



## RECOMMENDED PRACTICES FOR COMMUNICATIONS – BOARD MEMBERS

The boards encourage public participation in the performance of their duties and responsibilities. As government entities, citizen boards are required to follow the procedures set forth in both the general laws creating and defining their authority as well as the Administrative Process Act to ensure a fair process that comports with constitutional requirements for due process and the Governor's Executive Order on the Development and Review of State Regulations (EO 14 amended July 16, 2018). Boards also must satisfy the requirements of the Freedom of Information Act, which ensures that their actions are taken through an open process that comports with the requirements for an open government, and the State and Local Government Conflicts of Interest Act, which defines and prohibits inappropriate conduct.

Board actions are also governed by the procedural requirements of duly adopted regulations that establish notice requirements and timeframes for the public to provide comment to a board for its consideration.

Questions have been raised about contacts and communications with individual citizen board members regarding matters that are, or expected to be, before the board. There is a perception among some members of the public that they lack access to the board and that their comments may be filtered or not adequately relayed by DEQ staff. These concerns must be balanced against the need to protect the integrity of the process by ensuring that all board members have access to the same information prior to making a decision, that all board members have time to consider the information that is provided, and that all members of the public and all perspectives are treated equally throughout the process. This white paper provides a brief discussion of suggested best practices.

### GENERAL BACKGROUND

Citizen boards make decisions collegially, that is, it is the board as an entity that is the decision-maker. Communications to individual board members, outside of established processes create the risk that all members of the deciding entity are not equally aware of substantive information that has been provided with respect to a particular decision. Such practices also create the risk that affected persons, entities, and the public will be unaware of all that has been communicated and that underlies a particular decision. With respect to the boards' regulatory promulgation authorities and permitting authorities, Virginia law establishes specific procedures and periods for comment to be included in the record of the board's decision.<sup>1</sup> Establishment of specific time frames

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<sup>1</sup> See Va. Code §§ 10.1-1322.01; 62.1-44.15:02 requiring that in making a decision on a permitting action, the Board shall consider (i) the verbal and written comments received during the public comment period made part of

and processes for the acceptance of information on the record is consistent with the tenet that members of an administrative body cannot decide issues on personal knowledge, but must rely upon the evidence produced before them.<sup>2</sup> Although, rules of evidence in administrative proceedings may be less strict than in formal proceedings, best practices should ensure maintenance of this principle. Consideration of material outside of the rules of the proceeding may not always rise to the level that would void a board's decision, but it could make the decision voidable and at a minimum serve to undermine the integrity of the process and the decision in a particular matter.<sup>3</sup> The boards' current policies attempt to protect the process for establishing a record on which the board's decision is based and ensuring integrity of the process while balancing a need for flexibility under certain conditions. Specifically board policies have noted the expectation that comments and information on a regulatory action or pending case decision will be submitted within the comment period established in law and/or regulation, but if new information becomes available after the close of the comment period, there is a process for ensuring that the new information is appropriately distributed and considered.

## BEST PRACTICES

- Board members should not engage in communications regarding matters before, or expected to be, before the board and should advise people interested in sharing information that to ensure their information is included in the agency record they should use the established processes for commenting on matters before the board; i.e., to submit their information to the appropriate DEQ staff listed in the notice before the close of the comment period. This applies to all members of the public; e.g., individual citizens, organizations, applicants, and regulated entities.
- In addition to the summary of comments provided by DEQ staff, DEQ staff will make written comments submitted through the established processes and within the public comment period on a particular matter available to every board member in advance of the board meeting at which action will be taken. This is in addition to the opportunity for persons that provided comment to the board to address the adequacy of the summary of comments provided to the board by the DEQ staff at the time a matter is presented to the board for final action.

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the record, (ii) any explanation of comments previously received during the public comment period made at the Board meeting, (iii) the comments and recommendation of the Department, and (iv) the agency files.

<sup>2</sup> Johnston-Willis Ltd. v. Kenley, 6 Va. App. 231 (1988); Skyline Swannanoa, Inc. v. Nelson County, 186 Va. 878, 886 (1947).

<sup>3</sup> See Loudoun Hospital Center v. Stroube, 50 Va. App. 468 (2007); See also In re City of Virginia Beach, 42 F.3d 881, 884-85 (4th Cir. 1994) (referring to ex parte contacts as being among the things that "taint" agency proceedings and may constitute a fundamental infirmity in agency proceedings); see also Professional Air Traffic Controllers Org. v. FLRA, 685 F.2d 547 (D.C. Cir. 1982).

- If an individual board member chooses to engage in communications regarding matters before, or expected to be, before the board, the board member should handle and respond to all communications received in the same manner, regardless of the source of the communication.
- If an individual board member chooses to engage in communications regarding matters before, or expected to be, before the board outside of the established processes, but during a public comment period, best practices would require that the board member notify the appropriate DEQ staff and share any written information provided to them so that it may be shared with the other board members and made a matter of public record to preserve the integrity of the board's decision-making process and correct the potential "defect" in the public record.<sup>4</sup> If the information shared with the board members is verbal, then the board member should reduce the information to writing and provide it to the appropriate DEQ staff so that it may be shared with the other board members and made a matter of public record to preserve the integrity of the board's decision-making process and correct the potential "defect" in the public record.

If public comment has closed, the board member should advise the person that the public comment period has closed and be prepared to disclose the occurrence on the record at the board meeting, including a brief discussion of the matters discussed.

- Communications received and provided to DEQ staff during the public comment period will be included in the official public comment file on the matter.
- Communications received outside of the official public comment period will not be made part of the official public comment file.
- In rare instances, new information may become available after the close of the public comment period. To provide consideration of and ensure the appropriate review of this new information, persons who commented during the prior public comment period should submit the new information to DEQ staff at least 10 days prior to the board meeting on the matter.
- Most of the boards' activities, including the promulgation of regulations and the issuance of permits, are conducted through informal fact-finding proceedings.

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<sup>4</sup> There is limited case law regarding ex parte communications in informal proceedings in Virginia. Among the limited case law is Loudoun Hospital Center v. Stroube, 50 Va. App 468 (2007), where the Court of Appeals ultimately determined that a prior remand of the case coupled with disclosure of suspect contacts and the opportunity for affected parties to address those contacts could serve as a "cure" for any defect in the underlying decision associated with those communications. Of particular relevance to this discussion is the reason for that remand by the Circuit Court back to the state agency. Specifically the court was concerned by the discovery of e-mail correspondence received and responded to by the State Health Commissioner prior to closing the record which was not made part of the official record and not made available to other affected parties which the court determined was contrary to both the Administrative Process Act and the applicable general laws.

On the rare occasion when a board may hold a formal proceeding, on a permit or other case decision, pursuant to Virginia Code § 2.2-4020, the prohibitions and requirements of Virginia Code § 2.2-4024.2 as they apply to ex parte communications must be observed. Formal proceedings on the promulgation of regulations is provided for in Virginia Code § 2.2-4009 and while not subject to the provisions of Virginia Code § 2.2-4024.2, communications outside the established procedures would be considered ex parte communications.