

Court Process

Ways to get zoning to court

Zoning inspector as plaintiff:

- ❖ Injunction/Abatement

Zoning inspector as defendant:

- ❖ Administrative appeal/judicial review

Zoning inspector or other zoning officials as defendant(s)

- ❖ Declaratory judgment
- ❖ Mandamus or other writ

Zoning official as witness:

- ❖ Criminal

Other:

- ❖ Civil rights

Ways to get zoning to court

§519.24 Actions instituted to prevent violations of zoning regulations - special counsel

In case any building is or is proposed to be located, erected, constructed, reconstructed, enlarged, changed, maintained, or used or any land is or is proposed to be used in violation of sections 519.01 to 519.99, inclusive, of the Revised Code, or of any regulation or provision adopted by any board of township trustees under such sections, such board, the prosecuting attorney of the county, the township zoning inspector, or any adjacent or neighboring property owner who would be especially damaged by such violation, in addition to other remedies provided by law, may institute injunction, mandamus, abatement, or any other appropriate action or proceeding to prevent, enjoin, abate, or remove such unlawful location, erection, construction, reconstruction, enlargement, change, maintenance, or use. The board of township trustees may employ special counsel to represent it in any proceeding or to prosecute any actions brought under this section.

Zoning inspector as plaintiff

Injunction/Abatement

Injunction/Abatement

You've issued a violation notice...now what?

Enforcement through injunction

Ohio Revised Code Chapter 519

TOWNSHIP ZONING

AND

Ohio Rules of Civil Procedure

Injunction/Abatement

1. Approval of the Board of Trustees
2. Paperwork (and photographs) to prosecutor

Injunction/Abatement

1. Zoning inspector – regular review of property
2. Counsel – status reports of pending enforcement and litigation

Injunction/Abatement

1. Letter from Prosecutor's Office
2. Verified complaint/Affidavit signed by Zoning Enforcement Officer
3. Filing
4. Answer period of 28 days
5. Hearing – court allocates one hour which can be difficult to schedule – lower priority than criminal docket
6. Fees/Costs usually assessed to losing party – file appropriate notice for transcript costs

Injunction Hearing

Things that may slow down the process:

- ❖ Notice – defendant entitled to notice
- ❖ Answer – 28 days from date of successful service/notice – may request additional time if an attorney has been recently retained
- ❖ Opposing counsel – may request discovery or continuance(s)

Default Entry – available in some situations - when defendant has been served but failed to appear

Keep your expectations realistic and understand that this is not a fast process.

Injunction Hearing

Complaint allegations

- ❖ Parties and property identified with particularity.
- ❖ Present zoning.
- ❖ Procedural posture.
- ❖ Relief sought.

Injunction Hearing

1. Demonstrative Evidence
 - ❖ Maps
 - ❖ Photos
 - ❖ Zoning text
2. Live Testimony

Injunction Hearing

Plaintiff's case

examination

cross-examination

Defendant's case

examination

cross-examination

Injunction Hearing

Typically required for injunction:

- ❖ no adequate remedy other than an injunction
- ❖ truly irreparable harm will occur in the absence of an injunction
- ❖ it is more likely than not that the moving party will prevail on the underlying merits when the matter ultimately goes to trial
- ❖ the benefit to the party seeking the injunction outweighs the burden of the party opposed to the injunction
- ❖ right to the relief sought is clear.

Rule 65, Ohio Rules of Civil Procedure

Injunction Hearing

“Because the remedy is statutory, the petitioner need only show that a violation of the ordinance is occurring and is ‘not required to plead or prove no irreparable injury or that there is no adequate remedy at law, as is required by Civ.R. 65.’ “ *Id.*, quoting *Baker*, quoting *Union Twp. Bd. of Trustees v. Old 74 Corp.* (2000), 137 Ohio App.3d 289, 294, 738 N.E.2d 477. “Rather, the petitioner must prove, by clear and convincing evidence, that the property is being used in violation of the zoning ordinance.” *Id.*

Pecchio v. Saum, 11th Dist. Trumbull No. 2010-T-0030, 2010-Ohio-5930, ¶ 18

Zoning inspector as defendant

Administrative Appeal/
Judicial Review

Administrative Appeal/ Judicial Review

Your BZA has rendered a decision...now what?
Enforcement or appeal

Administrative Appeal/ Judicial Review

Ohio Revised Code Chapter 2506

*APPEALS FROM ORDERS OF
ADMINISTRATIVE OFFICERS AND AGENCIES*

AND

Ohio Revised Code Chapter 2505

PROCEDURE ON APPEAL

AND

Ohio Rules of Appellate Procedure

Administrative Appeal/ Judicial Review

- ❖ Final order, adjudication, or decision – including findings of fact.
- ❖ Approve (by vote) and mail.

Administrative Appeal/ Judicial Review

“A Board of Zoning Appeals has the inherent authority to reconsider its own decision. *State, ex rel. Borsuk v. Cleveland* (1972), 28 Ohio St.2d 224. However, the ability to reconsider a decision only exists until the actual institution of a court appeal or until expiration of the time for appeal. *Holmes, Inc. v. Board of Zoning Appeals* (1987), 35 Ohio. App.3d 161. Moreover, as long as a board grants the request to reconsider a decision within the statutory time period for appeals, “. . . it cannot reasonably be expected to always issue a hurried merit ruling before the end of the appeal period.” *Hal Artz Lincoln-Mercury v. Ford Motor Co.* (1986), 28 Ohio St.3d 20. A decision, however, should be made within a reasonable period of time.”

Role of Township Zoning Bodies, Donald F. Brosius, Brosius, Johnson & Griggs, LLC

Administrative Appeal/ Judicial Review

Failure to issue violation is appealable to BZA and to court.

“...zoning manager acted beyond her authority in permitting a known violation of the zoning resolution to continue over objection.”

Jeffrey Mann Fine Jewelers, Inc. v. Sylvania Twp. Bd. of Zoning Appeals, 6th Dist. Lucas No. L-08-1013, 2008-Ohio-3503.

Also can be subject of mandamus – though exhaustion of administrative remedies is required first.

Administrative Appeal/ Judicial Review

The township board of zoning appeals is the judge, not a party, and CANNOT appeal to the Court of Common Pleas.

Kasper v. Coury, 51 Ohio St. 3d 185 (1990).

Administrative Appeal/ Judicial Review

§2505.07 Time for perfecting appeal

After the entry of a final order of an administrative officer, agency, board, department, tribunal, commission, or other instrumentality, the period of time within which the appeal shall be perfected, unless otherwise provided by law, is thirty days.

Administrative Appeal/ Judicial Review

§2505.04 Perfecting an appeal

An appeal is perfected when a written notice of appeal is filed...in the case of an administrative-related appeal, with the administrative officer, agency, board, department, tribunal, commission, or other instrumentality involved.

Administrative Appeal/ Judicial Review

Notice of appeal can come from Clerk of the Court of Common Pleas, but still must be received by the Board of Zoning Appeals within 30 days.

Administrative Appeal/ Judicial Review

§2505.05 Notice of appeal

The notice of appeal...shall designate, in the case of an administrative-related appeal, the final order appealed from and whether the appeal is on questions of law or questions of law and fact. In the notice, the party appealing shall be designated the appellant, and the adverse party, the appellee.

Administrative Appeal/ Judicial Review

§2506.02 Notice of appeal - filing transcript

Within forty days after filing a notice of appeal in relation to a final order, adjudication, or decision covered by division (A) of section 2506.01 of the Revised Code, the officer or body from which the appeal is taken, upon the filing of a praecipe by the appellant, shall prepare and file in the court to which the appeal is taken, a complete transcript of all the original papers, testimony, and evidence offered, heard, and taken into consideration in issuing the final order, adjudication, or decision . The costs of the transcript shall be taxed as a part of the costs of the appeal.

Administrative Appeal/ Judicial Review

Praecipe for transcript

[Caption]

To the [name of administrative agency]

Please prepare and file in the Court of Common Pleas of County, Ohio, pursuant to RC 2506.02, a complete transcript of all the original papers, testimony, and evidence offered, heard, and taken into consideration in issuing the order appealed from in this cause.

[date] [Signature of attorney]

Administrative Appeal/ Judicial Review

Certification of transcript

[I/We] certify that the attached papers constitute a complete transcript of all the original papers, testimony, and evidence offered, heard, and considered in issuing the order appealed from in this matter, entered [date of agency order]. The transcript consists of:

[Number and list each item included in the transcript.]

The costs of the transcript are \$[dollar amount of transcript cost], to be taxed as part of the costs of the appeal.

Administrative Appeal/ Judicial Review

Note: There are special rules for
adult entertainment businesses.

Administrative Appeal/ Judicial Review

You're having a court hearing IF...

- (1) The transcript does not contain a report of all evidence admitted or proffered by the appellant.
 - (2) The appellant was not permitted to appear and be heard in person, or by the appellant's attorney, in opposition to the final order, adjudication, or decision, and to do any of the following:
 - (a) Present the appellant's position, arguments, and contentions;
 - (b) Offer and examine witnesses and present evidence in support;
 - (c) Cross-examine witnesses purporting to refute the appellant's position, arguments, and contentions;
 - (d) Offer evidence to refute evidence and testimony offered in opposition to the appellant's position, arguments, and contentions;
 - (e) Proffer any such evidence into the record, if the admission of it is denied by the officer or body appealed from.
 - (3) The testimony adduced was not given under oath.
 - (4) The appellant was unable to present evidence by reason of a lack of the power of subpoena by the officer or body appealed from, or the refusal, after request, of that officer or body to afford the appellant opportunity to use the power of subpoena when possessed by the officer or body.
 - (5) The officer or body failed to file with the transcript conclusions of fact supporting the final order, adjudication, or decision.
- (B) If any circumstance described in divisions (A)(1) to (5) of this section applies, the court shall hear the appeal upon the transcript and additional evidence as may be introduced by any party. At the hearing, any party may call, as if on cross-examination, any witness who previously gave testimony in opposition to that party.

Administrative Appeal/ Judicial Review

If you have a court hearing...

The court shall hear the appeal upon the transcript and additional evidence as may be introduced by any party.

At the hearing, any party may call, as if on cross-examination, any witness who previously gave testimony in opposition to that party.

§2506.03 Hearing

Administrative Appeal/ Judicial Review

§2506.04 Order, adjudication, or decision of court

If an appeal is taken in relation to a final order, adjudication, or decision covered by division (A) of section 2506.01 of the Revised Code, the court may find that the order, adjudication, or decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the order, adjudication, or decision, or remand the cause to the officer or body appealed from with instructions to enter an order, adjudication, or decision consistent with the findings or opinion of the court. The judgment of the court may be appealed by any party on questions of law as provided in the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code.

Administrative Appeal/ Judicial Review

“Under *Superior Metal (Superior Metal Products, Inc. v. Ohio Bur. of Emp. Serv. (1975), 41 Ohio St.2d 143)*...common pleas courts are authorized under R.C. 2506.04 to reverse an administrative decision and remand the cause to the administrative body to conduct further proceedings on the matter.”

State ex rel. Chagrin Falls v. Geauga Cty. Bd. of Commrs., 96 Ohio St.3d 400, 403, 2002-Ohio-4906, 775 N.E.2d 512, 516, ¶ 12 (2002)

Subsequent hearings

So you have a court decision...

Reasons you may go back to court...

- ❖ To obtain a permanent injunction where you were only awarded a preliminary or temporary restraining order
- ❖ Defendant's contempt of court
- ❖ Criminal prosecution

Subsequent hearings

§2705.02 Acts in contempt of court

A person guilty of any of the following acts may be punished as for a contempt:

(A) Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or officer;

Subsequent hearings

2705.05 Hearings for contempt proceedings.

(A) In all contempt proceedings, the court shall conduct a hearing. At the hearing, the court shall investigate the charge and hear any answer or testimony that the accused makes or offers and shall determine whether the accused is guilty of the contempt charge. If the accused is found guilty, the court may impose any of the following penalties:

- (1) For a first offense, a fine of not more than two hundred fifty dollars, a definite term of imprisonment of not more than thirty days in jail, or both;
- (2) For a second offense, a fine of not more than five hundred dollars, a definite term of imprisonment of not more than sixty days in jail, or both;
- (3) For a third or subsequent offense, a fine of not more than one thousand dollars, a definite term of imprisonment of not more than ninety days in jail, or both.

Subsequent hearings

§2727.11 Enforcing an injunction or restraining order

An injunction or restraining order granted by a judge may be enforced as the act of the court, and disobedience thereof may be punished by the court, or by a judge who granted it in vacation, as a contempt.

Subsequent hearings

2727.12 Procedure if injunction or restraining order is disobeyed.

Upon being satisfied, by affidavit, of the breach of an injunction or restraining order, the court or judge who issued such injunction or order may issue an attachment against the guilty party who shall pay a fine of not more than two hundred dollars, for the use of the county, make immediate restitution to the party injured, and give further security to obey the injunction or restraining order. In default thereof, said party may be committed to close custody until he complies with such requirement, or is otherwise discharged.

Zoning inspector or other zoning
officials as defendant(s)

Declaratory judgment

Declaratory Judgment

Questions concerning the construction or constitutionality of a zoning ordinance may be determined in a declaratory judgment proceeding. Before bringing a declaratory judgment action for determining the validity of a zoning ordinance, a plaintiff must ordinarily exhaust administrative remedies; however, an exception to this general rule exists if there is no administrative remedy available that would provide the relief sought, if resort to administrative remedies would be wholly futile, or if the available remedy is onerous or unusually expensive.

Ohio Jurisprudence, Third Edition, §19 Constitutional provisions, statutes, ordinances, and regulations—Zoning statutes and ordinances

Declaratory Judgment

- ❖ An alternative method to appeal.
- ❖ Not a review of the administrative order, but of the statute itself.
- ❖ Raised at the complaint stage or when an appeal is filed. Can ask for bifurcated proceedings.
- ❖ Must serve the Attorney General if challenging constitutionality of Ohio Revised Code.

Declaratory Judgment

- ❖ Must be real controversy between adverse parties.
- ❖ Relief must be justiciable in character.
- ❖ Speedy relief must be necessary to preserve rights that may otherwise be lost.

Fairview General Hospital v. Fletcher, 63 Ohio St. 3d 146 (1992); *Athens Metropolitan Housing Authority v. Pierson*, 2002-Ohio-2164 (Ohio Ct. App. 4th Dist. Athens County 2002).

Zoning inspector or other zoning
officials as defendant(s)

Mandamus

Mandamus

§2731.01 Mandamus defined

Mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.

Mandamus

- ❖ If issue involves reasonableness of local action, then appeal is appropriate route.
- ❖ Where litigant has exhausted all administrative remedies and has complied with all requirements and it would be an abuse of discretion to deny a permit, then mandamus is appropriate.
- ❖ When a taking of property is alleged, mandamus is appropriate where compensation is sought, but need not be used where landowner is appealing a regulation as applied to a specific parcel and not seeking compensation.
- ❖ Where there are important public rights, mandamus by Ohio citizen is appropriate.

Ohio Planning and Zoning Law, 2015 Edition, Stuart Meck and Kenneth Pearlman

Zoning inspector or other zoning
officials as witness

Criminal

Criminal

§519.23 Prohibition against violating resolution

No building shall be located, erected, constructed, reconstructed, enlarged, changed, maintained, or used, and no land shall be used in violation of any resolution, or amendment or supplement to such resolution, adopted by any board of township trustees under sections 519.02 to 519.25, inclusive, of the Revised Code. Each day's continuation of a violation of this section may be deemed a separate offense.

Criminal

§519.99 Penalty

Whoever violates sections 519.01 to 519.25 of the Revised Code shall be fined not more than five hundred dollars for each offense.

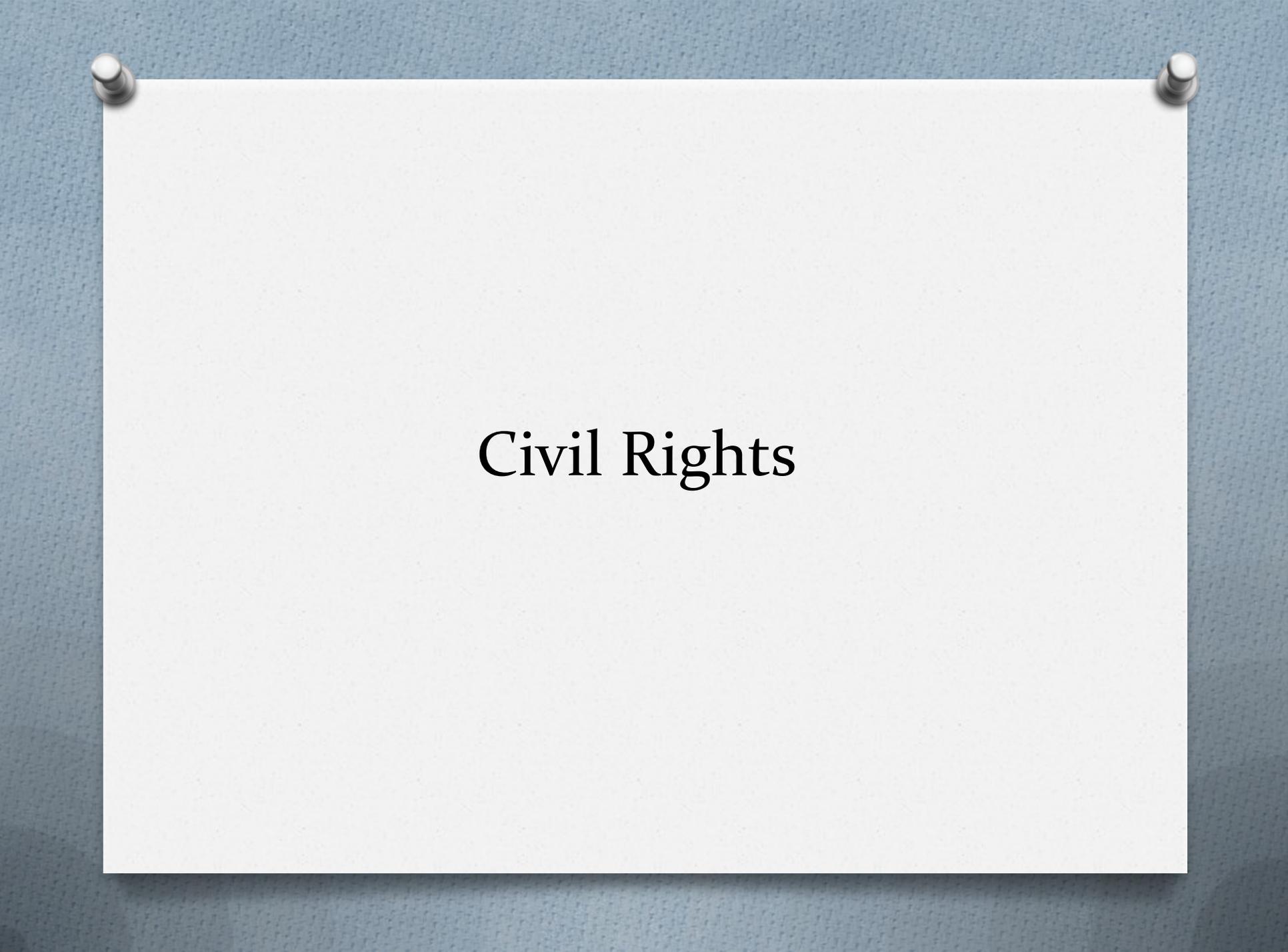
Criminal

PROCESS

1. **Complaint/Charge** filed (based on investigation and report, evidence, etc.)
2. **Service** of Complaint
3. **Arraignment/Initial Appearance** – Plea and Bond
4. **Pretrial/Settlement** Conference
5. **Discovery**
6. **Trial** – Jury v. Bench (Trial to Judge)
7. **Sentencing**
8. **Appeal**

Criminal v. Civil Action

- ❖ Burden of proof – beyond a reasonable doubt v. clear and convincing (more likely than not)
- ❖ Right to jury v. NO jury
- ❖ 5th Amend. right v. NO 5th Amend. Right
- ❖ One time remedy v. ongoing remedy



Civil Rights

Civil Rights

Civil rights - when the practice of personal preferences and prejudices of an individual, a business entity, or a government interferes with the protected rights of others.

Two major categories we see with zoning:

- ❖ Fair Housing - Exclusionary zoning - zoning that operates to exclude a protected class. Has a disparate impact on a protected class or perpetuates segregation. **Impact...not just intent.**
- ❖ Individual constitutional rights

Civil Rights

Courts have held that a plaintiff may establish a prima facie case under the Fair Housing Act by showing:

- a. that the plaintiff is a member of a protected group, e.g., racial minority;
- b. that the plaintiff applied for and was qualified to rent or buy a certain property;
- c. that the plaintiff was rejected; and
- d. that the housing opportunity remained available thereafter.

Phillips v. Hunter Trails Community Association, 685 F.2d 184, 190 (7th Cir. 1982). Once the plaintiff establishes a prima facie case the burden then shifts to the defendant to articulate some non-discriminatory reason for refusing the plaintiff. The plaintiff may then show that this reason is a sham or pretext for discrimination. A court may infer discrimination from the falsity of the defendant's explanation.

Reeves v. Sanderson Plumbing Products, Inc., 120 S. Ct. 2097 (2000).

Civil Rights

Protected classes

- ❖ Race
- ❖ Color
- ❖ Religion
- ❖ Sex
- ❖ National Origin
- ❖ Disability (added in 1988)
- ❖ Familial Status (having children under 18 in a household, including pregnant women) (added in 1988)

Civil Rights

Issues:

- ❖ Group residential facilities
- ❖ Low income housing
- ❖ Free speech

Civil Rights

Four factor test to determine if a policy or practice has the effect of perpetuating segregation under the Fair Housing Act:

1. The strength of the plaintiff's showing of discriminatory effect;
2. Evidence of the defendant's discriminatory intent (even though the evidence would be insufficient to establish a case of intentional discrimination);
3. The defendant's interest in taking the challenged action;
4. Whether the plaintiff seeks to compel the defendant affirmatively to provide housing or merely to refrain from interfering with others who wish to do so.

Metropolitan Housing Development Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), cert. denied, 434 U.S. 1025 (1978).

Civil Rights

Substantial relation to the public health, safety, morals, or general welfare.

Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 395, 47 S.Ct. 114, 121, 4 Ohio Law Abs. 816, 71 L.Ed. 303 (1926)

Civil Rights

Remedies:

- ❖ Injunctive Relief
- ❖ Actual and Punitive Damages
- ❖ Attorney's Fees
- ❖ Civil Penalties

Will involve insurance counsel.

Court Process

- ❖ <http://www.ohiotownships.org/sites/default/files/Taking%20Zoning%20Violators%20to%20Court%20-%20Part%201.pdf>
- ❖ <http://www.ohiotownships.org/sites/default/files/Taking%20Zoning%20Violators%20to%20Court%20-%20Part%202.pdf>
- ❖ <http://www.ohiotownships.org/sites/default/files/Legal%20Aspects%20of%20Code%20Enforcement.pdf>
- ❖ <http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=2317&context=clevstlrev>
- ❖ <https://portal.hud.gov/hudportal/documents/huddoc?id=fhpg.pdf>
- ❖ <https://www.development.ohio.gov/files/cs/Analyze%20Impediments%20to%20Fair%20Housing%20Guidebook%202016.pdf>
- ❖ *Ohio Planning and Zoning Law*, 2015 Edition, Stuart Meck and Kenneth Pearlman