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## **The Planning Commissioner as Judge**

*By Ted Hunter and Jim Driscoll, as reprinted with permission from **The Commissioner**, a publication of the American Planning Association*

The planning commissioner is expected to be like a judge: beyond error, above reproach, and within the law. Courts demand that commissioners make decisions based on broad unwritten rules referred to as "procedural due process." If these rules are not followed, courts have found that cities (and in some situations, the individual decision maker) must pay monetary damages to anyone who has been harmed. This article reviews procedural due process and provides guidance for "quasi-judicial proceedings." It does not apply to legislative decisions.

### **Is it a "Quasi-Judicial" Proceeding?**

First, does a land-use decision require a quasi-judicial proceeding? Only in a quasi-judicial proceeding must the decision-making body follow strict procedural requirements, and the local official must sit as a judge rather than a legislator. To determine whether an action is quasi-judicial, ask yourself two questions:

*Is a public hearing required by state statute or local ordinance? Will the decision maker consider evidence for or against the proposal?* If the answer to either is "no," then the proceeding is legislative in nature. Procedural requirements do not apply to legislative matters. However, if the answer is "yes," then ask:

*Will the decision impact specific parties or will it have an area-wide impact of community significance?* If the answer is "specific parties," the proceeding is clearly quasi-judicial. If the answer is "area-wide," it is probably legislative. Most land-use permit requests affect specific parties and are quasi-judicial. Generally, the only type of land-use requests that are not quasi-judicial are area-wide rezones and area-wide annexations. When in doubt, the wisest choice is to treat the proceeding as a quasi-judicial proceeding. There is no liability for treating any proceeding as quasi-judicial.

## **What is "Procedural Due Process"?**

If a quasi-judicial proceeding is required, certain "procedural due process" elements must be satisfied. Procedural due process is the legal method used to reach a decision on a land-use request. It encompasses everything from the initial application filing to the final decision.

The requirement for "due process" in quasi-judicial proceedings is based on guarantees in the federal and state constitutions that prohibit government from depriving a person of "life, liberty or property without due process of law." Due process has both substantive elements (not covered in this article) and procedural elements.

For land-use hearings, procedural due process includes the following:

- Appearance of fairness for decision makers.
- Proper notice of the hearing.
- A proper hearing process.
- A complete record.
- A decision that meets legal requirements and is based on the record.

Prior to the quasi-judicial hearing, the presiding planning official must review the procedural due process requirements with the city attorney and other members of the decision-making body. This should be part of your community's basic planning commissioner training program.

## **Five Key Elements of Procedural Due Process**

*Ensuring Fairness.* "Fairness" exists in a public hearing when all the participants are given an opportunity to present testimony and evidence to an unbiased decision maker. If fairness is absent, the entire process and decision are suspect. Common sense often defines what constitutes fairness, but it cannot be used as a solid legal foundation to support a council's actions. Legal principles involving fairness have been established.

Courts require that proceedings must be fair in process and in appearance. Thus, even without a direct conflict of interest, a commissioner may be prohibited from hearing and voting if there is an appearance that he or she cannot act in a fair manner. The most important issues of fairness involve relationships between a decision maker and a person who may benefit from a decision.

A second issue involves how open the communication has been between a decision maker and such persons. Always check your state laws both local statutes and legal precedents to determine what specific rules apply to the appearance of fairness. Answering this question also provides a good guiding principle: "Would a fair-minded person in attendance at this hearing say that everyone was heard who should have been heard, and that the decision maker was impartial and free of outside influences?"

If this question can be answered with a truthful, emphatic "yes," then you are acting fairly.

*Providing Notice.* An important element of the land-use hearing process is the notice of pending action. Notice provides advance warning to parties so that they can intelligently prepare for and participate in the hearing. Notice requirements are established by state statutes and local ordinances be familiar with them and keep them at hand in a hearing. If it is apparent prior to the start of a hearing that improper or inadequate notice has been given, the presiding officer must decide whether to begin the hearing or postpone it in order to give proper notice. If the hearing has begun and improper notice becomes apparent, the hearing should be rescheduled (or adjourned and continued). Each permit request must be given proper notice.

A helpful tool for determining if proper notice has been given is a "Certification of Public Notice." This document can be submitted by the planning department to establish when notice was given, the manner in which it was given, and to whom it was given. With this document as part of the record, the burden of showing that notice was not properly given is on the party making such a claim.

*Holding a Fair Hearing.* A land-use hearing allows the facts of a case to be presented in a manner that will assist the decision maker in making a fair, legal, and complete decision. The hearing must be conducted in a controlled environment that allows all parties and views an opportunity to present testimony and evidence. Although not as formal as a trial, the hearing is a fact-finding forum and the decision must be based on the evidence presented at the hearing.

### **A Controlled Environment**

*Hearing Room:* Hearings should be held in a room or chamber that is comfortable and appropriate. Crowding can create a hostile atmosphere.

*Testimony:* Keep the testimony and evidence relevant to the issues. Rules of decorum apply. Speakers should identify themselves, testify only at a podium, and speak into a microphone. No one should shout from a seat. Tape all testimony and evidence. Unruly behavior, such as booing, hissing, harassing remarks, or other obnoxious behavior, cannot be an element of a hearing. If the instructions to cease rowdy behavior are ignored, the hearing should be halted until order is restored.

Because administrative hearings may be reviewed by the court, testimony should be given under oath or affirmation. This serves two purposes: it satisfies the legal requirement for testimony to be truthful and it is symbolic of the seriousness of the proceeding. If witnesses refer to written material other than their own writings, they should identify the author and the publication of the document. If witnesses submit anything in writing, the writing should be admitted as an exhibit.

*Agenda:* Begin the hearing with a brief explanation of the hearing guidelines, including a description of the procedures to be used. A good model for the procedural

agenda of a hearing is an introduction, followed by initial presentation of the facts, presentation by the applicant, and the decision of the decision maker.

### **Keeping the Record**

All land-use decisions must be based on the official record (testimony and exhibits) that is developed at the public hearing. Why?

- The record must provide the basis and support for the conclusion reached by the decision maker.
- Courts review and rely upon the official record to reach a decision on appeal. Courts will not take new testimony and evidence in reviewing a land-use decision.

The record consists of all oral testimony and physical exhibits presented at the hearing. No land-use decision can be based on material that is not contained within the record. Objections to exhibits should be allowed. The decision maker must then decide whether the exhibits should be admitted or not. The decision can be based on what a reasonable person would do. Exaggeration, snideness, sarcasm, or other unnecessary statements by decision makers should be avoided. Such comments could cause the reviewer of the record (i.e., the courts) to interpret the meaning in a manner different than intended.

### **Making the Decision**

When the record is complete and a decision is needed, the decision maker must apply the appropriate legal criteria for review of the requested land-use permit. These criteria are found in city ordinances or state statutes. For example, if a variance is requested, the decision maker should refer to the variance ordinance for the exact criteria that must be satisfied. If the criteria are satisfied, the permit must be approved, even if popular opinion is contrary. If the criteria are not satisfied, the permit cannot be approved.

The decision may be oral or written, but all decisions must be supported by written findings of fact. Findings of fact are statements of the facts, derived from the record of the hearing, that support the decision. The key information to be addressed in findings of fact is that which satisfies or does not satisfy the required legal criteria. A decision must also include written conclusions of law, which are statements of how the facts satisfy, or fail to satisfy, the legal criteria for the request. Findings of fact and conclusions of law must be precise and understandable.

A decision can be a denial, an approval, or an approval with conditions. Reasons for the decision should be stated. Any conditions imposed as part of the approval should be clear, complete, free of ambiguity, supported by the facts, and enforceable.

### **Conclusion**

A planning commissioner must prepare for hearings and decisions on land-use applications like a judge. The commissioner is responsible for ensuring fairness of all decision makers, providing proper notice, holding a fair hearing, keeping a complete record, and making a decision based on the evidence consistent with the law.

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