



# Quasi-Judicial Proceedings

## Basic Training & Best Practices

Sam Light, CIRSA General Counsel

CIRSA.org

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# Quasi-Judicial Proceedings

## Presentation Overview

- Introduction to the quasi-judicial role.
- Best practices for quasi-judicial hearings.
- Tips for good deliberations.
- Issues related to closing out the hearing process.
- Tips for avoiding trouble as a quasi-judge.
- Closing remarks.



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## Quasi-Judicial Proceedings

### The Quasi-Judicial Role

- As a local government official, your board, council or commission is sometimes required to make decisions affecting the protected property rights of a specific person or entity.
- For these proceedings, you are essentially called upon to act like a judge, and these are “quasi-judicial” matters. Why?
  - The Constitution! Due Process Clause: No person shall be deprived “of life, liberty or property, without due process of law.”
  - For quasi-judicial matters at the local government level, it is your duty to provide due process.
  - And, for quasi-judicial matters, the key is fundamental fairness.



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## Quasi-Judicial Proceedings

### The Quasi-Judicial Role

- The decision-makers for quasi-judicial matters—e.g., the City Council, Town Board, Planning Commission, Licensing Authority, etc.—are essentially acting as judges and therefore must behave like judges.
  - And, must act as judges throughout the process—before, during and after the hearing on the matter.
  - Recognize also that the quasi-judicial rules apply to any decision-makers in that process, even if they are not the final decision-makers.
    - For example, the rules apply to Planning Commissioners who are making a recommendation to the City Council or Town Board.



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## Quasi-Judicial Proceedings

### Contrasting Legislative and Quasi-Judicial Acts

- A Legislative Act:
  - Reflects public policy relating to matters of a permanent or general character.
  - Not normally restricted to particular individual or entity.
  - Affects the legal rights of specific individuals only in the abstract.
  - Prospective in nature.
- You're acting as "legislators" when you review and make general rules...
- But when you apply those general rules to specific persons and property, you are acting as quasi-judges.



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## Quasi-Judicial Proceedings

### Contrasting Legislative and Quasi-Judicial Acts

- A Quasi-Judicial Act:
  - Determines the rights of a specific person/entity in relation to a specific property interest (most often an interest relating to land or a license).
  - Is based on facts developed at a hearing to resolve the particular interest in question.
  - In this process, you as the quasi-judge hear the evidence and then apply the existing legal standards to the specific case.
- Similar to a judicial process, the keys to the quasi-judicial process are notice, a hearing, and a record-based decision made by a fair and impartial decision-maker--that's you!



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## Quasi-Judicial Proceedings

### Contrasting Legislative and Quasi-Judicial Acts

#### Legislative Acts

- Adoption of general health and safety ordinances
- Adoption of a master plan
- Adoption of general amendments to the subdivision, zoning or licensing ordinances
- Adoption of an annexation ordinance

#### Quasi-Judicial Acts

- Action on a proposed rezoning application
- Hearing on a proposed liquor license
- Disciplinary hearing to suspend or revoke a liquor license, business license or other protected license
- Subdivision or development hearing
- Others per state law or local code



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## Quasi-Judicial Proceedings

### Best Practices For Quasi-Judicial Hearings - Context

- In quasi-judicial proceedings, a fair hearing is critical to reaching a good decision and ultimately defending it.
- Generally, if your decision is legally challenged, your hearing is “the hearing” and reviewing judges don’t “retry” the case—rather, they base their decision upon a review of the record of what you did, including:
  - The procedures you used;
  - The evidence you considered; and
  - The reasons for your decision
- A reviewing judge will judge your conduct against the way he/she would behave as a judge – so keep the “judge” frame of mind in your approach to your handling of quasi-judicial matters.



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## Quasi-Judicial Proceedings

### Best Practices - Hearing Preparation

- Know what's quasi-judicial, and what quasi-judicial matters are upcoming.
- Get in the “judge” frame of mind early:
  - Stay neutral
  - Don't make prejudicial comments
  - Don't get involved outside the hearing; the matter will eventually be “ripe” for you to hear and decide
  - Avoid “ex-parte” discussions (more later)



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## Quasi-Judicial Proceedings

### Best Practices - Hearing Preparation

- Look to your packet:
  - It will likely include an overview of the application, a summary of the decision-making criteria you must use, and other materials
  - When reviewing the packet and getting ready for the hearing:
    - Think about the key issues and your questions for the hearing
    - Focus on the scope of the hearing—knowing what the hearing is “not about” is as important
    - Confirm you don't need to “sit this one out” because of a conflict of interest or other disqualifying circumstance



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## Quasi-Judicial Proceedings

### Best Practices – Start of the Hearing

- Have and use an opening statement/script:
  - This is an opportunity to explain what the hearing is about and how the hearing will proceed.
- Confirm there is proper notice.
- Call for disclosures: conflicts of interest, site visits, ex parte contacts.
- Deal with any other preliminary matters that may arise; e.g., recording or other tech issues; overflow crowd; whether parties are present, etc.



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## Quasi-Judicial Proceedings

### Best Practices – During the Hearing

- Follow uniform steps/rules of procedure for conducting the hearing – helpful to you and public.
  - Have a consistent flow and announce up front what it will be; e.g.:
    - Staff report
    - Applicant presentation
    - Public comment
    - Questions by the council / board
    - Closing remarks by applicant and staff
    - Deliberations
    - Action
- Let speakers know there will be time limits and enforce them. Use a sign-up sheet or sign-up cards for the hearing.



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## Quasi-Judicial Proceedings

### Best Practices – During the Hearing

- Use and expect civility.
- Avoid reactive, off-the-cuff and off-topics comments (applies to all settings/participants but particularly true for quasi-judicial hearings— can look (and be) bad on a transcript!)
- Be consistent in requiring recognition by the chair, and in use of question and comment opportunities.
- Have speakers speak from the podium & direct their comments to you.
- Have them give name and address for record. Have a consistent policy on whether you swear in speakers (and follow any local rule on this).



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## Quasi-Judicial Proceedings

### Best Practices – During the Hearing

- Chair: Recognize and exercise your prerogative to maintain order.
- Do not allow free-wheeling comments from the gallery and if grumbling in the audience gets too loud, restore order politely.
- If necessary, someone can call for a recess.
- Consider steps to manage the flow: e.g., don't engage or allow others to engage in free-wheeling "back-and-forth" during staff, applicant, or public comments; better to hold questions until a defined question period.
- Manage the record: Identify documents, don't let two people speak at once; etc.



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## Quasi-Judicial Proceedings

### Best Practices – During the Hearing

- Use opportunities to “recalibrate” if discussion is straying off topic/off task.
- Have plans for dealing with other testimony issues; e.g.,
  - Can a person during public comment directly “cross examine” the applicant?
  - Can other audience members question each other?
  - “Show of hands,” “I have a petition,” “I’d like to call in.”
  - Comments received after the hearing “is closed.”



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## Quasi-Judicial Proceedings

### Best Practices – During the Hearing

- Consider a reminder: “Please keep your comments brief so everyone will have a chance to speak. If your comments are the same as those of a prior speaker, please feel free to simply state you agree with the prior speaker.”
- Stay focused on the matter at hand and directly manage the crux issues to help get to the necessary and relevant information.
- Don’t stray the course for insistent questioners; instead, let them know they’ve been heard and move on. For example: “That is a good question, but this is your opportunity to make **comments** and provide **information**. I’ve noted your question and I think one of us may ask the [staff/applicant] to address your question during our question and answer period.”



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## Quasi-Judicial Proceedings

### Best Practices – Deliberations Matter!

- Once you've heard the staff and applicant presentations, heard public comment and asked your questions, it's time to deliberate.
- Discussion of the evidence is critical; this is where:
  - You as quasi-judges formulate the bases of your impending decision.
  - The applicant and others obtain an understanding of your position.
  - The reviewing judge looks to understand why you decided the matter as you did (and whether it comports with your criteria and the law).
- So Deliberate – Talk Amongst Yourselves! And chair, make sure every member has a chance to weigh in.



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## Quasi-Judicial Proceedings

### Best Practices – Deliberations Matter!

- Tips for good deliberations – back to the future (see slide 10):
  - Focus on the key issues.
  - Focus on the relevant decision-making criteria. Have the criteria at the ready and ask questions as needed (e.g. "Staff/Attorney, remind me, what is the rule that applies to this issue?")
  - Discuss the relevant evidence that has been presented to you.
  - Remember - when you are prepared to discuss the criteria, you will arrive at a discussion of the defensible reasons for your decision.
- Use the "Rule of Why".



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## Quasi-Judicial Proceedings

### Best Practices – Deliberations Matter!

#### The Rule of Why In Action:

Chair: “Thank you everyone for your comments on this rezoning request. Now’s the time for the Board to deliberate. Who would like to start the discussion?”

Member Sam: “I would, thank you Mr. Chair. I want to say we’ve heard a lot of persuasive testimony and I’m going to vote no.”

Member Tami: “Sam, may I ask: Why do you intend to vote no?”

Member Sam: “I’m voting no because it doesn’t meet our standards.”

Member Nile: “Sam, why doesn’t it meet our standards? I have concerns too that I’ll mention in my comments but if you’d tell me what standards concern you and why you think they aren’t met, that will help frame our discussions.”

Member Sam: Yes, I’d be happy too. I think the height limit is an issue because...”.



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## Quasi-Judicial Proceedings

### Taking Action & Closing the Proceedings

- While deliberating & getting ready to act, maintain focus on what is pending before you.
- Understand your options and work towards an option, which in hearings will commonly include:
  - Approve [or recommend approval], with or without conditions;
  - Deny [or recommend denial];
  - Continue for further consideration and/or action at a future date;
  - Other options under your local ordinances?



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## Quasi-Judicial Proceedings

### Taking Action & Closing the Proceedings

- Use a “decision document”—such as an ordinance, resolution or written motion—to make your decision. Your code or state law may dictate the type of document required (e.g., rezoning usually is by ordinance).
- If you’re making findings and/or revising the decision document, then:
  - Be clear but not overly specific.
  - Deal with findings and conditions one step at a time.
  - Consider directing staff to prepare a revised decision document for the next meeting; it can be confusing and difficult to “draft on the fly.”



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## Quasi-Judicial Proceedings

### Taking Action & Closing the Proceedings

- Be careful in your use of “conditions of approval.” Contentious hearings lend themselves to quasi-judges seeking to resolve difficult issues through conditions of approval. This is problematic where:
  - The condition is not based upon any established legislation;
  - Or is an attempt to regulate a matter over which you have no authority; or
  - The condition itself is vague or difficult to enforce.
- In difficult cases, avoid drafting conditions on the fly; have them drafted and/or reviewed by staff & counsel.



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## Quasi-Judicial Proceedings

### Taking Action & Closing the Proceedings

- Be cautious once you've voted on a matter:
  - Let your record and decision speak for itself.
  - Don't undermine the group decision even if you disagree, have regrets or were in the minority.
  - Don't re-open the matter, even at the same meeting, after it's done. If you feel there is a need to re-visit or change a decision, use proper channels only and recognize some decisions cannot be undone without liability.



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## Quasi-Judicial Proceedings

### Avoiding Trouble as a Quasi-Judge

- Fundamental fairness requires a fair, unbiased and impartial quasi-judge, both in fact and appearance.
- Land use decisions are not overturned because the reviewing judge didn't "like your decision"—legal rules are deferential to the substance of what the you decide.
- Rather, they more likely overturned because the quasi-judges—as a group or because of individual behavior—deprived the applicant or other participant of fundamental fairness.
- Therefore, individually and as a group, do the things that judges would do, and don't do the things that judges wouldn't do!



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## Quasi-Judicial Proceedings

### Avoiding Trouble as a Quasi-Judge

- Don't make up your mind before the hearing.
- Don't make prejudicial pre-hearing statements.
- Don't speak with one side or the other before a hearing (ex parte contacts).
- Don't participate if you have a financial or other personal interest in the matter (code of ethics).
- Don't sign any "pro" or "con" petitions.



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## Quasi-Judicial Proceedings

### Avoiding Trouble as a Quasi-Judge

- Don't make your decision on the basis of personal preferences, or irrelevant or non-existent criteria.
- Also, don't make your decision based on things you "know" but did not "learn" at the hearing – For example:
  - Don't get on the internet and offer your own evidence.
  - Don't offer evidence of your own experiences as the basis for your decision – Aren't you in essence saying "I'm voting for/against the application based on my own testimony?"
- Do ask for advice on criteria or application of criteria to facts.



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## Quasi-Judicial Proceedings

### Avoiding Trouble as a Quasi-Judge

- Don't participate in decision if you weren't there for the entire hearing (or didn't at least listen to the rest on tape).
- Discuss and consider quasi-judicial matters only at the duly notice public hearing; that is:
  - Wait until the matter has arrived on your agenda and is "ripe" for you to hear, deliberate and decide.
  - Don't engage in pre-hearing "buzz"—you get to make the ultimate decision and with that goes the responsibility to fair and unbiased.



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## Quasi-Judicial Proceedings

### Ex-Parte Communications

- A critical duty of the quasi-judge is to avoid "ex-parte" contacts, meaning any "outside the hearing" discussion with an interested party about the subject matter of the hearing. Examples:
  - Meeting with the applicant outside the hearing to discuss the pro/cons of the request and how you might decide the case.
  - E-mailing your fellow decision-makers before the hearing to persuade them why they should vote yes or no.
  - Attending meetings where folks for or against the application are discussing the application, even if you're not participating.
- If it were your application, would these activities seem fair to you?



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## Quasi-Judicial Proceedings

### Ex-Parte Communications

- A proceeding loaded with “ex-parte” contacts is a clear path to having your decision overturned and, as important, having the integrity of your process eroded.
- When we advise against ex-parte contacts, we are protecting your ability to participate in the decision-making, and your ultimate decision.
- An ex-parte contact can be problematic whether with the applicant, citizens, or in some instances, staff.
- Or, even in the hearing itself (i.e., no texting or e-mailing about the subject matter of the hearing within the hearing itself).



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## Quasi-Judicial Proceedings

### Ex-Parte Communications

- Arm yourself (and staff, arm your quasi-judges) with knowledge you need when persons want to talk about a pending quasi-judicial matter outside the hearing. Keep some “talking points” ready; e.g.:
  - “Thanks for your interest [or e-mail, etc.] but I can’t talk with you about this application outside the upcoming hearing. I’d like to hear your views but because this is a specific [property rights][licensing] case, I need to hear and consider the evidence only through our public hearing process. Please plan to attend the hearing if you can. If you can’t attend, you can send written comments to our staff and they’ll include those comments in hearing materials.”
- Consider having a short explanation, or “FAQs,” on the quasi-judicial process on your website.



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## Quasi-Judicial Proceedings

### Ex-Parte Communications

- Contrast – For general legislative and policy making discussions and matters, it is okay: to lobby (and be lobbied) outside the meeting; to base your decision on your own personal policy perspectives, and to base your decision on information obtained from most any source.
- But, for a quasi-judicial matter, it is not. Rather, just like a judge presiding over a trial, because of constitutional due process requirements, you must make your decision based on the evidence presented to you at the hearing, and you must base your decision upon legal standards, and you may not engage with interested parties about the case outside the hearing.



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## Quasi-Judicial Proceedings

### The Best Practice? Give Great Process!

- The most important job for quasi-judges to is provide great process!
- Therefore, respect, follow, and be a champion of the fair and due process that you are set up to provide. Avoid process flaws and other acts that can cast doubt or create a sense of unfairness.
- Know that ***if*** you've carried out your hearing fairly and properly, and ***if*** you've issued a decision that is based on your hearing record and on the applicable criteria, then your decision will withstand legal challenge....
- And interested parties and citizens will have faith and trust in how you handle quasi-judicial matters concerning their property. That's a great place to be!



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Liability Risk Management **HOTLINE**

Do you have questions about liability risks related to:

- [Employee Termination and Discipline Issues](#)
- [Personnel Policies or Personnel Management](#)
- [Public Works, Parks and Rec or Police Liability](#)
- [Conducting Quasi-Judicial Proceedings](#)
- [Zoning or Land Use Liability](#)
- [Drug Testing Policies](#)
- [Marijuana – Related Issues](#)

Call CIRSA's Liability Risk Management Hotline and Sam Light, CIRSA General Counsel, can assist. The Hotline is a free service to CIRSA Property/Casualty members to help you identify, manage and avoid potential claims, and assist with your municipal liability questions.

CONTACT THE LIABILITY RISK MANAGEMENT HOTLINE IF:

- you're considering taking an employment action that could lead to liability;
- you'd like a policy or contract document reviewed from CIRSA's liability risk management perspective;
- you'd like help identifying options for handling a potential claim situation;
- you need to get up-to-speed on a current municipal liability issue; or
- you just need to bounce an idea or issue off a neutral source.

Please Note: At CIRSA's discretion, a courtesy contact may be made by Cirsa to the member's chief administrative officer and/or legal counsel to inform them of any Hotline inquiry. The Hotline is not a substitute for legal advice from the member's municipal attorney.

**To make an inquiry**, or if you have questions, please contact General Counsel Sam Light at 720-605-8002 or 1-800-228-7136, or [saml@cirsa.org](mailto:saml@cirsa.org).

**SAFER TOGETHER**

**Thank you for your time and your public service!**

**CIRSA Liability Hotline**

**1-800-228-7136**

<https://www.cirsa.org/wp-content/uploads/2020/04/Liability-Hotline-2020.pdf>

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