

How to Write an Error Free Decision

Issues Relating to the Record of an Error Free Hearing

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In this paper I will cover the basic elements of a well written decision. In the first part of our program, you heard Jim Lampke describe how to conduct an "error free hearing." In this second part of our program I will cover how to translate all relevant aspects of that hearing into a legally adequate written decision, one that can be read and understood by others who may not have attended the hearing itself.

Remember that your primary responsibility as a hearing officer is to hear and decide the case before you. But your job doesn't end with having presided over a hearing free of error, or even having reached and announced a well reasoned decision based on the evidence. You must now finish a job well begun by writing a concise history of the case, a document that "stands on its own," and doesn't depend on something said at the hearing to be understood.

To aid you in doing this I have attached to this paper an example of a "template" that you may wish to use. There is nothing magic about the template, and you should feel free to modify it to your own style and preferences. The key thing is the use it as a checklist of essential elements of the case, much as an airline pilot uses a checklist when landing and taking off. You have one chance to do it right; and if you don't have time to do it right, when will you have the time to do it over? All word processing programs today have the ability to create templates, consisting of what is often referred to as "boilerplate," within which are embedded the "variable information" specific to the matter at hand. Thus, the expression *The City of Gotham, Code Enforcement Hearing Requested by Mr. Felon Bounder* might have been generated by a template in which the variable information was inserted within the angle brackets: *The City of < >, Code Enforcement Hearing Requested by < >*.

So, let's begin.

Chapter 304 of the Acts of 2004 codified a whole new statutory mechanism for the enforcement of certain provisions of the State Building Code (780 CMR) and the State Fire Code (527 CMR). The new statute is General Laws Chapter 148A. It provides a "non-criminal" mechanism for code enforcement that begins with the issuance of a "notice of violation," or ticket, for certain code violations. A party charged with such violation and who receives a ticket may, within 21 days, either pay the scheduled assessment or request a hearing before the municipal hearing officer.

A city or town wishing to utilize the provisions of Chapter 148A must first appoint a hearing officer to conduct the hearing of one or more code violations pursuant to the statute. This training program was designed to help you carry out your duties as a municipal hearing officer. Your first duty under Chapter 148A is to “notify the alleged violator of the date, time and location of the hearing.” The new statute is quite short and quite readable, so it would be wise to have, and frequently refer to, the statute under which you serve. Keep in mind that as a hearing officer you must not be an employee or officer of the fire department or the building department associated with the code enforcement officer who issued the notice of violation.

As more concretely laid out in the materials prepared in Jim Lampke’s paper on the conduct of an “error free hearing,” the proceeding over which you preside “shall be informal and the formal rules of evidence shall not apply.” This means, in essence, that you will be guided by the same rules of judgement that you use in your day to day lives when making personal or business decisions. With this in mind, I offer several thoughts and reflections on how effectively to transition the “error free hearing” itself to the written decision that embodies the logical connections between the evidence and the ultimate outcome of the appeal made to you.

As a threshold observation, there is no substitute to being well informed about the applicable code provision(s) relevant to the matter at hand. The code provision(s) provides the structure onto which the testimony and other evidence is added to yield the record of the hearing. In this regard, take full advantage of your access to the city or town attorney as well as to the appropriate state officials in understanding the elements of the code provisions relevant to alleged violation.

Suggested Outline for drafting Code Violation Decisions

- Title - Give your decision an appropriate title. I would recommend something like “Findings and Decision.”

- Use a template for consistency - Consistency is always important. To assure this, use a “template” in writing your decision. This not only makes your job easier, but serves also as a checklist for the important and indispensable elements of a well written decision. Having the template on your word processor serves as a tried and true mold into which you can insert the case-specific content of the written decision.

- Case caption - It is useful to include the same unique alpha-numeric identifiers as assigned to the original notice of violation, including as well the date and its place in the municipal hearing officer’s sequence of decisions. E.g, “Notice #FC-3476, Decision # 05-23, issued December 31, 2005.”

- Jurisdictional Statement - Start off by stating that this is the decision of the hearing officer duly appointed to hear the appeal filed by a party who received a notice of violation under *General Laws, Chapter 148A*.

- Introduction - Create an introductory section that sets out in summary fashion all of the pertinent information that accounts for the appellant being before you today. This is a short history of the case at hand, a short narrative that sets the stage for what follows. Include here a brief account of

when and how the enforcing officer came to issue a notice of violation to the appellant. Attach a copy of the notice as part of the record. Include at least the following information:

1. The name and address of appellant.
2. Any other parties whose involvement is essential. If the Applicant is a corporation or other entity, identify the principals or representatives. If the Applicant was represented at the hearing by counsel, identify the attorney or other representative speaking on its behalf.
3. The specific code provision(s) the appellant is charged with violating.
4. A brief description of property involved, making sure to reference your source of information for this description. Include the address and references to maps or other locational information.
5. The relevant chronology, including the date of the alleged violation, the identity of the enforcing person, the date the notice was issued, the date on which the hearing request was made, and the date(s) of the hearing itself.
6. The specifics of all notices posted, published, or mailed as a record of the hearing officer's compliance with Chapter 148A.
7. The location where the hearing took place.
8. Whether a site visit or "view" was taken as part of the hearing process. Later on, make sure to recite in your conclusions that your findings are in part based upon information obtained at the view, if one was taken.
9. Identify yourself as the hearing officer including any relevant details of your appointment.

□ The evolution of a well crafted written decision - Working backwards, your ultimate conclusion (let's say, "responsible" or "not responsible" as charged) depends upon your having made certain findings of fact and conclusions of law that depend on the evidence available to you. As hearing officer, you must first have reached a series of conclusions - that is to say "facts" that you "find" to be true. These facts must not only be true, but they must also be relevant to the specific code provision(s) said to have been violated. How do you make these "findings?" You accept as true, discard as false, dismiss as irrelevant, or give varying amount of weight to the testimony and other evidence before you. The key thing to remember here is that for every element of the violation you must make the appropriate findings, otherwise your decision will seem to be arbitrary and may be reversed on appeal to the courts. You are not making a finding when you merely recite what a witness has testified to; you are making a finding when you declare a relevant fact to be true because

you believe and give weight to the witness's testimony. This is a critically important distinction which many hearing officers or board fail to make when they substitute a long litany of testimony without telling us whether they believe it to be so or not.

The chain of events, then, is something like the following:

10. Code Provision(s) - Specific code provisions that impose a duty on the appellant with respect to the property in question, prohibiting something or requiring something.
11. Conditions at the Property - The alleged situation, conditions, acts, or omissions that led to the issuance of the notice of violation.
12. The Evidence - (i) the photographs, maps, documents, reports, and other materials submitted into the record; (ii) the testimony of the witnesses; (iii) the view or site visit, if taken; and (iv) the stipulations or admissions by the parties before you.
13. Findings of Fact - Your specific findings of "facts" that are both true and relevant to the violations alleged, including your basis in the evidence before you for believing this.
14. Conclusion of Law - Either that the evidence supports charge of violation, or that it is insufficient to support the charge.

□ Maps and photographs can be invaluable to all parties to the hearing. Encourage their submission by the parties or produce them for the record. Make reference wherever possible to maps and photographs in your findings. If you have been attentive to the proper marking of all exhibits and documents during the hearing you will have an easier time making reference to these exhibits when citing the evidence that supports your findings and your conclusions.

□ With respect to your "general" findings:

15. Include a description of the appellant's property, including all relevant, pertinent physical features, and the conditions therein.
16. Always remember to connect each finding to the source of information (or evidence) upon which the finding depends. Make reference to exhibits by number or letter.
17. Include a description of abutting properties and neighborhood, where relevant.
18. Include a detailed description of the alleged code violation. Break the applicable code provision into its constituent parts in order to facilitate relating the evidence in the case to the specific features of the code.

19. Identify the pertinent evidence before you, whether documents, photographs, site visit, the testimony of witnesses, etc.

□ You serve as a hearings officer for your community in large part because you have an interest in and knowledge about your community generally and are presumed to know it well enough to hear the appeals that come before you. You are judging in a real local context, not in a vacuum. Your familiarity with your community and the neighborhood in question - whether acquired over time, or acquired in preparation for the hearing - is not irrelevant and is not an improper basis upon which to judge the matter before you. Your knowledge of general matters relating to the case before you is not an impediment to you serving as hearing officer. That having been said, it is important to let the record show how your findings relate to this knowledge. If your decision relies in part on your own knowledge of the area, let this be expressly reflected in your findings.

□ Arrange, where possible, to have all exhibits pre-marked and duplicated prior to being made part of the record on appeal. Try to have as many copies of the pre-marked exhibits as necessary to provide you, the enforcing person, the appellant, and the appellant's representative each to have one. This will save a lot of time, and eliminate confusion. It also facilitates your findings and thus allows you more easily to link any general or specific finding to the evidentiary basis for that finding. In complex cases, availability of the exhibits before the hearing can be helpful.

□ With respect to all the criteria noted above, write out your findings of fact in detail. Refer to written materials and oral testimony offered either in support of or in opposition to the project at the public hearing. This is the single most important section of the decision. This part of the decision must be well conceived and clearly organized.

□ As indicated above, the most common mistake made in local hearings is to confuse a recitation of the testimony and other evidence with findings. A "finding" is something made by the hearing officer, while "testimony" and "evidence" is made by others and which, if believed and relevant, the hearing officer may depend upon for the finding. What the hearing officer believes to be true is more important than what those who testified believe to be true. A mere recitation of what the witnesses said alone provides no clue as to whether the hearing officer accepts or rejects the testimony of the witness. It is better, then, for the hearing officer to announce conclusions in the form of "specific findings," citing as its basis for doing so the acceptance of the testimony of one or more witnesses, its rejection of the testimony or evidence offered by others, or such other reasons sufficient to support the finding.

□ In making findings, refer liberally to the exhibits (by number or letter) to tie each finding to something in the evidence base to which it relates.

□ Wherever possible, encourage stipulations from the parties to the hearing, and by accepting those stipulations you elevate the defensibility of your findings based upon them and ultimately of the

decision itself. It both shortens the hearing and strengthens the base upon which the decision is grounded.

□ Where letters or other materials have been submitted other than by those who testify, it is always necessary to let the record show that it was received, whether it has been shared with the parties to the case and entered into the record of the case, and whether it is a basis upon which the hearing officer's findings are made.

□ Restate your conclusions of law, that is, whether the evidence and the findings support the allegation of a code violation. Make certain that there are findings sufficient to support the conclusion reached, and revise your findings to assure inclusion of every relevant fact or provision of law upon your conclusion depends. Refer liberally to the Exhibits by number (or letter) to connect up the elements of your decision with the evidence.

□ Technology Tools - Take advantage of available technology during the hearing to record or videotape the hearing, and take good notes that later will serve you when drafting the decision. The laptop computer can be an invaluable aid in capturing important information relevant to the ultimate decision. Good notes are far superior to even the best memory.

□ Date, sign and file the decision. Include a notice of any right of appeal from your decision to the courts, including information of where and how to appeal and within what time frame.

□ Final Thoughts. Remember that the Public Records Law requires the retention of all that is submitted to hearing officer. One final note on style and grammar. These things matter. Poorly drafted decisions filed today all too often appear in a complaint filed in court tomorrow. Write your decision clearly so it can be easily read and understood by all. Avoid the use of jargon and legalese. Use lots of "white space" and outline formats to provide clarity and context to the components of the decision. The same style tips that are applicable to by-law drafting are applicable to decision writing. A wrongly placed comma can totally alter the meaning of the sentence in which it occurs. Wherever possible, find someone with good editing skills to proof-read the decision not for legality but for clarity and syntax. Take pride in the quality of your written decisions.

*The views and opinions expressed here are those of the author
and not of the Attorney General.*