

The Rules of the Game: A Framework for Fair and Effective Zoning Public Hearings

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As a planning commissioner or member of a zoning board of appeals (ZBA), you likely live in a state that requires some kind of public hearing in the consideration of an application for zoning relief.

Some courts may view proceedings on an application to be administrative or quasi-judicative, requiring a “due process” hearing to adjudicate the rights of the proponents and opponents to the application. Courts may also view a particular application as legislative in character, where the ultimate decision need not be solely based on the information produced at the hearing. No matter the kind of hearings your board or commission will oversee, you will be interested to know that many communities adopt rules of procedure to promote an efficient process that complies with the principles of fairness and any applicable due process requirements.

The authority to adopt such rules may be expressly provided by statute. Illinois, for example, recently adopted Section 11-13-22 of its Municipal Code. This allows municipalities outside Chicago to adopt or authorize the ZBA and any other board, commission, or committee that conducts zoning hearings (hereinafter “board”) to adopt rules of procedures governing those public hearings. The rules of procedures may concern participation in public hearings and the participants’ rights to cross-examine witnesses and to present testimony and evidence, and any other relevant matter.

Even if the authority is not expressly provided by the legislature, it may be “necessarily implied” from the general powers to conduct such hearings in the first place. This express or implied authority should provide your community with the flexibility to tailor appropriate rules for your municipality. While an urban community may want detailed rules and procedures, a rural community may not; procedures that are important in one municipality may not be in another. Of course, there may be no requirement that municipalities adopt rules of procedure, and communities may instead choose to treat each public hearing on a case-by-case basis. However, municipalities should consider adopting basic procedures to govern their public hearings and to promote efficiency and fairness.

Without such rules, skilled attorneys could turn a straightforward public hearing process into something akin to a full trial, demanding significant procedural accommodations that can frustrate and confuse appointed or elected officials, applicants, and members of the public. While applicants are entitled to a full airing of a proposed project, the question becomes how much procedure is enough? Your rules can help set the boundaries.

So, what kind of rules can your community adopt to help manage zoning hearings? Of course, this question may already be decided by your state’s zoning enabling act, open meetings act, or other law prescribing public hearing conduct. In the absence of such restrictions, you should consider the following in developing rules for administering zoning hearings:

- The rules should be tailored to the circumstances specifically before the board. The rules of procedure should be general in scope, and should allow that the rules may be temporarily waived, suspended, or adjusted to meet the particular needs of the public hearing process. Observing strict rules may be unnecessary for a simple side-yard variance, but a more formal procedure may be needed for a contested and complex planned unit development.

- Require prior registration for participants to provide comment, testimony, or questions on an application. Registration is useful not only for managing public hearings, but also as a record of who appeared and provided testimony. The registration forms can have a notes section for the chair or secretary to note the testimony offered.

- Participants may be entitled to cross-examine adverse witnesses, especially if they have a property interest affected by the zoning application. However, not every participant is entitled to the full panoply of due-process rights. Accordingly, the rules might limit the class of people that might exercise this right, such as adjacent or nearby property owners.

- Cross-examination should be straightforward and assist the public body in reaching its decision. A useful requirement is to make sure that those conducting a cross-examination limit their questions to the factors required to be demonstrated to support the zoning relief. These standards are listed in the zoning code sections dealing with the zoning relief in question (e.g., special uses, variations, text and map amendments).

- The rules should distinguish between ordinary public comment and testimony that may be the subject of cross-examination, and should keep participants from blurring the lines between these categories.

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- Public hearings before the board are not court proceedings and, while some formal procedures are necessary, the procedure is more flexible and informal process than a court proceeding. Participants should be reminded that rules of evidence and rules of civil procedure are only guides, and not strictly applicable to your public hearing.
- Some states allow the appointment of a hearing officer to take evidence or otherwise assist in the administration of a public hearing, which may be noted in the rules of procedure.
- Some states grant boards the power to compel the attendance of witnesses; if the governing law does not already provide the relevant guidelines, rules may be used to establish the factors to be considered and the circumstances under which the board exercises its subpoena power, if at all.
- The rules may provide that the hearing is automatically closed upon a vote of the board to make a recommendation on the relief. Alternatively, the hearing may be continued for the applicant, a member of the public, staff, or the attorney to provide new or additional information at a continued hearing date.

These are just a few examples. While it is not always necessary, it is far better to consider rules in advance rather than trying to develop them once your community is faced with a complex zoning application. With foresight, the board will be able to limit duplicative presentations of evidence while still granting applicants a full hearing for their requested relief.