



Doing Due Process Right – Practical Tips for Municipal Leaders

Presented by Sam Light, CIRSA General Counsel

Introduction

Presentation Overview

- Power to make land use, licensing and other “property rights” decisions at a local level is a significant, important and cherished power.
- And can be a source of claims/disputes/litigation. Given the significant risks in this area, including potential for federal constitutional claims, CIRSA and its members share a keen interest in reducing risks in this area.
- QJ training is one of our core services. We focus on “suggestions for success” in your role as quasi-judicial decisionmakers – best practices – which in turn will reduce risk for your City or Town and you individually.
- This presentation is a training resource only and not intended as legal advice. In case of any inconsistency between the presenter’s remarks and views of your City or Town Attorney...your Attorney’s views prevail!

Doing Due Process Right

The Quasi-Judicial Role

- As you know, the governing body often is acting as “legislators”—i.e., making general policies and rules that apply generally (for example, when working on general updates to the municipal code).
- But other times you act as “judges,” deciding specific cases where you apply the general rules to specific persons/property. For these “quasi-judicial” matters—which include many land use and licensing applications—municipal officials are called upon to essentially act as judges—and therefore must behave like judges.
- In this role municipal officials are required by law to provide “due process” and a failure to provide due process exposes you and your entity to liability.

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Legislative Acts

- Adoption of a general health/safety ordinance
- Approval of a master plan
- Adoption of general amendments to the zoning or licensing ordinances
- Annexation
- Adoption of tax

Quasi-Judicial Acts

- Rezoning
- Liquor licensing – new license, suspension or revocation of existing license
- Conditional or special review use request
- Certain subdivision and development applications
- Employment appeal hearing

Note: Determination of whether a matter is legislative or quasi-judicial depends in part on your entity's own ordinances – consult your entity's attorney.

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The Quasi-Judicial Role

- Quasi-judicial “rules of engagement” have a familiar source: “No person shall be...deprived of life, liberty, or property, without due process of law.”
- At the municipal level, for land use and other decisions affecting property rights, the governing body (and other QJ bodies) and its members are responsible for delivering the due process required by the Constitution.
- What are the key characteristics of a quasi-judicial process? Notice, a hearing, and a record-based decision made by a fair and impartial decision-maker—that’s you!
- All decision-makers in the process—those making recommendations and those making final decisions—must commit to providing due process. Each step in the process is a critical building block!

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Some Legal Context

“Quasi-judicial proceedings must be conducted in accordance with procedural due process. And, fundamental fairness is the cornerstone of due process.” –

Colorado Court of Appeals

- Thus, 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 your record, including:
 - The procedures you used;
 - The evidence you considered; and
 - The reasons for your decision.

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Some Legal Context

- And, quasi-judicial decisions aren't usually overturned because the judge didn't "like your decision."
- Rather, they more likely overturned because the quasi-judges either made an arbitrary decision or—as a group or because of individual behavior—deprived one or more participants of fundamental fairness.
- A reviewing judge will judge your conduct against the way he/she would behave as a judge – so keep the "judge" frame of mind when processing and conducting yourself in a quasi-judicial matter.
- And, individually and as a group...honor due process...do the things that judges would do, and don't do the things that judges wouldn't do!

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Some Practical Tips to Ensuring Fair Process

- 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, more in a moment).
- 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.
- Don't be a witness in your own hearing. Instead, have the parties provide you with information.

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Some Practical Tips to Ensuring Fair Process

- 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 decision but with that power comes the responsibility to be fair and unbiased and follow the QJ rules of engagement.
- Once your body has made its recommendation or decision, let the decision speak for itself and even if you held a minority view, recognize the member’s need to respect the body’s decision.

Real-Life Scenarios – What do You Think?

“We are in the middle of processing a very controversial application for a marijuana establishment. One of our decisionmakers has posted frequently to social media that he is adamantly opposed to marijuana establishments in our jurisdiction. Is this a due process concern? If so, what should he (or we) do?”

“We recently approved a controversial development and resolved the Fire District’s concerns with a condition of approval that requires the developer to obtain a fire access over the neighbor’s land. The neighbor said at the hearing that he’s willing to grant the access. One member who voted against the project (it was a 4-3 vote) has approached the neighbor to ask that he not grant the easement.” Concerns?

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Practical Tips for Running a Good Hearing

- The way the quasi-judicial body runs its hearings—and how the members conduct themselves in hearings—significantly impact your risk profile and the community’s trust and confidence in your work.
- Follow “best practices” for hearings:
 - Use your script and follow it throughout.
 - Use and expect civility; that applies to all meetings and participants.
 - Chair: Recognize and exercise your prerogative to maintain order.
 - Maintain formality and engagement; limit distractions.

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Practical Tips for Running a Good Hearing

- Stay focused on the matter and issues at hand and directly manage the crux issues to get the necessary and relevant information.
- Use opportunities to “recalibrate” if discussion is straying off topic/off task.
- 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.
- Don’t stray the course for insistent questioners. Better to hold questions until a defined question period and to instead let the questioner know they’ve been heard and move on.

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Avoid 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 decisionmakers 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 and your property interests at stake, would these activities seem fair to you?

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Avoid 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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Avoid 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 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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Avoid Ex-Parte Communications

- Contrast – For general legislative and policy making discussions—for example, when the governing body is looking at generally applicable changes to ordinances or regulations—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.

Real-Life Scenarios – What do You Think?

“Our ordinances allow the Clerk’s office to revoke certain types of licenses if the license holder commits a felony. The Police Department has let me know that a transient merchant has been charged with a felony. Given the seriousness of the charge, we think it is best to immediately send the merchant a letter revoking their license.” Concerns?

“Board member Nile is unable to the upcoming Board hearing on a rezoning request. Over the weekend he emails Board member Tami to tell her she should vote no because the request is inconsistent with the master plan. Tami responds to Nile and copies in Board member Bruce, telling them both that traffic impacts are also a huge concern. Bruce, in his “Reply all” response, says he went to the developer’s neighborhood meeting and “it did not go well.” Concerns?

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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 and the criteria 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!

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Deliberations Matter – Tips

- Focus on the key issues.
- Focus on the relevant decision-making criteria:
 - In quasi-judicial matters, you must make your decision based on the relevant existing criteria and not on the basis of personal preferences, or irrelevant or non-existent standards, or considerations that don't apply to the application in front of you.
 - Have the criteria at the ready and ask questions as needed (“Staff, remind me, what’s 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.

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Deliberations Matter – Use the “Rule of Why”

The Rule of Why In Action:

Mayor: “I’d like to thank everyone for their comments on this development plan. Now it’s time for the Board to deliberate. Who would like to start the discussion?”

Member Sam: “I would, thank you Mayor. I think we’ve heard a lot of differing opinions here and I just want to say I’m adamantly opposed and I’m voting 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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Deliberations Matter – Closing Out the Hearing

- All quasi-judges should have—and take—the opportunity to speak during deliberations.
- When getting ready to act, make sure the decision document is accurate and reflects your criteria, findings, desired conditions, etc.
 - If conditions of approval are being added or revised, be sure they are appropriate; follow your attorney and staff suggestions.
- Take the time you need to prepare the proper decision document, even if it requires another meeting.
- Similarly, if you are single decisionmaker—e.g., a Clerk empowered to revoke a license or a supervisor affording procedural rights—use your decision document to show your thought process.

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Due Process and Administrative Process

- While our focus in this presentation has been due process for quasi-judicial bodies, due process requirements can apply to a multitude of other municipal decisions made by individuals, ranging from employment decisions, to termination of utility service, to certain types of election decisions made by the election official.
- While what “process” is “due” will vary depending upon applicable laws, the interests at stake, and the deprivation at issue, the key concepts we have discussed here—**notice, opportunity to heard, and a fair and impartial decision**—are of universal importance.
- Embrace the spirit and intent of these concepts! Confer with your counsel on what is required and, in cases of doubt, err on the side of process!

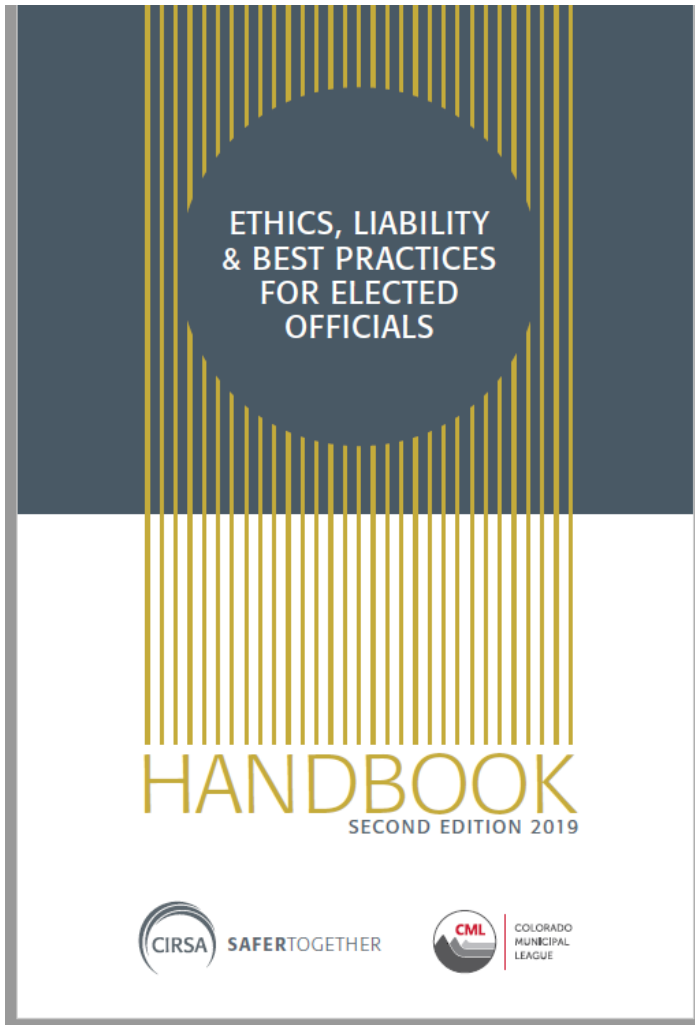
Conclusion

- 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 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!

Conclusion

Thank you for your public service and the opportunity to present!

Resources



CIRSA Webinar on Quasi-Judicial Proceedings
Basic Training & Best Practices:

<https://www.cirsa.org/wp-content/uploads/2020/05/Quasi-Judicial-Proceedings.mp4>

CIRSA Elected Officials Handbook:

<https://www.cirsa.org/wp-content/uploads/2019/06/EthicsLiabilityBestPracticesHandbookForElectedOfficials.pdf>

CIRSA Elected Officials Resources:

<https://www.cirsa.org/safety-training/elected-officials/>.

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Speaker Bio

Sam Light is General Counsel for the Colorado Intergovernmental Risk Sharing Agency (CIRSA). Previously Mr. Light was a partner with the Denver law firm of Light | Kelly, P.C., specializing in municipal and other public entity law, insurance law and defense of public entities and elected officials. Sam is a frequent speaker on municipal law and has practiced in Colorado since 1993.

About CIRSA

Colorado Intergovernmental Risk Sharing Agency

- Public entity self-insurance pool for property, liability, and workers' compensation coverages.
- Formed by in 1982 by 18 municipalities pursuant to CML study committee recommendations. Member-owned, member-governed organization.
- Not an insurance company, but an entity created by IGA of our members. Total membership today stands at 282 member municipalities & affiliated entities:
 - 278 are members of the PC pool
 - 139 are members of WC pool
- CIRSA views proactive approaches to risk management as critical member services – is a win-win.