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Municipal Newsletter

Summer 2012

Due Process Protections

The United States Constitution, specifically the Fifth Amendment, guarantees all citizens the protection of due process when they are faced with the possible loss of life, liberty and property through the actions of the federal government against them. Additionally, the Fourteenth Amendment affords this same protection to the citizens against such deprivations when actions are taken by the states against them. Sections 1, 9 and 11 of Article I of the Pennsylvania Constitution reiterate these rights and the due process protections safeguarding these rights. In that respect, the various political subdivisions comprising Pennsylvania are bound by law to respect these rights and protections as well.

Due process is divided into two concentrations: procedural and substantive. Procedural due process concerns an actual methodology implemented, typically by statute or some other rule, during the adjudication of an issue or matter. Substantive due process, however, requires the substance, the content, of any legislation to be reasonable and fair and to promote a justifiable governmental objective.

In Pennsylvania, the procedural due process requirements are provided for in the Local Agency Law (2 Pa. C.S.A. Sections 105, 551-555, 751-754). In some respects, the essential characteristics of the Sunshine Laws, which govern the manner in which municipal governments, among others, establish their rules parallel the aspects of procedural due process. First, adequate notice must be given to the constituents, notifying interested parties of the possible action to be undertaken. This allows such parties to be aware of the matter under consideration; to have the opportunity to present any objections they may have, to ascertain what in fact the proposed action is to be and what is necessary to protect their interests.

Next, a hearing is required when the potential deprivation of an individual's liberty or property could become a reality. That is, the individual facing the possible loss of any of these aforementioned rights must be given the opportunity to be heard by the governmental unit set to enact the ordinance or resolution.

Moreover affording the person the occasion for the hearing, as in any court of law, the governing body or de-

cisionmaker(s) must be objective, neutral and unprejudiced towards the individual.

As with any civil or criminal action, the party who is confronted with the peril of losing any of these fundamental rights is permitted representation by counsel before the decisionmaker(s). Likewise, not only are parties permitted to present evidence in their own defense and to exhibit why the proposed deprivation is untrue, they are encouraged to do so. This is attained prior to the convening of the tribunal and through discovery through the hearing itself by challenging and cross-examining opposing witnesses.

Finally, after all evidence is presented, a decision is made. If the decision is not in favor of the party whose interests are threatened, the reasons and the evidence upon which the decision is based must be specified.

Once these criteria are satisfied, the municipal entity can typically show the procedural due process protections have been met, should the affected party bring such a challenge as the violation of these rights.

Substantive due process, however, requires the substance, the content and the applicability of any legislation to be reasonable and fair and to promote a justifiable governmental objective. That is, aside from being sensible and unbiased, the law, ordinance or resolution should be, among other purposes, in the interest of the public safety, health, or welfare. The purpose of substantive due process is to guarantee a person's life, liberty or property is not taken by the government without proper justification.

In a situation where the legislation is challenged, depending upon the issue in question, courts rely upon two standards of judicial review to determine whether the legislation is permissible: strict scrutiny or rational basis. Typically, if a governmental action harms a basic right of people, particularly to life, liberty or property, the courts employ strict scrutiny. This is specific to an issue regarding the Bill of Rights, the 14th Amendment or when the governmental/political unit executes an action involving some characteristic of a person, like race or ethnicity.

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The Courts apply three tests to the questionable law, ordinance or regulation when exercising strict scrutiny to determine its acceptability:

1. Whether it is warranted as a compelling government interest. To be exact, the rule must be important and vital rather than cavalier.
2. Whether it is narrowly tailored to obtain the government interest. It is not overly broad; it must focus on the critical facets of the interest.
3. Whether it is the least restrictive means to realize the interest. This interest must not have another approach that is even less hampering than what is a part of this rule. There may not exist another method that is less intrusive to achieve the interest.

If the rule fails even one test, it must be deemed unacceptable.

Rational basis review is less rigorous than strict scrutiny, which is the most rigorous of the judicial reviews. As opposed to the types of issues in which strict scrutiny is used by the courts to determine appropriateness, rational basis review is applied to decide whether the action or policy of the governmental/political unit is a sensible measure to a goal. On occasions where the governmental action mars a non-essential right, such as an economic regulation, then the courts utilize the rational basis review. Unlike strict scrutiny, there is no set of tests to determine whether the action is permissible. Rather, the rationality of the policy or rule is decided.

Related to the due process protections previously mentioned, Equal Protection of individuals is just as important.

Equal Protection arises from the 14th Amendment of the U.S. Constitution, which states: "No state shall make or enforce any law... nor deny to any person within its jurisdiction the equal protection of the laws."

Equal Protection safeguards the rights of individuals in relation to the federal, state and local governments. The primary concern of Equal Protection is how political units may use classifications of people; not only those based on biological factors, such as race and ethnicity, but also social factors like religion and economics. Equal Protection seeks to prevent the discrimination of one classification of people in favor of another group even when circumstances for all parties are similar.

Infringements of Equal Protection are reviewed under one of three criteria, contingent on the situation:

1. Strict scrutiny, as with substantive due process, stringently examines when a law, ordinance or resolution negatively impacts a particular group's fundamental rights.
2. The intermediary test is used relative to limited groupings, such as gender, and seeks to determine whether a governmental action is substantially related to a governmental goal that is imperative.
3. Mere rationality, like rational basis review, as discussed relative to substantive due process, requires a classification employed by the government credibly contain a connection to the achievement of a genuine governmental goal.