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Sheldon J. Plager

Indiana University School of Law

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PARTICIPATORY DEMOCRACY AND THE PUBLIC
HEARING:
A FUNCTIONAL APPROACH

SHELDON J. PLAGER*

Historically one of the institutions built into our system of government by law and designed, presumably, to provide a vehicle for public participation is the public hearing. I have not done the research required to determine definitively when and where the public hearing first appeared in its fullblown state, but its roots no doubt can be traced back to preconstitutional times. The public hearing serves different functions, and is subject to different legal constraints, depending on the type of decision-making with which it is associated. One type involves governmental decisions whose primary thrust is to affect the public in a general sense, even though specific sub-groups may be the subject of the decision. Examples are enactment of criminal and tax statutes. This kind of decision-making, which we can call legislative or rulemaking, uses the public hearing ostensibly as a fact finding device, presumably to give the decision-maker information or ideas about public attitudes and reactions. It is well established that the procedures followed—including the kinds and extent of public hearings—is largely if not entirely in the discretion of the decision-maker. Few legal constraints exist. The procedures by which decisions are reached, including the quantity and quality of information available to the decision-maker, and motives hidden or otherwise, are essentially nonreviewable. In other words, public participation is presumed to be incorporated into the decision-making process by virtue of the representative nature of the decision-maker; public participation finds its outlet in the periodic election process rather than in formal hearings.

A second kind of governmental decision is the decision whose primary thrust is to affect the rights or privileges of specific individuals as a result of their individual status or actions. A familiar example is the criminal or civil trial. This is the adjudicative process. It is looked upon as being public only in the sense that the public has an interest in insuring that governmental processes are meeting democratic standards. Thus the proceedings are generally open to public view, but not to public participation.

*Professor of Law, University of Illinois.

A third kind of governmental decision-making, and the kind that is of primary interest here, arises out of and is largely the product of administrative activity. It has several characteristics that differentiate it from the legislative and adjudicative kinds mentioned above. Perhaps the most significant is that frequently both legislative and adjudicative functions will be carried on at the same time by the same agency, sometimes as part of the same decision-making process. Another characteristic is that the decision-maker is frequently neither a popularly chosen representative nor a neutral arbiter; it is usually the agency's own rules or prior decisions which are being challenged. Still another characteristic is the fact that the more common examples of these "mixed" type of decisions occur in the urban planning—land use regulation and development area. Public participation in the legislative-type decisions of the agency is not assured through the representative character of the decision-maker; and assurances of adequate information inputs and impartiality in adjudication-type decisions are not forthcoming merely through public scrutiny of the process. This blending of function and role makes analysis of the public hearing process in traditional terms difficult, and in many ways confusing. Accordingly, an alternative analysis will be attempted.

Three Functions. The following discussion adapts in part an approach used by Ashbel Gulliver in 1941 in an article on the statutory formalities of gratuitous transfers.¹ An assumption will be made that the public hearing requirement in the land use area is intended to, or at least should be able to, perform one or more useful functions in the governmental decision process—something beyond being simply an historical formality. What might these functions be? In the first place, the hearing requirement might serve to impress upon both the decision-maker and the public the fact that the matter before the house was something more than a preliminary inquiry or a proceeding of little or no immediate significance. This function may be particularly useful in the land use area, where planning commissions spend (theoretically at least) considerable amounts of meeting time on long-range planning matters, including the consideration and assimilation of substantial quantities of data having no direct impact at the moment. While those of us in planning would argue that all of this activity is important and the citizens ideally should be interested and involved in all of it, realistically it may be useful to have a technique for making visible the

¹See Gulliver and Tilson, *Classification of Gratuitous Transfers*, 51 Yale L. J. 1 (1941).

difference between the immediately important and the more long range. This may lead to a heightened public interest in a particular matter under consideration, and a more careful and fuller participation in the matter by the members of the planning commission and other affected decision-makers. It may also contribute to the public's feeling of participation in important matters. For convenience we can call this function the RITUAL function.

A second function that may be considered evolves out of the use of the hearing for fact finding. When the issue before a planning commission or city council is a specific question of land use, such as a zoning adjudication decision, the public hearing may provide the decision-maker with both factual information and some insights into public attitudes. The extent to which new information is developed at the public hearing depends of course on how well informed the planning commission or council members were prior to the hearing. This in turn depends on the quality of staff work, if any, and the practice of the board with regard to the holding of briefing meetings prior to the hearing. By the same token, the usefulness of the hearing as a means for obtaining insights into public attitudes depends on what other avenues of communication are open between decision-maker and citizen, and the extent to which there is a pattern of general citizen participation as distinct from special interest pleading in particular matters.

If the issue before the planning commission or council is a more general question of planning, such as the adoption of a comprehensive plan, the complexities of planning technology and the multiplicity of questions being dealt with at one time make useful informational contributions from the general public less likely, unless a particular individual or group goes to the trouble of obtaining his own professionals. And the explication of public sentiment in this context tends to degenerate into pro versus anti planning unless there happens to be a particular detail of the plan that catches the public fancy. In any event, this information and attitude gathering can be conveniently referred to as the EVIDENTIARY function.

The third function that may be served by the public hearing in the land use area has its analogy in the judicial process of adjudication. Our fundamental notions of due process have long encompassed the idea that the individual has the right to advance notice when his direct interests are in jeopardy by contemplated governmental action, and the idea that before action is taken he is entitled to be heard in his own behalf.

When statutes specifically provide for notice and hearing procedures, the courts generally consider that compliance with the statutory requirements is a prerequisite to valid governmental action. This is particularly true in those cases directly affecting a specific individual or a specific tract of land, such as condemnation and zoning adjudications. When the statutes are not explicit, local practice varies considerably, in part because the courts have generally not seen fit to impose constraints. We can conveniently refer to this notion of a right to be heard as the PROTECTIVE function.

1. THE RITUAL FUNCTION

Perhaps it is at the local level, in the smaller community, where the importance of a visible ritual prior to making significant decisions is most felt. Planning commissions tend to operate informally, indeed with little concern for legal niceties (and sometimes with little regard for democratic practices). But when the time comes for the commission to hold "a public hearing," there is at least some awareness that there are legal strictures governing the proceedings, and some sensitivity to the fact that the members of the commission are now acting as government officials with correlative responsibilities toward the citizenry.

In the same way, a citizen's invitation to a public hearing "as prescribed by law" may tend to impress upon him the fact that something of importance is pending, and may set a tone of serious consideration that can reduce the number of irrelevant (and irreverent) participants.

One somewhat fortuitous outcome of the public hearings associated with the adoption of a comprehensive city plan is that it affords an opportunity for individuals and groups to obtain a forum for the expression of views and thoughts about their city and its management. Most citizens, even the more civic minded ones, are reluctant to ask for a place on the agenda of the city council or even the planning commission in order to state their feelings about the need for more trees along the streets, or better road maintenance or street layouts. Indeed, a grievance needs to become a major irritant before most people will contact their alderman or commission member, much less appear in person before the assembled board.

However, in several well-attended public hearings on a plan, in which the writer has participated as a commission member or chairman, the comments of the citizens typically covered a wide range of municipal

¹See Gulliver and Tilson, *Classification of Gratuitous Transfers*, 51 Yale L. J. 1 (1941).

problems and functions, generally related to the subject of the plan, but by no means limited to its content. The catharsis for the citizen who participates in such a session, as well as the insights received by the commissioners, are values that should not be undersold. Perhaps it is a pity that the opportunity for such a session seems to come at quite infrequent times.

It was with some of this in mind that the Northeastern Illinois Planning Commission (the regional agency for the Chicago metropolitan area) set up and conducted a two year series of hearings prior to adoption of its comprehensive plan. The Illinois legislature in 1957 created the Commission (originally the Northeastern Illinois Metropolitan Area Planning Commission), and charged it with the duty of establishing and adopting a comprehensive plan for the development of the six county Chicago metropolitan area. The statute provided that "Prior to the adoption of a comprehensive plan for the development of the . . . area, the Commission shall hold a public hearing thereon."² There were provisions for giving notice that a hearing was to be held, and the Commission was enjoined to "give full consideration to the evidence and opinions presented at the hearing."³

In 1965 the Commission had reached a point in the development of its regional plan where it wished to hold a series of meetings in various communities for the purpose of explaining what it was doing and to gather information about the responses to its work. The participants in these meetings were to be interested citizens and civic leaders in the communities concerned. Some were to be invited by special invitation, most by newspaper and other general media announcement. The commission was also concerned that it comply with the statutory requirements regarding notice and hearing, and was in doubt as to at what point "a hearing" should be held.

The writer was asked to serve as special counsel to the commission in the planning and carrying out of what came to be known as the plan review and acceptance project. Without going into great detail, it was eventually agreed that, from the viewpoint of providing an orderly structure for the meetings, and for the purpose of underlining the importance of the work and the needs for active citizen participation, each area meeting would be advertised and conducted as a "public hearing," with all the appropriate trappings. Although a final report of the project has not yet been completed by the commission, it is safe to

²Ill. Rev. Stat. c. 85 § 1130 (1967).

³*Ibid.* at § 1131.

say that the project was strikingly successful in arousing public interest and participation (including some open hostility), even though it is not possible to say exactly what share of the credit can be given to the "public hearing" strategy.

The strategy did have one unanticipated and troublesome consequence. Some of the opponents of the commission and its work seized on the fact that each area meeting was advertised as a public hearing, pointed out that the law required only one public hearing, and vociferously complained that the commission was therefore free after the first area meeting to adopt a regional plan without further notice or opportunity for public comment. The commission of course had no such intention, and it is difficult to assess what if any political gain was made by the argument. It did, however, cause some discomfiture among the commission's staff, and illustrates one aspect of the problem of trying to make a meaningful hearing process out of a perfunctory statutory requirement.

2. THE EVIDENTIARY FUNCTION

As a fact gathering device the public hearing is probably not too useful. Several reasons can be suggested. One is the ad hoc order of citizen presentations at such hearings, to say nothing of the ad hoc content. This is particularly true of a hearing on a broad issue, such as adoption of a plan or an implementing ordinance. When the issue is a narrower one, such as the rezoning of a specific tract of land, the proponents and opponents may find it easier to deal in specifics, and the fact content tends to run somewhat higher.

A second reason why the hearing may not produce useful fact inputs is the timing. The statutes and ordinances rarely specify when the public hearing is to be held, other than in general terms such as "prior to the adoption of the plan [or ordinance] . . ." This leaves considerable discretion in the decision-maker, and it is not unusual to find that the hearing comes long after the fact-gathering process has been completed, and after tentative (or sometimes more than tentative) decisions have been made about content. This pattern is borne out by a number of studies.⁴

The pattern of course is not universal. The multiple hearings project undertaken by the Northeastern Illinois Planning Commission,

⁴See e.g., Plager and Handler, *The Politics of Planning for Urban Redevelopment*, 1966 Wis. L. Rev. 724, 773: "By the time the [four] projects were made 'public,' serious debate and decision making had been foreclosed."

described in the preceding section, was more than an effort to "sell" the commission and its program. It was also a determined effort to elicit information from citizens and officials throughout the area.

A few statutes have been drafted with the timing problem in mind, suggesting that the hearings required by the statute are intended to provide useful informational inputs. The 1947 Indiana zoning enabling act provided that the plan commission in the course of preparing its proposed zoning ordinance "shall hold public preliminary hearings and conferences, at such times and places and upon such notice as it may determine to be necessary to inform and aid itself in the preparation of the tentative report."⁵ A similar provision appears in the West Virginia act, enacted in 1959.⁶

Still a third reason why the public hearing may not prove useful for fact gathering is the increasing prevalence of professional planning assistance for the decision-maker. One of the chief jobs of the planning staff is to gather the evidence concerning a particular issue, and present it in a usable fashion to the decision-maker. Today this usually takes the form of a written report distributed in advance of the public hearing.

When there is no professional staff, or sometimes as a result of staff oversight, an important area of input may be overlooked, and then the public hearing may provide the opportunity for its introduction. On several occasions the writer has attended public hearings on a proposal where, during the course of the hearing, a spokesman for a state or other governmental agency appeared for the purpose of providing information not otherwise available with regard to the proposal. The indication in several cases was that the agency had only learned of the proposal a short while ago, sometimes through reading the newspaper. The English Town and Country Planning Act avoids this mutually embarrassing situation by specifically requiring, among others, that:

"(1) Before granting permission for development in any of the following cases, whether unconditionally or subject to conditions, a local planning authority shall consult with the following authorities or persons, namely:—

"(a) where it appears to the local planning authority that the development is likely to affect land in the area of any neighboring local planning authority, with that authority;

"(b) where it appears to the local planning authority that

⁵Ind. Am. Stat. § 53-760 (1964).

⁶West Va. Code § 8-5-42 (1966).

the development is likely to create or attract traffic which will result in a material increase in the volume of traffic entering or leaving a trunk road or using a level crossing over a railway, with the Minister of Transport;

“(c) where the development involves the formation, laying out or alteration of any means of access to a highway (other than a trunk road) and the local highway authority concerned are not the authority making the decision, with the local highway authority concerned;

“(d) . . .

“(e) . . .

(f) in relation to land in a metropolitan borough, where the development—

(i) would, whether in accordance with the development plan or not, conflict materially with existing development in the locality in which the land is situated, or

(ii) would conflict with proposals to construct or widen streets notified to the local planning authority by that borough, with the council of that borough.” (1963 Act, § 11.)

The consultation required by the Act presumably does not take place at the public hearing on the proposals. This raises the question of how the public participants at a hearing can become privy to information previously made available to the decision-maker, in order to comment upon or challenge the accuracy of the information. The question raises complex problems and issues touching on a number of aspects of governmental decision-making; it must necessarily be left for exploration at another time.

During the preceding discussion, the emphasis has been on fact gathering, as distinct from opinion gathering. If the public hearing is looked upon as an opinion gathering device, many of the objections raised above may not apply with the same force, if they apply at all. For example, the point about the ad hoc nature of public responses at the hearing is of considerably less significance if the object of the presentation is to voice a preference for or against a particular proposal. Similarly the presence or absence of professional staff becomes unimportant. While the staff may include as part of its report its understanding of public sentiment regarding the proposal, a politically-minded decision-maker is not likely to prefer this to an opportunity to hear from the people himself.

As to the timing issue, the reverse of the argument made becomes

applicable. The proposal needs to be in fairly final form before it can be fully grasped by those not involved in its preparation, and of course the better the understanding of the proposal the more likely the opinions expressed about it will reflect the speaker's values. This suggests the public hearing should come shortly prior to final action, rather than in the earlier formative stages.

It is a matter of some speculation as to how significant is the expression of public opinion on matters of the kind we have been discussing, particularly if the opinion is substantially divided on the issue. On the other hand, students of politics will point out that sometimes the presence of a determined group of objectors, even though relatively small, may stall or completely reverse an otherwise committed project. This point will be commented upon again in the next section.

3. THE PROTECTIVE FUNCTION

To the extent the public hearing is part of a primarily adjudicatory proceeding, such as a zoning proceeding involving the classification of a particular tract of land, the hearing provides an opportunity to the land owner to appear and be heard in open forum before decision is rendered. This is a fundamental protection for the property owner, and the statutes presumably state what constitutional doctrine would otherwise require. A recent Illinois case is illustrative:

“Illinois courts have held that the statutory provisions for the publication of notice in connection with the amendment of zoning ordinances are within the confines of procedural due process. . .”

“We regard the petition which seeks rezoning, or the proposed ordinance or resolution of amendment, as the procedure whereby the proposed change in the existing zoning is initiated. Section 5 [of the County Zoning Act, IRS c. 34, § 3158] makes specific provision for a hearing preliminary to the amendment of a zoning classification and requires notice to all interested parties. Such requirement is for the protection of the property owners and is essential to the exercise of jurisdiction by the County, or its agencies, over the land described in the notice. We believe such notice to be mandatory and jurisdictional. Any amendment passed in contravention thereof is void.”⁷

⁷Village of Riverwoods v. County of Lake, 237 N.E.2d 547, 551 (2d Dist. App. Ct. 1968).

Exactly what is sufficient opportunity to meet minimum due process standards is not clear. It is one thing to have an opportunity to be heard; it is another to require that one be listened to. It is clear, however, that the former must precede the latter; the rule goes at least that far.

Nor is it clear who must hear. The statutes in zoning and similar regulatory matters frequently provide that there must be a hearing before the planning commission prior to its reporting of the matter to the local legislature, and the local legislature must hold another hearing prior to its rendering the decision. The second hearing tends to be a replay of the first, and the actors sometimes show signs of over-rehearsal. Some statutes simply require a hearing, without indicating whether it is to be before the legislature, the planning commission, or both. Local practice varies, but is rarely challenged, except perhaps as additional smoke in an otherwise murky law suit.

The protection, whether real or theoretical, afforded by the public hearing may run only to the land owner, but may also run to his affected neighbors. There has been more than one instance when a land use proposal was defeated less on the merits than on the strength of an organized and vocal group of objectors at the hearing. In one particular instance the vocal group—some 250 strong—was organized in part through the efforts of a member of the planning commission itself. He opposed a proposal pending before the board, and feared that without a strong display of public opposition he would not have enough votes to block it. His strategy worked.

The success of this technique has been documented in several studies. In a study of the Lexington Zoning Board of Adjustment, it was found that during the period studied the board granted 63% of the petitions where there were protestants, compared with 85% granted where there was no protestants. Where neighbors favored the petition or said they had no objection provided certain conditions were met, the board granted 91% of the petitions.⁸ Even more striking results came out of a Philadelphia study, where it was found that the board of adjustment granted only 23.9% of variances requested when protestants appeared, compared with 78.7% when there were no protestants.⁹

When the hearing is one not involving the right of specific individuals, but is one on a more general question such as adoption of

⁸See Dukeminier and Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 Kty L.J., 273, 328 (1962).

⁹See Note, 103 U. Pa. L. Rev. 516, 542 (1955).

a comprehensive plan, the protective function seems to recede if not disappear. The hearing process would appear to be more analogous to hearings on legislative-type matters, and due process requirements presumably would be minimal if not nonexistent. But perhaps this conclusion should not be reached too hastily. At the local level a "general" issue may in fact affect a relatively small number of people. To deny them any right to be heard on the basis of a legislative/adjudicative dichotomy, particularly in view of the evidence of success of some group protests, may be to deny a significant opportunity for public participation.

CONCLUSION

The preceding analysis is intended to illustrate some of the complexities involved in using the public hearing as an institutional device for citizen participation in governmental decision-making. Hopefully it also suggests that the device may lend itself in some situations to effective use for that purpose.

There are of course other alternatives for structuring public participation. Community workshops are being tried, and may have considerable promise for specific areas. Advisory committees, representative of a cross section of affected residents, have become a requirement for a number of federally sponsored urban programs. It would seem apparent that the greater number of institutional techniques available through which public participation can be channeled the greater will be the impact of the citizen in the decision making process. If this is so, then the public hearing process, with its historical roots and with some evidence of its having performed useful functions in the past, deserves a careful reexamination to see if it can be made more useful, and better employed.

