



CITY OF RAPID CITY

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MEMORANDUM

TO: Mayor & City Council

FROM: Joel P. Landeen, City Attorney

DATE: 1/29/2017

RE: Proposed Due Process Policy for Rapid City

Mr. Freytag is requesting that the City adopt by ordinance a formal policy regarding due process in quasi-judicial proceedings conducted by the City of Rapid City. Due process is a legal concept that requires the government provide a fair proceeding before depriving an individual citizen of a protected right (i.e. property rights or the persons freedom). In particular the ordinance focuses on ex parte communications. Ex parte communications are conversations with decision makers which occur outside of a formal hearing where only one of the interested parties to a matter participates in the communication. The problem with ex parte communications is that if a decision maker engages in conversations regarding a matter which may influence their ultimate decision on an item under consideration without the participation of all of the interested parties, the parties not included in the conversation have no notice or opportunity to address or respond to the substance of that communication. Before I go any further, I think it is important to note that there are already federal & state laws in place which are applicable to the City and protect citizens' due process rights and would restrict ex parte communications. At the request of the Mayor, I have worked with Mr. Freytag to draft this ordinance. At this time, we have agreed on a majority of the ordinance language. The only difference remaining between our drafts is that Mr. Freytag's proposed ordinance requires that a decision maker who engages in ex parte communications is automatically excluded from participating any further in the proceedings on the matter in which the communication occurs. In my draft the policy does not automatically mandate that a decision maker not participate in the process as long as they disclose the fact the communication occurred and the substance of the communication. As I understand Mr. Freytag's rationale, the best way to ensure compliance with the policy against ex parte communications is to make a clear rule requiring automatic disqualification for a violation of the policy. While I believe the policy supported by Mr. Freytag would be legally permissible, it would be on the restrictive end of the spectrum for due process policies. Mr. Freytag would point to the language

in the decisions of the South Dakota Supreme Court which he has referenced in his memo as support for his position. The ordinance I have proposed follows a less restrictive approach in line with state statute. The state statute dealing with ex parte communications in South Dakota is SDCL 6-1-20. SDCL 6-1-20 states the following:

Formal rules of procedure and evidence not applicable to public hearing or meeting on quasi-judicial matter--Public disclosure of evidence. Any public hearing or meeting conducted by an elected or appointed municipal, county, or township officer regarding a quasi-judicial matter as defined in subdivision 1-32-1(10) may be conducted informally to secure the information required to make a decision. The formal rules of procedure and evidence do not apply to the conduct of the public hearing or meeting. If an officer relies upon any evidence not produced at a public hearing or meeting, the officer shall disclose the evidence publicly and include the information in the public record to afford all parties an opportunity to respond or participate. Failure to make this disclosure may be grounds for the municipal, county, or township officer's disqualification for that particular decision, pursuant to the grounds for disqualification pursuant to § 6-1-21.

Since the prohibition against ex parte communications is based on the idea that an opposing party would not have adequate notice or opportunity to respond to ex parte communications, the draft I have proposed addresses that issue by requiring disclosure of the communication and its substance so all interested parties can address it consistent with state law. The benefit of this approach is that it encourages disclosure of ex parte communications and provides an opportunity to rectify the situation. I am concerned that Mr. Freytag's proposal would encourage decision makers to not disclose ex parte contacts or communications. I would acknowledge that the disadvantage of my proposal (and state law) is that if ex parte communications are disclosed a party that is ultimately unhappy with the result of the proceeding could argue you cannot unring the bell and would have a clear basis to mount a legal challenge to the final decision in question.