. Record Before the Board. The Records before the Board on any matter shall be deemed to include the Comprehensive Plan, the Municipal Code and any relevant plans or studies which have been formally accepted or approved by the Board or by the City Council.

ARCHITECTURAL REVIEW BOARD
EXCERPT MINUTES: November 1, 2018

City Hall/City Council Chambers
250 Hamilton Avenue
8:30 AM

Present: Chair Wynne Furth, Vice Chair Peter Baltay, Board Members Alexander Lew and Robert Gooyer.

Absent: Osma Thompson.

4. Study Session on Ex-parte Communications Between Architectural Review Board Members and Applicants/Developers and Other Persons

Chair Furth: The first one is on Ex-parte communications between the Architectural Review Board members and applicants and developers and other persons. And we have a representative of the City Attorney's Office here, and a member of the public who has asked to speak, both of which we're grateful for. Just to set the scene, a lot of people, both neighbors, and historic preservationists, and applicants, make requests of us, that we speak to them about their project or the work of the Board. We have a Board policy, and a City policy, that give us some direction, but not total direction. We thought it would be helpful to discuss this with our counsel, our City's counsel, and with each other. If you would introduce yourself and proceed.

Ms. Lee: Thank you, Madam Chair. Sandra Lee, Assistant City Attorney. Thank you for inviting me here this morning to talk about what I hope is an interesting topic. You requested a study session on ex-parte communications and quasi-judicial hearings. This is a quick overview of what I'm going to touch upon. First is a little bit of refresher for all of you about quasi-judicial hearings, fair hearing requirements that attach to such matter, and within that context, the regulation of ex-parte communication. This will be a general discussion about these areas. You may have interest in talking about specific matters, specific situations. However, that may be more suitable for off-line discussions as these situations arise, and we can talk about it after this meeting -- or you and I, not all together -- individually, or as situations arise in the future with respect to specific projects and requests. Quasi-judicial hearings as opposed to legislative matters: When the ARB takes discretionary action on a proposed project. You are applying existing policies, roles and standards to a specific person, project or circumstance. These hearings involve the taking of evidence and will result in a written decision, based on required findings. And, in contrast, legislative actions are the promulgation of these more general policies, rules and standards, and the ARB does from time to time weigh in on such matters with respect to design guidelines and the like. Things that will apply to projects more generally. With respect to quasi-judicial hearings, certain rules apply to ensure due process for the project applicant and a fair administrative hearing for all interested parties. These are the fundamental requirements of a fair hearing that are rooted, not only in the federal constitution, but the state constitution, as well as state law. A fair hearing requires notice to the applicant and to the public, an opportunity to be heard, and to hear the evidence that the Board will consider. A hearing must occur before an impartial decision-maker, one that is not biased or has not prejudged the matter. And, within the context of all of this, a fair hearing does require the disclosure of ex-parte contacts. I would just say that, I just want to touch on, with respect to the impartial decision-maker item. Public officials are presumed to be impartial, but this could be overcome with evidence of bias, and in general, members should avoid taking a position on a specific project or class of projects prior to hearing

evidence. First, I wanted to talk about what are ex-parte communications, so we are all talking about the same thing. Evidence-gathering that takes place outside the hearing. It includes oral and written information, but it can include other sensory communication, something that you perceive visually, or that you hear, and that you may ascertain from a site visit, for example. These communications are those that are substantive and relevant to the project and the decision that the ARB is making. If you have a contact with a project applicant and it's about a barbecue that someone is having, then obviously that's not considered an ex-parte communication in this context. The law generally requires that such contacts be disclosed, and any new information learned as a result of those contacts be disclosed. Why is full and complete and timely disclosure of contacts important? It's for a couple of reasons. First, such disclosure affords applicants the right to rebut evidence that may have been learned outside of the hearing context. It gives not only the applicant, but other interested parties the ability to refute, test and explain such information. And, the other reason why this disclosure of ex-parte is important is that the hearing requirement necessarily contemplates that a decision will be made in light of the evidence introduced at the hearing. So, if you have an outside contact, if you don't disclose it at the hearing, it's not part of the record before the body. The decision needs to be made on the evidence presented at the hearing. That could be evidence presented by the applicant, presented by members of the public, other interested stakeholders, but it also could be evidence that you yourself obtained outside of the hearing context that is disclosed to all of the other members of the Board, and to the public and the applicant. I did want to mention that in the land use context...So, different rules apply, different due process rules apply in different context. But in the land use context, ex-parte evidence that is disclosed before the public hearing does not violate due process, which is why we put so much emphasis on disclosure. In a 1957 case involving the city of San Mateo, that's still good law, and this is just a paraphrase of the court's decision. Plaintiff complained that the defendant, the City of San Mateo and City Council members, relied upon information acquired by the council members outside of the hearing, but there, the mayor stated at the outset that the council members had a look at the property -- they conducted a site visit -- and the statements in question made at the hearing fully revealed the investigation. There was no concealment, so those who are protesting this decision -- it was a variance, in that case -- were free to challenge any views expressed, and they frequently did so at the hearing. In that context, it was deemed to not be a due process violation, that the council members had obtained information outside of the hearing. I want to just talk a little bit about what our rules are -- the City Council and the ARB -- they are a little different. Ex-parte contact are discouraged for the City Council. The Council, as well as the PTC, have procedural rules that do discourage such contact if they will affect the impartiality of the member. The ARB does not have this rule specifically in their procedural rules. And, in fact, the procedural rules say...Well, they acknowledge that in some circumstances, it may be useful and informative for ARB members to have these contacts. I would say that even though that is the rule that the Board adopted about three years ago...It may have been before, but the last time they were updated. Individual members could, of course, choose to be more restrictive in their conduct, should they desire. You're not compelled to have ex-parte communication, and you can make your own decision with respect to that, as long as you meet this minimum of disclosure. The ARB procedural rules require that members make best efforts to track any contacts, and the substance of those contacts. That includes conversations, meetings, site visits, mailings, or presentations where substantial factual information was conveyed with respect to the project. And, it is recommended -- this is not reflected specifically in the rules, but I would recommend that members who do engage in ex-parte contact take contemporaneous notes -- who, what, when, where -- and as detailed as possible, because that information, you're going to convey on the record prior to the beginning of the ARB hearing. Disclosure may be oral or in writing. You can submit it to staff prior to the hearing, or, the latest the disclosure should be made is at the beginning of the hearing, before any testimony is taken. The ARB rules state that ex-parte contacts are prohibited after the close of the public hearing, and prior to a decision. I would just mention that even though the rules don't expressly discourage ex-parte contacts for the ARB, that sometimes they may be useful. Whatever you learn that is useful, that you've considered and have influenced your decision, should be disclosed, because the purpose of the hearing is not to come together with all or separately-gathered evidence and just share it. I mean, the primary purpose of the hearing is to have the evidence presented by the parties and the staff, and should the ARB members obtain other evidence, then disclose it. But, it is really principally the forum for which the evidence should be presented by the parties. I wanted to make mention of a potential Brown Act violation, also in the context of ex-parte contact. To the extent that the

applicant...What I've been talking about up to now is the Board getting information about a project, learning information. But an applicant potentially will want to know, what does the Board think about their project? Elicit information the other way. There are a couple things with respect to that. The potential Brown Act violation is what's called the hub-and-spoke model, where that individual is ascertaining the position of various board members, and they may go to the next board member. There are five members, so they may go to three members, and to the third member, they tell them, "I've spoken to members A and B, they are on board with this project, I just need your vote." Now, there is a potential violation right there because there is this collective concurrence being formed through an intermediary. So, it's really incumbent on the board members to prevent that type of communication from a member of the public or the applicant, because if a Brown Act violation occurs, it will be your violation. It will not be their violation. And you are in the best position to know the requirements of the Brown Act, and to make sure the views of other Board members are not shared with you on a pending project. Also, with respect to providing feedback to applicants, I would be somewhat circumspect in what information you provide, only because of the requirements to be an impartial decision-maker. You do have to keep an open mind, to not prejudge the matter before the hearing, to not commit to a specific position, because the position must be based on evidence that you obtain at the hearing, or that is presented at the hearing. And then, my last slide really is just about, this is the last part of what's required for a fair hearing in quasi-judicial, is that, you know, you need to make a fair decision that is supported by substantial evidence in the record. That includes things that you might disclose that you've learned from ex-parte communications. Any questions?

Chair Furth: Thank you very much, Counselor Lee. I'm going to suggest that we hear from the members of the public before we start asking questions and having a general discussion. The first card that I have is from Jyanhwa Myau. Good morning.

Mr. Myau: Yeah. First, I would like to thank you for Counselor Lee's presentation. It's very informative for me, personally. I was asking, after the previous hearing, I was wondering if members of the council would like to talk to the community, to answer some of the questions, you know, if we have a chance. This is not directly related to this presentation. It's just so very happens about communication. And I truly understand and am very grateful that you present us as a public, you know, for the...This is a very complicated application process. Most of us, we don't have the professional knowledge, and specifically, I would like to (inaudible) about, last time you asked about the setback of the building, and today, we can (inaudible) to see all your efforts. The whole process, we need to communicate with the public, if possible, you know, to educate them about...To ease their anxiety about the future change. And there's a trend about, to adding more mass buildings around the boundary of the cities. That's just the trend. We'll have to live with it. But, how can we include the (inaudible) parties and work together as a community? That's where I'm coming from, and hopefully you can share most of your view of experience with us. That's it. Thanks.

Chair Furth: Thank you so much. I have another card from Randy Popp.

Mr. Popp: Thank you. Randy Popp, I'm a resident of Palo Alto, and an architect practicing in town here. I will tell you that I just happened across the agenda for today's meeting and noticed that this item was present. I'm very glad that you're taking up this discussion because, having sat in your seat as chair for some time, and board member for longer, I can tell you that it's important to me that applicants be able to speak to the Board throughout the process. We spend thousands of hours developing projects. They are immensely complex, and the number of decisions that goes into the organization of a site, the design of a building, the use of building, is something that you cannot possible absorb by reviewing the material that comes in your packet. It's just too complex. And while the PTC receives a packet that has written documentation that they can read and digest and understand, there's so much more involved in the process of developing a building, that it's critical -- I believe -- that the Board be open to meeting with applicants. And I think it can be done easily within the constraints of what was described. Having done this, again, myself, it's easy to say to an applicant, "I'm here today to hear what you have to say. I'm here today to listen to any explanation that you want to provide. I'm expecting that whatever you're showing me today will be in your presentation so that we can discuss it publicly. Share with me whatever

is important for you to really explain to me in a clear way, but I will not be giving you any additional information. I'm not going to be providing feedback for you. I'm not going to make any judgments about your project. I'm just here to absorb information, and be more educated when I come to the point of having to make a decision about your project." I believe that that's really critical for the Board to be open to, and to be accepting of, and to maintain as a policy. Thank you.

Chair Furth: Thank you. Any comments from staff?

Ms. Lee: I would say that whatever information is provided to the Board, I mean, to the extent that it's maybe too much to absorb in 10 minutes, that is not necessarily a reason to allow for ex-parte meetings that might take a substantially longer amount of time with each Board member. I would say that more time is required in a public setting, so, if the information that's going to be conveyed in these ex-parte meetings is so critical to understanding the project, then that information should probably be conveyed in a public setting so that all interested parties could hear that information.

Chair Furth: Staff? That was legal staff. Anything from planning staff?

Ms. Gerhardt: I think, related to the concept of a project being complex, I mean, if it's complex for the ARB, then it's that much more complex for the neighbors. Obviously, I very much agree with our counsel. I might kick myself later, but, I mean, I think we really should have more community meetings. If a project is that complex, we should be having community meetings ahead of hearings so that it can be explained to the neighborhood. And potentially, the Board could come. We'd have to figure out if that needs to be noticed, or not. That sort of thing. But the community meetings are noticed anyway, so, we would just have to notice that the Board would be in attendance if, you know...We will talk with counsel about the details of that.

Chair Furth: Thank you. Alex.

Board Member Lew: A comment on the community meetings. I do know that a lot of times, the planners, the project planners, will meet with members of the community, and it's not always documented to the Board. Sometimes they'll mention it during the staff presentation. So, it may be good to just have, for us to try to be more methodical about including that in staff reports and what-not. Like, how many meetings, and when did they happen, and what-not. I think my other comment is, for staff, is, can we make a document for the applicants about what they, if they ask for an ex-parte meeting, that there are guidelines that they need to follow. Because it seems to me that we've done it, we've had meetings before in the past, and usually the applicants are knowledgeable about what they should and should not do. But, I think there are other applicants out there that don't know that. I mean, we just have a guideline for them about what they can expect...

Chair Furth: (inaudible)

Board Member Lew: Yeah. But I would just say, for example, there was a recent project, and the applicant asked for a meeting with two Board members, and that would have violated the Brown Act. Just having the meeting right there. And they didn't seem to understand, so they were putting the Board members in a tight spot and not even know it, not even knowing that there was a potential issue. Yeah, so, I think we just have to be careful about that.

Ms. Gerhardt: Just related to the, when staff is meeting with neighbors, there is a portion of the staff report where that information should be because we have the public outreach section. But I will make sure we are more diligent about communicating that, if that hasn't been true.

Board Member Gooyer: I have a question. One of the things I thought was a bit unusual, under the "discouraged" items, you have a site visit. I mean, I thought that's pretty basic. In fact...

Ms. Lee: Yeah, I wasn't saying that that's discouraged. I was actually saying that that is okay, and the court has upheld the ability to do that, so long as that information was disclosed prior to the hearing.

Board Member Gooyer: Okay. I ask, basically talking to a lawyer, usually, a very specific, exactly... You know, if it's written there, it's gospel.

Chair Furth: You know what? I think one of the important things is that, that's why the chairs do ask us to disclose, have you done a site visit, because that is something that the applicant should know. Sometimes it needs to be more specific, like I saw it last Wednesday when there was an explosion on site, or something. If you just keep imaging this imaginary person participating in the hearing, and...

Board Member Gooyer: (inaudible) (off microphone)

Chair Furth: Yeah. They need to know what we think we've learned that's relevant to this project. And, of course, I was having a bit of a discussion with counsel about, we bring our whole experience to these hearings, and you particularly bring your professional experience. And one of the things I notice is that you have a lot of expertise on the use of materials in this area, so you frequently tell an applicant that, "That's not going to work here." And that is based on your professional experience, and you don't need -- in my opinion, Sandy can disagree -- to disclose that, you know, you did this on such-and-such a setting. Though I notice that Alex often does say, "This material has been used on three projects in the last 10 years. If you look at the one on Park Avenue, it really is a good example of why this is a bad idea." He has quite the memory, and history. And that lets the applicant say, "Oh, but that's not, you know, that was ipe from this part of the world, and I'm using a different..." But just so that people can respond to what we think we know and correct our understanding, or argue against it. I particularly wanted to talk about neighborhood concerns. You know, based on my professional history as a lawyer, and a municipal lawyer...And I've been doing this so long. I remember when the law came in requiring us to, for the first time, make written findings of fact and conclusions of law, so that courts could review our decisions, and people would have due process. Yeah, on stone tablets. Absolutely. It was the 70's. I sort of thought, well, it's much simpler if I just don't talk to anybody because then I don't have to take all these notes or remember everything, and tell them that no, they can't pay for my cup of coffee. And I found my views evolving, particularly with regard to neighbors, particularly when it's an existing community of neighbors, whether it's the Palo Alto redwoods next to the proposed hotel, to replace the restaurant on El Camino, or the Greenhouse neighborhood with respect to this hotel. And I do believe that, ideally, we have infinite staff, with infinite time, and they are able to have a community meeting, or one or more community meetings, with these groups. But we don't have infinite staff, and we don't have infinite time, and thinking about how to do that has been on my mind. I do believe that meeting with neighbors so that you can see what the view is from their property, so that you can look at the project literally from another angle, is useful. It does require a lot of note-taking. Because I think we not only have to be fair, we have to be seen to be fair, and we have to be seen to be listening, which is why I tend to run these hearings in what some of you may view as a rather sloppy way. Which, if we've got time, I essentially re-open the hearing and let people continue to comment, because I think the value of their speaking and us hearing outweighs the other. I'm more reserved about meeting with applicants because I think they have more professional ability to present their plans to us. I do agree that I sometimes want more than a week or less to look at a project, and its site, and its history. But, I decided to engage in some fact-finding on this approach, a little empirical research, so, I did meet with Roxy Rapp and his colleague and son, and his professional consultant, Steve Emslie, because they are proposing to do something concerning a retail use on the site of the former Cheesecake Factory. And I learned about the Rapp family history with that building, and the tenants who had been there before, and we discussed the fact that we think that the Masonic Temple and Design Within Reach did a bang-up job of redoing their site. And, I refuse to comment on proposed designs because I think that undercuts what we should be doing here at the Board. I find myself trying to figure out, under what circumstances, under what conditions, is it helpful to the process, to the community and to the applicant, to meet with them, and under what circumstances is it not? And I'm interested in Alex's question, suggestion of sort of, these are the ground rules here. Because I think it could be helpful, because it's not at all good when somebody blurts out, "Well, I've talked to two of your colleagues and..." And I will say, I never agree to meeting with anybody and with

another Board member because it's just a problem. First of all, we never know what our quorum is going to be for the actual hearing, and it could be that two people already violated the Brown Act because there's only going to be three or four decision-makers. Comments from folks?

Vice Chair Baltay: I have a specific three things, but one of them is regarding site visits. I wonder if we could just be clear. A site visit, when I go out to physically look at a property that's coming before us, that's considered an ex-parte communication? Just the act of visiting the site?

Ms. Lee: Any gathering of information outside of the hearing is an ex-parte contact.

Vice Chair Baltay: So then, it needs to be disclosed very clearly at the meeting. To the best of my memory, this is the first time we've been doing that since Wynne became Chair. Is that right?

Board Member Lew: That's correct.

Vice Chair Baltay: Okay, so, your advice is that we continue to do that very clearly. At each meeting, before each item, we should all disclose that we visited the site?

Ms. Lee: Yes. And if you have visited the site, I would disclose that you visited it, when you visited the site, and any information that you may have learned on that site visit that is not in the record. So, there could be something that happens that day that is unusual, and that might influence your decision. And we don't know if it's unusual or not, and the applicants and others will not be able to kind of test that information you've ascertained without knowing about it. And you are the only person who can disclose that information.

Chair Furth: One of the things about site visit disclosure is that I actually do hear you all disclosing...Frequently, I say, "I visited the site, and I notice that the trees overhang, or that the neighbors oak tree is very close, and I'm going to be concerned about how you're protecting that tree." We actually don't get too many on-site explosions. But, it's helpful to the applicants to know what struck us. Alex.

Board Member Lew: We've been disclose...I think the issue, though, is that...I think Sandy is saying that it needs to be done first.

Chair Furth: Yes.

Board Member Lew: And we haven't been doing that. That sometimes happens later in our disclosure...

Chair Furth: Well, we have to disclose the fact that we've been there.

Board Member Lew: Been to the site, but not the actual...

Chair Furth: And I would argue that, I would suggest that people have a pretty good understanding of what you're going to see on the site, and that we don't have to detail every single...It's impossible to detail everything we saw. You saw the site. But, if there's something that concerns us, we could take advantage of that time to mention it.

Ms. Lee: Yes. I would agree. You're not going to go through a minute-by-minute recount of...But, things that struck you. Things that could influence your decision. I do think that that type of information should be disclosed before the hearing. However, perhaps it doesn't occur to you until you're in the middle of the hearing. You know, something's happened. The applicant...So long as you give an opportunity to the applicant to respond to this other information, then that should be okay. But, I still would urge you to try to disclose as much as possible, as early as possible, so that every speaker has an opportunity to kind of question that information, or provide some kind of rebuttal to it.

Chair Furth: Peter.

Vice Chair Baltay: My second thought, then, was, when is the appropriate time to disclose? Again, on our hypothetical site visit, what if I just disclosed by email to the Planning staff that I visited the site? I'm visiting the site, I could just send an email, "I'm at the site right now, I visited it." Is that a proper disclosure? Or, more specifically -- I'm sorry to interrupt you -- but, at what point in the hearings do we have to do the disclosures? Could we do them all at the very beginning? Or does it have to be project by project?

Ms. Lee: It should be project by project, at the beginning of the hearing on that project. You could send an email to staff. It probably wouldn't be, "I just visited the site on this day." Again, you know, there might be some additional information that you want to provide about what struck you, what you saw, and all that. That information will be public, however, so, they could include it as part of the staff report, if you provide that email, or it would be read out loud at the hearing, along with anyone else who wants to make an oral disclosure.

Chair Furth: And I think that the applicant is entitled to due process; the public is entitled to a fair hearing. I always think of this imaginary person out there, and that imaginary person has read the public notices, they've read the staff report, they're familiar with the city's laws and rules -- this person doesn't exist -- and what else do we need to do so that they understand, in general, the basis for our decisions? Myself, I believe that the most effective way to do that is to, as we hear the...And they are only here for their item. They're not here for the meeting in general. They come in for their item. So, at the beginning of addressing that item, we disclose what needs to be disclosed. One of the things is, we're not terribly formal about what is in the public record, and what isn't. Sometimes, we say, "Now, I'll open the public hearing." What we're really saying is, "Now I'm opening the hearing to the public." Because from the court's point of view, and the due process point of view, the minute we call the item, that's when the hearing starts. So, somewhere in that period, we need to do this. And if there is a whole lot to disclose, you can refer to a document, but there generally is not anything to disclose, except that I went and looked at it. I will say that I found...I wanted to disclose my meeting with the Rapps because that was the first I knew that there was a project over there. And so, I want you all to know what I know. I sort of want you to know it, when I know it, so that...That's part of, sort of mutual respect for each other, so that if there is information that I have, you know it. That's a block which we spend a lot of time on. That's an alley we've put a lot of energy into. I want you to know that, so if you want to think about it, you have more time to do that. I would also say as a general practice, I'd be really uncomfortable being one of five people. The more of us talk to an applicant ahead of time, the more of us meet with the community ahead of time, the less comfortable I am about that. I don't know how the rest of you feel about that.

Vice Chair Baltay: I'm trying to come back, Wynne, to the concept of speaking to somebody that's not based on a certain project. Is it ex-parte communication for her to speak to...? I don't want to be specific. If it's not related to something that's coming before the Board. In other words, there's no project on application. Is that still an ex-parte communication to speak to somebody about...

Chair Furth: Sure.

Vice Chair Baltay: ...something?

Chair Furth: I don't have to disclose it until the project gets here, but, yeah. It doesn't matter that they haven't filed an application yet.

Ms. Lee: Yeah, so, typically, it attaches once an application is filed, so to the extent that there is information...You know? "In five years, I'm going to work on this project." I would not necessarily say that you need to record that and potentially disclose it five years down the road, when it comes to the ARB. This obligation to track your contacts and all of that, that would attach after the application is filed.

Chair Furth: Wynne's sense of disclosing things that are not based on a project is more out of a sense of doing it right than it is any legal requirement?

Ms. Lee: Yes.

Chair Furth: And I would say that I wouldn't do this if I didn't know they intend to file an application in the near future. I mean, some big discussion about open space policies in Palo Alto is not the kind of thing I'm going to regale you with during Board member comments.

Vice Chair Baltay: Another question I had was regarding, I've heard comments about not having ex-parte communications between hearings. We frequently have multiple hearings on a project, so, after the first hearing, is it then not allowed to, say, go visit a site to see what's going on?

Ms. Lee: The ARB rules do not expressly prohibit that. There's no clear demarcation, other than after the hearing is closed, you may not have...and prior to a decision, you may not have ex-parte communications. An example of that would be -- and I don't know if this happens with this Board -- but, you may make a preliminary decision, but you're waiting for findings to be prepared by staff, and it will come back to you for a final decision. Before that final decision is made, no further communications with the applicant or others.

Vice Chair Baltay: When we move and second and vote to continue a project, is that a decision, or is that just a continuation of...?

Ms. Lee: No, because that's just a continuation of the public hearing. It hasn't been closed.

Vice Chair Baltay: I see. So, until we have a decision issued, ex-parte communications are okay, then.

Chair Furth: I would say, as a member of this Board, first of all, I view site visits as very different from having a chat with the architect. Because I'm not going to convey any information out during a site visit. I'm going to be absorbing information, the same way I would be doing if I was researching some building material on the internet. But I'm not at risk of either pre-judging and conveying a prejudgment, or giving somebody my opinion so that they can start shaping the project in response to what I saw. Or what I said. I've used site visits as very difficult to get in trouble with a site visit. And by "get in trouble," I mean distort the hearing process, or find myself disqualified for bias. I can't think any circumstances under which I would want to talk to the applicant between hearings. Because we have, as a Board, looked at, we have commented, we've begun to discuss, and I don't want to tell them, "Well, of these two alternatives, I prefer X," because I think that's usurping the function of the Board as a whole. That's where I come down on that. But, other people might have different opinions.

Board Member Lew: Are you recommending then that the Board adopt the Council and PTC's bylaws regarding that?

Chair Furth: Refresh my recollection.

Board Member Lew: Well, I think...

Board Member Gooyer: Well, it's already discouraged, so I think...

Board Member Lew: But I think Sandra was saying that it's not in the, it's not written in our ARB...

Ms. Lee: Yes, sorry, this was confusing. Because it was kind of interesting to me, actually, that the ARB rules are different from Council and PTC's, which are the same. And those have changed over time, as well. But today, both Council and PTC have procedural rules that discourage ex-parte communications if it will affect the impartiality of the decision-maker. But, the ARB does not include that "discourage" language. It just, you know...It's really silent as to that.

Board Member Lew: I think my...I think there's a specific example that happened this year, where the applicant who really...He'd been pushing for meetings between hearings, and really was pushing the City Attorney's Office to show them where it was written in the ARB's rules. Right? If we think that the PTC and the Council's rules are better, then I think we should put them in the ARB's language. Because they are challenge...I mean, there are applicants who are challenging that.

Chair Furth: Does the PTC or the City Council have a rule forbidding ex-parte with the applicants or members of the public while a matter is being, a quasi-judicial matter is being continued?

Ms. Lee: No...

Board Member Lew: I think you're saying it's discouraged.

Chair Furth: Discouraged.

Ms. Lee: It's discouraged, in general. But I also think...You know, the ARB's process is interesting because you do contemplate having these three hearings, whereas that's not necessarily true before these other bodies. That's why there's no specific provision about between hearings. The only provision, which is the same as the ARB's, is about the prohibition between the close of the public hearing, and the decision.

Chair Furth: And I think we all understand that that's because the public hearing is closed. We are not supposed to be gathering more information. Except maybe reading the code, which would be okay.

Vice Chair Baltay: But I find I, I feel I have to visit the site, often several times on a complex project. It's only by going back there and looking at it again, often with the words of my colleagues ringing in my ears, that I can do this job properly. And yet, if that's ex-parte, is it or is it not?

Chair Furth: I really think we should, analytically, we should separate site visits from talking to the applicant...

[crosstalk]

Board Member Gooyer: I agree. I think one is a...

Chair Furth: ...very different concept, and nobody is going...

Board Member Gooyer: ...definite requirement, and the other one probably is not necessary.

Chair Furth: I think they are very different. Counsel?

Ms. Lee: Even though we might generally say they're ex-parte contacts, they are very different in degree, as other Board members have commented. I do think that a site visit is in its own class of outside information than communications with individuals.

Board Member Gooyer: What do you think of...Wynne? I mean, as far as...I've been on other boards where it was basically left for the chair to make that determination while his or her term...

Chair Furth: Make which determination, Robert?

Board Member Gooyer: Because, I mean, you know, every chair has a different way of looking at things. I don’t like the idea of making something too black and white where, in case you need an out, occasionally.

Chair Furth: Yeah, I'm less convinced that...Thank you for attending. I don't know what the chair's role might be. Just thinking tentatively, not conclusively. I would be in favor of having a policy of discouraging communications between hearings. I really do not want an applicant to shop alternative proposals or responses to the Board after they've heard from us. I think that's very much the Board's function, or staff's function, and I think we have worked hard to be clear on our direction, and to try to get, you know, straw votes, or consensus, so that people understand what our opinions are before...So they don't need to go say, "Well, what do you think of this shade of blue?" I'm not going to tell you, and I don't even want to hear the question. So, I would be in favor of modifying our rules in that regard. I'd like to hear more from staff about the use of community meetings and whether it's useful to have an ARB representative with you at such meetings. I think that Board members can say things that staff can't. I really like Alex's idea of some proposed, you know, explanation to the public and the applicant about how we can and cannot - or do and do not -- wish to gather information. I think it would be helpful. The thing that I'm clearest about is that I have felt that I was advancing the City's efforts when I've met with neighbors or community activists, or whatever, to hear their concerns before an application is filed. Those are lay people. They don't have professional advocates working for them. Though they're often highly sophisticated and very organized. It's pretty easy for me to keep track of what they've said, and when, and they are almost always telling me what they think, and never asking me what I think. All that makes it easier. I have -- twice -- met with applicants. No, three times. And once, the argument was, they really wanted to show me their drawings and plans. I am the slowest study on the Board in terms of looking at drawings and plans because that's not my profession. I can beat you anytime on an ordinance. And on balance, I don't think it's worth it. Staff is willing to go over questions with me, and I think that would be the better approach. I did meet with the Palo Alto Housing Corporation. It was helpful to hear their project description. I suggested that they give us that information when we were here. I disclosed that information in summary form before the hearing. Interestingly, they didn't make that part of their case when they came, and so I asked them to expand on it when they were here. The drive not to be discourteous is significant and refusing to meet with somebody is awkward. I would be happier if we had a policy that said that we strongly discourage meeting with applicants and the neighbors between hearings, and we directed those inquiries and communications to staff. I don't know how the rest of you feel.

Ms. Gerhardt: Just from a staff perspective, I think you'd asked some questions of staff. I think we have heard communications from various applicants, that they walked away from a first or second hearing and didn't quite know what needed to be done. And I think we've tried to be thoughtful about that in the recent past, about -- as Chair Furth said -- you know, taking some straw polls, doing a better summary at the end of our hearings. I think that can help a lot of this type of issue. If we want to do a handout related to ex-parte communications, I think that's a great idea, and we can certainly work on that. The other thing, too, I know from board members, there seems to be some struggles with the plan sets and things like that. Staff has tried to work on that as best as possible, but some early communication from the board members to staff might be helpful in that regard. If you're looking through the plans and you're not seeing something you want, then maybe an early email to us could help us. We'd have to scramble, but we could try and get something together related to that. Or, we could just be ready for that question with a possible answer. Related to community meetings, I think it's a much bigger topic than all of us, just about how this city would like to move forward with that potential idea. I think right now, we have applicants that do their own community meetings. Most of the time, they will invite staff, and if we hear something incorrect being said, we will certainly voice that and try and correct that issue immediately. But it really is a developer's community meeting at this moment. So, you know, the whole city should think about how they may want to move forward with that or change that. And then, regarding updating the ARB's rules, we're certainly available to do that, and if we want to put some line items in there that, you know, just says that meetings are discouraged after the first hearing, and that somehow, you know, doesn't exactly pertain to site visits, we could certainly do that.

Chair Furth: Thank you. Comments? Don't all speak at once.

Board Member Lew: Well, I would say that I think I agree with your position on discouraging ex-parte meetings between hearings, and I think we definitely acknowledge that a past board member, when

Chair Popp was here. I mean, he...He was arguing for the opposite (inaudible), and I think there are other board members in the past who would also agree with him. About board members being available for meetings between hearings. But I think to your point, I think it's better not to do it.

Vice Chair Baltay: I find that...I think the status quo is actually working pretty well. I think the feedback you've given us and the general understanding amongst the Board is pretty close to, it sounds like what the rules are. I don't see that we really need to change our rules or anything. Unless we want to put more time into it. But I think there are more pressing things we could work on changing our rules on. I'm satisfied with what we have. I'm happy to see it change, but I'm satisfied with what we have right now, too.

Chair Furth: It looks like two of us would be in favor of modifying our rules to discourage ex-parte meetings between hearings, meaning contacts with the applicant and the public. In my case, particularly the applicant. "Discourage" doesn't mean prohibited. And two of you are happy with it as it stands, so we will wait for Board Member Thompson. Anything else we want to say about this topic while we're here and have the chance? Oh, how do people...? I would be in favor of having a...cheat sheet is the wrong word. Tip sheet. A document that applicants and members of the public could read about what we can and cannot do in meetings with them, so they don't start off by telling me what two of my fellow board members believe before I can stop them.

Commissioner Gooyer: What we can and cannot do, or what we, what our purview is?

Chair Furth: Well, I think it would be helpful if there was a document that said, you know, when you have a matter before the Board, you know, if a Board member agrees to meet with you, you need to be sure you do not inadvertently violate the Brown Act. Tell them...I don't know if it's possible, but if it has been done...I'd be willing to put some energy into thinking about this. I mean, one of the problems is it may encourage more people to ask for more meetings, which I think would be undesirable. Comments?

Vice Chair Baltay: I think it's great as long as somebody else does it.

Chair Furth: Got it. Maybe we just need to make those standard speeches. Why don't we think about that? Yes, go ahead, staff.

Ms. Lee: I was just going to say that, as well. We can certainly put some thought into that, and what the appropriate forum would be.

Chair Furth: What might be useful.

Ms. Lee: Mm-hmm.

Chair Furth: Yeah.

Ms. Lee: Let us think about that a bit.

Chair Furth: I will say that having had this meeting, I find myself thinking, you know, if somebody asks me for a meeting, I am probably going to say, "Are you planning to talk to other members of the Board as well?" And if they say, "Yes, I'm going to talk to everybody," I'm going to say, "You're not talking to me."

Vice Chair Baltay: You know, when I started these meetings with this Board and others, I used to feel strongly that when somebody asked me, I would refer them back to the Chair, and the Chair would then direct how or if the Board would have ex parte communications. I've since come to think that maybe that's just overkill, and just sort of too much maneuvering and bureaucracy.

Chair Furth: I don't even think I can do it without breaking rules. I can't instruct the Board members whether or not to meet with a member of the public without violating other procedural (inaudible). How's that for vague?

Vice Chair Baltay: I guess I'm just a legal layperson. I don't understand why that would be a bad thing. But, I mean, clearly, it's not something that counsel or staff wants us to do, and...

Chair Furth: Because basically...

Vice Chair Baltay: ...I don't really care.

Chair Furth: Basically, the only authority I have I exercise at the meeting. When I'm not here, I have no importance. I have no authority except to chair the meetings. I'm entitled to put something on the agenda I forget. Anything else anybody wants to say about this today? Okay. Well, thank you very much for coming to talk to us. Staff, if you put this on as a follow-up meeting next time we have all five of us, follow-up item, that would be helpful. Thanks very much.

Ms. Lee: Okay. Thank you.

Chair Furth: I learned a lot.