



# **Common Issues in Quasi-Judicial Hearings**

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## **COMMON ISSUES IN QUASI-JUDICIAL HEARINGS**

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## I. Overview.

The City Attorneys' Department has written and reported extensively on the evolution of due process requirements for quasi-judicial hearings.<sup>1</sup> Prior reports have provided both detailed analysis of existing procedural due process law and explanations of the evolving line of cases concerning the separation of attorney functions.<sup>2</sup> In the paper that follows this one, the Department will explore the most recent *Sabey v. Pomona* decision<sup>3</sup> and the current issues, requirements and pitfalls concerning attorney functions. This paper sets a broad context. It focuses on quasi-judicial hearings, rather than the particular roles of attorneys in them. It provides a brief, practical review of what quasi-judicial hearings are, why certain of them are subject to procedural due process protections, and numerous examples of the particular procedures that many cities have developed for adversarial quasi-judicial hearings.

## II. Quasi-Judicial Hearings.

In both case law and statutes, the terms “quasi-judicial hearing” and “administrative hearing” are used interchangeably. See, e.g., CCP §1094.5; *Witt Home Ranch, Inc. v. County of Sonoma* (2008) 165 Cal.App.4th 543, 565; LOCC Due Process Committee Report, September 2009, ft. nt. 2.

As the 2009 Ad Hoc Due Process Committee Report explained, an “administrative hearing” occurs when: (a) a hearing is held to apply a rule or standard; (b) to an individual person, project or circumstance; (c) it involves the taking of evidence; (d) it results in the rendering of a written decision issued by the hearing officer or tribunal (including the adoption of findings); and (e) the written decision is based on the facts and arguments submitted at the hearing. 2009 Committee Report, ft. nt. 2.

Quasi-judicial proceedings are distinguishable from legislative proceedings. Legislative actions formulate rules to be applied to all future cases. *J.D. Patterson v. Central Coast Regional Coastal Zone Conserv. Comm'n* (1976) 58 Cal.App.3d 833, 840. Legislative actions include, but are not limited to, adoption and amendments to municipal codes, general plans, zoning codes and personnel

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<sup>1</sup> Albuquerque, “Procedural Due Process Limitations on the Municipal Lawyer Combining Quasi-Judicial and Prosecutorial or Investigatory Functions,” LOCC 2004; Albuquerque, “Due Process In Local Administrative Hearings After the California Supreme Court’s Opinion in *Morongo Band of Mission Indians v. California State Water Resources Control Bd.*, 45 Cal.4th 731 (2009),” LOCC May 2009; “2009 Ad Hoc Due Process Committee Report On the Separation of the Advocacy/Prosecutorial Function From the Decision Making Function in Administrative Hearings,” LOCC Annual Conference 2009.

<sup>2</sup> *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575; *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81; *Quintero v. City of Santa Ana* (2004) 114 Cal.App.4th 810; *Witt Home Ranch, Inc. v. County of Sonoma* (2008) 165 Cal.App.4th 543; *Morongo Band of Mission Indian v. California State Water Resources Control Bd.* (2009) 45 Cal.4th 731.

<sup>3</sup> *Sabey v. City of Pomona*, 215 Cal.App.4th 489 (2d Dist. 2013).

regulations. Whereas legislative actions establish public policy and rules applicable to groups of property or people, quasi-judicial proceedings affect individual properties or parties. Quasi-judicial proceedings involve the application of established standards to individual facts to determine specific rights or to take specific actions under existing law. Lindgren and Mattas, CEB California Land Use Practice, §1.49; *Arnel Dev. Co. v. City of Costa Mesa* (1980) 28 Cal.3d 511, 519; *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 273; *Mountain Defense League v. Board of Supervisors of San Diego County* (1977) 55 Cal.App.3d 723, 729.

Quasi-judicial proceedings are also different from ministerial proceedings. To be ministerial, a decision must be one the decision maker itself is forced to follow. *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 278; CEB California Land Use Practice, §1.51. Ministerial decisions cannot be a rule or standard established by the decision maker itself; *i.e.*, they cannot be a result reached by the decision maker's exercise of its own discretion, or that the decision maker would have the authority to change. *Friends of Westwood, Inc., supra*, 191 Cal.App.3d at 278.

Common examples of quasi-judicial hearings to which we will refer in this paper include: nuisance abatement, civil service, discipline, land use permits, and license revocation hearings.

### **III. Laws Applicable to Quasi-Judicial Hearings.**

Quasi-judicial hearings are subject to federal and state due process, the fair hearing requirement of Code of Civil Procedure section 1094.5, and additional requirements applicable to particular hearings. Relying on these authorities, California courts have held that administrative hearings must be fair and that administrative decision makers must be impartial.

“The Federal Due Process Clause imposes constraints on governmental decisions that deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth and Fourteenth Amendments.” *Mathews v. Eldridge* (1976) 424 US 319, 331.

The California Constitution's due process safeguards are in Article 1 §7. California due process includes a *liberty interest* in “freedom from arbitrary adjudicative procedures.” *People v. Ramirez* (1979) 25 Cal.3d 260, 268-69; *accord Saleeby v. State Bar of California*, (1985) 39 Cal.3d 547, 563-64. Thus, the fairness of all administrative hearing procedures may be judged under California due process, irrespective of whether the hearings involve deprivation of a property or liberty interest. LOCC, “Due Process in Local Administrative Hearings,” Manuela Albuquerque, Spring 2009.

Code of Civil Procedure section 1094.5(b) creates a statutory right to a fair hearing, which must be conducted before an impartial tribunal. *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152. Under section 1094.5, quasi-judicial proceedings are subject to review in administrative mandamus. *Topanga Ass'n for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514. In administrative mandamus, courts apply either the independent judgment rule or the substantial evidence test. *Mountain Defense League v. Board of Supervisors of San Diego County* (1977) 65 Cal.App.3d 723, 727. If the substantial evidence test applies, both trial and appellate courts limit their review to the question of whether the agency's findings were supported by substantial evidence in light of the whole record. CCP §1094.5.

Also noteworthy is the California Administrative Procedures Act (the “APA”), which provides detailed requirements that apply to adjudicative proceedings of state agencies. Govt C §§11400, *et seq.*) Although the APA is expressly inapplicable to cities and other local agencies unless its provisions have been adopted by the local jurisdiction, courts have looked to the APA for guidance in analyzing quasi-judicial issues involving cities that have not adopted it. Govt C §11410.30(b); *See, e.g., Nightlife Partners Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 92 (discussing the APA’s requirement to separate administrative functions in Govt C §11425.30). Govt C §§11410.20(a), 11410.60. Under the APA, adjudicative proceedings are evidentiary hearings to determine facts and issue a decision regarding a legal right, duty, privilege, immunity or other legal interest of a particular person. Govt C §§11405.20 and 11405.50.

### **What Process is Due?**

As the May 2009 *Morongo* update explained, due process, “unlike some technical rules, is not a technical conception with a fixed content unrelated to time, place and circumstances [citations omitted].” *Mathews, supra*, 424 US 319, 334. “It is flexible and calls for such procedural protections as the situation demands [citations omitted].” (*Ibid.*) “[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews, supra*, 424 US at 334.

In *People v. Ramirez*, 25 Cal.3d 260, the California Supreme Court adopted the federal factors laid out in *Mathews*, but added the dignitary protection of individuals. As reframed, the California due process factors are: “(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through procedures used, and the probable value, if any, of additional safeguards; (3) the dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible government official; and (4) the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substantive procedural requirement would entail.” (*Id.* at 268-69.)

The most fundamental requirements of procedural due process are: (1) adequate notice; and (2) an opportunity to be heard before a fair and impartial hearing body. *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612.

### **Notice**

Adequate notice is an essential element of due process. Notice is necessary to give the party a chance to defend charges: (1) before property interests are disturbed; (2) before assessments or penalties are imposed; or (3) when a penalty or forfeiture might be suffered for the failure to act. *People v. Swink* (1984) 150 Cal.App.3d 1076, 1079. *See also, Bollinger v. San Diego Civil Service Com.* (1999) 71 Cal.App.4th 568, 578 (due process requires that a permanent employee” receive notice

of the proposed demotion and the basis therefor and have the opportunity to fully respond at a public evidentiary hearing.”).

Under general principles of due process, notice must be of a type reasonably calculated to give the person with the property interest knowledge of the proceedings. 2 Witkin, California Procedure, Jurisdiction Section 263 (5<sup>th</sup> ed. 2008).

The California Supreme Court addressed the sufficiency of notice in *Horn v. County of Ventura* (1979) 24 Cal.3d 605. There, the petitioner found out, by chance, that the Board of Supervisors had approved a tentative map for his neighbor’s proposed subdivision. The Supreme Court concluded that notice of the approval of the subdivision failed due process where the relevant environmental documents were posted only at central public buildings and the notice was mailed only to those persons who specifically requested it. (*Horn v. County of Ventura* 24 Cal.3d at 614.) This practice unfairly placed the burden of obtaining notice on the affected citizens themselves.

### **The Right to Be Heard**

A person facing possible deprivation of a recognized interest has a right to defend herself and present her side of the dispute to the body or hearing officer that will be making the decision. (The “fundamental requisite of due process of law is the opportunity to be heard.” *People v. Swink, supra*, 150 Cal.App.3d at 1080.) The ability to bring evidence and to respond to evidence presented against her, the entitlement to adjudicators that are paying attention to the proceedings, and the provision of adequate notice are all features of this comprehensive right.

The hearing required is one that is appropriate to the nature of the case. *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612; Witkin, Summary of CA law, Constitutional Law, Section 663; *Smith v. Organization of Foster Families for Equality & Reform* (1977) 431 US 816, 848.

### **A Fair Tribunal**

“When ... an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair tribunal.” *Morongo, supra*, 45 Cal.4th at 737 citing *Withrow v. Larkin* (1975) 421 US 35, 46. “A fair tribunal is one in which the judge or other decision maker is free of bias for or against a party.” (*Id.*)

When they have no financial interest in the outcome of the hearing, adjudicators are presumed to be impartial. *Morongo, supra*, 45 Cal.4th at 737, citing *Haas v. County of San Bernardino, supra*, 27 Cal.4th at p. 1025, and *Withrow v. Larkin, supra*, 421 US at 47.

In *Morongo*, the Supreme Court laid out the test for rebutting the presumption: “In the absence of financial or other personal interest, and when rules mandating an agency’s internal separation of functions and prohibiting ex parte communications are observed, the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias.” *Morongo, supra*, 45 Cal.4th at 740. This evidence can consist of a combination of circumstances “in which experience

teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable.” (*Id.*, citing *Withrow v. Larkin*, 421 US at 47.)

### **A Fair Decision**

Under CCP §1094.5, courts are generally deferential to agencies’ decisions under the substantial evidence test; however, courts will invalidate an agency’s decision if the agency fails to make required findings or fails to demonstrate the analytical route between the evidence and the action. *West Chandler Blvd. Neighborhood Ass’n v. City of Los Angeles* (2011) 198 Cal.App.4th 1506. Making clear findings is perhaps the easiest way for a quasi-judicial body to demonstrate that its decision was well-founded.

The landmark California Supreme Court case *Topanga Association for a Scenic Community v. County of Los Angeles* articulated the purpose of findings in adjudicatory hearings. Findings:

- “Bridge the analytical gap between raw evidence” and an agency’s ultimate decision. 11 Cal.3d at 515.
- Enhance the efficiency and effectiveness of judicial review by explaining to the court what a decision means and how it was reached. 11 Cal.3d at 516.
- Allow interested parties to understand the relevant issues and information so that they can decide whether and on what basis to seek judicial review. 11 Cal.3d at 516.
- Diminish the importance of judicial review by enhancing the integrity and rigor of administrative decision making by cities. 11 Cal.3d at 516.
- Serve “a public relations function” by showing the parties and the interested public that the city made its decision in a careful, reasoned, and equitable manner. 11 Cal.3d at 517.

*Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506. The *Topanga* court also explained that its requirement of findings and a clear standard for judicial review facilitate the proper division of legislative from quasi-judicial proceedings. 11 Cal.3d at 517. While *Topanga* involved a challenge to a land use variance, it was decided under Code of Civil Procedure section 1094.5, and thus, its reasoning should be applicable to quasi-judicial proceedings beyond land use. *See also, Lucas v. Board of Education of the Fort Bragg Unified School District* (1975) 13 Cal.3d 674, 679 (the findings of fact and determination of issues required when educational employee faced dismissal “serve[] to prompt more deliberate consideration and analysis of the matter at hand,” “render[] arbitrary action more difficult,” and facilitate judicial review.

In section 1094.5 administrative mandamus actions challenging quasi-judicial decisions, the burden of proof is on the party attacking any findings to state fully, with specific transcript

references, the evidence that is claimed to be insufficient to support the findings, because it is “neither practical nor appropriate for [a reviewing court] to comb the record on [an appellant’s] behalf.” *City of Lomita v. City of Torrance* (1983) 148 Cal.App.3d 1062, 1069.

While findings are not required to follow a particular form, they must expose the decision makers’ analysis and evidence. *West Chandler Blvd. Neighborhood Ass’n v. City of Los Angeles* (2011) 198 Cal.App.4th 1506. Courts focus on substance over form in challenges to findings. In practice, the organization and presentation of findings varies significantly between jurisdictions. Courts have provided available guidance regarding findings:

- Conclusory findings that merely recite statutory language without applying facts about the application or subject of the hearing to the applicable law are insufficient as a matter of law. *City of Carmel-by-the Sea v. Board of Supervisors* (1977) 71 Cal.App.3d 84 (citing *Topanga*); *but see Jacobson v County of Los Angeles* (1977) 69 Cal.App.3d 374 (findings that restated almost verbatim the required conditional use permit findings were upheld because the permit findings were sufficiently precise that the mere restatement of them was sufficient to make clear the factors and analysis relied on by the decision makers)
- Oral findings are discouraged. Courts have upheld, but been critical of findings stated as part of a motion. *Hamilton v Board of Supervisors* (1969) 269 Cal.App.2d 64; *McMillan v. American Gen. Fin. Corp.* 60 Cal.App.3d 175.
- Administrative hearing findings need not be as precise or formal as findings required by a court. *Topanga* 11 Cal.3d at 517, nt. 16.
- Findings must be relevant to adopted, applicable criteria in statutes or policies. *See, e.g. J.L. Thomas, Inc. v County of Los Angeles* (1991) 232 Cal.App.3d 916 (finding adopted by planning commission to support denial of a use permit for an adult business did not address the criteria in the county code for approval of use permit, and that the decision to deny therefore came “as a complete non sequitur from the findings.”)

In addition, for a quasi-judicial decision to be fair, the hearing must be conducted by a fair decision making body. “A fair tribunal is one in which the judge or other decision maker is free of bias for or against a party.” *Morongo, supra*, 45 Cal.4th at 737, citing *Withrow v. Larkin, supra*, 421 US at 46. Despite the presumption of impartiality articulated in *Morongo*, as will be detailed in papers that follow, “[p]rocedural fairness requires internal separation between advocates and decision makers to preserve neutrality.” *Morongo, supra* 45 Cal.4th at 737, citing *Department of Alcohol Beverage Control v. Alcohol Beverages Appeals Bd.* (2006) 40 Cal.4th 1, 10.

Prior LOCC City Attorneys’ Department reports have explained that a majority of city administrative hearings involve a hearing body performing an “evaluative” function, with staff



and attorneys acting in an advisory role to the body. 2009 Ad Hoc Due Process Committee Report, LOCC Annual Conference 2009, page 5. The role of staff and attorneys in these proceedings is to explain law and facts, not to advocate for a particular position or side. These types of quasi-judicial hearings generally include processing a permit, considering an employment application and deciding whether to issue a license.

The Department has cited *Witt Home Ranch, Inc. v. County of Sonoma* (2008) 165 Cal.App.4th 543 to explain why separation of functions are not required in evaluative administrative hearings. In *Witt Home Ranch*, a property owner sought to compel issuance of certificates of compliance for an antiquated subdivision. Holding that separation of functions was not required, the court concluded that the role of the County attorney (Sue Gallagher) who was advising the decision “was limited to providing, at the request of a Board member, a public ‘primer on Gardner and how it applies to this particular situation.’ All of Gallagher’s activities vis-à-vis the Ranch are therefore consistent with those of a legal adviser to the Board.” The mere fact that she reached her conclusions and provided advice to PRMD and the Board prior to the hearing of the Ranch’s appeal did not convert her from an adviser to an advocate, nor did it demonstrate bias, either on her part or the part of the Board.” *Witt Home Ranch, Inc., supra*, 165 Cal.App.4th at 569, 2009 Ad Hoc Due Process Committee Report, LOCC Annual Conference 2009, page 4.

In contrast to evaluative proceedings, California cases requiring a separation between “advocates” and decision makers, including *Sabey v. Pomona*, have been in the context of an “adversarial” hearing. See *Id.* at page 3; *Sabey, supra* 215 Cal.App.4th 489. In an adversarial hearing model, the matter to be decided is structured as having two sides, each represented by an advocate presenting evidence and argument to support their position. In this model, the decision maker depends on each advocate to develop the facts and law, and has no staff whose role is to provide technical advice and assistance to all levels of the government agency. 2009 Ad Hoc Due Process Committee Report, LOCC Annual Conference 2009, pages 3-4. Adversarial quasi-judicial hearings generally include permit revocations, nuisance abatement, and employee discipline. *Id.* at page 9.

Separation of functions is one type of due process protection commonly afforded in hearings that follow the adversarial model,

In addition to separation of functions, there are a number of other protections that cities should consider to provide due process in adversarial quasi-judicial hearings. The following section of this paper provides the legal reasons for common protections and specific examples of the particular procedures many cities use in adversarial administrative hearings.

#### **IV. Common and Helpful Procedures in Quasi-Judicial Hearings.**

As a general proposition, the U.S. Supreme Court has stated that “the differences in the origin and function of administrative agencies ‘preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts [to the administrative setting].” *Mathews, supra*, 424 U.S. at 348. Moreover, “[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.” *Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy* (1961) 367 US

886, 896. And yet parties involved in quasi-judicial proceedings where there is a property interest at stake are entitled to due process under both the federal and state constitutions.

Again, the essence of due process is adequate notice and a hearing: “the requirement that ‘a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.’” *Mathews*, 424 U.S. at 348, citing *Joint Anti-Fascist Comm. v. McGrath* (1951) 341 US 123, 171-172. As the *Mathews* Court explained, more procedural safeguards are required, for example, where welfare benefits may be discontinued for a person “on the very margin of subsistence” than would be required where disability benefits not based on financial need might be terminated. *Mathews*, 424 US at 340, 341. That is because “the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decision making process.” *Id.* at 341.

Consistent with the test set forth in *Mathews*, cities provide different rights at administrative hearings pursuant to their municipal codes depending on the nature of the hearing and the interests at stake. See Govt C §53069.4(a)(1) (authorizing local agencies to set forth by ordinance the administrative procedures that govern review of administrative fines and penalties). Some of the more common procedures are described below.

### **Ex-Parte Contacts**

Ex-parte communications lead to a deprivation of a fair hearing when an administrative body utilizes evidence outside the record to reach a conclusion. See *Mathew Zakeri Corp. v. New Motor Vehicle Bd.* (1997) 55 Cal.App.4th 1305, 1319. “Administrative tribunals which are required to make a determination after a hearing cannot act upon their own information, and nothing can be considered as evidence that was not introduced at a hearing of which the parties had notice or at which they were present.” *English v. City of Long Beach* (1950) 35 Cal.2d 155, 158.

There is no denial of a fair hearing when an administrative body does not rely on information obtained through an ex parte communication. *Mathew Zakeri Corp., supra*, 55 Cal.App.4th at 1319. Additionally, ex parte information received at another board or commission that is duly noticed is not a deprivation of a fair hearing. *Stoddard v. Edelman* (1970) 4 Cal.App.3d 544, 552.

In the land use context, site visits are generally permitted prior to hearing provided that personal investigation by the administrative body is disclosed at the outset of the hearing so that other parties can contest the observations of the administrative body. *Flagstad v. San Mateo* (1957) 156 Cal.App.2d 138, 141. For example, Berkeley Resolution No. 62,571 “Establishing Fair Procedures in Land Use Quasi-Judicial Public Hearings . . .” specifically recognizes that “Council members and Commissioners may receive information relevant to the land use decision by contacts with the parties, the public or staff and are not confined to reading the record or hearing presentations at public hearings.” However, the policy requires that if ex parte information is not already in the record, it must be contemporaneously noted by the decision maker and disclosed at the start of the hearing. *Id.*

## Sworn Testimony

Witnesses may be required to testify under oath. Requiring testimony to be given under oath is useful where witnesses are self-interested and have a motivation to lie, and where issues of facts are “fully and hotly contested.” *Mobilef v. Janovici* (1996) 51 Cal.App.4th 267, 291.

Our experience suggests that personnel discipline and civil service commission hearings generally require witnesses to be sworn. In discipline hearings, quasi-judicial bodies may face conflicting testimony from the employee and his or her supervisor. There may also be testimony from investigators, and from witnesses who observed the employee’s behavior. The parties may dispute important facts, with limited ability for decision makers to rely on independently trustworthy sources. And because the private interest involved – one’s employment – is such a carefully protected property right, we find that disciplinary actions more closely resemble court proceedings than most other local agency quasi-judicial proceedings. Swearing in, cross-examination, court reporters, and rights of rebuttal are common features in disciplinary actions. Examples of civil service commissions’ oath requirements include: City of Los Angeles Civil Service Rules section 12.5, mandating that oral evidence presented to the Commission “shall be taken only under oath or affirmation and shall be recorded verbatim;” San Mateo County Civil Service Rules section 7, requiring witnesses testifying in hearings before the San Mateo County Civil Service Commission to testify under oath; and Rules and Regulations of the Civil Service Board for the Police Department City of Bakersfield rule 16.04, requiring oral testimony to be submitted under oath in Police Department Civil Service hearings.

In contrast, in a public nuisance abatement proceeding, the California Court of Appeal in *Mobilef*, using the *Mathews* analysis and citing numerous cases, found that due process did not require sworn testimony. Requiring that witnesses testify under oath, the court explained, would both place an undue burden on the City and prevent residents who were unable to attend the hearing from expressing their opinions and observations via letters. *See also*, Bakersfield Municipal Code section 1.28.140 (hearing officer is authorized, but not required, to take testimony under oath).

## Cross-Examination

Cross-examination is another feature of due process that sometimes appears in quasi-judicial proceedings to ensure that the evidence presented is competent and witnesses credible. As stated by a Court of Appeal, “[c]ross examination is the greatest legal engine ever invented for the discovery of truth.” *Manufactured Home Communities v. County of San Luis Obispo* (2008) 167 Cal.App.4th 705, 712, internal punctuation deleted.

The court in *Manufactured Home Communities* cites a number of cases where courts found a right to cross-examine witnesses, stating that it is especially important where findings against a party are based on an adverse witness’s testimony. *Giuffre v. Sparks* (1999) 76 Cal.App.4th 1322, 1330 [disciplinary hearings]; *Davis v. Mansfield Metropolitan Housing Authority* (6th Cir. 1984) 751 F.2d 180, 185 [housing authority]; *Welfare Rights Organization v. Crisan* (1983) 33 Cal.3d 766, 769 [welfare]; *Pence v. Industrial Acc. Com.* (1965) 63 Cal.2d 48, 50-51 [industrial accident]; *Desert Turf Club v. Board of Supervisors* (1956) 141 Cal.App.2d 446, 455 [use permit]. (*Fremont Indemnity Co. v.*

*Workers' Comp. Appeals Bd.* (1984) 153 Cal.App.3d 965, 971; *Palmer v. Rent Control Board of Brookline* (1979) 7 Mass.App.Ct. 110 [386 N.E.2d 1047, 1050] [rent control board erred by not allowing landlord to cross-examine investigator who provided report to the board].

In contrast, the *Mobilef* court concluded that the right to cross-examination is not mandated by due process in nuisance abatement proceedings because it would “strip the public hearings of their informality,” “unnecessarily lengthen the hearings,” and “encourage witnesses to retain counsel or not testify at all.” *Mobilef, supra*, 51 Cal.App.4th at 301. In addition, the court pointed out that the neutral arbiter had the ability to further question witnesses present at the hearing to clarify their testimony if needed.

In *Stardust Mobile Estates*, the court took the position that cases involving documentary evidence, rather than cases that turn on live testimony, such as the rent review issue at issue, do not require cross-examination and confrontation of witnesses. *Manufactured Home Communities*, decided by the same court the next year and also dealing with an increase in mobile home rent, found that cross-examination was essential to the provision of a fair hearing because of the importance of testimony in that case. In *Manufactured Home Communities*, the tenants had testified that the mobile home park manager had misled them and misrepresented key lease terms. Because cross-examination had not been permitted in the first hearing, the court remanded the matter to the rent review board for a new hearing.

Code enforcement hearings not involving an immediate risk to human health and safety frequently disfavor more formal proceedings such as the right to cross-examine all witnesses. Hearing bodies rely on documentary evidence and testimony from staff. While the property owner has a right to access and address all evidence before the body, in our experience, she may not have the opportunity to directly confront the individual who conducted the fieldwork to gather the evidence presented through cross-examination; this practice is consistent with the more relaxed evidentiary procedures of administrative hearings as compared to those in civil and criminal trials. *See, e.g.*, Palo Alto Municipal Code (“PAMC”) §1.12.

In Palo Alto, the party contesting an administrative citation is afforded the opportunity to testify, present evidence, and cross-examine witnesses concerning the administrative citation. PAMC §1.12.090(c). The party contesting the citation can appear through an attorney, and witnesses and documents can be subpoenaed as authorized by law. PAMC §1.12.090(c).

In contrast, Palo Alto does not provide the same protections in the land use context where a party appeals the planning director’s determination related to subdividing land. PAMC §21.36, *et seq.* While the planning commission and city council are both required to hold a hearing on the appeal, the appealing party is not explicitly afforded the right to present evidence and cross-examine witnesses as provided in PAMC §1.12.090(c).

In Stockton, although administrative hearings are intended to be informal in nature, each party is provided the opportunity to present evidence and to cross-examine witnesses. Stockton Municipal Code §1.44.090. Civil Service Rules in Stockton provide for a structured appeal process. In disciplinary appeals, the hearing officer makes rulings on the admissibility of evidence, hearsay alone cannot support a finding (unless it would be admissible in a civil action),

exhibits must be marked and numbered, and cross-examination of all witnesses is permitted. Rules XIV, XIA (appeals of disciplinary action by miscellaneous and fire employees).

Police Department Civil Services rules in Bakersfield allow parties to call and cross-examine witnesses and impeach testimony, and to rebut any evidence against them. Rules and Regulations of the Civil Service Board for the Police Department City of Bakersfield rule 16.04. Again, consistent with the adversarial nature of these proceedings, the rules in some cases use words like “guilty” and “defendant.” Bakersfield City Charter, Addendum 3, Section 231 (11); Rules and Regulations of the Civil Service Board for the Police Department City of Bakersfield, rule 16.04.

### **Rebuttal**

The Brown Act grants members of the public the right to speak on items on the agenda of regular and special meetings. Govt C §§54954.3(a), 54954.3. In addition, many agencies’ administrative procedures specifically provide subjects of administrative proceedings the right to testify and present evidence. *See, e.g.*, PAMC §1.12.090; Bakersfield Civil Service for the Police Department, rule 16.04. Beyond the basic right to be present at the hearing and to testify, subjects of proceedings may be afforded the additional potential opportunity to rebut evidence presented.

A party’s right to challenge and rebut any evidence presented against it, particularly evidence presented for the first time at a hearing, can help preserve key features of a fair hearing, such as the right of a party facing a loss of a property right to be heard and have a decision made fairly based on the evidence presented. CEB California Land Use Practice, §20.35; *Vollstedt v. City of Stockton* (1990) 220 Cal.App.3d 265, 275 (“the person or body who decides the case must know, consider and appraise the evidence.”).

In adversarial hearings, such as those involving the revocation or involuntary modification of an existing permit, allowing rebuttal is recommended because it helps to demonstrate that the permittee was fully informed of the evidence presented against him. Witkin, Const. Law, section 664; *English v. Long Beach* (1950) 35 Cal.2d 155.

### **Rules of Evidence**

Most cities do not use formal rules of evidence in quasi-judicial hearings. *See, e.g.*, Stockton Municipal Code §1.44.090.A. “Administrative hearings are intended to be informal in nature. Formal rules of evidence and discovery do not apply;” PAMC §1.12.090, “The hearing officer may conduct the hearing informally, both as to rules of procedure and admission of evidence, in any manner which will provide a fair hearing.” (administrative citation hearings); El Cerrito Municipal Code §1.14.100, “[T]he hearing officer shall conduct an orderly hearing and shall accept evidence on which persons commonly would rely in the conduct of their business affairs. Formal rules of evidence shall not apply.” (administrative citation hearings).

Arguably, such a requirement would have the effect of mandating the presence of attorneys at every administrative hearing, and the financial and other efficiencies of the hearings might be lost. Thus, even in employment hearings where more procedural protections are common, technical rules of evidence are usually not applied. *See, e.g.* Rules and Regulations of the Civil Service Board for the Fire Department, City of Bakersfield, rule 18.05; Rules and Regulations of the Civil Service Board for the Police Department, City of Bakersfield, rule 16.06; San Mateo County Civil Service Rules section 12; County of Alameda Civil Service Rules section 2118; City of Los Angeles Civil Service Rules section 12.7.

### **Scripts**

It may be helpful to prepare outlines of procedures and scripts for use in administrative hearings to supplement ordinance provisions, particularly where the hearing body may not meet frequently. In San Leandro, for example, the guidelines for code enforcement hearings include the specific order of proceedings, how long the presentations should be, and who has the burden of proof. Generally, the order in scripts for administrative hearings is presentations, cross-examinations, questions from decision makers, rebuttal, closing arguments, deliberation and decision.

### **Scope of Hearing**

In some jurisdictions, the hearing body's authority to consider legal challenges to city ordinances or rules is limited. Through this practice, the hearing body is able to more effectively focus the proceeding and issue a sound decision. In Sacramento, for example, the decision of the hearing body must be based on criteria specified in the ordinance. Sacramento City Code, §1.24.070.

### **Electronic Communications**

A number of the cities we work with have received Public Records Act requests such as the following from earlier this year:

“Dear \_\_\_\_\_, Several people noticed council members accessing their city provided devices – ipad, PA, whatever they are called – during deliberations at last week’s meeting. This is a formal Public Records Request for a list of any and all contacts, messages, or views made by council members on the date of the last council meeting . . . during or after the meeting. This is to include, but not be limited to, any and all emails to or from those devices, any and all text or video messages, and any and all web searches. Thanks, [Publisher]”

Sophisticated reporters, members of the public and interested parties are carefully watching how decision makers use technology in public meetings. Depending on city practices and policies, and the particular request, electronic communications exchanged during an administrative hearing may be subject to such a Public Records Act request. In March of this year the Santa Clara Superior Court granted summary judgment to a plaintiff who sent a broad request for copies of emails and text messages relating to city business and transmitted from city councilmembers’ personal electronic devices. *Smith v. City of San Jose* (March 15, 2013) Case No.

1-09-CV-150427. The court held that these communications, even though they were exchanged and stored on private devices, were records subject to disclosure under the Public Records Act. Whether higher courts will agree with this decision remains to be seen, but we believe the decision has already prompted more requests for such communications.

In addition to being potentially disclosable under the Public Records Act (Govt C §6252(e)), texts, emails and other electronic communications sent during administrative hearings raise due process issues. Using electronic devices during a public meeting can lead to a deprivation of due process where a public official is not paying attention during the meeting. “[D]ue process requires fair adjudicators in courts and administrative tribunals alike.” *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1024. An adjudicator is expected “to listen, hear and from the evidence determine the issues raised[,] maintain an orderly procedure[,] be patient[,] be not only fair but to appear to be fair[,] and to maintain an open mind[.]” *Chalfin v. Chalfin* (1953) 121 Cal.App.2d 229, 233. Texting, emailing or using other electronic devices during a public meeting can lead to the perception that the administrative body is disinterested and not determining the issues raised based on the evidence. Such perception may lead to the charge that the adjudicative body is violating the due process rights of the individual before the body. Indeed, in one (depublished) case, the inattentiveness of council members sitting in a quasi-judicial role and carrying on private conversations during a hearing was held to have violated the due process right to be heard. *Lacy Street Hospitality Service, Inc. v. City of Los Angeles* (2004) 125 Cal.App.4th 526 (stating that the council was “obligated to pay attention, as in the obligation of sitting members of the judiciary.”)

The use of electronic devices during an administrative hearing may also violate the Brown Act. Govt C §54953(a). If a public official is communicating to other individuals during the meeting regarding the issue before the body via an electronic device, arguably another meeting is taking place that is *not* open and public. Further, information conveyed in electronic communications during meetings can be subject to local *ex parte* reporting requirements.

Some cities have policies banning or strongly discouraging the use of electronic devices during public meetings. For example, the City and County of San Francisco’s “Good Government Guide” strongly discourages the use of text messaging and the use of other electronic communication devices during meetings. (*See*, “Good Government Guide An Overview of the Laws Governing the Conduct of Public Officials,” City and County of San Francisco). The “Good Government Guide” emphasizes that the use of electronic communication devices can be particularly problematic during an adjudicative hearing where an individual’s due process rights may be compromised.

Similarly, the City of Petaluma bans the use of electronic communications and data “in violation of due process rights of interested parties at adjudicatory hearings, such as by consideration of information not part of the hearing record, or by use of an electronic communications and data device so as to result in inattention to the record and/or proceedings before the body.” City of Petaluma Resolution No. 2012-026 N.C.S. Members of the legislative body are not permitted to receive or send electronic communications during hearings, except in an emergency situation, such as a family emergency. City of Petaluma Resolution No. 2012-026 N.C.S.

The APA also prohibits electronic and other communication outside of the record, during proceedings:

“While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication.” Govt C §11430.10.

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