

Best Practices for Quasi-Judicial Decision-Making

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**2024 ANNUAL
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Introduction

- The power to make “quasi-judicial” (QJ) decisions affecting land use and development at a local level is a significant, important and cherished power.
- And there are high stakes involved in these decisions. Missteps in the quasi-judicial arena can be a significant source of claims, disputes and liability.
- In this training we will focus on the “rules of engagement” that govern your role as a quasi-judicial decision-maker, and suggest “best practices” that will reduce risk for your municipality and you individually.
- Presentation is a training resource only and not intended as legal advice. In case of any inconsistency between author’s remarks and views of your entity’s own attorney...your attorney’s views prevail!

Due Process & Elected Officials' Roles

Your responsibilities as an elected official can be broadly broken out into two arenas: **legislative and quasi-judicial**.*

- The quasi-judicial role tends to be one of the lesser-known aspects of the job.
- Yet, the “rules of engagement” that apply to quasi-judicial decision-making are distinct from those that apply in other settings and are often counterintuitive. And missteps with respect to these rules can have severe consequences.

It's critical to know, with respect to any given matter that may come before you, which of these two arenas is applicable.

*(For simplicity, we'll set aside legal distinctions related to “administrative” decisions.)

The Legislative Role

- As an elected official, you're often acting as a "legislator", and legislative activities are the ones that most likely came to mind as the "job description" when you thought about a run for office:
 - **Listening to citizens who contact you in person, by email, text, on social media, etc.**
 - **Investigating the issues yourself and applying your own personal knowledge**
 - **Communicating early and often with your constituents**
 - **Lobbying and being lobbied—anywhere, anytime**
 - **Working in advance to build consensus (subject to open meetings laws)**
 - **Having strong convictions/opinions/prejudgments that you don't hesitate to voice and share...**
- And then ultimately voting on an ordinance or other policy-making enactment that will have general and prospective application—that's legislation! The legislative role involves the big picture.
- And the "rules of engagement" for legislative activities are easy and intuitive. When in "legislator" mode, the kinds of activities described above are OK!

The Quasi-Judicial Role

- But other times you're acting as a "judge," deciding specific cases where you're applying the established general rules—the legislation—to an individual property owner or applicant who comes to your board or council for a recommendation or decision concerning their property. These are "quasi-judicial" matters. More specifically, a QJ matter:
 - Involves a decision affecting property rights at an individual level
 - Provides for a decision made on the basis of specific, pre-existing criteria (the law) and the testimony and other evidence concerning the application of the criteria (the facts) brought forward at a hearing
 - Requires **notice, a hearing, and a decision based on the record** of the hearing (what's submitted by testimony and other evidence at the hearing)
 - Requires the decision **be made by a fair and impartial decision-maker—that's you!**
- In this quasi-judicial arena—which includes most land use applications—you are essentially acting as judges and therefore must behave like judges.

Honoring Due Process

- In this arena, the above-described legislative activities (in red) are inappropriate; instead, you must follow the quasi-judicial “rules of engagement”. Why? The premise of the quasi-judicial “rules of engagement” is that your decision is affecting individual property rights.
- The 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 quasi-judicial land use decisions affecting individual property rights, the town board/city council and other quasi-judicial decision-making bodies and their members are responsible for delivering the due process required by the Constitution.
- All quasi-judges in the process—those making recommendations and those making final decisions—are required by law to provide “due process” and therefore must commit to providing it!

QJ Rules of Engagement: Think Like a Judge

What are some of the key QJ rules of engagement related to your own conduct?

- 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 (ethics).
- Don't sign any "pro" or "con" petitions.
- Don't bring to your decision-making facts you "know" to be true, but that aren't part of the testimony or other evidence that the parties bring into the hearing—have the parties provide you with information at the hearing.
- Don't be a witness, prosecutor, advocate, or investigator – you're a JUDGE!

QJ Rules of Engagement: Think Like a Judge

- Discuss and consider quasi-judicial matters only at your duly noticed 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, unbiased and impartial. For example, would jumping into the social media “fray” about an upcoming QJ matter be consistent with your “judge” role? What about “working” on an upcoming QJ matter?
- Once your body has made its recommendation or decision, let the decision speak for itself. Even if you held a minority view, recognize the members’ need to respect the body’s decision.

QJ Rules of Engagement: Run a Good Hearing

- The way the quasi-judicial body runs its hearings—and how the members conduct themselves in hearings—significantly impacts your risk exposure and the community’s trust and confidence in your work.
- Follow “best practices” for hearings:
 - Use your script and follow it throughout. Don’t be ad hoc.
 - 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.
 - Identify speakers and documents and properly manage “record” issues.

QJ Rules of Engagement: Run 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.

Avoid Ex Parte Communications

- A critical duty of the quasi-judge is to avoid “ex parte” contacts. Such a contact occurs when someone interested in a QJ matter communicates with you “outside the hearing” about the issues in the case. 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 and property interests at stake, would these activities seem fair to you? Don’t these activities seem more like “advocate” than “judge”?

Avoid Ex Parte Communications

- A proceeding loaded with ex parte communications is a clear path to having your decision overturned and, as important, having the integrity of your process eroded.
- When your attorney/staff advise against ex parte contacts, they are looking to protect your ability to participate in the decision-making, and your ultimate decision.
- Ex parte contacts 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).
- Go back to the (red text) activities commonly associated with “legislative” actions, and you can see that most of them can be problematic in the quasi-judicial arena!

Avoid Ex Parte Communications

- Arm yourself 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 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.”
- Use staff as a resource to help you avoid ex parte problems; for example, if it’s an e-mail you receive, forward to staff; they can respond for you and assemble e-mails for the hearing packet.
- Consider having a short explanation or “FAQs” on the quasi-judicial process on your website.

Summing Up Contrasting Roles

- For legislative (policy) decisions—for example, when the town board/city council is looking at generally applicable changes to the municipal code—it is okay: to base your decision on your own personal opinions and policy perspectives; to take your counsel as you wish; to lobby (and be lobbied) outside the meeting, and to base your decision on information obtained from most any source.
- But, for a quasi-judicial decision, 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 the applicable, pre-existing legal standards rather than personal preferences, and you may not engage with interested parties about the case outside the hearing.

QJ Decision-Making: Deliberations Matter!

- Deliberation/discussion of the evidence is critical in a quasi-judicial proceeding; this is where you “connect the dots” according to this “formula”:

Facts learned at the hearing + the legal criteria applicable to the matter = Your decision

- In deliberating, the body formulates the bases of its impending decision by connecting up the evidence it heard at the hearing and that is in the hearing record (i.e., packet) with the legal criteria that apply to the decision.
- This is where the applicant and others obtain an understanding of your position.
- It’s also where 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!

QJ Decision-Making: Deliberations Matter!

- In your deliberations, focus on the key issues and 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 decision in front of you.
 - Therefore, 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 as well as the weight and credibility of that evidence. Remember - when you are prepared to discuss the criteria and the evidence, you will arrive at a discussion of the defensible reasons for your decision.

Deliberations Matter!



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Deliberations Matter: 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?”

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. I just don’t like it and I’m voting no.”

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

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 but if you’d tell us what standards concern you and why you think they aren’t met, I think that will help our discussions.”

Sam: “Sure. I find based on the staff report that this project doesn’t meet our design standards because...”.

Deliberations & Closing Out the Hearing

- All quasi-judges should have—and take—the opportunity to speak during deliberations.
- When deliberating and making findings, think and speak as a judge would—e.g., “I find...”, “The evidence shows...”, etc.—and not in terms of “I’m feeling...”, etc.
- 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 on conditions.
- Take the time you need to prepare the proper decision document, even if it requires another meeting.

Quasi-Judicial Liability? What Risks?

- State Claims: Certiorari (106(a)(4)); action for declaratory judgment (e.g., asserted violation of state law).
- Federal Claims: Due process, equal protection, regulatory taking, RLUIPA, etc.
- Potential Remedies: Decisions reversed; \$\$\$ damages; court order to do/not do something; attorneys' fees.
- Insurability issues: Not all land use risks are insurable and certain risks arising from land use decisions—e.g., takings claims—typically are not covered.
- Practical Risk: Loss of trust and confidence in government, particularly as arising from real or perceived concerns of unfair or unpredictable process or outcomes.

Quasi-Judicial Liability? What Risks?

- Recognize: quasi-judicial decisions aren't usually overturned because the judge didn't "like your decision."
- Rather, they are more likely overturned because the quasi-judges either made an arbitrary decision or—as a group or because of individual behavior—deprived the applicant or other participant of fundamental fairness.
 - The applicable legal presumptions and burdens of proof generally run in your favor, provided you're making the right decision for the right reasons through a fair and defensible process.
 - But court judges will keenly review the conduct of "quasi-judges".
- Therefore, 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!

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 trust and confidence in how you handle quasi-judicial matters concerning their property rights. That's a great place to be!

Thank you for attending!



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CIRSA Resources

For additional CIRSA resources:

- The elected officials' page on CIRSA website has some resources relevant to both elected and appointed officials: <https://www.cirsa.org/safety-training/elected-officials/>
- CIRSA *Elected Officials Liability Handbook*: <https://www.cirsa.org/wp-content/uploads/2019/06/EthicsLiabilityBestPracticesHandbookForElectedOfficials.pdf>
- For more CIRSA training on quasi-judicial best practices and due process, see these CIRSA videos: https://www.youtube.com/watch?v=mPz-P7A_qlc and <https://www.cirsa.org/wp-content/uploads/2020/05/Quasi-Judicial-Proceedings.mp4>.
- And our newest video (<https://www.youtube.com/watch?v=bfhxvn1c1lA&t=10s>), which is 17 minutes long, or you can just watch the “due process” section here: <https://www.youtube.com/watch?v=2HeNb1SJfL8>

About the Colorado Intergovernmental Risk Sharing Agency (CIRSA)

- 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
- Not an insurance company, but an entity created pursuant to Colorado statutes and intergovernmental agreement of our members
- Total membership today stands at 290 member municipalities and affiliated legal entities
- Member-owned, member-governed organization
- No profit motive – sole motive is to serve our members effectively and responsibly
- CIRSA Board made up entirely of municipal officials
- Seek to be continually responsive to the liability-related needs of our membership – coverages and associated risk management services, sample publications, training, and consultation services, as well as specialty services such as home rule charter review
- We have the largest concentration of liability-related experience and knowledge directly applicable to Colorado municipalities



Thank You!

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