

WHAT PROCESS IS DUE AN APPLICANT FOR A LOCAL GOVERNMENT PERMIT OR APPROVAL?

By Gerald A. Fisher and Lori Grigg Bluhm

When a person applies to local government for a permit or approval relating to real and personal property, do the requirements of procedural due process govern?¹ The answer to this question is most clearly answered by distinguishing two alternative scenarios: where the applicant is seeking but has yet to acquire a property interest in the subject matter, and where the applicant already possesses a property interest in the subject matter. The need to make this distinction flows from a frequently overlooked point rooted in the Magna Carta:² the due process mandate arises only when a person is being deprived of “life, liberty, or property.” Thus, two basic considerations are analyzed for purposes of this article: (1) the test to determine whether a party possesses an existing property interest required to qualify as a due process claimant, and (2) if a party satisfies the property interest threshold, it is mandatory to determine what government process is required, or due, for the process to be considered constitutional.³

The basic “property interest” test

The landmark reference for determining whether a party has the required property interest is *Board of Regents of State Colleges v Roth*,⁴ in which the plaintiff alleged a property interest in the renewal of his employment contract with a college. The terms of the contract provided an expiration date, but not renewal terms. The plaintiff understood that employment contracts had generally been renewed for others, and this formed the basis for his assertion of a property right in the renewal of his own contract. The court explained that “property” is a broad and majestic term, among the “(g)reat [constitutional] concepts,” and requires more than a unilateral expectation or abstract need or desire. More precisely, “property” means there must be a legitimate claim of entitlement: “It is a purpose of the ancient institution of property to protect

those claims upon which the people rely in their daily lives, reliance that must not be arbitrarily undermined.”⁵ The Constitution does not create property rights. Rather, property rights “stem from an independent source such as state law—rules or understandings that secure benefits and that support claims of entitlement to those benefits.”⁶ The plaintiff’s allegation of a property interest, rejected in *Roth*, was reviewed by the court not in terms of the job’s importance to the plaintiff, but in terms of the lack of a legally established entitlement to continued employment.

The *Roth* analysis has recently been cited by the Michigan Supreme Court in *Bonner v City of Brighton*.⁷ While due process claims are frequently associated with the Fifth and Fourteenth Amendments, they may also present a corresponding constitutional issue, as pointed out by the Michigan Court of Appeals:

The United States and Michigan constitutions preclude the government from depriving a person of life, liberty, or property without due process of law. US Const., Am. XIV; Const. 1963, art. 1, § 17. “A procedural due process analysis requires a dual inquiry: (1) whether a liberty or property interest exists which the state has interfered with, and (2) whether the procedures attendant upon the deprivation were constitutionally sufficient.”⁸

If the second inquiry is reached, we turn to the balancing test articulated in *Mathews v Eldridge*⁹ to determine whether the requirements of due process have been met.

The applicant who enters the process without a property interest

Within the space permitted, we explore two examples in which an applicant is found *not* to have a property interest required for a due process claim. The first



example is a disappointed bidder for a local government contract; the second, an applicant seeking a rezoning.

Selection of the successful bidder
for goods or services

The hypothetical picture presented here is of disappointed bidder “A” for a local government contract. “A” believes he submitted the best bid, and that the contract award must be forthcoming. In its request for proposals, the government maintained a degree of discretion for the award of the contract. When the government awards the contract to another bidder, “A” alleges a violation of due process rights on the ground that the government erred by awarding the bid to a party with an inferior bid through a faulty interview process and a material error in scoring the bid presentations. Bearing in mind the property interest requirement outlined previously, bidder “A” in this hypothetical—who has a unilateral expectation, but has not yet been granted a right in the contract being sought—is without a due process claim.

To claim a procedural due process violation, an unsuccessful bidder for a contract must establish that he or she

FAST FACTS

Public corporations are routinely called on to act on applications and bids seeking permits, contracts, and other approvals. The issues addressed in this article are:

- How does a court determine whether a party may insist that the public corporation provide “due process” in responding to the application or bid?
- If it’s determined that a party is entitled to due process, what process is due?

has been deprived of an *existing* property interest—not a proposed property interest—as a result of a defective governmental process. The plaintiff's due process argument based on a defective governmental process was rejected in *Richardson v Township of Brady*,¹⁰ in which the court explained that the unsuccessful bidder “can have no protected property interest in the procedure itself,”¹¹ but must have a property interest that is independent of the procedure. On this point, the court cited *United of Omaha Life Insurance Company v Solomon*¹² for the proposition that a disappointed bidder to a government contract did not have a property interest in the state's purchasing guidelines, and so suffered no due process violation when the state failed to comply with its own procedure in awarding the bid.¹³

Action denying a proposed rezoning

For this example of due process analysis, a local government has denied an applicant's proposal to rezone property to a new and arguably more valuable classification. The question presented is whether the owner can assert a denial of due process rights based on the alleged deprivation of the arguably more valuable classification. Again, the focus of this analysis must begin with the threshold issue: whether the owner has a property right in the *proposed* zoning classification.

Within this framework, *Kyser v Kasson Township*¹⁴ instructs that the state constitution due process review is based not on the deprivation from the *denial of the new classification*, but on the *existing zoning*, which “is presumed to be reasonable . . . [T]he burden is upon the person challenging [the existing] ordinance to overcome this presumption by proving that there is no reasonable governmental interest being advanced by the [existing] zoning ordinance.”¹⁵

There is a straightforward reason why a due process review is directed to the existing zoning and not to the denial of the proposed zoning.¹⁶ The court in *Braun v Ann Arbor Charter Township*¹⁷ explained:

The plaintiffs' procedural due process claim—in which they argue that the Township's treatment of their zoning request demonstrated an insufficiently fair decision-making process—is defective . . . [T]he claim is without any factual basis showing the deprivation of a property right under state law or the Constitution because the concept of property under state law does not include the right to have the local government rezone agricultural land to allow a trailer park.

Here, the plaintiffs are unable to point to any policy, law, or understanding with the defendant that created the rezoning benefit they are seeking to enforce. And in

the instant case, the board certainly possessed the discretion to deny the plaintiffs' request [for rezoning]; consequently, no cognizable property right exists, which, in turn, means that procedural due process protections are not triggered.¹⁸

The lessons on procedural due process provided previously relating to contract bids and rezoning applications apply with equal force to related rejections of proposals for the grant of *new rights*, as exemplified in cases addressing applications for new liquor licenses, in which applicants enter the process without a property interest in the sought-after license and thus may not claim a deprivation of due process after being denied.¹⁹

The applicant who enters the process with a property interest

Although individuals are not guaranteed governmental permission for new business activity, once a requested license or permit is granted, a property interest is established. This property interest entitles the business owner to due process protections before a government can deprive that interest. Moreover, the extent of due process protection afforded an owner is not the same in all instances, but increases in proportion to the importance of the property interest.

A Michigan liquor licensing case, *Bundo v City of Walled Lake*,²⁰ is frequently cited for the articulation of rudimentary due process requirements and provides guidance for municipal cases.²¹ In *Bundo*, a Michigan municipality objected to the otherwise automatic renewal of a liquor license. The Supreme Court recognized that possession of an existing liquor license is a property interest and that it is reasonable for a licensee to expect automatic renewal as long as the business complies with the laws. As such, before nonrenewal of the license, the municipality was required to provide the plaintiffs the following four procedural protections to avoid an undue deprivation:

- (i) timely written notice detailing the reasons for proposed administrative action;
- (ii) an effective opportunity to defend by confronting any adverse witnesses and by being allowed to present in person witnesses, evidence, and arguments;
- (iii) a hearing examiner other than the individual who made the decision or determination under review; and
- (iv) a written, although relatively informal, statement of findings.²²

Rudimentary due process balances the local government's interest in regulating its businesses against the interests of a person who has made a significant investment. The government's review must be directed toward

ensuring that a licensee (or owner of some other property interest) is provided with notice of alleged violations and the potential consequences, and an opportunity to refute the charges and offer any mitigating circumstances to an impartial decision maker.

Arbitrary or capricious decisions are subject to reversal upon court review. Thus, establishing a proper procedure for these purposes would reduce incorrect or ill-advised municipal determinations. Governmental entities can best protect against claims of due process violations by inserting into local legislation specific standards and criteria to apply in considering the revocation of a license or permit, and by adopting procedural guidelines and evidentiary standards in advance of any hearing.²³

Conclusion

A two-step inquiry is needed to determine what process is due an applicant for a government permit or approval under the United States and Michigan constitutions. The threshold analysis prescribed by *Roth* is whether the applicant has a property interest that is being deprived. If not, the due process inquiry ends. If the applicant possesses a property interest, the applicant must be afforded a procedure incorporating the four protective elements identified in *Bundo*, calculated under the particular circumstances to assure a fair hearing on whether a deprivation is justified. ■



Gerald A. Fisher is a professor at Western Michigan University Cooley Law School's Auburn Hills campus, teaching Property Law, Constitutional Law, and Municipal Law. He has practiced municipal law for many years and is a contributing editor of the ICLE publication Michigan Municipal Law and co-author of the ICLE publication Michigan Zoning, Planning, and Land Use. He is the chairperson of the Oakland County Parks and Recreation Commission.



Lori Grigg Bluhm is the Troy city attorney. She is a member and former chair of the SBM Public Corporation Law Section, president of the Michigan Association of Municipal Attorneys, and former chair of the Oakland County Bar Association's Municipal Law Committee. She has been designated a local government Fellow by the International Municipal Lawyers Association and was inducted into the MAMA Academy of Municipal Attorneys.



ENDNOTES

1. Courts have also fashioned a body of law generally characterized as "substantive due process," representing a judicial probe of the substantive fairness or appropriateness of government action regardless of the fairness of the procedures used to implement them. See *Zinermon v Burch*, 494 US 113, 125; 110 S Ct 975; 108 L Ed 2d 100 (1990).
2. See *Duncan v State of Louisiana*, 391 US 145, 168-170; 88 S Ct 1444; 20 L Ed 2d 491 (1968).
3. The "life" and "liberty" aspects of due process are outside the primary scope of this analysis.
4. *Bd of Regents v Roth*, 408 US 564; 92 S Ct 2701; 33 L Ed 2d 548 (1972).
5. *Id.* at 577.
6. *Id.*
7. *Bonner v Brighton*, 495 Mich 209, n 51; 495 NW2d 380 (2014) (referring to an earlier reliance on *Roth* in *Williams v Holey Mfg Co*, 430 Mich 603; 424 NW2d 278 (1988)).
8. *Hinky Dinky Supermarket, Inc v Dept of Community Health*, 261 Mich App 604, 605-606; 683 NW2d 759 (2004), quoting *Jordan v Jarvis*, 200 Mich App 445, 448; 505 NW2d 279 (1993).
9. *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976).
10. *Richardson v Twp of Brady*, 218 F3d 508 (CA 6, 2000).
11. *Id.* at 518.
12. *United of Omaha Life Ins Co v Solomon*, 960 F2d 31 (CA 6, 1992).
13. *Id.* at 34.
14. *Kyser v Kasson Twp*, 486 Mich 514; 786 NW2d 543 (2010).
15. *Id.* at 521.
16. The challenge associated with a denial of a rezoning, which focuses on the existing ordinance, can be contrasted against a challenge of the denial of an application for administrative relief. For example, a denial of an application for a special land use is subject to appeal to the circuit court, where the decision on the proposed use, not the existing ordinance, is subject to review for abuse of discretion. *Carleton Sportsman's Club v Exeter Twp*, 217 Mich App 195; 550 NW2d 867 (1996).
17. *Braun v Ann Arbor Charter Twp*, 519 F3d 564 (CA 6, 2008).
18. *Id.* at 571-573.
19. See, e.g., *Shamie v Pontiac*, 620 F2d 118, 120 (CA 6, 1980) ("Shamie is a first-time liquor license applicant; in that capacity, we repeat, he does not enjoy procedural due process rights under Michigan state law.").
20. *Bundo v Walled Lake*, 395 Mich 679; 238 NW2d 154 (1975).
21. For example, the revocation of massage and smoking licenses, nuisance enforcement, and actions concerning dangerous buildings.
22. *Bundo*, 395 Mich App at 696.
23. *Roseland Inn, Inc v McClain*, 118 Mich App 724, 731; 325 NW2d 551 (1982).