

**APA National Planning Conference
Planning and Law Division Facilitated Discussion:
Due Process and Zoning Hearings**

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6th and 7th Circuit Courts of Appeals Due Process Hearing Cases

***Fox Moraine, LLC v. United City of Yorkville,*
960 N.E.2d 1144 (Ill. App. Ct. 2011)**

Facts:

- Fox Moraine, LLC appealed an order from the Illinois Pollution Control Board to deny Fox Moraine's siting application to construct a landfill in Yorkville.
- Fox Moraine argued that the hearings on this application were not fundamentally fair, and that the decision that it failed to satisfy the siting criteria of the Environmental Protection Act was against the manifest weight of the evidence.
- Fox Moraine attempted to build a landfill on some unincorporated land in Kendall County, near the city limits of Yorkville.
- When negotiations with the county broke down, Fox Moraine attempted to have the land annexed to Yorkville so he could negotiate with the Yorkville corporate authorities.
- Fox Moraine filed a siting application pursuant to section 39.2 of the Environmental Protection Act (415 ILCS 5/39.2(a))
- Yorkville held several public hearings on this matter in March and April 2007, but due in part to a strong public backlash to the landfill, the city council denied Fox Moraine's application.
 - The city council formally noted that Fox Moraine did not meet most of the siting criteria set forth in section 39.2 of the EPA.
- Fox Moraine appealed this decision to the Illinois Pollution Control Board, arguing that the proceedings were fundamentally unfair and that the findings were against the manifest weight of the evidence.

- Fox argued that the proceedings were fundamentally unfair because: 1) city council members were biased and driven by political considerations which caused them to prejudge the siting application; 2) the council considered information not in the record; 3) the Board incorrectly applied the deliberative process privilege and did not apply the proper standard in determining whether the council members were biased.

Holding:

- The court found that the city council and Board's decision was not against the manifest weight of the evidence.
- The court held that it was error for the Board not to allow Fox Moraine to view a report by city attorney Mike Roth, but that this error was harmless.
 - The court noted that the report made by Roth was based only on evidence contained in the record. Therefore, although the city council had waived its attorney-client privilege, and therefore Fox Moraine had the right to view Roth's report, it would not have obtained any additional information as a result of viewing this report.
- The court also rejected Fox Moraine's argument that the deliberative process privilege no longer applies in Illinois. The court cited *Thomas v. Page*, 837 N.E.2d 483 (Ill. App. Ct. 2005), as support of its argument that this privilege applies to judicial bodies in Illinois, protecting them from disclosing how they arrived at a decision.
 - The court rejected Fox Moraine's argument that it should have been allowed to question council members about comments they made during deliberations meetings, holding that doing so would be unduly burdensome and that these comments did not require further clarification.
- The court then next noted that there was nothing in the record supporting Fox Moraine's argument that the city council's deliberations were fundamentally unfair. It found nothing supporting the contention that the mayor had colluded with attorney Roth to draft a report before the hearing denying the siting approval.
 - The court also noted that fundamental fairness merely required that the record be made available to the city council before it made its decision, and did not require the council members to review it, as Fox Moraine alleges.
- The court then noted that there was nothing in the record to show that illegal ex parte communications occurred between city councilmen and members of the public.

- Finally, the court held that the city council's decision on the siting criteria was not against the manifest weight of the evidence.
 - The court found that the council's determination that the clay that would be under the landfill was too permeable was a reasonable conclusion on which to base its decision to reject the application.

***Stop the Mega-Dump v. Cnty. Bd. of De Kalb Cnty.,*
979 N.E.2d 524 (Ill. App. Ct. 2012)**

Facts:

- Waste Management of Illinois applied for permits to expand a landfill in DeKalb County, exhuming an old section of the landfill and adding hundreds of acres of new capacity.
- As part of this agreement, Waste Management would pay \$120 million to the county over 30 years.
- The County and Waste Management began negotiating this agreement in 2008, and signed it in March 2009.
 - This did not, however, commit the county to allowing the siting of the landfill to be in the County, and instead stated that the statutory procedures would be followed before a location would be chosen.
- Stop the Mega-Dump (STMD) challenged the County's proceedings, arguing that they were fundamentally unfair.
 - STMD claimed that the proceedings were fundamentally unfair because the County Board merely rubberstamped the application because they were desperate for revenue.
- Public hearings were held over the course of six days by the County regarding the approval of a location for the landfill, required by the Illinois Environmental Protection Act, 415 ILCS 5/39.2(d). The siting of the landfill was approved by both the County and the Illinois Pollution Control Board (PCB).
- STMD sought reconsideration of the PCB's order, but this was denied. It then appealed the PCB's decision..
- STMD argued that the County Board's siting approval proceedings were fundamentally unfair because: 1) the County Board's procedural rules barred the general public from participating in the hearing; 2) Waste Management engaged in improper *ex parte* communication by taking County Board members on tours of Waste Management's landfill; 3) the County Board was biased toward Waste Management's application and approved it without a fair and impartial review.

Holding:

- The court found that the PCB's decision was not clearly erroneous.
- The court held that the PCB's determination that the procedures in the siting Ordinance and Articles were not fundamentally unfair was not clearly erroneous
 - STMD challenged sections of the County Board's "Articles of Rules and Procedures of the Pollution Control Facility Committee" (Articles), which were implemented to govern the Committee's application and hearing process. Specifically, it held that section 5 of Article III rendered the public hearing fundamentally unfair by discouraging and limiting public participation, as it did not provide enough people with an opportunity to comment at the public participation hearing.
 - The court disagreed, rejecting STMD's argument that the Articles too narrowly defined the class of individuals allowed to participate in the hearing.
 - The court noted that STMD cited no authority for the proposition that the fundamental fairness guarantees of the Articles afforded all members of the public the right to appear as a party and fully participate. It held that the public's ability to submit written comments satisfied this prerequisite.
- The court also held that no improper ex parte contacts occurred when the members of the County Board were allowed to tour the landfill at Waste Management's expense.
 - The court noted that the members of the County Board were not judges, but elected officials, so therefore it was expected that they would make contact with the public. The court would only find this contact improper if it can be demonstrated that this led to prejudice.
 - The court held that STMD had the burden of providing specific evidence that the County Board was biased. It failed to do this.
- STMD also alleged that the hearing was fundamentally unfair because the County Board failed to base its decision on the evidence at the hearing and instead prejudged Waste Management's application
 - The court held that the PCB's decision that this did not occur was not contrary to the manifest weight of the evidence.
 - It also found no evidence supporting STMD's claim that the County was desperate to obtain money to pay for a new jail.

Hidden Village, LLC v. City of Lakewood, Ohio,
734 F.3d 519 (6th Cir. 2013)

Facts:

- The Lutheran Metropolitan Ministries (LMM) ran the Youth Re-entry Program (Program), a service that helps young people released from foster care or juvenile detention re-enter society.
- The Program prepares its clients to live on their own by teaching them how to apply for a job or to find an apartment.
- About 4/5 of the Program's participants are black.
- In 2006, the Program moved from Cleveland to Lakewood, Ohio, where it attempted to lease an apartment complex from Hidden Village.
- Before moving in, the Program's directors met with city officials to explain their mission.
- At this meeting, Lakewood's Building Commissioner (Commissioner) stated that the location of the facility violated local zoning laws, as it was a prohibited institutional use.
- The Program disagreed, arguing that it was a permitted residential use, and moved into the Hidden Village apartment complex.
- The Commissioner responded by ordering the Program's removal, but this was overturned by the Lakewood Planning Commission.
- However, tensions between the city and the Program continued. The police department sent officers a memo telling them to issue citations to Program members, and the police started to issue jaywalking tickets for astronomically high fines and harassing the Program members in other ways.
- The mayor also wrote to the LMM, stating that he would seek to have the Program removed at the earliest possible time.
- As a result of these events, Hidden Village sued Lakewood, the mayor, Commissioner, and a housing and building department advisor. Hidden Village filed suit under §§ 1981, 1982, and 1983, claiming that the defendants discriminated against its tenants on the basis of race.
- The District court rejected the defendants' motion for summary judgment, holding that the individual defendants did not enjoy qualified immunity.

Holding:

- The appellate court upheld the district court's denial of the defendants' motion for summary judgment, finding that Hidden Village had produced enough evidence for a jury to conclude that the City had discriminated against the tenants on the basis of their race.
 - The court noted that emails between city officials revealed a detailed plot to drive the Program out of Hidden Village.
- The court also held that there was enough evidence for a jury to reasonably conclude that all three individual defendants participated in the effort to drive the Program out of Hidden Village.
 - The court again pointed to the emails that these officials sent to one another describing their goal to kick the Program out of Hidden Village.
- The court also held that a jury could conclude that race discrimination motivated the three individual defendants.
 - The court again pointed to these emails, and noted that a search conducted by the City focused exclusively on Program tenants, not other tenants.
 - The Court also noted that the white participants in the Program had not complained of harassment, but the black participants had.
- The court also found that there was enough evidence that the City violated the Fair Housing Act by their discriminatory actions.
 - However, it held that the individual defendants were entitled to qualified immunity.
- The court, however, did not find that the individual defendants were entitled to qualified immunity on the trespass claims brought against them, because a jury could find that they had acted with malicious intent, which defeats a legislator's claim for qualified immunity.

Due Process Issue:

- The court cited *Buchanon v. Warley*, 245 U.S. 60 in support of the legal principle that the state could not interfere with property rights except by due process of the law.
 - The court noted that if the government attempts to drive residents out of their homes on account of their race, these tenants' due process rights have been violated.

Scrap Yard, LLC v. City of Cleveland,
513 F. App'x 500 (6th Cir. 2013)

Facts:

- The City of Cleveland and Scrap Yard, LLC had a long-standing zoning dispute over whether Scrap Yard, a business which processed scrap metal, complied with the City's zoning code.
- In 2006, the City sued Scrap Yard for a number of zoning violations, claiming that it violated a number of land use ordinances. The City sought a preliminary and permanent injunction against operations at the site.
- The case wound its way through state court, with an injunction issued by the trial court and then overruled by the appellate court on two occasions.
- During the state court proceedings, Scrap Yard filed a complaint in federal court. The first complaint was dismissed without prejudice, and the second complaint is the subject of this action.
- Scrap Yard's complaint asserted claims alleging, among other things, a § 1983 claim alleging that the City's enforcement of its zoning code against Scrap Yard violated its Due Process rights, a § 1983 claim alleging deprivations of health, safety, privacy, and welfare, and an unlawful taking of property.
- The court dismissed the claim that the City's enforcement of its zoning code against Scrap Yard amounted to a civil rights violation
- Likewise, the court dismissed the allegation of a deprivation of health, safety, privacy, and welfare, noting that Scrap Yard had failed to allege facts to state this claim.
- Finally, the court held that, with the state law claims pending, Scrap Yard's taking claim was not ripe.

Due Process Issue:

- As noted above, the court found that the Scrap Yard suffered no due process violation by the City attempting to enforce its zoning code.

M & S Signs, LLC v. Twp. of Au Sable,
2014 WL 103219 (E.D. Mich. 2014)**Facts:**

- M&S Signs erects billboards. Between April 2011 and August 2012 it submitted three applications to erect billboards. All three of these were denied, as the municipality claimed that the signs did not comply with its sign ordinance, which limits signs to areas zoned for industrial uses.
- M&S claimed that this action was a violation of equal protection, a violation of its procedural due process rights, and a violation of free speech.
- M&S claimed that the action violated its Due Process rights because it fails to circumscribe the time in which government officials must grant or deny a sign permit.

Holding:

- The court held that M&S did not allege a procedural due process claim because it did not allege that it had any protected property interest in receiving the sign permit.
 - In order to allege a procedural due process claim, a plaintiff must establish that: (1) that it has a life, liberty, or property interest protected by the Due Process Clause of the Fourteenth Amendment, (2) that they were deprived of this protected interest within the meaning this clause, and (3) that the state did not afford them adequate procedural rights prior to depriving this protected interest.
- The court also rejected the argument that the denial of the applications was a violation of M&S's First Amendment rights because it found the ordinance to which the application did not conform to be a content-neutral, narrowly-tailored ordinance justified by a significant government interest, and that it left open other channels of communication.
- Finally, the court held that the Equal Protection argument was not yet ripe for disposition.

Due Process Issue:

- As noted above, the Due Process claim failed here because the plaintiff could not allege that it had any protected property interest in receiving a sign permit. A

protected property interest must be deprived in order for a Due Process claim to proceed.

Embassy Realty Investments, Inc. v. City of Cleveland,
2013 WL 5532646 (N.D. Ohio 2013)

Facts:

- Embassy purchased property from Barnes, who had obtained the property from a church.
- In 1998, while the property was still owned by the church, the City of Cleveland's issued a notice that the church violated zoning ordinances and condemned it. The notice, however, was never recorded. The City took no additional action on the property for nine years.
- Between 2007 and 2009, Barnes applied for four permits to add to the building. All four were denied, as the City's zoning division held that the building did not meet zoning codes.
- Barnes appealed these decisions, seeking variances, but these requests were denied.
- Embassy also filed an appeal with the zoning board, challenging the validity of the condemnation as it applied to subsequent purchasers. This was denied, and the City tore down the building.
- Both Barnes and Embassy filed this action, which brought a § 1983 claim alleging that the building had been demolished in violation of their right to procedural due process under the Fourteenth Amendment and the right to substantive due process. They also claimed that this demolition violated their Fourth Amendment right to be free from unlawful searches and seizures, and that it constituted an unlawful taking under the Fifth Amendment.

Holding:

- The court granted the defendant's motion for summary judgment on the Due Process claim.
 - The court held that the plaintiffs had waived their right to challenge their alleged lack of notice, because they waived this issue when they abandoned their appeal before the zoning board challenging the notice that they received.

- The court held that the plaintiffs could not complain that the administrative process was inadequate to address the alleged notice violations when they chose not to fully avail themselves of it.
- Furthermore, the court noted that plaintiffs had full notice of the condemnation before it occurred, and were given a full and fair opportunity to be heard prior to the deprivation.
- The court also granted the defendant's motion for summary judgment on their substantive due process claim.
 - The court noted that substantive due process will only be granted when the government action is arbitrary and capricious or "conscious shocking."
 - Here, the City's decision to demolish a building which it had already condemned was neither.
- The court also rejected the takings claim.
 - It held that there cannot be a taking where the action remedied a nuisance, which the court held the City's demolition of the property to do.

Due Process Issue:

- As noted above, the court did not find the City's action to violate the plaintiffs' due process rights because they had received sufficient notice of the condemnation and had received a sufficient opportunity to respond.
- The plaintiffs also failed to satisfy the high bar required to allege a substantive due process violation.

***Get Back Up, Inc. v. City of Detroit,* 2013 WL 3305672 (E.D. Mich. 2013)**

Facts:

- Get Back Up (GBU), a substance-abuse treatment center, sought a permit to operate in one of the city's business zones. This zoning classification allowed a number of larger residential structures like fraternity houses, multi-family dwellings, town homes, and pre-release adjustment centers.
- The City denied this permit, holding that GBU was not the type of use permitted in this zone. The zoning board of appeals was particularly worried about the reports it received of the GBU's occupants engaging in poor behavior.

- GBU sued the City, claiming that its action violated the ADA, the FHA, and the Rehabilitation Act. GBU also claimed that the ordinance violated its rights under the Due Process Clause, as it was void for vagueness.

Holding:

- The court held that GBU's Due Process rights were not violated because the zoning ordinance was not void for vagueness.
 - In order for a zoning ordinance to be void for vagueness, it must be so vague as to articulate no rule or standard at all.
 - The court noted that municipalities have broad power to implement zoning regulations, and consequently can pass general and far-reaching ordinances. While the ordinance in this case may have been broad, it was not unconstitutionally so.
- The court did not find the zoning ordinance to discriminate on its face against the disabled, which would have been required to allege a violation of the ADA.
 - Nothing in the ordinance made any distinction that would discriminate specifically against the disabled.
 - Furthermore, the ordinance was not applied in a manner to discriminate against the disabled. The zoning board had sound reasons to deny GBU a permit to operate in the district that had nothing to do with discrimination against the disabled.

***10 & Scotia Plaza, LLC v. City of Oak Park, 2013 WL 300906* (E.D. Mich. 2013)**

Facts:

- In 1999, Scotia Express, LLC applied for a liquor license. While this application was pending, the City of Oak Park passed a zoning ordinance that prohibited one business with a liquor license from being within 1,000 feet of another business with a liquor license.
- Across the street from where Scotia Express sought to locate was a business with a liquor license. Therefore, the City denied Scotia's application for a liquor license.

- In 2010, this space again become empty, and Scotia Express applied for a liquor license. Again, this license was denied, as it was within 1,000 feet of another business with a liquor license.
- Scotia Express sued, claiming that the denial of the liquor license was intended to give the business across the street an advantage. The complaint contained nine counts, including a § 1983 claim of selective enforcement, a claim of a violation of substantive due process, a takings claim, and a claim that the ordinance was unconstitutionally vague.

Holding:

- The court denied the substantive due process claim, holding that the City had a valid reason to enact the ordinance, and that the ordinance did not shock the conscious or constitute arbitrary and capricious action.
- The court also held that the ordinance was not void for vagueness and thus a violation of the plaintiff's procedural due process rights. The court held that a normal person could understand the ordinance, and that it had a discernable meaning.
- The court denied the takings claim, holding that it was not ripe for review
 - The court held that Scotia Express was required to go through the proper state law procedures first before it could apply for relief in federal court.
- The court denied the plaintiff's § 1983 claim, holding that the plaintiff had not articulated any viable constitutional claim.

Due Process Issue:

- The court held that there was no viable substantive due process claim, as the plaintiffs had failed to allege that the government's action "shocked the conscience."
- The court held that there was no procedural due process violation, because the ordinance was not void for vagueness.

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.