



PERSSON, COHEN, MOONEY, FERNANDEZ & JACKSON, P.A.

ATTORNEYS AND COUNSELORS AT LAW

Quasi-Judicial Hearings

Planning Commission Refresher

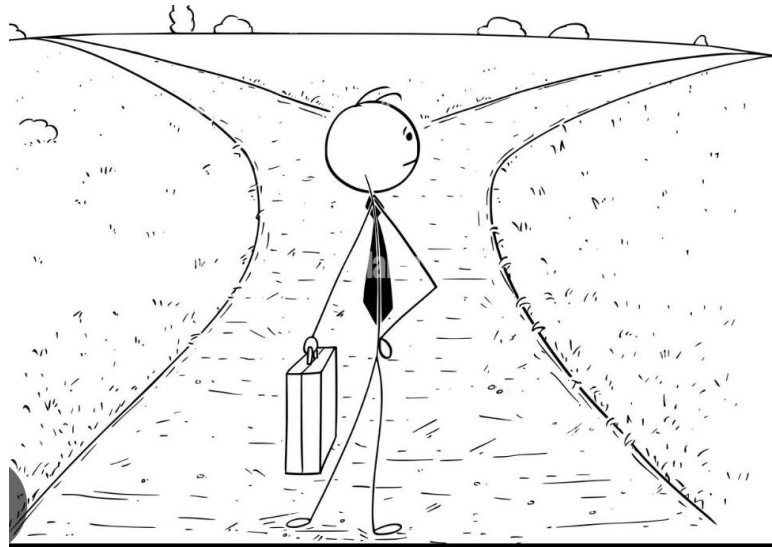
Presented by:

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2 Types of Municipal Decision Making

Legislative

Quasi-Judicial



Legislative Decision Making

- Involves the adoption of laws or policies that will be applied city-wide. IE, LDR's adoption.
- Burden of proof is on the challenger to show the decision is arbitrary and capricious.
- Courts apply a deferential 'fairly debatable' standard.
- Judicial review is *de novo*.



Quasi-Judicial Decision Making

- Involves the application of existing laws/policies to a particular property or person.
- Requires additional procedural due process.
- Decisions reviewed by a writ of certiorari evaluating the record before the deciding body.
- Hearings are “akin to informal trials” because it imposes obligations on the QJ Board.

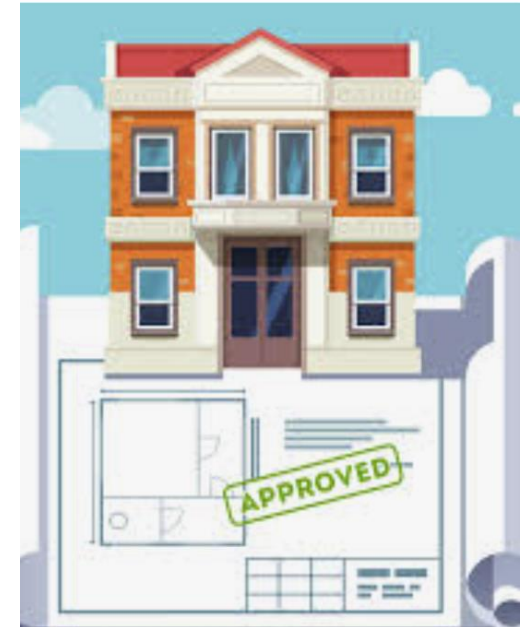




*'We hope to buy the first one
and then object to the other
199 being built'*

Quasi-Judicial Matters Include

- Site plans
- Site-specific rezoning of land
- Special exceptions
- Variances
- Preliminary plats
- Appeals from an administrative staff determination



3 Quasi-Judicial Hearing Standards

1. Has *Due Process* Been Afforded to the Parties?
2. Was the Decision Based Upon *Competent Substantial Evidence*?
3. Have the *Essential Requirements of Law* Been Followed?

3 Quasi-Judicial Hearing Standards

- 1. Due Process*
- 2. Decision Based On Competent Substantial Evidence*
- 3. Following the Essential Requirements of Law*

A violation of any 1 of the 3 elements will result in a reviewing Court remanding the matter back to the Board.

Due Process = Fairness

1. Notice.
2. Right to Know All Factors that Contribute to the Decision Making. [i.e., ex parte, site visits, etc.]
3. Meaningful Right to Be Heard.
4. Right to Present Evidence.
5. Right to Cross Examine Witnesses.
6. Right to Consistent Treatment.
7. Right to Have Established Procedures Followed.



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Due Process Means Fairness For ALL



- Has the hearing process been fair and reasonable to all parties involved?
- Was everyone who wanted to be heard afforded an opportunity to be heard/participate?
- If there is an error, is it material and/or can it be corrected?



So what is “ex parte”?



- “Ex parte communication” means any communication “on behalf of or involving one party to a legal matter” that is “conducted in the absence of or without notice to the other party.”



Ex Parte Communications/Experiences

- Caselaw provides there is a presumption of prejudice.
- Fla. Stat. § 286.0115 modifies the presumption and allows cities to adopt an ordinance/resolution removing the presumption if communication and/or experience is disclosed and made part of the record.
- Disclosure must include : the subject of communication and identity of the person, group, or entity; written communications; site visits; and expert opinions.
- Individuals with contrary positions must have opportunity to respond/refute the communication/experience.

Ex Parte Also Includes:

1. Site Visits
2. Conversation with Spouses, Friends, Neighbors
3. Information gathered on Social Media Feeds (Facebook, Nextdoor, etc.)
4. Research Board Members do “On Their Own”



Best Practices

- All Ex Parte Must be Fully Disclosed to Avoid Due Process Issues. Disclose at the Beginning of Each Hearing and After Any Continuances.
- If you Have Not Engaged in Anything, Then There is Nothing To Disclose!
- All Unsolicited Email/ Written Communications can be Included In the Record by the City Clerk.
- Best Response (s) to Interested Citizen Is a “Thank You” and Invitation to Participate in the QJ Hearing with the Entire Commission at a Specific Date/Time.

Voting Requirements

- Florida Statutes 286.012 requires members of municipal boards who are present at meetings vote unless there is a conflict of interest or a possible conflict (under Florida's Ethics Laws).
- However, in quasi-judicial proceedings, a member may abstain if the abstention is to assure a fair proceeding free from potential bias or prejudice.



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There is No Such Thing As Too Much Due Process

what are other
words for
due process?



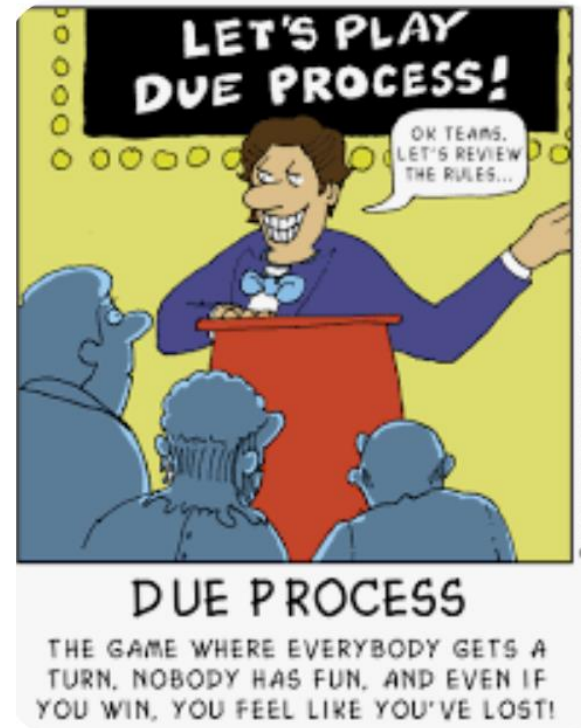
equity, due process of law,
justice, legality, mandate,
right, honesty, authority,
truth, law



 Thesaurus.plus

Consequences of Due Process Violations

If a due process violation is found by court, the case will be remanded back to the approving board for another public hearing.



Due Process is the Low Hanging Fruit

- Due Process Challenges are the Easiest to Raise on Appeal.
- How participants are treated, the time they are allocated, and how fair you are to the parties - are all under the Board's control.
- Balance Everyone's Rights: the applicant, participants, the opposition, and the public.
- Best Practice: Have CLEARLY defined hearing procedures in your Codes to avoid having to figure it out at the hearing on the fly!



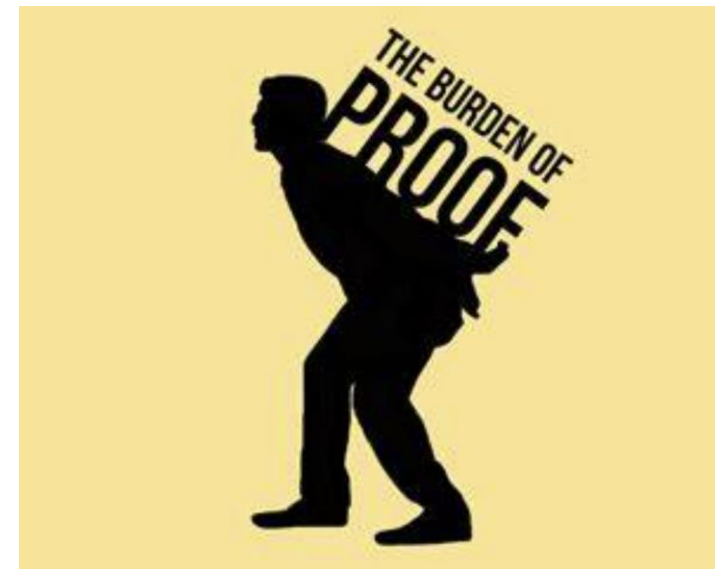
Competent Substantial Evidence

“We have used the term ‘competent substantial evidence’ advisedly. Substantial evidence has been described as such *evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred*. We have stated it to be such relevant evidence as a *reasonable mind would accept as adequate to support a conclusion*.”

DeGroot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957)

Initial Burden of Proof

- The Applicant carries the initial burden of proof.
- Applicant must show through competent substantial that it complies with the land use requirements of the City. *Bd. Of County Comm'rs of Brevard Co. v. Snyder*, 627 So. 2d 469, 476 (Fla. 1993).



Burden of Proof Shift



- Once the Applicant's burden is met, the burden shifts to the Opponent(s).
- Opponents must then show through competent substantial evidence that there is a legitimate purpose to deny the request. *Id.*; see also, *City of Hialeah Gardens v. Miami Dade Charter Foundation Inc.*, 857 So. 2d 202 (Fla. 3d DCA 2003)

Competency of Evidence

- Evidence that is relevant, material and reasonable.
- Formal rules of evidence do not apply, they are relaxed.
- Witnesses are subject to quasi-trial treatment and are subject to cross examination.
- Generally, witnesses must be sworn in.
- Hearsay testimony is admissible, but insufficient on its own to support a decision.

Competent Substantial Evidence

3 General Categories of Testimony:

1. Comments and opinions of professional staff;
2. Expert Testimony; and
3. Fact-based testimony of neighbors and lay people.

Not Competent Substantial Evidence

- Statements of public support/opposition without facts is **NOT** competent substantial evidence.
(i.e., NIMBY)
- Petitions.
- Not a popularity contest.



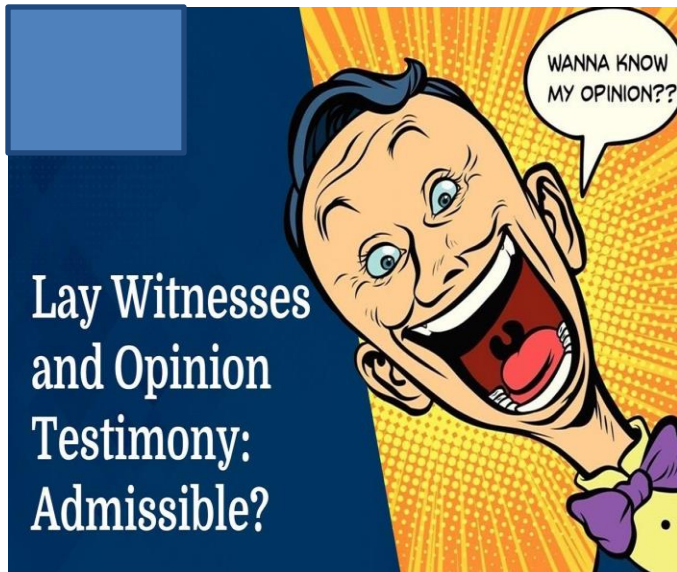
- BANANA =
Build Absolutely Nothing Anywhere Near Anything!

- LULU =
Locally Unwanted Land Use

- CAVE People =
Citizens Against Virtually Everything



Lay Person Testimony



- Lay Person Testimony is Not Competent Substantial Evidence on Technical Matters.
- Lay Testimony MAY be Competent Substantial Evidence if Based Upon First Hand Knowledge of an Area, General Facts or How it Affects the Lay Person's Quality of Life.

Competent Substantial Evidence

- The Quasi-Judicial Board gets to weigh and evaluate relevant evidence.
- If there is competing evidence, the Board gets to decide which evidence it believes more probable.
- Reviewing Courts are not permitted to second guess the Quasi-judicial Board's decision.
- Just need a *scintilla* of evidence!



What About Other “Outside” Evidence ?



Elected Officials should not conduct their own investigations to introduce as evidence ...

Elected Official Role

- If you have Particular Knowledge Base on a Subject Matter at Issue, Ask Questions of Witnesses on the Subject.
- If the Witnesses Do Not Have Answers, Request That the Answers Be Provided at a Future (Continued) Hearing.
- Do not Testify as to Your Knowledge, Your Research, and Your Findings!



Know Your Role on a Quasi-Judicial Board



You can be a
Witness or a Judge,
but you **CANNOT**
be Both!



Essential Requirements of Law

- Application of the Right Law/Code.
- Correct Interpretation of the Law/Code.
- Meet Constitutional Requirements.

Essential Requirements of Law

- Must be more than legal error, the departure must result in a miscarriage of justice. *Malloy v. Gunster, et. al.*, 850 So. 2d 578 (Fla. 2d DCA 2003).
- Courts generally give deference to agency interpretations of its own code. *Pruitt v. Sands*, 84 So. 3d 1267 (Fla. 4th DCA 2012).

Rendition of the Order

- Board Decisions Must Be Memorialized in a Written Order of Denial.
- Order Must Contain Findings of Fact and Conclusions of Law.
- Order serves as the Basis for Challenges by Writ of Certiorari.
- Board Should Continue to Observe Ex Parte Rules Until All Challenge Periods Expire.



Judicial Review of Quasi-Judicial Decisions



- A Writ of Certiorari is a Request for a Review of a Lower Court ruling.
- Known as First Tier Review.
- The Writ must be filed within 30 days of the Board's Rendition of the Written Order.
- The Court's Review is Based on the Quasi-Judicial Record and Briefs.
- There is no discovery; frequently, there is not oral argument.

Writ of Certiorari



- Issues must be raised in the hearing to be preserved for the Reviewing Court.
- The party seeking to challenge must preserve the record (including exhibits) and generate a verbatim transcript.
- No one expects the Quasi-judicial Board to have law degrees or know the Rules of Civil Procedure.
- However, Board should understand the 3 reviewable Quasi-judicial criteria.

Best Practices:

- Set Clear Procedural and Time Requirements Hearing and Observe Them. This includes Staff, Applicant, Affected Parties, Lawyers and Public.
- Ensure that the Hearing Record is Complete.
- Ensure the 3 Quasi-Judicial Hearing Standards have been Observed.
- Remember Civility, Order and Decorum are the Standard! Don't let Chaos Take Control.





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