

Important! FYI

Roland Bartl

From: Stephen D. Anderson [SAnderson@AndersonKreiger.com]
Sent: Wednesday, October 08, 2008 8:23 PM
To: Roland Bartl
Cc: Steve Ledoux
Subject: Acton/Planning Board - Quasi-Judicial Proceedings

:Roland:

You have asked for a reminder on what it means for Planning Board members to sit in a "quasi-judicial" capacity with respect to proceedings pending before the Board.

A municipal board acts in a "quasi-judicial capacity" when it sits in judgment on an application for discretionary zoning relief or similar relief. *McElderry v. Planning Bd. of Nantucket*, 431 Mass. 722, 726 (2000) ("a permit granting authority's action on applications for zoning relief, and a planning board's action on a definitive subdivision control plan, require hearings to determine the rights of applicants with respect to the use of land, and both proceedings are judicial, or quasi-judicial in nature."); see also, *Mullin v. Planning Board of Brewster*, 17 Mass. App. Ct. 139, 143 (1983); *Sesnovich v. Board of Appeal of Boston*, 313 Mass. 393, 396 (1943); *Coleman v. Board of Appeal of Building Department of Boston*, 281 Mass. 112 (1932). The same principle applies to a Planning Board hearing a special permit petition.

Principles of due process must be observed by the board acting in their quasi-judicial function. Mass. Zoning Manual, Supp. 2002, p. 10-31, citing, *Vitale v. Planning Board of Newburyport*, 10 Mass. App. Ct. 483, 487 (1980). This requires that applicants and other interested parties have access to the facts and evidence that Board considers in making a quasi-judicial determination. *Moran v. School Com. of Littleton*, 317 Mass. 591, 594 (1945) ("a decision made in a quasi-judicial proceeding by an administrative board based on evidence known only to the members of the board is a nullity"). The collection of evidence should occur during the course of the public hearing, where open meeting and public records laws can be observed. See, *Caruso v. Pastan*, 1 Mass. App. Ct. 28, 31 (1973) (zoning board should not have consulted privately with planning board outside of public hearing on special permit application)

Conservatively, Board members acting in a quasi-judicial capacity would be well-advised to follow the Code of Judicial Conduct applicable to judges in the Commonwealth. In particular, judges are strictly prohibited from initiating, permitting, or considering any communications with any other parties concerning a pending proceeding. Rule 3:09 of the Supreme Judicial Court Rules (Code of Judicial Conduct), Canon 3. These so-called "ex parte" communications are only permitted when they concern non-substantive matters, such as scheduling or other administrative tasks. Judges are also prohibited from commenting publicly on any pending proceeding in any pending court. **As applied to quasi-judicial Planning Board proceedings, this rule should be interpreted as precluding board members from speaking publicly, outside of the context of the public hearing, on the merits of any matter pending before the zoning board.** Compare *In re Troy*, 364 Mass. 15, 67 (1973).

Please call me if you have any questions.

Steve

Stephen D. Anderson
ANDERSON & KREIGER LLP
One Canal Park, Suite 200
Cambridge MA 02141
Direct Dial: 617-621-6510

Direct Fax: 617-621-6610

Wireless: 617-510-1159

Main number: 617-621-6500

Main Fax: 617-621-6501

e-mail: sanderson@andersonkreiger.com

web site: www.andersonkreiger.com

This electronic message contains information from the law firm of Anderson & Kreiger LLP which may be privileged. The information is intended to be for the use of the addressee only. If you are not the addressee, note that any disclosure, copying, distribution or use of the contents of this message is prohibited.