

CLARK COALITION

PO Box 596 | Winchester, KY 40392

In re: Ex Parte Communications

November 16th, 2020

Dear Chairman Wheeler and Planning Commissioners,

We are writing on behalf of the Clark Coalition, an organization dedicated to promoting smart-growth, sustainable economic development, and government transparency in Winchester-Clark County.

We are concerned about the assertions made during the November 10th, 2020 Planning Commission meeting, regarding *ex parte* communications—namely instructions given to the Planning Commissioners not to individually discuss the issue of industrial solar with members of the public.

The question of whether to permit industrial solar in Winchester-Clark County—either through the introduction of an ordinance or as a matter of policy in a Comprehensive Plan update process—is a *legislative* matter of countywide import.

As such, Kentucky law permits and encourages community members to meet with their appointed and elected public officials—individually and/or outside of formal meetings (*ex parte*)—to generally discuss all aspects of such issues. Indeed, the Courts celebrate *ex parte* dialogue as essential to our democratic process and good government.

Specifically, case law allows and supports *ex-parte* communications on legislative questions. There are multiple cases where Kentucky courts have addressed situations in which someone opposing a Planning Commission’s action, argued that it was “tainted” by an *ex parte* contact with an interested party.

One court noted the lack of authority on that issue, and indicated that the contact must be such as to make the decision “so tainted as to make it unfair either to the innocent part or to the public interest.” Houghman v. LFUCG, 29 S.W.3d 370, 373 (Ky. App. 1999), as modified (Jan. 14, 2000) (citing Louisville Gas & Electric v. Com., 862 S.W.2d 897, 901 (Ky. 1993)). Quoting from Louisville Gas & Elec, the Court held:

[t]he members of the Council are elected officials and cannot isolate themselves from the people they represent. There is no evidence in the record that any Council members made improper statements or promises in their dealings with constituents. There is no indication that the contacts at issue tainted the decision making process so as to make it unfair to the parties or contrary to the public interest. The facts of this case clearly do not reach the level of *ex parte* contacts which would require the Council’s decision to be voided.”

The Houghman Court was similarly unconcerned with the *ex parte* contact that had occurred in that case: “We agree with the trial court that **members of the council do not live in a vacuum nor are they required to. They are elected officials who represent the community and will be subjected from time to time to contact from constituents concerning issues, upon which they must ultimately decide.**” *Id.*

And in Cunningham v. City of Florence, 2010 WL 2976935 (Ky. App. 2010), some opponents of a zone change argued that the Planning Commission inappropriately engaged in *ex parte* contact with the petitioning party. The Court disagreed:

Moreover, there is no indication that Helmer’s contacts with the City or subdivision residents were improper. “**As rezoning is a legislative function, judicial concepts, like impartial tribunal and prohibition of *ex parte* contacts with the decision makers, do not apply....** Only bias or

CLARK COALITION

prejudicial conduct that demonstrates malice, fraud, corruption, conflicts of interest, or blatant favoritism, are considered arbitrary in zoning actions.” Hume v. Franklin County Fiscal Court, 276 S.W.3d 748, 752 (Ky.2008) (internal citation omitted).

Cunningham v. City of Florence, 2009-CA-001105-MR, 2010 WL 2976935, at *6 (Ky. App. July 30, 2010), *aff'd sub nom. Cunningham v. Whalen*, 373 S.W.3d 438 (Ky. 2012)

Accordingly, it is both legally inappropriate and disingenuous for our officials to deny individual meetings with Clark County citizens about the question of industrial solar. To do so, sabotages the legislative process, the policies it generates, and ultimately our future.

The Clark Coalition will continue to be a constructive and informed participant on the question of industrial solar in Winchester-Clark County moving forward.

Thank you Chairman Wheeler and Planning Commission members for your leadership and dedication to our community.

Respectfully submitted,

L. Edwin Gilkison
Chair, Clark Coalition

Will Mayer
Executive Director
Clark Coalition

Mark Mayer
Director, Clark Coalition

Deborah Garrison
Director, Clark Coalition

cc: Mayor Ed Burtner
Judge Executive Chris Pace
Winchester City Commission
Clark County Fiscal Court
William Dykeman, Winchester City Attorney
William Elkins, Clark County Attorney