

# **YOU** *be the* **JUDGE**

---

**A HANDBOOK FOR THE LAND USE DECISIONMAKER**

Sound Law Center and Ted Hunter



### Acknowledgements

*Many skilled professionals are involved in the land use decision making process, and each has a unique contribution to make. The utility of this handbook was greatly enhanced by the review and suggestions of many others including David Osaki and Steven Pilcher (professional planners), Linda Marousek (city attorney), and Michael Walter (city liability insurance defense attorney). We also deeply appreciate the legal editing skills of Jessica Clawson and Inessa Baram-Blackwell who worked tirelessly to help ensure that the handbook would be understood by its intended audience of elected officials and staff members.*

### A Disclaimer and Caveat

*This handbook is designed to help the land use decisionmaker follow the proper procedures when hearing and deciding land use matters in a quasi-judicial hearing. Use of the tools in this handbook will help officials avoid liability for land use decisions and, more importantly, ensure a fair land use decisionmaking process. The information is for general application only. It does not offer legal advice for specific cases and should not be relied on for application to specific cases. Specific legal questions should be directed to an attorney.*

# **YOU** *be the* **JUDGE**

---

**A HANDBOOK FOR THE LAND USE DECISIONMAKER**

Sound Law Center and Ted Hunter

# TABLE OF CONTENTS

Introduction.....i

## **The Framework**

1. The Quasi-Judicial Proceeding .....3  
2. Procedural Due Process.....5

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

1. Fairness .....9  
2. Notice .....13  
3. The Hearing .....16  
4. The Record.....23  
5. The Decision .....27

## **Other Systems**

1. The Land Use Hearing Examiner System .....32  
2. The Mediation System .....34

## **Glossaries**

1. Terms Used in a Hearing.....39  
2. Key Players in a Hearing .....42

## **Appendices**

1. Examples of Procedural Issues .....47  
2. The Appearance of Fairness Doctrine .....50  
3. Checklists for Local Officials  
    A. Quasi-Judicial Proceeding.....51  
    B. Fairness .....52  
    C. Notice .....53  
    D. Hearing .....54  
    E. Record .....55  
    F. Decision.....56  
4. Outline of Hearing Procedural Rules.....57  
5. The Site Visit.....60

## INTRODUCTION

The purpose of this handbook is to help local officials understand the elements of procedural due process required in a land use hearing. It is intended to assist decisionmakers in understanding the basic concepts of due process and in reaching decisions that are fair and equitable, and that will survive legal review by the courts.

The handbook contains:

- A brief discussion of each element of procedural due process.
- A checklist to help the decisionmaker comply with each element of procedural due process.
- Examples of common problems with some suggested solutions.

While no handbook or treatise can offer a guarantee from lawsuits, this handbook provides guidelines and suggestions that should reduce liability. A reduction of liability is extremely important as many state and federal courts have held decisionmakers *personally* liable for failure to properly abide by procedural due process principles. The handbook will give the local decisionmaker a better understanding of what courts will consider if a local decision is appealed.

The terms “local officials” and “decisionmaker” include members of the city or county council, planning commission, board of adjustment, design review board, zoning board, hearing examiner, or any other group or individual legally recognized by the municipality as having authority to decide a land use request. For consistency purposes, we have used the terms “city” and “city council” throughout the book, but the text applies to any local or regional government entity that makes formal land use decisions.

The burden on local officials when making land use decisions is a heavy one. The men and women serving as local officials are charged with balancing competing interests in a highly charged atmosphere in which the threat of a lawsuit is always present. If we are able to lighten that burden even slightly by the suggestions in this handbook, our efforts will have been successful.

---

---

# THE FRAMEWORK

**FAILURE TO FOLLOW THE PROPER PROCEDURAL STEPS IN A QUASI-JUDICIAL HEARING CAN RESULT IN LIABILITY FOR THE MUNICIPALITY AND PERSONAL LIABILITY OF OFFICERS, AS WELL AS INVALIDATION OF THE DECISION.**

## 1. THE QUASI-JUDICIAL PROCEEDING

This handbook provides guidance for conducting “quasi-judicial proceedings” in reaching decisions or making recommendations on land use requests. These proceedings do not apply to legislative decisions.

If proper procedural steps are not followed during quasi-judicial proceedings, a local decision is vulnerable to being overturned by the courts. This is problematic for two reasons: first, it may result in the courts, instead of local elected officials, deciding important land use decisions; and second, there is a risk that a court could impose monetary damages on local government and/or its officials. These results could have long-lasting impacts on both the land uses and the finances of a city.

### **IS THIS A QUASI-JUDICIAL MATTER?**

The first step in a land use case is to decide whether the land use request requires a quasi-judicial proceeding.

This determination is important because in a quasi-judicial proceeding the decisionmaking body must follow strict procedural requirements. The procedural due process protections that apply to a quasi-judicial proceeding are designed to ensure a fair hearing for all. If the requirements are not followed, the decision could be declared invalid – with the municipality (and the local official) being subject to monetary damages.

City councils, planning commissions, administrators and others involved in land use decisionmaking do not always make quasi-judicial decisions. The decision may be an administrative or ministerial decision that does not require Findings of Fact or Conclusions of Law. If the administrative decision can be appealed to a city council, the hearing held by the council may be a quasi-judicial

**EXAMPLES OF QUASI-JUDICIAL HEARINGS:**

- SUBDIVISIONS
- VARIANCES
- CONDITIONAL USE PERMITS
- ZONING CODE VIOLATIONS
- SMALL REZONES

**EXAMPLES OF LEGISLATIVE HEARINGS:**

- PASSAGE OF ORDINANCES
- PASSAGE OF BUDGETS
- REZONES OF COMMUNITYWIDE SIGNIFICANCE
- COMPREHENSIVE PLANNING

**EXAMPLES OF ADMINISTRATIVE OR MINISTERIAL DECISIONS:**

- GRADING PERMITS
- BUILDING PERMITS
- CODE INTERPRETATIONS

proceeding. If a council is reviewing a policy of general application, the hearing may be a legislative hearing that need not adhere to the strict requirements for quasi-judicial proceedings. To assist the local official in determining whether an action is quasi-judicial, the decisionmaker must two key questions:

- #1: Is a public hearing required by state statute or local ordinance?
- #2: Will the decisionmaker consider evidence for and against the proposal?

If both of these questions are answered “no,” then the proceeding is legislative, administrative, or ministerial, not quasi-judicial. Thus, the procedural requirements in this handbook do not apply. However, if either or both questions are answered in the affirmative, the decisionmaker must answer these additional questions:

- #3: Will the decision impact only specific parties?
- #4: Will the decision have an area-wide impact of community significance?

If the answer to question three is “yes,” the proceeding is clearly quasi-judicial. If the answer is “no,” and the answer to question four is “yes,” it is possibly legislative.

This process may seem confusing and complicated. In practice, most land use requests impact specific parties and are quasi-judicial. Usually the only types of land use requests that are not quasi-judicial are area-wide rezones and annexations.

Although courts and legislatures have tried to define “quasi-judicial,” there are some situations when it is difficult to determine if a quasi-judicial process is required. **When in doubt, the wisest choice is to treat the proceeding quasi-judicially to reduce exposure to liability that may result from failing to follow procedural requirements.**

## 2. PROCEDURAL DUE PROCESS

**PROCEDURAL DUE PROCESS IS THE LEGAL METHOD THAT MUST BE USED TO REACH A DECISION ON A LAND USE REQUEST.**

If a quasi-judicial proceeding is required, certain “procedural due process” elements must be considered and satisfied. Procedural due process is simply the legal method that must be used to reach a decision on a quasi-judicial land use request. It includes everything that occurs from the time an application is filed until the final decision is made.

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.” As interpreted by the courts, due process has both substantive and procedural elements.\* This handbook will focus on the five elements of procedural due process:

- Fairness and the appearance of fairness
- Proper notice of the hearing
- A fair hearing
- A complete record
- A decision based on the record

\* Substantive due process generally means that local government action regulating land must not be arbitrary and capricious. Specifically, zoning and development regulations must be enacted for a legitimate governmental purpose such as protection of health, safety, morals, or the environment. Furthermore, the specific regulation must further the legitimate public purpose for which it was enacted.

**CHECKLIST TO  
PREPARE FOR A  
LAND USE HEARING:**

**THE PROCEEDING IS  
QUASI-JUDICIAL IF  
THE ANSWERS TO  
THE FOLLOWING  
QUESTIONS ARE  
“YES”:**

- **IS A PUBLIC HEARING REQUIRED BY STATE STATUTE OR LOCAL ORDINANCE?**
- **WILL THE DECISIONMAKER CONSIDER EVIDENCE FOR AND AGAINST THE PROPOSAL?**
- **WILL THE DECISION IMPACT ONLY SPECIFIC PARTIES?**

Before a quasi-judicial hearing begins, the hearing’s presiding official should review the procedural due process requirements with the city attorney and other members of the decisionmaking body. Failure to follow procedural due process requirements may result in a decision that is declared invalid and in monetary damages imposed against the local government and/or local official.

Procedural due process requirements are similar to a recipe for baking a cake. The cake does not suddenly appear – it is made only after each step of the recipe is followed closely. If the baker leaves out one ingredient or adds too much of another, the results can be disastrous.

Envision a land use hearing as a similar process. The goal is to arrive at a correct and workable decision on a permit or land use application. However, if the procedures (the recipe) are not followed correctly, the results may be disastrous.

Like a good baker, the decisionmaker must follow the proper steps in order to attain the desired goal. The five key elements of procedural due process are the ingredients that the decisionmaker must use to ensure a fair process. These key elements are presented in detail in the next chapter.