Quasi-Judicial Public Hearings: What Process is Due?

by Donald Jarrett



The modern, full-service local government performs many different functions in serving the public. It does so through a myriad of authorizations and restrictions, switching hats from one function to another, sometimes administrative in character, sometimes legislative, and sometimes quasi-judicial. As a practical matter, most public officials understand the parameters of their administrative duties and the responsibilities of their legislative role. However, most public officials do not have a comfortable appreciation for the judicial process. This is not surprising, since they see public processes in political terms, wherein officials have and fulfill official positions, rather than reserve judgment on issues before making a decision based on the "evidence."

Yet, local governments routinely conduct public hearings that have a judicial character to them, which requires that governmental officials assume a quasi-judicial role. While they make good faith efforts to carry out that role, most governmental officials possess minimal qualifications for the task and are not comfortable in performing it. This article provides some basic guidance that may ease the discomfort of that quasi- judicial role.

Understanding the Quasi-Judicial Role

Not all hearings that are conducted by local governments are quasi-judicial. The test for determining whether a governing body acts in a quasi-judicial capacity focuses upon the nature of the action being taken, rather than the type of official or agency carrying out the action.[1] As one court noted:

> ...this test involves the determination of whether action produces a general rule or policy which is applicable to an open class of individuals, interest (sic), or situations, or whether it entails the application of a general rule or policy to specific individuals, interests, or situations. If the former determination is satisfied, there is legislative action; if the later determination is satisfied, then the action is judicial.[2]

Other courts concentrate on the adjudicatory nature of the proceeding, concluding that the hearing has judicial characteristics when it investigates facts, weighs evidence, declares rights or liabilities, and is primarily concerned with specific persons or property.[3] Finally, some courts look no further than the role to be played by members of the public. Where the law affords a right not only to be present at the hearing but to participate in it in an effort to influence the outcome, then the governing body must act judicially in receiving and considering that input.[4] Occasionally, the designation that a specific proceeding is quasi-judicial is made by statute,[5] but, more commonly, the determination is made by a court decision.[6]

Regardless of how or whether a particular proceeding is determined to be quasi-judicial, it is the responsibility of the local government to recognize it and conduct its proceedings in a quasi-judicial manner. As a practical matter, if the proceeding has the characteristics of a hearing (where members of the public have some right to participate), where the action is investigative or declares and enforces

rights or liabilities, or where the proceeding applies directly to particular individuals or interests, then it is more likely to be quasi–judicial in nature. If a proceeding is considered to be quasi-judicial, then certain legal requirements will attach to the proceeding.[7]

The Due Process Elements

Due process protections are derived from the Fifth and Fourteenth Amendments to the U.S. Constitution, and seek to ensure that a person's life, liberty, and property are protected from unwarranted actions of the government[8] (including state and local government[9]). At its most basic, procedural due process[10] "imposes constraints on governmental decisions,"[11] and requires that a government provide procedural safeguards in its actions to ensure, to the extent practicable, that erroneous deprivations of liberty or property are prevented.[12] While the constraints are procedural, they are meaningful and, in essence, establish a doctrine of fundamental fairness such that a defect in process can void the resulting governmental action.[13]

Simply stated, "[p]rocedural due process requires some process to ensure that the individual is not arbitrarily deprived of his or her rights," and that "requirement is met if the defendant is provided with notice and an opportunity to be heard."[14] As identified by the U.S. Supreme Court, the question for local governments is, then, "when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness."[15] The answer to that question will vary depending upon the circumstances and the jurisdiction, but, generally, when an individual's life, liberty or property interests are implicated, or where the governmental action, by its nature, is quasi-judicial, then the local government must provide procedural due process in taking such actions.

The good news for local governments is that due process is a "flexible" concept which "calls for such procedural protections as the particular situation demands."[16] The U.S. Supreme Court has acknowledged that "[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decision-making in all circumstances."[17]

On the other hand, the bad news for local governments is that due process is a "flexible" concept and the same procedural requirements will not necessarily apply to all proceedings. Thus, the fundamental question for each quasi-judicial proceeding is: What process is due?

At a minimum, due process requires that the government give fair notice of a proposed action to affected persons, and provide them with an opportunity to be heard in "some form of hearing" which is "meaningful."

Due Process Procedures

The Supreme Court has repeatedly stated that "due process, unlike some legal rules, is not a technical conception with fixed content unrelated to time, place and circumstances,"[18] with similar holdings being rendered by state courts.[19] One state court has noted that "the City is not required to conduct its public, quasi-judicial hearings following the same evidentiary and procedural standards applicable to a court of law, although it must adhere to fundamental principles of justice and procedural due process."[20] Another has stated that "quasi-judicial proceedings do not invoke the full panoply of procedures required in regular judicial proceedings, civil or criminal, many of which would be plainly inappropriate in these quasi-judicial settings."[21]

What, then, are the required procedures?

At a minimum, due process requires that the government give fair notice of a proposed action to affected persons, and provide them with an opportunity to be heard in "some form of hearing"[22] which is "meaningful."[23] Beyond these basic elements, however, due process remains flexible, recognizing that not all situations call for the same procedural safeguards.[24] To determine what other procedural elements may be required to provide adequate due process protection in a given situation, a balancing of three factors is considered, being: (1) the private interest affected by the proceeding; (2) the risk of an erroneous deprivation of that private interest through available procedures, and the probable added value of providing further procedural safeguards; and (3) the government's interest, including the governmental function involved, and the fiscal and administrative burdens reasonably expected from any added procedural requirements.[25] Clearly, this analysis is complex and better suited for use by the courts.

For practical application, "the requirements of due process must be measured according to the nature of the governmental function involved and whether or not private interests

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Donald Jarrett is the Chief Counsel for Johnson County, Kansas, and has served in that capacity for the past 25 years. Prior to that time, Don was a firm partner in private practice as a litigator and represented cities, school districts, the County and other municipalities. He was also an instructor in paralegal studies and has made numerous presentations to municipal organizations and attorneys, including the Kansas Association of Counties, the Kansas Association of Mental Health Centers, the International Association of Assessing Officers, and the Society of Human Resource Professionals. Don is a graduate of the University of Kansas School of Law, where he was a member of the Law Review.

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are directly affected by the government action."[26] The more severe the potential deprivation, the greater the due process protections required by the courts.

Designing the Process Due

Absent applicable statutory procedures, local governments are left on their own to define the process for their quasi-judicial hearings. Generally, the courts will give deference to that process as long as it provides "a form of procedure that is suitable and proper to the nature of the determination to be made and conforms to fundamental principles of justice."[27]

While there is no magic formula for due process, the following four elements are considered fundamental and should be provided for every quasi-judicial hearing:

Notice. Notice is an essential element of due process. It must be timely and provided in a manner "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity" to be present and be heard.[28] The sufficiency of notice is determined by the circumstances of the particular hearing, but it must reasonably convey the information which fairly informs persons of the substance of the hearing.[29] While general notice, by publication or posting, will suffice in some instances, actual notice (by mail or other means) will be required for proceedings that directly affect specific or known individuals.[30]

The Opportunity to be Heard. The real essence of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."[31] That opportunity does not have to be provided in a trial-like proceeding or a full evidentiary hearing, but affected persons must be able to "present their case"[32] in argument, however brief, and by proof, however informal.[33]

A Record. The outcome of the hearing must be based upon the evidence presented at the hearing. Therefore, a record of the proceedings is essential to safeguard the integrity of the process and to make any subsequent judicial review meaningful.[34]

An Impartial Decision-Maker. Fundamental fairness dictates that "the concerns of the affected parties should be heard by an impartial decision maker."[35] However, while local government officials must be more judge-like in conducting quasi-judicial proceedings, due process does not require them to insulate themselves from their community or community interests.[36] It does require, though, that the decision-maker keep an open mind and base the decision upon evidence presented during the proceeding.[37]

The quandary faced by most local governments is "what process is due," since the requirements will vary depending upon the nature of each hearing.

While these four elements should be incorporated into the procedures for all quasi-judicial hearings, there are other factors that merit consideration. These include:

- **Time**. Due process requires that those affected by the proceedings be given the opportunity to be heard and provided with a reasonable amount of time to fairly present their case. However, local governments may impose reasonable limitations on time for speaking at public hearings when necessary to ensure that all persons are heard, or when it is otherwise reasonable in the circumstances.[38]
- **Oath**. Unless a particular circumstance warrants it, due process does not require that testimony be given under oath.[39]
- **Discovery**. Persons affected by government action should be provided with reasonable access to information related to the hearing. However, pre-hearing discovery is not generally required.[40]
- **Cross-examination**. Cross-examination is, perhaps, the most difficult procedural action to apply in a quasi-judicial proceeding. Some courts hold that cross-examination is an essential element of due process, even in quasi-judicial hearings,[41] while others maintain that it is not.[42] In reality, due process may require cross-examination in some proceedings and not in others.[43] Further, the type and extent of cross-examination may vary depending upon the type of proceeding or the nature of the evidence.[44] As a matter of practice, some form of questioning or cross-examination should be provided in those proceedings that directly affect specific individuals or rights or involve technical evidence, but this is likely not required for general public hearings, where the testimony is usually in the form of objections or viewpoints expressed by members of the public.[45]

Quasi-Judicial Conduct

For local government officials, one of the most difficult parts of the quasi-judicial process is the concept of quasi-judicial conduct. In a legal sense, local government officials, while participating in a quasi-judicial process, are functioning in the capacity of a judge and must, therefore, comply, to a great extent, with accepted standards of judicial conduct. These include the following elements:

Bias. A judge must be free of bias and even the appearance of bias, both as to the issues in the proceeding and the parties. In a legislative or administrative process, there are many factors that influence or guide decision-making, including political concerns or the preferences of the public. These factors are not appropriate in the quasi-judicial context. Quasi-judicial proceedings should always be conducted in a fair and impartial manner, without favor toward any position or party, and give equal

consideration to all the "evidence" presented.

Prejudgment. A judicial decision must be based upon the merits of the "evidence" and the arguments presented at the hearing, as properly transcribed in a record of the proceedings. A judge must, therefore, refrain from prejudging the issues, even though almost assuredly, some constituents will demand to know an official's "position" on the issues before the hearing has been concluded. Accordingly, a public official acting in a quasi-judicial capacity must always be cautious about making any statements that would give the appearance of prejudging the issue.

Further, in the normal course of business, prior official actions of a local governmental body will sometimes have some relationship to the issues being heard in a quasi-judicial proceeding and, therefore, indicate a prejudgment position. In that case, the local government officials should state clearly, for the record, that the prior action will not influence their judgment on the issue at the present hearing.

Undue Influence. Public officials conducting quasi-judicial proceedings must be cautious about undue influences on their decision-making. Undue influences are often exerted by the media, by special interest groups, or just friends and family.

Conflicts of Interest. Obviously, a quasi-judicial proceeding cannot be fair and impartial if the decision-makers have a conflict of interest, whether actual or apparent, on the issue under consideration. Typically, the conflict issue arises from a business or financial arrangement, but conflicts can also readily arise for public officials in the political arena. Where a conflict exists, the official is required to recuse himself from any and all participation in the hearing process.

Ex Parte Communications. Communications between a judge and a person with interests in the proceedings, conducted outside the formal hearing process, are considered "ex parte" and may be improper if they relate to the substance or merits of the issues involved in the hearing. However, this is very common in local government, particularly where the hearing judge is an elected official. Ex parte contacts are becoming easier than ever due to the present use of technology like text messaging and e-mails. A local government official acting in a quasi-judicial capacity must avoid such ex parte communications. If they do occur, the official should disclose the contact for the record and express assurances that his or her decision will be based only on the "evidence" provided through the formal hearing process.

Considerations Outside the Record. The decision in a quasi-judicial proceeding must be based upon the information in the record of proceedings. Information outside that record, no matter how useful, should not be considered. Local government officials frequently have access to information outside the record —from site visits, public documents, or well-intentioned citizens. The official must refrain from considering such information or, alternatively, take action to ensure that the information is included properly in the record in a timely manner, so that the parties and the public can fairly be apprised of it and have an opportunity to respond or address it.

Conclusion

Not every public hearing or similar proceeding conducted by local government earns the designation "quasi-judicial." Those that do, however, must be conducted in a manner that satisfies the requirements of procedural due process. The quandary faced by most local governments is "what process is due," since the requirements will vary depending upon the nature of each hearing.

The prudent approach for local governments is to design their hearing procedures around four elements of fundamental fairness: (1) full and adequate notice; (2) a fair opportunity to present evidence and argument; (3) an official record of the proceedings; and (4) an impartial decision-maker. Additional procedural protections, such as some form of questioning or cross-examination, can readily be incorporated into the process when required for a particular type of proceeding.

Equally important, due process requires that the decision-makers in a quasi-judicial proceeding conduct themselves in a judicial manner. Local governments must implement careful guidelines for officials who act in a quasi-judicial capacity, with special attention to ex parte contacts, particularly in today's new technology environment, where the likelihood of ex parte contacts is increased.

Government officials will continue to wonder what process is due for each type of public hearing, but they can best address that question by focusing upon the basic elements of fairness.

Notes

1. Harris v. County of Riverside, 904 F. 2d 497, 501-02 (9th Cir. 1990).
2. Idaho Historic Pres. Council, Inc. v. City Council of the City of Boise, 8 P. 3d 646, 649 (Idaho 2000), quoting *Cooper v. Bd. of County Comm'rs of Ada County,* 614 P. 2d 947, 950 (Idaho 1980).
3. Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908); Adams v. Marshall, 512 P. 2d 365, 370 (Kan. 1973).
4. *See, e.g.,* Smith v. Skagit County, 453 P. 2d 832, 846 (Wash. 1969).
5. *See e.g.,* 12 KAN. STAT. ANN. §12-521 (2009) (designating annexation hearing as a quasi-judicial proceeding).
6. Cooper v. Bd. of County Comm'rs of Ada County, 614 P. 2d 947, 950 (Idaho 1980).
7. Unfortunately, whether a particular type of proceeding is considered as quasi-judicial can vary by state, making it necessary to research specific state statutes and cases for specific types of hearings.
8. U.S. CONST., amend. V.
9. U.S. CONST., Amend. XIV; *see* Baker v. McCollan, 443 U.S. 137 (1979). While state constitutions contain due process protections, the basic elements of procedural due process are derived primarily from the U.S. Constitution for the purposes of this article.
10. This article will only address considerations related to procedural due process and not issues of substantive due process.

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Penalties and Open Meetings

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551.143(a) (Vernon 2004) provides that an elected official commits an offense if he or she knowingly conspires, with less than a quorum of the public body, to circumvent the TOMA.
11. Harris County Emergency Serv. Dist. #1 v. Harris County Emergency Corps, 999 S.W.2d 163 (Tex. Ct. App. 1999).
12. Author's notes.
13. Rangra v. Brown, No. P-05-CV-075, 2006 WL 3327634 (W.D. Tex. Nov. 07, 2006).
14. *Id.* at *5.
15. State ex rel. Murray v. Palmgren, 646 P.2d 1091, 1099 (Kan. 1982).
16. 547 U.S. 410 (2006).
17. 2006 WL 3327634 at *5.
18. *See* Pickering v. Bd. of Educ. of Tp. High School, Dist. 205, 391 U.S. 563, 568 (1968); Connick v. Myers, 461 U.S. 138, 147 (1983).
19. Rangra v. Brown, 566 F.3d 515 (5th Cir. 2009).
20. *Id.* at 521.
21. *Id.* at 522.
22. Jenevein v. Willing, 493 F.3d 551, 557-58 (5th Cir. 2007) (citing *Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002)).
23. *Id.* at 556-58.
24. *Id.* at 559-60.
25. Rangra v. Brown, 576 F.3d 531 (5th Cir. 2009).
26. Rangra v. Brown, 584 F.3d 206 (5th Cir. 2009) (Dennis, J., dissenting).
27. *Id.* at 207.
28. Noting that "This court shirks its duty under the Constitution to afford Rangra a forum for his constitutional challenge and live controversy by dismissing his claim without full briefing, full oral argument, and full judicial consideration and attention." *Id.* at 210.
29. City of Alpine, et al. v. Gregg Abbot and the State of Texas, No. 4:09-CV-00059 (W.D. Tex. filed Dec. 14, 2009).
30. *See, e.g.*, Frank Sturzl, *Texas Newspapers Lash Out at City Officials*, Texas Municipal League Legislative Update (Dec. 10, 2009), available at http://www.tml.org/leg_updates/updatepdf/121009.pdf. ML

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11. Mathews v. Eldridge, 424 U.S. 319 (1976).
12. *Id.*
13. *See, e.g.,* Goss v. Lopez, 419 U.S. 565 (1975).
14. Neighbors for a Healthy Gold Fork v. Valley County, 176 P. 3d 126, 132 (Idaho 2007); *Mathews,* 424 U.S. at 333.
15. *Mathews*, 424 U.S. at 348.
16. Morrissey v. Brewer, 408 U.S. 471 (1972).
17. *Mathews*, 424 U.S. at 348.
18. *Id.* at 334, quoting *Cafeteria & Restaurant Workers Union, Local 473 AFL-CIO v. McElroy*, 367 U.S. 886 (1961).
19. *See, e.g.,* Dairy Prod. Serv., Inc. v City of Wellsville, 13 P. 3d 581, 593 (Utah 2000); Petersen v. Chicago Plan Comm'n of City of Chicago, 707 N.E.2d 150, 154 (Ill. Ct. App. 1998); Mohilef v. Janovici, 51 Cal. App. 4th 267, 286 (Cal. Ct. App. 1997).
20. West Bluff Neighborhood Ass'n v. City of Albuquerque, 50 P. 3d 182, 193 (N.M. Ct. App. 2002).
21. Barton Contracting Co. Inc. v. City of Afton, 268 N.W. 2d 712, 716 (Minn. 1978).
22. Mathews v. Eldridge, 424 U.S. 319, 333 (1976).
23. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).
24. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).
25. *Mathews*, 424 U.S. at 335.
26. *Barton Contracting Co. Inc.*, 268 N.W. 2d at 715.
27. Petersen v. Chicago Plan Comm'n of City of Chicago, 707 N.E.2d 150, 154 (Ill. Ct. App. 1998), quoting *Telcser v. Holzman*, 201 N.E. 2d 370 (Ill. 1964).
28. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).
29. *Id.*
30. Harris v. County of Riverside, 904 F.2d 497, 504 (9th Cir. 1990), quoting *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983).
31. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).
32. Mathews v. Eldridge, 424 U.S. 319, 348-49 (1976).
33. Londoner v. City and County of Denver, 210 U.S. 373, 385 (1908).
34. *See, e.g.*, Idaho Historic Preservation Council, Inc. v. City Council of the City of Boise, 8 P.3d 646, 649 (Idaho 2000).
35. Dairy Prod. Serv., Inc. v. City of Wellsville, 13 P.3d 581, 593 (Utah 2000), citing *V-1 Oil Co. v. Dept. of Envtl. Quality*, 939 P.2d 1192, 1197 (Utah 1997).
36. West Bluff Neighborhood Ass'n v. City of Albuquerque, 50 P. 3d 182, 194 (N.M. Ct. App. 2002); McPherson Landfill, Inc. v. Bd. of County Comm'rs of Shawnee County, 49 P.3d 522, 531-32 (Kan. 2002).
37. *Id.*
38. *See West Bluff Neighborhood Ass'n*, 50 P.3d at 193; Medeiros v. Hawaii County Planning Comm'n, 797 P.2d 59, 67 (Haw. Ct. App. 1990).
39. *See, e.g.,* Mohilef v. Janovici, 51 Cal. App. 4th 267, 289-94 (Cal. Ct. App. 1997) and its discussion of cases.
40. *Id.* at 302.
41. *See, e.g.*, Kaelin v. City of Louisville, 643 S.W. 2d 590, 591 (Ky. 1982).
42. *See, e.g.*, Barton Contracting Co. Inc. v. City of Afton, 268 N.W. 2d 712, 715-16 (Minn. 1978).
43. *See Mohilef*, 51 Cal. App. 4th at 300-01.
44. People ex Rel. Klaeren v. Village of Lisle, 737 N.E.2d 1099, 1110-112 (Ill. Ct. App. 2000).
45. Chrobuck v. Snohomish County, 480 P.2d 489, 496 (Wash. 1971). ML

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were not hired filed suit in 1997, alleging that the City's selection practice had a disparate impact.[44] The City responded that the suit was untimely because the earliest EEOC charge was filed more than 300 days after the only discriminatory act, that of sorting the scores into eligibility categories.[45] The Court held that no limitation period applied for a disparate impact claim where the plaintiff could prove each element of a disparate impact claim and a discriminatory "employment practice."[46] The issue was not based on when a claimant's claim accrued, but whether the claim could accrue at all.[47] Although Title VII did not define "employment practice," the Court found that it encompassed excluding applicants on a "pass list" that exhibited a disparate