REPORT OF THE
ADMINISTRATIVE LAW ADVISORY COMMITTEE ON

# THE EX PARTE COMMUNICATIONS SUBCOMMITTEE

TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA


# SENATE DOCUMENT NO. 14

COMMONWEALTH OF VIRGINIA
RICHMOND
1997

# REPORT OF THE EX PARTE COMMUNICATIONS SUBCOMMITTEE OF THE ADMINISTRATIVE LAW ADVISORY COMMITTEE, 1996

Philip F. Abraham, Chairman

## Executive Summary

The federal Administrative Procedure Act §551(14) defines "ex parte communication" as "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." The definition makes an exception for requests to know the status of a proceeding. In Virginia, an ex parte communication has been defined as "one in which an advocate for but one of two or more parties presents his views upon the controversy to the decision maker."[1]

The purpose of restrictions on ex parte communications in administrative hearings and appeals are:
1. preserving the integrity of the process through preventing impropriety (by using "secret" off-the-record information) or the appearance of impropriety in decision making; and
2. ensuring all parties have a fair opportunity to address the issues and comments made by their adversaries.

An additional consideration sometimes offered for prohibiting ex parte communications is that judicial review cannot be properly performed if the decision is based on "off the record" considerations.

Since 1994, legislation has been introduced in each session of the General Assembly to prohibit or limit ex parte communications. The Administrative Law Advisory Committee, after studying the issues involved, recommended to the 1996 General Assembly that independent and executive agencies be required to develop, adopt, and implement policies regarding ex parte communications made or attempted to be made to decision makers during administrative hearings and appeals. This approach recognizes the variety in function and format of agencies' administrative processes by allowing each agency to tailor its policies to its unique needs. This approach also ensures public participation in the development of ex parte policies by requiring that the policies be promulgated as regulations subject to notice and comment.

The subcommittee reviewed Senate Bill 479 in light of issues arising during the 1996 General Assembly Session and held a hearing to receive public comment. After consideration of the issues and comment, the subcommittee developed draft legislation which is included as Appendix A of this report.

## 1995 Study

[1] Ex Parte Contact Means Presentation of Data or Arguments on Merits of Case, Op. Att'y Gen. 4-5 (1982-83)

At present, neither statute nor case decision prohibits ex parte communications in administrative processes conducted under Virginia's Administrative Process Act (§9-6.14:1 et seq.)("VAPA"). During the 1994 and 1995 sessions of the General Assembly, legislation was introduced which would prohibit ex parte communications during administrative agency rule-making and adjudicatory proceedings. Neither bill was approved by the General Assembly.

The Administrative Law Advisory Committee proposed to the Virginia Code Commission that it be authorized to study the issue and develop a recommendation for the 1996 General Assembly Session. The Code Commission approved the request and a subcommittee of the Administrative Law Advisory Committee was appointed.

The study subcommittee found that few Virginia agencies had written policies to govern ex parte communications during agency hearings and appeals. The federal Administrative Procedure Act, §554(c), the 1981 Model State Administrative Procedure Act, §4-213, and three of the five Fourth Circuit states' Administrative Procedure Acts all prohibit ex parte communications in agency adjudicatory settings. The study subcommittee concluded that agencies may not have given enough thought to the issue and may be vulnerable to the appearance of bias in their adjudicatory proceedings as a result. However, the study subcommittee also found that Virginia agencies vary greatly in the function and format of their administrative proceedings, and that a "one-size-fits-all" approach to ex parte communications may be unnecessarily prescriptive, may hamper informal efforts at conflict resolution and may disrupt the beneficial flow of information during the early administrative process of developing and issuing case decisions. Accordingly, the study subcommittee issued the following recommendations in 1995:

1. Legislation should be adopted that requires all state executive and independent agencies that conduct case decisions as defined by the VAPA to adopt a policy regarding ex parte communications in case decisions. This statute should not be adopted as part of the VAPA and, except as provided below, should apply to all such agencies, whether or not exempted from the VAPA. The Offices of the Governor, the Lieutenant Governor, the Attorney General, the General Assembly, and the Courts of the Commonwealth should be exempt from this statute.

2. Such legislation should require policies to be adopted as regulations developed in compliance with the VAPA. Agencies not subject to the rule making provisions of the VAPA should follow any applicable provisions for adopting regulations, including, but not limited to the Virginia Register Act.

3. If such legislation is enacted, the Administrative Law Advisory Committee should monitor and evaluate these policies during their development. If after considering these new policies, the Committee determined further legislative action is required, it should make recommendations regarding the adoption of specific statutory requirements prohibiting ex parte communications during trial-like formal adjudicatory proceedings.

**Senate Bill 479**

The Administrative Law Advisory Committee also proposed draft legislation which was introduced during the 1996 Session of the General Assembly as Senate Bill 479. This bill was carried over in the Senate Committee on General Laws until the 1997 session. The Administrative Law Advisory Committee, upon the request of the chairman of the Senate Committee on General Laws and with the approval of the Code Commission, continued its study of ex parte communications to consider concerns arising during the 1996 session of the General Assembly. A copy of Senate Bill 479 in included as Appendix B.

**1996 Subcommittee Deliberations**

Members of the subcommittee met five times during 1996 to review Senate Bill 479, discuss concerns raised during its consideration by the General Assembly, reconsider whether any such legislation was necessary and, if so, to recommend necessary changes in SB 479 for consideration by the 1997 General Assembly. The subcommittee scheduled a public hearing and issued a call for public comment in the Virginia Register of Regulations and in a direct mailing to approximately 1,000 individuals included in the Administrative Law Advisory Committee's mailing list. The mailing list contains representatives of state agencies, professional and trade associations, hearing officers, public interest associations, attorneys and others interested in administrative law. The notice requested that individuals comment on a list of the most salient topics related to the bill. A copy of the Notice of Public Hearing is included as Appendix C.

**Public Comment**

More than 30 people, the majority being state agency employees, attended a public hearing held July 30, 1996. However, only three of those in attendance addressed the subcommittee. The subcommittee also received written comments from nine individuals. A summary of the public hearing and copies of the written comments received are included as Appendix D. The public comment can be categorized in several broad topics as follow:

Ex Parte Communications Should be Prohibited to Ensure the Integrity of the Decision-Making Process: Four commenters stated that a limitation on ex parte communications should be implemented to ensure openness in government and to prevent the appearance of impropriety. Of these, three cited their experiences in which perceived ex parte communications influenced agency administrative proceedings. One commenter noted that ex parte communications are, by definition, off the record and thus are difficult to document.

Ex Parte Communications Have Not Been Shown to Be a Problem, Therefore Legislation is Unnecessary: Four commenters indicated that no conclusive evidence has shown that

ex parte communications are a problem in administrative hearings and appeals; therefore the legislation is unnecessary.

Potential for Increasing the Formality of Agency Decision-Making: Two commenters expressed concern that prohibiting ex parte communications in informal settings may have a chilling effect on communications and discourage informal settlement.

The Definition of "Case Decision" Includes Matters that Should Not be Subject to a Prohibition on Ex Parte Contacts: Some commenters felt that the use of the term "case decision" and its definition in the proposed legislation was overly broad and may unnecessarily apply ex parte communications prohibitions to certain agency functions. For example, informal communications may facilitate dispute resolution in actions where the only parties are a permit or license applicant and the agency.

Ex Parte Policies Should Not Put the Public at a Disadvantage in Obtaining Information: One commentator felt that the definition of "ex parte communication" would restrict the ability of interested individuals who are not direct parties to obtain information about contemplated agency action. Because the definition requires only notice to "parties", the commenter felt that the agency and the applicant would be free to engage in off the record communications to the detriment of the overall public interest.

Prohibitions on Ex Parte Communications Should Apply Only to Adversarial Hearings: Five commenters indicated that a prohibition on ex parte communications should apply only when the agency is acting in a judicial capacity in an adversarial situation.

Prohibitions on Ex Parte Communications Should Apply Only to Formal Hearings: Three commenters stated that prohibitions on ex parte communications should apply only for formal hearings conducted under §9-6.14:12 of the Administrative Process Act. These commenters noted that these formal hearings most closely resemble court proceedings to which ex parte prohibitions have traditionally applied. However, some subcommittee members expressed concern that several agencies, including the Department of Environmental Quality and the Department of Professional and Occupational Regulation, offer only informal hearings pursuant to §9-6.14:11 of the VAPA and thus the agencies' records should reflect any communications related to any proceedings.

Communications with an Agency Decision Maker Should be Included in the Agency's Record: Three commenters stated that if ex parte communications are made to the decision-maker, then the substance of the communication should be documented in the agency's record and made public in a timely manner. To mitigate the effects of ex parte communications, one of these commenters suggested that written communications and summaries of oral communications should be placed in the agency record along with copies of written responses and summaries of oral responses from the agency.

Another commenter suggested that agency staff place a memo in the agency's record any time agency staff discuss the merits of a case, even when the applicant and the

agency are the only parties. In such cases, he said, the communications would not be considered ex parte because there are no other parties involved. He added that interested persons should also be able to contact the agency to discuss the case and that the substance of their comments should be noted in the case record. The recordation of these comments was suggested to help the agency in documenting its reasons for the final decision and to assist the court in the event of judicial review.

The Definition of "Ex-Parte Communication" Should be Amended: One commenter stated that the phrase "which could be reasonably expected to influence the outcome of the case" is vague and could require a reviewing court to examine the mental processes of the decision-maker--a process that is usually prohibited in administrative law.[2] Instead, the commenter suggested that the phrase be amended to "matters that concern the merits of the case..." The commenter also suggested that the definition exclude requests for status reports on a pending matter.

Ex Parte Communication Policies Should Not be Promulgated as Regulations: All five state agencies submitting comments suggested that agencies be permitted to adopt policies regarding ex parte communications without following the process required by Article 2 of the VAPA. The agencies cited the amount of time and staff resources required to promulgate regulations pursuant to the Administrative Process Act and suggested that the policies either be exempt from the Act or that agencies be permitted to adopt them as guidelines rather than regulations. During subsequent deliberations, the subcommittee rejected these suggestions. Although the subcommittee recognized that the regulatory process required by the VAPA and Executive Order Thirteen (94) may be cumbersome and time consuming, the subcommittee strongly feels that the development of ex parte policies should be subject to notice and comment.

Legislation Should Preserve Agency Flexibility: Five commenters supported the approach proposed by Senate Bill 479 of allowing agencies to develop policies based upon their own needs and administrative procedures. One commenter stated that a prohibition against ex parte communications in adversarial adjudication should be adopted as legislation applicable to all agencies.

Ban on Ex Parte Communications Should Apply to the Decision-Maker: Four commenters suggested that any legislation to require policies regarding ex parte communications should place the burden of avoiding such communications on the decision-makers because: 1)the decision maker is most likely to be aware that such communications are improper and 2) the decision-maker is the appropriate person to place any such communications on the record.

Application of Ex Parte Policies to Agency Staff and to Interested Parties: One commenter noted that "the history of administrative law is replete with examples of elected officials and other interested parties trying (and sometimes succeeding) to

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[2] See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 416, 420 (1971) and United States v. Morgan, 313 U.S. 409,422 (1939).

influence administrative decisions off the record. The rules should apply to them to the same extent as anyone else."

Comments were mixed on the issue of party communications with staff and staff communications with the decision-maker. Several commenters suggested parties to a case decision should be able to communicate with staff and to curtail these types of communications may hamper informal negotiations. Another commenter suggested that staff who are involved in the decision-making process should be identified by the applicable agency and included in the prohibition against receiving communications from the parties involved.

**Subcommittee Conclusions**

By a vote of 7-2-1, the members of the subcommittee concluded that, based on the testimony and comments received, legislation regarding ex parte communications in Virginia's administrative proceedings should be adopted. The subcommittee unanimously supported the approach proposed in Senate Bill 479 of allowing agencies flexibility in developing ex parte policies. The subcommittee was evenly split, by a vote of 4-4-2, on a motion that the legislation should be amended to limit the policies to "adversarial proceedings", i.e. cases where there are two or more parties as defined under the APA or the agency's basic law. The subcommittee's recommendations which follow have been included in draft legislation which is included as Appendix A to this report.

**Recommendations**

1. Legislation should be adopted to address ex parte communications in administrative hearings and appeals.

2. The legislation should allow agencies flexibility in developing regulations to address ex parte communications.

3. The legislation should continue to apply to agency permitting processes.

4. The legislation should continue to apply to all agency informal fact-finding proceedings described in §9-6.14:11 of the VAPA and to formal litigated issues as described in §9-6.14:12 of the VAPA.

5. The policies should only apply to ex parte communications with the agency's decision-makers--the agency's director, governing board, and hearing officers, and any other person within the agency who has been designated to make case decisions, and the policies should include a method for identifying the decision-makers and parties involved with the case decision.

6. The legislation should continue to require that policies be adopted pursuant to Article 2 of the VAPA for those agencies subject to the Act. Agencies not subject to the

VAPA should develop ex parte communications policies through that agency's process for adopting regulations.

7. The legislation should include recommended components for agencies to consider in developing ex parte communications regulations.

8. The legislation should state that the policies may include requirements for including in the agency's record for a case decision any communications with the agency's decision-maker related to the merits of the case.

**Recommendations to Agencies In the Adoption of Policies on Ex Parte Communications**

In studying the issues involved, several members expressed concern that if legislation is adopted, agencies may perceive that the easiest course is simply to prohibit all ex parte communications. This is not the Administrative Law Advisory Committee's intent in recommending that ex parte communications policies be adopted.

The definition of case decision contained in the APA does not differentiate between the process of making a decision with respect to the grant or denial of a license, permit or benefit, and hearings and appeals of that initial decision. In some situations, ex parte communications are not likely to pose a great problem because only the applicant and the agency are likely to have an interest in the case.

In other cases, where two or more persons have opposing positions in a case pending before an agency, the issues involved are much more complex. In these more controversial situations, case decisions are more likely to be subject to public scrutiny and judicial review. In these cases, clearly communicating agency policies regarding ex parte communications is important both as a matter of fairness to those impacted by and interested in the outcome of the case as well as to preserving public confidence in the integrity of the decision-making process.

Toward this end, the subcommittee recommends that agency policies on ex parte communications be adopted to achieve the following purposes:

1. To give all parties, interested persons and members of the public a clear understanding of what type of off-the-record communications are permitted by the agency when it decides cases, grants licenses or issues permits.

2. To establish at what point in the case decision process such communications will be restricted or prohibited.

3. To clearly establish whether restrictions on ex parte communications apply to agency staff, and if so, which agency staff.

4. To ensure that the record of the agency proceeding accurately reflects the factors upon which the decision is based.

## MEMBERSHIP OF THE EX PARTE COMMUNICATIONS SUBCOMMITTEE

Philip F. Abraham, Chairman*
Hazel & Thomas

Mark C. Christie
Office of the Governor

Kevin J. Finto
Hunton & Williams

Harry E. Gregori, Jr.*
Department of Environmental Quality

Roy A. Hoagland*
Chesapeake Bay Foundation

Jon L. Woltmann
Union Camp Corporation

Brian L. Buniva*
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Virginia Municipal League

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Virginia Citizens Consumer Council

C. Flippo Hicks*
Virginia Association of Counties

John W. MacIlroy*
Virginia Manufacturer's Association, Inc.

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Appendix A

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SENATE BILL NO. 479

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on/for General Laws on _____)

(Patron Prior to Substitute--Senator Gartlan)

A BILL to amend the Code of Virginia by adding a section numbered 2.1-7.3, relating to the administration of state government; policies or rules of practice regarding ex parte communications.

**Be it enacted by the General Assembly of Virginia:**

**1. That the Code of Virginia is amended by adding a section numbered 2.1-7.3 as follows:**

§ 2.1-7.3. Policies or rules of practice regarding ex parte communications.

A. For purposes of this section:

"Agency" means any administrative or independent unit of state government, including a department, institution, commission, board, council, authority, or other such body, however designated.

"Case" or "case decision" means any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is or is not, or may or may not be, (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit.

"Decision maker" means the agency head, a member of the agency's board, a hearing officer, or any other person who is authorized by law and designated by the agency to issue the case decision.

"Ex parte communication" means an oral or written communication with a decision maker not in the agency's record regarding any matters which could reasonably be expected to influence the outcome of the case or case decision pending before the agency and for which reasonable notice to all parties is not given at the time of the communication.

B. Any agency that (i) is subject to the Virginia Administrative Process Act (§ 9-6.14:1 et seq.) or the Virginia Register Act (§ 9-6.15 et seq.) and (ii) hears cases or issues case decisions, shall develop, adopt, and implement policies or rules of practice regarding ex parte communications made or attempted to be made in the course of hearing such cases or issuing such case decisions.

C. Such policies or rules of practice for ex parte communications (i) shall apply only to communications with the agency's decision makers regarding the case they will decide; (ii) shall encourage negotiation and the free flow of information during informal proceedings; (iii) shall include a method of identifying the decision makers and the parties to the case or case decision and making that information available to the public; and (iv) except to the extent otherwise required by law, may include requirements for recording in the agency's case record any oral or written communications with the decision maker.

D. By the date set forth in their final policies or rules of practice or by January 1, 1999, whichever occurs first, agencies shall develop, adopt, and implement the policies or rules of practice described in subsection B as follows: (i) pursuant to Article 2 (§ 9-6.14:7.1 et seq.) of the Administrative Process Act if the agency is subject to the Act or (ii) pursuant to the procedures by which the agency adopts rules and regulations if the agency is not subject to the Act.

E. Notwithstanding the provisions of subsection D, agencies that have written policies or rules of practice regarding ex parte communications in effect on or before January 1, 1996, regardless of the procedure by which such policies or rules of practice were developed, adopted, and implemented, may continue to use such policies or rules of practice.

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**SENATE BILL NO. 479**

Offered January 22, 1996

*A BILL to amend the Code of Virginia by adding in a section numbered 2.1-7.3, relating to the administration of state government; policies or rules of practice regarding ex parte communications.*

Patron—Gartlan

Referred to the Committee on General Laws

**Be it enacted by the General Assembly of Virginia:**

**1. That the Code of Virginia is amended by adding a section numbered 2.1-7.3 as follows:**

*§ 2.1-7.3. Policies or rules of practice regarding ex parte communications.*

*A. For purposes of this section:*

*"Agency" means any administrative or independent unit of state government, including a department, institution, commission, board, council, authority, or other such body, however designated.*

*"Board" means any collegial body in the executive branch created by the General Assembly.*

*"Case" or "case decision" means any agency or board proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is or is not, or may or may not be, (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit.*

*"Ex parte communication" means an oral or written communication not in the agency's or board's record regarding substantive, procedural, or other matters which could be reasonably expected to influence the outcome of the case or the case decision pending before the agency or board and for which reasonable notice to all parties is not given at the time of the communication.*

*B. Any agency or board which (i) is subject to the Virginia Administrative Process Act (§ 9-6.14:1 et seq.) or the Virginia Register Act (§ 9-6.15 et seq.) and (ii) conducts cases or issues case decisions, shall develop, adopt, and implement policies or rules of practice regarding ex parte communications made or attempted to be made to the agency or board in the course of conducting such cases or issuing such case decisions. Such policies or rules of practice shall encourage negotiations and the free flow of information during informal proceedings.*

*C. On the earlier of the date set forth in their final policies or rules of practice or January 1, 1998, the policies or rules of practice described in subsection B shall be developed, adopted, and implemented by agencies and boards (i) as regulations pursuant to Article 2 of the Administrative Process Act (§9-6.14:7.1 et seq.) if the agency or board is subject to Article 2 of the the Virginia Administrative Process Act (§ 9-6:14:47.1 et seq.) or (ii) if the agency or board is not subject to Article 2 of the Virginia Administrative Process Act, pursuant to the procedure by which they otherwise adopt rules and regulations.*

**2. That this act shall not apply to agencies or boards which have written policies or rules of practice regarding ex parte communications in effect on or before January 1, 1996, regardless of the procedure by which such policies or rules of practice were developed, adopted, and implemented.**

# PUBLIC HEARING

## Ex Parte Communications During Agency Proceedings

**July 31, 1996**
**House Room Four of the Capitol**
**Richmond, Virginia**

The Virginia Administrative Law Advisory Committee (the "Committee"), which advises the Virginia Code Commission on administrative law issues, studied the issue of ex parte communications during the 1995-96 interim and recommended that the enclosed legislation (Senate Bill 479) be approved by the General Assembly during its 1996 Session. The bill was carried over in the Senate Committee on General Laws until the 1997 Session to allow time for additional consideration of the issues involved. The deadline for committee action, if any, on carried over bills is December 20, 1996. The Committee is conducting a further review of Senate Bill 479 prior to that deadline.

Senate Bill 479 defines ex parte communication as "an oral or written communication not in the agency's or board's record regarding substantive, procedural, or other matters which could be reasonably expected to influence the outcome of the case or case decision pending before the agency or board and for which reasonable notice to all parties is not given at the time of the communication."

To assist in its review of Senate Bill 479, the Ex Parte Subcommittee of the Committee (the "Subcommittee") is holding a public hearing to solicit public comments on the bill and the issues surrounding such legislation. The Subcommittee is interested in receiving comments on whether ex parte communications should be limited or prohibited during the agency case decision process, regardless of whether the process is covered under the Administrative Process Act (§9-6.14:1 et seq.) of the Code of Virginia. The Subcommittee is particularly interested in your views on the following topics:

1. The definition of case decision applies to many agency functions, including initial determinations of eligibility for licenses, benefits and permits as well as hearings and appeals of such determinations. Should ex parte communications be prohibited or limited during agency processes for:
   - issuing permits, licenses and determinations of eligibility?
   - hearings and appeals?

2. If you favor a limit on or prohibition of ex parte communications, should such a limitation or prohibition be:
   - promulgated as agency regulations by each agency (as contemplated by SB 479); or
   - a single statute in the Code of Virginia which would apply to all agencies?

3. Should an ex parte policy apply to:
   - staff communications with the agency decision-maker? If so, should the policy apply to all staff or just certain staff?
   - individuals who are not a formal party to the case decision but who are interested in its outcome?

4. If you favor a limitation or prohibition on ex parte communications during the hearings and appeals process, should the limitation or prohibition be applied during:
   - formal (:12) hearings?
   - informal (:11) hearings?
   - both formal and informal hearings?
   - any hearing where two or more adversarial parties are seeking an agency determination?

5. If a limitation or prohibition against ex parte communications is to be promulgated by individual agencies, are there minimum standards which you feel should be addressed by these regulations? If so, what minimum standards do you favor?

**Appendix D**

**Comments Offered at Public Hearing**

The Ex Parte Communications Subcommittee met for a public hearing on Wednesday, July 31, 1996 in House Room 4 of the Capitol. Although the meeting was well attended, with an audience of 25 to 30, only three of those in attendance offered comments. Members of the Subcommittee present were: Phil Abraham, Brian Buniva, Suzette Denslow, Jean Ann Fox, Roy Hoagland, Mark Christie, Jon Woltman, Kevin Finto, and Flip Hicks.

Phil Abraham started the meeting with a description of the subcommittee's work during the past two years and of the issues involved. The following speakers then offered comments:

Carl Schmidt, Department of Medical Assistance Services -- Mr. Schmidt stated that although the ex parte policies described by Senate Bill 479 are not unreasonable, they are unnecessary as they would apply to his agency in the case of informal and formal hearings for provider appeals. He stated that the Hearing Officers who hear provider appeals are located in a separate division of the agency from that which issues original determinations. In some cases, he added, the hearing officer may lack information and consult with staff, and the ability to consult with staff typically benefits providers in appeals.

If the provider disagrees with the determination resulting from the informal (:11) hearing, he can request a formal hearing at which a Hearing Officer from the Supreme Court list will preside. Communications with the Supreme Court Hearing Officer are always through counsel and the Hearing Officers are cognizant of the need to avoid ex parte communications. He added that although the decision in a :12 formal hearing is recommended to the agency director, with the director making the final determination, DMAS staff does not contact the director to discuss the case.

Mr. Schmidt added that if the Subcommittee recommends legislation to limit ex parte communications, that such legislation should amend the Administrative Process Act instead of amending Title 2.1 of the Code of Virginia. Otherwise, the ex parte policies would apply to Medicaid eligibility determinations that are governed by specific federal requirements. In response to questions from Mr. Hicks about whether requiring agencies to state their policies would be burdensome, Mr. Schmidt responded that the requirement, as proposed by Senate Bill 479, would not be burdensome. However, the agency is concerned that the policies may increase the formality of initial provider appeals.

Conway Moy --Mr. Moy spoke as a concerned citizen about the need for open government. He asked whether it is true that ex parte communications are currently not prohibited, and stated that they should be. Mr. Moy said that when an individual in a position to influence a case decision receives an ex parte communication, the

communication should be documented and made public in a timely manner. Such openness promotes the public interest and is necessary to prevent the public from perceiving that government is operated through the "back door."

Mr. Hicks asked Mr. Moy if he would be satisfied if ex parte comments were included in the agencies file and made available to the public and the press. Mr. Moy responded that such actions would be satisfactory if they were taken in a timely manner so that other interested parties had the opportunity to respond.

Marilyn J. Eichelberger -- Ms. Eichelberger, a supervisor in King George County, stated that ex parte communications in the case decision process should be deterred in the interests of good government. She described difficulties she had encountered in receiving copies of landfill permits under consideration for her County, even though the County was named on the permit. Ms. Eichelberger stated that a reasonable person would expect openness in government and that information provided to an agency would be available to the public. She also asked whether the issue of ex parte communications under consideration by the Administrative Law Advisory Committee included the issue of who has standing to sue. Mr. Abraham responded that the issue of standing to sue was not a focus of the study. Mr. Buniva stated that Ms. Eichelberger's experience with the landfill permitting process would fall into the purview of the committee's study to the extent that she felt that others may have had greater access to the decision-maker.

Mr. Christie asked whether informal off-the-record negotiations would be allowed between the County Government and an individual requesting a building permit, or should others be notified of the negotiation. Ms. Eichelberger responded that a heated issue had arisen about how much the County Administrator should tell the board if he is approached to influence the county's decision making process, but that as a supervisor, she had not been involved in the building permit process. Mr. Hicks indicated that such boards were more likely to become involved in zoning decisions, but that it would be uncommon for board to be involved in the building permit process. Mr. Hicks asked whether, if an individual spoke to a county planner to receive information about the types of proffers the county had accepted for similar projects, this type of communication should be allowed or curtailed. Ms. Eichelberger stated that the information should be a part of the public record. Mr. Hoagland asked if Ms. Eichelberger believed that a record should be kept of all discussions; she responded "yes". She similarly affirmed her agreement with the concept that a permit applicant and a public citizen should have equal access to information and decision makers.

Conclusion: After the public testimony, Mr. Hicks asked those present whether they support or oppose the concept of agencies being required to spell out their policies regarding ex parte communications. A representative of the Virginia Department of Transportation indicated that although the requirement to state a policy would not be burdensome, requiring all agencies to go through the regulatory process could be expensive and time-consuming.

Mr. Abraham concluded the hearing by requesting those present to submit any written comments by August 9, 1996 and reminded those present that the Senate Committee on General Laws was scheduled to consider carry-over bills, including Senate Bill 479, on December 19, 1996.

COMMONWEALTH of VIRGINIA

George Allen
Governor

DEPARTMENT OF
HOUSING AND COMMUNITY DEVELOPMENT

Robert T. Skunda
Secretary of
Commerce and Trade

Warren C. Smith
Director

August 7, 1996

Mr. Philip Abraham
Administrative Law Advisory Committee
c/o Ms. Lynn Hammond
Division of Legislative Services
910 Capitol Street
Richmond, Virginia 23219

Dear Mr. Abraham:

I am writing in response to the Advisory Committee's recent request for information that might assist it in its review of SB 479. This, or any other bill establishing ground rules for ex parte communications in connection with agency proceedings, would directly affect two boards associated with the Department of Housing and Community Development. These include the State Building Code Technical Review Board, which hears and decides appeals from decisions arising from the application of building regulations, and the Manufactured Housing Board, which issues licenses to dealers and renders case decisions.

Although DHCD has not adopted formal rules or regulations governing ex parte communications in connection with the activities of these two entities, the Department is sensitive to the necessity for assuring due process and fairness in their operations. To date, the Department's informal rules, the provisions of the Administrative Process Act, and the Supreme Court's rules binding hearing officers have proved adequate to the task. No incidents have come to our attention to suggest the undue or unfair impact of ex parte communications upon decisions by either body.

However, if legislation is advanced for the purpose of assuring that all state agencies recognize and respond to ex parte communications issues, it should take care not to stifle the flow of essential information. In addition, the actions that decision-making bodies take vary greatly from agency to agency. For these reasons, I recommend that any legislation obligating agencies and their decision-making bodies to adopt rules governing ex parte communications provide sufficient latitude for agencies to define which procedures and parties are subject to the rules. This would be preferable to attempting to establish a broad general rule in a statute that must then also include a list of exceptions--as is the case, for example, of the Administrative Process Act.

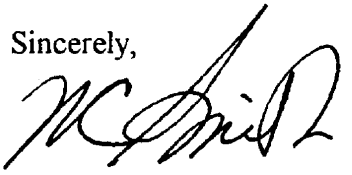
EQUAL HOUSING OPPORTUNITY

It may also be important for agencies adopting rules on ex parte communications to be able to do so without having to follow the full procedural requirements of the Administrative Process Act. Even under favorable circumstances, the adoption of agency regulations may require a year or more. Such a delay would appear unwarranted in the case of a rule that is intended to assure efficiency, fairness, and openness in government. Agencies could still be required to provide for public participation in developing these rules, but without being subject to the full rigors of the APA.

Like the members of the Advisory Committee, DHCD and other state agencies recognize the importance of rendering decisions through processes that offer not only the form but also the substance of fairness. Agencies need to be able to do this in a way that allows them to tailor an ex parte communications rule to fit their unique circumstances rather than require them to alter those unique characteristics to fit the rule.

I am confident that the Advisory Committee will be able to make recommendations to the General Assembly that assure the continuation of agency adjudicatory procedures that are fair, effective, and efficient.

Sincerely,



Warren C. Smith ,
Director

rcvd from Henry C. Murden, Clerk of Circuit Court Suffolk

# PUBLIC HEARING

## Ex Parte Communications During Agency Proceedings
### July 31, 1996
### House Room Four of the Capitol
### Richmond, Virginia

The Virginia Administrative Law Advisory Committee (the "Committee"), which advises the Virginia Code Commission on administrative law issues, studied the issue of ex parte communications during the 1995-96 interim and recommended that the enclosed legislation (Senate Bill 479) be approved by the General Assembly during its 1996 Session. The bill was carried over in the Senate Committee on General Laws until the 1997 Session to allow time for additional consideration of the issues involved. The deadline for committee action, if any, on carried over bills is December 20, 1996. The Committee is conducting a further review of Senate Bill 479 prior to that deadline.

Senate Bill 479 defines ex parte communication as "an oral or written communication not in the agency's or board's record regarding substantive, procedural, or other matters which could be reasonably expected to influence the outcome of the case or case decision pending before the agency or board and for which reasonable notice to all parties is not given at the time of the communication."

To assist in its review of Senate Bill 479, the Ex Parte Subcommittee of the Committee (the "Subcommittee") is holding a public hearing to solicit public comments on the bill and the issues surrounding such legislation. The Subcommittee is interested in receiving comments on whether ex parte communications should be limited or prohibited during the agency case decision process, regardless of whether the process is covered under the Administrative Process Act (§9-6.14:1 et seq.) of the Code of Virginia. The Subcommittee is particularly interested in your views on the following topics:

1. The definition of case decision applies to many agency functions, including initial determinations of eligibility for licenses, benefits and permits as well as hearings and appeals of such determinations. Should ex parte communications be prohibited or limited during agency processes for:
   - issuing permits, licenses and determinations of eligibility?
   - hearings and appeals?

2. If you favor a limit on or prohibition of ex parte communications, should such a limitation or prohibition be:
   - promulgated as agency regulations by each agency (as contemplated by SB 479); or
   - a single statute in the Code of Virginia which would apply to all agencies?

3. Should an ex parte policy apply to:
   - staff communications with the agency decision-maker? If so, should the policy apply to all staff or just certain staff?
   - individuals who are not a formal party to the case decision but who are interested in its outcome?

4. If you favor a limitation or prohibition on ex parte communications during the hearings and appeals process, should the limitation or prohibition be applied during:
   - formal (:12) hearings?
   - informal (:11) hearings?
   - both formal and informal hearings?
   - any hearing where two or more adversarial parties are seeking an agency determination?

5. If a limitation or prohibition against ex parte communications is to be promulgated by individual agencies, are there minimum standards which you feel should be addressed by these regulations? If so, what minimum standards do you favor? Emphasis on uniformity!

# THE VIRGINIA COAL ASSOCIATION, INC.

W. THOMAS HUDSON
PRESIDENT

JOHN T. HEARD
LEGISLATIVE COUNSEL

1001 EAST BROAD ST.
SUITE 425
OLD CITY HALL
RICHMOND, VIRGINIA 23219
804 / 643-6697

July 31, 1996

Lyn Hammond, Program Coordinator
Administrative Law Advisory Committee
General Assembly Building
910 Capitol Street
Richmond, Virginia 23219

RE: Ex Parte Communication Comments

Dear Ms. Hammond:

On behalf of the Virginia Coal Association (VCA), I am providing the Virginia Administrative Law Advisory Committee and the Ex Parte Subcommittee with the VCA's comments on the "issue" of ex parte communications during agency proceedings.

Before addressing the topics of interest to the Subcommittee which were listed on the announcement for the July 31, 1996 public hearing, the VCA believes that it is imperative that a more fundamental topic be addressed and analyzed by the Committee:

> Have there actually been problems in Virginia which are associated with ex parte communications made during agency proceedings?

For the past three regular sessions of the Virginia General Assembly, legislation dealing with ex parte communications has been introduced. Despite repeated requests by opponents of these bills, proponents have never provided any concrete examples of problems caused by ex parte communications during any agency proceeding in Virginia. In fact, the VCA is unaware of any example of inappropriate actions or improper decisions caused by such communications. Unless actual examples of problems caused by ex parte communications in Virginia exist, there is no issue involving ex parte communications that needs to be addressed.

If, on the other hand, the Committee is aware of actual examples in Virginia where ex parte communications have resulted in inappropriate actions or improper decisions, the VCA believes that it would be appropriate to place limits on such communications during the APA's formal hearing process (as discussed in Va. Code §9-6:14:12). The VCA views formal hearings as quasi-judicial and more akin to litigation, where there are already specific prohibitions on ex parte communications. Such communications could be prohibited after a request is made for a formal hearing without most of the negative impacts which would be

associated with such a prohibition in informal hearings (Va. Code §9-6.14:11). Under no circumstances should ex parte communications be prohibited or limited during informal hearings -- in fact, such communications should be encouraged, as they many times can lead to a much quicker and less costly (to all parties concerned) resolution of problems. Likewise, ex parte communications should be encouraged in the permit application and renewal process, as well as in the regulatory development process. Agency staff, whether they be permit writers or policy specialists drafting regulations, need to be free and unencumbered by communication requirements to do the best job they can. Any limitation or prohibition on communications with such individuals will only slow down the process, increase costs for applicants and the State (taxpayers), and result in lesser quality work. Furthermore, such prohibitions can only be based on the assumption that agency personnel may not act in the best interests of the State. Simply put, at some point we have to trust these individuals to do the job they were hired to do.

The VCA believes that, absent concrete examples of serious problems caused by ex parte communications during agency proceedings, current agency policies and practices regarding ex parte communications are satisfactory. Ex parte communications occur at all levels of government and provide an efficient and necessary means of resolving problems and transmitting information. Only in limited circumstances, such as when a party requests a formal hearing under the APA, should any consideration be given to limiting such forms of communication.

The VCA appreciates this opportunity to offer these comments.

Sincerely,

John T. Heard

JTH/bgm

# VDOT'S COMMENTS ON SB 479 CONCERNING THE ADMINISTRATION OF STATE GOVERNMENT AND EX PARTE COMMUNICATIONS

## Background

If passed, Senate Bill 479 would require State agencies or collegial boards subject to the Administrative Process Act (APA) (§ 9-6.14:1 et seq.) or the Virginia Register Act (VRA) (§ 9-6.15 et seq.) which conduct cases or issue case decisions to promulgate policies or procedures concerning ex parte communications in such activities as regulations subject to Article 2 of the APA. "Ex parte communications" are oral or written communications which are not part of the public record, but could be reasonably expected to influence the outcome of the case or case decision; furthermore, all parties do not receive reasonable notice of communications of this type at the time they are made.

The bill was carried over by the 1996 General Assembly. VDOT took no position on the bill when introduced previously, but listed its impacts from financial and administrative standpoints. Essentially, the bill would impose additional administrative costs to implement. The Virginia Administrative Law Advisory Committee convened a public hearing on July 31, 1996, to gauge public sentiment on the bill prior to making a report to the General Assembly. The following paragraphs represent VDOT's comments on the bill and the issues involved.

## VDOT's Regulatory Activities

The Management Services Division (MSD), the liaison division responsible for APA coordination, was informally advised by the Office of the Attorney General that VDOT is not generally involved in issuing case decisions as defined by the APA. Most of VDOT's work involves activities either wholly or partially exempt from the Administrative Process Act. These exemptions include: agency actions concerning money or damage claims against the Commonwealth or its agencies; orders setting rates or prices; regulations establishing agency organization; internal practices or procedures; the award or denial or contracts (including decisions involving compliance); the location, design, specifications, or construction of public buildings or other facilities; grants of State or federal funds or property; and traffic signs, markers, or control devices.

Among actions subject to the APA, VDOT's regulatory activity is largely restricted to controlling activities occurring on State-owned right of way. The agency has a reasonable obligation to regulate such activities to ensure public safety, guarantee convenient, accessible transportation, and protect the financial investment in the infrastructure. The most common method of regulation is through permit, such as a hauling permit or land use permit. Existing regulations concerning these activities provide a means whereby denials may be appealed, either

to the Commonwealth Transportation Commissioner or his designee. VDOT works closely with contractors, utilities, and other permit applicants to ensure that the process is well understood and possible conflicts are minimized. It is not clear whether the types of appeals provided for by regulations of this type actually are considered "cases or case decisions," but they appear to satisfy the broad definition used by the Committee.

The only APA regulation not directly involved with VDOT's engineering activities that could involve case decisions is the regulation concerning the Setoff Debt Collection Act. The regulation addresses the procedures to be followed when a citizen appeals a decision to withhold refunds due to VDOT's intention to seek the refund owed the citizen against a debt to the Commonwealth. That regulation addresses conduct and representation at the hearing, but does not mention ex parte communications.

## VDOT's Response to the Administrative Law Committee's Questions

1) *The definition of case decision applies to many agency functions, including initial determinations of eligibility for licenses, benefits, and permits, as well as hearings and appeals of such determinations. Should ex parte communications be prohibited or limited during agency processes for:*

- *issuing permits, licenses, and determinations of eligibility?*
- *hearings and appeals?*

VDOT does not favor prohibition or limitation of ex parte communications for any agency processes.

*2) If you favor a limit on or prohibition of ex parte communications, should such a limitation or prohibition be:*

- *promulgated as agency regulations by each agency (as contemplated by SB 479); or*
- *a single statute in the Code of Virginia which would apply to all agencies?*

VDOT does not favor prohibition or limitation of ex parte communications for any agency processes. If such an action were necessary, promulgation under Article 2 by individual agencies would be expensive and time-consuming. On the other hand, a single statute might not allow the flexibility for individual agencies, unless allowance were given for agencies to supplement the statute by more restrictive regulation if they deem it necessary.

*3) Should an ex parte policy apply to:*

- *staff communications with the agency decision-maker? If so, should the policy apply to all staff or just certain staff?*
- *individuals who are not a formal party to the case decision but who are also interested in its outcome?*

If necessary, an ex parte policy should apply to communications with the agency decision-maker by those directly involved with the case only.

*4) If you favor a limitation or prohibition on ex parte communications during the hearings and appeals process, should the limitation or prohibition be applied during:*

- *formal (:12) hearings?*
- *informal (:11) hearings?*
- *both formal and informal hearings?*
- *any hearing where two or more adversarial parties are seeking an agency determination?*

VDOT does not favor prohibition or limitation of ex parte communications for any agency processes. If such a policy were necessary, however, it should only apply to formal hearings arising from regulatory activities subject to the Administrative Process Act or the Virginia Register Act. Activities currently exempt from APA/VRA requirements should not be subject to this policy.

*5) If a limitation or prohibition against ex parte communications is to be promulgated by individual agencies, are there minimum standards which you feel should be addressed by these regulations? If so, what minimum standards do you favor?*

VDOT does not favor prohibition or limitation of ex parte communications for any agency processes. If such standards are necessary, however, they should not unduly restrict the freedom of the agency to make a timely determination with a minimum of additional expense. They should also include examples of allowable and prohibited contacts to ensure that all participants have an idea of whether a communication is acceptable. Finally, the standards should ensure that the policy does not conflict with any other federal or State statutes.

## Conclusion

VDOT believes that the appeals process established for these types of regulations work well as currently configured, and no further regulatory action is necessary. However, if some type of policy or procedural action is deemed necessary, simpler, quicker, and less expensive means of enactment exist. The primary objections to a statutory requirement obligating agencies and boards to promulgate a regulation subject to Article 2 of the APA involve issues of timeliness, efficiency, and cost.

Timeliness is a valid concern in promulgating regulations. Under current Executive Orders and statutes concerning promulgation of regulations under the APA, it can take a year or longer to promulgate a non-emergency regulation under Article 2, which involves public

hearings. Agencies must receive permission from the Executive Branch to publish a Notice of Intent in the *Virginia Register* informing the public that a regulatory action is contemplated, then wait 30 days for public comment. Following the initial public comment period, an agency must submit its proposed regulation to the Department of Planning & Budget for an economic impact analysis, which by statute, may take up to 45 days. The Office of the Attorney General must review the proposed regulation and issue a formal opinion confirming the agency's statutory authority to promulgate the regulation.

After the economic impact analysis is completed, the agency is allowed to comment on it, and both are published in the Virginia Register, along with a copy of the proposed regulation and a Notice of Comment Period. After reviewing the proposed regulation, the Governor may direct that changes be made before proceeding further. A 60-day comment period must elapse before the final regulation can be published in the *Register*, after which there is an additional 30-day review period before the regulation may take effect. VDOT is also obligated to follow its own Public Participation Guidelines when promulgating regulations subject to the APA, which may involve additional administrative time and expense to implement.

Efficiency should be considered in determining the effect of many individual regulations which need to be processed by the Office of the Governor, the Office of the Attorney General, the Department of Planning & Budget, and the Office of the State Registrar of Regulations. This regulatory workload would be in addition to the routine analyses and approvals unrelated to this bill. Promulgating many regulations from the boards and agencies subject to this bill would add a great deal to the workload of State government in general, not to mention the effect on the general public, who might need to attend many public hearings. Although the number of boards and agencies subject to this bill is not precisely known, a recent organizational chart of the Executive Branch listed almost one hundred boards, agencies, colleges and universities, and councils. Other bodies subject to this bill may not have been listed, which would add even more individual regulations to be promulgated.

Cost is another factor: holding a public hearing can be an expensive exercise. Depending on the nature of the regulation, more than one hearing is generally held, usually at four or five VDOT sites roughly corresponding to the nine construction districts. VDOT's Public Participation Guidelines call for at least one hearing to be held if public input is needed or required. The results of a public hearing could be inconclusive, especially if the hearing is poorly attended or no clear consensus emerges. This outcome would leave the board or agency no better off than before the hearing was held.

Previous estimates for MSD to promulgate a regulation from start to finish derived from previous actions for SB 479's Legislative Impact Statement indicated that the cost to promulgate the regulation would be approximately $6,470. This amount includes only costs incurred by MSD to prepare paperwork, coordinate reviews, develop the regulation, and publish the notices. Administrative costs incurred by other branches of State government cannot be accurately estimated, so the actual overall cost would be higher.

Should some sort of policy be required, VDOT believes that other means could be used to satisfy the spirit of the law. Boards or agencies could survey those participating in appeals over a given period to determine whether ex parte communications presented a problem, and issue a policy as needed. Such a policy could be issued as a regulation under the Virginia Register Act (VRA) if the Office of the Attorney General finds that it meets the statutory definition of a "rule or regulation" as defined in the Act, and the rule or regulation concerns internal policies or procedures. In such a case, no public hearing is required, but the regulation would still be subject to the *Virginia Register* filing and 30-day waiting period requirements prior to becoming effective.

Alternatively, the section of the APA concerning agency actions exempt from Article 2 (§ 9-6.14:4.1 (C)) could be amended to include agency actions establishing policies and procedures for ex parte communications in matters concerning cases or case decisions. This amendment would permit the policies and procedures to be enacted without using an expensive and time-consuming full-scale APA process.

If neither of these approaches can be used, the policy could simply be written and published in the General Notices section of the *Virginia Register*, with a notice soliciting public comment. This action would allow the agency to collect public input, but in an informal manner, with no need to follow outside requirements or rules.

# Chesapeake Bay Foundation

*Environmental Defense - Environmental Education - Land Management*

Suite 710, Heritage Building • 1001 E. Main Street • Richmond, Virginia 23219
(804) 780-1392 Fax (804) 648-4011


TO: Administrative Law Advisory Committee
Subcommittee on Ex Parte Communications
FR: Roy A. Hoagland
DA: August 9, 1996

RE: EX PARTE COMMUNICATIONS

After witnessing the scarcity of public comment on the proposed legislation governing ex parte communications (yet the high level of interest reflected by the number of attendees), I would like to reiterate for the subcommittee the concerns of the Chesapeake Bay Foundation (CBF) and submit this memo into the public hearing record.

I would like to highlight our concerns with the following example.

CBF was recently involved in a debate over a highly controversial permit. During the public notice period, interested citizens filed a considerable number of comments on the permit. At the request of one of the commentators, the Department of Environmental Quality (DEQ) granted the request for a public hearing. When DEQ failed to grant the hearing within the time period specified under its regulations, it rescinded its grant of a public hearing and withdrew the permit from public comment. It then engaged in a series of private negotiations. These negotiations included active participation by the Regional Director (it is the Regional Director who, in the absence of a hearing, has the authority to issue a permit).

In the process of the private negotiations between the agency and the permit applicant, DEQ agreed to change provisions in the permit which were wholly unrelated to any of the concerns raised by the public comments. The permit file reflected that on a Thursday and Friday, DEQ teleconferenced with the applicant to discuss "minor changes" in the permit; on the next Monday, DEQ issued a modified permit with significant changes unrelated to the public comments. DEQ admitted it negotiated these changes in order to prevent threatened litigation by the applicant DEQ, basically, "cut a deal" with the applicant. The record, of course, no where reflects the actual content of any discussions on these changed permit provisions.

To make matters worse, after DEQ thereafter held an informal hearing, presided over by a State Water Control Board member, at which there was tremendous public outcry, the hearing officer held a private meeting with DEQ staff. At the Board meeting, wherein the decision on final issuance of the permit was to occur, the Board member specifically referred to his private meeting with DEQ staff. He stated that based on that meeting, he was satisfied with the correctness of the agency's permit recommendations, that the public's concerns were addressed,

and that he was thus voting for issuance of the permit. I do not believe this Board member was attempting to do anything he perceived as unfair or incorrect; however, his reliance on an "off-the-record" discussion with agency personnel in the midst of a highly, publicly contested matter gave the applicant, and DEQ, a clear advantage and preference unavailable to interested citizens.

Situations like those presented in this instance provide the basis for the need for ex parte legislation which must deal with de facto parties (interested citizens) as well as the actual parties (the state and the permit applicant). In many instances, like that described, it is the interested citizens who serve the role of the plaintiff, and the state and applicant, jointly, become the defendant.

# COUNTY OF YORK, VIRGINIA

William M. Hackworth
County Attorney

James E. Barnett
Assistant County Attorney

July 17, 1996

Administrative Law Advisory Committee
General Assembly Building
2nd Floor
910 Capitol Street
Richmond, Virginia 23219

Dear Members of the Committee:

Thank you for soliciting my opinion on Senate Bill 479. I favor this bill. Five years ago, I represented the County in an appeal before a state agency, the State Building Code Technical Review Board, involving an interpretation of the Uniform Statewide Building Code (USBC). I was shocked by the absence of minimal due process considerations during the appeal hearing. For example, the appellant, a citizen, had sent various documents to the review board, and they were provided to members of that board, but not to me or the County. Even worse, staff for the review board did the same thing. I was not even aware of these documents until they were referred to by board members during the hearing, and I had to ask to see the documents. The board ruled against the County, and I firmly believe that it was heavily swayed by these ex parte communications and documents. To make matters worse, the chair cut off our presentation before we could even rebut some of the documents and ex parte communications. (The review board's decision was overturned by our circuit court; later that decision was reversed by the Court of Appeals on dubious grounds in an unreported decision. After this, the USBC was amended to conform with the County's original interpretation! This was a lot of bother, which perhaps could have been avoided if a fair hearing had been conducted by the review board.)

As a result of this experience, I strongly favor a prohibition on ex parte communications during hearings and appeals, especially when adversarial parties are seeking an agency determination. I think this should be embodied in a single statute applicable to all state agencies. It should apply to staff as well as parties to the appeal, and those with an interest in its outcome. The hearing process of the review board in our case was fundamentally unfair; it appears that Senate Bill 479 would eliminate such situations. We would be roasted alive by our constituency if we were to conduct administrative hearings at the local level the way this one state agency did.

224 Ballard Street • Post Office Box 532 • Yorktown, Virginia 23690
(804) 890-3340 • Facsimile (804) 890-3346 • TDD (804) 890-3300

Thank you again for seeking my input.

Sincerely,

Bill Hackworth

William M. Hackworth
County Attorney

jlh

Ad

# COMMONWEALTH of VIRGINIA

George Allen
Governor

Becky Norton Dunlop
Secretary of Natural Resources

*Marine Resources Commission*
*P. O. Box 756*
*2600 Washington Avenue*
*Newport News, Virginia 23607-0756*

William A. Pruitt
Commissioner

August 26, 1996

Philip F. Abraham, Chairman
Ex Parte Communications Subcommittee
Administrative Law Advisory Committee
910 Capitol Street
Richmond, Virginia 23219

Dear Mr. Abraham:

m writing to offer our recommendations on the topic of ex parte communications, as were recently scussed at the July 31, 1996, public hearing.

1. Each agency or board should be allowed to develop its own guidelines for handling ex parte communications on case decisions.

   Senate Bill 479 was drafted to include this individual agency flexibility. The Subcommittee Report of the Administrative Law Advisory Committee wisely confirms this approach on page 11.

2. Each agency or board should be able to develop its own procedural guidelines without promulgating a regulation under the Administrative Process Act.

   The APA procedures for promulgating regulations, as well as changing them once they are in place, are very involved, consume much staff effort, and take a long time for completion.

   A modification to Senate Bill 479 is recommended to delete the requirement that ex parte communication policies be adopted in the form of regulations.

Thank you for the opportunity to make these suggestions.

Sincerely,

William A. Pruitt

William A. Pruitt

WAP:mfj
CO

# COMMONWEALTH of VIRGINIA

*Department of Criminal Justice Services*

Bruce C. Morris
Director

805 East Broad Street, Tenth Floor
Richmond, Virginia 23219
(804) 786-4000
FAX 804-371-8981
TDD (804)786-8732


August 29, 1996

Administrative Law Advisory Committee
General Assembly Building, 2nd floor
910 Capitol Street
Richmond, Virginia 23219

Dear Committee Members:

Your public hearing notice regarding ex parte communications during agency proceedings was received by this agency and discussed. The Department of Criminal Justice Services views ex parte communication from two perspectives:

***Formal Hearings***

We agree that any ex parte communication during the formal hearing process should be documented. Further, the Department does not initiate nor desire any ex parte communication from the inception of the need for the formal hearing.

***Informal Fact Finding Hearings***

We limit ex parte communication in the informal hearing process. The Informal Hearing Officer provides a finding of facts and opinion which contains recommended options for consideration to the decision maker. Once the Informal Hearing Officer has provided recommendations to the decision maker, a meeting occurs for the decision maker to question the hearing officer. Based upon the written document and the discussion with the hearing officer, the decision maker renders a decision.

Senate Bill 479 calls for the agency or board which is involved in such decisions to either create rules or policy guidelines pertaining to ex parte communication. Experience indicates that policy guidelines would be the better approach. The rule making process is cumbersome and

lengthy. Potentially, an agency may invest 12 months or more promulgating a rule and be unable to react in a timely manner should amendments be necessary. Policy guidelines, on the other hand, allow the agency to re-evaluate its position based upon experience and adjust accordingly and quickly.

Whatever the approach of the committee, it should recognize the need for and the value of open discussion and negotiation between agency personnel and the party. Often matters are resolved without even an informal fact finding. If, however, "ex parte" rules are too limiting, cumbersome and require documentation of every conversation, there is less incentive and perceived value in any discussion or negotiation. In addition, restrictive "ex parte" rules could be costly in time and resources to the agency and the party.

If we can be of further assistance, please let us know.

Sincerely,

Christine L. Turner
Chief Deputy Director

FINE PAPER
DIVISION

FRANKLIN, VIRGINIA 23851 TELEPHONE (804) 569-4321

Jon L. Wolman
Counsel

June 12, 1996

The Ex Parte Communications Subcommittee
Administrative Law Advisory Committee

Dear Subcommittee Members:

I understand that the Ex Parte Communications Subcommittee will be holding a meeting on June 17, 1996 to receive information and comments concerning S.B. 479. As a member of the regulated community, I have some interest in the issues raised in that legislation which I would like the Subcommittee to consider. I am forwarding this correspondence to you as I will not be able to attend your next scheduled meeting.

During the Second Annual Administrative Law Conference, the Virginia Supreme Court Justice Lacy made several relevant comments concerning this issue. She specifically noted and addressed some of the concerns which had previously been raised concerning this legislation.

As you know, prohibitions against ex parte communications have their root in judicial proceedings. Whenever there is an adversarial proceeding before a court, neither party to that adversarial proceeding may have an ex parte communication with the judge. This is a time-honored and accepted practice in the courts.

While acceptable and appropriate in judicial proceedings, the legislation, as it is currently drafted, will have a much broader impact. It is not restricted to adjudicatory proceedings before administrative agencies. If such legislation is to be adopted, it should be amended to limit its application.

Administrative agencies perform several significantly different functions. An agency will act as a legislative body in promulgating regulations, it will act as an administrative body when issuing and

The establishment of a prohibition against ex parte communication in non-judicial proceedings will raise many questions. For example, who is the "other party" in those non-judicial proceedings?

If someone is seeking a driver's permit, a permit to operate a barber shop, a license to practice law, these are all administrative proceedings. In other words, the State (acting on behalf of the citizens and for the public good) makes a determination concerning the issuance or non-issuance of such permits or licenses in accordance with the law and regulations. These simply are not and should not be considered adversarial proceedings.

Similarly, when a State administrative agency promulgates regulations, it is not acting in a judicial capacity. The promulgation of regulations is simply not a judicial proceeding. It is more closely related to a legislative proceeding where open communication is encouraged so that all views are provided prior to the adoption of a new mandate.

For example, communications with legislators are not subject to an ex parte communication rule. This would be inefficient and impractical as it would be impossible to identify and share opinions and views with all other adverse parties. The same reasoning should apply to administrative agencies acting in their legislative capacity.

When the agency is acting in its administrative capacity, there is no need or justification for an ex parte communication rule. When enforcing regulations, the agency is, in effect, acting as a policeman. Free communication with the enforcing agency is necessary for the efficient operation of the agency and for the protection of the public.

For example, there is no prohibition against ex parte communications with an investigating police officer. Such a rule would prevent a person accused of a violation of the law from assisting in an investigation.

enforcing licenses and permits, and it will act in a judicial capacity when deciding if there is a violation of the law, regulation, license or permit.

Senate Bill 479 makes no distinction between these separate categories of responsibility. If enacted in its present form, it would be significantly broader than the ex parte communications restriction applicable to judicial proceedings which only applies when there is an adversarial judicial proceeding.

If Senate Bill 479 is adopted in its present form, it is most likely that administrative agencies will adopt broad, conservative policies. These policies will, in turn, have a chilling effect on the administration of these agencies' individual regulatory programs.

If legislation is to be enacted requiring such policies, it should be restricted to policies involving ex parte communications with the judge during a formal adversarial adjudicatory proceeding. In other words, the prohibition against ex parte communication should only apply to the individual(s) acting in a judicial capacity during the course of any formal adversarial adjudicatory proceeding. Moreover, such prohibition would obviously be limited to contact concerning that particular adversarial proceeding.

As noted by several speakers during the Second Annual Administrative Law Conference, there has not been a significant problem in this area. Thus, while it may be a theoretical concern, there does not appear to be any significant practical problem with the current system in either the adjudicatory or non-adjudicatory setting. As a consequence, there appears to be no significant reason for changing the status quo.

If, however, the Subcommittee wishes to recommend a change in the status quo, it makes no sense to prohibit ex parte communication when an administrative agency is acting in a non-judicial capacity. Further, it makes no sense to apply that ex parte communication prohibition to individuals who are not performing a judicial function.

If there is a need to enact legislation requiring establishment of policies concerning ex parte communications within administrative agencies, that legislation should specify that the policies apply to formal adjudicatory proceedings only. In addition to the foregoing, such policies should apply only to communications concerning that adjudicatory proceeding and should only apply to the individual within the agency who will be acting as the decision maker.

For example, if an applicant has several applications before the ABC Board and is currently subject to the adjudicatory proceeding under an existing license, that individual should not be prohibited from contacting the ABC Board or its staff on its other applications. Further, that individual should not be concerned about violating an ex parte communication policy by making such contacts.

By limiting such policies to formal adversarial adjudicatory proceedings and requiring the agency to specify the individual(s) who may not be contacted during such adjudicatory proceedings, citizens and agency staff will be better able to comply with such policies. Moreover, the potential chilling effect of such policies will be significantly reduced.

I appreciate your taking the time to consider the foregoing comments. I will be glad to discuss the same with you at your convenience. My phone number is (804) 569-4228 and my fax number is (804) 569-4037. Again, if you have any questions, please contact me.

Sincerely,

Jon L. Woltmann

jb
c: E. C. Minor

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July 31, 1996

Lane Kneedler, Esq.
Chairman
Administrative Law
Advisory Committee
Richmond, Virginia 23219

BY FAX

Dear Lane:

Thank you for sending me the notice of the hearing of the Administrative Law Advisory Committee on SB 479, dealing with ex parte communications. Since I cannot attend the hearing today, I am submitting these comments on the general subject and on the issues posed in the Committee's notice.

These comments are divided into three sections. The first covers several general considerations about the provisions of SB 479; the second addresses the specific topics upon which the Committee requested comments; and the third covers several additional topics.

## I. General Considerations

My general comments are based on what I understand to be to purpose(s) of laws or regulations concerning prohibited ex parte communications in administrative proceedings, i.e.,

(1) preserving the integrity of the process through preventing impropriety (by using "secret" off-record information), or the appearance of such impropriety in decision making; and

(2) insuring all parties have a fair opportunity to address the issues and comments made by their adversaries[1].

An additional consideration sometimes offered for prohibiting ex parte communications is that judicial review cannot be properly performed if the decision is based on "off the record" considerations.

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[1] See, PATCO v. Federal Labor Relations Authority, 685 F2d 547, 564-64 (D.C. Cir. 1982)

## II. Committee Questions

### a. Application of Ex Parte Regulations.

Fully honoring the policy goals listed above requires the restrictions on ex parte communications should apply across the board. However, given the wide range of decisions to which SB 479 is potentially applicable, some accommodation needs to be considered. A basic problem is the nature and function of the administrative process. Unlike most judicial functions, the administrative process often acts and is designed to act ex parte in such functions as the issuing of permits and licenses, eligibility determinations, and many regulatory matters. Here, the purpose of the process is to translate and apply the legislative definition of the "public interest" to particular cases, and not to resolve disputes or dispense public justice. In most such cases, no one other than the applicant and the agency cares what happens. Too stringent a rule on ex parte communications may serve to gum up the process without any offsetting benefit.

Unless the Committee feels that SB 479 requires a blanket rule for consistency and to address concerns about the integrity of the process, I would confine the application of the rules to: (1) **all contested informal** cases, and **all heard cases**, as those terms are used in the APA, and all appeals.

### b. Agency Regulations vs. Statute.

The approach taken in SB 479, vesting responsibility in the boards and agencies for tailoring rules on ex parte communications to meet each agency's own needs, is consistent with this approach and is similar to that taken in the federal APA on the same subject. See, 49 CFR 1102.2 by way of example. However, the agencies ought to have some general idea of what the legislature intends. Accordingly, it is desirable to have some statutory provisions, such as those suggested herein, to give some basic structure, leaving the agencies to "fill in the blanks."

### c. To Whom Should Ex Parte Rules Apply?

#### 1. Application To Staff

Clearly, it should apply to all agency or board members or others who are decision-makers in the chain from the initial decision to the final order of the agency or board. This is fairly easy to apply since one knows or can, with least effort, find out who these people are. Applying the rules to staff is

more difficult since the same staff that helps a decision maker (and, thus, should be subject to the rules) may, in a different case, may have nothing to do with a decision as which ex parte communications are not a matter of concern.

Most ex parte rules with which I am familiar place the burden on the applicant to figure this out with a vague directive that one should not communicate off the record with anyone who "could reasonably be expected to participate in the decision." A possible safe harbor is to include in SB 479 the following:

> Each agency or board shall establish a process or procedure for identifying all staff persons who may be involved in any case or case decision, and no written or oral ex parte communication made to any person not so identified shall be considered unlawful under this section.

2. <u>"Interested" Parties</u>

The history of administrative law is replete with examples of elected officials and other "interested parties" trying (and sometimes succeeding) to influence administrative decisions off the record. The rules should apply to them to the same extent as anyone else.

**d. What Kinds of Cases Should Rules Apply To?**

See response to question 1.

**e. Should There Be Minimum Standards?**

Yes. Some of these are suggested in earlier portions of these comments.

## III. Additional Matters

Some additional features that might be included are the following:

a. <u>The Definition of Ex Parte Communications</u>

The definition of an ex parte communication as one "which could be reasonably expected to influence the outcome" (lines 24-27 of the bill) is vague, and has the potential for considerable mischief.

The issue of ex parte communications usually comes up in the context of judicial review of an agency decision or order as

point raised by an unhappy (losing) party. While "reasonably expected" wording may have some value in criminal or other actions where the "influences" on an actor can be part of the fact finding process, such an examination is not consistent with the limited role courts have in reviewing most administrative actions. The proposed standard will likely require a reviewing court to sift through the record and evaluate claims that an ex parte communication had the proscribed effect. By enlarging the role of reviewing court to include an evaluation whether an ex parte communication did or did not "influence" the outcome and whether this result "could be" foreseen will necessarily require a court to engage in some speculation or inquiry as to the mental processes of the decision maker. Except in extraordinary situations, this is not now permitted.[2]

Moreover, this standard assumes that the **only** public policy served by regulating an ex parte communication is the prevention of secret off-the record influences or the like that might actually accomplish its purpose. While this concern is certainly one aspect of the issue, it is a small one compared with the larger objectives of preserving the integrity of the process and insuring fair treatment of all parties.

In this connection, the Committee should compare that standard proposed in SB 479 with standard used in the Rules of the Virginia Supreme Court on the same subject. This is not an entirely academic matter since representing another before an administrative agency is, with certain exceptions, considered the "practice of law." See, Unauthorized Practice Rules UPR 9-101 and 9-102 and Unauthorized Practice Considerations, UPC 9-1.

The Code of Professional Responsibility deals with the subject in bright-line terms, by generally prohibiting such communications on the "merits" of a proceeding whether it has any "expected to influence" effect or not. Thus, DR 7-109 states that "[i]n an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except [listing exceptions as to notice, delivery of copies to other side, etc]." Also see, Ethical Considerations 7-32 on the same point stating that ex parte communications should be avoided in circumstances "which might have the effect or **give the appearance of granting undue advantage to one party.**" (emphasis supplied)

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[2] See, Citizens to Preserve Overton Park v. Volpe, 401 US 416,420 (1971), and United States v. Morgan, 313 US 409,422(1939)

For these reasons, I would suggest that the words "which could be reasonably expected to influence the outcome" on lines 25-26 be stricken, and replaced with something similar to the Canons discussed above like the following:

> which concern the merits

The definition would then read as follows:

> "Ex parte communication" means an oral or written communication not in the agency's record regarding substantive, procedural, or other matters <u>that concern the merits</u> of the case or case decision pending before the agency or board and for which reasonable notice to all parties is not given at the time of the communication.

The Committee may also wish to consider two additional changes. First, on line 27, add the following:

> but it does not include requests for status reports on a pending matter

This addition, derived from the federal APA, 5 USC § 551 (14) simply makes it clear that they do not prohibit an inquiry about the status of a pending case (as distinct from an inquiry about the merits).

**b. <u>Disclosure of Ex Parte Communications</u>**

SB 429 does not address the issue of what an agency or board is to do if it receives an oral or written communication. At the very least, there should be a uniform mandatory requirement that such communications should be disclosed to permit another party to respond if needed and to police the system against undue influence. This is the practice in the Virginia courts.

While it may be argued that administrative agencies have some inherent power to so this by rule, as with the courts, a uniform legislative directive would put this beyond question. Language to accomplish this might be something like the following:

> Any member of a board or agency or an employee of the same who is involved in the decisional process or who may reasonably be expected to be involved who receives a written or oral ex parte communication, as defined in this section, shall place in the public record of the case or case decision (1) a copy of any

writtencommunication, (2) a memorandum stating the substance of the oral communication, and (3) a copy of any written response or summary of any oral response to any ex parte communication.

c. **When Ex Parte Rules Are In Effect**

SB 429 is silent on this subject also. While it probably not possible to write a "one size fits all" rule into the bill, some guidance to the agencies should be provided such as the following:

> An agency or board may determine at what point restrictions against ex parte communications will apply, but in any event, shall they apply any later than when a case or case decision shall be noticed for for informal fact finding, as provided in § 9-6.14:11, hearing, as provided in § 9-6.14:12 as the case may be.

Thank you for your consideration. Keep up the good work.

Sincerely yours,

Robert L. Calhoun

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October 15, 1996

Ms. Lyn Hammond
Program Coordinator
Administrative Law Advisory Committee
General Assembly Building
Capitol Square
Richmond VA 23218

Re: *Ex Parte* Communications

Dear Lyn:

I am pleased to provide my final comments on the prohibition or limitation of *ex parte* communications during agency proceedings. I do so in furtherance of my responsibilities as a member of the *Ex Parte* Subcommittee of the Administrative Law Advisory Committee, a general representative of the regulated business community on the Administrative Law Advisory Committee, and as President of the Virginia Manufacturers Association. Having voted **against** reporting the *ex parte* bill to the Code Commission, I ask that these comments be made part of the record as a dissenting report and distributed to the Commission along with the majority report.

## Overview

At the meeting of the *Ex Parte* Communication Subcommittee on August 26th, and again at our meeting of the full Committee on October 9th, I described my concluding position as the end of a "circular journey." Almost four years ago, when the issue of *ex parte* communication was first brought before the General Assembly (and before the creation of the ALAC), I questioned -- on behalf of the manufacturers of Virginia -- the need for legislation in this area, and opposed any legislative "fix" to a "problem" which I then believed to be non-existent. For the reasons stated below, and following a lengthy review by the Subcommittee, I return to my conclusion that the proposed *ex parte* legislation is, indeed, **unnecessary, unwise and unwarranted**.

## The Threshold Question

Any serious review of "reform" legislation should, in my view, begin with a threshold determination of specific need for change. The fundamental first question then follows: **is there a compelling reason -- or even widespread support -- for recommending a legislative prohibition of *ex parte* communications in non-judicial agency processes?**

I conclude the answer is **"no,"** and my reasons follow:

## Demonstration of Need

Are there real problems in Virginia caused by *ex parte* communications during agency proceedings in Virginia? The record before the Subcommittee **does not provide evidence of any significant problems in current practice.** As the result of a formal invitation for the public to provide views to the Subcommittee on July 31, 1996, only three persons appeared to testify,[1] and several others submitted written comments.[2] Of these, I find, at best, only two calls for specific *ex parte* legislation: To the extent that other frustrations were described, I am not persuaded that they embrace the subject before this Committee.

On the other hand, in the course of subcommittee review, serious and ongoing concerns that the proposed legislation is unnecessary have been raised by businesses and state agencies, as included in written comments and discussions with the subcommittee. In addition, speakers and participants at the Administrative Law Conference on May 21, 1996, focusing on the topic "Communication Between Agency Decision Makers and Advocates," raised other important questions regarding the need for legislation.

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[1]Three speakers offered comments: (1) Mr. Schmidt of the Department of Medical Assistance Services, who stated that the *ex parte* policies proposed in SB 479 "are unnecessary," (2) Mr. Conrad, a concerned "private citizen," who spoke of the general "need for open government," and (3) Ms. Marilyn Eichelberger, a supervisor in King George County, who shared her frustration in receiving copies of County landfill permits.

[2]Written comments were received from others, including (1) William M. Hackworth, York County Attorney, complaining of an appeals process before the State Building Code Technical Review Board; (1) former State Senator Robert L. Calhoun, who endorsed the idea of reform; (3) Henry Murden, Clerk of Circuit Court, Suffolk, favoring *ex parte* prohibitions for hearings and appeals only; (4) Roy A Hoagland, Chesapeake Bay Foundation, strongly favoring restrictions, (5) Warren Smith, Director of the Department of Housing and Community Development, who stated that existing informal rules "have proved adequate to the task."

This very thin call for reform should give us pause. As one agency put it, **"existing informal rules, the provisions of the Administrative Process Act, and the Supreme Court's rule binding hearing officers have proved adequate to the task."**[3] Without a compelling record of abuse which would justify scrapping current practices, I believe it inappropriate to substantiate a new and uncertain regulatory process.

## Chilling Effect

Obviously, the regulated community I represent has embraced neither a "need," nor any "fix" proposed. We simply find no evidence that this legislation would improve current practice. In fact, the opposite result is likely. It is clear that the **potential "chilling" effect of the changes proposed within the business community is very real**, widespread and of great potential harm to the informal flow of information between agencies and regulated entities. It is worth noting again that an early and basic premise of the Subcommittee was the recognition that informational flow is an essential element in the administrative process[4]. Moving forward ignores the likelihood that this legislation is inconsistent with that starting premise.

## A Can of Worms Opened

Over months of analysis and discussion, and at virtually every turn in our deliberations, the Subcommittee seemed to open up new and, in my view at least, very worrisome questions. That process has convinced me that progressing this legislation will leave us vulnerable to serious unwanted and probably unanticipated results. These consequences are above and beyond the "chilling" of free exchange of information which is, again, essential to the workings of public/agency activity.[5]

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[3]Testimony of Warren C. Smith, Director, Department of Housing and Community Development, August 7, 1996.

[4]As the Report of the Ex Parte Subcommittee of December 14, 1995 put it, the "free flow of information between administrative agencies and the public and those who are regulated by the agencies is usually desirable, both when an agency acts in its legislative capacity through adoption of regulations and when an agency acts in its adjudicatory capacity."

[5]Mr. Woltmann, sitting *ex officio* on the Subcommittee has provided to the Subcommittee a series of detailed concerns. See e.g., Woltmann letters of September 10, 1996, and others.

Among the most serious basic issues is this: The term "*ex parte*" communication is a legal term of art. It is an idea traditionally confined to adversarial proceedings, and generally accepted as a rule against one party contacting a decision maker in the absence of another party. By expanding the proposed rule to include non-parties (other interested persons), the Committee has gone far beyond the scope of an *ex parte* rule[6] -- and deep into an unknown abyss.

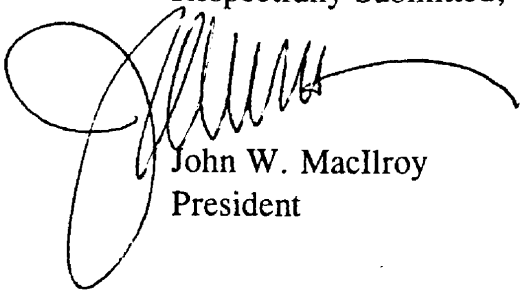
**In short, we have taken a rule, understood and accepted in the judicial process, and twisted its meaning beyond reason or practical application.** Prohibitions against *ex parte* communications are rooted in judicial proceedings. Whenever there is an adversarial proceeding before a court, neither party to that adversarial proceeding is permitted an *ex parte* communication with the judge. That is clearly sound practice, but it is one which **simply does not translate well into the administrative arena.**

Administrative agencies perform very different functions. An agency will act as a legislative body in promulgating regulations, it will act as an administrative body when issuing and enforcing licenses and permits, and it will act in a quasi-judical capacity when deciding if there is a violation of law, regulation, license or permit. The proposed legislation **simply does not make an adequate distinction between these responsibilities.**[7]

## Conclusion

This is unnecessary legislation, with the potential for great mischief. It is, in my view, simply a solution in search of a problem. Senate Bill 479, even as modified and recommended to the Code Commission, does not carry my support.

Respectfully Submitted,



John W. MacIlroy
President

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[6]If, for example, someone is seeking a permit or license, the state (acting on behalf of the citizen and for the public good) makes a determination to issue -- or not issue -- that permit or license in accordance with the law and regulations. These are not, and should not be considered, adversarial proceedings.

[7]See Woltmann comments, September 5, 1996.