

**CITY OF CODY**  
**PLANNING, ZONING AND ADJUSTMENT BOARD AGENDA**  
**MEETING OF TUESDAY, JANUARY 23, 2024 AT 12:00 P.M. (NOON)**  
**CODY CITY HALL COUNCIL CHAMBERS, 1338 RUMSEY AVENUE, CODY, WY**

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1. Call the Meeting to order.
2. Roll Call, excused members.
3. Pledge of Allegiance.
4. Approval of the Agenda for the January 23, 2024 Regular Meeting.
5. Approval of the Minutes for the January 9, 2024 Regular Meeting.
6. New Business: Board Training
7. P & Z Board Matters (announcements, comments, etc.)
8. Council Update
9. Staff Items
10. Adjourn

The public is invited to attend all Planning, Zoning and Adjustment Board meetings. If you need special accommodations to participate in the meeting, please call the City office at (307) 527-7511 at least 24 hours in advance of the meeting.

**City of Cody**  
**Planning, Zoning, and Adjustment Board Special Meeting**  
**January 9, 2024**

A regular meeting of the City of Cody Planning, Zoning and Adjustment Board was held in the Council Chambers of City Hall in Cody, Wyoming on Tuesday, January 9, 2024 at 12:00 p.m.

Carson Rowley called the meeting to order at 12:03 p.m.

Present: Carson Rowley; Ian Morrison; Dan Schein; Kathryn Kyle; Sarah Miles; Josh White; Matt Moss; Council Liaison Andy Quick; City Attorney Scott Kolpitke; City Planner Todd Stowell; GIS Analyst Utana Dye.

Absent: Ian Morrison; Matt Moss;

Carson Rowley led everyone in the pledge of allegiance.

Dan Schein made a motion, seconded by Josh White to approve the agenda for the January 9, 2024 regular meeting. Vote on the motion was unanimous, motion passed.

The Board asked that the new board members and old members introduce themselves to the board and the public.

Josh White nominated Carson Rowley to serve as Chairman and Dan Schein for Vice Chairperson of the Board for the 2024 calendar year. Sarah Miles seconded the motion. Vote on the motion was unanimous, motion passed.

Dan Schein made a motion, seconded by Kathryn Kyle to approve the minutes for the December 19, 2023 Special Meeting. Vote on the motion was unanimous, motion passed.

City Planner Todd Stowell presented the final plat for the Sommers Minor Subdivision, a 2-lot subdivision of 2620 Carey Street.

Dan Schein made a motion, seconded by Josh White to recommend to City Council the approval of the Sommer Minor Subdivision final plat, subject to conditions 1-5 of the staff report. Vote on the motion was unanimous. Motion passed.

City Planner Todd Stowell presented the final plat, for the Meadowlark Meadows Subdivision, a 28-lot subdivision, located 500 feet north of Mountain View Drive, and extends from 23<sup>rd</sup> Street to 26<sup>th</sup> Street. Lots 1-24 are located in a Residential R-2 zone, while lots 25-28 are in a Residential R-3 zone.

Dan Schein made a motion, seconded by Josh White to recommend to City Council the approval of the Meadowlark Subdivision final plat and construction plans, subject to the conditions 1-13 with adding another condition to the emergency access to post signage for emergency vehicle and authorized personnel only and no parking in front of path and paint the curb yellow in front of the emergency access within the staff report, and recommend that the Council grant an additional variance to allow surface water rights to be transferred to a 3<sup>rd</sup> party, rather than to the City of Cody, due to the position of the Board of Control.

P&Z Board Matters (announcements, comment, etc.):

Council Update: None

Staff Items: None

Josh White made a motion, seconded by Sarah Miles to adjourn the meeting. Vote on the motion was unanimous. The meeting was adjourned at approximately 1:12 p.m.

*Utana Dye*

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GIS Analyst



COLORADO MUNICIPAL LEAGUE

# 100<sup>TH</sup> ANNUAL CONFERENCE

JUNE 21-24 | BRECKENRIDGE, CO



## Land Use Liability and the Basics of Quasi-Judicial Decision-Making

**Presented by Sam Light**  
**CIRSA General Counsel**  
**6.22.22**



## Introduction

- The power to make “quasi-judicial” (QJ) decisions affecting land use and development at a local level is a significant, important and cherished power.
- And there are high stakes involved in these decisions. Missteps in the quasi-judicial arena can be a significant source of claims, disputes and liability.
- In this training we will focus on the “rules of engagement” that govern your role as a quasi-judicial decision-maker, and suggest “best practices” that will reduce risk for your municipality and you individually.
- Presentation is a training resource only and not intended as legal advice. In case of any inconsistency between author’s remarks and views of your entity’s own attorney...your attorney’s views prevail!



## Due Process and Elected Officials' Roles

Your responsibilities as an elected official can be broadly broken out into two arenas: **legislative and quasi-judicial**.\*

- The quasi-judicial role tends to be one of the lesser-known aspects of being an elected official.
- Yet, the “rules of engagement” that apply to quasi-judicial decision-making are distinct from those that apply in other settings and are often counter-intuitive. And missteps with respect to these rules can have severe consequences.

It's critical to know, with respect to any given matter that may come before you, which of these two arenas is applicable.

\*(For simplicity, we'll set aside legal distinctions related to “administrative” decisions.)



## The Legislative Role

- As an elected official, you're often acting as a "legislator", and legislative activities are the ones that most likely came to mind as the "job description" when you thought about a run for office:
  - Listening to citizens who contact you in person, by email, on social media, etc.
  - Investigating the issues yourself and applying your own personal knowledge
  - Communicating early and often with your constituents
  - Lobbying and being lobbied—anywhere, anytime
  - Working in advance to build consensus (subject to open meetings laws)
  - Having strong convictions/opinions/prejudgments that you don't hesitate to voice and share...
- And then ultimately voting on an ordinance or other policy-making enactment that will have general and prospective application—that's legislation!
- The "rules of engagement" for legislative activities are easy and intuitive. The kinds of activities described above are OK!



## The Quasi-Judicial Role

- But other times you're acting as a "judge," deciding specific cases where you're applying the established general rules—the legislation—to a specific person/property. These are "quasi-judicial" matters. More specifically, a QJ matter:
  - Involves a decision affecting property rights at an individual level
  - Provides for a decision made on the basis of specific criteria (the law) and the testimony and other evidence concerning the application of the criteria (the facts) that are brought forward at a hearing
  - Requires notice, a public hearing, and a decision based on the record of the hearing (what's submitted by testimony and other evidence at the hearing)
  - Requires the decision be made by a fair and impartial decision-maker—that's you!
- In this quasi-judicial arena—which includes most land use applications—you are essentially acting as judges and therefore must behave like judges.
- And in this arena, the above-described legislative activities are inappropriate; instead, you must follow the quasi-judicial "rules of engagement".





## Honoring Due Process

- Why? The premise of the quasi-judicial “rules of engagement” is that your decision is affecting individual property rights.
- The rules of engagement have a familiar source: “No person shall be...deprived of life, liberty, or property, without due process of law.”
- At the local governmental level, for quasi-judicial land use decisions affecting individual property rights, the town board/city council and other quasi-judicial decision-making bodies and their members are responsible for delivering the due process required by the Constitution.
- All quasi-judges in the process—those making recommendations and those making final decisions—are required by law to provide “due process” and therefore must commit to providing it!



## **QJ Rules of Engagement: Personal Conduct**

What are some of the key rules of engagement related to your own conduct?

- Don't make up your mind before the hearing.
- Don't make prejudicial pre-hearing statements.
- Don't speak with one side or the other before a hearing (ex parte contacts, more in a moment).
- Don't participate if you have a financial or other personal interest in the matter (code of ethics).
- Don't sign any "pro" or "con" petitions.
- Don't be a witness in your own hearing. Instead, have the parties provide you with information during the hearing.



## **QJ Rules of Engagement: Personal Conduct**

- Discuss and consider quasi-judicial matters only at your duly noticed public hearing; that is:
  - Wait until the matter has arrived on your agenda and is “ripe” for you to hear, deliberate and decide.
  - Don’t engage in pre-hearing “buzz”—you get to make the decision but with that power comes the responsibility to be fair, unbiased and impartial. As an example, would jumping into the social media “fray” about an upcoming QJ matter be consistent with your “judge” role?
- Once your body has made its recommendation or decision, let the decision speak for itself. Even if you held a minority view, recognize the members’ need to respect the body’s decision.



## **QJ Rules of Engagement: Run a Good Hearing**

- The way the quasi-judicial body runs its hearings—and how the members conduct themselves in hearings—significantly impacts your risk profile and the community’s trust and confidence in your work.
- Follow “best practices” for hearings:
  - Use your script and follow it throughout. Don’t be ad hoc.
  - Use and expect civility; that applies to all meetings and participants.
  - Chair: Recognize and exercise your prerogative to maintain order.
  - Maintain formality and engagement; limit distractions.
  - Identify speakers and documents and properly manage “record” issues.



## Run a Good Hearing

- Stay focused on the matter and issues at hand and directly manage the crux issues to get the necessary and relevant information.
- Use opportunities to “recalibrate” if discussion is straying off topic/off task.
- Consider steps to manage the flow: e.g., don’t engage or allow others to engage in free-wheeling “back-and-forth” during staff, applicant, or public comments.
- Don’t stray the course for insistent questioners. Better to hold questions until a defined question period and to instead let the questioner know they’ve been heard and move on.



## **QJ Rules of Engagement: Avoid Ex Parte Communications**

- A critical duty of the quasi-judge is to avoid “ex parte” contacts. Such a contact occurs when someone interested in a QJ matter communicates with you “outside the hearing” about the issues in the case. Examples:
  - Meeting with the applicant outside the hearing to discuss the pro/cons of the request and how you might decide the case.
  - E-mailing your fellow decision-makers before the hearing to persuade them why they should vote yes or no.
  - Attending meetings where folks for or against the application are discussing the application, even if you’re not participating.
- If it were your application and your property interests at stake, would these activities seem fair to you?



## Avoid Ex Parte Communications

- A proceeding loaded with ex parte contacts is a clear path to having your decision overturned and, as important, having the integrity of your process eroded.
- When your attorney/staff advise against ex parte contacts, they are looking to protect your ability to participate in the decision-making, and your ultimate decision.
- An ex parte contact can be problematic whether with the applicant, citizens, or in some instances, staff.
- Or, even in the hearing itself (i.e., no texting or e-mailing about the subject matter of the hearing within the hearing itself).



## Avoid Ex Parte Communications

- Arm yourself with knowledge you need when persons want to talk about a pending quasi-judicial matter outside the hearing. Keep some “talking points” ready; e.g.:
  - “Thanks for your interest [or e-mail, etc.] but I can’t talk with you about this application outside the upcoming hearing. I’d like to hear your views but because this is a specific property rights case, I need to hear and consider the evidence only through our public hearing process. Please plan to attend the hearing if you can. If you can’t attend, you can send written comments to our staff and they’ll include those comments in hearing materials.”
- Consider having a short explanation or “FAQs” on the quasi-judicial process on your website. Use staff as a resource to help you avoid ex parte problems.





## Due Process: Summing Up Contrasting Roles

- For legislative (policy) decisions—for example, when the town board/city council is looking at generally applicable changes to the municipal code—it is okay: to base your decision on your own personal opinions and policy perspectives; to take your counsel as you wish; to lobby (and be lobbied) outside the meeting, and to base your decision on information obtained from most any source.
- But, for a quasi-judicial decision, it is not. Rather, just like a judge presiding over a trial, because of constitutional due process requirements, you must make your decision based on the evidence presented to you at the hearing, and you must base your decision upon the applicable legal standards rather than personal preferences, and you may not engage with interested parties about the case outside the hearing.



## **QJ Decision-Making: Deliberations Matter!**

- Once you've heard the staff and applicant presentations, heard public comment and asked your questions, it's time to deliberate.
- Discussion of the evidence and the criteria is critical; this is where:
  - You as quasi-judges formulate the bases of your impending decision.
  - The applicant and others obtain an understanding of your position.
  - The reviewing judge looks to understand why you decided the matter as you did (and whether it comports with your criteria and the law).
- So Deliberate – Talk Amongst Yourselves!



## Deliberations Matter!

- Focus on the key issues and relevant decision-making criteria:
  - In quasi-judicial matters, you must make your decision based on the relevant existing criteria and not on the basis of personal preferences, or irrelevant or non-existent standards, or considerations that don't apply to the application in front of you.
  - Have the criteria at the ready and ask questions as needed ("Staff, remind me, what's the rule that applies to this issue?")
- Discuss the relevant evidence that has been presented to you.
- Remember - when you are prepared to discuss the criteria, you will arrive at a discussion of the defensible reasons for your decision.



# Deliberations Matter!



## Deliberations Matter!

### The Rule of Why In Action:

Mayor: "I'd like to thank everyone for their comments on this development plan. Now it's time for the Board to deliberate. Who would like to start?"

Member Sam: "I would, thank you Mayor. I think we've heard a lot of differing opinions here and I just want to say I'm adamantly opposed. I just don't like it and I'm voting no."

Member Tami: "Sam, may I ask: Why do you intend to vote no?"

Sam: "I'm voting no because it doesn't meet our standards."

Member Nile: "Sam, why doesn't it meet our standards? I have concerns too but if you'd tell us what standards concern you and why you think they aren't met, that will help frame our discussions."

Sam: "Yes, I'd be happy to. This project doesn't meet our design standards because..."



## **Deliberations and Closing Out the Hearing**

- All quasi-judges should have—and take—the opportunity to speak during deliberations.
- When getting ready to act, make sure the decision document is accurate and reflects your criteria, findings, desired conditions, etc.
  - If conditions of approval are being added or revised, be sure they are appropriate; follow your attorney and staff suggestions on conditions.
- Take the time you need to prepare the proper decision document, even if it requires another meeting.



## Land Use Liability? What Risk?

- State Claims: Certiorari (106(a)(4)); action for declaratory judgment (e.g., asserted violation of state law).
- Federal Claims: Due process, equal protection, regulatory taking, RLUIPA, etc.
- Potential Remedies: Decisions reversed; \$\$\$ damages; court order to do/not do something; attorneys' fees.
- Insurability issues: Not all land use risks are insurable and certain risks arising from land use decisions—e.g., takings claims—typically are not covered.
- Practical Risk: Loss of faith and trust in government, particularly as arising from real or perceived concerns of unfair or unpredictable process or outcomes.



## Land Use Liability? What Risk?

- Recognize: quasi-judicial decisions aren't usually overturned because the judge didn't "like your decision."
- Rather, they are more likely overturned because the quasi-judges either made an arbitrary decision or—as a group or because of individual behavior—deprived the applicant or other participant of fundamental fairness.
  - The applicable legal presumptions and burdens of proof generally run in your favor, provided you're making the right decision for the right reasons through a fair and defensible process.
  - But court judges will keenly review the conduct of "quasi-judges".
- Therefore, individually and as a group, honor due process—do the things that judges would do, and don't do the things that judges wouldn't do!





## Conclusion

- The most important job for quasi-judges to is provide great process!
- Therefore, respect, follow, and be a champion of the fair and due process that you are set up to provide. Avoid process flaws and other acts that can cast doubt or create a sense of unfairness.
- Know that *if* you've carried out your hearing fairly and properly, and *if* you've issued a decision that is based on your hearing record and the applicable criteria, then your decision will withstand legal challenge...
- ...And interested parties and citizens will have faith and trust in how you handle quasi-judicial matters concerning their property rights. That's a great place to be!



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THANK YOU!

Sam Light, CIRSA General Counsel

- [saml@cirsa.org](mailto:saml@cirsa.org)
- 720-605-8002

For more CIRSA training on quasi-judicial best practices and due process, see these CIRSA videos: [https://www.youtube.com/watch?v=mPz-P7A\\_qIc](https://www.youtube.com/watch?v=mPz-P7A_qIc) and <https://www.cirsa.org/wp-content/uploads/2020/05/Quasi-Judicial-Proceedings.mp4>.



# About CIRSA

## Colorado Intergovernmental Risk Sharing Agency

- Public entity self-insurance pool for property, liability, and workers' compensation coverages.
- Formed by in 1982 by 18 municipalities pursuant to CML study committee recommendations.
- Not an insurance company, but an entity created by IGA of our members.
- Total membership today stands at 282 member municipalities & affiliated entities:
  - 278 are members of the PC pool
  - 139 are members of WC pool
- CIRSA views proactive approaches to risk management as critical member services – it's a win-win when issues can be addressed/resolved before they turn into more contentious disputes or litigation.
- For more information, visit [www.cirsa.org](http://www.cirsa.org).

