

**SUGGESTED RULES FOR CONDUCTING A HEARING**  
**POST-KLAEREN DECISION**

A subcommittee of the Home Rule Attorneys Committee has produced the attached Suggested Rules for Conducting A Hearing Post-Klaeren Decision. These rules are the result of many hours of research, deliberation, and revisions and take into account the variety of specific zoning issues and the differing size of municipalities throughout Illinois.

The Suggested Rules are just that. If they help your municipality as written, please use them. If not, modify them to better serve your city in accordance with your reading of the Klaeren decision.

The Illinois Municipal League acknowledges the long hours of work and dedication of the following members in formulating these rules:

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## **IML KLAEREN SUBCOMMITTEE**

### **COMMENTS AND SUGGESTED RULES FOR PUBLIC HEARING**

- March 6, 2003 -

On October 18, 2002, the Illinois Supreme Court issued its opinion in the case of Klaeren v. Village of Lisle, 202 Ill.2d 164, 781 N.E.2d 223, 269 Ill.Dec. 426 (2002). Among the significant holdings of the Court in Klaeren was that municipal bodies act in administrative or quasi-judicial capacities when those bodies conduct zoning hearings concerning a special use petition. The rationale of the Court implies that this ruling will likely be extended to other site-specific land use decisions, such as variations.<sup>1</sup> In light of this holding, the land use public hearing must be conducted in a manner which meets the due process rights of the applicant and other interested persons.<sup>2</sup> The hearing will include, but is not limited to, the right of cross-examination and the right to present witnesses. The purpose of these comments and the following proposed rules is to guide governmental bodies in the conduct of public hearings related to administrative or quasi-judicial site-specific land use approvals, including special uses, variations, rezoning and planned developments in light of Klaeren. It is recommended that public bodies review these rules with their attorneys and adopt their own rules of procedure as needed. These rules are intended to be supplemental to, and should be coordinated with, the provisions of local ordinances.

A "public hearing"<sup>3</sup> is a formal proceeding mandated by law for the purpose of taking evidence with a view to formulating a decision or recommendation on an issue within the jurisdiction of the public body. A "public hearing" is distinguished from a "meeting" in that all hearings are meetings, but not all meetings are hearings.

Notice requirements for a public hearing are found in State law and local ordinances. Care should be taken to ensure that notice is given in a timely manner consistent with statutory and ordinance requirements.

Although courts have indicated that there may be some discretion to restrict the class of persons eligible to take part in the public hearing, it is recommended that any person so desiring be allowed to participate in the matter.<sup>4</sup>

#### Suggested Rules for Public Hearing

1. All hearings of the public body shall be subject to the Illinois Open Meetings Act.
2. The Chair may impose reasonable limitations on evidence or testimony presented by persons and parties, such as time limits and barring repetitious, irrelevant or immaterial testimony. Time limits, if imposed, shall be fair, and equally administered.<sup>5</sup> The public body shall not be bound by strict rules of

evidence; however, irrelevant, immaterial, or unduly repetitious evidence shall not be admissible. The Chair shall rule on all questions related to the admissibility of evidence, which ruling may be overruled by a majority of at least a quorum of the public body. The Chair may impose reasonable conditions on the hearing process based on the following factors<sup>6</sup>:

- a. The complexity of the issue.
  - b. Whether the witness possesses special expertise.
  - c. Whether the testimony reflects a matter of taste or personal opinion or concerns a disputed issue of fact.
  - d. The degree to which the witness's testimony relates to the factors to be considered in approving or denying the proposal
  - e. Such other factors appropriate for the hearing.
3. The Chair may take such actions as are required to maintain an orderly and civil hearing.
  4. Proof of lawful notice shall be introduced into evidence before the public body.
  5. A record of proceedings shall be made as directed by the public body.<sup>7</sup>
  6. At a public hearing, a Petitioner may appear on his or her own behalf or may be represented by an attorney.<sup>8</sup>
  7. The municipality shall be a party in every proceeding, and need not appear.
  8. In addition to the Petitioner, any person may appear and participate at the hearing.
  9. People participating shall identify themselves for the record, either orally or in writing, and indicate if an attorney represents them. Any person participating, other than the Petitioner, shall be referred to in these rules as Interested Person.
  10. The examination of a witness shall not be used by the questioner to offer testimony or evidence of the questioner.
  11. All persons offering testimony at a hearing shall testify under oath. An attorney shall be sworn if he or she offers testimony but not if he or she is questioning witnesses, summarizing testimony of witnesses, or addressing the public body.
  12. The order of presentation of evidence at a public hearing shall generally be as follows, but may be modified as determined appropriate by the Chair:

- a. Identification of Petitioner and Interested Persons.
  - b. Submittal of proof of notice.
  - c. Testimony and other evidence by Petitioner.
  - d. Public body examination of Petitioner's witnesses and other evidence.
  - e. Cross-examination of Petitioner's witnesses and other evidence by Interested Persons.<sup>9</sup>
  - f. Testimony and other evidence by Interested Persons.
  - g. Public body examination of Interested Persons' witnesses and other evidence.
  - h. Cross-examination of Interested Persons' witnesses and other evidence by Petitioner.
  - i. In some cases re-examination may be allowed.
  - j. Report by staff, if any.
  - k. Summary/Closing by Petitioner.
  - l. Summary/Closing by Interested Persons.
  - m. Rebuttal/Closing by Petitioner.
13. At the conclusion of an evidentiary portion of the public hearing, the public body may, among other actions, move to deliberate its decision on the evidence presented, or continue the hearing to a date, time and location certain.
  14. A written decision shall be prepared which shall include findings of fact and the public body's recommendation or decision based upon the record.<sup>10</sup>
  15. These Rules for Public Hearing may be amended by a vote of a majority of the public body.

## FOOTNOTES

<sup>1</sup> It is unclear whether rezoning of specific property fits within the Klaeren reasoning although the recent Second District Appellate Court decision in Gallik v. County of Lake seems to imply that such decisions fall under Klaeren. “It is not part of a legislative function to grant permits, make special exceptions or decide particular cases. Such activities are not legislative but administrative quasi judicial or judicial in character.”

<sup>2</sup> Procedural due process is a flexible concept and the procedural protections employed must be adapted to the particular situation. Courts consider three (3) factors when determining the procedural protections due process requires:

- a) The private interest that will be affected by the official action.
- b) The risk of an erroneous deprivation of such interest through the procedures used and the probable value of additional or substitute procedural safeguards.
- c) The government’s interest including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. Matthews v. Eldridge, 424 US 319, 334 (1976).

<sup>3</sup> The Appellate Court decision in Klaeren, 737 N.E. 2<sup>nd</sup> 1099, 250 Ill.Dec. 122, 132, specifically adopted the reasoning expressed in E & E Hauling v. County of DuPage, 77 Ill.App. 3<sup>rd</sup> 1017, 1021, 33 Ill.Dec. 536 (1979) that a “public hearing before any tribunal or body means the right to appear and give evidence and also the right to hear and examine the witnesses whose testimony is presented by opposing parties.”

Municipalities may wish to consider authorizing a “pre-hearing” conference to clarify legal and factual issues, exchange documents and information, discuss stipulations and the order of witnesses, similar to what may be done in a court pretrial conference.

<sup>4</sup> The definition of the party entitled to participation in the municipal proceedings has been constructed broadly. Village Supermarket, Inc. v. Mayfair Supermarkets, Inc., 634 A.2d 1381, 1388 (N.J. Super 1993) (variance hearing). “While notice must be given to property owners within 200 feet, they are not the only ones with standing to participate.” Id. Piney Mountain construed it even more broadly: “[W]here... a corporate petitioner has no property interest, but represents individuals who live in the affected area and who potentially will suffer injury by the issuance of a special permit, such petitioner has standing to seek judicial review of municipality’s action in approving an application for a special use permit.” Piney Mountain, 304 S.E. at 252. This broad definition appears to be allowed because “[a]n application to the planning board for a variance and site plan approval requires a fact-finding hearing that is not literally an adversary process. The proceeding is not a lawsuit. Objectors have the right to be heard.” Id.

A municipality can however adopt rules limiting the class of individuals allowed to exercise a right of cross-examination. People ex. el. Klaeren v. Village of Lisle, 737 N.E. 2<sup>nd</sup> 1099, 250 Ill.Dec. 122, 134.

<sup>5</sup> The Appellate Court in Klaeren discussed a variety of procedural devices which municipalities may employ, including:

- a) Limiting the class of individuals allowed to exercise a right of cross-examination.
- b) Require those wishing to exercise the right of cross-examination to register in advance of the public hearing.
- c) Require those who wish to cross-examine to allege some special interest beyond that of the general public.
- d) Adopt rules creating a presumption of the right to cross-examination in favor of an identified class.
- e) Reasonably restrict the right of cross-examination based on the subject matter.
- f) Adopt rules specifying which factual issues are considered relevant to the decision and limiting cross-examination to witnesses addressing those issues.

In light of the probable need for more formal hearing procedures, municipalities may wish to consider utilizing a hearing officer for more complex hearings. See 65 ILCS 5/11-13-14.1.

<sup>6</sup> The Klaeren Supreme Court decision makes clear that the right of cross-examination “is not unlimited and may be tailored by the municipal body to the circumstances specifically before it. 269 Ill.Dec. 438. To what extent the full panoply of due process rights commonly associated with quasi-judicial hearings must be afforded interested parties depends upon the purpose of the hearing. 269 Ill.Dec. 437. See also Hannah v. Larche, 363 US 420 (1960).

<sup>7</sup> Although the term “record” is not defined, the Code of Civil Procedure implies that in administrative review actions at a minimum the record should contain “the original or certified copy of the entire record of proceedings under review including such evidence as may be heard by it and the findings and decisions made by it.” 735 ILCS 5/3-108 (b). Supreme Court Rule 323 also describes in detail the contents and procedure for creating a report of proceedings.

A municipality may want to consider adopting an appropriate ordinance to recoup through its fees sufficient sums to offset the anticipated higher costs of a more formal hearing process.

<sup>8</sup> A petitioner is always authorized to represent his or her interests or those of the entity in which he or she is a principal. It is thought however that a land planner,

engineer or other professional who is not an attorney may engage in the unauthorized practice of law by the representation of parties in a public hearing.

<sup>9</sup> Such cross-examination rights may be limited to certain individuals. All property owners within 250 feet of proposed special use must be afforded the right of cross-examination. 250 Ill.Dec. 133. In smaller municipalities it is more difficult to adopt a per se rule defining which adjoining land owners are so adversely affected by the determination that they should be entitled to additional procedural safeguards. “Municipal authorities in such areas should be free to adopt procedural rules uniquely adapted to reflect these differences.” 250 Ill.Dec. 133. A zoning body has the discretion to limit public comment but it should do so with care. 250 Ill.Dec. 136. A proceeding that incorporates an arbitrary time limit without consideration of the nature of the comments and the relevance to the factual issues presented fails to meet the statutory definition of a public hearing. 250 Ill.Dec. 137, wherein a two (2) minute time limit imposed on public comments was found to be unreasonable.

<sup>10</sup> A thorough, well-written ordinance approving or disapproving an application may constitute a sufficient “written decision”, especially if it incorporates appropriate findings concerning the relevant ordinance standards involved.