

CITY SOLICITORS AND TOWN COUNSEL ASSOCIATION

"The Massachusetts Municipal Lawyers Association"

"HOW TO HOLD AN ERROR FREE MUNICIPAL HEARING"

"ISSUES RELATING TO THE HEARING ITSELF"

By

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This program is designed to give you a better understanding of the local level hearing process. As municipal officials, you are often called upon to conduct various types of hearings. Having a better understanding of how to prepare for the hearing, conduct the hearing and prepare the decision, as well as what happens with an appeal, will better enable you to properly carry out your hearing functions. This aspect of the program will address the various issues which arise during the hearing itself.

Most legal citations and cases have been omitted to make the presentation more practical and less legalese. The citations and cases can be obtained by contacting the author. As with all aspects of the hearing process, it is important for you to consult and work with your local counsel.

I. Beginning the hearing

Now that presumably the case has been prepared and the proper notices and posting of meetings has occurred, you are ready to begin the hearing.

Normally, the presiding officer, such as the chairman of the board or the individual conducting the hearing, would convene the proceedings. This is done simply by stating, to the effect, that "This is a hearing to consider charges against Joseph Smith, made by the Police Chief; consider charges against the ABC Restaurant and Lounge; consider whether to approve a common victualler license for Al's Chili House; etc."

II. Witnesses and Exhibits

A case is presented through witnesses and exhibits.

Usually several of the witnesses would be employees of the community, the applicants (if it is a hearing on an application), people in favor or opposed, or other such groups of people who usually come voluntarily to the hearing. These people would normally not need to be compelled to come to the hearing.

Some witnesses however will not come voluntarily to the hearing. Even if certain witnesses say that they will come voluntarily, sometimes you get a feeling that they will not show up. Some witnesses want to come, but for various reasons want to be subpoenaed to attend.

Subpoena Witnesses

For witnesses who will not come voluntarily or due to job or personal reasons need a subpoena, you need to have them subpoenaed. Usually this is handled by your local municipal counsel.

Witnesses can be required to bring with them documents within their possession or control.

State law provides that witnesses "may be summoned to attend and testify and to produce books and papers at a hearing before a city council, or either branch thereof, or before a joint or special committee of the same or of either branch thereof, or before a board of selectmen ...11 and other public bodies. G.L. c. 233, section 8.

In addition to the statutory authority noted above, there is generally considered to exist a customary right of bodies or persons holding hearings to have a Notary Public or Justice of the Peace issue summonses to compel the attendance of persons at hearings. There is also authority for the Notary Public or Justice of the Peace to issue summons under G.L. c. 233, section 1 to compel attendance before "other persons authorized to examine witnesses". Arguably, this could include any officer or board authorized by law to hold a hearing.

If the person so summoned does not appear, then the law provides a mechanism to go to court to seek a court order to compel the attendance of the recalcitrant witness. G.L. c. 233, section 10. The court can order the witness to attend. A failure to attend then would be a contempt of the court.

III. Marking of Exhibits

In any hearing where there are going to be documents used, which basically is all hearings, you should be prepared to mark the Exhibits with either numbers or letters. If there are not going to be too many Exhibits, you can use numbers if you wish.

If there are going to be a large number of Exhibits, you should use numbers.

You can purchase little tags that state "Exhibit" on them, with space for the date and number. It is also a good idea to keep a separate sheet called an "Exhibit List", indicating the name of the hearing, the date, what party the Exhibit is from or if it is a joint Exhibit, the number of the Exhibit and if possible, a brief description of the Exhibit. This will help you keep better track of the various exhibits and will make it easier to complete the record of the hearing.

In some hearings, the parties may agree in advance as to certain Exhibits and at the *beginning* of the hearing they may present to you certain Exhibits which they have already agreed may be introduced. Sometimes they might pre-mark Exhibits which they will try to introduce in the proceedings.

In other hearings, the Exhibits are introduced as the hearing proceeds.

Some times the parties will make copies of each of the Exhibits they introduce for each of the persons hearing the matter. Other times they make just one copy and use that as the document to be introduced. If there is just one copy, you can either make copies for the other people hearing the matter, or make sure that each of the people hearing the matter have an opportunity to review the document.

All testimony and exhibits which are relevant to the matter being heard should be allowed and introduced. What is relevancy? You should ask yourself whether it bears in some way on the issues before you. Would it be helpful in deciding the issues? Does it go to the establishing or disproving of any of the issues or allegations?

If it does, does the Exhibit appear to be accurate and either authentic or a copy of an authentic Exhibit? You should be satisfied that the Exhibit is what it is claimed to be. Usually this is done by having it certified by someone in a position to say that it is what it is claimed to be. You can use reasonable judgment if it is not certified.

Many times the parties might stipulate that a document is what it is claimed to be. This of course makes it easier in terms of admitted the document. You should note for the record any such stipulations. Sometimes the parties may stipulate as to certain facts. These likewise should be noted for the record.

It is always a good idea to mark as an Exhibit, often the first ones, the notice of the hearing, the application if there is one and any other pertinent correspondence (such as agreements to reschedule the matter). This is not always done and that is not a problem, depending on the issues and the *significance* of the proceedings. As will be noted below, the more important it is to have a complete record of the matter, the more important it is to have documents, including the notices and applications, introduced. You can make a general reference in the beginning of the hearing that the notices and applications are deemed admitted. If there are other documents in the file which are important, you should have them deemed admitted. Often times, even when this is not done, when the record is being prepared, these items are incorporated into the record.

the witnesses, you are ready to begin hearing the matter.

Adversarial Hearings

The order of proceedings in adversarial matters (disciplinary hearings, license suspension/revocation hearings, for example) is that the party making the charges puts their case on first and then the other party puts on their case.

In the presentation of both cases, either party has a right to object to the questions or Exhibits of the other party. You need to rule on these. In addition, you, as the person or body hearing the matter, can ask questions of the witnesses.

Let us assume there is a local level disciplinary hearing. In such a hearing, the order of proceedings might be as follows (we will assume that each party is represented by an attorney; in such instances it is the attorney who is acting for the Town or Employee):

- Town and Employee may make an opening, giving you an overview of the matter; either party may waive opening; Employee may want to reserve opening until he presents his case
- Town introduces its first witness and questions same; may also introduce Exhibits through the witness
- Employee cross-examines witness; can also introduce Exhibit through witness
- Board or person holding hearing questions witness
- Town introduces its next witness and the same pattern follows
- Town rests its case
- Employee introduces his first witness and questions same; may also introduce Exhibits through the witness
- Town cross-examines witness; can also introduce Exhibit through witness
- Board or person holding hearing questions witness
- Employee introduces its next witness and the same pattern follows
- Employee rests its case
- Town may present rebuttal evidence
- Parties may make closing arguments
- Board or presiding officer takes matter under advisement and eventually renders decision (be careful of time periods involved as to when decision must

be rendered)

Objections in Adversarial hearings-

During the course of the proceedings, either party may object to the other party's questioning of a witness or the - introduction of an Exhibit.

If a party is seeking to introduce an Exhibit, be sure that they show it to the other side. Usually the parties know to do this, but sometimes they forget and it is necessary for you to remind to show it to the other side before you consider whether to admit it.

After the other side has seen it, you should ask if there is any objection. If there is an objection, ask the person to state and explain his objection. The other side (being the party trying to introduce the Exhibit) should then be permitted to respond to the objection.

You can then decide the issue as to the objection. You would either "overrule" the objection and allow it to be admitted, or you would "sustain" the objection and not allow it to be admitted. You can also allow it in subject to permitting the objecting party to renew his objection later.

During the questioning of a witness, there may be an objection. In such a situation, you need to address it then. The questioning should stop and the witness should not answer until you permit the answer.

When there is an objection to a question, you should allow the person making the objection to explain the basis of the objection. Then allow the other party (the one whose question was objected to) to respond.

In dealing with objections, as well as other matters, you are not expected to be as familiar with the law as judges. Local hearings, as well as many state hearings, are not bound by the strict rules of evidence and judicial procedure. Thus you have some flexibility. The key is to maintain fairness and use common sense. Even if you allowed a question which a judge would not have allowed, as a general rule as long as you conducted a fair and reasonable hearing, you will not be in trouble.

Practice tip- when there is an objection, and you may not be sure how to rule on it, you may want to allow it in, but state that "upon review of the entire matter, I will give it what weight is appropriate" or words to that effect. It may be that you do not feel much weight, if any, should be given to the question or Exhibit when you review the entire matter.

There may be objections based on legal principles which may disqualify a witness from testifying. An example of this is spousal immunity. When there are objections made based on such issues, you need to consult with your legal counsel. This presentation is not designed to address such technical matters.

Non-Adversarial Hearings

Non-Adversarial hearings include license hearings, where someone is appearing before your board seeking a license, such as a liquor license or common victualler

license. These are still very important hearings. Because they are non-adversarial in nature, the format is different from the adversarial hearings discussed above.

In these hearings, usually the applicant, either by himself or through his legal counsel, makes his presentation to you or the Board as to why he should be granted the license.

He may present witnesses in support of his application. Often this is done to explain various aspects of the business activity, such as parking and traffic, building design, etc.

After the applicant has presented a witness; or at the conclusion of all the applicant's witnesses, the Board may question the applicant or his witnesses. Also, the Board can introduce relevant Exhibits.

There may be others at the hearing who wish to testify. It may be the custom in your community to have certain municipal officials, such as the Police or Fire Chief, Building Commissioner or Health Director speak and provide information on the application. The people associated with the community should be allowed to speak next.

Next would be the general public. You can start off by asking for those who are in favor of the application to speak first. When that group is done, you can then ask for those opposed.

An issue often arises as to whether the public can ask questions of the applicant. Usually the applicant is anxious to address any questions or issues. You need not allow the applicant to be questioned by the public. Often, especially in controversial matters, these questions tend to be hostile. If you are not going to allow the questioning, the person can still state the questions as issues he is concerned with. In any event, all such questions should go through the chair.

VI. Developing a Record

The record is the history of what went on before your Board. It contains the documents introduced and to the extent that it exists, the transcript or tape of the matter. It contains the notices and the decision.

It is important to be sure that there is enough evidence before you to make the decision.

As discussed by other speakers, certain matters before you require findings of good or just cause, or that the public need will be served or that something is not detrimental to the public good and welfare. You must be certain that enough evidence has been presented in order for you to make such findings.

In all cases therefore, the record which is developed before you is important. The importance is even greater if the matter is appealed, because, as will be discussed in greater detail by another speaker, some appeals are usually based solely on the record developed by your Board, while other appeals involve a new hearing before a new fact finder, whether it be a judge or an administrative law magistrate.

Appeals involving only a review of the record require of necessity more attention to be paid to the record. However, even in other hearings where there will be a new hearing, it is important to have a complete record as you want to be able to show that the decision you made was based on sound reason and was not arbitrary, capricious or whimsical.

Particularly in license matters, such as a common victualler, it is critical to have in the record sufficient information to justify your decision if it is a denial. A court in reviewing the denial of a common victualler license is only going to be looking at what was before the Board, unless the Court allows the record to be opened and new evidence introduced. There is one exception of note to that cautionary alert- a court will recognize that a local board is familiar with local conditions and will usually give deference to determinations by a local board which involve knowledge of local conditions.

However, Boards acting in their licensing capacity can create a stronger case for upholding their decisions in a denial of a license by being sure that the record contains certain pertinent information which would enable a judge to see that there was some basis for the Board to decide the way they did. This information can even be introduced by the Board itself at the hearing.

Practice tip- In license matters, it is very helpful and prudent to introduce a map of the community showing the location of other similar licenses in the community, particularly serving the same or similar fare. This can easily be done using a local zoning map or a few sheets from the Assessors' Maps. The proposed location and the other locations can be marked. This enables someone reviewing the decision to see that there was a basis for finding; for example, that the public good would not be served by another pizza parlor where there are several others already in existence.

Practice tip- In business license matters, do not get into the issue of competition to other locations. This often happens when a Board denies a license, stating that it would give too much competition to other businesses. This is fraught with danger. The same point is actually whether the public good would be served by this particular licensee. By finding that the public good is already adequately served and that this license would not serve the public good which is adequately served, you are able to have a recognized basis to deny the application and can avoid the uncertain issue of competition. While there may be some cases which can be interpreted to suggest that competition, to the point that it causes other places to be unable to serve the public, can be considered, you are generally better off not dealing with competition as a reason.

You can also have introduced into the record a listing of all or some of the licenses already issued. This is helpful in seeing how many of a certain of license is already in existence.

If traffic is a concern, you can help beef up the record by having someone from the police department testify as to traffic conditions at a certain location. A report can also be prepared on this issue and introduced into the record. Under certain procedures, some boards can have the applicant finance a traffic study. Check with your local counsel as to if and how this can be done in your community.

Photographs are also helpful to have in the record. While sometimes a judge will take a view, it is helpful to have information in the record to show what the area is like so that a fact finder on appeal can get a feeling for the area.

VII. Decorum-

One of the easiest ways to lose control of a hearing and commit an error which can lead to reversing the decision of the Board or, even worse, create serious legal liability, is to not maintain proper decorum.

The best rule of thumb is to treat all people and matters before you the same way you would want to be treated if you or a matter you had an interest in what was before a Board.

This is easy to say, but in practice it is often hard to observe. Due to the emotions which often arise during hearings or the strong feelings which all persons may have from time to time, history has shown that it is sometimes difficult to treat persons and matters before you properly. However, you must resolve constantly that you will treat all persons and matters fairly. To do less is to weaken the strength of orderly government and will only cause problems.

The best way to do this is to pause and think before responding to matters before you. Do not fall prey to the occasional wrongful conduct of those before you, whether it is inadvertent on their part or even intentional on their part.

Here are some typical examples which may happen-

an applicant becomes argumentative at the thought that he needs a license or some approval from you, even though the law clearly requires it

an attorney representing a person or party becomes argumentative and "over zealous" in his representing his client, whether it be getting into an argument with the Board or criticizing the Board for some policy

members of the public are rather harsh in their opposition to the matter before the Board and threaten Board members with revenge at the next election

members of the Board disagree amongst themselves as to the proper way to proceed

the matter before you is one which you and a sizable segment of the community find repulsive, but yet the law allows the matter to come before you

In instances where things get out of hand, a record is created which can easily form the basis for an appeal or other legal action. Such situations enable an appealing party to show that the hearing was not conducted properly, that there was bias or animosity from the Board which prevented the person from receiving a fair hearing.

Even if you are able to be successfully defended, it is costly in terms of time and expense to do so and it still presents you in an unfavorable light to the Court and public.

How do you deal with such situations? Remember the basic rule- treat all persons the way you would want to be treated. Pause and think before responding. Do not lower yourself to the depths of an unruly person before you. Maintain firm but fair control.

Ejecting disorderly persons-

The law does permit the presiding officer to order a person to leave a meeting for unruly conduct and if he does not do so, to order a constable or other person to remove him from the meeting and held until the meeting is over. G.L. c. 39, section 23C. While it may be tempting to do so, you are cautioned to never do so except under the most dire circumstances, and then only with consultation from your legal counsel. While the law gives you this right, it is so fraught with danger of a lawsuit that it is rarely, if ever, worth the risk.

There are several other steps you can take to maintain decorum as opposed to having to order the person removed.

The best thing to do would be to take a recess. Rarely after a recess does the person continue.

You can call in a police officer to speak to the person about being disruptive. Usually this has the effect of restoring calm. Even the police officer has to be careful in doing this however.

When all else fails, consider adjourning the meeting to another date. While you may not want to appear as if you backed down because of this person's conduct, most people once they ponder the situation will see the wisdom in rescheduling the meeting and avoiding a controversy. In any event, if the person was unruly, the public will know it and he will have to live with that view from the public.

Be most careful not to get involved in a hostile dialogue with the person before you or their attorney. Sometimes there is an attempt to do this in order to show that the hearing was not fair. You must resist responding to each remark.

If you feel that a response is needed, make it a neutral one- "We believe that we are conducting a fair and proper hearing. We would ask that all persons please act in a calm manner."

This does not mean that you cannot caution a person about interrupting or being hostile to a witness. You must exercise control in ensuring that the hearing is be conducted fairly and calmly. That includes cautioning someone not to be abusive to a person or witness, to not shout or speak when not recognized. You should also not allow members of the public to act hostile to persons before you. Outbursts should not be permitted and you must protect the stranger before you the same as the longtime resident before you. You can and should do this, but you must do it in a calm and responsible manner.

VIII. Bias and Conflict of Interest-

It is important that you be sure you are acting free of bias and not in conflict of interest in the matter before you.

Conflict of Interest-

A conflict of interest generally may arise when the matter before you is something which you have a personal interest in or a member of your family or business has an interest in.

Usually you will know prior to the hearing if there is a conflict of interest issue in the matter. In such instances it is important that you consult with your legal counsel to discuss it and see if it disqualifies you from participating in the matter.

It does happen however that even during the hearing a conflict of interest situation can arise. This may happen when certain facts are brought out during the hearing which give rise to a potential conflict of interest. In such a situation you should ask that the hearing be recessed. You should then consult with your local municipal counsel. Do not try to ignore the situation. Chances are that if you think that there might a conflict, others might think so to and might raise the issue if you do not.

If it does disqualify you, you should not participate. Participating in a matter in which you are disqualified because of conflict of interest may not only lead to a reversal of the action, but may subject you to a violation of the law.

It may also be that it is not a disqualifying conflict.

Some potential conflicts can be addressed by making a disclosure of the situation pursuant to G.L. c. 268A, section 23. In appropriate cases, such a disclosure will protect you and enable you to participate. It is important that consult with your City Solicitor or Town Counsel on this.

Dealing with matters affecting abutting property-

A common but often overlooked conflict of interest situation arises when the matter before you relates to property abutting your property. Under the Conflict of Interest Law, G. L. c. 268A, you are prohibited from participating as a municipal official in a particular matter in which you have a financial interest.

In such a situation, the State Ethics Commission has ruled that it will presume that there is a financial interest in any matter affecting abutting property. Thus, you may not participate as a municipal employee or official in the matter unless you can show that you do not have a financial interest in the matter. In other words, you have to overcome the presumption that you have a financial interest in the property.

The effect of the matter may be positive or negative to your financial interest in the property- it does not matter. It is very unlikely that a property owner would be able to sufficiently demonstrate that he does not have a financial interest in the property and

thus not a financial interest in the matter before the Board. [See generally State Ethics Commission Fact Sheet, "Municipal Officials: Don't Vote on Matters Affecting an Abutting Property"]

Likewise, you cannot participate in matters affecting yourself or family or businesses. Any exceptions are very few and narrow. You should not attempt to determine if an exception applies to you, but rather should consult your municipal counsel.

The Rule of Necessity-

There is a theory called the Rule of Necessity which basically provides that a person who would otherwise be disqualified from participating in a matter because of a conflict of interest can still participate because there is no other way that matter can be decided.

However, the true situations where this rule can be used are so few and rare that you should not even consider applying this rule without specific guidance from your municipal legal counsel. Inconvenience, having to reschedule matters, having to now arrange for someone else legally qualified to perform the function, etc. are not sufficient grounds to invoke this rule.

Bias¹

Bias exists when you are so predisposed to a matter before you that you cannot reasonably be expected to fairly and impartially adjudicate the matter. Holding a hearing is generally considered a quasi-judicial function and as such persons conducting hearings are generally expected to observe the impartiality of judicial officers.

No one usually considers himself or herself biased to the degree that they cannot act impartially. However, the person making that conclusion is usually too close to the situation to make that determination in an unbiased manner.

We all have some degree of bias. That is human nature. Thus, not all bias is invalidating bias. The problem arises when the bias is of such a degree that it would interfere with the responsibility of conducting a hearing fairly.

Often times there may be a community controversy on a matter which may end up before your Board. This can be for example when a controversial business which will need a license or permit announces that they are coming into the community. Another example is when there may have been some significant misconduct by a public employee and it creates a controversy in the community. Both matters may end up before your Board.

The problem arises when, because of your public position, you take a position on the matter, often is response to please by local residents or the media.

¹ A very recent Appeals Court case upheld a Board of Health's revocation of a site assignment, in spite of strong claims of bias on the part of the board members. While this case certainly is supportive of local officials who may have expressed previously an opinion on a matter which then ends up before them, local officials are still cautioned to use discretion in making statements and to still ensure that local hearings are fair and proper.

Therefore, you must think first- is this a matter which may come before the Board in an adjudicatory proceeding?

If the answer is yes, then you should be careful on your public pronouncements. Saying "There is no way that a XXX store is coming into this community." or "This officer should be fired immediately." will only leave you open to charges of bias and motions that you disqualify yourself from the hearing.

What you can say is such things as "The Board will hold a very thorough and careful hearing on this matter-to see if it is good for the community. Come and testify if you have anything to say." or "This is a very serious situation and the Board will hold a hearing to find out what happened and what should be done."

Being public officials there is a natural tendency on your part to want to assure the public that you are with them on a matter. However, you can better help the public by being careful in your public positions so that you are not subject to a bias charge.

In sum, if you are so predisposed that you cannot fairly adjudicate the matter before you, you should abstain from participating. Since there are so many variables involved, you should discuss this with your local municipal counsel.

IX. Ex parte Contacts and Personal Investigations

Ex parte contacts

It sometimes occurs that people either for or against a matter which is pending before your Board will call you or stop you on the street to discuss "the Smith disciplinary hearing" or the "pizza shop license". Usually they mean no harm by doing so and you normally want to be receptive to what your *constituents* are saying.

In a hearing situation, the problem with such discussions is that if they relate to the particulars of a hearing before you, the contact may constitute "ex parte" contact-contact with an adjudicator out of the presence of the parties involved.

All parties to a quasi-judicial matter are entitled to know the evidence that the fact finder will be using to decide the matter. They are entitled to be able to respond to the "I heard such and such" or the "I don't think they are telling the truth" statements which may arise in an ex parte contact.

When these contact are made they may cause an irregularity in the proceedings and could be the cause of a reversal as well as a charge of violating the rights of the parties before you.

Without being disrespectful to the people who may *innocently* want to discuss the matter with you, you should simply tell them that *you* too are concerned about the matter and that you appreciate their *concern* *but* since the matter is presently before your Board in a hearing you can not discuss it with them. If they want to comment on the matter, and the proceeding is one which allows public input (typically a license or permit issuance hearing) you can tell them that they must come to the hearing and they will be allowed to speak.

You must resist the temptation to continue such discussions because they may come back to haunt you. In some appeals you may have your deposition taken and you may be asked if you discussed the facts of the case with anyone. In the more typical case someone has overheard your discussion and then tells someone else who then tells someone else. After awhile the *conversation is* described perhaps much differently than what really happened. However, by that time the damage is done and the appearance of a problem is there, if not an actual problem.

Personal Investigations-

You are certainly permitted to know what you see and observe in your everyday travels. The common experiences we all may have during our life will not disqualify you from a proceeding.

The problem arises when a matter is before your Board and you decide to do some personal independent investigation.

An example of this would be re-creating an incident which is the subject of a civil service hearing before you. You decide to go down to the scene and see if it could happen as the officer claimed. This is fraught with danger. The parties to the proceeding are not there to see what you are doing or to be able to address the matter. It is worse if you do this and do not even tell anyone, as therefore no one knows you have this additional knowledge which relates to a matter before your Board and which you got on your own. Such situations can easily lead to a reversal.

What you can do if you feel it is necessary is to request a site visit or a re-enactment of the incident, if possible. This would be done in the presence of all the parties and the person hearing the matter. This is acceptable and in certain cases appropriate.

If you feel that certain matters should be addressed, you can raise the issue yourself at the hearing and have the parties address it.

Common sense rules apply. Asking about or knowing on your own that there are 20 restaurant licenses in an area and then producing a map to show them is probably acceptable, as long as you introduce it at the hearing. Conducting your own investigation into an incident and speaking to witnesses outside of the hearing is traveling the road to trouble.

It is only a matter of time before charges of civil rights violations for such conduct, innocently intended, become the norm.

Conclusion-

Conducting hearings on behalf of your community is one of the most important functions of a local official. It is through holding your position that you are vested with this responsibility to make decisions on behalf of the community.

Incumbent upon you is to exercise that responsibility in a fair and impartial manner.

It is hoped and expected that through this program you will have gained a better appreciation and understanding of the hearing process.

A common theme is apparent. Act reasonably and fairly and treat people before you the way you would want to be treated. Consult and work with your local municipal counsel. Your legal counsel is an integral part of your team for effective and efficient government.

By conducting a fair and proper hearing, you will be in a better position to withstand a challenge and possible overturning of the decision.

Good luck!!!

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