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Opinion No. 09-02

Ex Parte Communications in Municipal Administrative Proceedings

QUESTIONS

1. Are there any constitutional or other legal restrictions that would preclude the members of a municipal legislative body from discussing an increase in fees charged by the city for use of its wastewater treatment plant with industries or individuals affected by the fee increase while there is a pending appeal of the fee increase, which may eventually be heard by that body pursuant to a local ordinance?

2. If city council members are permitted to discuss the fee increase with industries or individuals affected by the fee increase, while there is a pending appeal challenging the fee increase before the city's Director of Utilities which could be appealed to the city council, should city council members who engage in such discussions be disqualified from participating in a hearing if the matter is appealed to the city council?

3. If city council members are not permitted to discuss the fee increase with industries affected by the increase while there is a pending appeal challenging the fee increase, must an industry affected by the fee increase give up its procedural due process right to a hearing in order to discuss the fee increase with city council members?

OPINIONS

1. In hearing a legal challenge to a wastewater fee increase, the members of the city council would be functioning in an administrative or quasi-judicial capacity. Once a challenge to the fee increase is pending, if any city council member discusses the fee increase with a party to the proceeding, or with industries or individuals affected by the increase, such ex parte communications may violate principles of procedural due process protected by the United States and Tennessee Constitutions.

2. Once a legal challenge to a fee increase is pending, city council members should avoid discussing the increase with a party to the proceeding, or with affected industries or individuals. If such ex parte communications occur inadvertently or unavoidably, a council member may prevent a procedural due process violation by disclosing the full nature and extent of any ex parte communications on the record at the beginning of the hearing and not relying on such ex parte communications in making a decision at the hearing.

3. Industries affected by the wastewater fee increase who discuss the increase with city council members do not give up their right to pursue a legal challenge to the increase and seek a hearing. But once an industry member has initiated a challenge to the increase, neither the industry/party nor any industry affected by the increase should have ex parte communications about the increase with any city council member. Such communications could so prejudice the proceeding as to be held to violate procedural due process protections.

ANALYSIS

1. There may be a violation of constitutional procedural due process if city council members participate in a hearing in which a city fee is challenged if such members have previously discussed the merits of this fee increase with a party to the proceeding, or with affected industries or individuals prior to the hearing. Article I, Section 8, of the Tennessee Constitution¹ contains the same protection of due process as is provided in the Fourteenth Amendment to the United States Constitution.² *Lynch v. City of Jellico*, 205 S.W.3d 384, 391 (Tenn. 2006) (citing *Willis v. Tenn. Dep't of Corr.*, 113 S.W.3d 706, 711 n. 4 (Tenn. 2003)). Due process “requires the opportunity of the party charged to be heard at a meaningful time and in a meaningful manner, before an impartial tribunal.” *Cooper v. Williamson County Bd. Educ.*, 803 S.W.2d 200, 202 (Tenn. 1990) (citations omitted). Due process also “demands an appearance of fairness and the absence of probability of outside influence on the adjudication.” *Martin v. Sizemore*, 78 S.W.3d 249, 264 (Tenn. Ct. App. 2001) (citing *Utica Packing Co. v. Block*, 781 F.2d 71, 77-78 (6th Cir. 1986)).

In reviewing the actions of municipal bodies, such as city councils, a court must first determine if the municipal body is acting in an administrative, meaning quasi-judicial or judicial, capacity or in a legislative capacity. See *Riverbluff Cooperative v. City of Memphis*, C.A. No. 02A01-9805-CH-00128, 1998 WL 414921 at *6 (Tenn. Ct. App. 1998). In making this decision, a court should review the city’s action to determine if it makes new law, in which case it would be legislative in nature, or applies existing law, in which case it would be considered administrative or quasi-judicial in nature. See *McCallen v. City of Memphis*, 786 S.W.2d 633, 639 (Tenn. 1990) (when city council is applying pre-existing legal standards in a proceeding, it is acting in an administrative or quasi-judicial capacity because its authority is limited and it must use reasonable discretion in making a decision). If the action is an administrative proceeding, then the protections of procedural due process attach to the proceeding. *Sizemore*, 78 S.W.3d at 263. An example of an administrative or judicial decision by a city council would be the actions of a local zoning appeals board based on a record of evidence before such board. See *Fallin v. Knox County Bd. of Comm’rs*, 656 S.W.2d 338, 342 (Tenn. 1983). On the other hand, the enactment of ordinances and the amendment of zoning regulations are considered legislative actions and usually are not accompanied by a record of evidence. *Id.*

¹ It provides that “no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land.” Tenn. Const. art. I, § 8.

² The Fourteenth Amendment to United States Constitution provides in part that no state shall “deprive any person of life, liberty, or property without due process of law.” U.S. Const. amend. XIV, § 1.

Turning to the facts presented in this opinion request, an industry, which has been affected by a municipality's fee increase for use of its wastewater treatment plant, has requested a hearing before the city's Director of Utilities pursuant to a local ordinance in order to challenge the fee increase. This city ordinance allows for a person to challenge the actions of the city with regards to water and sewage use matters to the director of the city's utility department. The ordinance also provides that a person has the right to appeal an adverse decision of the director to the city council. The request does not describe the basis for the appeal. To a large extent, adoption of an ordinance is a legislative decision. This Office assumes that the appeal presents a legal challenge to the increase as applied to the industry funding the appeal, or to the manner of enactment or form of the fee increase.

If the affected industry appeals an adverse decision of the director to the city council, it is likely that a court would consider the council to be acting in an administrative or quasi-judicial capacity at this hearing. Like the city council in *McCallen*, the city council in question here would be required to use its reasonable discretion based on an existing municipal ordinance, which prescribes how fees for the wastewater treatment facility are calculated and assessed, to determine if the fee assessed against the appealing industry is justified. Therefore, it is likely that a reviewing court would find that the city council acts in an administrative or quasi-judicial capacity when it reviews the appeal from the director pursuant to the local ordinance.

Because the city council would be acting in a quasi-judicial capacity at such a hearing, it would be required to comply with procedural due process requirements including the right to a fair hearing before an *impartial* tribunal. If city council members speak to a party to the proceeding or to affected representatives of an industry or an affected individual about the fee increase, while a challenge to the fee increase is pending, these communications will likely be considered *ex parte* communications by a court reviewing the decision of the city council. An *ex parte* communication is defined as a "generally prohibited communication between counsel and the court when the opposing counsel is not present." *Worman Enterprises, Inc. v. Boone County Solid Waste Mgmt. Dist.*, 805 N.E.2d 369, 374-75 (Ind. 2004) (*quoting* Black's Law Dictionary 597 (7th ed. 1999)). Although this definition refers to communications to a court, reliance on *ex parte* communications by members of a decision-making body in quasi-judicial administrative hearing are also generally prohibited. *See id.* at 375 (citations omitted). The reason for this is that *ex parte* communications interfere with a party's due process rights "to hear and comment on all of the evidence considered in a case." *Id.* Courts have noted that *ex parte* communications can "shadow the impartiality, or at least the appearance of impartiality," during a hearing and "may, in some circumstances, constitute a deprivation of due process of law." *Gomes v. Univ. of Maine System*, 365 F.Supp.2d 6, 35 (D. Me. 2005) (*quoting* *Grieco v. Meachum*, 533 F.2d 713, 719 (1st Cir. 1976)), *cert. denied*, 429 U.S. 858, 97 S.Ct. 158, 50 L.Ed.2d 135 (1976), *overruled on other ground by* *Maine v. Moulton*, 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985).

In deciding whether *ex parte* communications are prejudicial enough to violate procedural due process, courts consider a number of factors including "1) the gravity of the contact; 2) whether the contact may have influenced the decision; 3) whether the party making the contact benefited from the decision; 4) whether the contents of the communications were unknown to the opposing parties, who had no opportunity to respond; and 5) whether vacation of the decision and remand for further proceedings would serve a useful purpose." *Gomes*, 365

F.Supp.2d at 35 (citing *Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Auth.*, 685 F.2d 547, 564-65 (D.C. Cir. 1982)).

These factors are exemplified by the ruling in *Honeycutt v. Civil Service Comm'n of Johnson City*, C.A. 181, 1988 WL 67165 (Tenn. Ct. App. 1988), wherein the court determined that ex parte communications prior to a quasi-judicial hearing were so prejudicial that they resulted in a violation of procedural due process. *Id.* at *4-5. In *Honeycutt*, a police officer requested a hearing before the city civil service commission to dispute the disciplinary sanctions which he received from the police department as a result of a physical altercation with an individual in the community. *Id.* at *2. Prior to the hearing taking place, the city, which was a party to the proceeding, provided a copy of the police department's disciplinary action report, which contained the city's most persuasive arguments about the case including a summary of the testimony of the individual alleged to have been assaulted by the police officer, to the civil service commission members thirty (30) days in advance of the hearing. *Id.* at *3. The hearing was eventually held, and, even though the individual allegedly assaulted by the police officer did not testify at the hearing, the commission upheld most of the sanctions imposed by the city upon the police officer. *Id.*

In reviewing the decision of the commission, the court held that the police officer had been denied due process of law during the hearing because the commission had received the disciplinary action report in advance of the hearing. *Id.* at *4. The court reasoned that the receipt of such a report, which the court characterized as "partisan advocacy" on the part of the city, prior to the hearing violated the due process rights of the police officer because it destroyed the impartiality or appearance of impartiality of the commission. *Id.* at *4-5. The court also found that the due process rights of the police officer had been violated because two commission members admitted to receiving other ex parte communications from members of the community prior to the hearing and considered such communications in making a decision. *Id.* at *5. The court reasoned that the reliance on these ex parte communications violated due process because the police officer never had the opportunity to rebut the substance of the ex parte communications at the hearing. *Id.*

Thus, if city council members engage in ex parte communications with a party, or with industries or individuals affected by the fee increase, while a legal challenge to the increase is pending, a court may find, like the court in *Honeycutt*, procedural due process violations because the ex parte communications were so prejudicial that they destroyed the impartiality of the city council's hearing.

2. Once a legal challenge to the fee increase is pending, city council members should avoid discussing the increase with a party to the proceeding, or with affected industries or individuals. If city council members are unable to avoid discussing the fee increase or inadvertently discuss the fee increase with a party or an affected constituent, the council member may avoid a procedural due process violation by disclosing the full nature and extent of any ex parte communications on the record at the beginning of the hearing and not relying on such ex parte communications in making a decision at the hearing. The reason disclosure of ex parte communications is important is because it "prevents the appearance of impropriety from secret communications in a proceeding that is required to be decided on the record" and because

disclosure gives the other party the opportunity to rebut the substance of the ex parte communication. *See Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Auth.*, 685 F.2d 547, 563 (D.C. Cir. 1982) (construing section 557(d) of Administrative Procedures Act, 5 U.S.C. § 557(d) (2000)).

Just as it is important to disclose the full nature and extent of any ex parte communications, it is also important for the city council members not to rely on any ex parte communications in making a decision on the merits at the hearing. If there is no reliance on the ex parte communication, a court may find that even if ex parte communications occurred they did not prejudice the party raising the due process challenge as the record would indicate no reliance on the ex parte communication by the council member. *See Wright v. Tenn. Bd. Exam'rs in Psychology*, No. M2003-01654-COA-R3-CV, 2004 WL 3008881 at *11 (Tenn. Ct. App. 2004) (“the party claiming bias as a result of ex parte communications must prove both the existence and content of the alleged communication, and the record may negate any claim of bias in the decision maker”) (citations omitted). *See also Waste Management of Illinois, Inc. v. Pollution Control Bd*, 175 Ill. App.3d 1023, 1043 (Ill. App. Ct. (1988) (“although personal ex parte communications to county board members in their adjudicative role are improper, there must be a showing that the complaining party suffered prejudice from these contacts”) (citations omitted).

3. Industries affected by the wastewater fee increase who discuss the increase with city council members do not give up their right to pursue a legal challenge to the increase and seek a hearing. But once an industry member has initiated a challenge to the increase, neither the industry/party nor any industry affected by the fee increase should have ex parte communications about the increase with any city council member. As discussed above, such communications could so prejudice the proceeding as to be held to violate procedural due process requirements protected by the state and federal constitutions.

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