Due Process of Law

CHAPTER 18

Due Process of Law must be respected and provided when a person's life, liberty or property are in question – this is required by the Fourteenth Amendment to the Constitution of the United States.

> "'Due Process' is not a technical concept with a fixed content unrelated to time, place and circumstances, which can be imprisoned within the treacherous limits of any formula. Rather the demands of due process rest on the concept of basic fairness of procedure and demand a procedure appropriate to the case and just to the parties involved."[1]

Due process is flexible and calls for the procedural protections that the given situation demands.[2]

The most common reference to due process in the land use arena is what we call procedural due process. This term refers to notice, hearing, and other procedures which are required by state and local law when applying land use regulations to individual permit applications and property. Fair and open procedures are required by the Utah Land Use, Development, and Administration Acts, both for municipalities and counties. Some procedural rights are also protected by both the Utah and federal constitutions.

Constitutional Due Process

Basic principles of procedural due process include notice, the right to be heard, and the right to present evidence and confront witnesses. These are fundamental rights protected by the Fourteenth Amendment to the Constitution of the United States in many instances or by state and local codes in others.

The guarantee in the U.S. Constitution is that a person will not be deprived of life, liberty or property without due process of law.[3] In the land use context, this

provision is triggered when a person encounters a threatened or actual deprivation of some "protected" interest in property.[4]

A person has a constitutionally protected property interest, for example, in an administrative application pending before the city for review if and only if the property owner is entitled to approval of the application.[5] One may have a protected interest in the outcome of the consideration of an application by others if that outcome might affect a significant property right in one's own property.[6] Those with constitutionally protected property interests are entitled to due process whether or not the local ordinance or state statute provides for it.[7]

Codes and Statutes

Our local land use ordinances and state statutes have broadened the protections of due process, both in who is entitled to some components of procedural due process such as notice of a meeting and the right to be heard.[8] Generally these codes and statutes accommodate all the constitutionally required procedures for those with protected property interests and also provide for specific due process rights that would otherwise not exist.

For example, an applicant is entitled under the statute to notice of a meeting where the application is to be considered by the local land use authority.[9] Others, particularly neighbors and third parties, usually are not entitled to notice of consideration of an administrative application. Such a right might only arise by the wording of some provision in the local ordinance.[10] The state land use statutes impose no public hearing requirement on a local government's review of a subdivision application, for example, nor for the review of most other administrative land use applications.[11]

These hearings are common, however, because local ordinances provide for them. Sometimes landowners and others within a certain distance of the land which is the subject of a subdivision, conditional use or variance application are to be given notice of the application as well as the date, place and time when a hearing will be held to consider it.

Since there is no constitutional protection for neighbors and third parties related to administrative land use applications, these decisions can be made by any land use authority appointed by the legislative body upon recommendation of the planning

commission. They can even be made by staff with no specific notice to anyone at all except those with constitutional protected rights of due process – usually only the applicant.[12] Any land use authority composed of more than one person, however, would typically be required to comply with the Open and Public Meetings Act by posting a 24 hour notice of their agenda and allowing public observation of their meetings.[13]

If, however, notice is required by the local code, then the land use authority involved provides that notice and a hearing opportunity that is also required. A person whose property is be located 310 feet away from the land involved in the proposed application might not be entitled to any notice at all while his neighbor located 290 feet away would be. This is all based on the local ordinance which might provide for notice to landowners within 300 feet or notice to no one at all.

Usually if a person is given a required notice, then that person would also have a right to be heard on the matter. However the local ordinance may allow for written or electronic comment and not the right to speak in a public hearing. If a person has no "protected property interest" in the matter, they can only rely on the codes and statutes, and not constitutional due process protections providing a right to participate.[14]

Basic Due Process. That said, if someone does have constitutional due process rights, there are minimum rights that must be provided to them without regard to the local ordinance. These include:

1. The right to reasonable notice of a meeting where the application is to be considered by the land use authority with power to decide on the application.
2. The right to be heard and provide evidence on the issues involved in whether the application is approved or not. This right is limited to a reasonable opportunity, however, and an applicant is not entitled to impose unreasonable demands on the land use authority's time or resources. The right to be heard includes the right to present evidence.
3. The right to confront the evidence presented. In criminal court, this would be styled as the right to cross-examine the witnesses, but that language would rarely be used in a land use regulation context. What it means is that

> when information is provided to the decision-maker about the application, that the applicant is entitled to review and respond to it in a reasonable manner. This would include time to study the evidence provided in the application review, such as a staff report, and a reasonable opportunity to comment on the evidence and to provide evidence to the contrary in response.

Ex-Parte Communications. One common problem with the right to confront the evidence arises when individual members of a land use authority such as the planning commission or city council (when acting as a land use authority) have conversations with individuals involved in an administrative application which are held outside of the public meetings and outside the presence of other individuals with a stake in the outcome. For example, when a subdivision is proposed, a chat between the subdivider and a planning commission member outside the public meeting would be ex-parte. It would also be an ex-parte communication for that planning commission member to chat with members of the public, a member of the city council, or others about a pending administrative application.

Because ex-parte communications can violate due process rights, it is common for local agendas to include time for members of the decision-making body to disclose and ex-parte contacts they may have been involved in which relate to an administrative item on the agenda. By making these disclosures, the member allows the applicant and others who have due process rights to respond to the information which the member received outside the public meeting.

Ex-parte communications are to be avoided in administrative matters. They are appropriate, however, when legislative issues are concerned. When functioning in her legislative capacity as an elected official, a city councilmember may conduct wide-ranging conversations with constituents and others about the wisdom of proposed amendments to the general plan, land use ordinances, zoning map or annexations. Some larger development projects and associated development agreements may or may not be administrative in nature, so this rule may or may not apply to them.

What Does Due Process Mean?

Case Law – Dairy Product Services v. Wellsville

A Utah Supreme Court case from 2000 does a good job of defining some basic rules of due process. The matter involved a company named Dairy Product Services (DPSI) located in the small city of Wellsville, in Cache County. DPSI produced some offensive odors in its operations. After some effort to otherwise resolve nuisance complaints from neighbors, the city decided to refuse to renew DPSI's business license. While this matter is not directly a land use case, the principles involved are directly on point because DPDI claimed that the City had illegally interfered with its due process rights during the hearing held.

The hearing involved both the business license and a claim that DPSI operations violated the local nuisance ordinance. Both the City and DPSI were each represented by legal counsel. Public comments were allowed. The attorneys for DPSI were given the opportunity to respond to and to cross examine both expert witnesses and members of the public who made comments but did so sparingly.

Offensive smells from this animal products facility in Wellsville, in Cache County, resulted in the revocation of the business license for Dairy Product Services, Inc. The case opinion by the Utah Supreme Court highlights some basic issues of due process.

When it lost its license, DPSI filed suit. The trial court ruled on summary judgment, without a trial, and dismissed the case. Wellsville won at both the trial court and Supreme Court.

Among the issues heard by the Supreme Court were some related to due process of law. These included adequate notice to DPSI, bias by the City Council who heard the matter, failure to allow cross-examination, public declarations by council members, private deliberations by the council, and other issues.

Notice: The City provided timely notice to DPSI of the date of the first hearing, the reasons Wellsville intended to consider for denial of the license, reference to specific applicable ordinances, and a history of the issue. DPSI was informed that it had a right to appear, to be represented by counsel, hear evidence against it, cross-examine witnesses and present evidence on its own behalf. Perfectly adequate, ruled the court.

Bias: DPSI argued generally that the Wellsville city council members "appeared" biased and referred to "gestures, mannerisms, facial expressions, and comments" to support that claim. The court ruled this to be insufficient and stated that bias must be shown by specific facts and not general characterizations. This makes sense – the City needed "substantial evidence" to refuse the license – the property owner also would need substantial evidence to back up its argument as well. Mere allegations and characterizations are not sufficient to establish the facts needed to establish bias.

Evidence: Without specific reference to a verbatim transcript or written communication, DPSI offered no substantial evidence that it was denied the chance to respond to evidence presented. The official minutes stated clearly that the opportunity to cross-examine witnesses was offered to DPSI attorneys. DPSI was able, in the meeting record, to ask a member of the public if he could distinguish between two different kinds of smells. The company failed to show that it was not given adequate opportunity to both present and respond to evidence.

Records: The company also claimed that it was reversible error that the city did not provide a full record of the city council's deliberations on the matter. The

court also held against it on this issue. The minutes provided a record adequate to provide the factual and legal bases for the decision.[15]

This case also highlights the fact that even smaller communities can meet the due process requirements of citizens and property owners. Wellsville was wise to rely on the good advice of legal counsel and to act openly and deliberately to ensure that its process and its final decision were consistent with the rights of all involved.

So, in general, local officials can protect all the due process rights of those who come before them by following certain specific steps:

Notice. Always notify the applicant for any administrative land use application of any meeting where the application will be discussed. This applies whether the meeting is a hearing or not. Always notify the others entitled to notice in the local ordinance, specifically as provided in the ordinance. In some rare cases, such as when a variance is applied for to waive or temper provisions affording protection to neighboring property owners, the owner of the abutting parcel whose interests the ordinance was designed to protect may have a protected property interest in the application and be entitled to notice.[16]

Hearing. Always provide a reasonable opportunity for the applicant to be heard. This does not mean at every meeting, but before any final decision is made. The applicant's right to be heard is different than the right of the public. It would rarely be appropriate, when restricting the public to, say two or three minutes of comment, to impose that same restriction on the applicant. That said, however, it is also required that a reasonable opportunity to speak be provided for those entitled to notice of a public hearing in the local ordinance, but not to the same extent as it would be required for the applicant. While it is common and not necessarily inappropriate to restrict the public comments to a certain time limit, it is important that the time allowed be reasonable.

Evidence. Always provide a reasonable opportunity for the applicant to respond to evidence presented to the decision-maker/land use authority. It would be inappropriate, for example, for the chair of a public body to announce that public comments are closed while the body deliberates and then allow members of the body to present

evidence that the applicant has not had a chance to respond to. The deliberation of the land use authority should be based on the evidence that everyone with due process rights has had a chance to comment on and respond to. It would be a violation of due process to bring up new issues with new evidence that a decision is based on, for example, without allowing the applicant a reasonable opportunity to respond. At times this may mean that the issue must be continued to the next meeting or some other means should be used to allow a fair response time.

Other Due Process Considerations

An impartial decision-maker is also a constitutional guarantee when a person might be deprived of life, liberty or property.

Conflicts of Interest – Statute. Utah statute provides for conflicts of interest and how local officials are to disclose them, although many have considered these rules to be overly lenient and not sufficiently strict. Each local elected and appointed official must decide for himself or herself where the rules of fairness and impartiality should apply to his or her actions, understanding, of course, that the state disclosure rules are a minimum standard that must be met.

The basic rule is that every elected or appointed officer of a city or town must disclose substantial interests in business entities in a written and sworn disclosure statement to be filed with the mayor when they take office.[17] For a county, the statement is to be filed with the county legislative body.[18] A "substantial interest" in an entity means at least 10% of the outstanding shares of an entity whether owned by the officer personally or by his or her spouse or minor children.[19] Once filed, a disclosure statement related to a city or town must be updated if the official's position with a business entity changes significantly or if the value of the official's interest increases significantly.[20] County disclosures must be refiled during January of each year whether there are any changes in the disclosure or the interest or not.[21]

An officer is also not to use an official position to further his or her own personal economic interest or to gain special privileges.[22] An elected or appointed officer is also not to receive any compensation (defined as anything of economic value[23]) for assisting any person with a transaction involving the municipality or county unless that is fully disclosed in writing *and* in a public meeting as required by statute.[24] Other conflicts of interest should also be disclosed.[25]

When an officer or employee does or anticipates doing business with the municipality or county, they must publicly disclose to the members of the body which they are a member of or employed by immediately prior to any discussion by that body concerning matters related to a business in which the officer or employee has an interest.[26] The minutes should note that disclosure.[27]

If anyone induces or seeks to induce a municipal official or employee to violate the disclosure rules, they can be charged with a class A misdemeanor.[28] The county disclosure act prohibits such actions but does not state a penalty for doing so.[29] The penalty for an official or employee of a city or town for some violations of these rules (but not all) is removal from office as well as potential charges for a felony.[30] County officials and employees shall be removed and may also be charged with a misdemeanor.[31] A transaction entered into without proper disclosures may be rescinded or voided without returning any consideration received by the local government entity.[32]

Counties and municipalities are also authorized to create an ethics commission to review complaints.[33] A person filing a complaint may file it with the local ethics commission or with the state Political Subdivisions Ethics Review Commission.[34]

Most disclosure documents made under these statutes are public records and may be obtained from the local government entity by use of the Government Records Access and Management Act.[35] See Appendix A to this handbook.

Bias. Even with total compliance with the state conflicts of interest statutes, however, the issue of bias is not settled in many minds. Local officials do not have conflicts of interest as the statute defines the term if they and their immediate family have no financial interests involved.

When considering legislative issues of policy, it would not be a conflict of interest or basis for recusal because an official ran for office on a platform of either favoring or discouraging growth and development. The rules are meant to be flexible when legislative issues are concerned. Absent bribery, graft and corruption, and when there is compliance with the state conflicts of interest statute, there is rarely an actionable bias by elected officials acting in their legislative roles – the issues that come before them are political by nature. General promises made to constituents in an election

and individual statements of political philosophy do not disqualify an elected official from implementing their political agenda.

That said, with administrative matters, we make a 180-degree pivot. Those serving on any land use authority are operating in an adjudicative capacity.[36] This is an entirely different format than legislative actions (See Chapter 3 of this handbook). A different set of rules applies here. An administrative body is acting not to set public policy, but to answer one primary question: Does this administrative application comply with the relevant rules and regulations? If it does, the application is to be approved. If it does not, it may be denied.[37]

According to the Utah Supreme Court, "a clear demonstration of partiality apparent on the face of the record, or a showing of direct, pecuniary interest, automatically requires disqualification of the decision maker."[38] A decisionmaker is subject to disqualification if he or she has "[a] personal bias or personal prejudice, that is an attitude toward a person, ... when it is strong enough" or if he or she "stands to gain or lose by a decision either way ... if the gain or loss to the decisionmaker flows fairly directly from [his or] her decision"[39]

Those serving as the land use authority when reviewing an application must act impartially and objectively, looking to preserve the rights of due process for all involved in the manner our democratic system requires. Indeed, each official sworn into office makes a simple pledge – to support, obey, and defend the Constitution of the United States and the State of Utah and to discharge the duties of that office with fidelity.[40] The constitutional rights of due process are fundamental to our democracy and deserve our careful protection.

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1 *Rupp v. Grantsville City*, 610 P.2d 340 (Utah 1980).

2 *Long v. Ethics & Discipline Committee of the Utah Supreme Court*, 2011 UT 32 ¶29.

3 Fourteenth Amendment to the U.S. Constitution, applicable on enactment to the states and its political subdivisions.

4 To make a claim for deprivation of property without due process under the United States Constitution, a plaintiff must show both a property interest and a deprivation of that interest by the state without the required legal process. *Harper v. Summit County*, 2001 UT 10 ¶30. See also *Patterson v. American Fork City*, 2003 UT 7, ¶23, 67 P.3d 466, "To prevail on either a procedural or substantive due process claim, a plaintiff must first establish that a defendant's actions deprived plaintiff of a protectable property interest."

5 *Petersen v. Riverton City*, 2020 UT 58 ¶21-24. The United State Supreme Court has defined a property interest "as a 'legitimate claim of entitlement' to some benefit. *Hyde Park Co.,* 266 F.3d at 1210 (quoting

Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972). "a property interest exists only where 'existing rules and understandings that stem from an independent source such as state law . . . secure certain benefits and support claims of entitlement to those benefits." Id. Utah's "vesting" statutes (Utah Code Ann. §10-9a-509 and §17-27a-508) proving that an application is entitled to approval if it conforms to the ordinances in place when the application is filed is not sufficient, in and of itself, to confer due process rights where there is any discretion left to the land use authority to approve or deny the application. *Farley v. Utah County*, 440 P.3d 856 (Utah App. 2019) ¶27.

6 For example, in the right to avoid dust and other materials emitted during operation of a nearby facility which was the subject of a land use application. *Harper*, ¶30.

7 *Northern Monticello Alliance, LLC v. San Juan County*, 2022 UT 10 ¶¶31-32 discusses the constitutional procedural due process rights of a property owner separately from the procedural due process rights that arise from codes and statutes.

8 For example, the notice requirements in state statute related to legislative land use decisions found in Utah Code Ann. §§10-9a-201 through 213 and in Utah Code Ann. §§17-27a-201 through 213. These are not required by the constitution but buy state statute. Additional notice requirements can be found in most local ordinances. For example, while state statutes do not require public notice for consideration of a subdivision application, local ordinances commonly do.

9 Utah Code Ann. §10-9a-202 (municipalities) and §17-27a-202 (counties).

10 *Northern Monticello Alliance*, supra.

11 Among the few exceptions to the lack of notice requirements is for subdivision amendments (Utah Code Ann. §10-9a-207 (municipalities) and §10-17a-207 (counties)) and a petition to vacate a public street (Utah Code Ann. §10-9a-208 (municipalities and §17-27a-208 (counties)).

12 If more than one staff member is appointed to be involved in making decisions on applications, the group of staff may be subject to the Open and Public Meetings Act found at Utah Code Ann. §52-4-101 et seq. See Appendix B to this Handbook. A 24 hour notice of the meeting of a public body would be required.

13 See Appendix B to this handbook.

14 *Northern Monticello Alliance*, supra.

15 *Dairy Product Services, Inc. v. City of Wellsville*, 2000 UT 81.

16 This issue is complicated. For example, owners of property near a wind farm were held not to have a protected property interest, and thus no due process rights, even though they had standing to appeal a decision not to repeal a conditional use permit for the wind farm. Absent due process rights provided in code or statute, the Utah Supreme Court refused to extend constitutional due process protections to those neighbors. *Northern Monticello Alliance*, supra. In footnotes 10 and 13, where the Court states that there may be times when a land use authority must allow for due process rights of neighbors and others but finds that the specific case is not one of those times. The issue would revolve, it appears, around the determination that the required "protected property interest" is held by those third parties. Local officials should err on the side of notice and full participation where the facts of a matter render the due process rights of the parties and public unclear.

17 Municipal Officers' and Employees' Ethics Act, Utah Code Ann. §10-3-1301 et. seq. or County Officers and Employees Disclosure Act, Utah Code Ann. §17-16a-1 et. seq. The definition of "appointed officer" found at §10-3-1303(1) or §17-16a-3(1) would include members of planning commissions, boards of adjustment, landmark commissions, and other local land use boards and commissions. It includes "special, regular, or full-time committees, agencies, or boards".

18 Utah Code Ann. §17-16a-5.

19 Utah Code Ann. §10-3-1303(9) (municipalities) or §17-16a-3(8) (counties). See also Utah Code Ann. §10-3-1308 which requires a disclosure of any conflict between the personal interests and public duties of an employee or official.

20 Utah Code Ann. §10-3-1306.

21 Utah Code Ann. §17-16a-6.

22 Utah Code Ann. §10-3-1304(2) (municipalities) and §17-16a-4 (counties).

23 Utah Code Ann. §10-3-1303(4) (municipalities) and §17-16a-3(4) (counties).

24 Utah Code Ann. §10-3-1305(2).

25 Utah Code Ann. §10-3-1308 (municipalities) and §17-16a-8 (counties) requires a disclosure of any conflict between the personal interests and public duties of an employee or official.

26 Utah Code Ann. §§10-3-1305 and 1307 (municipalities) §§17-16a-5 and 7 (counties).

27 Id.

28 Utah Code Ann. §10-3-1309.

29 Utah Code Ann. §17-16a-10.

30 Utah Code Ann. §10-3-1310.

31 Utah Code Ann. §17-16a-10.

32 Utah Code Ann. §10-3-1312 (municipalities) and §17-16a-12 (counties).

33 Utah Code Ann. §10-3-1311 (municipalities) and §17-16a-11 (counties).

34 Id. The state commission is authorized by statute at Utah Code Ann. §63A-15-101 et seq.

35 The Act, commonly referred to as "GRAMA" is found at Utah Code Ann. §63G-2-101 et seq. Utah Code Ann. §10-3-1305 (municipalities) provides that information about compensation paid to an official for doing business with the municipality must disclose this in an "open meeting"; disclosures under this section are "available for examination by the public"; §17-16a-5(2) (counties) provides that a statement filed with regard to assisting a person in doing business with the governmental entity is public; §10-3-1306 (municipalities) and §17-16a-6 (counties) provide that disclosures are to be made to the municipal mayor or county legislative body, the substance of which "shall" be reported to members of the legislative body while the actual disclosure detail "may" be provided to members of the governing body; §10-3-1307 (municipalities) and §17-16a-7 (counties) provide that interests in business entities doing business with the city, town or county are to be disclosed in open public meeting and entered into the minutes; §10-3-1308 (municipalities) and §17-16a-8 (counties) provide that potential or actual conflicts of interest must be disclosed in "open meeting" to members of the body the official serves on.

36 *McElhaney v. City of Moab*, 2017 UT 65, ¶¶31, 32.

37 Utah Code Ann. §10-9a-509 (municipalities); §17-27a-508 (counties). See discussion in Chapter 6 of this handbook.

38 *Carlson v. Smithfield*, 2012 UT App 260, 287 P.3d 440, citing *V-1 Oil Co. v. Department of Envtl Quality*, 939 P.2d 1192, 1197 (Utah 1997).

39 *Carlson*, citing *Dairy Prod. Servs., Inc.*, 2000 UT 81, ¶ 52, 13 P.3d 581.

40 Utah Constitution, Article IV, Section 10.