



Due Process and Effective Decision Making

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Principles of Due Process

- | 5th Amendment, U.S. Constitution prohibits the federal government from depriving a person of life, liberty, and property (interests) without due process.
- | Due Process protections extended to states' citizens by 14th Amendment and to local governments
- | Two Parts to Due Process; Substantive and **Procedural**
- | Procedural Due Process applies to **Administrative Decision Making**



Principles of Procedural Due Process

1. Adequate Notice
2. Unbiased Decision Makers
3. Ability to be Heard
4. Ability to Present and Cross Examine Evidence
5. Prompt Decision Making
6. Record of Proceedings
7. Written Findings of Fact



1. Adequate Notice

To the Applicant

“Submit written **notice to the applicant** by first class mail...postmarked at least 10 days before the day of the meeting to discuss the site plan...” *Chesapeake Beach*

“Submit verifiable notice to the applicant at least seven days before the meeting...” *Chesapeake City*



1. Adequate Notice (continued)

To the Neighbors

"Submit written notice to all owners of property adjoining or immediately across the street from the subject property. Such notice shall state the date, time, place, and subject matter ... and the name of the applicant. Such notice shall be postmarked at least 7 days before the day of the meeting." *Church Hill*

Upon receipt ..., the Zoning Administrator shall send written notice... **to all property owners whose property line is within 200 feet of the applicant's property line...** *Chesapeake Beach, As Proposed*



1. Adequate Notice

Posting the Property and Notice in Newspaper

"A property being considered for a possible change of zoning classification shall be **posted at least 15 days before** the Planning Board hearing on the issue..." *Baltimore County*

"**Publish a notice** containing the name of the applicant; the date, time, and place fixed for the hearing; and the general nature of such hearing **in at least one (1) newspaper of general circulation in the Town once each week for 2 successive weeks.**" *Church Hill*



2. Unbiased Decision Makers

- | Little or nothing in local zoning codes about this
- | Title 15, the MD Ethics Law deals with conflicts of interests, mostly financial in character



3. Ability to be Heard

- | “The **Board of Appeals shall hold a public hearing on each application** at the time and place established by it...” *City of Annapolis*

- | Optional Public Hearing, for Administrative Adjustments: “The **Planning & Zoning Director shall hold a public hearing**...if an objection to the application is raised.” *City of Annapolis*



4. Ability to Present and Cross-Examine Evidence

“The hearing shall be open to the public and all interested persons shall be given an **opportunity to present evidence and arguments and ask questions of persons who testify.**” *City of Cambridge, as proposed*



5. Prompt Decision-Making

"The Planning Commission shall approve, conditionally approve, or reject a site plan **within 60 days from the filing of the application.** *North Beach (Critical Area site plans.)*

Re: Request to extend an approval of a site plan:

"Such request shall be acknowledged and a **decision shall be made within 30 days of filing such request.**" *North Beach*



6. Record of Proceedings

“The commission shall keep an **open record of its resolutions, proceedings and actions** that shall be kept available for public inspection during reasonable business hours.” *Town of Berlin (Historic District Code)*

“An **audio recording shall be made** of all hearings and such recordings shall be kept for at least two years. Accurate minutes shall also be kept.” *City of Cambridge*



7. Written Findings of Fact

- | “In addition to a statement of the board’s ultimate disposition of the case ..., **the written decision shall state the Board’s findings and conclusions, as well as supporting reasons or facts.**” *Cambridge*
- | “ All decisions of the **Planning Commission**, whether favorable or unfavorable to the applicant, **shall be based on and supported by written findings of fact pertaining to the case under review.** No decision of the Planning Commission shall be final until the written decision of the Commission is signed and filed.” *Chesapeake Beach, as proposed*



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Case Studies

For each Case Study, Answer:

Is there a potential due process violation, Yes or No?

If Yes, which Principles might be violated?



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Case Study 1

The Planner Commission denies a site plan for a 24,000 square foot office building just after hearing from the Town Planner.

Potential Principles Violated

- | #1 Notice of Meeting
- | #4 Ability to Present and Cross-Examine Evidence



Case Study 2

The Mayor and City Council approve a new Zoning Map after just hearing allegations about Councilmember Jones meeting with the developer who stands to benefit from the new zoning.

Potential Principles Violated

None



Case Study 3

The Board of Appeals decides the fate of a group home in a single-family neighborhood after a difficult and raucous public hearing.

Potential Principles Violated

- | #2 Unbiased Decision Makers
- | #3 Ability to be Heard (in an orderly proceeding)
- | #4 Ability to Present and Cross-Examine Evidence



Case Study 4

The Planning Commission rejects a site plan for the third Sushi restaurant on Main Street; two members deciding the issue also own Sushi restaurants on Main Street.

Potential Principles Violated

- | #2 Unbiased Decision Makers
- | #4 Ability to Present and Cross-Examine Evidence
- | #5 Prompt Decision Making



Case Study 5

An overworked Planning Commission approves a site plan for a waterfront condo with conditions and then takes a vacation until Fall.

Potential Due Process Violations:

- | # 6 Record of Proceedings
- | #7 Findings of Fact



Case Study 6

The Board of Appeals meets to approve a variance. It makes its decision known in writing five months later and it may be in for a surprise.

Potential Principles Violated

- | #2 Unbiased Decision Makers
- | #5 Prompt Decision Making
- | #4 Ability to Present Evidence



Obstacles to Procedural Due Process



Obstacles to Procedural Due Process

- | Going into closed-session and then re-emerging to make a decision with very little discussion.
- | High costs to make an appeal to the Board of Appeals.
- | Meeting with an applicant or other party before the hearing (ex-parte).
- | Not preparing findings of fact.
- | Taking any action (such as extending a site plan that is site to expire) without placing it on the agenda with giving standard public notice.



Obstacles to Procedural Due Process

- | Not keeping records and making the file available.
- | Not providing the staff report to the applicant in time to prepare for the meeting or hearing.
- | Not permitting the applicant to question the staff or members of the public.
- | Not saying NO when that's what you mean – if standards are not satisfied, it's ok to deny approval and move on...provided you've done your findings of fact.



Obstacles to Procedural Due Process

- | Failing to give a full and accurate account of the actions taken (poor minutes).
- | Failing to follow up decisions with written findings of fact.
- | Failing to notify adjacent property owners of an meeting to consider a site plan that could impact them.



Opportunities for PC and Board Members to Enhance Due Process



Opportunities for PC and Board Members to Enhance Due Process

Things you can do without changing the zoning regulations.

- | If you don't have them, prepare and adopt rules of procedures. Then follow them.
- | If your zoning ordinance makes little mention of procedures for site plan review, prepare an amendment and transmit to the legislative branch for adoption.
- | For PC members, if the project demands close scrutiny from the community– call an official public hearing.



Opportunities for PC and Board Members to Enhance Due Process

- | When it makes sense, ask staff to expand the geographic area for notification to include the whole neighborhood, not just the adjoining properties.
- | Notify people throughout all of the deliberations, not just the first meeting.
- | Direct staff to make staff reports public at the same time they are provided to the Planning Commission.
- | Show an interest in relevant testimony, ask questions..



Did I mention findings of fact?

Prepare findings of fact! Insist on it.

Examples:

- | "We decided to approve the site plan because..."
- | "We were not persuaded that the applicant met all six standards for granting a variance and these are the areas where he fell short..." Therefore we deny...
- | "The Site Plan standards require 10 parking spaces and a planted critical area buffer strip along the water and because the applicant refuses to submit a plan that complies with these requirements we must deny..."



Questions...

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