



**Demystifying Due Process  
for Decision Makers:  
The Top Ten List**  
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## Demystifying Due Process for Decision Makers –The Top Ten List

This list of practical tips for elected and appointed decision makers seeks to demystify fair hearing requirements and prevent legal pitfalls in conducting administrative hearings.

### **1. When Fair Process Is Required: “Adjudicative” Or “Quasi-Judicial” Hearings**

California courts have held that when the applicable law (for example a city ordinance) **requires** that an administrative hearing must be held to take testimony and apply a standard or rule to an individual set of facts, the hearing must be fair and have “impartial” decision makers. This is the case irrespective of whether or not the hearing entails the taking away or modification of a vested right, such as an exiting permit or other entitlement. These hearings are often referred to as “adjudicative” or “quasi-judicial” because the decision makers act like judges applying rules to facts and evidence, rather than as legislators making policy decisions.<sup>1</sup> They generally concern an application for a city permit or other entitlement (including employment) or the modification or revocation of one. Such hearings may, but need not, involve an appeal from an initial administrative determination.

### **2. What Process Is Due: Notice, Reasonable Opportunity To Be Heard, Impartial Decision Maker**

Administrative hearings are not required to be conducted like trials with sworn testimony, cross examination and conformity to the rules of evidence. The procedures will generally be governed by a local ordinance. The essential components of fairness are reasonable advance notice, reasonable opportunity to be heard and an “impartial” decision maker.<sup>2</sup>

### **3. Judicial Review: Unfairness**

The final administrative decision is subject to judicial review in an administrative mandate writ proceeding based on an administrative record of the proceedings before the City and the City’s written findings.<sup>3</sup> A judge can invalidate the City’s decision based on the unfairness of the proceedings.<sup>4</sup> Sometimes attorneys’ fees can be awarded based on an unfair proceeding.<sup>5</sup>

### **4. Adequacy Of Notice-Special Considerations**

Notice of a hearing usually should conform to the requirements of the local ordinance or other law setting up the hearing, should provide reasonable advance notice as to when the hearing will be held, what will be at issue and how any staff reports and other material before the hearing body may be accessed.<sup>6</sup> This is a matter that City staff will normally handle. Decision makers should be alert to problems that may arise during the course of a hearing. These might be addressed by continuing the hearing, for example, is there some compelling circumstance that makes it impossible for a key witness to be present or is the applicant or appellants not present at the hearing suggesting that they may not be aware that the hearing was to proceed? If a hearing is to be continued from one date to another it is a good idea to make it clear on the record that no further notice will be given of the continued date, especially in land use hearings with complex noticing requirements.<sup>7</sup>

### **5. Reasonable Opportunity To Be Heard: Responding To New Issues**

Sometimes a new issue or a new twist on an old issue gets raised during the hearing. Persons whose interests are affected need to be given a fair chance to address them. A hearing can be re-opened for a limited purpose and a reasonable time limit placed on the parties to address the new issue. This will ensure that your hearing is perceived to be fair by a reviewing judge.

## **6. Fair “Hearing”: Being/Seeming Attentive, Reviewing The Record Of Prior Proceedings**

The fairness of the proceeding requires that decision makers appear to be and are paying close attention to the information being presented at the hearing. Making or taking cell phone calls, stepping out of the chambers in the middle of the hearing, using a computer for unrelated matters (for example, reviewing or sending emails) can all be taken by a reviewing court as an indication that the decision maker is not paying attention to the proceedings and therefore that the hearing is unfair.<sup>8</sup> It is helpful to state for the record that you are taking notes concerning the proceedings if you are using your computer for this purpose. If you have been absent for a prior part of the hearing it is important to state on the record that you have reviewed the tapes of the prior proceedings you missed. Doing so will avoid any public misperceptions and prevent legal challenges based on such misunderstandings.

## **7. Bias: Personal Embroilment, Seeking Advice, Disclosures On The Record**

Impartiality in a hearing context goes beyond disqualifications required by the state financial conflict of interest laws. “Personal embroilment” is a broad legal term the courts use when the decision maker has some personal stake in the outcome which might impair impartiality.<sup>9</sup> Are you very close friends or an adversary of the applicant? Ask your city attorney ahead of the hearing if the circumstances present a problem. If there is any question, ask the parties by disclosing the involvement and whether anyone objects. If there is a reasonable basis for objecting to a decision maker’s participation, it is often wise to err on the side of caution and recuse yourself so as not to render the decision vulnerable to legal attack.

## **8. Avoiding Prejudgment: Framing Questions, Maintaining A Neutral Demeanor And Tone**

Did you take a position on the project or matter so as to suggest that you cannot make a decision on the evidence presented?<sup>10</sup> Asking questions rather than stating opinions helps show you are interested in making a decision on the merits and haven’t made a decision without considering the information presented. Be mindful of whether your tone and demeanor reflect your neutrality. Even after the hearing has been closed and it is time to make a decision, make temperate statements explaining your conclusions by reference to the evidence received.

## **9. Fair Hearing: Disclosing “Ex Parte” Out Of Hearing Facts- Avoiding Commitments**

While members of the council and city boards and commission may be permitted to make out of hearing “ex parte” contact with the parties to gather facts, especially in land use matters, the information gathered must be disclosed on the record *in sufficient detail* so that all parties can respond and all decision makers are provided access to the same information. You can explain to anyone seeking your commitment to a position that you cannot make a decision until you consider all the information presented at the hearing. Such pre-judgment is inconsistent with the duty of impartiality and the conduct of a fair hearing.<sup>11</sup>

## **10. Asking The Staff: Separating Adjudicatory And Prosecutorial Functions.**

Sometimes, city staff will be playing a “prosecutorial” or advocacy role in the hearing. When this occurs, a decision maker will not be able to seek information or advice from staff on the “prosecutorial” side. Your city attorney will guide you as to the lawyers and staff assigned to play the “advisory” role who you may consult.<sup>12</sup>

Providing fairness is actually quite simple once you know the rules of the road. Good luck!

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## END NOTES

<sup>1</sup> *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1170; *accord Breakzone Billiards v. City of Torrance*, (2000) 81 Cal.App.4th 1205, 1223-24. These cases point out that although federal due process only applies to the taking away of a property right or liberty interest, which is not implicated by a hearing involving any application for an entitlement, the fair hearing requirements imposed on administrative hearings are as a practical matter the equivalent of procedural due process.

<sup>2</sup> See e.g. *Gai v. City of Selma* 68 Cal.App.4th 213,219.

<sup>3</sup> Code of Civil Procedure section 1094.5.

<sup>4</sup> Code of Civil Procedure section 1094.5 (b).

<sup>5</sup> *Bowman v. City of Berkeley* (2005) 131 Cal.App.4th 173, 177.

<sup>6</sup> See *Bowman v. City of Berkeley* 131 Cal.App.4th 173, 177.

<sup>7</sup> The *Bowman* case cited above was an example of a case in which the decision was set aside on the first round, because the opponents failed to attend a continued hearing at which the hearing decision was made because the opponents thought it would be continued and were not notified that the City would proceed.

<sup>8</sup> *Lacy Street Hospitality Service, Inc. v. City of Los Angeles*, 125 Cal. App. 4th 526, 22 Cal. Rptr. 3d 805 (2 Dist. 2004), decertified from publication June 15, 2005.

<sup>9</sup> *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1170.

<sup>10</sup> *Nasha LLC v. City of Los Angeles*, (2004) 125 Cal. App. 4th at 483-84.

<sup>11</sup> Check with your city attorney about the nature of the hearing and whether, in that context, it may be improper to have any ex parte contacts.

<sup>12</sup> *Morongo Band of Mission Indians v. State Water Quality Resources Board* (2009) 731 Cal.4th 731, 737.

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Manuela Albuquerque is the Director of Complex Public litigation for Burke Williams & Sorensen, LLP. In addition to her due process papers for the City Attorneys' Department and County Counsel, she authored a successful amicus brief for the League and CSAC before the California Supreme Court in *Morongo Band of Mission Indians v. California Water Control Resources Control Board* (2009) 45 Cal.4th 731, was the Berkeley City Attorney for twenty-two years, is a past President of the City Attorney's Department and represented City Attorneys on the League Board of Directors.