



# Town of Minturn Historic Preservation Commission Training

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**Presented by**

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# Introduction

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- Congratulations on your appointment to the Minturn Historic Preservation Commission, and thank you for your service!
- This training is an intro/refresher on liability risks & risk prevention best practices surrounding your role as a “quasi-judicial” decision-maker (which we’ll define in a moment)
- Presentation is a training resource only; is not intended as legal advice on any specific, pending issues; in case of any inconsistency between this presentation and your Town Attorney’s advice, your Town Attorney is always right!
- For additional CIRSA resources:
  - The elected officials’ page on CIRSA website has some resources relevant to boards and commissions: <https://www.cirsa.org/safety-training/elected-officials/>
  - CIRSA *Elected Officials Liability Handbook*: <https://www.cirsa.org/wp-content/uploads/2019/06/EthicsLiabilityBestPracticesHandbookForElectedOfficials.pdf>
  - And our newest video (<https://www.youtube.com/watch?v=bfhxvn1c1IA&t=10s>), which is 17 minutes long, or you can just watch the “due process” section here: <https://www.youtube.com/watch?v=2HeNb1SJfL8>

# About CIRSA

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## Colorado Intergovernmental Risk Sharing Agency

- Public entity self-insurance pool for property, liability, and workers' compensation coverages
- Formed 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 290 member municipalities & affiliated entities
- 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
  - The work of the Historic Preservation Commission is highly visible and impactful, and can be a source of claims and litigation

# Quasi-Judicial Issues

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- Your role as a quasi-judicial decision-maker is one of the relatively little-known aspects of municipal service at your level
- The rules that apply to quasi-judicial decision-making are distinct from those that apply in other settings, and are often counter-intuitive
- But, because of the high stakes involved in these decisions, and because of the constitutional protections underlying the applicable rules, missteps in the quasi-judicial arena can have severe consequences
- Your responsibilities can be broadly broken out into two arenas:
  - Those involving the **big picture**—making and adopting general historic preservation plans; recommending general amendments to historic preservation regulations (Chapter 19 of the Town Code)
  - Those affecting the rights of **individual** property owners or developers, who come to you for your recommendation or decision concerning their property – e.g., landmark designation and alteration hearings
- When a decision concerning individual rights – e.g., a landmarking or alteration application – is before you, you are acting in a **quasi-judicial capacity**

# Quasi-Judicial vs. Legislative: A Comparison

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- Comparing “quasi-judicial” activities with the kinds of “legislative” activities that you see coming before the Town Council can provide a useful contrast from a conduct standpoint
- Examples: Should we have a historic preservation code or plan? Should we adopt general amendments to design guidelines to further reflect our desire to protect historic elements? Should we as a matter of policy allow or ban certain land uses? In such matters, the following activities by officials are commonplace, expected, and perfectly OK
  - **listening to citizens who contact you in person, by email, on social media, etc.**
  - **investigating the issues yourself, applying your own personal knowledge**
  - **communicating early and often with your fellow citizens**
  - **lobbying and being lobbied**
  - **working in advance to create a 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 a policy-making enactment that will have prospective application to all who come within the ambit of the enactment** – that’s a good working definition of “legislative”
- The “rules of engagement” for legislative activities are easy and intuitive – the kinds of activities described above are OK! **Think legislator – State Capitol!**

# A Comparison

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- Your role of making and recommending general historic preservation plans, and making recommendations on generally applicable updates to the historic preservation ordinance or similar “legislative” regulations, is the part of your work that’s most analogous to the legislative work of the Town Council
  - You are visioning, looking prospectively and “big picture”
  - You aren’t seeking to make binding decisions concerning the individual rights of specific landowners, or concerning individual parcels of property
- But when you make decisions concerning requests such as the following (and others), you **are** affecting the individual rights of a specific landowner:
  - Request for landmarking designation of specific properties (Code Ch. 19, Art. 4)
  - Request for alteration to listed historic properties (Code Ch. 19, Art. 5)
- These proceedings are **quasi-judicial!** Thus: **Think Judge – Courtroom!**

# A Comparison

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- When it comes to quasi-judicial issues, *the activities listed in red above for legislative issues are problematic, because you're not supposed to be acting like a **legislator**, you're supposed to be acting like a **judge!***
- So, let's arrive at a working definition for "quasi-judicial":
  - Typically involves a decision affecting **property rights** at an **individual** level; Decision is 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** with a decision (or recommendation) rendered by a **fair and impartial decision-maker—that's you!**
  - Requires **notice, a public hearing, and a decision based on the record of the hearing** (what's submitted by testimony and other evidence admitted into the record at the hearing)
  - If your hearing was done correctly, judicial review is via a "**Rule 106**" action (Rule 106(a)(4) of the CO Rules of Procedure) – judge reviews the findings of fact and conclusions of law of the lower body (e.g. you or the Town Council) under an "arbitrary and capricious" standard – limited to a review of whether the lower body **exceeded its jurisdiction or abused its discretion based on the evidence in the record.** This is a very deferential standard but puts the burden on you to do the hearing correctly!

# Rules of Engagement for Quasi-Judicial Conduct: Why?

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- The “rules of engagement” that apply to quasi-judicial decision-making are premised on the existence of property rights that will be affected by your decision, and the constitutional requirement that **“no person shall be...deprived of life, liberty, or property, without due process of law.”**
- “Due process,” at its essence, **means a fair hearing before an unbiased decision-maker: you, acting as a judge!**
- When your Town Attorney emphasizes the need to follow the “rules of engagement” in quasi-judicial matters, their intent is to achieve two goals:
  - Protect YOUR right and responsibility to participate in the decision-making; and
  - Protect you, the Town, and the decision that is ultimately reached
- Not following these rules can jeopardize both of those goals!
- **If you violated constitutional rights in the conduct of the hearing and/or your decision, then Rule 106 is not the only remedy!**
  - Federal “Section 1983” (42 U.S.C. Section 1983) becomes another remedy – for **violation of civil rights**

# Remedies for Disagreement with a Quasi-Judicial Decision

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- To sum up, IF your landmarking, alternation or other quasi-judicial hearing has been carried out properly, and the decision has been issued based on facts in the record and application of proper legal criteria:
  - Decision will likely be upheld in a Rule 106 review; and
  - Other recourse (such as a claim of a constitutional violation) will likely be unavailable or unsuccessful
- But IF there are procedural flaws in the hearing or the decision, a claimant may seek redress for a constitutional violation!
- This means that in **quasi-judicial matters, the PROCEDURE by which you arrived at a decision can be *more important*, from a legal and liability standpoint, than the SUBSTANCE of your decision!**

# Quasi-Judicial Issues

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- A Historic Preservation Commission member doesn't wear a robe, is easily recognized on the street, and might be expected by citizens and others to be “accessible” at all times, but . . .
- Judge reviewing your quasi-judicial decision in an appeal proceeding will judge your conduct against the way they would behave as a judge in their own courtroom – so keep the “judge – courtroom” scenario in mind in terms of how you conduct yourselves in quasi-judicial matters
- So “think like a judge” in your personal conduct and your collective conduct when a quasi-judicial matter is involved. . .

# “Think Like A Judge”

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- 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 bring to your decision-making facts you “know” to be true, but that aren't part of the testimony or other evidence that the parties bring into the hearing -- have the parties provide you with information at the hearing
- When deliberating and making findings, think and speak as a judge would—e.g., “I find...”, “The evidence shows...”, etc.—and not in terms of “I'm feeling...”, etc.
- Don't be a witness, prosecutor, advocate, or investigator – you're a JUDGE!

# Other Conduct Issues

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- Discuss and consider quasi-judicial matters only at the Commission's 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 and unbiased and follow the rules of engagement
- Once the Commission has made its decision, let the decision speak for itself
- Even if you held a minority view, recognize your individual responsibility as a member of the body to respect the body's decision.

# Real-Life Scenarios: What Do You Think?

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“We recently recommended approval of an application for an alteration (renovation) of a listed home where the owner plans to create a shared driveway with his neighbor which will allow the applicant to move his existing driveway and create room for an addition that will expand the home and, admittedly, impact portions of home’s historic façade. The neighbor testified he supports the application and is willing to enter into a shared driveway agreement. One of our members who voted against the project (it was a 3-2 vote) has approached the neighbor to convince him to not agree to a shared driveway.” Concerns?

“From prior comments, it seems one of our members generally disfavors any alterations that replace historic elements of wood (window casings, roofs, eaves, etc.) with synthetic materials. We have an upcoming hearing that proposes these kinds of changes, and the member has been asking staff to include in the packet detailed information about the inferior quality and aesthetic of faux historic elements. He also has been posting on social media about the upcoming hearing.” Concerns?

# Ex Parte Contacts

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- A bit more about “ex parte contacts”:
- A critical duty of the quasi-judge is to avoid “ex-parte” contacts, meaning any “outside the hearing” discussion with an interested party about the subject matter of the hearing.  
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 decisionmakers 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?
- Don’t these activities seem more like “advocate” than “judge”?

# Ex Parte Contacts

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- 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 we and your Town Attorney advise against ex-parte contacts, we are protecting 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).
- Go back to the activities commonly associated with “legislative” actions, and you can see that most of them can be problematic in the quasi-judicial arena!

# Ex Parte Contacts

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- Arm yourself (and staff, arm your quasi-judges!) 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 – as noted, these “rules of engagement” are non-intuitive and may be baffling to those encountering them for the first time!
- If it’s an email—forward to staff; they can respond for you and assemble emails received for the hearing packet.

# Ex Parte Contacts

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- At what point does the ex parte prohibition kick in?
  - At the point at which an application is filed? Before? Ask your Town Attorney – this is a somewhat fluid issue!
  - But be extremely cautious about protecting your prerogative to participate as a neutral decision-maker at all times
  - Should individual members of the body be “working” on a landmarking or alteration matter that could result in an application that will come before those same members?
  - What “individual” powers does any member have? Should your body have any individual “dealmakers”?
    - Such efforts could get you seriously in front of your colleagues or the Town Council
    - Or jump in front of the staff – shouldn’t it be your staff that has the initial contact/does the up-front work on potential applications?
    - Or end up in a “divide and conquer” situation
    - Or end up displaying a seeming bias

# Real-Life Scenarios: What Do You Think?

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“Commissioner Nile is unable to attend the HPC meeting next week at which the Commission will hold a public hearing on a controversial landmark application submitted by a party other than the owner. Over the weekend he emails Commissioner Tami to tell her she should vote no because he disagrees with the idea of landmarking property other than through an application by the owner. Tami responds to Nile and copies in Commissioner Bruce, telling them both that she disagrees with the staff report’s suggestion that the property is eligible for designation based on its connection with persons significant in history (criteria 19-3-20(a)(2), which is the only eligibility criteria that might be a basis for landmarking). Bruce responds to Tami (copying Nile) adding that there is a lot of social media “buzz” about this application and “people around Town don’t want to see this property demolished.” Concerns?

# Beyond Ex Parte Communications

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- In addition to due process concerns for ex-parte communications, public officials are subject to other laws of transparency.
- Commit to the “openness” requirement of the Open Meetings Law (OML).
  - Applies to 3 or more or a quorum, whichever is less, and requires that discussion/action on public business take place at a meeting open to the public.
  - A “meeting” includes any gathering to discuss public business, in person, by phone, or electronically.
  - Note, while one-on-one discussions are okay on legislative matters, such discussions are not okay with respect pending QJ matters.
- Separate from OML requirements, e-mails sent and received by public officials that concern their official duties are generally public records.
- Using social media?

# A Word About Ethics

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- As appointed public officials, you are also subject to ethics laws governing your conduct (e.g. Town of Minturn Code of Ethics). Because of the property interests at stake, the conduct of quasi-judicial decision-makers is an area where expectations and scrutiny around ethics can get heightened.
- Thus, become familiar with ethics rules applicable to your position. Make the code of ethics your “best friend” in resolving ethics issues. Key areas:
  - Conflicts of Interest: Disclose, recuse, don’t vote, and don’t influence others.
  - Don’t disclose or use any confidential information for personal benefit.
  - Decline any gifts that seem to be connected to your service (and abide by gift rules).
- Avoid situations that create an appearance of impropriety. Recognize that in matters of ethics, fair or not, sometimes perception = reality and reality = perception!

# After the Hearing

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- Deliberation/discussion of the evidence is critical in a quasi-judicial proceeding; this is where you “connect the dots” according to this “formula”:

**Facts learned at the hearing**

**+ the legal criteria applicable to the matter**

**= Your decision**

- In deliberating, the body formulates the bases of its impending decision by connecting up the evidence it heard at the hearing and that is in the hearing records (i.e., packet) with the legal criteria that apply to the decision.
- This is where the applicant and others obtain an understanding of your position.
- It’s also where the reviewing judge looks to understand why you decided the matter as you did (and whether it comports with your criteria and the law).

# After the Hearing

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- Deliberation is the time to “talk amongst yourselves.”
  - The time for questions for the applicant or other witnesses is over!
  - If you had questions about details as the hearing unfolded, jot them down and be prepared to ask them during the hearing, **not after**
    - Example: “When do you anticipate you’ll start work on the project?”
    - But be cautious about questions during the evidentiary presentation portions of the hearing – you’re seeking clarification on essential points to plug into the “formula” – not asking about extraneous matters, or asking “leading” questions that may be perceived as bias, or that contain your own (uncorroborated) version of the “facts,” or make you appear to be an advocate rather than a judge
    - And remember, the “talk amongst yourselves” time is during deliberations, not during the hearing! Hearing time belongs to the applicant, staff, persons providing public comment, and others testifying.

# After the Hearing

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In deliberations:

- Focus on the key issues and the 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**
    - **It's easy to be led astray by pressing but irrelevant considerations!**
  - Have the criteria at the ready and ask questions as needed (“Staff, remind me, what’s the specific design guideline that applies to this issue?”)
    - Or consider asking Town Attorney or Staff to provide you with standard checklist of applicable decision-making criteria for ready reference
- Discuss the relevant evidence that has been presented to you (**not stuff you “know” but that isn’t in the record!**)
- Remember - when you are prepared to discuss the criteria, you will arrive at a discussion of the defensible reasons for your decision. Use the “Rule of Why”.

# After the Hearing

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## Deliberations - Use the “Rule of Why”

Chair: “I’d like to thank everyone for their comments on this alteration certificate request. Now it’s time for the Commission to deliberate. Who would like to start the discussion?”

Member Sam: “I would, thank you, Mr. Chair. I think we’ve heard a lot of differing opinions here and I just want to say I’m adamantly opposed and I’m voting no.”

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

Member 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 that I’ll mention in my comments but if you’d tell me what standards concern you and why you think they aren’t met, that will help frame our discussions.”

Member Sam: Yes, I’d be happy to. I find the proposed addition does not comply with the Secretary’s specific Treatment Standard that requires ‘a new addition must preserve the building’s historic character, form, significant materials, and features’ because...”.

# After the Hearing

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## Deliberations Matter: 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 bringing the matter back to a future meeting.

# After the Hearing

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- Be very cautious about commenting on the evidence or criteria when making motions or “explaining your vote”
  - Be very certain that any “comments from the bench” are 100 percent consistent with proper findings of fact and conclusions of law
- Don't reopen the hearing for a latecomer.
- If the Commission has a general “public comment” period as part of its agenda—usually at the beginning of your meeting—during that period, don't allow comments on a matter that is the subject of a public hearing. Instead, let folks know there will be time for public testimony on the public hearing matter during the public hearing.
- Similarly, if you have “Commissioner reports” or similar after public hearing matters, don't hold or reopen deliberations on a QJ matter at that time.

# Running Great Hearings: A Few Suggestions

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- The way a hearing is run —and how the members conduct themselves in hearings— significantly impact 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.
  - Model and expect civility—applies to all meetings and participants.
  - Recognize and exercise your prerogative to maintain order.
  - Observe formalities, like signing up to testify, using titles, having a podium and requiring its use.
  - Ensure the room is set up to emphasize formality and good order.

# Running Great Hearings: A Few Suggestions

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- Ensure everyone stays focused on the matter and issues at hand and directly manage the flow of the hearing to get the necessary and relevant information.
- Use opportunities to “recalibrate” if discussion is straying off topic/off task, or if tensions seem to be rising in the room.
- Don’t engage or allow others to engage in free-wheeling “back-and-forth” during staff, applicant, or citizen witness comments.
- Ensure comments are made to the Commission, and not at each other; avoid outbursts and overtalking; coach witnesses, if necessary, to provide information rather than asking questions.

# Conclusion

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- 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. That's a great place to be!
- **And thank you for your service on behalf of the community!**