

Excerpt from:

PROCEDURAL DUE PROCESS

in Plain English

A GUIDE FOR PRESERVATION COMMISSIONS



“Ten Tips From the City Attorney” *

CITY ATTORNEYS Robert L. Zoekler and Kate Herrmann Stacy have each spent a considerable portion of their legal careers advising local preservation commissions and staff about how to carry out their responsibilities in a manner that is both effective from a preservation standpoint, and fair to those individuals affected. The following practical tips for preservation commissions reflect some of the guiding principles that these two attorneys have found useful in helping to keep their clients out of trouble, and out of court.

1. **Create and follow your own Rules of Procedure.** Every commission or board should compile a set of rules governing their procedures. These rules should be simple, clear, and easy to interpret and enforce—but also flexible enough to handle difficult situations. Once promulgated, procedural rules should be strictly followed. An oral summary of your procedures is an excellent way to begin each meeting.
2. **Treat every person fairly and impartially.** Treating a party fairly and impartially is more important than ruling in their favor. Parties frequently choose to appeal a commission decision less because they lost than out of a sense of unfair or biased treatment. As a practical matter, a large and legitimate part of due process is perception. Take your constitutional responsibility to provide a fair and meaningful hearing seriously:
 - Treat everyone politely and with respect.
 - Give every speaker your attention.
 - Reciprocate courtesies—if you grant one party extra time, automatically extend that courtesy to the other parties.
 - Never express personal feelings about any individual.

* This chapter of “Procedural Due Process in Plain English” was contributed by Robert L. Zoekler, Senior Assistant City Attorney, City of Atlanta, and Kate Herrmann Stacy, Deputy City Attorney, City of San Francisco. Copyright © 1995, National Trust for Historic Preservation.

3. **Always maintain control and decorum.** Usually the Chair bears this responsibility, but all members should assist. Be fair but firm. Never let speakers cross-talk or speak out of turn. If necessary, gavel them down. Do not allow clapping or demonstrations. It is unfair to others and a major perception problem to allow a public meeting to get out of hand or become disruptive.
4. **Do not delay or compromise decisionmaking unnecessarily.** Avoid the human urge to delay every controversial decision in the hope that it will be resolved later, or to compromise every problem. Accept the fact that you will not be able to make everyone happy, and that you must make a decision that usually makes you the enemy to a substantial part of the public. Delay frequently takes a heavy toll on financial resources. Similarly, compromise always sounds good, but frequently backfires and is often directly contrary to the criteria you are required by the law to follow. If a tangible result is likely or further testimony necessary, deferral or compromise may be appropriate. Otherwise, take the plunge, make the difficult decision and move on.
5. **Remember Ms. McGillicuddy.** If you encounter trouble deciding a thorny notice issue, it may help to imagine the existence of an unknown citizen—a Ms. McGillicuddy—who stays at home reading legal notices. Think about how she would react to your conduct. Focus on what she would know—not what you know. Would she be aware that you are taking up an issue you did not publish? How would she know that you decided to delay the meeting until tomorrow night? When in doubt, defer the meeting to ensure proper notice. Try to remain objective by keeping your focus on the unknown public when dealing with notice questions.
6. **Avoid Surprises.** Try to avoid surprising the public with new information at the decisionmaking hearing. Allow the public an opportunity to review available information on the matter before the commission ahead of time whenever feasible. Get notices and agendas out to the public as early as possible.
7. **Record, record, record.** This is the most important point to remember. A good record is an absolute necessity on appeal, due to the type of decisions most commissions render. If you want your decision to be upheld, you must have a good record to support that decision:
 - Always be aware that what you say is being recorded. Assume it will be transcribed and read. Hearings are not social gatherings. Flip comments, in addition to being inappropriate, will often come back to haunt you.
 - Be meticulous in your record keeping. Make an audio or video tape of every meeting. If the machine breaks, stop the meeting until it is repaired.
 - Date every document, preferably with a colored stamp to identify an original. Maintain all of these documents in a master docket.

- Never go “off the record” to have private discussion unless you first comply with your jurisdiction’s sunshine laws and consult with legal counsel, if possible.
 - Never express your conclusions prior to hearing all of the evidence.
 - The person who decides must hear. Review the record. Do not vote if you are not familiar with the record or have not actually heard or reviewed everything in the record.
8. **Listen to your legal counsel.** Every commission needs legal counsel on occasion. If you anticipate a difficult hearing, ask your attorney to attend. If you ask a legal question, follow the advice given. The worst posture for legal counsel is to answer a question, only to have the client make a contrary decision on the record—such inconsistencies are difficult to defend in court. If you are not prepared to follow advice, do not ask the question.
9. **Explain your decisions.** The public should know why you voted the way you did, and often, your jurisdiction’s laws will require some form of factual findings and conclusions:
- Try to make sure every decision has an explained rationale, either written or expressed at the public hearing.
 - Be consistent in your decision making. Explain the basis for apparent inconsistencies on the record.
10. **Follow your criteria.** Though not always framed in procedural terms, this point is critical. Read and understand the criteria in your ordinance. Listen to the evidence. Determine the facts. Then apply those facts to the applicable criteria. By tying your decision to the criteria with a very tight knot, you are treating all parties fairly while providing a sound foundation in case of an appeal.