The Due Process Clause plays a unique dual role in land use law because courts have determined that it possesses two distinct components — substantive and procedural. Procedural and Substantive Due Process, p.6.

The hallmark of the “procedural” aspect, the focus of this article, is the right to a fair and open process. Sounds simple enough, but as with most areas involving constitutional law, complexities lurk behind the obvious.

Some Limitations

As an initial matter, it is important to recognize that the Constitution does not require government to afford procedural due process unless it deprives an individual of an interest in life, liberty or property. More Than the Minimum, p.6. It is equally certain that land use decision-making does not affect life or liberty interests. So, we are left with the single threshold question: “is there a property interest involved?”

This is the point where things can get away from us if we’re not careful. One would normally and understandably say: “of course a property interest is involved whenever land use decisions are made, because such decisions, by definition, concern the use of land.” Therefore, using this reasoning, anyone who owns or leases property should be entitled to Constitutional due process protections whenever there is a government land use decision affecting his or her property. This common sense reasoning, while seemingly persuasive, is nonetheless incorrect.

The Due Process Clause plays a unique dual role in land use law because courts have determined that it possesses two distinct components — substantive and procedural. Procedural and Substantive Due Process, p.6. The hallmark of the “procedural” aspect, the focus of this article, is the right to a fair and open process. Sounds simple enough, but as with most areas involving constitutional law, complexities lurk behind the obvious.

WHAT IS PROCEDURAL DUE PROCESS AND WHEN DOES IT APPLY?

The Fifth Amendment to the U. S. Constitution provides that “No person ... shall ... be deprived of property, without due process of law.” This mandate, known as the “Due Process Clause,” applies to the state governments through the Fourteenth Amendment, which provides in pertinent part: “... nor shall any state deprive any person of life, liberty, or property without due process of law.” Over time, this safeguard (applied to local governments through “Dillon’s Rule,” which provides that local governments have only so much power as the state may grant) has come to protect individuals from arbitrary governmental action, no matter what level of government is acting.

The article begins by examining the meaning of procedural due process and when it applies. In the second part, it covers specific acts that ensure fairness: adequate notice; an unbiased decision-maker; avoidance of ex-parte contacts; an opportunity to be heard; the right to present evidence; prompt decision-making; a record of the proceeding; and a written decision based on the record and supported by reasons and findings of fact.

WHAT IS PROCEDURAL DUE PROCESS AND WHEN DOES IT APPLY?

The Fifth Amendment to the U. S. Constitution provides that “No person ... shall ... be deprived of property, without due process of law.” This mandate, known as the “Due Process Clause,” applies to the state governments through the Fourteenth Amendment, which provides in pertinent part: “... nor shall any state deprive any person of life, liberty, or property without due process of law.” Over time, this safeguard (applied to local governments through “Dillon’s Rule,” which provides that local governments have only so much power as the state may grant) has come to protect individuals from arbitrary governmental action, no matter what level of government is acting.

The Due Process Clause plays a unique dual role in land use law because courts have determined that it possesses two distinct components — substantive and procedural. Procedural and Substantive Due Process, p.6. The hallmark of the “procedural” aspect, the focus of this article, is the right to a fair and open process. Sounds simple enough, but as with most areas involving constitutional law, complexities lurk behind the obvious.

WHAT IS PROCEDURAL DUE PROCESS AND WHEN DOES IT APPLY?

The Fifth Amendment to the U. S. Constitution provides that “No person ... shall ... be deprived of property, without due process of law.” This mandate, known as the “Due Process Clause,” applies to the state governments through the Fourteenth Amendment, which provides in pertinent part: “... nor shall any state deprive any person of life, liberty, or property without due process of law.” Over time, this safeguard (applied to local governments through “Dillon’s Rule,” which provides that local governments have only so much power as the state may grant) has come to protect individuals from arbitrary governmental action, no matter what level of government is acting.

The Due Process Clause plays a unique dual role in land use law because courts have determined that it possesses two distinct components — substantive and procedural. Procedural and Substantive Due Process, p.6. The hallmark of the “procedural” aspect, the focus of this article, is the right to a fair and open process. Sounds simple enough, but as with most areas involving constitutional law, complexities lurk behind the obvious.
permit application in most cases, but that is not the point of the Constitutional inquiry. The real question is: how does one demonstrate a sufficient interest in the granting of a permit to be entitled to procedural due process protections?

The “Clear Entitlement” Test

The United States Supreme Court, in the well-known (at least to lawyers) case of Board of Regents v. Roth, 408 U.S. 564 (1972), developed what is referred to as the “clear entitlement” test to determine whether the property interest at stake warrants due process protection under the Constitution. It may be easiest to understand this test in the following way: if the government has no choice but to grant a permit in the event that the applicant meets certain criteria established by regulation, then a protected property interest is involved — and procedural due process protections must be provided. This occurs, for example, when a zoning board or other body sitting in a permitting capacity applies adopted policies or regulations to specific individuals and circumstances. In other words, when the body is acting in an “adjudicative” manner.

Contrast this with “legislative” decisions where the local body (most commonly the governing body) is setting policy of a general application — for example, by enacting a zoning ordinance or by designating an historic district. The exercise of “legislative” functions is usually not subject to the detailed hearing, notice, and public participation requirements imposed on “adjudicative” functions.

Many planning commissions, however, do not act precisely as either “adjudicative” or “legislative” bodies, but fall somewhere in between. This is especially the case in those states where a planning commission reviews permit applications according to adopted criteria, but does not make the final decision. Since the commission does not function as an “adjudicative” body in the strictest sense, one could argue that it does not have to provide procedural due process protections such as adequate notice and the opportunity to be heard. Our advice, however, is that where a commission makes recommendations that the ultimate permit-granting authority (usually the local governing body) may rely on in making its own determination to approve or deny a permit, prudence dictates that the commission also follow the principles of procedural due process.

Having just gone through the basics of the Supreme Court’s “clear entitlement” test, we must now caution you that courts can invalidate local actions because of the unfairness of the action even if they conclude that the Constitution’s due process clause does not apply! If a court is sufficiently outraged by the unfairness or bias of the local decision-making process it may search for (and find) some other basis for invalidating the decision. A good example of this is a recent California Court of Appeals decision, Clark v. City of Hermosa Beach, summarized in the sidebar. Clark v. City of Hermosa Beach, p. 7.

WHAT IS REQUIRED TO SATISFY PROCEDURAL DUE PROCESS?

Procedural due process requires that governmental proceedings be conducted in an orderly, fundamentally fair, just, and impartial manner. In the balance of this article,
we will discuss what we feel are the minimum requirements for a defensible proceeding. Please note, however, that requirements may vary in your jurisdiction depending on your state statutes and how your courts have interpreted them. Our goal is to alert you to the issues. You should be guided by your commission's legal counsel in determining the full scope of procedural due process required in reviewing permit applications.

Also, bear in mind that while your proceedings must conform with the requirements of procedural due process, they need not be conducted in a formal “trial-like” manner. Indeed, running a commission hearing like a trial will end up intimidating virtually everyone involved (except for the lawyers). Procedural due process can usually be provided within the confines of a relatively informal atmosphere.

1. Adequate Notice

Notice requirements are normally found in state enabling laws and in local zoning and subdivision ordinances. They direct who is to receive notice and what form the notice must take. Courts generally consider these requirements as mandatory and jurisdictional, which means that a failure to comply will invalidate the action taken.

The person whose property is at issue and the person who has applied for a permit (sometimes the same person) ordinarily must get notice. To ensure fairness, most communities also provide notice to neighbors or property owners within a specified radius, even if state law does not mandate this. A commission should also give some type of notice of its hearings to the general public. Most states require, at a minimum, that notice of hearings be published in a newspaper of general circulation.

The following cases illustrate actions constituting insufficient notice, and underscore the importance of strictly following your jurisdiction's notice requirements.

- An Illinois court held that notice of a rezoning application was not reasonably calculated to reach those who should have been informed so as to afford them an opportunity to present their objections when this notice was buried in the back pages of a newspaper. American Oil Corp. v. City of Chicago, 331 N.E.2d 67 (Ill. App. Ct. 1975).

- The Utah Supreme Court held that a city planning and zoning commission failed to comply with statutory notice requirements when it gave no notice of its hearing on a proposed project master plan, and then an ordinance enacting the same was passed by the governing body. Call v. City of West Jordan, 727 P.2d 180 (Ariz. 1986).

2. An Unbiased Decision-Maker

Commission members must be free from conflicts of interest and bias. At the least, such behavior can lead to a crisis of confidence in the commission's ability to deal fairly with applicants. But bias and conflict of interest can also result in a court invalidating the commission's decision.

- The Maine Supreme Court held that a landowner was denied due process when only two of five commission members who heard the evidence were on the commission when it issued its findings, and one of the new members had been a vocal opponent of the project at the hearing. As the Court noted: “Procedural due process ... assumes that Board findings will be made only by those members who have heard the evidence and assessed the credibility of the various witnesses.” The Court further held that only those Board members who had not previously opposed or supported the project could participate at a future rehearing. Pelkey v. City of Presque Isle, 577 A.2d 341 (Me.1990).

- The Georgia Supreme Court vacated a county commission rezoning of two lots from residential to commercial because two of the three commissioners had a financial interest in the rezoning. Wyman v. Popham, 312 S.E.2d 795 (Ga. 1984).

3. Ex-Parte Contacts

Related to the previous point, it is fundamentally unfair to engage in ex-parte contacts — contacts outside of the public hearing process with a party involved or potentially involved in a

continued on page 8
matters before your commission. These are “one-sided” conversations because you are allowing one party to have a discussion with you in the absence of other parties. You must scrupulously avoid these conversations.

- The Maine Supreme Court held that a planning board’s meetings with opponents of a subdivision proposal were ex parte in nature (and violated due process) since the applicant was not notified of them. *Mutton Hill Estates Inc. v. Oakland*, 468 A.2d 989 (Me. 1983), appeal after remand, 488 A2d 151 (1985).

Should you inadvertently commit an ex-parte contact, you must reveal it on the record before you vote on the matter. As Gregory Dale has stated in one of his “Ethics & the Planning Commission” articles in the Planning Commissioners Journal, “there is nothing more frustrating for the losing party than to have the impression that the other side prevailed through the use of ‘back door’ politics. And nothing is more important to you as a planning commissioner than your credibility and integrity.” PCJ #2, Jan./Feb. 1992, “Ex-Parte Contacts.”

Most states have also enacted “Sunshine Acts” and “Open Meetings” laws that define what constitutes a public meeting and require that all deliberations (with a few specified exceptions) take place in a public forum. You should have your commission’s attorney brief you on what these laws require.

4. Opportunity to be Heard

Every hearing, formal or informal, must allow all interested parties a fair and reasonable opportunity to present arguments and evidence supporting their position. This does not mean that a commission cannot place reasonable time restrictions on presentations and testimony. In general, courts weigh an individual’s interest in an opportunity to be heard against the public interest in fair but efficient hearings.

- A Colorado court held that a board of adjustment violated due process when it took additional testimony at a second public hearing after telling an applicant that his presence was not necessary because no testimony would be taken. *Slaventis v. City of Cherry Hills Bd. of Adjustment and Appeals*, 751 P.2d 661 (Colo. Ct. App. 1988).

- A California court held that a governing body, by waiving notice requirements and limiting the developer’s opportunity to speak, violated due process. *Cohan v. City of Thousand Oaks*, 35 Cal. Rptr.2d 782 (2d Dist. 1994).

5. The Right to Present Evidence

A commission must reach its decision after hearing all of the evidence and after permitting the evidence to be examined and commented upon by all interested parties. Each side must be allowed to rebut the other’s arguments and evidence.

- A New York court held that an applicant was entitled to a rehearing when the zoning board’s denial was based on a planning department report containing evidence that the applicant did not have an opportunity to rebut. *Sunset Sanitation Service Corp. v. Bd. of Zoning Appeals*, 569 N.Y.S.2d 141 (2d Dep’t 1991).

The right of cross-examination in the context of land use hearings varies with the nature of the proceeding and with requirements of state law. Some states require commissions to allow cross-examination. Because the prospect of facing formal cross-examination may make residents reluctant to speak (thus depriving your commission’s attorney of valuable evidence) we recommend that your proceedings allow for only as much cross-examination as is legally necessary. This is a particularly important issue to consult with your commission’s attorney about in advance.

6. Prompt Decision-Making

The right to be heard includes the right to a prompt decision. Common sense dictates that you should make your decision within a reasonable time in light of the substantial financial and personal capital expended by all sides in land use applications. In fact, many states and localities require land use decisions to be made in a particular time frame and to be published in a certain manner.

7. A Record of the Proceeding

The record is the basis for your decision. Moreover, in “record appeal” states, the court relies on this record when it reviews a commission’s action; you must build a meticulous record at every hearing in these jurisdictions. In “de novo” states, the court holds its own hearing as if the commission had not previously rendered a decision (but even in these states, we would advise commissions to preserve in some form the evidence presented and considered at the hearing).

The record of the proceedings is a compilation of testimony from the hearings, written information provided by witnesses, staff reports and recommendations, and any other information used to form the basis for the decision. Testimony may be recorded in various forms: a formal transcript prepared by a professional court reporter, written minutes, or audio or video recordings.
8. A Written Decision Based on the Record and Supported by Reasons and Findings of Fact

Courts will generally uphold local land use decisions so long as they are supported by facts contained in the record. However, courts will overturn local land use decisions as “arbitrary and capricious” when they are not the product of sufficient fact-finding.

- A Minnesota court reversed a county board’s decision to deny a conditional use permit for a sewage treatment plant, noting that: “The minutes of the county board contain no findings of fact explaining the decision ... The board gives no factual basis for its findings. It merely recites the language of the zoning ordinance. ... There is no way to determine from the record before this court what the county board’s thinking was when it denied the conditional use permit.” City of Barnum v. County of Carlton, 386 N.W.2d 770 (Minn. App. 1986).


- The Nevada Supreme Court found a city council’s denial of a rezoning request for a hotel and casino (which the planning commission had recommended be approved) to be arbitrary and capricious. The Court found that council members made their decision based on “campaign promises” and “pledges to constituents” instead of on whether the rezoning conformed with the city’s master plan. Nova Horizon v. City Council of Reno, 769 P.2d 721 (Nev. 1989).

The best way to avoid a charge of arbitrary and capricious action is to ensure that the reasons you give for your decision are supported by facts contained in the record of the hearing. While many states and localities expressly require findings of fact and a statement of reasons, sound practice dictates that your commission adopt this practice even if your state’s laws are silent on this topic. Your decision should also be based on your ordinance and plan criteria, and should be consistent with previous decisions of your commission dealing with similar circumstances.

Remember that the point of creating a written decision is to distill the facts, articulate your assumptions, and clearly describe how you are applying the facts to the legal requirements of your ordinance. The decision should also be written in a manner that others can understand. In other words, discipline yourself not to use “legalese” and “planner-speak.”

**SUMMING UP:**

If you abide by the basic principles outlined above, your actions should survive any judicial scrutiny. You can ensure that these practices become a part of your day-to-day commission routine by incorporating procedural safeguards into your bylaws or ordinance.

Ensuring due process may seem to be an expensive and time-consuming proposition. But as land use lawyer Ted Carey has noted, “lack of process costs even more money ... Virtually anything that’s questionable should be accorded procedural due process steps. It’s a small price to pay for a very large insurance policy.” Land Use and the Constitution, p. 46. ◆

Dwight H. Merriam, AICP and Robert J. Sitkowski, AIA, are lawyers with Robinson & Cole LLP in Hartford, Connecticut, where they practice land use law. Merriam has been a director of the American Planning Association, and is past President of the American Institute of Certified Planners. He is co-author of The Takings Issue (to be published this year by Island Press) and also co-authored “The Supreme Court Takes on ‘Takings’ “ in PCJ #8 (Jan./Feb. 1993).

Sitkowski was the 1994 winner of the American Planning Association, Planning & Law Division’s R. Martin Smith Student Writing Competition, and is a member of the American Institute of Architects.