

How to Conduct a Public Hearing

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ATTORNEYS AT LAW

[Introduction]

- There are two basic types of public hearings.
- **Adjudicatory Hearings** which are hearings to determine the legal rights, duties or privileges of specifically named persons or entities.
- **Regulatory Hearings** which are hearings in which a board or commission considers adoption or amendment to its rules or regulations.

Adjudicatory Hearings

- An adjudicatory hearing is one in which the legal rights, duties or privileges of specifically named persons or entities are required by law to be determined after an opportunity for a hearing.
- For example, the Licensing Board may believe that it has cause to suspend or revoke a liquor license, or the Board of Health may believe it has cause to condemn a residential structure. In these instances and others, an adjudicatory hearing is required.

[Adjudicatory Hearings]

- It is important that adjudicatory hearings comply with the basic concepts of Due Process – which are notice of the charges and an opportunity to be heard.
- Adjudicatory Hearings have three basic components: Notice; the Public Hearing; the Decision. I will address each in turn.

Adjudicatory Hearings - Notice

- Prior to conducting a public hearing, you must ensure that proper notice is given to all interested parties.
- Interested parties include the target of the public hearing, the complaining parties (if any) and in some circumstances, abutters.
- Notice should always be sent by certified mail – return receipt requested and by regular first class mail. Notice should be sent in a manner that is reasonably likely to provide actual notice to interested parties.



Adjudicatory Hearings - Notice

- The substantive law will determine when the notice has to be given.
- For example, pursuant to the State Sanitary Code, 105 CMR 410.831(C), the Board of Health is required to give at least 5 days' notice of a hearing to determine whether a dwelling is unfit for human habitation, unless there is an emergency.
- With regard to liquor license hearings, although Chapter 138 does not specify when notice needs to be given, the ABCC takes the position that the licensee must be notified at least ten days prior to the hearing.
- If there is no specific requirement, 10 days is generally sufficient.



Adjudicatory Hearings - Notice

- Notice to the individual must specify the following:
 - Date, time and location of the hearing;
 - Statutory basis for the hearing;
 - Statutory basis for the violation; and
 - Brief statement of facts.
- If there are police or inspection reports, copies should be sent with the Notice.

Adjudicatory Hearings - Notice

- In addition to providing notice to interested parties, you must also provide public notice in accordance with the Open Meeting Law, which, pursuant to G.L. c. 30A, §20, requires that notice be provided to the Town Clerk at least 48 hours prior to the hearing, excluding Saturdays and Sundays.
- That means that if a public hearing is scheduled for a Monday at 3:00 pm, notice must be given to the Town Clerk by Thursday at 3:00 pm.
- Emergencies – If you have to proceed on an emergency basis, provide notice as soon as the hearing date is determined and schedule a properly posted meeting to ratify any decision at the earliest date possible.



Adjudicatory Hearings - Notice

- **Sample Agenda Item– Licensing Board:**

Public Hearing – Liquor License Violation - [Licensee]

Public hearing to determine whether Licensee violated G.L. c. 138, §34 by serving alcoholic beverages to a minor and whether disciplinary action should be taken. Votes may be taken.

Adjudicatory Hearings - Notice

- **Sample Agenda Item– Board of Health:**

**Public Hearing – Dwelling Unfit for Human Habitation-
[Address]**

Public hearing to determine whether the premises located at Address are unfit for human habitation based on the existence of numerous violations of the State Sanitary Code and whether an order to vacate and secure or other remedial action should be taken. Votes may be taken.

Adjudicatory Hearings - Hearing

- At the commencement of the hearing, the Chair should formally open the hearing as follows:
 - I will now open the public hearing in the matter of [name] or [property].
- The Chair should then read the notice sent to the target of the hearing and ask staff to confirm that Notice was properly served and received.
- Once the Notice is read, the Chair can turn the proceedings over the Town Counsel (if present) or he/she can commence with the hearing by making an Opening Statement explaining the hearing procedures.



Adjudicatory Hearings - Hearing

- Once the Opening Statement of the Board is Complete, the Board should recess for the purpose of giving those who wish to testify an opportunity to register with the recording clerk.
- The Chair can then swear in the witnesses by asking that everyone who intends to testify stand, raise their right hand and swear that the testimony they are about to give is the truth, the whole truth and nothing but the truth.

Adjudicatory Hearings - Hearing

- The Hearing will proceed in four phases:
 - First, the Board will hear testimony from representatives of the Police Department or Staff concerning any complaints and/or investigation that triggered the hearing;
 - Second, the Board will hear testimony from any persons complaining about violations;
 - Third, the Board hear testimony from representatives of the target.; and
 - Finally, once all parties have had an opportunity to be heard, the Board will enter its deliberations phase.

Adjudicatory Hearings - Hearing

- Once the evidentiary portion of the hearing has concluded, the Chair should declare that the evidentiary portion of the hearing is now closed and inform the public that the Board will begin its deliberations.
- Deliberations should be conducted in open session and in a manner that is audible to all present.
- The Board should consider and vote on 3 issues: (1) whether the Board finds that a violation has occurred; (2) if so, the Board should consider and vote on the appropriate penalty; and (3) if a penalty is imposed, the Board should adopt findings of fact in support of its decision.

Adjudicatory Hearings - Hearing

■ Quorum and voting:

- A quorum is a majority of the maximum complement of the Board.
- To take action, the vote must be by a majority of those present at the meeting.
- If the hearing spans more than one day, only those members who are present at all sessions can vote, unless the member invokes G.L. c. 39, §23D (if the Town has adopted the statute).
- If a member has a conflict of interest, that member cannot be counted towards a quorum and cannot participate in any way. The member must leave the table, but can remain in the room and participate to the same extent as any other member of the public.



Adjudicatory Hearings - Hearing

- Here are a few practice pointers:
 - Although you want to proceed in an orderly fashion, do not elevate form over substance, make sure that everyone has an opportunity to be heard and that all relevant information is obtained.
 - The hearing should be recorded and the recording should be preserved.
 - All reports, photos and exhibits should be formally introduced into the record.

Adjudicatory Hearings - Decisions

- After the conclusion of the hearing, if a violation was found, the decision should be reduced to writing.
- The decision letter should specify that a hearing was held and it should contain the following:
 - The violation found;
 - The penalty imposed;
 - The Board's findings of fact; and
 - The subject's right of appeal.

Adjudicatory Hearings - Decisions

- The Decision Letter should be sent certified mail – return receipt requested and first class mail.
- The ABCC takes the position that the Board can only raise issues on appeal that are within the four corners of the decision letter, therefore, care must be taken to include all the reasons voted on.
- In other circumstances, review is on the entire record, so a less detailed letter may suffice.

[Regulatory Hearings]

- A Regulatory Hearing is one in which a board or commission considers adoption or amendment to its rules or regulations.
- There may also be state law requirements that have to be met in certain circumstances.

Regulatory Hearings - Notice

- To adopt a regulation concerning on-site septic systems, pursuant to G.L. c. 111, §31, the Board of Health must provide public notice in a newspaper twice, the first time being at least fourteen days before the hearing. The Planning Board must do the same to amend its Subdivision Rules and Regulation. G.L.c.41, §81Q.
- All Open Meeting Law posting requirements must be met.

[Regulatory Hearings - Hearing]

- The Regulatory Hearing Procedure is similar to the procedure for Adjudicatory Hearings.
- The Chair should commence the Hearing by reading the Notice and explaining the rules that will be followed.
- Usually, there is no need to require testimony under oath.

Regulatory Hearings - Hearing

- The Hearing should proceed in the following manner:
 - Proponents of the measure may argue in favor, one at a time.
 - Once a speaker finishes, questions will be permitted, first from members of the Board, then from members of the public.
 - There will be no argument between speakers and members of the public. All questions will be through the Chair.
 - Questioners will identify themselves, state their questions and specify to whom they are addressed.
 - When there are no more questions, the next speaker may proceed.



Regulatory Hearings - Hearing

- Once all proponents of the measure have had an opportunity to speak, Opponents of the measure will have an opportunity to present their case.
- The Opposition will proceed in the same manner – speaker, questions from the Board, questions from the public.
- After the Opposition is complete, there will be a brief recess and each side will have an opportunity to present closing arguments, with the Proponents going first.
- At the completion of arguments, citizens may record themselves in agreement with one of the sides without making another presentation.

Regulatory Hearings - Decisions

- After all presentations have been made, the Board may deliberate, in open session, and determine the final text of the new or revised rule or regulation.
- Once the final text is determined, the text and the effective date must be published once in a newspaper of general circulation in the Town.
- For the Board of Health, all regulations must be sent to the DEP for publication in a central register. For Planning Board Subdivision Regulations, a copy must be sent to the Register of Deeds and to the Recorder of Land Court.



[Resources]

- Massachusetts Attorney General – Division of Open Government Page:

<http://www.mass.gov/ago/bureaus/government/the-division-of-open-government/>

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