Land Use Training Handbook

for Effective Land Use & Decision Making

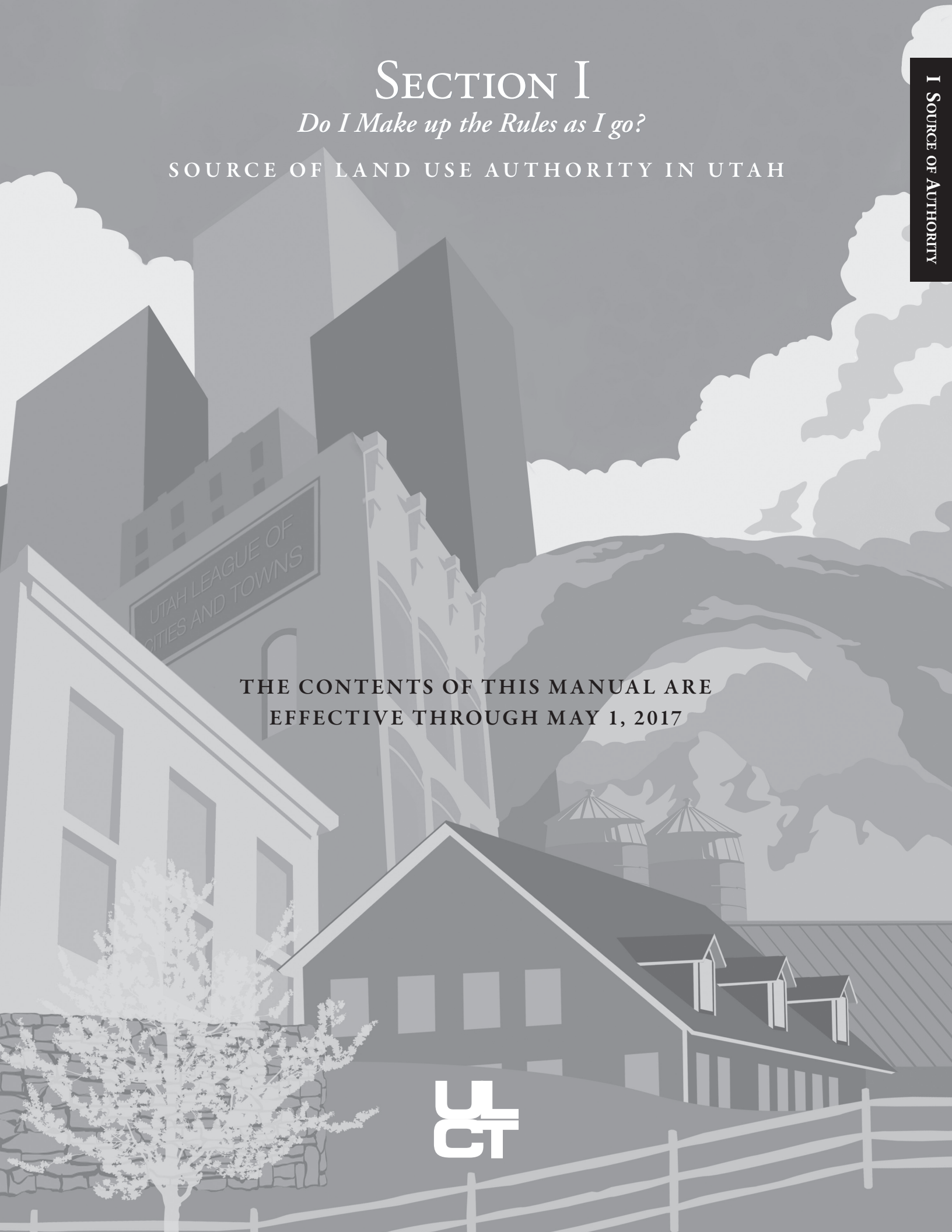
MAY 2016

for Elected and Appointed Officials in Utah

Section I

Do I Make up the Rules as I go?

SOURCE OF LAND USE AUTHORITY IN UTAH



THE CONTENTS OF THIS MANUAL ARE EFFECTIVE THROUGH MAY 1, 2017

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Sources of Land Use Authority in Utah
Selected Sections

Utah Code Title 10 Chapter 09a
Municipal Land Use, Development, and Management
http://www.le.state.ut.us/~code/TITLE10

10-9a-102. Purposes–General land use authority.

(1) The purposes of this chapter are to provide for the health, safety, and welfare, and promote the prosperity, improve the morals, peace and good order, comfort, convenience, and aesthetics of each municipality and its present and future inhabitants and businesses, to protect the tax base, to secure economy in governmental expenditures, to foster the state's agricultural and other industries, to protect both urban and nonurban development, to protect and ensure access to sunlight for solar energy devices, to provide fundamental fairness in land use regulation, and to protect property values.

(2) To accomplish the purposes of this chapter, municipalities may enact all ordinances, resolutions, and rules and may enter into other forms of land use controls and development agreements that they consider necessary or appropriate for the use and development of land within the municipality, including ordinances, resolutions, rules, restrictive covenants, easements, and development agreements governing uses, density, open spaces, structures, buildings, energy efficiency, light and air, air quality, transportation and public or alternative transportation, infrastructure, street and building orientation and width requirements, public facilities, fundamental fairness in land use regulation, considerations of surrounding land uses and the balance of the foregoing purposes with a landowner's private property interests, height and location of vegetation, trees, and landscaping, unless expressly prohibited by law.

10-9a-501. Authority to enact land use ordinances and zoning map.

The legislative body may enact land use ordinances and a zoning map consistent with the purposes set forth in this chapter.

10-9a-301. Ordinance establishing planning commission required–Ordinance requirements–Compensation.

(1) (a) Each municipality shall enact an ordinance establishing a planning commission.

(b) The ordinance shall define:

(i) the number and terms of the members and, if the municipality chooses, alternate members;

(ii) the mode of appointment;

(iii) the procedures for filling vacancies and removal from office;

(iv) the authority of the planning commission; and

(v) other details relating to the organization and procedures of the planning commission.

(2) The legislative body may fix per diem compensation for the members of the planning commission, based on necessary and reasonable expenses and on meetings actually attended.

10-9a-302. Planning commission powers and duties.

The planning commission shall make a recommendation to the legislative body for:

(1) a general plan and amendments to the general plan;

(2) land use ordinances, zoning maps, official maps, and amendments;

(3) an appropriate delegation of power to at least one designated land use authority to hear and act on a land use application;

(4) an appropriate delegation of power to at least one appeal authority to hear and act on an appeal from a decision of the land use authority; and

(5) application processes that:

(a) may include a designation of routine land use matters that, upon application and proper notice, will receive informal streamlined review and action if the application is uncontested; and

(b) shall protect the right of each:

(i) applicant and third party to require formal consideration of any application by a land use authority;

(ii) applicant, adversely affected party, or municipal officer or employee to appeal a land use authority's decision to a separate appeal authority; and

(iii) participant to be heard in each public hearing on a contested application.

10-9a-701. Appeal authority required. Condition precedent to judicial review. Appeal authority duties.

(1) Each municipality adopting a land use ordinance shall, by ordinance, establish one or more appeal authorities to hear and decide:

(a) requests for variances from the terms of the land use ordinances; and

(b) appeals from decisions applying the land use ordinances.

(2) As a condition precedent to judicial review, each adversely affected person shall timely and specifically challenge a land use authority's decision, in accordance with local ordinance.

(3) An appeal authority:

(a) shall:

(i) act in a quasi-judicial manner; and

(ii) serve as the final arbiter of issues involving the interpretation or application of land use ordinances; and

(b) may not entertain an appeal of a matter in which the appeal authority, or any participating member, had first acted as the land use authority.

(4) By ordinance, a municipality may:

(a) designate a separate appeal authority to hear requests for variances than the appeal authority it designates to hear appeals;

(b) designate one or more separate appeal authorities to hear distinct types of appeals of land use authority decisions;

(c) require an adversely affected party to present to an appeal authority every theory of relief that it can raise in district court;

(d) not require an adversely affected party to pursue duplicate or successive appeals before the same or separate appeal authorities as a condition of the adversely affected party's duty to exhaust administrative remedies; and

(e) provide that specified types of land use decisions may be appealed directly to the district court.

(5) If the municipality establishes or, prior to the effective date of this chapter, has established a multiperson board, body, or panel to act as an appeal authority, at a minimum the board, body, or panel shall:

(a) notify each of its members of any meeting or hearing of the board, body, or panel;

(b) provide each of its members with the same information and access to municipal resources as any other member;

(c) convene only if a quorum of its members is present; and

(d) act only upon the vote of a majority of its convened members.

10-9a-401. General plan required. Content.

(1) In order to accomplish the purposes of this chapter, each municipality shall prepare and adopt a comprehensive, long-range general plan for:

(a) present and future needs of the municipality; and

(b) growth and development of all or any part of the land within the municipality.

(2) The plan may provide for:

(a) health, general welfare, safety, energy conservation, transportation, prosperity, civic activities, aesthetics, and recreational, educational, and cultural opportunities;

(b) the reduction of the waste of physical, financial, or human resources that result from either excessive congestion or excessive scattering of population;

(c) the efficient and economical use, conservation, and production of the supply of:

(i) food and water; and

(ii) drainage, sanitary, and other facilities and resources;

(d) the use of energy conservation and solar and renewable energy resources;

(e) the protection of urban development;

(f) the protection or promotion of moderate income housing;

(g) the protection and promotion of air quality;

(h) historic preservation;

(i) identifying future uses of land that are likely to require an expansion or significant modification of services or facilities provided by each affected entity; and

(j) an official map.

Selected Definitions from the Utah State Code

Affected Entity. "Affected entity" means a county, municipality, independent special district under Title 17A, Chapter 2, Independent Special Districts, local district under Title 17B, Chapter 2, Local Districts, school district, interlocal cooperation entity established under Title 11, Chapter 13, Interlocal Cooperation Act, specified public utility, a property owner, a property owners association, or the Utah Department of Transportation, if:

(a) the entity's services or facilities are likely to require expansion or significant modification because of an intended use of land;

(b) the entity has filed with the municipality a copy of the entity's general or long-range plan; or

(c) the entity has filed with the municipality a request for notice during the same calendar year and before the municipality provides notice to an affected entity in compliance with a requirement imposed under this chapter.

Appeal Authority. A person, board, commission, agency, or other body designated by ordinance to decide an appeal of a decision of a land use application or a variance.

Culinary Water Authority. The department, agency, or public entity with responsibility to review and approve the feasibility of the culinary water system and sources for the subject property.

Land Use Application. An application required by a municipality's land use ordinance.

Land Use Authority. A person, board, commission, agency, or other body designated by the local legislative body to act upon a land use application.

Land Use Ordinance. A planning, zoning, development, or subdivision ordinance of the municipality, but does not include the general plan.

Noncomplying Structure. A structure that:
(a) legally existed before its current land use designation; and
(b) because of one or more subsequent land use ordinance changes, does not conform to setback, height restrictions, or other regulations, excluding those regulations that govern the use of land.

Nonconforming Use. A use of land that:
(a) legally existed before its current land use designation;
(b) has been maintained continuously since the time the land use ordinance regulation governing the land changed; and

(c) because of one or more subsequent land use ordinance changes, does not conform to the regulations that now govern the use of the land.

Public Hearing. A hearing at which members of the public are provided a reasonable opportunity to comment on the subject of the hearing.

Public Meeting. A meeting that is required to be open to the public under Utah Title 52, Chapter 4, Open and Public Meetings.

Sanitary Sewer Authority. The department, agency, or public entity with responsibility to review and approve the feasibility of sanitary sewer services or onsite wastewater systems.

Special District. An entity established under the authority of Utah Title 17A, Special Districts, and any other governmental or quasi-governmental entity that is not a county, municipality, school district, or unit of the state.

Landowner's (Applicant) Rights

David Church, ULCT

The Utah Municipal Land Use and Development Act contains several specific statutory rights of the land owner or applicant for development approval. These rights probably existed as a matter of law before they were spelled out specifically in the Act, but because of perceived abuses by municipalities the Legislature decided it was necessary to include them in the statutes. They should be considered part of the land owner's "bill of rights" when it comes to applications to develop land. The following are specific applicant rights contained in the Act.

Every applicant is entitled to notice of the date, time and place of any public meeting or hearing that is held to consider his or her land use application. This notice must include a copy of any staff report prepared by the city or town about the application. The notice must be at least three business days before the meeting. This time period can be waived by the applicant. The applicant is also entitled to be notified of any final action taken on the application.[1]

An applicant is entitled to have his or her application approved if the application conforms to the requirements of the city or town ordinances in effect on the day a complete application is submitted and all fees are paid.[2] The intent of this is to freeze the applicant's rights in the ordinances in existence when the application is filed and to clarify that approval of a compliant application is mandatory and not discretionary by the city or town.

An applicant for a land use development approval is entitled to a reasonably quick determination if his or her application is complete. After waiting a reasonable time the applicant can request in writing a determination of the completeness of the application and the city or town must respond within 30 days by either saying the application is complete or telling the applicant in what ways it is deficient.[3] In addition an applicant has the right to a reasonably quick decision on his or her completed application and can, after a reasonable time, request in writing the decision, and the city or town must then process the application within 45 days of the written request. The purpose of these provisions is to force the city or town to process the applications in a timely manner.

An applicant for the subdivision of property has the right to approval of the subdivision if the application meets the city or town's ordinances.[4] A land owner's application to subdivide his or her land should be treated by the city or town not as a request for permission but as a request for the rules on how to do it. It is not discretionary with the city or town on whether a land owner can or can not subdivide.

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[1] Utah Code 10-9a-202.

[2] Utah Code 10-9a-509.

[3] Utah Code 10-9a-509.5.

[4] Utah Code 10-9a-603(2).

All applicants for land use development approval must be provided with the right to appeal the final decision of the land use authority and the right to appeal any interpretation of municipal land use ordinances.[5] This requires the city or town to designate in the city's or town's ordinances one or more appeal authorities to decide these issues. The intent of this is to provide the applicant with a way to have a fair impartial review of any final land use decision, with full rights of due process, at the city or town level, without having to go to court to get it.

[5] Utah Code 10-9a-701.

Applicant Entitled to Fundamental Fairness in Review Process

10-9a-509.5. Review for application completeness. Substantive application review. Money damages claim prohibited. (Enacted 2007)

Highlighted Provisions:
This bill enacted provisions relating to a county or municipality's processing of a land use application and modifies the standard that applies in determining the validity of a county or municipal decision, ordinance, or regulation.

The bill established what has been called the "ripcord" provision—that is, allowing an applicant to ask for a final determination on the completeness of a land-use application. The "ripcord" provision would allow the applicant to request a final determination on completeness, and then allow them to move forward in the appeals process if they so desire.

Specifically the applicant can ask after 30 days for a determination of the application is complete. The municipality must mail a notice to the applicant as to whether the application is complete or not. If it is complete then the applicant can move along in the review process.

After a reasonable period of time to allow the land use authority to consider an application, the applicant may in writing request that the land use authority take final action within 45 days from date of service of the written request.

The land use authority shall take final action, approving or denying the application within 45 days of the written request.

If the land use authority denies an application or if the applicant has requested a written decision in the application, the land use authority shall include its reasons for denial in writing, on the record, which may include the official minutes of the meeting in which the decision was rendered.

Suggested language for compliance in your land use code

Insert in you administration and enforcement section of your land use code as outlined below.

SAMPLE

Applicant entitled to fundamental fairness in review process

Each applicant is entitled to a timely, written decision and to timely, judicial review of each decision made by a land use authority. A land use applicant is able to:

a. receive a timely written decision in all circumstances; and

b. seek timely judicial review in a delayed land use application process in all circumstances.

A. Request for determination of complete application

Each municipality shall, in a timely manner, determine whether an application is complete for the purposes of subsequent, substantive land use authority review. After a reasonable period of time to allow the municipality diligently to evaluate whether all objective ordinance-based application criteria have been met, if application fees have been paid, the applicant may in writing request that the municipality provide a written determination either that the application is:

1. complete for the purposes of allowing subsequent, substantive land use authority review; or

2. deficient with respect to a specific, objective, ordinance-based application requirement.

Within 30 days of receipt of an applicant's request under this section, the municipality shall either:

1. mail a written notice to the applicant advising that the application is deficient with respect to a specified, objective, ordinance-based criteria, and stating that the application must be supplemented by specific additional information identified in the notice; or
2. accept the application as complete for the purposes of further substantive processing by the land use authority

B. Request for final action on a complete application

Each land use authority shall substantively review a complete application and an application considered complete under Subsection A and shall approve or deny each application with reasonable diligence.

After a reasonable period of time to allow the land use authority to consider an application, the applicant may in writing request that the land use authority take final action within 45 days from date of service of the written request. The land use authority shall take final action, approving or denying the application within 45 days of the written request. If the land use authority denies an application processed as outlined above or if the applicant has requested a written decision in the application, the land use authority shall include its reasons for denial in writing, on the record, which may include the official minutes of the meeting in which the decision was rendered.
If the land use authority fails to comply within the 45 day period the applicant may appeal this failure to district court within 30 days of the date on which the land use authority should have taken final action. Subject to Utah State Code (Section 10-9a-509) nothing in this section and no action or inaction of the land use authority relieves an applicant's duty to comply with all applicable substantive ordinances and regulations of the city.

Land Use Decision and Appeal Process 2016

Effective May 14, 2016

DECISION TO BE MADE	ADVISORY BODY	DECIDING BODY	APPELLATE BODY	EXTERNAL APPEAL
Adoption or Amendments of General Plan	Planning Commission (public notice required at inception of the process and one public hearing and notice required prior to recommendation)	Legislative Body (public hearing optional)	District Court	30 days from decision by legislative body
Adoption of Land Use Ordinance/ Amendments to Land Use Ordinance	Planning Commission (public hearing and notice required)	Legislative Body (public hearing optional)	District Court	30 days from decision by legislative body
Annexation Policy Plan	Planning Commission (Public hearing and notice required)	Legislative Body (public hearing and notice required)	Appeal Authority as designated by Legislative Body then if needed on to District Court	30 days from decision by legislative body
Annexation Application	Planning Commission (Public hearing if required by local ordinance)	Legislative Body (public hearing and notice required)	Appeal Authority as designated by Legislative Body then if needed on to District Court	30 days from decision by legislative body
Appeal of Administrative Decision		Appeal Authority as designated by Legislative Body in municipal ordinance- must be a minimum of 10 days to appeal	Appeal Authority as designated by Legislative Body then if needed on to District Court	30 days from decision by Appeal Authority
Conditional Use Permit * Choice of process decided at local level	Land Use Authority as designated by Legislative Body in municipal ordinance (Planning Commission, or Administrator or City Council or combination of both)	Land Use Authority as designated by Legislative Body in municipal ordinance	Appeal Authority as designated by Legislative Body then if needed on to District Court	30 days from decision by Appeal Authority

DECISION TO BE MADE	ADVISORY BODY	DECIDING BODY	APPELLATE BODY	EXTERNAL APPEAL
Nonconforming Uses and Non Complying Structures	As designated by municipal ordinance. (need to allow rebuild provision in lieu of fire, etc.)	Land Use Authority as designated by Legislative Body in municipal ordinance	Appeal Authority as designated by Legislative Body then if needed on to District Court	30 days from decision by legislative body
Subdivision Ordinance Approval	Land Use Authority as designated by Legislative Body in municipal ordinance (Public hearing and notice required)	Legislative Body (public hearing optional)	District Court	30 days from decision by legislative body
Subdivision Application and Plat Approval		Land Use Authority as designated by Legislative Body in municipal ordinance in a public meeting. No Public hearing required. Policy choice to hold one. *Approval process must include letter from culinary, sewer and fire authority.	Appeal Authority as designated by Legislative Body then if needed on to District Court	30 days from decision by legislative body
Vacation or changing a Subdivision Plat		Land Use Authority as designated by Legislative Body in municipal ordinance. Public hearing required to be held 45 days after application is filed. *Public hearing requirement does not apply and a land use authority may consider at a public meeting an owner's petition to alter a subdivision plat if: (a) the petition seeks to join two or more of the owner's contiguous, residential lots; and (b) notice has been given to adjacent property owners and pursuant to local ordinance.	Appeal Authority as designated by Legislative Body then if needed on to District Court	30 days from decision by legislative body

DECISION TO BE MADE	ADVISORY BODY	DECIDING BODY	APPELLATE BODY	EXTERNAL APPEAL
Amendment or Vacation of platted street, Right of way or Easement		Legislative Body to hold public hearing.	Appeal Authority as designated by Legislative Body then if needed on to District Court	
Variances		Appeal Authority as designated by Legislative Body in municipal ordinance	District Court	30 days from decision by legislative body

Notes:

1. Internal appeals timelines (one body to another) are designated by local ordinances with a default provision of 10 days. External appeals (District Court) are always 30 days from date of decision.

2. Special Exceptions are prohibited as of May 2005. Need to consider as a use within a specific zone either conditional or permitted.

Notice Matrix For Land Use Decisions And Appeal Process 2016

Utah League of Cities and Towns, Effective May 14, 2016

LAND USE DECISION	TIME	NOTICE TYPE
Preparation, Adoption or Amendments of General Plan	A. Upon inception of the initial process to generally plan or the process for any comprehensive Plan amendment B.10 days prior to first public hearing C. 24 hours notice of each public meeting	A. <u>For all municipalities:</u> Notice mailed or emailed to: 1. "affected entities" **For municipalities within a 1st or 2nd class county** 1. LOCAL AOG 2. State Planning Coordinator (GOPB Office) 3. Automated Geographic Reference Center (AGRC) B. Published in paper <u>and</u> posted in 3 public places or on website C. Posted in 3 public places or on website at least 24 hrs prior to meeting.
Adoption or Amendments of Land Use Ordinance or Zoning Map	A. 10 days prior to first public hearing: B. 24 hours notice of each public meeting	A. Published in paper and posted in 3 public places or on website and Notice mailed or emailed to: "affected entities" and Posted in 3 public places or on website. B. For zoning map or map amendment: Courtesy notice to each owner of private real property whose property is located entirely or partially within the proposed map. Must state that owner has 10 days after 1st public hearing to file a written objection to the legislative body. C. Posted in 3 public places or on website at least 24 hrs prior to meeting.
Annexation Policy Plan	A. 14 days prior to first public meeting B. 14 days prior to first public hearing C. 30 days after adoption	A. Notice mailed or emailed to: "affected entities" B. Notice mailed or emailed to: 1. "affected entities" 2. Published in paper 3. Posted in 3 public places or on website C. Copy to County
Appeal of Permit Decision		Notice must be given to applicant. Ten day minimum if local ordinance does not supercede.
Acquisition/ Disposition of Public Property	14 days prior to first public hearing	Notice mailed or emailed to "affected entities" and published in paper and posted in 3 public places or on website.
Conditional Use Permit	See Land Use Application	
Land Use Application		Notify the applicant of the date, time, and place of each public hearing and public meeting and of any final action on a pending application.

LAND USE DECISION	TIME	NOTICE TYPE
Nonconforming Uses/Non Complying Structures	See Land Use Application	
Subdivision Plat Approval or Amendment	10 calendar days prior to public **meeting** *10 lots or less are exempt from noticing if you choose to acknowledge the state subdivision exemptions.	Notice mailed **or** emailed to: 1. to the record owner of each parcel within specified parameters of that property; OR 2. posted, on the property to give notice to passers-by.
Subdivision Plat Approval or Amendment within 100' of a Canal	Within 30 days after day that application is filed	Certified or registered letter to canal operator. Must wait ten days after notice to take final action on item.
Vacating or amending a Subdivision Plat	10 calendar days prior to public meeting. If public hearing is required due to exceptions then 10 calendar day notice is required.	1. Notice mailed to the record owner of each parcel within specified parameters of that property OR posted on the property proposed for subdivision 2. Notice of petition filed to each affected entity that provides service to the plat.
Vacating some or all of a public street, right of way or easement	10 calendar days prior to public hearing.	Mailed to the record owner of each parcel that is accessed by the public street, right-of-way, or easement; mailed to each affected entity; Posted on or near the street, right-of-way, or easement in a manner that is calculated to alert the public; and Published in a newspaper of general circulation in the municipality in which the land subject to the petition is located.
Variances	See Land Use Application	

Notes:

1. Each jurisdiction may require more than the minimum notice. Challenge to proper notice must be taken within 30 days of the meeting or action, otherwise notice is considered adequate and proper.

2. <u>10-9a-206. Third party notice</u>. (1) If a municipality requires notice to adjacent property owners, the municipality shall: (a) mail notice to the record owner of each parcel within parameters specified by municipal ordinance; or (b) post notice on the property with a sign of sufficient size, durability, print quality, and location that is reasonably calculated to give notice to passers-by. (2) If a municipality mails notice to third party property owners under Subsection (1), it shall mail equivalent notice to property owners within an adjacent jurisdiction.

State/Federal Law Mandates

General Plan Before Zoning

1. Land Use Element in General Plan
2. Transportation; and
3. Affordable Housing;
4. Annexation Policy Plan

Land Use Ordinances that:

1. Creates a planning commission and establishes an appeal authority
2. Address residential facilities for elderly and persons with disabilities
3. Allow for manufactured homes which comply with zone
4. Address cell towers—can't prohibit—can regulate
5. Reestablish after calamity nonconforming structure
6. Allows for charter schools—in all zones
7. Allow for uses protected by freedom of speech (adult oriented businesses)

Section II

Who Does What?

LAND USE AUTHORITIES

Just What Is the Job of a Planning Commissioner?

by PCJ Editor, Wayne Senville

The primary goal of the *Planning Commissioners Journal* has always been to help citizen planners – especially members of local planning and zoning boards – do their job better. But just what is the job of a planning commissioner?

We want to re-examine this broad question in light of what our talented contributors have had to say over the past twenty years. So go get yourself a cup of coffee or tea, sit back, and thumb through the following pages.

Some of the keenest observations on the role planning commissioners play have – not surprisingly – come from commissioners themselves. Over the years, many planning board members have drawn on their own experiences in writing for the *PCJ*.

An Obligation to Contribute

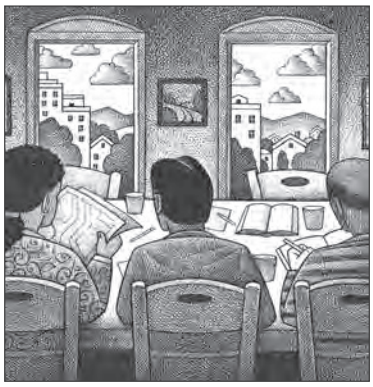
"Recognize that you have an obligation to contribute to your planning and zoning meeting, even if you don't have a set of initials following your name and can't name the planner who laid out the streets of Paris. It's not a 'chance' to contribute; it's an 'obligation' by virtue of your appointment. Study any staff reports, maps, and the like, and come prepared to contribute … Planning commissions are places for people who care and want to make a difference to their communities." – *Steven R. Burt, Sandy City, Utah* {100}

Ask Questions

"Once appointed, don't be reluctant to ask questions of other board members and the planning staff. The staff is there to assist and advise the board. At your board's public meetings, ask questions. Other board members, or citizens in attendance, may have the same question in the back of their mind. The old adage 'the only dumb question is the one not asked' is true." – *Stephen F. DeFeo, Jr., Methuen, Massachusetts* {234}

Think Before You Respond

"Think carefully before you respond to demands from citizens and developers. Often a salient issue will come to the attention of citizens before you, as a board member, have all the facts. Resist the urge to express your opinion until you are sure about where you stand on the issue." – *Cheryl R. Roberts, Huntersville, North Carolina* {234}



Put Aside Your Own Biases

"Put personal preferences and prejudices aside to deliberate on technical issues and application merits, and be proactive to seek changes to local zoning laws where deficiencies have been identified." – *Louis Joyce, Alloway Twp., New Jersey* {467}

"Try very hard to see both sides of an issue. It's easy to vilify developers as uncaring, manipulative, and simply out to make a profit. But remember that it is not a crime to make a reasonable profit … With this said, commissioners have a duty to protect the public, follow the general plan, and enforce the city code – and sometimes a project just does not conform to that mandate." – *Fedolia "Sparky" Harris, Elk Grove, California* {467}

Make the Right Decision, Not the Popular One

As Carolyn Braun noted in "Planning From Different Perspectives" {170}:

"As planning commissioners, I'm sure you have heard difficult requests from friends or neighbors that do not comply with the code. It is hard not to be empathetic with your neighbors. They stand before you, looking at you, hoping you – of all people – will understand and help them. After all, you live there. Silently, you wonder whether granting the request would be that bad. After all, it really wouldn't hurt

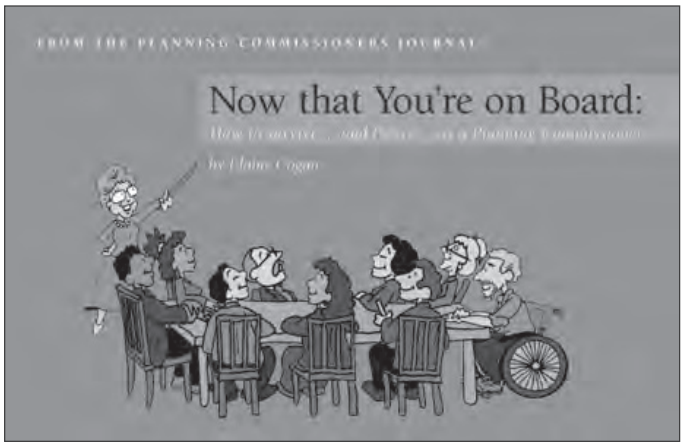
continued on next page

Using this Article

Throughout this article you'll see brackets with a number inside like this: {467}. This is the identifying number we've given to each article we've published.

When you or your community join our new *PlannersWeb* service you will be able to access the full text of each article simply by going to our web site: www.plannersweb.com; then logging in as a *PlannersWeb* member; and then inserting the article number (or the article title) in the search field.

We'll also be posting on the *PlannersWeb* site a copy of this article – complete with hyperlinks.



Just What is the Job…?
continued from previous page

anyone. What's a couple of feet in the greater scheme of things?

Similarly, you may be called on to decide applications that have evoked strong neighborhood opposition. … Silently, you wonder how you can approve this request with so many people in opposition. How could this possibly be best for the community? …

It is tempting as a commissioner to simply make a popular decision. It has been my experience, however, that in the long run, consistent decisions give you more credibility. Rest assured, it won't always be easy."

"The Effective Planning Commissioner"

That's the title of a column Elaine Cogan wrote for the *PCJ* for some eighteen years. Cogan, who is a founding partner in the Portland, Oregon, planning and communications firm of Cogan Owens Cogan, has for more than thirty years served as a consultant to communities undertaking strategic planning or visioning processes. She's also the author of *Now that You're on Board: How to Survive … and Thrive … as a Planning Commissioner* – which will be available on our *PlannersWeb* site.

In her *PCJ* column, Cogan often focused on those special attributes that can help planning commissioners be more effective – such as patience and passion:

Patience

"Patience is an essential attribute if you are to be an effective decision maker, especially in the contentious situations that often confront the planning board. You need to exercise patience over your own desire to rush to judgment after a cursory review of the 'facts' as they are presented by staff or an applicant, or seem to be borne out by your own experience. You also need to be patient with other board members who may have a different perspective or be slower to grasp complicated concepts.

Most importantly, you must be patient with the public at that inevitable public hearing or meeting. … Each citizen deserves to be heard with patience, no matter how misguided you may think they are." – *from "What Counts Most as a Planning Commissioner"* {249}

Passion

"Passion is a powerful and admirable quality if it is not expressed in a hysterical or zealous, take-no-prisoners mode. It can be a positive model when you as a commissioner show a calm but passionate advocacy for the value of planning as a vital contribution to your community's present and future livability – and when you recognize that citizens can also be rightfully passionate about their neighborhoods, the natural environment, schools, playing fields, or other matters of concern. …

Sometimes passion can cause you to be a loner. You may have patiently listened to all the arguments on a contentious issue, weighed the information, debated openly and fairly with your colleagues, and still reached a conclusion that is not supported by the majority on the planning board. This may not be a comfortable position and would be ineffective if you are too often on the losing side. However, if you can express that passionate disagreement with conviction while not disparaging those who have other points of view, you will engender respect, and may even win over others."– *from "Making the Case for Passion" in Now that You're on Board.*

Consensus-Builders

Elaine Cogan has also written about the different roles members of a planning commission can play. You'll read later about the role of the chair, but as she noted in "… And the Consensus Is" {311}, there's also an important role for the consensus-builder:

"Knowing when to vote and when to rely on consensus can contribute substantially to the smooth running of your planning board. First, it is important to acknowledge that most, if not all, decisions on legal matters require a recorded vote. Some issues require a simple majority; others two-thirds or more. These procedures should be spelled out clearly and followed precisely.

Many other issues, however, are best resolved without a vote. Voting can polarize people and create a winner/loser environment. Consensus implies that the group can come to general agreement without forcing individuals to take sides.

Is there a consensus-builder on your board? If you are the chair, do not assume you have to take that role if it is not a comfortable position for you. Your primary responsibility is keeping order and giving everyone a fair opportunity to speak. If you are not the chair but have that skill, do not hesitate to use it. The consensus-builder can be anyone on the board who has the patience, aptitude, and interest. …"

Since our very first issue in 1991, we've invited comments from planners and planning commissioners on the first drafts of all articles submitted for publication. When space has allowed, we've also included some of these comments

alongside the published article – as was the case with Cogan's article on consensus building:

"As Chairman of the Plan Commission in the Town of Dodgeville, Wisconsin, my conviction about the value of consensus building couldn't be stronger. Democracy is, at its heart, dependent upon good citizens with fair minds who can work their way through all of the information and arguments and come to an agreement about their decision." *– Lois Merrill, Dodgeville, Wisconsin.*

"Regardless of the circumstances our Chairman will go out of his way to assure that whoever wants to be heard receives their opportunity. We seem to reach consensus, at least to a great degree, in near all of our deliberations without a specific 'consensus builder.'. .. Any of our members will take the lead as they deem necessary." *– Bob Steiskal, Jr., Gulf Shores, Alabama.*

Getting Prepped

How to run, participate in, and benefit from meetings are topics we've regularly covered. But it's important to remember that the "job" of a planning commissioner doesn't start when the meeting is called to order and end when it is adjourned.

James Shockey – who's served as both a planner and a planning commissioner in Colorado – reminded commissioners to:

"Make sure to take the time to read and understand the information presented in the staff reports prior to the meeting. Staff really appreciates commissioners who have read their packet and we can always tell by the questions asked at the meeting who has or hasn't." *– from "Sitting on Both Sides of the Table"* {467}

Along similar lines, Cynthia Eliason – another planner who's also served as a planning commissioner (in California) – emphasized:

"Do your homework! There is nothing worse than coming to the meeting and hearing the ripping open of meeting packets for the first time." {467}

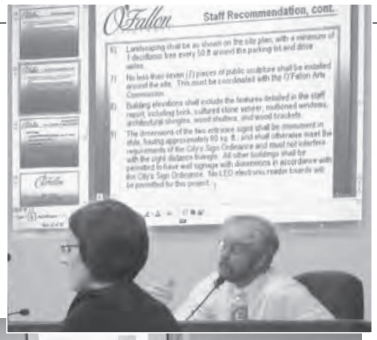
What's On Your Agenda?

How much thought do we give to our meeting agendas? In many cases, not enough. As Elaine Cogan described in "First on the Agenda is the Agenda" {251}:

"The agenda is the template for your meetings. It should be developed thoughtfully so that the planning board has adequate time for matters that require attention and/or decisions and less time for 'housekeeping' or more routine subjects. It should delineate plainly when public comment is invited and the actions expected of each item (review only; action; referral).

Many commissions leave the agenda writing to staff and may see it for the first time when they come to the meeting. This does not serve you or the public well. The best approach is for the chair, or a committee of your board, to review the agenda before it is final and for commissioners to receive it and any backup materials several days in advance.

Allow ample and early time for issues which most concern the public. … Put the contentious or controversial issues on the agenda early, and give them the time they deserve. Do not be offended if most of the crowd leaves as soon as you turn to other matters."



W. SENVILLE

Meeting of the O'Fallon, Illinois, Planning Commission. Chairman Gene McCoskey is at far right of photo at bottom. Note how staff uses the large screen to allow the public to easily view information about the project under review.

Setting the Right Tone

One of the most important steps a planning commission can take is to set the right tone at the very start of a meeting. During my 2007 cross-country trip on U.S. Route 50, I attended a meeting of the O'Fallon, Illinois, Planning Commission. Chairman Gene McCoskey did a terrific job in creating a welcoming atmosphere. He opened the meeting by providing brief introductions of the commissioners and staff; a review of how the meeting would be run and when public comment would be taken; and an explanation of the planning commission's role in the project review process.

McCoskey and his fellow commissioners listened intently during lengthy, sometimes angry, public comments about a development proposal on the

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evening's agenda. They asked a few questions to clarify points, but basically sat and listened, and then offered the developer and his team the chance to respond. By showing an open mind and being respectful to all, the commission left those attending – whatever side they were on – knowing they had been heard.

You can listen to a four minute audio clip of McCoskey's opening remarks. Go to: <www.rte50.com>, then in the left sidebar scroll down to June 12: Introductions. You can also access the nearly one hundred posted Route 50 trip reports.

For more on the importance of setting the right tone at the start of the meeting, see Elaine Cogan's "… In the Beginning" {352}

Chairing the Commission

One place where leadership skills are especially important – along with sound judgment and an even temperament – is in the role of chair. Here's some of what Carol Whitlock, longtime chair of both the City of Merriam (Kansas) and Johnson County Planning Commissions, had to say:

"Always be fair. This is perhaps the most important responsibility of the chairperson. Remember it is your job to give everyone their 'day in court,' not to decide who is right or wrong. (You will do that also, but outside of your job as chairman). …

Do not allow the audience to break in when someone else has the floor. If patiently telling members of the public to wait their turn doesn't work, stop the meeting and let everyone sit and stew until it comes back under control. No need to yell, pound the gavel, or demand control. Things will settle down if all business stops until peace reigns. Only one time have I ever had to threaten to get the police to clear the room. …

Patiently listen until every person who wishes to speak has had their say. This is where [a] time limit comes in to help you out. But more importantly, if everyone understands that they will be heard, they are much more apt to sit patiently and not disrupt the meeting.

Develop a good working relationship with your planning director (or whoever is your key staff support person). This is vital. In my years' of experience as chairperson, I have also found that meeting with our planning director before each public meeting has strengthened our relationship, while providing me with a heads up about any unique or 'hot' items on the agenda."– *from "Chairing the Commission"* {183}

Show Respect

As Whitlock noted, one of the essentials of running a good meeting is showing respect to members of the public. This is important not just as a matter of civility, but also because you might actually learn something from your fellow citizens – even if you disagree with what they're saying. What's more, if the commission is to be effective in its job of planning for the future of the community, it needs the respect and support of the public.

Elaine Cogan has often spoken on the importance of respect, as in her article, "Meaningful Dialogue With the Public" {153}:

"To keep and maintain the trust of the public, it is imperative that your planning commission understands – and practices – the fine art of inviting their comments and questions and responding in a cordial and respectful manner.

It is most important to establish ground rules and enforce them. Ask people who wish to speak to sign in ahead of time and refer to that list throughout the meeting. You can then call on each one by name. If you accompany your words by a nod or a smile, you show a welcoming acceptance. …

Show by your body language that you are listening. Lean forward, with hands discretely on the table or in your lap. Never roll your eyes, shake your head, or tap a pencil or pen – all sure signals you are impatient or distracted.

Do not fall for 'red herrings' or baited questions. If necessary, repeat what you or other commissioners have said or explain your answer in more detail. …

Always be polite. You may have to agree to disagree, but insults and innuendo are never appropriate. …"

The "Riggins Rules"

Eighteen years ago we heard about the "Riggins Rules" from Arizona planner Bev Moody. They were put together in 1967 by the late Fred Riggins, then Chairman of the Phoenix Planning Commission, who titled them "Suggested Do's & Don'ts for the Conduct of Public Hearings and the Deportment of Members of Boards, Commissions, & Other Bodies." They've since been re-titled as the "Riggins Rules" in his honor.

While we hope you'll read all 39 of the Riggins Rules {513}, here are a few excerpts:

"• Do be on time. If the hearing is scheduled at 7:30, the gavel should descend at the

exact hour, and the hearing begin, if there is a quorum. If you have to wait ten minutes for a quorum and there are 100 people in the room, the straggler has … created a very bad beginning for what is a very important occasion for most of those present.

• Don't mingle with friends, acquaintances, unknown applicants or objectors in the audience before the meeting or during a recess period, if it can be politely avoided. You will invariably create the impression … that there is something crooked going on, especially when you vote favorably on the case of the applicant you were seen conversing with.

• Do your homework. Spend any amount of time necessary to become thoroughly familiar with each matter which is to come before you. It is grossly unfair to the applicant and to the City for you to act on a matter with which you have no previous knowledge or with which you are only vaguely familiar. And you will make some horrible and disturbing decisions.

• Do be attentive. Those appearing before you have probably spent hours and hours preparing and rehearsing their arguments. The least you can do is listen and make them think that you are as interested as you should be. Refrain from talking to other members, passing notes and studying unrelated papers.

• Don't use first names in addressing anyone at all during the course of the hearing. This includes audience, applicants, members of your particular body, even if the person concerned is your brother or your best friend. Nothing, repeat nothing, creates a more unfavorable impression on the public than this practice.

• Don't try to make the applicant or any other person appearing before you look like a fool by the nature of your questions or remarks. This is often a temptation, especially when it is apparent that someone is being slightly devious and less than forthright in his testimony. But don't do it.

• Don't forget that the staff is there to help you in any way possible. It is composed of very capable professional people with vast experience. Lean on them heavily. They can pull you out of many a bad spot if you give them a chance. Or they may just sit and let you stew, if you do not give them the respect which is their due."

If Our Meetings Could Talk

Quite a few of the Riggins Rules relate to two critically important topics we've covered extensively: ethical matters (such as ex parte contacts and conflicts of interest) and the relationship between commissioners and staff. We'll turn to them shortly. But first, allow us a few minutes to talk more broadly about the nature of meetings – and how they can be made more productive.

On this point, we need to introduce (or re-introduce) you to Mike Chandler, who for eleven years wrote "The Planning Commission At Work" column for the *PCJ*. During this time, Chandler was also the "go to" speaker at planning commission training workshops around the country. In one of his *PCJ* columns he asked what we'd hear if our meetings could talk:

"During our planning commission training sessions we spend a considerable amount of time exploring the nature of meetings. One of the more interesting exercises involves having the participants complete the following question: 'If our planning commission meetings could talk what might they say?'

As you might suspect, this question has generated some very interesting responses. We've had meetings tell us: 'I'm happy that's over. I feel good. I've got more to do. What a great meeting. I need a drink. If that happens one more time I'll do something you will regret.' Who ever said meetings don't have a sense of humor!

Another exercise that generates much discussion involves determining why some planning commission meetings succeed while others fail. Commonly cited reasons for successful commission meetings include: the meeting started on time; the commission followed the agenda; the public was able to participate; the meeting accomplished a predetermined task; and, the meeting did not last too long.

Reasons for meeting failure usually include the absence of the attributes listed above. In addition, commission meetings may not be successful if commissioners fail to do their homework; if the commission chair is weak or ineffectual; or if the meeting sequence is haphazard or disjointed.– *from "Making the Most of Your Meeting Time"* {451}

Before leaving behind the arena of meetings, there are two more "pieces of business" we want to bring to your attention – first, the importance of rules of order, and second, the danger of ex parte contacts.

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For more on how to hold effective public meetings and hearings:
- Wayne Senville, "Dealing With Contentious Public Hearings" {380}
- Ric Stephens, "Ten Things to Avoid" {347}
- Elaine Cogan, "Meeting Formats Should Follow their Functions" {248}
- Ric Stephens, "Late Nights with the Commission" {138}
- Debra Stein, "Dealing With An Angry Public" {233}
- Elaine Cogan, "How Well Do You Use Your Time?" {474}

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Rules of Order

Many planning commissioners are not familiar with the mechanics of rules of order. But they can be quite important.

As then planning commissioner Steven Burt reminded readers in "Being a Planning Commissioner" {100}:

"Be aware that the motion maker has a decided advantage in influencing the outcome of a vote. Often, if there is indecision on the part of one or more commissioners, the person making a clear, strong motion will carry votes to his or her position."

In "The Commission Will Come to Order" {388} the late David Allor provided a very helpful two page "Model Outline of Motions for Planning Commissions and Zoning Boards," which he specially adapted from Robert's Rules of Order. We urge your planning commission to take a look.

Ex Parte Contacts

For many years, planner Greg Dale has been our "in-house" expert on ethical questions facing planning board members. Dale is a founding partner of the Cincinnati-based firm of McBride Dale Clarion, and a regular at planning commissioner training workshops. He's covered topics ranging from conflicts of interest, to bias, to dealing with confidential information. But perhaps the most important subject Dale's reported on involves "ex parte" contacts. From his most recent article on the topic, "Revisiting Ex Parte Contacts" {129}:

"Fifteen years ago, one of my first *Planning Commissioners Journal* articles dealt with the topic of 'ex parte contacts.' I defined this as any contact that you have with the party involved, or potentially involved, in a matter before the planning commission outside of the public hearing process. I pointed out the perils of ex parte contacts, both from a legal and an ethical perspective.

… As I think further about the issue, there are several reasons why I feel more strongly about the problems with ex parte contacts now.

First, over the last fifteen years, I have continued to conduct numerous planning commission training sessions at the local, state, and national level. I always discuss ex parte contacts with commissioners and it is striking how almost universal their reaction is against allowing them. Perhaps I am just preaching to the choir at planning commissioner workshops, but there appears to be a very broad recognition that ex parte contacts are potentially damaging to the process.

Second, public interest in planning and development decisions has increased as development pressures in many places have continued to mount. As many of us realize, development decisions are being made under increasingly intense scrutiny. This often includes a focus on the fairness of the process.

Quite simply, in my opinion, ex parte contacts are a bad idea and ought to be avoided… My concern is not so much with the legality of ex parte contacts in this situation – that is for your legal counsel to address – but with how the public is likely to perceive such contacts even if they are legally permissible. …

The simplest, clearest, and best policy is for a commission to agree not to engage in ex parte contacts. That means telling people who contact you that you cannot talk to them about a matter pending before the commission, while encouraging them to come to the commission meeting to ask their questions or give their opinion.

… One other caution on ex parte contacts … treat email communications just as you would hard copy or oral communications. It is amazing to me how people tend to view emails as somehow being under the radar screen. The reality is that email communications … about matters before you are likely to be considered public records, and you may be required to produce them."

Remember that your job is to make decisions or recommendations based on the evidence presented to you during the public review process, and that the public has a right to know what information you use as the basis for your decision."

Not Ex Parte Contacts

I recall when Greg Dale submitted the first draft of this article, one concern I had was to be sure planning commissioners realized that there are, in fact, many times when they can and should speak with others about planning issues. Dale agreed, and added the following section:

"It might seem to some that the concerns I've expressed about ex parte contacts would result in planning commissioners being insulated from the community, at the same time that we are asking them to reflect its planning values. Here is an important distinction to make: ex parte concerns relate primarily to matters that are pending before the commission, primarily related to requests for development approvals such as zone changes, planned unit developments, site plan approvals, and other similar requests that involve a specific, legally prescribed process of review.

On the other hand, we do expect planning commissions to concern themselves with long range, community-wide planning policies and issues outside the development review process. This requires planning commissioners to be in tune, and in touch, with citizens who are interested in planning issues. …

It is entirely appropriate for commissioners to participate in community organizations and to use those opportunities to discuss planning issues … as long as these do not involve specific case matters pending before the commission."

Citizen Planners

In thinking about the role of planning commissioners, how many of us are aware of the early history of planning commissions in America? Let's take a short trip with planning historian Laurence Gerckens – national historian for the American Institute of Certified Planners and a frequent contributor to the *PCJ* – as he recounts how citizen planners helped turn around one Midwestern city {392}

"It's easy to sit back and wait for problems to arrive at the planning commission. All of a commissioner's time can be spent stamping out brushfires and processing standard reviews. But it is worth recalling that citizen planning commissioners were put in that position … to provide insights into the problems and potential of the community, and to provide leadership in the solution of problems before they arise.

Consider the history of the Cincinnati Planning Commission: On January 4, 1914, a group of civic minded individuals and representatives of the community development committees of a number of Cincinnati organizations founded the 'United City Planning Committee.' … Through the medium of community planning, these Cincinnatians were seeking a more rational, publicly open, and less expensive system for the provision of needed capital facilities than the system of secret agreements, payoffs, and bribes that determined public development policy in Cincinnati at the time. …

The Committee charged [Alfred] Bettman with drafting state enabling legislation authorizing the creation of local, citizen dominated municipal planning commissions, giving these groups the power to create and adopt a general development plan for their communities. … In May of 1915 the Ohio legislature enacted the first planning enabling law in the United States …

The Cincinnati City Planning Commission … helped bring order, rationality, and economy to Cincinnati through: the integration of future land-uses, transportation facilities, and public utilities and facilities in a long-range comprehensive plan; the use of the land-use zoning power to shape future community form; and the use of carefully prepared six year capital budgets designed to allow for development while keeping tax expenditures at a low, even rate.

The bold and creative efforts of the citizen-member dominated Planning Commission shaped not only the city of Cincinnati, but also, through its example and leadership, the community planning practices of the entire country."
– from "Community Leadership & the Cincinnati Planning Commission" {392}

It Happened In Chicago

Let's take one step even farther back in time. In 1893 an event occurred in Chicago that profoundly affected the role citizens would come to play in shaping the future of their communities. Americans in the late 19th century were wrestling with the effects of rapid urban growth and development. But when they came to visit Chicago that year – as they did by the

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View across the west end of the Main Basin, World's Columbian Exposition, Chicago 1893.

CHICAGO HISTORICAL SOCIETY

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millions – they were moved by a strikingly beautiful vision of the future.

As one reporter described the scene: "The world has been vouchsafed one perfect vision which will never suffer from decay … then or now, no words can express the beauty of the Dream City, for it is beyond even the unearthly glamour of a dream."
– Candace Wheeler writing for Harper's New Monthly Magazine, May 1893.

As you've probably guessed – especially if you've taken a look at the photo! – the vision of the future was found at the World's Columbian Exposition, the great Chicago World's Fair of 1893.

Gerckens put the Chicago World's Fair in perspective for planners:

"Architect Daniel Hudson Burnham, Director of Works for the Chicago World's Fair of 1893 undertook to realize the first city-scale unified design of buildings, pedestrian plazas and public monuments in America. Painted all in white, this 'Great White City' thrilled visitors with its beauty, cleanliness and order. It initiated the City Beautiful Movement in the United States and catapulted Burnham into leadership of the newly emerging city planning profession.

Thousands of visitors left Chicago with the belief that things could be made better back home. They began to organize local groups to plan for a visually and functionally unified new 'civic center,' for metropolitan park systems and tree-lined boulevards with coordinated public benches, street lights and transit stations. They sought to realize architecturally integrated streets through laws regulating building heights and setting building setback lines.

Led by major businessmen, unofficial City Plan Committees undertook to raise the quality of the public environment to make physical America a fitting subject for public-spirited support and patriotic respect, capable of inspiring both the ambitions of youth and the visions of the industrious. The idea of America would take positive physical form through the effort of community planning commissions; it would be realized in community actions directed toward shaping and protecting the public environment. …

The modern American planning commission is the guardian of the public physical environment. When this responsibility is forsaken, all citizens of the community, present and future, suffer losses that are ecological, cultural, and economic, as well as aesthetic." *– from "Community Aesthetics & Planning"* {461}

Leadership

After reading Gerckens' remarks, we might ask ourselves whether we have visionary leadership in our cities and towns today – and whether planning commissioners should aspire to take on this role? As civic consultant Otis White has noted:

"The planning commission can be the perfect place for … leadership to emerge. First, because it's where many community disputes receive their earliest hearings, so if the community needs to learn new ways of resolving disagreements, the commission can be where it learns them. Second, with its mandate for planning, the commission is already concerned with the community's future. If new ideas are needed, where better for them to be developed and aired?

What's needed in those circumstances, though, are commissioners with an interest in broader community leadership, along with the temperament, experiences, and skills to take a leadership. … The key is to understand how communities navigate change and where your own talents and interests lie. … You have to be part analyst (What is my community's greatest needs? Where is it stuck?), part strategist (How could we get past this sticking point?), and part self-critic (What am I good at?)." *– from "Making a Difference: The Planning Commissioner As Community Change Agent"* {586}

The Big Picture

Over the years *PCJ* articles have focused not just on the role of the individual planning commissioner, but also on the role of the planning commission as a body – and how it can be more effective.

Many planning commissions spend much of their time in reviewing development applications or rezoning requests. Yes, these are important responsibilities, but one of the biggest challenges facing commissions is keeping their eye on the "big picture."

That was the theme of one of the very first articles we published – written by the late Perry Norton, one of America's most respected planners. Norton not only served as the first Executive Director of the American Institute of Planners in the 1950s, but three decades later in his retirement pioneered the use of online forums to discuss planning issues.

In his first *PCJ* article, "Remembering the Big Picture" {468}, here's some of what Norton had to say:

"When a shopping center is proposed, when the question of what is wetland and what isn't hits the fan, when people line up to protest the conversion of a single family residence to some sort of a group home, the local area newspapers are quick to point out that the 'planners' did this, or the 'planners' did that.

And who are these planners? Well, they're not those professionally trained planners, with degrees in planning. They are the members of local planning boards or commissions. They are, for the most part, volunteers, unpaid volunteers I might add, who give hours of their time, mostly in the evenings – carrying out the mandates of local and state land use planning laws.

The work, at times, gets tedious. Hours and hours of discussion as to whether a proposed land use meets the requirements of the zoning or subdivision ordinance, is consistent with all the codes, is not discriminatory, is or isn't a landmark, and so on. There are, indeed, so many items on the agenda that board members sometimes wonder what happened to the Big Picture.

The Big Picture is, indeed, a vital part of a planning board's responsibilities. … The public, through legislatures, gives planning boards broad mandates. Again, the specifics vary from one location to another, but the fact remains that people turn to planning boards to secure a high quality of living environment.

You get the picture. What society wants from its planners is something more than the processing of permits. It would like the processing of some vision, as well. Not an easy row to hoe. But enormously fruitful if faithfully tended.

The question is often posed, however: how do we deal with the Big Picture when there are so many little pictures we're lucky to get home in time for the 11 p.m. news? One thing is certain: the board has to make it happen."

The Planning Universe

If you've been a regular reader of the *PCJ*, you know that we've often focused on what we've called the "planning universe" – those individuals and groups (or planets, if you will) in the planning commission's orbit: lawyers; developers; planning consultants; the media; and so on.

But there are three that are especially important to planning commissions: citizens; the governing body; and last, but not least, planning staff.

Citizen Input

We've already touched on the need to be respectful to citizens during public hearings, in listening to what they have to say. But gaining input from citizens outside the formal hearing process is just as important.

As then Arlington County, Virginia, planning commissioner Monica Craven explained:

"An effective planning commission reaches out to the community and does not limit its interaction with the community to a single public hearing. With the help of the planning staff, the planning commission can organize and participate in outreach efforts such as public forums and walking tours, to name a few." – *from "Planning Commissioner Perspectives"* {322}

Along similar lines, Elaine Cogan spoke of the value in planners and planning commissioners going out to actively solicit public feedback:

"It was a sunny Friday. People were at their local mall as usual, shopping, strolling, meeting their friends and neighbors. Prominent among the storefronts, in the center of all the activity, was something new: a display about Our Town – what it is and what it might become, depending on the planning decisions that soon would be made.

Maps and drawings and possible alternatives in simple text were displayed attractively. Staff and commissioners stood nearby to engage onlookers in conversation and entice them to participate.

People were invited to stay as long as they liked – to write their comments on the displays and handy pads of paper, talk to planners, fill out questionnaires, and otherwise participate in a low-key but important exercise to help determine their community's future.

From more than 25 years experience designing and facilitating public participation processes, it is obvious to me that the most successful are those where we go out to the people – not expect them to come to us." – *from "Getting Out to Where the People Are"* {383}

Engage the Community

As Otis White noted in "Getting Power By Giving It Away" {313}: "By itself, a planning commission has limited powers. But allied with an involved and supportive community, its powers can be enormous."

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More articles on citizen involvement in planning:

- Michael Chandler, "Citizen Planning Academies" {309}
- Thomas Miller, "Citizen Surveys: Taking Your Community's Pulse" {377}
- Elaine Cogan, "Habla Usted Espanol?" {112}
- Elaine Cogan, "On Gauging Public Opinion" {314}
- Kathleen McMahon, "Public Outreach Through Video" {256}
- Kit Hodge, "The Next Generation of Your Planning Commission" {250}

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That means that neighborhood associations and other community groups should be places planning commissioners are familiar with.

In "Engaging the Public" {161}, planner Larry Frey pointed out that:

"One of the best ways to engage citizens in planning is by going out to their neighborhoods. Neighborhood-based planning is an old concept with tremendous power, but it is not used enough. While it may work best in municipalities which tend to have more distinct neighborhoods, rural areas can benefit as well, by identifying activity centers that target organized groups. … Meetings should be held in the neighborhood, allowing input to flow more freely and pertinent issues to unfold."

For more on how neighborhood associations and groups can help strengthen the local planning process, take a look also at Lila Shapero's "Bowling Together: The Role of Neighborhood Associations" {371} As Shapero noted:

"Bringing neighborhood associations on board helps makes them part of the solution, rather than an obstacle, in planning the community's future. At the same time, their input can deepen planners' and planning commissioners' understanding of neighborhood issues."

Lisa Hollingsworth-Segedy drew our attention to another way of better understanding peoples' issues and concerns:

"My grandmother used to tell me, 'We have two ears and one mouth because listening is twice as important as talking.' … A few years ago, Jim [Segedy] was working with a rural Midwestern community to develop a new comprehensive plan. The interviews with elected and appointed officials had gone well, and the public meetings were well attended, but the actual usable community input was sparse. So in an infrastructure focus group, I asked, 'What was the most exciting day in your town?'

Right away several folks talked about the tornado that had hit a few years before. From their stories of the storm striking with no warning, residents suddenly realized that a storm warning siren network was an important infrastructure and public safety need they had overlooked when writing their new plan. … The act of listening to someone's story allows them to listen to it as well – this is empowerment at the most basic level." – *from "Inviting Them In: Using Story as a Planning Tool"* {421}

Planning Commissions & Governing Bodies

In thinking about the relationship between a planning commission and the local governing body, it's important to recognize the very different roles each plays – while also keeping in mind how the two are intertwined.

In one of the early issues of the *PCJ* we ran an article by Pamela Plumb, who had served both as Mayor of Portland, Maine, and on the City Council – and was also a past president of the National League of Cities. Plumb provided an overview of the relationship between the two bodies:

"There has always been a delicate dance in the relationship between Town Councils and their appointed Planning Boards. Perhaps it comes from the community emotion that inevitably surrounds local land use issues. Perhaps it is rooted in a lack of clarity about their different roles. Whatever the origins of this tension, the relationship is frequently a source of debate and occasionally a source of friction. …

The two groups have distinctly different jobs. Councilors are policy makers. They are elected by and are responsive to the public whom they represent in all its various constituencies. The Board members, on the other hand, are not policy makers. They are appointed to work within the ordinances adopted by the Council. They work within already established policy and do not change policy based on public comment.

Even if the room is packed with citizens arguing that a permitted use be denied in a site plan hearing, it is not the Planning Board's role to change what is or is not permitted. It is their role to apply the given ordinance. If the public does not like what the ordinance permits, then the Council is the place to get it changed. Similarly, if the Board is concerned about the impacts of applying a given ordinance, their option is to recommend changes to the Council.

Even in the process of rewriting or developing new ordinances, the Council is still the policy maker … [it] gives a sense of direction to the Board. The Board then uses its specialized background and expertise to make recommendations back to the Council. The recommendations may be creative and far reaching. They may be more complex or technically innovative than the Council ever imagined. But, it is the Council that makes the final decision with whatever political considerations it deems appropriate.

Each role is vital to a smoothly functioning community. But they are separate. If the Board tries to set policy or the Council tries to interfere with the application of the ordinance or fails to value the technical advice of the Board, confusion and trouble will follow." – *from "Town Councils and Planning Boards: A Challenging Relationship"* {584}

Not Having the Final Word

As Mike Chandler once observed: "Not having the final word can be a difficult thing – especially when the commission expends great amounts of time and energy only to have its advice rejected by the governing body (though, hopefully, this

will not happen too often)."

But, as he added: "Don't let this discourage you. Instead, look for ways your commission can advance the cause of good planning, and strengthen its relationship with the governing body. Remember that as a planning commissioner you're responsible for focusing on the long-term. Most elected officials appreciate this forward thinking role because it allows them to gauge the public's receptivity to future courses of action." – *from "Linking Elected Officials with Planning* {139}

Remain Above Politics

Don't forget this advice from Jim Segedy:

"The planning commission's marching orders are to provide the best advice to the governing body as laid out in the comprehensive plan, mindful of the potentially evolving notion of the health, safety, and welfare of the whole community. Planning commissioners MUST remain above politics." – *from "Putting Some Oomph Into Planning"* {560}

Consider also some cautionary words Greg Dale wrote about the relationship between elected officials and planning commissioners.

"As an appointed planning commissioner you are not designated to represent any special interest group. Neither are you appointed to represent the 'voice' of an elected official. More specifically, as a planning commissioner you have an ethical obligation to remain in a position of objectivity and fairness.

Your position should not be used to seek political favors, nor should you create a perception that you are seeking political goodwill in your action. Any time you take a position at the urging of an elected official, you run the risk of tainting your credibility as an objective decision-maker. In addition, contacts that you have outside of the public meeting process may fall in the category of ex parte contacts." – *from "Who Do You Work For?"* {545}

Staff Relations

It almost goes without saying that if planning commissioners and staff don't have a good working relationship, the community's planning efforts will be badly handicapped. It is essential for both commissioners and staff to understand their respective roles, and to work cooperatively.

In "Sitting on Both Sides of the Table" {467}, several planning commissioners who have also worked as professional planners spoke to this:

• "The ideal situation is that the board and staff see themselves as a team, each with distinct but equal roles. Staff is there to do the heavy lifting regarding the board's submission standards and plan reviews and the board's job is to determine if the submission meets the relevant approval criteria." – *Aaron Henry, Danvers, Massachusetts.*

• "Open communication is the best way to have a great working relationship. Talking outside of the monthly meetings is a great way to build a rapport between staff and commissioners. Communication is the key." – *Austin Bleess, Winnebago, Minnesota.*

• "Don't take the staff or the professional planner's word on everything. Ask for an explanation. Commissioners need to understand that the staff's job is to interpret the regulations but the decision making process is not just a checklist. There is room for subjectivity as well, otherwise there is no need for the commission." – *Tim Jackson, New Orleans, Louisiana.*

Along these lines, Greg Dale in "Independent and Informed" {133} noted that: "Planning commissions should take full advantage of staff expertise in making decisions. However, both commission and staff should recognize the obligation of the commission to act in an independent manner."

We'll leave the final word in our overview of the role of the planning commissioner with Elaine Cogan. In "Staff Needs a Little TLC, Too" {440} Cogan reminded planning commissioners to:

"Resist the temptation to 'micro-manage' … you are not expected to be a professional planner. Indeed, you would be less effective as a citizen planning commissioner if you were. Even if you are a successful professional or businessperson, it is not appropriate to try to tell the planning director whom to hire or fire or how you think the agency should be managed. You should have more than enough to do studying the issues and making policy decisions."

From my own experience as a planning commissioner, I can say "amen" to Elaine Cogan's remarks – and to the many thoughtful comments and suggestions we've heard from commissioners, staff, and others across the country over the past twenty years. Thank you all for making my job as editor of the *PCJ* so much easier.

PlannersWeb

We hope you enjoyed this overview of what planning commissioners do. As we mentioned at the start, when our redesigned and updated *PlannersWeb* site is up and running this summer, you'll be able to access the nearly 500 articles we've published – including all the articles referenced in what you just read. Join us as charter members as we move online. ◆

Wayne M. Senville has been publisher and editor of the Planning Commissioners Journal since its founding in 1991. Senville was also honored to serve as a member of the Burlington, Vermont, Planning Commission for eleven years, including three as Chair.

Join us at: PlannersWeb.com

Public Hearings Required by Utah State Law 2016

Utah Code Title 10 Chapter 09a
Municipal Land Use, Development, and Management
http://www.le.state.ut.us/~code/TITLE10

#1. The General Plan. Public hearing by planning commission on proposed general plan or amendment. Notice. Revisions to general plan or amendment. Adoption or rejection by legislative body. 10-9a-404.

(1) (a) After completing its recommendation for a proposed general plan, or proposal to amend the general plan, the planning commission shall schedule and hold a public hearing on the proposed plan or amendment.
(b) The planning commission shall provide notice of the public hearing, as required by Section **10-9a-204.**
(c) After the public hearing, the planning commission may modify the proposed general plan or amendment.
(2) The planning commission shall forward the proposed general plan or amendment to the legislative body.
(3) The legislative body may make any revisions to the proposed general plan or amendment that it considers appropriate.
(4) (a) The municipal legislative body may adopt or reject the proposed general plan or amendment either as proposed by the planning commission or after making any revision that the municipal legislative body considers appropriate.
(b) If the municipal legislative body rejects the proposed general plan or amendment, it may provide suggestions to the planning commission for its consideration.
(5) The legislative body shall adopt:
(a) a land use element as provided in Subsection 10-9a-403(2)(a)(i);
(b) a transportation and traffic circulation element as provided in Subsection **10-9a-403**
(2)(a)(ii); and
(c) for all cities, after considering the factors included in Subsection **10-9a-403**(2)(b)(ii), a plan to provide a realistic opportunity to meet estimated needs for additional moderate income housing if long-term projections for land use and development occur.

#2. Notice of public hearings and public meetings on adoption or modification of land use ordinance. 10-9a-205.

(1) Each municipality shall give:
(a) notice of the date, time, and place of the first public hearing to consider the adoption or any modification of a land use ordinance; and
(b) notice of each public meeting on the subject.
(2) Each notice of a public hearing under Subsection (1)(a) shall be:
(a) mailed to each affected entity at least 10 calendar days before the public hearing;
(b) posted:
(i) in at least three public locations within the municipality; or
(ii) on the municipality's official website; and
(c) (i) (A) published in a newspaper of general circulation in the area at least 10 calendar days before the public hearing; and
(B) published on the Utah Public Notice Website created in Section 63F-1-701, at least 10 calendar days before the public hearing; or
(ii) mailed at least 10 days before the public hearing to:

(A) each property owner whose land is directly affected by the land use ordinance change; and
(B) each adjacent property owner within the parameters specified by municipal ordinance.
(3) Each notice of a public meeting under Subsection (1)(b) shall be at least 24 hours before the meeting and shall be posted:
(a) in at least three public locations within the municipality; or
(b) on the municipality's official website.
(4) (a) If a municipality plans to hold a public hearing in accordance with Section 10-9a-502 to adopt a zoning map or map amendment, the municipality shall send a courtesy notice to each owner of private real property whose property is located entirely or partially within the proposed map at least 10 days prior to the scheduled day of the public hearing.
(b) The notice shall:
(i) identify with specificity each owner of record of real property that will be affected by the proposed zoning map or map amendments;
(ii) state the current zone in which the real property is located;
(iii) state the proposed new zone for the real property;
(iv) provide information regarding or a reference to the proposed regulations, prohibitions, and permitted uses that the property will be subject to if the zoning map or map amendment is adopted;
(v) state that the owner of real property may no later than 10 days after the day of the first public hearing file a written objection to the inclusion of the owner's property in the proposed zoning map or map amendment;
(vi) state the address where the property owner should file the protest;
(vii) notify the property owner that each written objection filed with the municipality will be provided to the municipal legislative body; and
(viii) state the location, date, and time of the public hearing described in Section 10-9a-502 .
(c) If a municipality mails notice to a property owner in accordance with Subsection (2)(c)(ii) for a public hearing on a zoning map or map amendment, the notice required in this Subsection (4) may be included in or part of the notice described in Subsection (2)(c)(ii) rather than sent separately.

Preparation and adoption of land use ordinance or zoning map. 10-9a-502.
(1) The planning commission shall:
(a) provide notice as required by Subsection 10-9a-205 (1)(a) and, if applicable, *Subsection 10-9a-205*
(b) hold a public hearing on a proposed land use ordinance or zoning map; [~~and~~]
(c) if applicable, consider each written objection filed in accordance with Subsection 10-9a-205 (4) prior to the public hearing; and ~~[(c)]~~ *(d) (i)* prepare and recommend to the legislative body a proposed land use
ordinance or ordinances and zoning map that represent the planning commission's recommendation for regulating the use and development of land within all or any part of the area of the municipality[~~.~~]; *and*
(ii) forward to the legislative body all objections filed in accordance with Subsection 10-9a-205 (4).
(2) The municipal legislative body shall consider each proposed land use ordinance and zoning map recommended to it by the planning commission, and, after providing notice as required by Subsection 10-9a-205 (1)(b) and holding a public meeting, the legislative body may adopt or reject the ordinance or map either as proposed by the planning commission or after making any revision the municipal legislative body considers appropriate.

#3. Subdivision Ordinance. Planning commission preparation and recommendation of subdivision ordinance. Adoption or rejection by legislative body. 10-9a-602.

(1) The planning commission shall:
(a) prepare and recommend a proposed ordinance to the legislative body that regulates the subdivision of land;
(b) prepare and recommend or consider and recommend a proposed ordinance that amends the regulation of the subdivision of the land in the municipality;
(c) provide notice consistent with Section **10-9a-205**; and
(d) hold a public hearing on the proposed ordinance before making its final recommendation to the legislative body.
(2) The municipal legislative body may adopt or reject the ordinance either as proposed by the planning commission or after making any revision the legislative body considers appropriate.

#4. Vacating, altering, or amending a subdivision plat. 10-9a-608.

(1) (a) A fee owner of land, as shown on the last county assessment roll, in a subdivision that has been laid out and platted as provided in this part may file a written petition with the land use authority to have some or all of the plat vacated or amended.
(b) If a petition is filed under Subsection (1)(a), the land use authority shall provide notice of the petition by mail, email, or other effective means to each affected entity that provides a service to an owner of record of the portion of the plat that is being vacated or amended at least 10 calendar days before the land use authority may approve the vacation or amendment of the plat.
~~[(b)]~~ (c) If a petition is filed under Subsection (1)(a), the land use authority shall hold a public hearing within 45 days after the day on which the petition is filed if:
(i) any owner within the plat notifies the municipality of the owner's objection in writing within 10 days of mailed notification; or
(ii) a public hearing is required because all of the owners in the subdivision have not signed the revised plat.
(2) Unless a local ordinance provides otherwise, the public hearing requirement of Subsection (1)~~[(b)]~~(c) does not apply and a land use authority may consider at a public meeting an owner's petition to vacate or amend a subdivision plat if:
(a) the petition seeks to:
(i) join two or more of the petitioner fee owner's contiguous lots;
(ii) subdivide one or more of the petitioning fee owner's lots, if the subdivision will not result in a violation of a land use ordinance or a development condition;
(iii) adjust the lot lines of adjoining lots or parcels if the fee owners of each of the adjoining lots or parcels join in the petition, regardless of whether the lots or parcels are located in the same subdivision;
(iv) on a lot owned by the petitioning fee owner, adjust an internal lot restriction imposed by the local political subdivision; or
(v) alter the plat in a manner that does not change existing boundaries or other attributes of lots within the subdivision that are not:
(A) owned by the petitioner; or
(B) designated as a common area; and
(b) notice has been given to adjacent property owners in accordance with any applicable local ordinance.
(3) Each request to vacate or amend a plat that contains a request to vacate or amend a public street, right-of-way, or easement is also subject to Section **10-9a-609.5.**

(4) Each petition to vacate or amend an entire plat or a portion of a plat shall include:
(a) the name and address of each owner of record of the land contained in the entire plat or on that portion of the plat described in the petition; and
(b) the signature of each owner described in Subsection (4)(a) who consents to the petition.
(5) (a) The owners of record of adjacent parcels that are described by either a metes and bounds description or by a recorded plat may exchange title to portions of those parcels if the exchange of title is approved by the land use authority in accordance with Subsection (5)(b).
(b) The land use authority shall approve an exchange of title under Subsection (5)(a) if the exchange of title will not result in a violation of any land use ordinance.
(c) If an exchange of title is approved under Subsection (5)(b):
(i) a notice of approval shall be recorded in the office of the county recorder which:
(A) is executed by each owner included in the exchange and by the land use authority;
(B) contains an acknowledgment for each party executing the notice in accordance with the provisions of Title 57, Chapter 2a, Recognition of Acknowledgments Act; and
(C) recites the descriptions of both the original parcels and the parcels created by the exchange of title; and
(ii) a document of conveyance shall be recorded in the office of the county recorder.
(d) A notice of approval recorded under this Subsection (5) does not act as a conveyance of title to real property and is not required in order to record a document conveying title to real property.
(6) (a) The name of a recorded subdivision may be changed by recording an amended plat making that change, as provided in this section and subject to Subsection (6)(c).
(b) The surveyor preparing the amended plat shall certify that the surveyor:
(i) holds a license in accordance with Title 58, Chapter 22, Professional Engineers and Professional Land Surveyors Licensing Act;
(ii) has completed a survey of the property described on the plat in accordance with Section 17-23-17 and has verified all measurements; and
(iii) has placed monuments as represented on the plat.

#5. Vacating a street, right-of-way, or easement. 10-9a-609.5.

(1) A petition to vacate some or all of a public street, right-of-way, or easement shall include:
(a) the name and address of each owner of record of land that is:
(i) adjacent to the public street, right-of-way, or easement; or
(ii) accessed exclusively by or within 300 feet of the public street, right-of-way, or easement; and
(b) the signature of each owner under Subsection (1)(a) who consents to the vacation.
(2) If a petition is submitted containing a request to vacate some or all of a street, right-of-way, or easement, the legislative body shall hold a public hearing in accordance with Section 10-9a-208 and determine whether:
(a) good cause exists for the vacation; and
(b) the public interest or any person will be materially injured by the proposed vacation.
(3) The legislative body may adopt an ordinance granting a petition to vacate some or all of a public street, right-of-way, or easement if the legislative body finds that:
(a) good cause exists for the vacation; and
(b) neither the public interest nor any person will be materially injured by the vacation.
(4) If the legislative body adopts an ordinance vacating some or all of a public street, right-of-way, or easement, the legislative body shall ensure that a plat reflecting the vacation is recorded in the office of the recorder of the county in which the land is located.
(5) The action of the legislative body vacating some or all of a street, right-of-way, or easement that

has been dedicated to public use:
(a) operates to the extent to which it is vacated, upon the effective date of the recorded plat, as a revocation of the acceptance of and the relinquishment of the municipality's fee in the vacated street, right-of-way, or easement; and
(b) may not be construed to impair:
(i) any right-of-way or easement of any lot owner; or
(ii) the franchise rights of any public utility.

#6. Annexation policy plan. 10-2-401.5.

(1) After December 31, 2002, no municipality may annex an unincorporated area located within a specified county unless the municipality has adopted an annexation policy plan as provided in this section.
(2) To adopt an annexation policy plan:
(a) the planning commission shall:
(i) prepare a proposed annexation policy plan that complies with Subsection (3);
(ii) hold a public meeting to allow affected entities to examine the proposed annexation policy plan and to provide input on it;
(iii) provide notice of the public meeting under Subsection (2)(a)(ii) to each affected entity at least 14 days before the meeting;
(iv) accept and consider any additional written comments from affected entities until ten days after the public meeting under Subsection (2)(a)(ii);
(v) before holding the public hearing required under Subsection (2)(a)(vi), make any modifications to the proposed annexation policy plan the planning commission considers appropriate, based on input provided at or within ten days after the public meeting under Subsection (2)(a)(ii);
(vi) hold a public hearing on the proposed annexation policy plan;
(vii) provide reasonable public notice, including notice to each affected entity, of the public hearing required under Subsection (2)(a)(vi) at least 14 days before the date of the hearing;
(viii) make any modifications to the proposed annexation policy plan the planning commission considers appropriate, based on public input provided at the public hearing; and
(ix) submit its recommended annexation policy plan to the municipal legislative body; and
(b) the municipal legislative body shall:
(i) hold a public hearing on the annexation policy plan recommended by the planning commission;
(ii) provide reasonable notice, including notice to each affected entity, of the public hearing at least 14 days before the date of the hearing;
(iii) after the public hearing under Subsection (2)(b)(ii), make any modifications to the recommended annexation policy plan that the legislative body considers appropriate; and
(iv) adopt the recommended annexation policy plan, with or without modifications.
(3) Each annexation policy plan shall include:
(a) a map of the expansion area which may include territory located outside the county in which the municipality is located;
(b) a statement of the specific criteria that will guide the municipality's decision whether or not to grant future annexation petitions, addressing matters relevant to those criteria including:
(i) the character of the community;
(ii) the need for municipal services in developed and undeveloped unincorporated areas;
(iii) the municipality's plans for extension of municipal services;
(iv) how the services will be financed;
(v) an estimate of the tax consequences to residents both currently within the municipal boundaries and in the expansion area; and
(vi) the interests of all affected entities;

(c) justification for excluding from the expansion area any area containing urban development within 1/2 mile of the municipality's boundary; and
(d) a statement addressing any comments made by affected entities at or within ten days after the public meeting under Subsection (2)(a)(ii).
(4) In developing, considering, and adopting an annexation policy plan, the planning commission and municipal legislative body shall:
(a) attempt to avoid gaps between or overlaps with the expansion areas of other municipalities;
(b) consider population growth projections for the municipality and adjoining areas for the next 20 years;
(c) consider current and projected costs of infrastructure, urban services, and public facilities necessary:
(i) to facilitate full development of the area within the municipality; and
(ii) to expand the infrastructure, services, and facilities into the area being considered for inclusion in the expansion area;
(d) consider, in conjunction with the municipality's general plan, the need over the next 20 years for additional land suitable for residential, commercial, and industrial development;
(e) consider the reasons for including agricultural lands, forests, recreational areas, and wildlife management areas in the municipality; and
(f) be guided by the principles set forth in Subsection **10-2-403**(5).
(5) Within 30 days after adopting an annexation policy plan, the municipal legislative body shall submit a copy of the plan to the legislative body of each county in which any of the municipality's expansion area is located.
(6) Nothing in this chapter may be construed to prohibit or restrict two or more municipalities in specified counties from negotiating and cooperating with respect to defining each municipality's expansion area under an annexation policy plan.

Public Hearings

David Church, ULCT

There is a difference between a public meeting and a public hearing. All public hearings are public meetings but not all public meetings are public hearings. In general a public meeting is one in which the public is invited to come and watch you deliberate on and decide matters. There is no right for any individual member of the public to actively participate in the meeting (although there is nothing wrong about allowing it to). In a public hearing the public has the right to participate by giving information or testimony about the topic of the hearing. All meetings that meet the definition of meeting in the Open and Public Meetings Act must be public meetings. A public meeting must also be a public hearing when some specific law, ordinance or policy requires it to be so.

Most things that city and town councils are involved in do not require public hearings. However, city and town councils are required by state law to hold public hearings on some specific issues. These issues fall into two general categories. Public hearings must be held on financial issues and on the enactment of land use control ordinances and policies. Examples of the financial issues that require a public hearing are the adoption of a city or town budget, tax increase, and issuing of certain bonds. The common land use issues that require a public hearing are the adoption (or amendment) of the general plan, land use control and subdivision ordinances, and the approval of certain subdivisions. Some less common matters that require a public hearing include the setting of compensation for elected and appointed officials and the vacation of a street.

Most ordinances adopted by a city or town that do not regulate the use of land, do not require a public hearing. For example the adoption of animal control ordinances, nuisance ordinances, and ordinances regulating traffic or use of public property do not require a public hearing. Even though a public hearing may not be required for these types of ordinances, it may be a good idea to hold one anyway. After all it does not do any good to pass an ordinance that nobody knows about. In addition a controversial ordinance will result in an eventual de facto public hearing, even though it is not called or required, after the ordinance is passed and becomes known to the public.

All required public hearings will have a mandatory notice requirement. This requirement will include what must be stated in the notice and the manner of publicizing the hearing. In short, if the law requires a public hearing, the law will also dictate what, when, how and how often the public must be notified of the hearing, These noticing requirements should be strictly adhered to or you risk having to hold the hearing anew. There is no general rule of thumb for these notices except almost all notices must be published in a newspaper of general circulation unless the city or town is so isolated no such newspaper exists. The only way of knowing what needs to be done for each public hearing notice is to look up the law.

The following are examples of some of the most common required public hearings and the minimum published notice required. This is not a complete list. There are other required public hearings. You have to check the state statutes when ever you are doing something out of the ordinary to see if a public hearing is required.

- The adoption or amendment of an annexation policy declaration requires two public hearings, one with the planning commission and one with the city or town council each with at least 14 days notice.[1]
- The ordinance annexing property into a city or town requires a public hearing with at least seven days notice.[2]
- A boundary adjustment requires a public hearing with a notice given at least once a week for three consecutive weeks.[3]
- A properly filed request for disconnection is entitled to a public hearing with a seven day notice.[4]
- A public hearing with a seven day notice is required before an ordinance can be passed adopting or amending the compensation for elected and statutory officers.[5]
- The hearing for adoption of or amendment of a budget in a town needs seven days notice[6] while the required public hearing notice for adoption or amendment of a budget in a city is seven days.[7]

Notices of public hearings regarding land use matters are more complicated. A public hearing is required for the amendment or adoption of a general plan. This hearing requires notice be published at least 10 calendar days before the hearing.[8] I do not know the difference between just a "day" and a "calendar day" but apparently it was important to the writers of the law that it be clear that the notice not just be given 10 days before, it had to be calendar days. I myself never count days I can't find on the calendar but maybe someone else does. Whenever any land use ordinance (zoning or subdivision) is amended or adopted a public hearing is required. The notice for this hearing must be published at least 10 calendar days before the hearing, posted in three public places in the city, and mailed to the property owners who are directly affected.[9]

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1 Utah Code 10-2-401.5(2).
2 Utah Code 10-2-407(3)(b)(ii).
3 Utah Code 10-2-419(2).
4 Utah Code 10-2-502.5.
5 Utah Code 10-3-818.
6 Utah Code 10-5-108.
7 Utah Code 10-6-113.
8 Utah Code 10-9a-204.
9 Utah Code 10-9a-205

Public hearings can become quite contentious. It is the duty of the chair of the meeting to see that they are kept in control. The best way to do this is to establish clear rules for the public hearing. Those rules can include reasonable limitations on the time each speaker is given and the conduct of the speaker. What is reasonable depends on the issue, the number of people present and the time constraints of the meeting. One good way of keeping a public hearing on track is for the chair to keep members of the council and city staff from responding directly to the member of the public who is speaking. It is very tempting to try to correct misstatements made in a public hearing, but this is rarely helpful. It leads to unnecessary confrontation and argument. A public hearing is a time for the public to speak and not a time for the council members to pontificate, but to listen.

Public hearings can be very useful tools for local government officials. Like any tool, they have to be used properly. I believe in the following maxims for proper use of a public hearing.

- Always remember that the purpose of the public hearing is to get information from the public and to inform the public. It is not to convince the public that what you propose to do is right.
- The more formal the rules of procedures for the meeting, the better the hearing will be. Formal rules of procedure for a public hearing will result in respectful speakers and respect for the process. Less formal rules of procedure can lead to chaos, contention and incivility.
- All speakers should be afforded respect from the council and the other members of the public. The chair must use the power of the gavel to see that this is done.

The rules of procedure that are required to be adopted for both city council and planning commission meetings can and probably should also contain rules for conducting public hearings. These rules can include rules of conduct for the public. The rules should be available at the meeting and published on the city or town's website if any.

Ordinances and Resolutions

David Church, ULCT

Municipal power is exercised by city legislative bodies through passage of ordinances and resolutions. The Utah Municipal Code sets forth the general process for enacting an ordinance or resolution.[1] The difference between an ordinance and a resolution is that a resolution is used to exercise only administrative powers. Examples of administrative powers are such things as establishing water and sewer rates, charges for garbage collection, or adopting personnel policies or guidelines regulating the use of municipal property. All legislative functions must be done by ordinance. Items such as punishments, fines, or forfeitures, may not be imposed by resolution but must be imposed by ordinance.

All ordinances and resolutions must be in a written form in front of the council prior to their passage. This does not mean that the written proposed ordinance cannot be amended at the meeting. It only means that there has to be a starting proposed written ordinance.

The written form of an ordinance and resolution should be substantially the following:

1. A number.
2. A title that indicates the nature of the subject matter of the ordinance or resolution.
3. A preamble that states the need or reason for the ordinance or resolution.
4. An ordaining clause which states "be it ordained (or resolved) by the (name of the governing body and municipality)."
5. The body or subject of the ordinance or resolution.
6. When applicable, a statement indicating the penalty for violation of the ordinance.
7. A statement indicating the effective date of the ordinance or when the ordinance shall become effective.
8. A place for the signature of the mayor or acting mayor.
9. A place for the municipal recorder to attest the signature of the mayor.[2]

An ordinance becomes effective either on the effective date set forth in the ordinance or if it does not have an effective date 20 days after publication or posting or 30 days after final passage, whichever is closer to the date of passage.[3]

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[1] Utah Code 10-3-701 et seq.

[2] Utah Code 10-3-705.

[3] Utah Code 10-3-712.

In all municipalities other than those operating under the council-mayor form of government, ordinances are to be signed by the mayor (if the mayor is absent, by the mayor pro tem), or by a quorum of the governing body. In the council-mayor form, the ordinance is submitted to the mayor for approval or veto. Mayors in other forms of government do not have veto rights.

Ordinances must be recorded before taking effect. Recording is when the city recorder, records in a book used for that purpose, all ordinances passed by the governing body. The city recorder gives each ordinance a number if the governing body has not already done so. Following each ordinance or codification of the ordinances, the recorder is to make, or cause to be made, a certificate stating the date of passage and the date of publication or posting, as required.[4]

A short summary of the ordinance is required to be published at least once in a newspaper of general circulation within the municipality or posted in nine public places for a city of the first class or three public places for other cities and towns.[5]

Resolutions are effective without publication or posting and may take effect on passage or at a later date as the governing body may determine, but resolutions may not become effective more than three months from the date of passage.

No ordinance or resolution may be adopted by a municipality except in an open and public meeting held pursuant to the Utah Open and Public Meetings Act. Most ordinances and resolutions do not require a public hearing prior to their adoption. The exceptions to this general rule include ordinances adopting salary schedules for elected officers and officials, which require a public hearing upon seven days notice; resolutions or ordinances adopting the tax levy, or budget, which require a public hearing of at least forty-eight hours in towns and seven days in cities; land use ordinances, which require generally a minimum of 14 days notice of the public hearing; and ordinances enacting impact fees. If there is not a specific state statute that requires a public hearing prior to the ordinance or resolution being passed, then no public hearing is required. However, it is important to remember that no ordinance or resolution can be acted on except at a public meeting held pursuant to the Utah Open and Public Meetings Act.

A city or town may adopt by reference, without publication or posting, any code or book relating to building or safety standards or other published codes. Three copies of the code book are required (one copy in towns) to be on file at the municipal recorder's office for public inspection prior to adoption of the ordinance. The ordinance adopting the code by reference is then posted or published in the usual way.[6]

[4] Utah Code 10-3-713.
[5] Utah Code 10-3-711.
[6] Utah Code 10-3-711.

The municipality may compile its previously adopted ordinances in a book form. The codification of the ordinances may be contracted out to professional publishers. The ordinances in the code need not contain the titles, enacting clauses, or signatures. The code can be compiled and then adopted by a simple ordinance that is either published or posted, as required.[7]

Helpful Tips

- All ordinances must be in writing before being voted on.
- All ordinances are to be numbered, signed, and recorded.
- At least a summary of all ordinances must be published or posted.
- If it's not appropriately on the agenda you cannot pass it.
- All ordinances are public documents.

[7] Utah Code 10-3-707.

Sample Planning Commission Ordinance

Chapter 4
HUNTINGTON CITY PLANNING COMMISSION

4-1 Establishment of the Planning Commission.

There is created a Planning Commission to be composed of five voting, one non-voting member who is a representative of the City Council and one alternate member. Members of the Planning Commission shall be appointed by the Mayor with the advice and consent of the City Council. The ex-officio member of the Planning Commission shall be appointed from among members of the City Council by the Mayor with the advice and consent of the City Council. The alternate member shall be utilized in order to maintain a quorum.

The Planning Commission shall consist of 5 residents of Huntington City. At least three of these 5 members shall hold no other public office or position within the City. Members shall be selected without respect to political affiliations.

The members of the Planning Commission shall serve without compensation, but the City Council shall provide for the reimbursement of the members of the Planning Commission for reasonable expenses incurred in performing their duties as members of the Planning Commission.

4-2 Appointment—Term.

The term of office of the members of the Planning Commission, with the exception of the ex-officio member, shall be 5 year(s), and until their respective successors shall have been appointed. The terms of the initial members shall be staggered, so that 3 members serve for 3 year(s), and 2 members serve for 2 years. The alternate shall serve a two year term. Appointments shall be made at the beginning of the calendar year.

Vacancies in the Planning Commission occurring for any reason other than the expiration of a term of office shall be filled through appointment by the Mayor with the advice and consent of the City Council. Members appointed to fill such vacancies shall serve for the remainder of the unexpired term. The ex-officio member shall serve at the pleasure of the City Council, or until his or her term as a councilperson has expired, at which time a successor shall be appointed from among the members of the City Council by the Mayor, with the advice and consent of the City Council. Any member may be re-appointed for an additional term.

There is no limit to the number of terms a member may serve. Upon a majority vote in a public meeting, the City Council may remove from office any member of the Planning Commission-for misconduct or non-performance of duty. Unexcused absence from three consecutive regular meetings of the Planning Commission shall constitute non-performance of duty.

The Planning Commission shall elect from among its members a Chairperson, whose term shall be one year. Any member may be re-elected for an additional term as Chairperson. There is no limit to the number of terms a member may serve as Chairperson. If for any reason, the position of Chairperson is vacated before the elected member's term has expired, the Planning Commission shall elect from among its members a successor, who shall serve for the remainder of the unexpired term.

4-3 Powers and Duties. The Planning Commission shall be the Land Use Authority that:

(a) Prepares and recommends a general plan and amendments to the general plan to the City Council;

(b) Prepares and recommends to the City Council, zoning ordinances and maps, and amendments to zoning ordinances and maps, which conform to the provisions of the general plan adopted by the City Council;

(c) Administers provisions of the zoning ordinance, where specifically provided for in the zoning ordinance adopted by the City Council;

(d) Prepares and recommends to the City Council, subdivision regulations and amendments to those regulations, which conform to the provisions of the general plan adopted by the City Council;

(e) Recommends approval or denial of subdivision applications;

(f) Advises the City Council on matters as the City Council directs and hears, or decides any matters that the City Council designates and as otherwise authorized by state law;

(g) Assists the City Council with the creation of an Appeal Authority for the City of Huntington;

(h) Conduct such public hearings as are required by law or as may be deemed necessary by the Planning Commission.

(i) The Planning Commission has the power and authority to employ experts and a staff, and to pay such expenses as may be reasonable and necessary for carrying out the duties of the Planning Commission, but not in excess of such sums as may be appropriated by the City Council and/or which may be placed at the disposal of the Planning Commission by gift or otherwise.

(j) The Planning Commission or its authorized agents may enter upon any land, public or private, at reasonable times to make examinations or surveys.

(k) Hears and decides any matters that the City Council designates, including the approval or denial of conditional use permits and review of non conforming uses and structures; and

(l) Exercises other powers that are necessary to enable it to perform its function, or that are delegated to it by the City Council.

4-4 Organization. The Planning Commission may adopt such rules that it deems necessary for the conduct of its proceedings. The Planning Commission shall keep minutes of its proceedings, showing the vote of each member upon each question, or if absent or failing to vote, indicating such fact, and shall keep records of its examinations and other official actions, all of which shall immediately be filed in the office of the recorder/clerk, which shall be the office of the Planning Commission, and shall be a public record.

A. Meetings. The Planning Commission shall meet monthly and at such times as the Planning Commission may determine necessary. Meetings shall be held at the Huntington City offices or at such other reasonable location(s) within Huntington City as the Planning Commission may adjourn from time to time. Meetings shall be held in accordance with the provisions of Section 52-4-1 UCA (1953 edition), as amended (UCA), entitled "Open and public meetings", or any successor statute enacted in its place.

B. Quorum. Three (3) members of the Planning Commission shall constitute a quorum. An alternate member may be counted as part of the membership for a quorum. A majority of the voting members present at a meeting at which a quorum is present shall be required for any action. No less than three (3) yes votes are required for passage of any action.

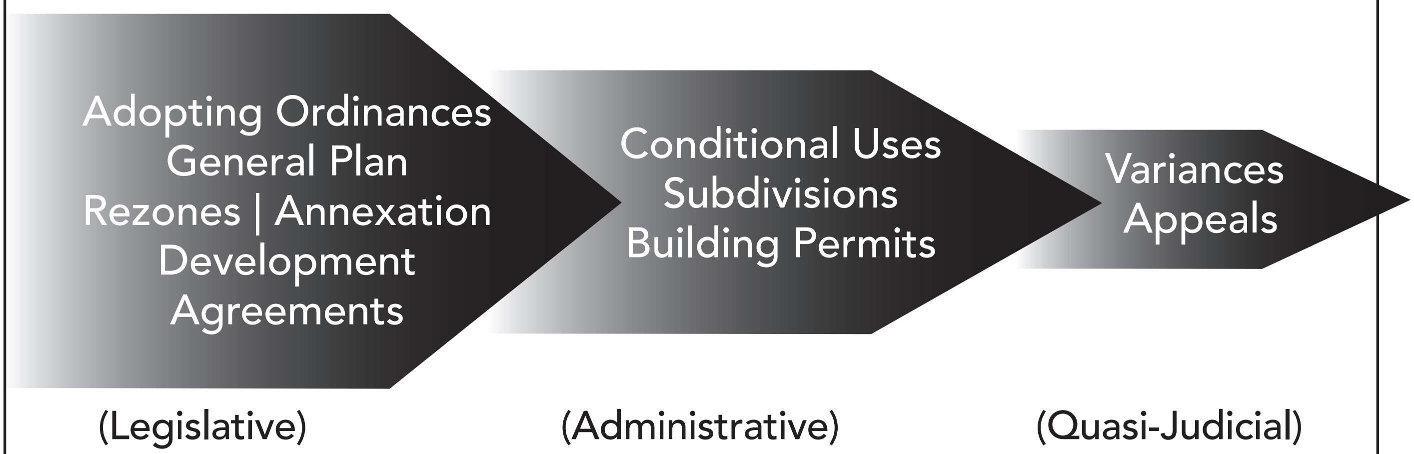
4-5 Conformance with General Plan.

Upon adoption of the general plan by the City Council, thereafter, no street, park or other public way, ground, place or space; no public building or structure; and no public utility, whether publicly or privately owned, shall be constructed or authorized until and unless the location and extent thereof shall conform to the general plan, and shall have been submitted to and approved by the Planning Commission. In the case of disapproval, the Planning Commission shall communicate its reasons to the City Council, which may, by a vote of not less than a majority of its entire membership, overrule such disapproval.

The widening, narrowing, extension, relocation, removal, vacation, abandonment, change of use, acceptance, acquisition, sale, or lease of any land, street or public way, or any property or structure shall be subject to similar submission to, and approval by, the Planning Commission. Disapproval may be similarly overruled. Failure by the Planning Commission to act to: approve; approve subject to conditions; disapprove; or table for further consideration within forty five (45) days from and after receipt of complete official submission shall constitute approval.

How Much Flexibility Do You Have?

MOST>>>LEAST



Developer's Rights | Expectations

Nothing to Count on>>>>>>>>>>Everything to Rely On...

FEATURE

Keeping Things in Order:

PLANNING COMMISSION BY-LAWS

by David J. Allor

During my training sessions for planning commissioners, I am often asked procedural questions. Seeking to stimulate discussion, my initial response has always been "What do your by-laws say?" I reluctantly report that in many cases my inquiry has been unanswered. There are some planning commissions whose by-laws are silent on important matters. Other planning commissions simply cannot find their by-laws. A surprising number of planning commissions have never adopted by-laws.

There are three principal reasons for adopting and using by-laws:

First, they serve to guide the internal conduct of the planning commission. For instance, by-laws can specify that during a public hearing a commissioner's job is to receive and analyze information on an agenda item, but that during a deliberative meeting the job is to synthesize and share information with other commission members, and decide the item.

Second, by-laws also serve to guide the conduct of persons appearing before the commission. By-laws, for example, can spell out that during a public hearing, members of the public have the right to be present and to be given equitable opportunity to speak to the planning commission, but that during a deliberative meeting, though members of the public have the right to remain in the room, they cannot address the commission.

Third, by-laws, if properly constructed and consistently followed, serve to strengthen the commission's decisions. They can help to ensure that the planning commission conducts its affairs in a fair and reasonable manner, that due process is afforded to all parties, and that decisions are supported by relevant and sufficient findings.

I recognize that members of planning commission are reluctant to undertake so dry and tedious an activity as constructing a set of by-laws. I encourage planning commissions to consider by-laws creation in much the same way as a vaccination: trading short-term discomfort for the increased assurance of long-term security. I hope the outline of a set of planning commission by-laws which is set out on the following pages will help ease any short-term discomfort you might otherwise have.

CONSIDER BY-LAWS CREATION IN MUCH THE SAME WAY AS A VACCINATION: TRADING SHORT-TERM DISCOMFORT FOR THE INCREASED ASSURANCE OF LONG-TERM SECURITY.

In addition to addressing the concerns I have already mentioned, the outline deals with four other important issues: (1) that by-laws be consistent with state constitutions, relevant state statutes, state planning enabling legislation, and possible municipal charter provisions; (2) that by-laws be written so as to be comprehensible to members of the planning commission and the public; (3) that gender neutral language be used; and (4) that direct reliance upon Robert's Rules of Order, Revised be reduced by tailoring procedures to the specific needs of a planning commission.

As some of the articles interlock, be sure to review the entire outline. Articles 1 through 5 focus on the construction of the planning commission and professional staff support. Articles 6 through 9 define hearings and meetings processes. Articles 10 and 11 define quorum, motions and voting procedures. Articles 12 through 14 focus on administrative procedures. Articles 15 and 16 govern the conduct of the members of the planning commission and of the public before the planning commission. The concluding Articles 17 and 18 incorporate legal-technical provisions.

I am aware that many planning commissions in smaller communities do not have full-time, professional staff, such that Article 5 would require revision. For larger communities, whose professional planning staff are employed under uniform administrative personnel procedures, Article 5 would require complete revision.

I hope that the vaccination takes effect, yet I know that we all need periodic booster shots. In like manner, planning commission by-laws require periodic amendment. Nevertheless, a properly constructed and consistently implemented set of by-laws can serve to improve the work of a planning commission and ensure fair public participation. The end result will be better decisions and an increased level of trust in the planning processes.

I wish to express my appreciation to C. Gregory Dale who reviewed the early drafts of this outline and to the members of local and regional planning commissions in Utah and Nevada, during whose respective 1993 state planning conferences, revised drafts were presented. They may take credit for the improvements. I retain responsibility for errors and omissions. ♦

The late David J. Allor was Professor, School of Planning, and Fellow, Center for the Study of Dispute Resolution, University of Cincinnati. He authored The Planning Commissioners Guide: Processes for Reasoning Together *(APA Planners Press).*

Outline of Articles of By-Laws for a Planning Commission

Editor's Note: We hope the following outline drafted by David Allor will help you in developing or improving your commission's by-laws. Please note, however, that by-laws should be reviewed by your legal counsel to ensure conformance with state enabling law and any local charter requirements. In fact, Article 18 of the outlined articles states that this kind of review should take place.

Notes:

1. While the great majority of planning commissioners conscientiously and capably fulfill their duties, it is nevertheless useful to spell-out in the by-laws the conditions under which a commissioner should be removed. Continuing unpreparedness, continuing absence from meetings, biased participation, and conflict of interest are all causes for removal because they impair the quality of decision making and diminish the integrity of the planning commission.

[Editor's Note: For more on how to deal with chronic absenteeism, see Greg Dale's column, "The Ghost Commissioner," in Issue 6 of the Planning Comm'rs Journal].

BY-LAWS OF THE PLANNING COMMISSION FOR THE (VILLAGE, CITY, OR COUNTY) IN THE STATE OF (STATE), AS AMENDED (GIVING MOST RECENT DATE)

Article 1: Authority

- specific citation of state enabling legislation or municipal charter provisions to create a planning commission.

Article 2: Jurisdiction

- specific definition of the political-geographical jurisdiction of the commission.
- specific definition of any extra-territorial jurisdiction of the commission.
- specific definition of the time limit to make recommendation or decision by the commission.

Article 3: Appointment and terms of members

- specification of appointing authority and process.
- specification of number of citizen members and residency requirements.
- specification of term (time period) of appointment, usually appointed in overlapping terms.
- appointment of "ex officio" members of the planning commission, specifying with or without right of vote.
- specification of appointment of planning commission members to other boards or commissions.
- specification for the removal of a planning commission member "for cause". **See Note 1**
- provision to replace a planning commission member to complete an unexpired period of appointment.

Article 4: Planning commission officers and their duties. See Note 2.

- Chairperson - presides at all hearings and meetings of the commission, assures proper order of the commission and the public in all proceedings, signs all documents of the commission, prepares the agenda of the commission, and represents the commission before legislative and administrative bodies.
- Vice-chairperson - prepares the annual report of planning commission activities, coordinates the annual meeting of the planning commission, provides orientation to new planning commission members, and, in the absence of the chairperson, performs all of the above duties.
- Secretary - prepares all official instruments of the planning commission, records the proceedings of all hearings and meetings, and prepares the minutes of the commission hearings and meetings; together with the chairperson signs all documents of the planning commission, and assures the proper indexing of all planning commission documents as public record.
- Treasurer - where a planning commission retains direct control over the budget for operations and staff, the treasurer shall maintain complete, accurate and orderly accounts in preparation for the annual audit, and together with the chairperson shall sign all authorizations and payments of funds.
- Chairperson-pro-temp - where both the chairperson and vice chairperson are absent from hearing or meeting, the remainder of the citizen members of the planning commission shall elect a chairperson-pro-temp from among their own number by majority vote.

Notes:

2. It is helpful in the by-laws to specify the duties of and relations among both the officers of the commission and the staff. Contingency provisions are important so that the work of the commission can proceed in the event of unavoidable absence.

Notes:

3. It is not unusual for planning commissioners to forget that a hearing is designed to obtain testimony from the applicant and members of the public, while a meeting of the planning commission is one where cases are deliberated and decided. By-laws must clearly establish and reinforce separate procedures for hearings and meetings.

Article 5: Staff of the commission and their duties -- see Note 2 (previous page)

- Director of Planning - advises the planning commission, legislative body, and chief administrative officer on matters related to planning, development, and redevelopment, coordinates and supervises the work of all other staff and consultants, prepares all documents for presentation to the planning commission, and assists the chairperson and secretary in the exercise of their duties; the director of planning or designee shall have the privilege to address the planning commission during regular meetings.
- Zoning Administrator - advises the planning commission on all matters regarding the regulation of development, prepares all related documents for presentation to the planning commission, and serves as staff to the board of zoning appeals.
- Commission staff - the planning commission may appoint other staff members to carry-out appropriate functions.
- Consultants - the planning commission may hire consultants to perform planning related activities under terms of contract prepared by the director of planning and approved by the planning commission.
- Legal counsel - the county attorney or municipal director of law shall serve as legal counsel to the planning commission; prepares memoranda of law as requested by the planning commission, and reviews drafts of ordinances, resolutions, and by-laws, and their amendment.

Article 6: Hearings of the planning commission -- see Note 3

- Public hearing - a noticed official hearing, the express and limited purpose of which is to provide an equitable opportunity for the public to speak on matters before the planning commission, for which publicly-accessible minutes must be prepared; the planning commission may neither deliberate nor take a substantive vote during a public hearing.
- Working Session - a noticed official hearing open to the public to discuss specific matters before the commission; the intent of the working session is informational; the planning commission may neither deliberate nor take a substantive vote during a working session.

Article 7: Meetings of the planning commission -- see Note 3

- Regular meeting - a noticed official meeting, open to the public, during which the planning commission deliberates and may take substantive votes on specific items.
- Emergency meeting - in the event of a true emergency, the chairperson, with the assent of a majority of citizen planning commission members contacted by telephone, may call an emergency meeting without notice; such meeting is open to the public; publicly-accessible minutes shall carry the specific justification for such meeting. **See Note 4**
- Executive meeting - a noticed official meeting, closed to the public, whose topics of deliberation are truly confidential in nature; there shall be neither deliberation nor vote on agenda items before the commission.

Article 8: Order of a public hearing -- see Note 5

- Sign-in sheets by agenda item, listing printed name, signature, address of persons wishing to testify, and indication of support or opposition to items.

2. Call to order and determination of quorum.
3. Presentation by the staff summarizing item.
4. Testimony of agencies related to the item.
5. Presentation by the applicant.
6. Testimony of the proponents.
7. Testimony of the opponents.
8. Concluding comments of the applicant.
9. Concluding comments of the staff.
10. Request of the Chairperson for a motion to close the public hearing.

Notes:

4. Provision should be made for calling emergency meetings. Such a provision reduces public suspicions and avoids contentious disputes about how to proceed when emergency action is needed.

5. It is very important to follow a prescribed order when holding a public hearing. This serves to ensure equitable and consistent treatment of all applicants. Moreover, it permits interested parties to arrange for such practical matters as time off from work, child care, and travel to the hearing.

Notes:

6. Motions should be brief, clear, and complete. A commission should not, for example, simply move approval of a project, but should move approval with specific, stated reasons.

Article 9: Order of a regular meeting

1. Call to order and determination of quorum.
2. Approval of the minutes of the previous meeting.
3. Items carried-over from a previous agenda:
   - matters regarding the comprehensive plan,
   - matters regarding capital improvements,
   - matters regarding subdivision of land,
   - matters regarding zoning of land,
   - matters regarding other regulatory action.
4. Items of the present agenda, presented in same order as above.
5. Other business.
6. Review of the planning commission calendar and announcement of future meetings.
7. Request of the chairperson for a motion to adjourn.

Article 10: Form and character of motions. See Note 6

- The form and character of motions shall conform to those offered within Robert's Rules of Order, Revised, except as specified below.
- Upon review of the full public record and due deliberation among the members of the planning commission, any of its members, except the chairperson, may make a substantive motion. The motion shall include not only direction (Approval, Approval with specified conditions, or Disapproval) but also a recitation of findings which support the motion.
- A second, citing compatible findings shall be required
- Other commission members may support the motion with other compatible findings.
- A motion shall die for lack of second.
- Where a motion to disapprove an item has been defeated, a member of the planning commission initially in the opposition may make a motion to approve or approve with conditions.

Article 11: Quorum and voting requirements. See Note 7

- A majority of the appointed citizen members of the planning commission shall constitute a quorum; ex officio members shall not be counted within a quorum.
- A majority of the citizen members of the planning commission shall be required to pass a motion.
- All votes shall be taken by the Secretary in random order, except that the chairperson shall vote last.
- Abstention from voting shall not be counted in the determination of a motion but shall be recorded.
- In the event of a tie vote, the motion shall have been defeated.

Article 12: Requirements for the submission of requests

- The planning commission shall adopt standard forms for the submission of each type of request required for its consideration; such forms shall specify the schedule of submission, form and content of complementary materials, and scale and content of drawings.
- The secretary of the planning commission shall certify the completeness of submissions.
- Certified requests shall be fully noticed under requirements of law and agendized on the planning commission calendar on the same day.
- Any request disapproved by the planning commission shall not be resubmitted for a period of six months.
- The planning commission may establish a reasonable fee schedule in order to recover costs associated with notice publication, request processing, agenda, staff report and related materials duplication and distribution; moreover, the planning commission may require the applicant to post signs on the affected property, in conformance with provisions of the ordinance, and to notify adjacent property owners, tenants, and community residents of the nature of the applicant's request.

Article 13: Instruments and documents of the planning commission

- The official instruments of the planning commission are the record of notice, the agenda, and the minutes of hearings and meetings. Where in special cases the planning commission wishes to provide advice to the legislative body or administrative agency, it may do so by resolution.

Notes:

7. A surprisingly large number of planning commissioners do not have a clear sense of their quorum and voting requirements. A question such as "What happens if there is a tie vote?" usually comes up when the case is controversial. To avoid both embarrassment and frustration, clearly specify both quorum and voting requirements in the by-laws.

- Any and all materials submitted to the planning commission regarding and item shall be entered into the public record by a motion to "Accept for the record."
- All notices, agendas, requests, agency or consultant letters or reports, citizen petitions, staff reports, minutes of hearings and meetings, and resolutions shall constitute the documents of the planning commission and shall be indexed as a matter of public record.

Article 14: Administrative calendar

- Notice for all hearings and meetings shall conform to requirements of law.
- The planning commission shall hold an annual meeting to review both the activities of the previous year and decide the work program for the coming year. **-- see Note 8.**
- The election of planning commission officers for the coming year shall occur at the annual meeting of the planning commission.
- The regular meeting schedule for the coming calendar year shall also be determined at the annual meeting.
- Copies of the agenda, requests, staff reports, and related documents shall be delivered to each planning commission member no less than five working days prior to a public hearing and regular meeting.

Article 15: Conduct of the members of the planning commission. See Note 9

- Members of the planning commission shall take such time as to prepare themselves for hearings and meetings.
- Any citizen member of the planning commission absent from three consecutive regular meetings or any four regular meetings within a calendar year, without being excused by the chairperson, may be removed for cause.
- A planning commission member with a conflict of interest in an item before the commission must state that a conflict of interest exists and withdraw from participation in the public hearing, working session, emergency meeting, or regular meeting on that item. **See Note 10.**
- The interests of that planning commission member may be represented before the planning commission by a specifically designated representative or legal agent at the public hearing or working session, and testimony entered into the public record.
- Participation of a planning commission member under cloud of a conflict of interest is cause for removal.

Article 16: Conduct of persons before the planning commission

- During all public hearings and working sessions, members of the public shall be given equitable opportunity to speak. Comments should be addressed to the item before the planning commission. Where a comment is irrelevant, inflammatory, or prejudicial, the chairperson may instruct the planning commission to "disregard" the comment, which nevertheless remains in the public record. **See Note 11.**
- During all regular and emergency meetings of the planning commission, the public may be present but shall remain silent unless specifically invited by the chairperson to provide comment.
- During all proceedings, members of the public have the obligation to remain in civil order. Any conduct which interferes with the equitable rights of another to provide comment or which interferes with the proper execution of commission affairs may be ruled by the chair-person as "out-of-order" and the offending person directed to remain silent. Once having been so directed, if a person persists in disruptive conduct, the chairperson may entertain a motion to "eject" from the planning commission hearing or meeting. Where the person fails to comply with the successful motion to eject, the chairperson may then call upon civil authority to physically re-moved the individual from the chamber for the duration of hearing or deliberation on that item. **See Note 12.**

Article 17: Separability

- Should any article of the planning commission by-laws be found to be illegal, the remaining articles shall remain in effect.

Article 18: Adoption and amendment of by-laws. -- see Note 13.

- By-law adoption or amendment shall be made following review by the legal counsel and public hearing.
- The by-laws shall be adopted or amended upon a vote of a majority plus one of the citizen members of the planning commission.
- Adoption or amendment of by-laws takes effect immediately following a successful vote.

♦

Notes:

8. *Given the sheer number of cases decided by many planning commissions, it makes sense to hold an annual meeting to review the previous year and to develop a work program for the coming year. If the by-laws require such a meeting, it will not be forgotten.*

9. *Defining the proper conduct of the members of a planning commission is of critical importance in helping to ensure that the public has confidence in the commission's integrity. For that reason, the appointment of conscientious citizens is essential. Each planning commissioner must retain objectivity in the face of prejudice, impartiality in the face of contentious interests, and reasonableness in the face of strident disputes.*

10. *Conflicts of interest can be extraordinarily sensitive. If a member of a planning commission has declared a conflict of interest, that member should leave the commission chambers so as not to have an indirect but undue influence upon deliberations. If a member of a planning commission wishes to have personal interests stated, the member should still leave the commission chamber, entrusting that presentation to a competent third party.*

Notes:

11. *In order for the work of the planning commission to be both impartial and efficient, members of the public should be informed of their responsibilities to each other and to the commission in all hearings and meetings. The commission must protect the integrity of its deliberations by explicitly disregarding demeaning, hateful, or vulgar language.*

12. *While very rare in occurrence, where the conduct of a member of the public interferes with the rights of others or impairs the orderly work of the commission, that person may be ejected from the hearing or meeting on that matter.*

13. *Planning commissioners need to remember that their by-laws are a public document. Consideration of any amendment to by-laws should come only after review by legal counsel and full discussion in public hearing. It is only fair that members of the public, whether future applicants, proponents, or opponents fully understand the rules which guide their conduct before the commission.*

The Commission Will Come to Order:

Commentary on Adapting the Rules of Parliamentary Procedure for Planning Commissions, Zoning Boards & Boards of Adjustment

by David J. Allor

As part of my work, I often observe planning commission meetings. I appreciate the conscientious efforts of members to examine complex aspects of specific issues under the principles of the comprehensive plan, adopted public policy, and development regulation. This is a difficult enough task in itself; yet, under our system of government these processes of deliberation and decision must comply with established procedures.

To structure their efforts, many planning commissions have adopted, and come to rely upon, *Robert's Rules of Order*, in one or another edition. I doubt, however, that many commissions have either a clear understanding of parliamentary procedure or the ability to effectively apply *Robert's Rules*.

In this short article, I want to summarize the essential features of parliamentary procedure, and review some of the problems planning boards face in using *Robert's Rules*. The "Model Outline of Motions for Planning Commissions," which follows this article, seeks to adapt *Robert's Rules* to better meet the particular needs of today's planning and zoning boards. The Model Outline of Motions represents a simpler and, I hope, more understandable set of procedural rules to guide a planning or zoning board's deliberative processes — and, of equal importance, promote public understanding of commission deliberations.

1. Why Have Rules of Procedure?

I am aware that many planning commissioners will read this discussion and the Outline with little enthusiasm, if not with real dread. Permit me to argue three reasons for understanding and applying parliamentary procedures. First, failure to adopt and follow formal, fair, and coherent procedures erodes public confidence in planning. Where planning is an optional power of local government, such an erosion of confidence could endanger planning altogether. Even where planning is a mandated power of local government, public participation could be reduced to a paralyzing conflict over proper procedure. Second, failure to consistently apply procedures could result in a deprivation of individual rights and damage to individual interests. Third and finally, failure to consistently apply procedures would invite litigation against the local unit of government.

THE FAILURE TO ADOPT AND FOLLOW FORMAL, FAIR, AND COHERENT PROCEDURES ERODES PUBLIC CONFIDENCE IN PLANNING.

These considerations do reflect certain basic principles of self-government. First, as Henry Roberts notes is "the right of the *deliberate* majority to decide" — which is immediately coupled to the second, the right of the minority to secure "considered judgment after a full and fair 'working through' of the issues involved." (*Robert's Rules* [1915] 1971). Moreover, such procedures assure that all members of the body are treated equally, and that all are free to participate fully in the discussion.

Parliamentary procedure seeks to provide for both efficient and effective decision-making and both open and full debate of issues. They are closely allied to constitutional requirements of due process and to common law concepts of reasonableness, non-arbitrariness, and non-capriciousness. Perhaps, the best advice on the balance between discipline and reasonableness comes from Henry Robert himself:

> *Know about parliamentary law, but do not try to show off your knowledge. Never be technical, or more strict than is absolutely necessary for the good of the meeting. Use your judgment; the assembly may be of such a nature through its ignorance of parliamentary usages and peaceful disposition, that a strict enforcement of rules, instead of assisting, would greatly hinder business; but in large assemblies, where there is much work to be done, and especially where there is liability to trouble, the only safe course is to require a strict observance to the rules.*
>
> *Robert's Rules* (1915 edition)

2. Problems With *Robert's Rules*.

The prededing quotation, while containing valuable advice, also reflects the first of three weaknesses within *Robert's Rules*. The text, now more than a century-old, is not written in a manner coherent to speakers accustomed to the contemporary use of the English language. The complexity of the language undermines the ability to understand and apply the procedure. More seriously, misunderstandings of the language of parliamentary procedure aggravate suspicion of deception or manipulation within debate. Again, dual requirements must be addressed: parliamentary procedure must be comprehensible as contemporary language but be sufficiently disciplined to fulfill the requirements of law.

The second weakness is largely historical. In the early years of its independence, the United States of America felt a strong need to give discipline to the processes of self-government. Thomas Jefferson's *Manual of Parliamentary Practice* (1801) sought to guide the conduct of the national congress. Both Luther S. Cushing's *Manual of Parliamentary Practice* (1845) and Henry M. Robert's *Rules of Order* (1876) extended procedures to non-legislative bodies and

voluntary associations. Yet, many manuals focus upon large legislative bodies, where contending interests, perhaps politically-partisan interests, reinforce a "win-lose" rather than "argument-to-consensus" conception of decision-making. The rigidity of certain procedures impairs the collaborative exploration of alternatives.

Two examples are important. First, parliamentary procedure disallows discussion of an issue in the absence of a motion; however, if a motion is made, the subsequent discussion is constrained to that motion. Many deliberative bodies employ the option of "Recessing into a Committee of the Whole" to enable broader discussion. This is impracticable on a regular basis and often confuses the public. Second, small deliberative bodies (those of three to five members) may do well to delete the requirement for a "Second" to motions. It would be unfortunate for an otherwise good motion to "die for lack of Second." In both cases, the ultimate decision should be based upon the quality of the deliberation, not technical considerations of motion-making.

The third weakness of *Robert's Rules* relates to the application of parliamentary rules to the special nature of planning and zoning boards. Unlike the large, elected or self-constituting assemblies considered by Henry Robert, the work of planning is guided by deliberative bodies which are small, appointed in staggered terms of office, and obligated to conform to provisions of state statute and/or municipal charter.

In general, the work of planning commissions and zoning boards are taken to be *quasi-legislative;* their actions are most frequently recommendations to a legislative body, rather than definitive actions (except, in those states where a planning commission makes final decision on plat approvals). Where a board of adjustment hears requests for variance or appeals of administrative interpretation, its actions are taken to be *quasi-judicial* and are final (except as they may be appealed to the court). These peculiarities were not envisioned by Robert.

Four other issues also merit discussion:

First, planning commissions, zoning boards, and boards of adjustment often must act within fixed time frames — for example, within thirty days to make recommendation or decision. As a result, motions to "Object to Consideration," "Lay on the Table," or "Postpone Indefinitely" are largely inappropriate.

Second, and similarly, a motion to "Reconsider" is very difficult to employ within limited time periods, and taking into account notice requirements.

Third, since the votes of commission and board members should always be taken by roll call, the motion for the "Division of the Assembly" is unnecessary.

Fourth, public hearings — so common to the planning commission deliberative process — are not directly addressed in *Robert's Rules.* Robert's provisions for "Occasional or Mass Meetings" offer little direction. For Robert, deliberative bodies did not directly hear the testimony of interested parties. While such information could be introduced through committee report, regular deliberative sessions permitted only commission or board members to speak. In consequence, deliberative bodies in planning need to adopt a number of procedures to facilitate the orderly participation of the public. Such motions as "Open (or Recess into) Public Hearing", "Accept (written materials) for the Public Record", "Close the Public Hearing", and "Close the Public Record" are essential features of due process for planning-related decision-making.

3. Some Final Observations.

I wish to conclude these comments on a very serious note. Each commission or board member is under an obligation to know the relevant statutes and codes, charter provisions, and by-laws. If a question of law or procedure arises, it should — if at all possible — be referred to and answered by legal counsel and settled prior to the meeting. Recurrent questions to legal counsel on matters of procedure within a meeting cast doubt upon both the dedication and preparedness of commission or board members. Formal procedures can offer little support to proper planning unless they are clearly understood, consistently applied, and broadly-accepted as both fair and effective.

I hope you will read through the "Model Outline of Motions" set out on the following pages. It is designed to make it easier for planning and zoning boards to operate in a manner that is fair and understandable, both to the members themselves and to the public.

I wish to express my appreciation to the many planning commission, zoning board, and board of adjustment members with whom I have worked to clarify decision-making procedures. Many of the comments in both the above essay and the outline on the following pages have been taken from notes made at local, state or national training sessions sponsored by the American Planning Association. I also wish to thank Professor Robert E. Manley, University of Cincinnati, and partner in the law firm of Manley, Burke, Fischer, Lipton and Cook, Cincinnati, Ohio, for his constructive criticism of the draft versions of this work. ◆

David J. Allor is Professor, School of Planning, and Fellow, Center for the Study of Dispute Resolution, University of Cincinnati. He is the author of "Keeping Things in Order: Planning Commission By-Laws," and "Outline of Articles of By-Laws for a Planning Commission," in Issue #14 of the Planning Commissioners Journal. Allor has also written The Planning Commissioners Guide: Processes for Reasoning Together *(available from the APA Bookstore), and is a member of the American Institute of Certified Planners and the Society of Professionals in Dispute Resolution.*

Model Outline of Motions for Planning Commissions and Zoning Boards

by David J. Allor

The following outline modifies, withdraws, and inserts motions into the order provided within *Robert's Rules of Order* (Revised 1971 and Newly Revised 1990). However, the motions are not presented in order of precedence, but in the order in which they are most likely to appear within the meeting of a commission or board. In this outline, a single public hearing is heard within a deliberative meeting.

Borrowing from Jon L. Ericson's *Notes and Comments on Robert's Rules* (1991), each motion is coded in four categories:

requires **Second** (**S**), or **not** (**NS**),
is **Debatable** (**D**), or **not** (**ND**),
is **Amendable** (**A**), or **not** (**NA**),
and requires **Vote** (**V**), or **not** (**NV**).

A simple majority is required, unless otherwise noted. Immediately below the motion and its codes is a brief explanation of the motion's use and relevance.

1. CALL TO ORDER

NS | ND | NA | NV

Action of the chairperson to bring the members, staff, and audience into order.

2. CALL FOR QUORUM

NS | ND | NA | NV

Action of the chairperson, with confirmation by the secretary, that the commission may conduct official business.

3. CALL TO FOLLOW THE AGENDA

NS | ND | NA | NV

Action of the chairperson to proceed with the agenda as published, so that persons attending and possibly wishing to testify may know the order of issues to be heard and decided.

4. Motion to AMEND THE ORDER OF THE AGENDA

S | D | A | V

For very specific reasons, other than those of inconvenience or unpreparedness, a commission member may move to alter the order but not the content of the agenda.

5. Motion to FIX THE TIME TO ADJOURN

S | ND | A | V

Once the order of the agenda has been decided, a planning commission is under an obligation to estimate how much of its work it can reasonably and responsibly conclude within a single meeting. Where a public hearing is required, the chairperson can impose reasonable but equitable time constraints upon public testimony.

6. Motion to APPROVE THE MINUTES

NS | ND | A | V

Action to approve the minutes of a previous meeting. The minutes are amendable to improve clarity, accuracy, and completeness, but not to re-open debate on a previously decided agenda item.

7. Motion to RECONSIDER

S | D | NA | V

A procedural motion, used where a commission member in the majority on a previously decided item wishes to have the commission reconsider its vote. The motion is appropriate only where: (1) crucial information, not available at the time of the initial vote, is now available, or (2) there has been a substantial change of circumstances since the initial vote. Great care should be taken with respect to this motion so as to not violate notice requirements or time limitations on action. If the motion for RECONSIDERATION is passed, the item is re-presented in total, after which a new substantive motion may be made.

8. Motion to RECESS INTO PUBLIC HEARING

S | ND | NA | V

To this point the commission is in regular deliberative meeting, it now may RECESS INTO PUBLIC HEARING in order to take public testimony on a specific agenda item. During a public hearing, a commission member may not make substantive motions.

9. Motion to ACCEPT FOR THE RECORD

S | ND | NA | V

A procedural motion to officially incorporate an application, agency report, consultant's report, letter, petition, or other written or visual materials into the public record.

10. Motion to CLOSE THE PUBLIC RECORD

S | ND | NA | V

If the planning commission wishes to proceed with debate on the item, it must close the public record. Both the record of written and visual materials and the oral testimony form the basis of consideration and decision. Where the commission is to deliberate the case at a future meeting, it may leave the public record open for a specific period of time, usually two business days, to receive any additional written materials.

11. Motion to CLOSE THE PUBLIC HEARING

S | ND | NA | V

A procedural motion made when all public testimony has concluded; the planning commission has now returned to deliberative meeting.

12. CALL TO ENTERTAIN A MOTION

NS | ND | NA | NV

After broad discussion and deliberation among the members of the planning commission, the chairperson may invite, but may not make, a motion.

13. Motion to CLOSE DELIBERATION

S | ND | NA | V

A procedural motion to test whether the planning commission is ready to move from deliberation to decision. For smaller commissions, the CALL TO ENTERTAIN A MOTION (see #12) would be sufficient to move the commission toward substantive motion.

14. Motion to APPROVE, APPROVE WITH CONDITIONS, or converse motion to DISAPPROVE

S | D | A | V

A substantive motion (often called the MAIN motion); it may take one of two forms: (1) a definitive action, or (2) a recommendation. Requires recitation of reasons in support of the motion; both the Mover and Seconder must concur in the reasons and in the conditions, if such are attached. A tie vote constitutes defeat of the motion. When a motion to DISAPPROVE is defeated, a converse motion should be made to secure APPROVAL or APPROVAL WITH CONDITIONS.

15. Motion to AMEND the Previous Motion

S | D | A | V

Amending motions may be either procedural or substantive. When a motion has been moved and seconded and is within the period of debate, it is subject to substitution, alteration or perfection. When an amendment is seen as "friendly," that is, compatible with the previous motion by the initial mover and seconder, the amendment may be incorpo-

rated directly into the previous motion by verbal assent; where the amending motion is seen as "unfriendly," it must be debated and decided first. All motions to AMEND the previous motion must be decided prior to deliberation and vote on the MAIN motion (see #14).

16. Motion to RECESS

S | ND | A | V

A procedural motion to permit a very brief suspension of public hearing or deliberative meeting to facilitate commission operations or for the comfort of the public. Planning commission members should avoid contact with interested parties during recess.

17. Motion to DEFER TO SPECIFIC TIME

S | D | A | V

Where testimony on a public hearing or deliberation by the commission on an agenda item cannot be concluded within a single session, a motion to DEFER TO A SPECIFIC TIME, that is, the immediately next meeting, is appropriate. The deferred item becomes the first item in the succeeding agenda. Care must be taken to not violate notice or time limitation requirements (as with #7, Motion to RECONSIDER).

18. Motion to EXTEND THE TIME TO ADJOURN

S | ND | A | V

Having already fixed the time of adjournment (see #5, Motion to FIX TIME TO ADJOURN), the commission may nevertheless extend such time, but by a two-thirds vote.

19. Motion to ADJOURN

S | ND | NA | V

While a motion to ADJOURN is always appropriate, planning commissions are obligated to expedite items on the meeting agenda. A Motion to ADJOURN is best used when all agenda items have been decided or remaining items have been DEFERRED TO SPECIFIC TIME (see #17).

An additional number of motions are necessary to facilitate the internal operations of the commission or acknowledge rights of its members. The following motions have no order of precedence.

20. Motion to ADOPT or the converse motion to REJECT

S | D | A | V

Action to incorporate, alter, or eliminate policies which guide the decision-making of the commission or board. Policy adoption requires only a voting majority; adoption of, or amendment to, by-laws requires a two-thirds vote.

[Editor's Note: For more on by-laws, see David Allor's "Keeping Things In Order: Planning Commission By-Laws, in PCJ #14].

21. Motion to REFER TO COMMITTEE

S | D | A | V

Some larger planning commissions have provision in their by-laws allowing referral of specific issues to smaller committees for deliberation and subsequent recommendation back to the full commission. This does not delegate power to the committee to decide the issue.

22. Motion to DIVIDE A MOTION

S | ND | A | V

Where a motion has been both moved and seconded and is under deliberation, but where that motion is considered as complex. Any member of the commission may seek to divide the motion, thereby permitting independent votes on specific issues. Care must be taken not to divide a motion in such a manner as to subsequently make contradictory decisions among the features of the divided motion.

23. Action to WITHDRAW A MOTION

NS | ND | NA | V

Where the Mover finds that an initial motion is flawed, inappropriate, or premature, the Mover may seek to withdraw the motion in whole. This action is not permissible if the original motion is either subject to an amending motion or has been amended.

24. Motion to SUSPEND THE RULES

S | D | A | V

Where, in extraordinary conditions, established rules would hinder rather than promote effective deliberation, specific rules may be suspended for specific time within a meeting — the reasons for such suspension should be entered into the minutes of the meeting. Any suspension of rules requires a two-thirds vote. Great care must be taken under a suspension of rules to avoid the appearance (or the fact) of unfairness. No rule may be suspended which is otherwise required by law.

25. Action to RULE OUT OF ORDER

NS | ND | NA | NV

To assure the orderly progress of a meeting or hearing, the chairperson may rule individuals — whether members of the commission, staff, or the public — out of order where: (1) comments are irrelevant to the item under discussion, (2) comments have already been made, (3) the specified period of time in which to speak has expired, or (4) comments are disruptive to the order of the meeting.

26. Instruction to DISREGARD

NS | ND | NA | NV

To assure the objectivity of the hearings and meetings, the chairperson may instruct the members to DISREGARD comments and/or written or visual materials that are inflammatory or prejudicial. Such comments, however, are retained in any recordings or transcribed minutes of the meeting, and in the public record.

27. Motion to APPEAL THE RULING OF THE CHAIR

S | D | NA | V

A right of members of a commission to challenge the action of a chairperson, so as to ensure that proper procedures are followed, not to impede deliberation and decision.

28. A POINT OF ORDER

NS | ND | NA | NV

A right of members of a commission to request that the chairperson follow proper order. The intent is to assure proper progress of deliberation, not to contest action of the chairperson (as in #27 Motion to APPEAL THE RULING OF THE CHAIR). The point of order seeks to address an immediate concern, not debate larger procedural issues. Repeated use of A POINT OF ORDER to delay or frustrate decision is inappropriate and damages the continuity of deliberation.

29. A POINT OF INFORMATION

NS | ND | NA | NV

A right of members of a commission to request the specific inclusion or clarification of matters of fact from the chairperson.

30. A POINT OF PERSONAL PRIVILEGE

NS | ND | NA | NV

A right of any member of the commission to express matters of serious concern. For example, if a member of the commission is aware of a conflict of interest in a specific case, that member should at the time that the case is brought forward on the agenda, raise A POINT OF PERSONAL PRIVILEGE, declare that a conflict of interest exists, and withdraw from all further participation on that case. As a special note: I encourage that a member, having declared a conflict of interest, leave the chamber until that case has been decided. ◆

First on the Agenda is the Agenda!

by Elaine Cogan

Who sets the agenda for your planning board meetings? How are decisions made about the order, public comment, and other important matters? Do you allot specific times or just go with the flow? In other words, does your agenda work for you as well as it should?

If your planning board uses its agenda as a tool to efficient and productive meetings, these questions may seem elementary and even foolish. But if you are one of many whose agenda is either inadequate or even an impediment to effective meetings, it may be wise to consider how it can be improved.

The agenda is the template for your meetings. It should be developed thoughtfully so that the planning board has adequate time for matters that require attention and/or decisions and less time for "housekeeping" or more routine subjects. It should delineate plainly when public comment is invited and the actions expected of each item (review only; action; referral, etc.).

Many commissions leave the agenda writing to staff and may see it for the first time when they come to the meeting. This does not serve you or the public well. The best approach is for the chair, or a committee of your board, to review the agenda before it is final and for commissioners to receive it and any backup materials several days in advance.

Upcoming meeting agendas should also be posted in public places, such as public libraries and town or city halls. A growing number of communities also are posting agendas on their Web sites.

Other helpful procedures:

• Allow ample and early time for issues which most concern the public. Too often, planners still put them last or next to last on the agenda even though they are well aware of one or more matters certain to attract a big crowd. It is no wonder that people get restless and cranky if they have to sit through several hours of deliberations that do not concern them. Put the contentious or controversial issues on the agenda early, and give them the time they deserve. Do not be offended if most of the crowd leaves as soon as you turn to other matters.

• Consider setting aside a general comment period where people can talk to you about any planning items that concern them. Fifteen minutes at the beginning of the agenda usually is adequate and can serve as a "safety valve" for testing the pulse of the community.

• Place together routine items that require little or no discussion on the agenda and consider them in a group. Some bodies call this the "consent agenda" and require one motion and one vote to approve them all. But be careful that they are, indeed, routine items and not anything controversial you can be accused of "sneaking through."

• Print the allotted time for each item on the agenda...7-7:05, Roll Call; 7:05-15, Correspondence; 7:15-7:45, Major item # 1, Public Comment, etc. ... and follow the schedule as much as you can.

• Do everything possible to make the public comfortable. Print sufficient agendas for all to have one, with the aforementioned time allotments. Also, make sure there are sufficient copies of any graphics or explanatory material.

• At the start of the meeting, ask people who wish to speak on specific agenda items to sign up. This allows the chair to control the agenda and perhaps ask the board to extend the time if it is obvious the stated comment period is not sufficient for all the people who wish to be heard.

• Make sure the agenda is written in words and phrases easily understood by the public. How long did it take you, as a layperson, before you finally understood planning jargon? Put yourself in the shoes of the citizen who is attending her first meeting. You probably need to use legal terminology when you are actually voting, but that should not preclude an explanation on the agenda that is in plain English.

• Are you expecting a turnout of non-English speaking people? Translate the agenda into one or more other languages beforehand and engage interpreters to be available at the meeting.

• Provide a simple explanation of the board's procedures on each agenda or on a separate handout. What is the purpose of a first reading? Second? Do you require simple majorities or unanimous votes? What general rules of procedure do you follow?

• Keep to your schedule, unless there are extenuating circumstances. The public and the board will be appreciative.

All planning boards and commissions have some form of agenda. By treating it seriously, you will find it is an important tool toward orderly and productive meetings. ◆

Elaine Cogan, partner in the Portland, Oregon, planning and communications firm of Cogan Owens Cogan, is a consultant to many communities undertaking strategic planning or visioning processes. Her column regularly appears in the PCJ.

Editor's Note: We received a number of thoughtful replies from our "online reviewers" concerning Elaine's article. Because we do not have the space to include this feedback here, we are posting it on our PlannersWeb site at: www.plannersweb.com/agendas.html – along with other information related to meeting agendas.

Rules of Meeting Procedure

David Church, ULCT

The 2011 Utah Legislature has now required all cities and towns to adopt rules of procedure and order for its council meetings and planning commission meetings. Prior to this the state law established some minimum rules of procedure and of course required us all to follow the Utah Open and Public Meetings Act. These rules are generally found in Utah Code 10-3-502 through 10-3-608 but additional rules regarding notice, agenda and minutes are found in the Utah Open and Public Meetings Act which is found at Utah Code 52-4-101 et seq.

Attached are two drafts of potential rules of procedure I have been working on. Obviously nothing in any of these proposed sets of rules were contained in the tablets Moses got from the burning bush so feel free to change cut, combine or change them as you will.

The first set of rules is what I see most often happening in cities and towns when I visit a council meeting. I call it the informal meeting procedure. I included in this some state law provisions just to remind us what the law already requires and for those people who do not keep at the ready either a copy of the Utah State Code or an attorney.

The second set of rules is a simple but formal set of rules that some people will like. They simply adopt Roberts Rules of Order. Unfortunately Roberts Rules of Order can be complicated and require some training. There are also various editions and compilations of the rules so you have to pick a book as the official one to use. I did not include in this the sections from the Utah Code as I assume if you can afford a copy of Roberts Rules of Order then you probably have a copy of the state law.

Rules of Procedure and Order

(Short and informal)

Pursuant to Utah Code 10-3-606 the City hereby adopts the following rules of order and procedure to govern the meetings of the City Council.

Rule No. 1.

The City shall comply with the all required procedures contained in Utah Code including the following Sections:

10-3-502. Regular and special council meetings.

(1) The council of each municipality shall:

(a) by ordinance prescribe the time and place for holding its regular meeting, subject to Subsection (1)(b); and

(b) hold a regular meeting at least once each month.

(2) (a) The mayor of a municipality or two council members may order the convening of a special meeting of the council.

(b) Each order convening a special meeting of the council shall:

(i) be entered in the minutes of the council; and

(ii) provide at least three hours' notice of the special meeting.

(c) The municipal recorder or clerk shall serve notice of the special meeting on each council member who did not sign the order by delivering the notice personally or by leaving it at the member's usual place of abode.

(d) The personal appearance by a council member at a special meeting of the council constitutes a waiver of the notice required under Subsection (2)(c).

10-3-504. Quorum defined.

The number of council members necessary to constitute a quorum is:

(1) in a municipality with a seven-member council, four;

(2) in a municipality with a five-member council, three; and

(3) in a municipality operating under a six-member council form of government, three, excluding the mayor.

10-3-505. Compelling attendance at meetings of legislative body.

The legislative body of a municipality may compel the attendance of its own members at its meetings and provide penalties it considers necessary for the failure to comply with an exercise of the authority to compel attendance.

10-3-506. How the vote is taken.

A roll call vote shall be taken and recorded for all ordinances, resolutions, and any action which would create a liability against the municipality and in any other case at the request of any member of the governing body by a "yes" or a "no" vote and shall be recorded. Every resolution or ordinance shall be in writing before the vote is taken.

10-3-507. Minimum vote required.

(1) The minimum number of yes votes required to pass any ordinance or resolution, or to take any action by the council, unless otherwise prescribed by law, is a majority of the voting members of the council, without considering any vacancy in the council.

(2) (a) Any ordinance, resolution, or motion of the council having fewer favorable votes than required in this section is defeated and invalid.

(b) Notwithstanding Subsection (2)(a), a council meeting may be adjourned to a specific time by a majority vote of the council even though the majority vote is less than that required in this section.

(3) A majority of the council members, regardless of number, may fill any vacancy in the council as provided under Section 20A-1-510.

10-3-508. Reconsideration.

Any action taken by the governing body may not be reconsidered or rescinded at any special meeting unless the number of members of the governing body present at the special meeting is equal to or greater than the number of members present at the meeting when the action was approved.

10-3-601. Business of governing body conducted only in open meeting.

All meetings of the governing body of each municipality shall be held in compliance with the provisions of Title 52, Chapter 4, Open and Public Meetings Act.

10-3-607. Rules of conduct for members of the governing body.

The governing body of each municipality may fine or expel any member for disorderly conduct on a two-thirds vote of the members of the governing body.

10-3-608. Rules of conduct for the public.

The governing body on a two-thirds vote may expel any person who is disorderly during the meeting of the governing body. This section or any action taken by the governing body pursuant hereto does not preclude prosecution under any other provision of law.

Rule No. 2.

The agenda for the meeting will be the guide to the meeting. Items may only be placed on the agenda by either the mayor or any two council members. While matters not on the agenda may at times come up for discussion, no final action can be taken on any matter not on the agenda.

Rule No. 3.

The mayor shall open and introduce an item on the agenda in order, unless the mayor feels like there is a good reason to go out of order. If the item is one that requires discussion the council members can consider the item in a polite, civil, free-for- all type exchange of ideas for as long as they feel necessary. The mayor may or may not, at his or her discretion, allow members of the public or staff to participate in the discussion. When the mayor thinks the discussion has gone on long enough, and the item is one that requires a decision of the council, the mayor can ask for vote on the matter. Any council-member who has had enough of the discussion, can at any time also ask the mayor to either move on to the next item or call for a vote on the item. If a majority of the others on the council agree, the mayor shall call for a vote or move on to the next item as appropriate. No formal motions or seconds are required or necessary.

Rule No. 4.

The mayor and council members shall treat each with respect and act at all times during the meeting in a civil and courteous manner to each other and the public.

Rules of Procedure and Order

(Short and informal)

Pursuant to Utah Code 10-3-606 the City hereby adopts the following rules of order and procedure to govern the meetings of the City Council.

1. Meeting Procedures. All City Council meetings shall be conducted in accordance with Roberts Rules of Order as contained in the following publication: [insert book, title, edition etc.]

A copy of these rules shall be available at each public meeting for the reference of the Mayor and Council, and shall also be made available to the public for review during all normal business hours of the City.

If any rule contained in Roberts Rules of Order conflicts with any provision of these rules or Utah State law governing meeting procedures for the City Council, the City Council shall follow the provision of these rules or state law.

2. Public Comment. There shall be on every agenda of the City Council an item entitled "public comment." The public comment portion of the meeting shall be limited to the public speaking to the council on any item not on the agenda. Members of the public shall be free to express any idea, question, or view point without limitation except for time and the manner of the presentation. Individual members of the public shall be limited to three (3) minutes time. The Chair of the meeting shall ensure that the public comment is civil and orderly. The Chair shall use its best efforts to allow the free expression of the public and keep the meeting in order. Council members should not interrupt, argue with, or otherwise interfere with any comment by a member of the public. The Mayor and City Council may ask clarifying questions of the member of the public making a presentation and other members of the public may ask clarifying questions of the presenter at the discretion of the Chair.

3. Public Participation in Meeting. Other than at a required public hearing and the public comment portion of the meeting, members of the public shall not be allowed to participate in the meeting unless they are on the agenda or requested to present to the Council by the Chair of the Meeting or a member of the Council.

4. Council member Participation. At regular meetings of the City Council, Council members shall speak only after being recognized by the Chair. Any meeting designated as a work meeting shall be more informal and Council Members may freely participate as long as proper decorum is maintained. Council members shall conduct themselves at all times with decorum and respect. They shall refrain from making any disparaging remarks concerning any other member of the governing body or the public. Any member of the Council wishing to speak on any item on the agenda shall be recognized by the Mayor to do so.

5. Chairing the meeting. The Mayor shall chair the meeting in a manner to accomplish the following goals. The Mayor, as Chair, shall pace the meeting so that all items on the agenda should be addressed and either concluded or continued. The Mayor, as chair, shall ensure that the time limits on the public comment portion of the meeting are complied with. The Mayor, as chair, shall use his best efforts to see that Council members and the public are treated at all times with respect and that the meetings are orderly.

6. Meeting Adjournment. Meetings of the City Council, as a goal, shall be scheduled to end at or before 10:00 p.m. and the Mayor and City Council shall use their best efforts to conclude the meeting in a timely manner. However, no motion to extend the time of the meeting is necessary to be made. The meetings of the City Council shall not be adjourned until either all items listed on the agenda have been acted upon or a motion to adjourn is made and approved by a majority of the City Council.

Some Suggestions for Land Use Authorities that Focuses on Long-Term Visions and Meeting Procedures

By Craig Call, Utah Land Use Institute

The current system of land use administration has hardly been updated for many decades. State law does not require the formalities of the past, and state legislation has opened up dramatically the opportunity for innovative and inclusive visioning for land use.

1. Prioritize general plan updates, moderate income housing plan, transportation planning, community character and other important processes ahead of trivia.

2. Assign staff or a subcommittee of the planning commission to approve routine applications of subdivision, conditional use permits and other administrative matters. Allow the applicant, the staff, or the public to trigger a hearing before the full planning commission when the situation warrants it.

3. Avoid holding hearings on matters that are administrative and routine. Even in regular meetings the public may be allowed a limited opportunity to ask questions or make comments–as local protocol allows–without all the notice, formality and artificial stiffness of a formal hearing. Print the guidelines on the agenda.

4. Explain the difference between an administrative act and a legislative one on the agenda- the essence of an administrative question is whether the application complies with the ordinance.

5. Use the internet to disseminate information about applications broadly and invite comment through electronic means. Perhaps a community might send notice to neighbors as has been done by local ordinance in the past, but don't hold a hearing–ask for written, email or telephone comments.

6. Don't hold just one hearing if the application cannot be approved in one meeting. Allow individuals to engage in a conversation without the pressure of the clock ticking down to a final deadline for comment. If time is short, explain that the hearing will remain open and the topic will be heard at the next meeting.

7. When large and complex development proposals are discussed, note the questions asked by the public, restate them at the end to make sure that the public knows the question is understood, and ask the applicant to respond at the next meeting where several meetings are required.

8. Use controversy and public emotion to generate citizen involvement over time–engage in conversations at the hearings and beyond when people have the interest and motivation to participate. Manage that energy to develop long term involvement in community planning and development.

9. Collect an email and address list of individuals interested in land use issues and engage them in a conversation about long–term vision for the community. Conduct on-line polls of general preferences for the future (not individual project applications). Use blogs and email broadcasts to familiarize citizens with trends and goals.

10. Use notices to direct individuals to the community website. Don't waste meeting time accomplishing what such a cheap, inclusive, and comprehensive tool can do.

11. Get volunteers to engage in door to door surveys of residents when area plans are developed. It does not have to be scientific to be effective in reaching out to citizens for input.

12. Focus on the process without presupposing a result. Believe that a majority of your friends and neighbors want what is best for the community.

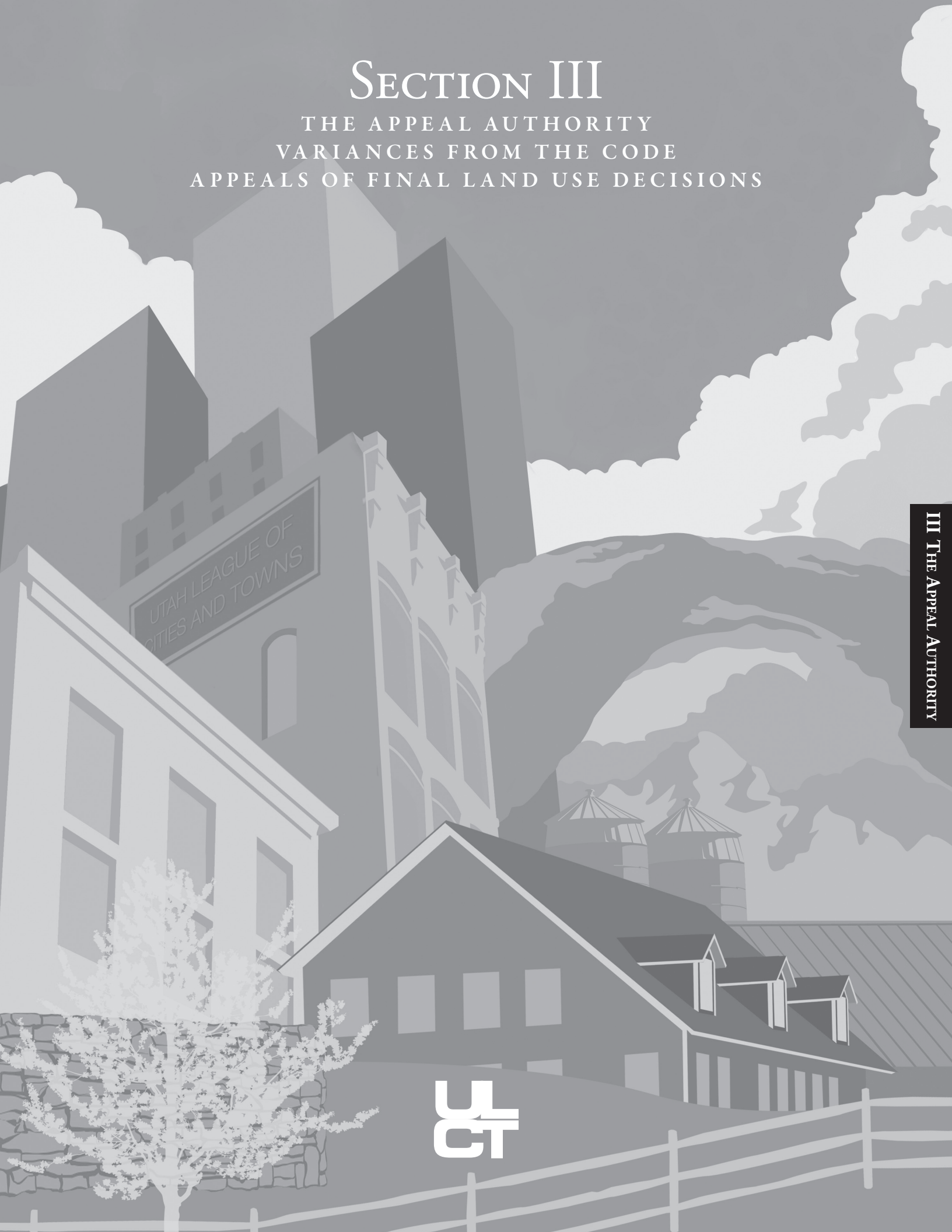
13. Allow for flexibility in the rules. Don't try to micro-manage zoning enforcement or you will not have time for big-picture thinking.

What Role as a Citizen Do I Have in Each Agenda Item?

	LEGISLATIVE	ADMINISTRATIVE	QUASI-JUDICIAL
Characteristics	**Very Broad Authority** **Broad public input taken**	**Much More Restrictive** **Limited public input for information only**	**Very Restricted** **Public input for information only**
	• Allows for citizen input as basis of decision • Creates new law • Based on vision and goal setting • Use of judgment and consensus	• Enforces the current law and makes reference to it in a final decision • Bound by the law rather than public opinion • Does not create or "bend" the law • The application of the law to a specific situation	• Based on established state law • Looks for errors made in the process • Not a judgmental decision
Responsible Body taking action	**Land Use Authority(ies)** • Planning Commission* • City Council • Town Board *Acts as an advisory board to the council.	**Land Use Authority(ies)** • Planning Commission • City Council • Mayor • Enforcement Officer • Staff	**Appeal Authorities** • As designated by the Council **Courts**
Applications	• General Plan • Zoning Ordinance • Subdivision Ordinance • All Municipal Ordinances • Creation and Amendments to Ordinances • Annexation Policy Plan	• Building Permit Approval • Subdivision Plat Approval • Conditional Uses • Variances	• Appeals

Section III

THE APPEAL AUTHORITY
VARIANCES FROM THE CODE
APPEALS OF FINAL LAND USE DECISIONS



Role of the Appeals Authority

1. Consider Appeals From Decisions Applying the Land Use Ordinances
2. Grant or Deny Variances from the Land Use Ordinances.

Appeals–10-9a-701

1. Land use ordinances must provide for an appeal authority or refer appeals to the district court.
2. May not require repeated appeals–one decision, one appeal.
3. A decision must be final before it can be appealed.
4. A decision is final when it is made by a land use authority and reduced to writing.
5. No one making the decision to be appealed can serve on the appeal authority.
6. There is usually no appeal from the appeal authority except to go to court.

Flexibility

1. An appeal authority may be one person.
2. There is no reference to the "Board of Adjustment" in state statute.
3. Appeal authorities need not hold public hearings, but if they are a board they must respect the open meetings act.
4. Appeals boards may deliberate in a closed meeting.
5. An appeal authority must respect due process, but can be very flexible in its procedures.
6. Appeal authority personnel need not live in the jurisdiction.

Quasi-Judicial Functions

1. The decision-maker is neutral and unbiased.
2. Conclusions of law are based on relevant statutes, ordinances, and case law that are identified in the record.
3. Findings of fact are based on substantial evidence included in the record of the proceedings and nothing else.
4. There are no "ex parte" contacts or political pressure.
5. Public clamor is irrelevant to the decision

Other Details

1. The person making the appeal has the burden of proving that a land use authority has erred.
2. Issues are heard "de novo" unless otherwise provided by ordinance. This means "from the start "or new, which means relevant evidence can be submitted for review. A municipality can also choose to review an appeal "on the record" which means no new evidence is permitted.
3. The appeal authority is to be free to substitute its judgment for the decision-maker unless some standard of deference is provided by ordinance.
4. A decision is not final until it is reduced to writing.
5. A decision must be appealed to district court within 30 days or it cannot be appealed.

6. An ordinance can provide that no issue not considered in the appeal can be raised in court.
7. Only the appeal authority is vested with the authority to grant variances. The appeal authority could be different for each land use application if the municipality chooses. The appeal authority may not be the same person or board that took final action on the land use application. Any appeal of the decision must be made to the district courts.
8. There is no legal way to grant a variance that would change the use of a piece of property. Use variances are not allowed.

Variances–10-9a-702

Only Granted if All Five Conditions are Met:

1. **Unnecessary Hardship**
2. **Circumstances Attached to the Property**
3. **Substantial Property Right**
4. **Consistent with Public Interest**
5. **Spirit Observed, Justice Done**

The same section of the State code goes on to require that the "unreasonable hardship" being claimed by the petitioner:

- must be associated with the property (It cannot be with the people who will live on the property or the structure that will be built on the property);
- must be peculiar to this piece of property and one that is not general to the neighborhood;
- cannot be purely economic;
- cannot be self-imposed (The hardship cannot exist because of something for which the owner of the property is responsible);
- cannot be a "use" variance (No variance can change the general purpose of the property. A variance cannot be used to allow a commercial use in a residential zone, nor a duplex in a single home residential zone).

In granting a variance, the appeal authority may impose additional requirements on the applicant that will:

(a) mitigate any harmful affects of the variance; or
(b) serve the purpose of the standard or requirement that is waived or modified.

In addition, it is important to note that a variance runs with the land, not with the property owner, and that the burden of proof for meeting all of the above rests with the petitioner.

Findings of Fact–Use with Variances/Appeals and Conditional Use Permits

1. Findings of fact are the reasons why a motion is being made or a decision is being made in such a way.
2. Findings should be part of a motion and recorded carefully in the minutes of the meeting. They cannot legally be added at a later date.
3. When action is taken to the court, the judge will read the minutes of your meeting, looking specifically at your process and your findings. If both are in order and relevant, the case usually goes no further. Seldom does the judge consider the merits.
4. In legislative actions, findings can be fairly broad and contain "soft" issues such as a perceived need, or the results of an informal vote or survey.
5. In an administrative vote, findings should be based on the law, or on the intent of the law.
6. Finding for conditional use permits are unique to each conditional use permit. The review criteria, however, are the same for each conditional use application.
7. In matters of appeal, findings need to show how some necessary procedure or process was violated.
8. Some actions, such as a granting of a variance by the Appeal Authority, must refer to specific state legal requirements.
9. In formal, prewritten motions, the findings are usually presented as statements of "where as. . ."

Sample Appeal Authority Ordinance

Chapter 5-A
APPEAL AUTHORITY

5-A-1 Appointment of Term.

A. The Appeal Authority shall be appointed by the Mayor, with the advice and consent of the Council, at the beginning of the calendar year for a term of three (3) years.

B. The Mayor, with the advice and consent of the City Council, shall fill any vacancy. The person appointed shall serve for the unexpired term.

5-A-2 Powers and Duties

The powers and duties of the Appeal Authority shall be to:

A. Hear appeals on decisions applying to the zoning ordinances of Huntington City; and

B. Hear and decide variances from the terms of the zoning ordinance.

5-A-3 Standards for Review of Appeals

A. 1. The applicant or any other person or entity adversely affected by a decision administering or interpreting a zoning ordinance may appeal that decision applying the zoning ordinance by alleging that there is error in any order, requirement, decision, or determination made by an official in the administration or interpretation of the zoning ordinance.

2. Any person, including any officer, department, board or bureau of Huntington City affected by a decision administering or interpreting a zoning ordinance or affected by the grant or refusal of a building permit or by any other decisions of the Land Use Authority in the administration or interpretation of the zoning ordinance may appeal such decision to the Appeal Authority. An appeal must be made within thirty (30) days from the date of such decision by filing with the City Recorder a written notice of appeal specifying the grounds thereof. When an appeal is taken from a decision of the Land Use Authority, the City Recorder shall forthwith transmit to the Appeal Authority all papers, if any, constituting the record upon which the action appealed from was taken.

3. An appeal filed in accordance with this section stays all proceedings in the appeal action, unless the officer from whom the appeal is taken certifies to the Appeal Authority that by reason of facts stated in the certificate the stay would in his/her opinion cause imminent peril to life or property. In such cases, proceedings shall not be stayed otherwise than by restraining order which may be granted by the Appeal Authority or by the district court on application and notice and on due cause shown.

4. The Appeal Authority shall fix the time for hearing any appeal within fifteen (15) days of the date of filing such appeal with the City Recorder and shall give public notice thereof in accordance with he Utah Open and Public Meetings Act, as well as notice to the parties in interest.

5. Proceedings and hearings before the Appeal Authority shall be had pursuant to rules adopted by the City and in conformance with general principles of due process. Any party in interest may appear at such hearing in person, by agent, or by an attorney of his/her choice.

6. The person or entity making the appeal has the burden of proving that an error has been made.

B. 1. Only decisions applying the zoning ordinance may be appealed to the Appeal Authority.

2. A person may not appeal, and the Appeal Authority may not consider, any zoning ordinance amendments.

3. The City Council shall hear and decide appeals from Planning Commission decisions regarding conditional use permits.

C. Appeals may not be used to waive or modify the terms or requirements of the zoning ordinance.

5-A-4 Decision on Appeal

In exercising the above-mentioned powers the Appeal Authority may affirm, wholly or partly, or may modify the order, requirement, decision or determination of a Land Use Authority.

5-A-5 District Court Review of Appeal Authority Decision

1. Any person adversely affected by any decision of the Appeal Authority may petition the district court for a review of the decision.

2. In the petition, the plaintiff may only allege that the Appeal Authority's decision was arbitrary, capricious, or illegal.

3. (a) The petition is barred unless it is filed within 30 days after the Appeal Authority's decision is final.

(b) (i) The time under 3.(a) to file a petition is tolled from the date a property owner files a request for arbitration of a constitutional taking issue with the private property ombudsman under Utah Code Annotated 63-34-13 until 30 days after:

(A) the arbitrator issues a final award; or

(B) the private property ombudsman issues a written statement under Utah Code Annotated 63-34-13(4)(b) declining to arbitrate or to appoint an arbitrator.

(ii) A tolling under Subsection 3.(b)(i) operates only as to the specific constitutional taking issues that are the subject of the request for arbitration filed with the private property ombudsman by a property owner.

(iii) A request for arbitration filed with the private property ombudsman after the time under Subsection 3.(a) to file a petition has expired does not affect the time to file a petition.

4. (a) The Appeal Authority shall transmit to the district court the record of its proceedings including its minutes, findings, orders and, if available, a true and correct transcript of its proceedings.

(b) If the proceeding was taped, a transcript of that tape recording is a true and correct transcript for purposes of this subsection.

5. (a) (i) If there is a record, the district court's review is limited to the record provided by the Appeal Authority.

(ii) The court may not accept or consider any evidence outside the Appeal Authority record unless that evidence was offered to the Appeal Authority and the court determines that it was improperly excluded by the Appeal Authority.

(b) If there is no record, the court may call witnesses and take evidence.

6. The court shall affirm the decision of the Appeal Authority if the decision is supported by substantial evidence in the record.

7. (a) The filing of a petition does not stay the decision of the Appeal Authority

(b) (i) Before filing a petition under this section or a request for mediation or arbitration of a constitutional taking issue under Section 63-34-13 Utah Code Annotated (1953 edition), the aggrieved party may petition the Appeal Authority to stay its decision.

(ii) Upon receipt of a petition to stay, the Appeal Authority may order its decision stayed pending district court review if the Appeal Authority finds it to be in the best interest of the City.

(iii) After a petition is filed under this section or a request for mediation or arbitration of a constitutional taking issue is filed under Section 63-34-13 Utah Code Annotated (1953 edition) , the petitioner may seek an injunction from the district court staying the Appeal Authority's decision.

5-A-6 Variance

Any person or entity desiring a waiver or modification of the requirements of the zoning ordinance as applied to a parcel of property that he/she owns, leases, or in which he/she holds some other beneficial interest may apply to the Appeal Authority for a variance from the terms of the zoning ordinance.

5-A-7 Standards

A. The Appeal Authority may grant a variance only if each of the following conditions are met:

1. Literal enforcement of the zoning ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the zoning ordinance;
2. There are special circumstances attached to the property that do not generally apply to other properties in the same district;
3. Granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same district;
4. The variance will not substantially affect the general plan and will not be contrary to the public interest; and
5. The spirit of the zoning ordinance is observed and substantial justice done.

B. In determining whether or not enforcement of the zoning ordinance would cause unreasonable hardship under subsection A, above, the Appeal Authority may not find an unreasonable hardship unless the alleged hardship:
   1. Is located on or associated with the property for which the variance is sought; and
   2. Comes from circumstances peculiar to the property, not from conditions that are general to the neighborhood.

C. In determining whether or not enforcement of the zoning ordinance would cause unreasonable hardship under subsection A, above, the Appeal Authority may not find an unreasonable hardship if the hardship is self-imposed or economic.

D. In determining whether or not there are special circumstances attached to the property under subsection A, above, the Appeal Authority may find that special circumstances exist only if the special circumstances:
   1. Relate to the hardship complained of; and
   2. Deprive the property of privileges granted to other properties in the same district.

E. The applicant shall bear the burden of proving all of the conditions justifying a variance have been met.

F. Variances run with the land.

G. The Appeal Authority may not grant use variances.

H. In granting a variance, the Appeal Authority may impose additional requirements on the applicant that will:
   1. Mitigate any harmful affects of the variance; or
   2. Serve the purpose of the standard or requirement that is waived or modified.

5-A-8 Building Permits

The Building Official shall not issue any building permit for any building, construction or repair of any building unless such fully conforms to all zoning regulations or ordinances of this municipality in effect at the time of application. No permit shall issue for any building or structure or part thereof on any land located between the mapped lines of any street as shown on any official street map adopted by the governing body.

5-A-9 Notice to Council of Variance or Building Permit Application

Before any application for a variance or building permit is heard by the Appeal Authority, the Appeal Authority shall give Huntington City at least fifteen (15) days notice of any hearing to consider the application.

5-A-10 Zone Boundary Adjustment

Where a zone boundary line divides a lot in a single ownership at the time of the passage of this chapter, the Board may permit a use authorized on either portion of such lot to extend not more than fifty feet (50') into the other portion of the lot.

5-A-11 District Court Review of Appeal Authority Decision

1. Any person adversely affected by any decision of the Appeal Authority may petition the district court for a review of the decision.

2. In the petition, the plaintiff may only allege that the Appeal Authority's decision was arbitrary, capricious, or illegal.

3. (a) The petition is barred unless it is filed within 30 days after the Appeal Authority's decision is final.

(b) (i) The time under 3.(a) to file a petition is tolled from the date a property owner files a request for arbitration of a constitutional taking issue with the private property ombudsman under Section 63-34-13 Utah Code Annotated (1953 as amended) until 30 days after:

(A) the arbitrator issues a final award; or

(B) the private property ombudsman issues a written statement under Section 63-34-13(4)(b) Utah Code Annotated declining to arbitrate or to appoint an arbitrator.

(ii) A tolling under Subsection 3.(b)(i) operates only as to the specific constitutional taking issues that are the subject of the request for arbitration filed with the private property ombudsman by a property owner.

(iii) A request for arbitration filed with the private property ombudsman after the time under Subsection 3(a) to file a petition has expired does not affect the time to file a petition.

4. (a) The Appeal Authority shall transmit to the district court the record of its proceedings including its minutes, findings, orders and, if available, a true and correct transcript of its proceedings.

(b) If the proceeding was taped, a transcript of that tape recording is a true and correct transcript for purposes of this subsection.

5. (a) (i) If there is a record, the district court's review is limited to the record provided by the Appeal Authority.

(ii) The court may not accept or consider any evidence outside the Appeal Authority's record unless that evidence was offered to the Appeal Authority and the court determines that it was improperly excluded by the Appeal Authority.

(b) If there is no record, the court may call witnesses and take evidence.

6. The court shall affirm the decision of the Appeal Authority if the decision is supported by substantial evidence in the record.

7. (a) The filing of a petition does not stay the decision of the Appeal Authority.

(b) (i) Before filing a petition under this section or a request for mediation or arbitration of a constitutional taking issue under Section 63-34-13 Utah Code Annotated (1953 edition) , the aggrieved party may petition the Appeal Authority to stay its decision.

(ii) Upon receipt of a petition to stay, the Appeal Authority may order its decision stayed pending district court review if the Appeal Authority finds it to be in the best interest of the City.

(iii) After a petition is filed under this section or a request for mediation or arbitration of a constitutional taking issue is filed under Section 63-34-13 Utah Code Annotated (1953 edition), the petitioner may seek an injunction from the district court staying the Appeal Authority's decision.

Checklist

Appeals from Decisions Applying the Land Use Ordinance

_____ 1. Determine that a final land use decision has been rendered by a land use authority.

_____ 2. Determine that the request for appeal was filed in a timely manner. State law requires that the local ordinance set a deadline to appeal that is not less than ten days after the land use decision has been rendered in writing.

_____ 3. Determine that the request for appeal is sufficiently complete for consideration. If it is incomplete, tell the appellant, specifically, how the appeal is deficient.

_____ 4. Determine that all appeal fees have been paid.

_____ 5. Place the item on an agenda for the appeal authority, if the appeal authority is composed of a board or commission that includes more than one person.

_____ 6. Provide the required notice of the meeting (or, if required by local ordinance, a hearing) to consider the application. If the appeal authority is composed of a board or commission that includes more than one person, notify the members of the appeal authority of the meeting.

_____ 7. Review standards in the local land use ordinance and state law that apply to the consideration of the appeal.

_____ 8. Verify that the appeal authority is impartial and free of bias from conflicts of interest with regard to the matter before it.

_____ 9. Conduct the meeting, and, if a hearing is required by local ordinance as part of the consideration of an appeal application, a hearing. A hearing is not required by state law.

_____ 10. Act in a quasi-judicial manner and gather evidence impartially. Afford the applicant and the appellant due process, which includes the rights of notice, to be heard, to confront witnesses, and to respond to evidence submitted by others.

_____ 11. If there is no standard of review provided for in the local land use ordinance, consider the appeal "de novo," which means that the appeal authority may look at the issue as a new issue, as if the matter had not been decided before. The appeal authority, if acting "de novo," does not need to defer to the prior decision of the land use authority. If the ordinance provides for a different standard of review, follow the local ordinance.

_____ 12. Allow the person bringing the appeal to present evidence supporting his or her appeal. The person bringing the appeal has the burden to show that the previous decision was in error. If the person does not meet this burden, dismiss the appeal.

_____ 13. If a person appears in opposition to the appeal and will be adversely affected if the appeal is granted, allow him or her to present evidence supporting his or her point of view. While the procedure need not be overly formal, allow each side to respond to the evidence presented by the other side.

_____ 14. Deliberate. Since an appeal authority is a quasi-judicial body, its deliberations may be conducted in private. Consider evidence that is before the appeal authority that is both relevant and credible related to the issue on appeal. Seek advice from professionals. After considering the standards and the evidence, determine which view of the matter is correct.

_____ 15. In interpreting the law or ordinance, look to its plain language. If the ordinance has been interpreted in the past, be consistent with prior interpretation. If the ordinance is ambiguous, interpret ambiguities in a light favorable to the use of property. If it is not ambiguous, give effect to the intent of the legislative body that enacted the law or ordinance. Harmonize conflicting provisions so that they can be reconciled. Do not impose an absurd or unreasonable result.

_____ 16. If, in the opinion of the appeal authority:

_____ a. The appellant has provided substantial evidence in the record to support his or her point of view, and there is no substantial evidence to the contrary, approve the appeal.

_____ b. The appellant has failed to provide substantial evidence in the record to support his or her point of view, deny the appeal.

_____ 17. Support the action of the appeal authority with evidence in the record, identifying the evidence that the appeal authority relied upon in its decision. The decision must be supported by substantial evidence in the record and not solely by public clamor. The appeal authority may be assisted by professional staff.

_____ 18. Preserve the record of the proceedings to document the law and evidence that was considered by the appeal authority before it made a decision related to the application.

Notes and Practice Tips

The action taken by an appeal authority is legal only if it is supported by substantial evidence in the record. "Substantial evidence" is evidence that is relevant and credible. To be relevant, it must relate to the standards in the ordinance and state law related to the review of applications for variances. To be credible, it must be objective and independent.

Public clamor is not substantial evidence. Evidence is independent—it stands on its own and is not based on public opinion. For the average person, either participating in a land use decision as a member of the appeal authority or as a citizen, his opinion is not evidence. Evidence is the justification—the facts—that are the basis for the opinion.

The opinion of expert witnesses qualified to testify in their field of expertise can be substantial evidence if proper information is provided supporting the qualifications of the persons expressing the opinions.

Checklist

Variances

_____ 1. Determine that a variance from the strict application of the land use ordinance could be appropriate for the physical circumstances involved with a potential application. Use variances are not allowed.

_____ 2. Determine that the variance application is sufficiently complete for consideration.

_____ 3. Determine that the variance fee has been paid.

_____ 4. Place the item on an agenda for the appeal authority.

_____ 5. Provide the required notice of a meeting (or, if required by local ordinance, a hearing) to consider the application. If the appeal authority is composed of a board or commission that includes more than one person, then notify the members of the appeal authority of the meeting.

_____ 6. Review standards in the local land use ordinance and state law that apply to the consideration of a variance. They are stated in item 10 of this checklist.

_____ 7. Verify that the appeal authority is impartial and free of bias from conflicts of interest with regard to the matter before it.

_____ 8. Conduct the meeting, and, if a public hearing is required by local ordinance as part of the consideration of the variance application, a hearing. A public hearing is not required by state law.

_____ 9. Act in a quasi-judicial manner and gather evidence impartially. Afford the applicant due process, which includes the rights of notice, to be heard, to confront witnesses, and to respond to evidence submitted by others.

_____ 10. Deliberate. Since an appeal authority is a quasi-judicial body, its deliberations may be conducted in private. Consider evidence that is before the appeal authority that is both relevant and credible related to the proposed variance. After considering the standards and the evidence, determine if the applicant has met his or her burden to establish by substantial evidence each of the required findings: front witnesses, and to respond to evidence submitted by others.

   a. Literal enforcement of the ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the land use ordinances. An unreasonable hardship can only be found when the alleged hardship:
      i. Is located on or associated with the property and not from conditions that are general to the neighborhood;
      ii. Comes from circumstances peculiar to the property, and not from conditions that are general to the neighborhood;
      iii. Is not self-imposed;
      iv. Is not primarily economic, although there may be an economic loss tied to the special circumstances of the property; and

b. There are special circumstances attached to the property that do not generally apply to other properties in the same zone. The appeal authority may find that special circumstances exist only if the special circumstances:
   i. Relate to the hardship complained of; and
   ii. Deprive the property owner of privileges granted to other properties in the same zone; and
   iii. Are not simply common differences between the property and others in the area.
c. Granting the variance is essential to the enjoyment of a substantial property right possessed by other property in the same zone; and
d. The variance will not substantially affect the general plan and will not be contrary to the public interest; and
e. The spirit of the land use ordinance is observed and substantial justice done.

_____ 11. If, in the opinion of the appeal authority:

a. The applicant has provided substantial evidence in the record to support all five of the required findings, and there is no substantial evidence to the contrary, approve the variance.

b. The applicant has failed to provide substantial evidence in the record to support any one of the five required findings, deny the variance.

_____ 12. Support the action of the appeal authority with evidence in the record, identifying the evidence that the appeal authority relied upon in its decision. The decision must be supported by substantial evidence in the record and not solely by public clamor.

_____ 13. Preserve the record of the proceedings to document the law and evidence that was considered by the appeal authority before it made a decision related to the application. Remember, any appeal of the decision heads to district court.

Notes and Practice Tips

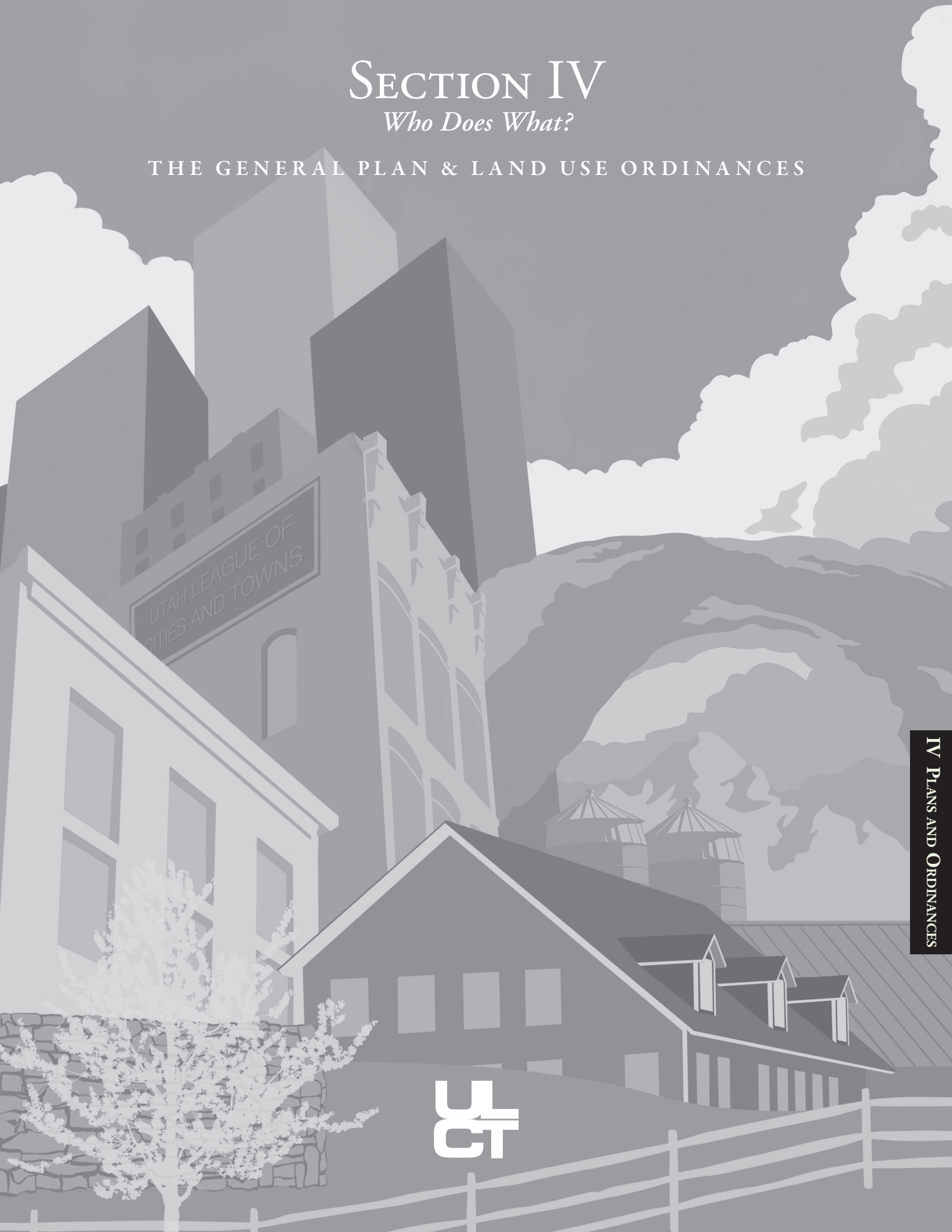
The action taken by an appeal authority is legal only if it is supported by substantial evidence in the record. "Substantial evidence" is evidence that is relevant and credible. To be relevant, it must relate to the standards in the ordinance and state law related to the review of applications for variances. To be credible, it must be objective and independent.

Public clamor is not substantial evidence. Evidence is independent—it stands on its own and is not based on public opinion. For the average person, either participating in a land use decision as a member of the appeal authority or as a citizen, his opinion is not evidence. Evidence is the justification—the facts—that are the basis for the opinion.

Section IV

Who Does What?

THE GENERAL PLAN & LAND USE ORDINANCES



The General Plan—What is it?

David Church, ULCT

A general plan is required for all cities and towns if the city or town wants to be in the land use A general plan is required for all cities and towns if the city or town wants to be in the land use control business. Simply put, if you want to tell people what they can and can't do with their property, you have to have a plan.

Sometimes, the general plan is referred to as a master plan or a comprehensive plan. Regardless of its title, there are certain procedural requirements to adopting a plan and some substantive minimums. These are set forth in the Utah State Code.[1] Some cities and towns have spent thousands of dollars creating plans, while others have spent little money and used volunteers and internal staff. It is impossible to say which of these courses of action have been more successful. The success of the plan is usually dependent upon the ordinances passed that are needed to implement the plan and the will of the city and town to comply with the plan.

The process to develop a plan begins at the planning commission. The planning commission provides notice of its intent to make a recommendation to the legislative body for the plan or the plan amendment and then initiates the process of preparing its recommendations. This notice of intent is given to specific affected entities in counties of the first and second class. No notice of intent is required in the smaller counties.

At a minimum, the proposed general plan should include maps, charts and explanations of the planning commission's recommendations for certain elements.[2] The elements should include a land use element; a transportation and circulation element; and in cities, and not towns, a moderate-income housing element. The proposed plan may also include such things as an environmental element; a public services and facilities element; a rehabilitation, conservation element consisting of plans and programs for historic preservation and the elimination of blight; and an economic development element and recommendations for implementing all or any portion of the general plan.

After completing its proposed general plan, the planning commission must schedule and hold a public hearing on the proposed plan. Prior to the public hearing, notice of the hearing must be given to the public. This notice must contain the time and place of the public hearing. The notice must be given at least ten calendar days before the public hearing. It should be published in a newspaper of general circulation in the area and be posted in at least three public locations within the city or town or on the city or town official web site. In addition, the provisions of the Utah Open and Public Meetings Act must be complied with. The planning commission can hold as many public hearings as it feels necessary. However, it only needs to hold one.

After the planning commission has agreed on a recommended general plan, it forwards it to the city council for final action. The city council may make any revisions to the proposed general plan or amendments that it considers appropriate. The city council does not need to hold a public hearing on the general plan, but it may if it wishes. If it does hold a public hearing it should give proper

[1] Utah Code 10-9a-401 et seq.

[2] Utah Code 10-9a-403(2)(a).

public notice of the hearing. The required notice is the same as that for the public hearing in front of the planning commission. The general plan should be adopted as an ordinance. Once the general plan is adopted, it is an advisory guide for land use decisions.[3] The city could make the general plan mandatory through ordinance.

After the general plan is in effect, no street, park, or other public way, grounds, places, or space, no publicly owned building or structure, and no public utility, whether publicly or privately owned, may be constructed or authorized unless it conforms to the current general plan.[4]

As part of the planning process, cities and towns adopt what are called official maps. An official map is a map that is recorded in the county recorder's office that shows actual and proposed rights-of-way and setbacks for highways and other transportation facilities. It may also provide the basis for restricting development in these designated rights-of-way and allow the city or town time to purchase or otherwise reserve the land. To be an official map it must be adopted as part of the city's general plan.[5] Adoption of an official map does not automatically require a landowner to dedicate and construct the street as a condition of development approval except under very specific circumstances. Those circumstances are that the street is found to be necessary by the city or town because of the proposed development and the dedication is a legitimate exaction as opposed to an excessive one. Adoption of the official map does not require the municipality to immediately purchase the property it has designated for eventual use as a public street.[6]

These restrictions may make it seem that an official map is ineffective. This is far from true. An official map informs the public where future streets are going to be built. An official map can assist a city in its development plans and it can provide the basis for a city or town that requires a public road to be built as part of a development process. What an official map does not do is prevent development in areas where cities desire future streets. A city or town cannot hold up development because it has a beneficial map. It can purchase the property or, if the right circumstances are found to be present, require the road to be built as part of the development. Those circumstances are discussed in more detail in the section of this handbook dealing with exactions.

The general plans for all cities must contain a moderate income housing element. The law requires that the city review this element every two years. The purpose of the review is to determine whether or not moderate-income housing needs of the city are being met. A report setting forth the findings of the review must be prepared and sent to the Utah Department of Community and Culture and the local association of governments. As previously discussed, a general plan for towns does not have to have a moderate income housing element.

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3 Utah Code 10-9a-405.

4 Utah Code 10-9a-406.

5 Utah Code 10-9a-103(33).

6 Utah Code 10-9a-407.

The General Plan—
A Practical Vision for the Future
Requirements from the Utah State Code

Utah Code Title 10 Chapter 09
The Municipal Land Use Development and Management Act
http://www.le.state.ut.us/~code/code htm

Make not little plans; they have no magic to stir men's blood and probably themselves will not be realized. Make big plans; aim high in hope and work, remembering that a noble, logical diagram once recorded will never die, but long after we are gone will be a living thing, asserting itself with ever-growing insistency.

Daniel H. Burnham, architect (1846-1912).

10-9a-401. General plan required. Content.

(1) In order to accomplish the purposes of this chapter, each municipality shall prepare and adopt a comprehensive, long-range general plan for:

(a) present and future needs of the municipality; and

(b) growth and development of all or any part of the land within the municipality.

(2) The plan may provide for:

(a) health, general welfare, safety, energy conservation, transportation, prosperity, civic activities, aesthetics, and recreational, educational, and cultural opportunities;

(b) the reduction of the waste of physical, financial, or human resources that result from either excessive congestion or excessive scattering of population;

(c) the efficient and economical use, conservation, and production of the supply of:

(i) food and water; and

(ii) drainage, sanitary, and other facilities and resources;

(d) the use of energy conservation and solar and renewable energy resources;

(e) the protection of urban development;

(f) the protection or promotion of moderate income housing;

(g) the protection and promotion of air quality;

(h) historic preservation;

(i) identifying future uses of land that are likely to require an expansion or significant modification of services or facilities provided by each affected entity; and

(j) an official map.

(3) Subject to Subsection 10-9a-403(2), the municipality may determine the comprehensiveness, extent, and format of the general plan

10-9a-402. Information and technical assistance from the state.

Each state official, department, and agency shall:

(1) promptly deliver any data and information requested by a municipality unless the disclosure is prohibited by Title 63, Chapter 2, Government Records Access and Management Act; and

(2) furnish any other technical assistance and advice that they have available to the municipality without additional cost to the municipality.

10-9a-403. Plan preparation.

(1) (a) The planning commission shall provide notice, as provided in Section **10-9a-203**, of its intent to make a recommendation to the municipal legislative body for a general plan or a comprehensive general plan amendment when the planning commission initiates the process of preparing its recommendation.

(b) The planning commission shall make and recommend to the legislative body a proposed general plan for the area within the municipality.

(c) The plan may include areas outside the boundaries of the municipality if, in the planning commission's judgment, those areas are related to the planning of the municipality's territory.

(d) Except as otherwise provided by law or with respect to a municipality's power of eminent domain, when the plan of a municipality involves territory outside the boundaries of the municipality, the municipality may not take action affecting that territory without the concurrence of the county or other municipalities affected.

(2) (a) At a minimum, the proposed general plan, with the accompanying maps, charts, and descriptive and explanatory matter, shall include the planning commission's recommendations for the following plan elements:

(i) a land use element that:

(A) designates the long-term goals and the proposed extent, general distribution, and location of land for housing, business, industry, agriculture, recreation, education, public buildings and grounds, open space, and other categories of public and private uses of land as appropriate; and

(B) may include a statement of the projections for and standards of population density and building intensity recommended for the various land use categories covered by the plan;

(ii) a transportation and traffic circulation element consisting of the general location and extent of existing and proposed freeways, arterial and collector streets, mass transit, and any other modes of transportation that the planning commission considers appropriate, all correlated with the population projections and the proposed land use element of the general plan; and

(iii) for cities, an estimate of the need for the development of additional moderate income housing within the city, and a plan to provide a realistic opportunity to meet estimated needs for additional moderate income housing if long-term projections for land use and development occur.

(b) In drafting the moderate income housing element, the planning commission:

(i) shall consider the Legislature's determination that cities should facilitate a reasonable opportunity for a variety of housing, including moderate income housing:

(A) to meet the needs of people desiring to live there; and

(B) to allow persons with moderate incomes to benefit from and fully participate in all aspects of neighborhood and community life; and

(ii) may include an analysis of why the recommended means, techniques, or combination of means and techniques provide a realistic opportunity for the development of moderate income housing within the planning horizon, which means or techniques may include a recommendation to:

(A) rezone for densities necessary to assure the production of moderate income housing;

(B) facilitate the rehabilitation or expansion of infrastructure that will encourage the construction of moderate income housing;

(C) encourage the rehabilitation of existing uninhabitable housing stock into moderate income housing;

(D) consider general fund subsidies to waive construction related fees that are otherwise generally imposed by the city;

(E) consider utilization of state or federal funds or tax incentives to promote the construction of moderate income housing;

(F) consider utilization of programs offered by the Utah Housing Corporation within that agency's funding capacity; and

(G) consider utilization of affordable housing programs administered by the Department of Community and Culture.

(3) The proposed general plan may include:

(a) an environmental element that addresses:

(i) the protection, conservation, development, and use of natural resources, including the quality of air, forests, soils, rivers and other waters, harbors, fisheries, wildlife, minerals, and other natural resources; and

(ii) the reclamation of land, flood control, prevention and control of the pollution of streams and other waters, regulation of the use of land on hillsides, stream channels and other environmentally sensitive areas, the prevention, control, and correction of the erosion of soils, protection of watersheds and wetlands, and the mapping of known geologic hazards;

(b) a public services and facilities element showing general plans for sewage, water, waste disposal, drainage, public utilities, rights-of-way, easements, and facilities for them, police and fire protection, and other public services;

(c) a rehabilitation, redevelopment, and conservation element consisting of plans and programs for:

(i) historic preservation; and

(ii) the diminution or elimination of blight; and

(iii) redevelopment of land, including housing sites, business and industrial sites, and public building sites;

(d) an economic element composed of appropriate studies and forecasts, as well as an economic development plan, which may include review of existing and projected municipal revenue and expenditures, revenue sources, identification of basic and secondary industry, primary and secondary market areas, employment, and retail sales activity;

(e) recommendations for implementing all or any portion of the general plan, including the use of land use ordinances, capital improvement plans, community development and promotion, and any other appropriate action;

(f) provisions addressing any of the matters listed in Subsection 10-9a-401(2); and

(g) any other element the municipality considers appropriate.

(3) The proposed general plan may include:

(a) an environmental element that addresses:

(i) the protection, conservation, development, and use of natural resources, including the quality of air, forests, soils, rivers and other waters, harbors, fisheries, wildlife, minerals, and other natural resources; and

(ii) the reclamation of land, flood control, prevention and control of the pollution of streams and other waters, regulation of the use of land on hillsides, stream channels and other environmentally sensitive areas, the prevention, control, and correction of the erosion of soils, protection of watersheds and wetlands, and the mapping of known geologic hazards;

(b) a public services and facilities element showing general plans for sewage, water, waste disposal, drainage, public utilities, rights-of-way, easements, and facilities for them, police and fire protection, and other public services;

(c) a rehabilitation, redevelopment, and conservation element consisting of plans and programs for:

(i) historic preservation; and

(ii) the diminution or elimination of blight; and

(iii) redevelopment of land, including housing sites, business and industrial sites, and public building sites;

(d) an economic element composed of appropriate studies and forecasts, as well as an economic development plan, which may include review of existing and projected municipal revenue and expenditures, revenue sources, identification of basic and secondary industry, primary and secondary market areas, employment, and retail sales activity;

(e) recommendations for implementing all or any portion of the general plan, including the use of land use ordinances, capital improvement plans, community development and promotion, and any other appropriate action;

(f) provisions addressing any of the matters listed in Subsection **10-9a-401**(2); and

(g) any other element the municipality considers appropriate.

Checklist

General Plan or Amendment to the General Plan

This includes all actions required for both the planning commission and the legislative body, and staff (if present).

_____ 1. Place the plan or amendment on an agenda for the planning commission..

_____ 2. Provide the required notice of a meeting and a hearing by the planning commission to consider the application. State law sets the minimum notice requirements: 24-hour notice for meetings and ten days published notice for hearings. Local ordinances may require additional notice. (Note: There are separate notice requirements to "affected entities" for municipalities within the four largest counties on the Wasatch Front at 10-9a-203.)

_____ 3. Conduct at *least* one public hearing before the planning commission. The general plan should have public review and additional meetings to gather input may be necessary (but are not required).

_____ 4. The planning commission considers relevant evidence and opinion related to the content of the plan, the plan's conformity with state law, and whether or not the proposed plan or plan amendment complies with the goals of LUDMA (outlined in the Notes and Practice Tips), and contains the essential elements:

_____ a. A land use element, including agricultural protection zone issues, if applicable;

_____ b. A transportation element; and

_____ c. For cities, a moderate income housing element.

_____ 5. The planning commission takes a vote and recommends approval or denial of the plan, or amendment to the plan, to the legislative body. A proposed general plan or amendment may be modified by the planning commission as part of its recommendation. Important considerations are whether the proposal is in the best interest of the citizens and the community, and whether it complies with LUDMA.

_____ 6. Place the item on the next available agenda for the legislative body.

_____ 7. Provide the required 24-hour notice of a meeting by the legislative body to consider the application. A public hearing before the legislative body is not required by state law. Check to see if one is required by local ordinance.

_____ 8. Conduct at *least* one public meeting, as required by state statute, before the legislative body.

_____ 9. The legislative body considers the planning commission recommendation and any other relevant evidence and opinion related to whether or not the proposed plan or amendment is in the best interest of its citizens and the community, complies with the goals of LUDMA, and contains the essential elements as outlined in item 4 of this checklist.

_____ 10. The legislative body takes a vote and approves or rejects the plan or amendment. A proposed plan or amendment may be reviewed and revised by the legislative body prior to taking action without sending the plan or amendment back to the planning commission.

_____ 11. Preserve the proofs of notice, as well as the minutes of the meetings and hearings as required by GRAMA. There is no legal requirement that a "record" of the decision be preserved.

Notes and Practice Tips

The authority to regulate land use is derived from LUDMA and must be preceded by a general plan. A general plan must advance the purposes of LUDMA. Those purposes are:

1. To provide for the health, safety, and welfare, and promote the prosperity, improve the morals, peace and good order, comfort, convenience, and aesthetics of each municipality and its present and future in habitants and businesses:
2. To protect the tax base;
3. To secure economy in governmental expenditures;
4. To foster the state's agricultural and other industries;
5. To protect both urban and nonurban development;
6. To protect and ensure access to sunlight for solar energy devices;
7. To provide fundamental fairness in land use regulation; and
8. To protect property values.

The essential elements of the general plan are:

1. A land use element designating long-term goals; proposed location of land for housing, business, industry, agriculture, recreation, education, public buildings and grounds, open space, and other appropriate categories; and, for municipalities with agricultural protection areas, the plan must avoid proposing a land use within an agricultural protection area that is inconsistent with or detrimental to the use of the land for agriculture; and
2. A transportation and traffic circulation element; and
3. For cities, a moderate income housing element.

Public opinion and the preferences of the members of the planning commission and legislative body are both relevant and adequate for consideration in contemplating a general plan and amendments. There is no prohibition of consideration of "public clamor" as there would be in an administrative context, such as the approval of a subdivision or conditional use permit. Broad public input is encouraged during this process.

No findings or evidence are required to support a decision to adopt or to amend the general plan.

The legislative body's decision to adopt or amend a general plan will be deemed legal if it is reasonably debatable that the decision advances the purposes of LUDMA as noted above and does not violate a local, state, or federal law.

Amendments to the general plan may be initiated by the public, and are subject to referendum for 45 days after their enactment.

Types of Zoning Codes

This article excerpted from the New Philadelphia Zoning Code: Best Practices Report, by the Zoning Code Commission's Clarion/Duncan consulting team.

New approaches to zoning matters are always emerging and evolving. What follows is a brief description of some basic types of zoning codes: Euclidean, Form-Based, Smart Zoning, Incentive and Performance. Information is also included on alternative forms of zoning codes: Modular and Web-based.

Euclidean Zoning

The most common and most traditional approach to zoning is called Euclidean Zoning. It is named after the town of Euclid, Ohio. A landowner in Euclid, Ohio challenged the city's zoning code. The case wound its way up to the U.S. Supreme Court which upheld the municipality's ordinance. The case was decided in 1926, and the term "Euclidean Zoning" emerged and influenced the content and design of zoning codes across the country for decades.

Euclidean Zoning regulates development through land use classifications and dimensional standards. Typical land use classifications are single-family residential, multi-family residential, commercial, institutional, industrial and recreational. Each land use must comply with dimensional standards that regulate the height, bulk and area of structures. These dimensional standards typically take the form of setbacks, sideyards, height limits, minimum lot sizes, and lot coverage limits.

The traditional planning goals associated with Euclidean Zoning are providing for orderly growth, preventing overcrowding of land and people, alleviating congestion, and separating incompatible uses (such as insuring that a noisy factory cannot be built near a residential neighborhood).

Euclidean Zoning has come under scrutiny and criticism due to its lack of flexibility and somewhat outdated planning theory. Philadelphia's zoning code is a Euclidean code.

Form Based Codes

A form-based code places more emphasis on regulating the form and scale of buildings and their placement along and within public spaces (such as sidewalks, street trees, street furniture). Some of the urban planning goals of form-based codes include curbing urban sprawl, promoting pedestrian safety, and preserving the fabric of historic neighborhoods.

The following description appears on the Form-Based codes Institute website:

"Form-Based codes address the relationship between building facades and the public realm, the form and mass of buildings in relation to one another, and the scale and types of streets and blocks. The regulations and standards in form-Based codes, presented in both diagrams and words, are keyed to a regulating plan that designates the appropriate form and scale (and therefore, character) of development rather than only distinctions in land-use types."

The City of Miami has a "floating-zone" form-based zoning code, and Denver is moving in this direction. Form-Based codes are very new, and have not been utilized yet in any large, old industrial city. Depending upon the quality of the code and its diagrams, form-based codes can be difficult to interpret and administer.

To learn more about form-based codes, go to:

- http://www.formbasedcodes.org/index.html
- http://en.wikipedia.org/wiki/Form-based_codes

Smart Zoning

- Smart zoning (or smart coding) is an alternative to Euclidian zoning. There are a number of different techniques to accomplish smart zoning. Floating zones, cluster zoning, and planned unit development (PUDs) are possible even as the conventional Euclidean code exists, or the conventional code may be completely replaced by a smart code, as the City of Miami is proposing. The following techniques may be used to accomplish either conventional separation of uses or more environmentally responsible Traditional Neighborhood Development (TND), depending on how the codes are written. For serious reform of Euclidean zoning, TND ordinances such as form-based codes or the SmartCode are usually necessary.

- Cluster zoning permits residential uses to be clustered more closely together than normally allowed thereby leaving substantial land area to be devoted to open space.

- Planned unit development is cluster zoning but allows for mixed uses including some commercial and light industrial uses in order to blend together a traditional downtown environment but with at a suburban scale.

Incentive Zoning

Incentive zoning, as its name implies, offers a reward (usually in the form of increased density) to a developer who does something "extra" that is in the community's interest (such as more open space) or promotes a public goal (such as affordable housing).

The Smart Growth Resource Library defines incentive zoning as follows:

"Incentive zoning allows a developer to build a larger, higher-density project than would be permitted under existing zoning. In exchange, the developer provides something that is in the community's interest that would not otherwise be required (e.g., open space, plazas, arcades, etc.). The common types of community benefits or amenities for which state and local governments have devised incentive programs are urban design, human services (including affordable housing), and transit access.

Incentive zoning has its origins in New York City and Chicago. It has become increasingly common over the past 20 years. The terms "density bonuses" or "community benefits" are related terms and are often used when discussing incentive zoning.

Incentive zoning allows for a high degree of flexibility, but it can be complex to administer.

Performance Zoning

A key goal of zoning codes is to limit conflicting and incompatible uses. Traditional Euclidean zoning does this by regulating land use and bulk. Performance zoning, however, regulates the effects or impact of land uses through performance standards. Performance standards usually concern traffic flow, density, noise and access to light and air. Developers can build almost any building that meets the performance standards for that district. Therefore, performance zoning allows for a great deal of flexibility. This level of flexibility makes it a very useful tool, but also makes it difficult to administer.

Currently, no large city has a zoning code based completely on performance zoning. Chicago has used a hybrid approach for its manufacturing districts, using performance standards in addition to Euclidean zoning.

More information about Chicago's manufacturing districts can be found in the publication Revise, Recreate, Rezone: A Neighborhood Guide to Zoning prepared by the Metropolitan Planning Council. Go to http://www.metroplanning.org/zoningGuide/index.html

Modular Zoning

One reason that the number of zoning districts in major U.S. cities tends to expand over time is that new development proposals and redevelopment plans seem to need "a zone district that is almost like C-2 (or R-3, or M-1), but a little different." In other words, new zone districts are sometimes only modest variations of older districts. In some cases, they involve a slightly different list of uses, in others they allow slightly larger (or smaller) buildings, and in yet others they vary only in the amount of parking required or the size of signs permitted. This has led some cities to move toward "modular zoning". In concept, modular zoning "breaks-up" the idea of a zone district into its fundamental building blocks—permitted uses, dimensional standards (i.e., height, bulk, and setbacks, or form), and development standards (i.e., parking, signs, landscaping)–and allows those components to be combined in different ways. For example, a theoretical modular zoning district might be R-3-B: The first module (R) indicates a set of uses available to the owner; the second module (3) might indicate the maximum height of buildings in stories; and the third module (B) might indicate a package of parking requirements and design requirements.

Modular zoning's proponents generally come from two groups with different visions of why it is a good idea. The first support this technique as a way to encourage flexibility. A property owner who wants to build a larger building can request a zoning amendment to the second module—for example, from R-3-B to R-4-B. In theory, a modular rezoning request could be simpler and less

controversial, since the owner could agree in advance that he or she was not asking for any change in permitted uses or parking requirements. The only debate would be over building size.

The second group of proponents supports modular zoning as a way to more closely tailor zoning regulations to specific neighborhood character. For example, a typical R-3 district might allow one set of residential uses and buildings of a certain size, while the R-4 district allows a few more permitted uses and larger buildings. But if R-3 limits buildings to be smaller than those in the existing neighborhood and R-4 allows uses not currently permitted in the area, the city may face a difficult choice in how to zone the area. Modular zoning seems to offer the opportunity to combine a use module that perfectly matches the character of the area with a size module that matches that same character. In this case, however, the goal is not to insert flexibility to change zoning but to create more predictability for neighbors, and the expectation is that this closely tailored zoning will probably not change much over time.

The major argument against modular zoning is that it adds complexity to the zoning code. It takes time to do the research to determine what dimensions or development standards should be grouped together in different modules. The more module combinations, the more time it takes. While individual zoning modules can be simple, the number of combinations can be very large, which may require more staff training and more explanations to citizens about how the system works. When a wide variety of use and dimensional modules are allowed to be combined, the chances of unintended consequences increase–some combinations that work on paper may be impossible in practice.

This article excerpted from the New Philadelphia Zoning Code: Best Practices Report, by the Zoning Code Commission's Clarion/Duncan consulting team.

Web-based Code

The future of zoning is web-based codes, for a variety of reasons. One important advantage is the cost of keeping codes current. When book-based codes are used, amendments need to be printed and manually inserted in the document, and many cities can only afford to consolidate amendments, send them to the publisher, and mail out updates to known code users every three or six or twelve months. As a result, zoning book readers always need to check with zoning staff to ensure that there are no new amendments that modify the text they are reading. In contrast, web-based codes can be updated (often by city staff without the use of an intermediary codification firm) on an almost real-time basis–often on the same date that the amendment becomes effective. If the planning director makes an interpretation of an ambiguous provision, that can be uploaded as well, so that other property owners can rely on the same interpretation. Residents, property owners, and potential investors save substantial time and energy–and avoid costly mistakes–simply by being able to rely on the accuracy of the web-based code.

In addition, web-based codes can offer several features that promote user-friendliness and understandability to the general public. In addition to standard text, they can include far more illustrations and graphics because uploading them to the web is very inexpensive relative to printing costs. They can also include unofficial commentary and links to comprehensive plan or area plan policies that are helpful to property owners and landowners interested in understanding the objective behind a specific zoning provision. Links between zoning text and defined terms can be instantaneous, and "flipping back and forth" between different provisions of the code can be done by the click of a mouse. Perhaps most importantly, zoning code portals can be programmed to answer common technical questions ("Where can I build a fence? How tall can it be?") based on a specific property address, while book-based codes often require readers to integrate several sections together to get the same answer.

Drafting Clear Ordinances: Do's and Don'ts

by Carolyn Braun, AICP

Many planners spend a lot of time interpreting or explaining ordinances to citizens and those representing them. Unclear language in an ordinance provides an opportunity for both confusion and legal challenges. The best way to minimize this is by writing clear, readable ordinances.

> THE BEST WAY TO AVOID THE TIME AND EXPENSE OF A LAWSUIT IS TO MAKE SURE THAT ALL IMPORTANT TERMS ARE DEFINED AND EVERY DEFINITION IS CLEAR AND UNAMBIGUOUS.

Tips On Developing Ordinance Content

1. Be Able to Explain the Need

Elected officials often suggest consideration of an ordinance based on what a neighboring community has adopted. Reviewing other community ordinances can be very helpful. Be cautious, however, particularly if you are adopting a small section of that ordinance. Does the ordinance language you are "borrowing" include terms not defined in your own ordinance?

Most importantly, be sure the ordinance you are drafting is tailored to meet *your* community's concerns. You should be able to explain the need for the ordinance. That understanding will also lead to clearer interpretation and enforcement, and help ensure that your ordinance is legally defensible.

2. Make Sure You Have the Authority

Before you go too far in drafting an ordinance, make sure you have the authority to enact it. Does it conform to state and federal law? Communities cannot adopt local ordinances that contradict explicit provisions of state or federal law. For example, in Minnesota there are specific provisions in state law requiring communities to allow state licensed residential facilities.

In some cases, the applicable "field of law" has been preempted by state law. For example, a state-adopted building code may preempt adoption of a local building code. In such cases, you do not have the authority to adopt regulations. Always check with your attorney. Adoption of an ordinance by another community does not guarantee that a similar ordinance will be legally defensible in yours.

In some instances, state laws and rules can be adopted by reference, but there is a question whether any future amendments to the state law are then automatically incorporated into your previously adopted ordinance. One way to deal with this is to include the phrase "as may be amended from time to time" when you adopt an ordinance that references a state law or rule.

3. Discuss the Draft

It's good practice to discuss draft ordinance provisions in a work session (in most places, these must be noticed and open to the public). Planning commissioners can offer valuable insights and assistance, and should be involved in reviewing the draft. The meaning of the ordinance should be clear to them, not just to staff. Planning board members can also be asked to play devil's advocate and thoroughly explore various possible interpretations of the draft. This extra time and work often pays off.

If you know of any interested individuals or groups, ask them to participate. Consider how application of the ordinance will affect them. Are there any unintended consequences that may result from adoption of the ordinance?

Get input from your town, city, or county attorneys' office as early as possible. At a minimum they need to review the draft before it is scheduled for public hearing.

Finally, if there's a public hearing before your local governing body, make sure the members have been briefed in advance and given a chance to provide their feedback.

4. Use a Check List

Create a check list to review each draft. The check list should include tips from this article and the procedural requirements of your ordinance.

5. Proofread, and Proofread Again

After reading several drafts of an ordinance, it becomes difficult to see errors in typing, numbering, or other items. It can be very helpful to have someone proofread who hasn't been involved in the drafting.

6. Keep Good Records

While communities often have a wide range of discretion in adopting local ordinances, they must also comply with procedural due process requirements. Often litigants will allege violations of due process when they challenge an ordinance.

Documentation of compliance can reduce the likelihood of such litigation. It is also very helpful to record minutes from ordinance discussions that are held prior to the public hearing. This information provides background on the basis for the ordinance, and should be included in the public hearing staff report.

Tips On The Mechanics Of Drafting An Ordinance

Ordinances – in particular zoning ordinances – can be lengthy documents. To improve readability, emphasis should be placed upon drafting a well-organized ordinance that uses plain, well-defined

language. Such an ordinance will be easier to administer and amend.

1. Make it Clear

There are several principles of clear writing. Writing in the active voice – using action verbs – is arguably the most important. The active voice makes it clear who is to perform the action required. For example, an ordinance in passive voice might say "The application must be approved." In active voice it would say "The administrator must approve the application."

Here are some other suggestions:

• Use action verbs that are shorter and more direct. For example, change "make payment" to "pay" or "is concerned with" to "concerns."

• Be direct, especially when describing procedures and lists of duties. For example, say "Sign all copies."

• Similarly, convert phrases to simpler terms. Instead of saying "failed to comply with," use the word "violated." Substitute simple words where possible. For example, instead of "construct" or "fabricate" use the word "make," instead of "initiate" or "commence" use "begin."

• Short, compact paragraphs work best. Each paragraph should deal with a single topic. Lengthy, complex, or technical provisions should be presented in a series of related paragraphs. This will help readers understand the relationship of the provisions.

• Watch out for commas. The placement of one little comma can sometimes make a big difference in meaning.[1]

• Draft your ordinances in the present tense.

• If you have a choice between writing either positively or negatively, use positive language. For example, instead of saying "The City Manager may not approve signage in the right-of-way unless he or she has determined that there is no public safety impact from such signage," use "The City Manager may approve signage in the right-of-way when he or she determines that there is no public safety impact from such signage."

• Similarly, avoid negative words or phrases. For example, don't say "A project will not be approved unless all application requirements are met." Instead, say "A project will be approved only if the applicant meets all requirements."

• Simple illustrations can clarify terms or concepts – and are found in a growing number of ordinances. But first check with your municipal attorney on whether you can do this. If you include graphics, make sure they are clear and legible.

2. Language in an Ordinance Should be Consistent

Don't use different words to denote the same thing just for the sake of variation. Using different words rather than repeating the same term simply confuses the reader and may provide opportunities for misinterpretation and litigation. For example, don't say "Each motor vehicle owner must register his or her car." Instead, say "Each automobile owner must register his or her automobile."

3. Do Your Lists Right

Lists should be clear and use parallel structure. List each item so that it makes a complete thought when read with the introductory text.

If the introductory text is a complete sentence, end the introduction with a colon and make each item in the list a separate sentence. If the introductory language for the list is an incomplete sentence, end the introduction with a dash and end each item in the list except the last item with a semicolon.

After the semicolon in the next to the last item in the list, write "and" or "or" as appropriate and end the last item in the list with a period. Listing in this manner can help avoid problems of ambiguity caused by the words "and" and "or."

When using lists it is also helpful to have the introductory text say "at least one of the following" or "all of the following."[2]

4. Be Considerate

Ordinances should avoid gender-specific terminology. For example, "draftsman" becomes "drafter," "foreman" becomes "supervisor," and so on. In addition, instead of using phrases such as "the administrator or his designee," substitute "the administrator or the administrator's designee." Similarly, avoid archaic or potentially offensive terms.

5. Be Careful When Defining Terms

For zoning ordinances in particular, the best way to avoid the time and expense of a lawsuit is to make sure that all important terms are defined and every definition is clear and unambiguous.

In interpreting zoning ordinances, courts will attempt to find the plain and ordinary meaning of the terms. Any ambiguous language will usually be interpreted in favor of the landowner. In Minnesota, the courts have been asked to interpret undefined terms such as "lawn and garden center," "accessory," "subordinate," "incidental," "main," and "structure."

It's Worth the Work

The tips in this article can help you draft a clear, legally-defensible ordinance. It may seem like a lot of work. It is. However, taking the extra time as you draft the ordinance will likely save your community even more time and resources when you administer and enforce it. ◆

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1 I was reminded of this in a comment by planner Vicky Newson on a draft of this article. As she explained: "Many times the placement or omission of a comma can change the interpretation of a code section. I always use the example of 'I have several dresses. They are red, green, blue, orange and yellow' versus 'I have several dresses. They are red, green, blue, orange, and yellow.' In each case it says the same thing, but how many dresses do I have? In the first example, the last dress could be an orange and yellow dress, but in the second example it is clear that they are two separate dresses."

2 Thanks to Davis, California, Community Development Director Katherine Hess for this suggestion.

The Zoning Ordinance

Utah Code Title 10 Chapter 09
The Municipal Land Use Development and Management Act
http://www.le.state.ut.us/~code/code htm

"If a builder build a house for some one, and does not construct it properly, and the house which he built fall in and kill its owner, then that builder shall be put to death."

Hammurabi, King of Babylon, Code of Laws Section 229 (1780 BC)

Tips for drafting Land Use Ordinances

1. Clarity
2. Easy to read & interpret & enforce!
3. Objective as possible
   Permitted Uses—routine as possible
   Conditional—extra level of review with objective criteria

10-9a-501. Authority to enact land use ordinances and zoning map.

The legislative body may enact land use ordinances and a zoning map consistent with the purposes set forth in this chapter.

10-9a-502. Preparation and adoption of land use ordinance or zoning map.

(1) The planning commission shall:
(a) provide notice as required by Subsection 10-9a-205(1)(a);
(b) hold a public hearing on a proposed land use ordinance or zoning map; and
(c) prepare and recommend to the legislative body a proposed land use ordinance or ordinances and zoning map that represent the planning commission's recommendation for regulating the use and development of land within all or any part of the area of the municipality.

(2) The municipal legislative body shall consider each proposed land use ordinance and zoning map recommended to it by the planning commission, and, after providing notice as required by Subsection 10-9a-205(1)(b) and holding a public meeting, the legislative body may adopt or reject the ordinance or map either as proposed by the planning commission or after making any revision the municipal legislative body considers appropriate.

10-9a-503. Land use ordinance or zoning map amendments.

(1) The legislative body may amend:
(a) the number, shape, boundaries, or area of any zoning district;
(b) any regulation of or within the zoning district; or
(c) any other provision of a land use ordinance.

(2) The legislative body may not make any amendment authorized by this subsection unless the amendment was proposed by the planning commission or was first submitted to the planning commission for its recommendation.

(3) The legislative body shall comply with the procedure specified in Section **10-9a-502** in preparing and adopting an amendment to a land use ordinance or a zoning map.

10-9a-505. Zoning districts.

(1) (a) The legislative body may divide the territory over which it has jurisdiction into zoning districts of a number, shape, and area that it considers appropriate to carry out the purposes of this chapter.

(b) Within those zoning districts, the legislative body may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings and structures, and the use of land.

(c) A municipality may enact an ordinance regulating land use and development in a flood plain or potential geologic hazard area to:

(i) protect life; and

(ii) prevent:

(A) the substantial loss of real property; or

(B) substantial damage to real property.

(2) The legislative body shall ensure that the regulations are uniform for each class or kind of buildings throughout each zoning district, but the regulations in one zone may differ from those in other zones.

(3) (a) There is no minimum area or diversity of ownership requirement for a zone designation.

(b) Neither the size of a zoning district nor the number of landowners within the district may be used as evidence of the illegality of a zoning district or of the invalidity of a municipal decision.

Checklist

Application for Land Use Ordinances and Zoning Map Changes

This includes all actions required for both the planning commission and the legislative body, and staff (if present).

_____ 1. Determine that the application for a zoning map or land use ordinance text amendment contains information required by local ordinance (a.k.a. "completeness determination").

_____ 2. Determine that all application fees have been paid.

_____ 3. Place the item on the next available planning commission agenda.

_____ 4. Provide a minimum of ten days published notice of a public hearing. Local ordinance may require even more notice.

_____ 5. Provide the applicant with a copy of the staff report at least three days in advance of the hearing and each public meeting thereafter.

_____ 6. Conduct at least one public hearing before the planning commission.

_____ 7. The planning commission should consider relevant evidence and opinion related to whether or not the proposed zone change or ordinance amendment should receive a positive recommendation. Important references are whether the amendment:

_____ a. Is in the best interest of the citizens and community;

_____ b. Advances one or more of the goals of LUDMA (outlined in the Notes and Practice Tips); and

_____ c. Can be construed as generally consistent with one or more elements of the community's general plan.

_____ 8. The planning commission must vote and recommend approval or denial of a map change or land use ordinance amendment to the legislative body. A proposed zone change or amendment may be reviewed and revised by the planning commission as part of its recommendation.

_____ 9. Place the item on the next available agenda of the legislative body.

_____ 10. Provide the required 24-hour notice of a meeting by the legislative body to consider the application. A public hearing is not required by state law, but if one is required by local ordinance, provide the required notice (at least ten days published notice) for the hearing. More notice may be required by local ordinance.

_____ 11. Conduct at *least* one public meeting.

_____ 12. The legislative body should consider the planning commission recommendation and any other relevant evidence and opinion related to whether or not the proposed zoning map or land use or ordinance amendment:

_____ a. Is in the best interest of the citizens;

_____ b. Complies with the goals of LUDMA; and

_____ c. Can be construed as generally consistent with at least one element of the general plan.

_____ 13. The legislative body takes a vote and approves, modifies and approves, or denies the zoning map or land use ordinance amendment. A proposed map change or text amendment may be reviewed and revised by the legislative body prior to taking action without referring the matter back to the planning commission.

_____ 14. Preserve the proofs of notice, as well as the minutes of the meetings and hearings as required by GRAMA. There is no legal requirement that a "record" of the decision be preserved.

Notes and Practice Tips

The authority to plan and zone is derived from LUDMA. As such, all land use ordinances must advance at least one of the purposes of LUDMA. Those purposes are:

1. To provide for the health, safety, and welfare, and promote the prosperity, improve the morals, peace and good order, comfort, convenience, and aesthetics of each municipality and its present and future inhabitants and businesses:
2. To protect the tax base;
3. To secure economy in governmental expenditures;
4. To foster the state's agricultural and other industries;
5. To protect both urban and nonurban development;
6. To protect and ensure access to sunlight for solar energy devices;
7. To provide fundamental fairness in land use regulation; and
8. To protect property values.

Public opinion and the preferences of the members of the planning commission and legislative body are both relevant and adequate for consideration in contemplating zone changes and ordinance amendments. There is no prohibition of consideration of "public clamor" as there would be in an administrative context, such as the approval of a subdivision or conditional use permit. Zoning map changes and land use ordinance amendments should take the general plan into consideration, though unless the municipality has an ordinance to the contrary, the plan is only advisory.

The legislative body's decision to approve or deny a zone change or to adopt or reject a proposed amendment to the ordinances will be deemed legal if it is reasonably debatable that the decision advances the purposes of LUDMA as noted above and does not violate a local, state, or federal law.

A zoning map change or land use ordinance text amendment is subject to appeal to the district court within 30 days of final action. It is also subject to the citizens' power of referendum within 45 days of enactment.

Subdivision Ordinances

Subdivision ordinances are one of the tools given to cities and towns. They accomplish two general purposes: first, they help a city or town implement the general plan, and secondly, they provide some level of consumer protection to would-be buyers of new lots. A typical subdivision ordinance will set requirements on a land owner that the land owner must meet before the land owner is allowed to record a subdivision plat with the county recorder. This is important to the landowner because it is illegal for him or her to sell lots before the plat is recorded.

Having a subdivision ordinance is not mandatory, it is optional. However, if a city or town chooses not to have a subdivision ordinance, the provisions of the state code regarding subdivisions will become the regulations for subdivisions for that city or town.[1] This situation results in every city or town having at least some body of law under which a land owner can subdivide under municipal regulations.

A subdivision is defined by the state code to be any land that is divided, re-subdivided, or proposed to be divided into two or more lots for the purposes of offer, sale, lease, or other development. It includes any division or development of land for residential or non-residential purposes including land to be used for commercial, agricultural, or industrial purposes. The exceptions to this definition include any real division of agricultural land for the purpose of joining one parcel to a contiguous parcel of un-subdivided agricultural land. A recorded agreement between owners of adjoining un-subdivided property adjusting their mutual boundary if no new lots are created, or a recorded document executed by one owner revising his legal description or adjoining two of his own parcels together is also exempt.[2]

The process to enact a subdivision ordinance is a two-step process. The planning commission is required to prepare and recommend a proposed ordinance to the city council. The planning commission must hold a public hearing on the proposed ordinance before making its final recommendation to the city council.[3] The city council does not have to hold a public hearing but it may if it wishes. Notice of the public hearing must be mailed to each affected entity and posted in at least three public locations within the city or town or posted on the city or town's official website at least ten calendar days before the public hearing. Notice of the public hearing must also be published in a newspaper of general circulation and on the Utah Public Notice Website at least ten calendar days before the public hearing; or it can be mailed to each property owner whose land is directly affected and to each adjacent property owner if the city or town has adopted an ordinance to that effect. [4]

The city or town council may adopt or reject the ordinance as proposed by the planning commission or it may revise the recommended ordinance and then adopt it as amended.[5]

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1 Utah Code 10-9a-601.

2 Utah Code 10-9a-103 (52).

3 Utah Code 10-9a-602.

4 Utah Code 10-9a-205.

5 Utah Code 10-9a-602(2).

When a land owner desires to subdivide his property, he must comply with the city or town subdivision ordinance. If there is no ordinance, then he must comply with the minimum standards in the state law. The state law generally requires that a plat be prepared by a licensed surveyor. The plat must have a name, set out the boundaries, course, and dimensions of the land, layout and dedicate the streets and public places, and set out the lots. The plat must also show the necessary easements for public utilities.

A city or town can have additional requirements for the plat, but not more lenient requirements. Any plat proposed by a landowner must be approved by the supplier of culinary water and the supplier of sanitary sewer. This requirement is to protect future buyers. It ensures that whoever buys the land will be able to actually build on the property and have water and sewer available. Obviously, in an area that does not have sewer, the plat must be approved by the body that allows and approves other systems such as septic tanks.

A city or town does not have to hold a public hearing on the plat before it is approved. The old law required one so many ordinances still contain that requirement. If the city or town ordinance still has this requirement it must be followed.

The state code requires that if the ordinances and the state law have been complied with, then the plat must be approved.[6] The city or town can condition the approval on the land owner getting tax clearance evidence showing that all property taxes are current. This can be important because if the plat dedicates land to the city or town for a park or other public space and the taxes are not current, the county will still collect the back taxes against that newly dedicated public property even though it is now owned by the city or town.

The state code does not say who in the city or town has to give final approval of the plat. This is determined by the city or town's own land use ordinances. A city or town could have subdivision plats finally approved by the planning commission or city council or, even theoretically, by an individual assigned to do so in the city. It is required, however, that all approvals are entered in writing on the plat by the designated city or town officers. The plat is recorded with the county recorder's office. The plat is required to be recorded within the time period set out in the city or town ordinance. If it is not, the plat is voidable.

The state code does have some plat exceptions. The principle exception is for subdivisions of ten lots or fewer. These are sometimes referred to as minor subdivisions. Even if a development is proposed for fewer than ten lots, it will still need a plat if it requires the dedication of any public street or place. A minor subdivision must still be approved by the culinary water and sewer authority and must not violate any zoning ordinance. While minor subdivisions do not require a plat,[7] they do require a record of survey.[8] This may not be much of an advantage to a landowner as a record of survey may cost as much as a plat.

The city or town is faced with enforcing its own subdivision ordinances. No one else is going to do it for you. Very often landowners will just record deeds in the county recorder's office without subdivision approval. The county recorder is required to accept these documents. The deeds are valid transactions. However, these deeds do not create approved lots unless a city or town certifies them.[9] This creates a difficult problem for a city or town. The lot has been created, the property transferred to a new owner, and the deed recorded but no legal building lot has been created. The only way a city or town can effectively enforce the subdivision and zoning ordinances is to deny building or other use permits until such time as the lot is brought into conformity with the local ordinance. This may require a city or town to tell

6 Utah Code 10-9a-603(2).

7 Utah Code 10-9a-605.

8 Utah Code 10-9a-605(2)(b).

9 Utah Code 10-9a-605(3).

an innocent purchaser of an illegally divided lot that his or her only recourse is to go back against the person who sold them the lot. In many instances the illegal division of land is done innocently. It may be the result of a divorce, estate settlement, or just ignorance. However, no matter how sympathetic the situation, if a city or town wishes to have enforceable land use ordinances, it cannot treat the innocent any differently than the guilty. A substandard lot is a substandard lot.

Once a plat is recorded two things happen: first, the public uses and places indicated on the plat are dedicated to the city or town, and second, the lots can now be legally sold. The law specifically provides that the city or town does not have any liability to improve a dedicated but unimproved street just because it is shown on a filed subdivision plat and dedicated to the city or town.[10] However, the buyers of the new lots will certainly expect that someone is going to see that the streets and parks are finished. The usual method of seeing that the public places are finished is to condition the approval of the subdivision plat on either the completion of the public improvements in a manner that satisfies city or town standards or to require that the developer post with the city sufficient money or a surety bond to guarantee that the subdivision improvements can be completed. If you do have a surety or warranty bond it cannot be for longer than one year after the subdivision is completed and accepted unless some very special conditions exist. In other words once a subdivision is done and the city accepts the improvements the city cannot require the developer to warrant the quality of his work for longer than one year.

The streets and public places are now yours, but they are not yours to do anything with them that you wish. The dedication is for a specific purpose only. The city or town has what the lawyers call a defeasible interest in the property. If the city or town decides it no longer needs the street or park, the city or town cannot just sell it or use it for some other purpose; the street or park goes back to the landowners.

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10 Utah Code 10-9a-607.

Thinking About Subdivision Design

Subdivisions, as opposed to in-fill development, can have a major impact on a community. They can "eat" up open space, put a drain on infrastructure and thus on city coffers, and can alter the character of an entire community.

It is vital, therefore, that planners and municipal officials take great care in writing and enforcing a subdivision ordinance that will serve the community.

The Problems

- ➜ Most subdivisions are built in a cookie-cutter style with every lot the same as every other lot. They are usually the same size, nearly the same shape and offer little diversity as to where and how the house is placed in relationship to the street. In addition the houses turn out looking very much alike with large garages that dominate the front of the house.
- ➜ Developers look to the "bottom-dollar, and view diversity of style and layout as costly. They are often in the process for the short term. The citizens are there for the long term. Open space is considered to be a loss to the developer and so unless it can serve as a revenue enhancement, he or she is not likely to see it as valuable.
- ➜ The subdivision of the last twenty years has been car dependent because we have separated residential living from the necessities of living. They are often far from the center of town, from shopping centers, professional services, and even from schools and libraries. Because of the car-centeredness of these areas, streets are wide, sidewalks are often not required, and garages have replaced front porches.
- ➜ Cities and towns, fearing the loss of the rural look and feel of their communities have insisted on larger lot sizes in hope of preserving the sense of open space. Ironically, in doing so, more open space is consumed as it becomes cut off from the community by private ownership and fences.
- ➜ Zoning does not solve the problems. When all we look at is lot size and frontages, we actually encourage the type of subdivision that is described above. Take time to make sure you deal with the overall design that meets the intent of you community's general plan for new growth.

What can be done?

Expectations: Decide what type of development you want and where. Urban or rural ? Or concentrations of both? It is possible that you will want some of each in your community. Then state this vision in your purpose statement. To many ordinances focus on street layout and infrastructure details but forget to articulate the vision that is desired.

Urban design is best suited to neighborhoods that are within close proximity to the town center. While there may be larger lots there now, think into the future. Do you see growth continue in? Do you want growth to happen close to town rather than in the out-laying areas? If so, plan for urban development design in those areas. In the out lying areas you may decide that you want to maintain an atmosphere of the traditional rural quality of the community despite the fact that growth will occur. If that is the case, create an rural area where you will expect open space to be protected. This does not mean that you will not allow development, it means that development will be done in a different way.

Resources: There are a number of ideas that can help us redesign the subdivision and result in better community development. One concept comes from two books by Randall Arendt. The titles are: *Rural by Design* and *Conservation Design for Subdivisions.* The City of Farmington has implemented these concepts into ordinances and has found great success.

The Center for Green Space Design has also worked in Oakley and other parts of the state to implement subdivisions that honor the rural heritage of older rural communities while allowing for new growth. The can be found at http://greenspacedesign.org/

We here at the League also have a guidebook on subdivisions as well as resources on our website.

Subdivisions—Utah Code Title 10 Chapter 09 10-9a–601 et seq

Once again it is not required that municipalities adopt a subdivision ordinance but the law does set a minimum standard of review if no local ordinance is in place. Again, we highly recommend that each jurisdiction implement a subdivision ordinance. New growth can dramatically shape the physical and financial future of a community.

10-9a-601. Enactment of subdivision ordinance.

(1) The legislative body of a municipality may enact ordinances requiring that a subdivision plat comply with the provisions of the ordinance and this part before: (a) it may be filed or recorded in the county recorder's office; and (b) lots may be sold.

(2) If the legislative body fails to enact a subdivision ordinance, the municipality may regulate subdivisions only to the extent provided in this part.

The planning commission is responsible for the creation and maintenance of the subdivision ordinance.

10-9a-602. Planning commission preparation and recommendation of subdivision ordinance—Adoption or rejection by legislative body.

(1) The planning commission shall: (a) prepare and recommend a proposed ordinance to the legislative body that regulates the subdivision of land; (b) prepare and recommend or consider and recommend a proposed ordinance that amends the regulation of the subdivision of the land in the municipality; (c) provide notice consistent with Subsection 10-9a-205; and (d) hold a public hearing on the proposed ordinance before making its final recommendation to the legislative body.

(2) The municipal legislative body may adopt or reject the ordinance either as proposed by the planning commission or after making any revision the legislative body considers appropriate.

Good subdivision development is important to almost every community in Utah. One or two houses are probably not going to have a city-wide influence no matter how large or out of character they may be. A large subdivision can and will have a major impact on the character, population, and the need for services. Therefore, the creation of a subdivision ordinance must be carefully, clearly, and precisely crafted.

If your municipality is using the same ordinance that it has used for more than five years, it is probably out of date. Here are just a few general rules that need to be considered:

1. The primary objective of the ordinance should be to tell the developer, objectively, how the jurisdiction wants subdivision to occur. Fiscal, safety, and aesthetic issues should be considered:
   a. Fiscal issues include how the city or town will pay for future services to the development.
   b. Safety issues include infrastructure standards, street layout and width and intersection design.
   c. Aesthetic issues might include how the subdivision will integrate into the already-developed areas of town;

2. The subdivision ordinance should clearly state that all development costs, including those incurred by the city for review, must be borne by the developer. However, the cost to the developer may not exceed the roughly proportionate cost of providing those services. In other words, development fees may not be a "profit center" for a city;
3. The ordinance should require the developer either to: (a) construct all improvements prior to recording a plat, or (b) procure an assurance, in the form of a bond, letter of credit, or cash, which will ensure that the improvements have been properly installed within a reasonable time. With few exceptions, the improvement assurance cannot be held for more than one year after the improvements are completed;
4. The jurisdiction cannot make demands of a developer if those demands are not in the ordinance;
5. The ordinance should delegate responsibility for administering the subdivision laws to the lowest possible level in the organization. Options include allowing staff to permit subdivisions, the planning commission, or the legislative body;
6. The developer should be responsible for all development fees. If the city charges impact fees, it must have completed a specific study that justifies the fees. (If you do not know the difference between impact fees and development fees, see the sections specific to exactions and impact fees);
7. Typically, the subdivision process is broken into two or three processes:
   a. Concept plan/sketch plat;
   b. Preliminary plat; and
   c. Final plat;
8. The ordinance should include the number of plans to be submitted for concept plan/sketch plat approval and preliminary plat approval as well as the manner in which the final plat should be submitted and recorded;
9. The ordinance should consider natural hazards and resources that need to be addressed by the developer;
10. Subdivision ordinances should detail landscaping and street lighting requirements, especially in commercial areas, and can require design elements in all zones;
11. Both the physical elements of road construction, such as width, depth, and materials, and the impact and flow of the traffic roads will produce, should be addressed in the ordinance;
12. The general plan should also provide for infrastructure and utility needs with a view to long-term demands that apply to future needs rather than just the short-term needs of a single development.

You may have decided by now that the writing of a subdivision ordinance is a very complicated endeavor. No one will disagree with you. A poorly written ordinance will come back to haunt you and the municipality for a very long time.

A commission should take its time, look at a variety of ordinances, and even get professional assistance. While ordinances from other cities and towns can be helpful, each jurisdiction will need to tailor the ordinance to suit the community.

Checklist

Subdivision Plat Approvals by Staff

(Staff is the land use authority that makes a final decision)

_____ 1. Determine that the land use ordinance allows the requested subdivision in the zone where the property is located.

_____ 2. Determine that the application contains the information required for a subdivision. The application requirements must be in the ordinance.

_____ 3. Determine that all application fees have been paid.

_____ 4. Consider whether the phase of the application (concept plan/sketch plat, preliminary plat, final plat) conforms to the ordinance. (If there is no subdivision ordinance, review the standards in state statute related to subdivisions.)

_____ 5. Provide notice of a public meeting to consider the application.

_____ 6. Provide the applicant with a copy of any staff report that has been prepared in response to the application at least three days in advance of the public meeting. The staff report should reflect an analysis of whether the application complies with the specific subdivision ordinance standards.

_____ 7. Conduct the meeting, allowing broad input from the applicant, as well as relevant and credible evidence regarding the application's compliance with the vested ordinance (the ordinance in place at the time that the complete application was submitted and application fees were paid).

_____ 8. Either approve the phase of the application, noting on the record that it complies with the provision of the relevant ordinance; deny the phase of the application noting on the record how the evidence indicates that the application does not comply with the ordinance; or with the consent of the applicant, allow the applicant to modify the application in a specific manner that is required by a specific section of the municipal code.

_____ 9. Preserve the record of the proceedings to document the law and evidence that was considered by the land use authority before it made a decision related to the application.

Notes and Practice Tips

The action taken in response to a land use application is legal only if it is supported by substantial evidence in the record. "Substantial evidence" is evidence that is relevant and credible. To be relevant, it must relate to the standards in the ordinance related to the review of applications for conditional uses. To be credible, it must be objective.

While public testimony can produce substantial evidence, "public clamor," such as: "I don't like the project" is not substantial evidence. Evidence is independent—it stands on its own and is not based on lay opinion. The opinion of expert witnesses qualified to testify in their field of expertise can be substantial evidence if proper information is, or can be, provided supporting the qualifications of the persons expressing the opinion.

Generally speaking, if notice is given, and the subdivision proposal complies with the zoning and the objective standards of the subdivision ordinance, then the land use authority must approve the subdivision application.

Checklist

Subdivision Plat Approvals by Planning Commission

(Planning commission is the land use authority that makes a final decision)

_____ 1. Determine that the land use ordinance allows the requested subdivision in the zone where the property is located.

_____ 2. Determine that the application contains the information required for a subdivision. The application requirements must be in the ordinance.

_____ 3. Determine that all application fees have been paid.

_____ 4. Consider whether the phase of the application (concept plan/sketch plat, preliminary plat, final plat) conforms to the ordinance. (If there is no subdivision ordinance, review the standards in state statute related to subdivisions.)

_____ 5. Review standards in the ordinance that apply to the consideration of the phase (concept/sketch, preliminary or final) of the application. Are there written standards for exactions in the local ordinance? (If there is no subdivision ordinance, review the standards in state statute related to subdivisions.)

_____ 6. Provide the required notice of a public meeting (24 hours) to consider the application.

_____ 7. A single public meeting is required by state statute. Local ordinance may require more. Some local ordinances require a public hearing. These ordinances should be revised to eliminate the public hearing requirement.

_____ 8. Conduct the meeting that is required by the ordinance and state statute as part of the consideration of the application for subdivision.

_____ 9. Either approve the phase of the application, noting on the record that it complies with the provision of the relevant ordinance; deny the phase of the application noting on the record how the evidence indicates that the application does not comply with the ordinance; or with the consent of the applicant, allow the applicant to modify the application in a specific manner that is required by a specific section of the municipal code.

_____ 10. Preserve the record of the proceedings to document the law and evidence that was considered by the land use authority before it made a decision related to the application.

Notes and Practice Tips

The action taken in response to a land use application is legal only if it is supported by substantial evidence in the record. "Substantial evidence" is evidence that is relevant and credible. To be relevant, it must relate to the standards in the ordinance related to the review of applications for conditional uses. To be credible, it must be objective.

While public testimony can produce substantial evidence, "public clamor," such as: "I don't like the project" is not substantial evidence. Evidence is independent—it stands on its own and is not based on lay opinion. The opinion of expert witnesses qualified to testify in their field of expertise can be substantial evidence if proper information is, or can be, provided supporting the qualifications of the persons expressing the opinion.

Generally speaking, if notice is given, and the subdivision proposal complies with the zoning and the objective standards of the subdivision ordinance, then the land use authority must approve the subdivision application.

Checklist

Subdivision Plat Approvals by Legislative Body

(Planning commission is not the land use authority, but if designated by local ordinance, acts as advisor to the legislative body for subdivision plat approvals)

_____ 1. Determine that the land use ordinance allows the requested subdivision in the zone where the property is located.

_____ 2. Determine that the application contains the information required for a subdivision. The application requirements must be in the ordinance.

_____ 3. Determine that all application fees have been paid.

_____ 4. Consider whether the phase of the application (concept plan/sketch plat, preliminary plat, final plat) conforms to the ordinance. (If there is no subdivision ordinance, review the standards in state statute related to subdivisions.)

_____ 5. Review standards in the ordinance that apply to the consideration of the phase (concept/sketch, preliminary or final) of the application. Are there written standards for exactions in the local ordinance? (If there is no subdivision ordinance, review the standards in state statute related to subdivisions.)

_____ 6. Provide the required notice of a public meeting before the planning commission or the legislative body (24 hours) to consider the application.

_____ 7. A single public meeting is required by state statute. Some local ordinances require a public hearing. These ordinances should be revised to eliminate the public hearing requirement.

_____ 8. Provide the applicant with a copy of the staff report on the application at least three days in advance of the public meeting.

_____ 9. Conduct the meeting that is required by the ordinance and state statute as part of the consideration of the application for subdivision. In the public meeting, allow broad input from the applicant, as well as relevant and credible evidence from the public regarding compliance with the vested ordinance.

_____ 10. The planning commission must:

- _____ a. Recommend approval of the phase of the application, noting on the record that it complies with the provision of the relevant ordinance;
- _____ b. Recommend denial of the phase of the application noting on the record how the evidence indicates that the application does not comply with the ordinance; or
- _____ c. With consent of the applicant, allow the applicant to modify the application in a specific manner that is required by a specific section of the municipal code.

_____ 11. Place the item on an agenda for the legislative body.

_____ 12. Provide the required notice of a meeting to consider the application. State law requires 24 hours notice. Local ordinance may require more.

_____ 13. Review standards in the ordinance that apply to the consideration of the application. (If there is no subdivision ordinance, review the standards in state statute related to subdivisions.)

_____ 14. Provide the applicant with a copy of the staff report at least three days in advance of the public meeting before the legislative body.

_____ 15. Conduct the meeting that is required by the ordinance and state statute as part of the consideration of the application for subdivision.

_____ 16. Consider evidence, which is before the legislative body, that is both relevant and credible related to whether or not the proposed subdivision complies with the ordinances in place at the time that the complete application was submitted and all relevant fees were paid.

_____ 17. Consider the recommendations of the planning commission.

_____ 18. Either approve the phase of the application, noting on the record that it complies with the provision of the relevant ordinance; deny the phase of the application noting on the record how the evidence indicates that the application does not comply with the ordinance; or with the consent of the applicant, allow the applicant to modify the application in a specific manner that is required by a specific section of the municipal code.

_____ 19. Preserve the record of the proceedings to document the law and evidence that was considered by the land use authority before it made a decision related to the application.

Notes and Practice Tips

The action taken in response to a land use application is legal only if it is supported by substantial evidence in the record. "Substantial evidence" is evidence that is relevant and credible. To be relevant, it must relate to the standards in the ordinance related to the review of applications for conditional uses. To be credible, it must be objective.

While public testimony can produce substantial evidence, "public clamor," such as: "I don't like the project" is not substantial evidence. Evidence is independent—it stands on its own and is not based on lay opinion. The opinion of expert witnesses qualified to testify in their field of expertise can be substantial evidence if proper information is, or can be, provided supporting the qualifications of the persons expressing the opinion.

Generally speaking, if notice is given, and the subdivision proposal complies with the zoning and the objective standards of the subdivision ordinance, then the land use authority must approve the subdivision application.

Creating Great Neighborhoods:

Density in Your Community

produced by
Local Government Commission
in cooperation with
U.S. EPA

NATIONAL ASSOCIATION OF REALTORS®
The Voice for Real Estate®

Real Strength.
Real Advantages.

Lessons Learned: Design for Density

Five Design Principles

1. Identify appropriate locations
2. Connect people and places
3. Mix uses
4. Find parking alternatives
5. Create great places for people

As the case studies show, communities that successfully add dense areas to their neighborhoods find that particular attention to design is necessary to create great places to live. In all these cases, community officials, business leaders, citizen representatives and others all worked together to employ design principles that helped create better places for present and future residents.

Developers and community members can learn from the mistakes of other dense developments in which some individual design principles may have been employed, but other critical elements for great, dense neighborhoods were neglected. A look at some projects shows that while density may provide access to transit or proximity to different land uses, it can neglect to create a welcoming place for people. Often poor building and street design create places where it is difficult or unsafe to walk and engage one's neighbors.

Density that does not work may be found along multi-lane, high-speed one-way streets and in neighborhoods that rely on pedestrian bridges, but fail to provide any sidewalk level shops or restaurants. These characteristics limit people's ability and motivation to walk or bike to shops, and lead to empty sidewalks.

Without an appropriate location, a good mix of different uses nearby, adequate open space and a vibrant, safe and interesting life along the sidewalks and streets, dense neighborhoods will flounder.

Crystal City – Going from Just Dense to a Great Place to Live

"We're looking for a place that is more user-friendly, and more attractive as a destination. We want an entity that will not shut down at 5 o'clock, but will have a nightlife, a weekend life and will be more of a complete neighborhood," said Robert Smith, developer of Crystal City in Arlington County, Virginia. An area that is essentially an "unusually dense version of the suburban office park," Crystal City, just outside Washington, DC, has a very high density (most buildings are 12 floors or more), access to transit and a mix of uses, including offices, apartments and hotels. But it is not a great place to live. With predominantly one-way streets, underground retail and pedestrian bridges over the streets, one could live in Crystal City "without setting foot outdoors."

But that is all set to change. The developers have plans to convert the one-way streets to two-way, provide safe crosswalks and slow down the passing cars. They intend to integrate new street-level shops into the area and hope to create an interesting street life. Smith realizes that successful design must integrate "vibrant street life, busy sidewalks, and inviting stores and restaurants" with the density and transit connections to create a great place. (*Washington Post*, May 24, 2003)

Creating great neighborhoods is not just a mathematical equation of adding individual elements. The task requires the collaboration of neighborhood stakeholders and design professionals that understand how people use public spaces.

Communities can avoid mistakes and create great, dense neighborhoods by bringing together five major principles for dense development. To build viable dense neighborhoods, communities must plan density for the right locations, ensure strong connections between destinations, mix land uses, provide parking alternatives and create great places for people.

Additional resources on designing great higher density projects can be found online at www.designadvisor.org.

1 • Increase Densities in Appropriate Locations

Choosing the right locations for density is important. The right balance helps to ensure that the development enhances the community and supports existing or new services like transit, shops, or a neighborhood center. By putting density in the best locations, new housing helps create neighborhoods – places where all residents are within a 5- to 10-minute walk to a cup of coffee or a gallon of milk at the corner store. These locations may also allow density to take advantage of special site characteristics – such as wetlands, tree groves or hills – to create neighborhoods with unique character. All of these elements not only help a community accept new density, but also help residents understand how it can improve their neighborhood.

Communities can identify these locations for dense developments by focusing on various types of neighborhood hubs, such as existing or planned transit stations, town centers, the junction of two neighborhoods or major retail and employment destinations. Adding density to each of these locations can help build a stronger community (or a new community) with better access to a local store, park or school.

Density next to a transit station helps improve transit services for more people. As more people live closer to the station, the system will likely be used more and can economically support more frequent service.

View of retail and residential development from San Antonio Transit Station in Mountain View, California.

New density near a town center places more people closer to neighborhood shops, the town square or civic buildings. This adds life to the downtown, and more people in the town center ensure its greater public safety, while supporting more shops and broadening the local retail base.

Density at the junction of two neighborhoods can help create a

Courthouse Hill is an example of increased density in the most productive locations. Located one block from the local subway station, the project used vacant land to help knit the neighborhood together.

mixed use or higher density corridor. The area where two neighborhoods meet can become a larger community node and support more diverse retail.

Existing retail and employment destinations can also benefit from incorporating other types of dense uses. Greater density can help improve local safety by keeping the area busy after regular business hours. It can also help create a new town center by placing more homes closer to shops or offices.

One integral factor for density increases in appropriate locations is designing additional development to blend into the existing neighborhoods. Ideally, this will generate further community acceptance and support for density. Dense developments can be laid out to concentrate higher densities next to the shops and offices, or towards the center of the site, while stepping down building heights to lower densities next to existing residences.

Questions to Ask about Increasing Densities

- ➢ Where are the best places in our community for density?
- ➢ Is there available land near existing transit stations, town centers, employment centers or major community amenities? Is there an opportunity to redevelop the area between two neighborhoods?
- ➢ How can we change the zoning for these selected areas to encourage development at higher densities?
- ➢ How will this dense development be integrated with the neighborhood? What techniques will be used?
- ➢ Are there old vacant or underperforming shopping centers that could be converted into denser neighborhoods?

2 • Connect People and Places

Dense developments with a complete street and path network and convenient access to routes for walking, bicycling and bus or rail create the strong connections necessary for great places, because more compact development will add more people to an area. Without good street and transit connections throughout an area, people must use cars for every errand and every trip to school or work, facing unavoidable congestion. With a good street network and other mobility options, density will add some drivers to the area, but will also pull many people out of their cars – onto the sidewalks and into transit. Dense development with good connections to homes, shops, schools and offices allows people to choose an alternative to driving and also provides more route options to those who still choose to drive.

A complete street network helps reduce congestion because it allows drivers, bicyclists and pedestrians to go around traffic or just take more direct routes to their destinations. At each intersection, a person may turn onto a different street and choose a different route, or continue along the way.

More intersections also increase the safety of pedestrians and drivers by slowing down traffic and making drivers more aware of street crossings and turning motorists. The opportunity to walk, bike or take a bus or subway provides residents and shopping visitors with alternatives that also help ease local congestion.

Added density also promises new transportation choices, since the placement of a critical number of people within walking distance of a rail station or bus stop opens up the possibility of more frequent or new transit service.

The best way to create a complete street network and support new transportation choices is to use a modified street grid network, ensure access to different modes of transportation (car, bus, train, and walking or biking routes) and build inviting sidewalks. The street network needs to accommodate both cars and people with many routes to their destinations. The streets and sidewalks should connect all neighboring areas with compatible uses, particularly adjacent residential areas. The network should have short blocks (some suggest 600 feet maximum[8]), which will make it easier for both people and cars to navigate the area. The streets should primarily meet in three or four-way intersections to allow people and cars to go around congestion. Cul-de-sacs should be avoided because they limit people's options to travel around congested areas and impede the connections between neighborhoods.

The streets should also be relatively narrow. This means that lanes on residential streets can be 9-10 feet wide and that each intersection should maintain a short curve radius to encourage drivers to obey the recommended speed limit. If the street is too wide, drivers will go faster than allowed. This discourages people from walking along the sidewalk to reach their destinations. Narrowing the street helps slow traffic, improve both driver and pedestrian safety, and make people feel more welcome on the sidewalk.

NewHolly Urban Village in Seattle, Washington, exemplifies a dense development that succeeds in reconnecting people to places. The development removed the previous system of curvilinear streets and replaced it with a grid pattern with narrow 28-foot wide streets. This change allows NewHolly residents to reach neighboring shops in a safe and welcoming pedestrian environment.

The network should include a complete sidewalk along the local streets. It should be passable, without people having to go around hedges or highways to continue on the path. It should also have limited driveway cuts. Ideally, a planting strip should be placed along the street, creating a buffer for pedestrians and the opportunity to plant trees, whose canopy would provide shade.

On-street parking also helps protect pedestrians and makes more efficient use of public streets.

Questions to Ask about People-Place Connections

- ➢ What type of street network is proposed for the development?
- ➢ Will the street and sidewalk network provide a safe, welcoming pedestrian environment?
- ➢ Are the buildings parallel to the street? Are they close to the sidewalk?
- ➢ Will the development provide access to bus or transit service?
- ➢ Is there an infill development that needs to implement traffic calming measures to slow vehicle speeds and create streets that are safe and comfortable for motorists, pedestrians and bicyclists?

3 • Mix Uses

Mixing uses turns density into a village center or helps create a community from a sea of houses. With different types of uses within a walkable area, density creates a healthy neighborhood where a child can walk to a nearby school, a resident can run out for a gallon of milk from the corner store, or neighbors can congregate at the bandstand for a community picnic. Without these walkable destinations, a new neighborhood becomes like any other place where people must get into their cars and drive to get that milk.

Mixing uses allows more choices and improves quality of life by letting people decide if they want to live near their work, walk to the local store, or bike to the local library with their kids. This technique employed in a residential neighborhood – for instance, to accommodate more people within a 5- to 10-minute walk of a town center – supports the economic viability of services like a coffee shop or a local hardware store. Without a critical mass of people nearby, those stores would not be able to survive economically. The same is true of transit. Placing more residential, commercial and office space near a transit station builds a stronger base for the day-long train or bus use.

Mixed use comes in many forms. It may be a corner store in each neighborhood. It may be a neighborhood work center for people who sometimes telecommute during the week.

Mixed use can help add jobs or homes to an area, improving a jobs/housing balance. This balance benefits the community when people relocate to the area to be within walking distance of jobs.

Mixed use can also mean redesigning a neighborhood to bring in civic buildings such as recreation centers, bandstands, or a library, or to ensure that an

elementary school is within a 15-minute walk of each household. It may also mean integrating parks throughout the area, so that every home is within a 2- to 3-minute walk of a small park.

In a town center or infill development downtown, mixed use can succeed within each building. It may mean offices or apartments over shops along the town square, or a hotel over shops downtown. Mixing uses in each building or in adjacent buildings works best when design guidelines ensure that the buildings will be consistent in height and size, regardless of use.

Questions to Ask about Mixing Uses

- ➢ What uses will be integrated into the development?
- ➢ Will local services be provided within the development?
- ➢ Are there neighboring commercial, office or civic uses that will be accessible from the development?
- ➢ How would mixing uses on or next to the development site help improve residents' access to local services?

Planners for the City of Davis, California, and the University of California worked with the community to create a mixed-use neighborhood with Aggie Village and Davis Commons. By placing the commercial center, Davis Commons, next to Aggie Village residences, the university and town succeeded in expanding the commercial center and improving the university's link to downtown. Mixing uses improved access from the university to downtown and brought them new amenities.

4 • Find Parking Alternatives

Density succeeds at creating great places when people feel comfortable walking down the street to get a cup of coffee, sitting on their front porch to talk to passing neighbors, and parking on the street in the town center for some quick shopping. Shops and houses close to the street, not separated from the sidewalk by a stretch of parking or a wide setback from the street, help make this possible.

Sensitive placement of parking in different locations can help sidewalks become more inviting. On-street parking, in particular, also helps improve the safety of the neighborhood by slowing traffic and serving as a barrier between the sidewalk and the roadway.

Still, the most important effect of density on parking is its potential to reduce required parking space, as compared to similar developments at conventional densities. As density increases, people find other means to reach the shops or offices. More people take transit or walk. Different neighboring uses may also share the same parking spaces at different times of the day. For instance, a movie theater and an office rarely need parking spaces at the same time and can share a parking lot or

garage. On-street parking also provides necessary spaces without separating the people on the sidewalk from the homes and stores. These spaces should be included in the calculation of the area's parking supply and not considered "extra."

Mixed use areas also help minimize the demand for parking by allowing people to park once and reach a number of shops or errands. People will not park in a new space every time they go to another store if they can walk down a short block to reach it. These areas do not need the same quantity of parking spaces as a suburban location where each errand is so distant from the next that the car must be moved.

Belmont Dairy, in Portland, Oregon, devised creative parking alternatives to ensure that shops would be accessible from the sidewalk, pedestrians would be protected from traffic and residents and visitors would be accommodated. Residential garages are accessed from the rear of the development, while shared parking is provided underground and on-street parking lines the streets.

Lastly, a well-designed dense area with well-placed parking is an interesting place to walk – more people will choose to walk to the shops or offices when the streets are welcoming and the stores close by.

Parking demand in a dense development is quite different from other locations. Communities should be allowed to reduce parking requirements and use better alternatives to create great places.

The appropriate number of well-placed parking spaces will support local shops and restaurants, encourage people to stroll through the area, and help create great dense neighborhoods.

Parking removed from the "front yard" of homes, stores, or other buildings allows neighborhoods to flourish because people are closer to each other and closer to their destinations.

Parking may be moved to lots or structures behind buildings or to alleyways if on-street parking is permitted.

For homes, setback garages or alley garages allow buildings to be closer to the street and reduce the street frontage each house requires.

For shops or offices, the combination of mid-block and on-street parking keeps parking spaces nearby while making building entrances more accessible from the sidewalk.

Questions to Ask about Parking

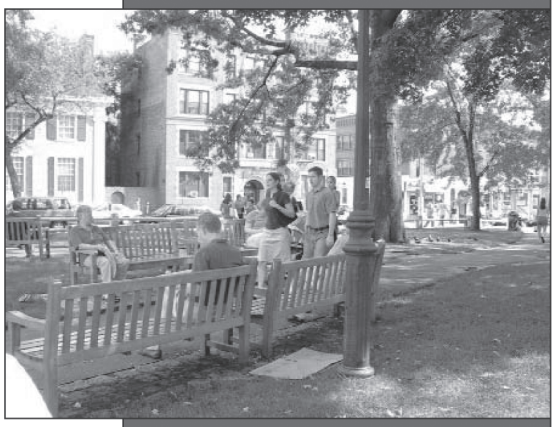
- Where will parking be located for residential, commercial and office uses?
- How can parking be used to improve pedestrian safety and accessibility?
- Will parking be located between the sidewalk and buildings?
- How can parking demand and supply be reduced? Can walking or transit accessibility help reduce the need for parking?
- Can parking supply be shared between neighboring residences or shops and offices?
- Are densities high enough to build a parking structure?

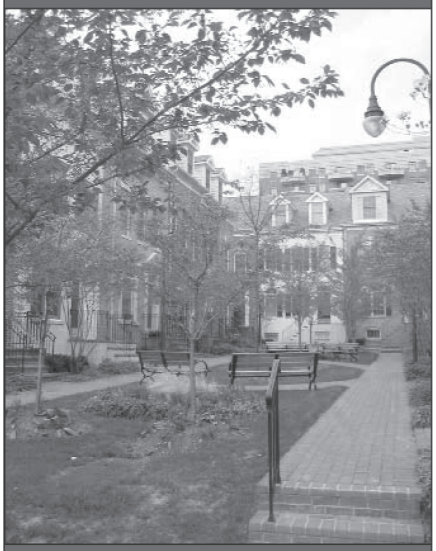
5 • Create Great Places for People

If we enhance higher densities with great places for people, then we haven't built density alone, we've built a community. Alternatively, we've expanded a community and made it even better. The addition of density gives us the opportunity to build a town, a community and a new family of friends – or to connect to the ones that have always been around us. This begins to happen when people have the chance to talk to each other and congregate. Density offers that chance to be together.

Great places are created by combining all the different elements listed above, and then adding the detail. The 5-minute neighborhood is immortalized in great places. People can reach the corner store in five (to ten) minutes. Streets are welcoming – proportioned to feel like a room in your house, a cozy place where you would want to be. Trees in planting strips or in grated planters line the street, in appropriate sections. Diverse housing types – bungalows, live-work rowhouses, apartments and shops – are found on a neighborhood walk. The neighborhood has interesting places on the street, and the community feels inviting to the pedestrian, driver and bicyclist, and to young and old alike.

Certain characteristics help create this inviting place. A well-designed streetscape makes people feel comfortable and invites residents to walk or bike to destinations. Part of this comfort is from the relationship between building height and street width; certain relationships make people feel comfortable by creating "outdoor rooms."[9] In such places, there is a pleasant sense of enclosure – enough not to feel too exposed, but not so enclosed as to feel cramped. This enclosure is supported by orienting buildings to be parallel to the street, and placing them within a short distance of the sidewalk or along the sidewalk in the case of a town center.





The setback should be minimized both from the street and from the neighboring building. Placing buildings side-by-side (rowhouses or town center buildings, for instance), or close to each other (single-family bungalows) helps create a more interesting place to walk.

These buildings should also have some architectural detail on the facades, and no blank walls facing the street. Local architectural styles help incorporate the new development into an existing neighborhood.

Porches, balconies and other additions add to the outdoor room to create a sense of community and a welcoming place to be.

Open spaces, parks and plazas also enhance the community's experience. They provide gathering spaces and focal points for

In Breckenridge, Colorado, Wellington's design ensures that all residents live in a community with easy access to parks and local amenities and a welcoming pedestrian environment.

the community. Such common spaces can come in all shapes and sizes – some large enough to serve those functions for an entire city, others small enough to give shape to individual neighborhoods. Even small "tot lots" can provide a community with space to gather and socialize. Framing these parks and plazas with residences and other community uses helps create a thriving community center.

Questions to Ask about Creating Great Places

- ➢ How will the buildings relate to the street? Will they come up to the sidewalk or have narrow setbacks?
- ➢ What will building walls facing the street look like? (No blank walls)
- ➢ Where will parks and plazas be located?
- ➢ How will residential or other uses frame the open spaces?
- ➢ What other community focal points will be integrated into the development to create an interesting place to walk?

Endnotes

■ **INTRODUCTION**

1 Designing for Transit: A Manual for Integrating Public Transportation and Land Development in the San Diego Metropolitan Area. July 1993.

2 Katherine Shaver, "The Road Too Much Traveled: For Many Children, Drive Time Just Keeps Going," *Washington Post*, January 27, 2003; Page A01.

3 For example, the Surface Transportation Policy Project found that suburban mothers spend on average 66 minutes per day in their cars, and that approximately one-half of women's trips are for the purpose of chauffeuring other people. In *High Mileage Moms*, Surface Transportation Policy Project, May 1999.

4 www.tjpdc.org/pdf/rep_comm_epiBrochure.pdf

5 "The Metropolis Plan: Choices for the Chicago Region." Chicago Metropolis 2020. Chicago, Illinois, 2002, p. 24.

6 American Farmland Trust, *Alternatives for Future Urban Growth in California's Central Valley: The Bottom Line for Agriculture and Taxpayers*, October 1995.

7 U.S. Environmental Protection Agency, "Protecting Water Quality with Higher Density Developments." (U.S. EPA, Washington, DC, 2003), 2-8.

■ **"LESSONS LEARNED: DESIGN FOR DENSITY"**

8 Duany, A., Plater-Zyberk, E., Speck, J. *Suburban Nation*, North Point Press, NY. 2000.

9 Many designers recommend at least a 1:1 ratio; that is, the buildings are at least as tall as the street is wide. Some distinctive urban streets reach a 3:1 ratio, where the buildings are three times higher than the street width.

Focus on Livable Communities

Why People Don't Walk and What City Planners Can Do About It

Walking is key to staying healthy.

- Regular physical exercise is a vital part of maintaining our health and well being. Yet we are walking an average of eight miles less per day than our forebearers. Instead, our time is spent behind the wheel. On average, U.S. households make 12 auto trips a day.
- One-fourth of all trips are less than one mile, yet three-fourths of these trips are made by car.
- Car dependence is damaging our health. Poor diet and lack of exercise is now second only to cigarette smoking as a leading cause of death in the United States.

Local Government Commission
Center for Livable Communities
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fax (916) 448-8246
web www.lgc.org

Why are we driving everywhere instead of walking?

Our communities are designed so that we have no other choice!

The following pairs of photographs illustrate **barriers** in current land use patterns that keep us from walking alongside **solutions** that demonstrate more pedestrian-friendly alternatives. Which land use patterns would you like to see in your community?

BARRIERS

No through streets or walkways

Walking is made difficult when streets look like spaghetti and there are no paths that take you directly to your destination.

Large-lot or strip development

It is unlikely that anyone would walk from McDonald's to the bank. Buildings are too spread out.

SOLUTIONS

Through streets

Streets or paths which connect to multiple destinations encourage walking. In these neighborhoods, people walk up to 3 times as often.

Compact development

Compact development makes walking possible because destinations are closer to one another and the walk is more interesting.

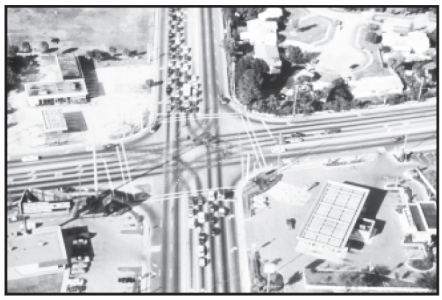
"Changes in the community environment to promote physical activity may offer the most practical approach to prevent obesity or reduce its co-morbidities. Restoration of physical activity as part of the daily routine represents a critical goal."

– Dr. Jeffrey Koplan
and Dr. William Dietz,
Centers for Disease Control

BARRIERS

◗ Dead wall space

In many areas, it doesn't feel safe to walk. People feel vulnerable when there is no one around.



◗ No crosswalks

It's often too hard to walk across the street to get where you want to go. It's much easier to drive.

◗ Long blocks

Long blocks are inconvenient for pedestrians who want to travel efficiently between destinations.

◗ Unappealing walks

A path like this one is infrequently used except by those without options.

SOLUTIONS

◗ Windows on the street

Windows and people along the street create a safe and pleasant place to walk.

◗ Crosswalks

Well-marked crosswalks help the pedestrian feel safer when crossing a wide street.

◗ Short blocks or mid-block alleys and paths

Mid-block crossings make walking more convenient.

◗ Interesting or beautiful walks

Amenities such as landscaping encourage pedestrian use.

BARRIERS

◗ Wide, unshaded streets

Wide, unshaded streets look unappealing to the pedestrian and encourage cars to speed. In the summer, these streets are hot.

◗ Wide streets with no medians

Walking across a wide street is unappealing and extends pedestrians' exposure to traffic hazards.

◗ Large shopping malls

A California Air Resources Board study shows that 99% of the shoppers drive to malls like this.

SOLUTIONS

◗ Narrow, shaded streets

Narrow, shaded streets can slow down the cars and be up to 10 degrees cooler, making walking far more pleasant.

◗ Streets with medians

Adding a street median will make it more pleasant and safe to cross the street.

◗ Downtown shopping

60% of the people who shop in this mall located in downtown San Diego either walk or take transit.

Resources

The resources listed below will be helpful to you and your city planners. Call the Local Government Commission for additional help, (916) 448-1198.

Ordinances. *The LGC maintains a collection of the nation's best mixed-use ordinances and traditional neighborhood development ordinances.*

Policies. *"Portland Pedestrian Design Guide," City of Portland, June 1998. Call the Pedestrian Transportation Program, (503) 823-7004.*

"Pedestrian Level of Service," City of Fort Collins. Contact: kreavis@ci.fort-collins.co.us.

Downtowns. *The National Main Street Center can assist communities interested in downtown revitalization. Contact: (202) 588-6219; www.mainst.org. In California: California Main Street, (916) 322-5003.*

Urban Design. *The Congress for the New Urbanism has resources and referrals to architects, planners, and urban designers who design walkable environments. (415) 495-2255; www.cnu.org*

LGC Guidebooks:

"Street Design Guidelines for Healthy Neighborhoods," by Dan Burden, 1999.

"Streets and Sidewalks, People and Cars: The Citizens' Guide to Traffic Calming," by Dan Burden, 2000.

Focus on Livable Communities

BARRIERS

Isolated schools

Increasingly, schools are being put on the edge of existing development, making driving unavoidable.

Isolated recreational areas

It is likely that children will need to be driven to this recreational area.

Isolated grocery stores

People must drive to stores like this, even if they simply need a carton of milk!

Isolated office buildings

No pedestrian access here! In 1990, only 4% of Americans walked to work.

SOLUTIONS

Neighborhood schools

When schools are integrated into the neighborhood, children can walk or ride a bike.

Neighborhood parks

Neighborhood parks allow kids to be more active when they are in their own neighborhood.

Neighborhood grocery stores

A neighborhood store allows family members to pick up daily needs by walking.

Downtown or neighborhood

This office location allows people to walk to work and go to lunch without climbing in a car.

Create a walkable environment and the community will reap the benefits:

- Walkers bring business to shop owners.
- Walkers interact with neighbors, building a sense of community.
- Walkers teach children traffic safety skills.
- Walkers don't pollute the air.
- Walkers don't clog the roads.
- Walkers get energized and improve their fitness.
- Walkers who are seniors live longer than those who are sedentary.
- Walkers make our communities more livable.

Most planning decisions are made at the local level by your city or county. Form coalitions to work with your county supervisor, mayor, or city council members, planning commission members, and planning or public works staff.

This project is funded by the Physical Activity and Health Initiative, California Department of Health Services under a Preventive Health Services Block Grant from the U.S. Centers for Disease Control and Prevention. Work performed as part of a UC San Francisco contract.

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Conditional Uses

Conditional uses can be problems for cities and towns. They are a problem because many cities and towns think that they have more discretion than they actually do in the granting or denying of a conditional use permit application. These cities and towns treat conditional use permit applications like zone change requests. A conditional use permit application is not the same as a request to change a zone.

A conditional use is defined as a use that, because of its unique characteristics for potential impact on the city or town, may not be compatible in some areas or may be compatible only if certain conditions are required that mitigate or eliminate the detrimental impacts.[1]

It has been the common practice for Utah cities and towns to include many conditional uses in their land use ordinances. Very often this occurs because the drafters of the ordinances cannot make the hard decisions about whether or not to permit or disallow a particular use. Sometimes conditional uses are used because the city or town thinks that conditional uses give planning commissions or city councils more discretion in whether or not to allow certain uses. This cannot be further from the actual situation.

A conditional use only exists if it is created by the land use ordinance. It is not sufficient to just identify a potential use as a conditional use in a land use ordinance. The state statute requires that standards be set forth in the ordinance for the granting or denying of the conditional use.[2]A conditional use must be approved if reasonable conditions are proposed, or can be imposed, to mitigate the reasonably anticipated detrimental effects of the proposed use in accordance with standards that are contained in the ordinance. If there are no identifiable standards contained in the ordinance, there will be no basis for denying the permit.

The granting or denial of the conditional use permit is not a legislative act, it is an administrative act. This is a significant distinction. Because it is an administrative act, it will be reviewed by the courts in a less differential manner than a legislative act. In addition, a city or town must provide an appeal process from any decision on a conditional use permit application. This appeal process must allow anyone who is aggrieved by the decision that either granted or denied a conditional use to appeal that decision. This appeal must be to someone other than the body that initially decided on the conditional use permit. After this internal appeals process has been completed, the aggrieved party can petition the district court to review the city's decision.

A court will review and support the city's decision, as it would any other administrative decision if there is a good record of what the city or town did and if the decision is supported by substantial evidence found in the record. If there is a good record of what occurred in the city and if there is not substantial evidence in that record to support the city's decision, the court will overturn the city's decision. If the record from the city is insufficient, the court will rehear the entire matter, including taking new evidence, and make its own independent determination and ignore the city's previous decision. The city's record consists of the minutes of the various meetings and the decisions made. A good record will be one that has a transcript of the meetings held and written findings and conclusions regarding the permit.

Another significant difference between the granting of a conditional use and a legislative act is the role of the public. While it is appropriate to take public comment and even hold public hearings on

1 Utah Code 10-9a-103(5).

2 Utah Code 10-9a-507.

the granting or denial of individual conditional use permits, public clamor is not to be considered. The difference between public clamor and public input is one of substance. It is appropriate to seek from the public factual information about whether or not the applicant for the permit can meet the standards of the ordinance. It is not appropriate to seek from the public their emotional feelings about the application. Whether or not to grant a conditional use permit is not a political decision or a popularity contest; it must be based solely on the standards in the ordinance itself. The applicant can either meet the standards in the ordinance for the permit or not meet the standards.

The best practice is to avoid, as much as possible, having conditional uses. If the use is not appropriate, the ordinance should make it a non-permitted use. If the use is appropriate, it should be a permitted use. Conditional uses should be the exception and not the rule. Putting a conditional use in the ordinance is inviting the use to occur. If a city does not want a particular use in a particular area, the best practice is to not allow it.

Standards for Granting Conditional Uses

Utah State Code

10-9a-507. Conditional uses.

(1) A land use ordinance may include conditional uses and provisions for conditional uses that require compliance with standards set forth in an applicable ordinance.

(2) (a) A conditional use shall be approved if reasonable conditions are proposed, or can be imposed, to mitigate the reasonably anticipated detrimental effects of the proposed use in accordance with applicable standards.

(b) If the reasonably anticipated detrimental effects of a proposed conditional use cannot be substantially mitigated by the proposal or the imposition of reasonable conditions to achieve compliance with applicable standards, the conditional use may be denied.

"Conditional use" means a land use that, because of its unique characteristics or potential impact on the municipality, surrounding neighbors, or adjacent land uses, may not be compatible in some areas or may be compatible only if certain conditions are required that mitigate or eliminate the detrimental impacts."

Amended by Chapter 245, 2005 General Session

The overall purpose of any condition, established as part of the Conditional Use Process, is to protect the integrity of the underlying zoning. For example: If the underlying zoning is residential, the conditions should all be justifiable as protection against the intrusion that a nonresidential use will create. As long as each use can be justified as providing such protection, a court will seldom assume conditions to be arbitrary.

A zoning ordinance may specify standards to be considered in general use permits and can also include specific conditions for specific uses, such as child care or a gravel pit. The league has samples that other cities have adopted that are provided at the end of this document.

Listed below are possible standards as well as examples of more defined conditions that might be made.

Standard: The safety of people and/or property.
Conditions:

1. Traffic control:
    i. minimizing the traffic flow
    ii. directing the traffic flow
    iii. limiting the types of vehicles
1. Requiring fencing or other types of protection
2. Requiring additional setbacks or land area

Standard: Health and Sanitation
Conditions:

1. Controlling outdoor storage
2. Requiring sewer connections
3. Demanding proper disposal of waste
4. Controlling dust or other types of air pollution

Standard: Environmental Concerns
Conditions:

1. Enforcing well-head protections standards, when applicable.
2. Requiring planting to control dust, runoff and erosion.
3. Enforcing necessary standards for the protection of water shed.
4. Controlling the disposal of hazardous materials.
5. Requiring no special uses of resources.

Standard: The General Plan and the Permitted Zoning
Conditions:

1. Protecting the quality of the underlying zone.
    i. traffic
    ii. lighting
    iii. esthetics
    iv. noise
    v. landscaping
    vi general use and design

Example

CONDITIONAL USE STANDARDS OF REVIEW. The City shall not issue a conditional use permit unless the Planning and Zoning Administrator, in the case of an administrative conditional use, or the Planning Commission, for all other conditional uses, concludes that the application fully mitigates all identified adverse impacts and complies with the following general standards applicable to all conditional uses, as well as the specific standards for the use. If the reasonably anticipated detrimental effects of a proposed conditional use cannot be mitigated by the proposal or the imposition of reasonable conditions to achieve compliance with applicable standards, the conditional use may be denied.

1. GENERAL REVIEW CRITERIA: An applicant for a conditional use in the zone must demonstrate

a. The application complies with all applicable provisions of this chapter, state and federal law;

b. The structures associated with the use are compatible with surrounding structures in terms of use, scale, mass and circulation;

c. The use is not detrimental to the public health, safety and welfare;

d. The use is consistent with the City General Plan as amended;

e. Traffic conditions are not adversely effected by the proposed use including the existence or need for dedicated turn lanes, pedestrian access, and capacity of the existing streets;

f. There is sufficient utility capacity;

g. There is sufficient emergency vehicle access;

h. The location and design of off-street parking as well as compliance with off-street parking standards;

i. A plan for fencing, screening, and landscaping to separate the use from adjoining uses and mitigate the potential for conflict in uses;

j. Exterior lighting that complies with the lighting standards of the zone.

k. Within and adjoining the site, impacts on the aquifer, slope retention, and flood potential have been fully mitigated and is appropriate to the topography of the site.

2. SPECIFIC REVIEW CRITERIA FOR CERTAIN CONDITIONAL USES. In addition to the foregoing, the Planning Commission must evaluate the applicant's compliance with each of the following criteria when considering whether to approve, deny or conditionally approve an application for each of the following conditional uses:

Adult Oriented Businesses.

The purpose and objective of this chapter is to establish reasonable and uniform regulations to prevent the concentration of adult-oriented businesses or their location in areas deleterious to the health, safety and welfare of the City, and to prevent inappropriate exposure of such businesses to the community. This chapter regulates the time, place, and manner of the operation of sexually-oriented businesses, consistent with the United States and Utah State Constitutions. See also City Sexually Oriented Business Ordinance #00-104.

a. No adult-oriented business may be located within five hundred feet (500') of any:
   (i) School, day care facility, cemetery, public park, library, or religious institution;
   (ii) Residential zoning boundary;
   (iii) Liquor store; or
   (iv) Other adult-oriented business.

b. For the purposes of this section, distance is measured in a straight line, without regard to intervening structures or objects, from the closest exterior wall of the structure in which the adult-oriented business is located and:
   (i) The closest exterior wall of another adult-oriented business;
   (ii) The closest property line of any school, day care facility, public park, library, cemetery or religious institution; and
   (iii) The nearest property line of any residential zone.

Home Occupation.

Each application for a business license for a home occupation shall include the applicant's agreement that the proposed use:

1) Shall not include outdoor storage, outdoor display of merchandise, nor parking/storage of any vehicle in excess of twelve thousand pounds (12,000 lbs) gross vehicle weight.

2) Shall not include identifying signage in excess of a six (6') square foot name plate, attached to the dwelling;

3) Is limited to the on-site employment of immediate family members who occupy the dwelling. (This criterion is not intended to limit the number of employees who are engaged in business for the home occupation but work off-premises.);

4) Shall not alter the residential character or appearance of the dwelling or neighborhood;

5) Shall not occupy more than twenty-five percent (25%) of the main floor of the dwelling nor more than fifty percent (50%) of the floor area of any garage or outbuilding in which the use is conducted;

6) Shall not generate business-related vehicular traffic in excess of three (3) vehicles per hour;

7) Shall not cause a demand for municipal services in excess of that associated with normal residential use;

8) Shall be enclosed within a structure in complete conformity with international building codes as adopted by the City; and

9) Is not a mortuary, animal hospital, kennel, clinic, hospital, RV service, junkyard, auto repair service, public stable or adult oriented business.

PERMIT REVOCATION:

A. The City Council may revoke the Conditional Use Permit of any person upon a finding that the holder of the permit has failed to comply with any of the conditions imposed at the time the permit was issued. The City Council shall send notice of the revocation to the holder of the permit and the holder of the permit shall immediately cease any use of the property which was based on the Conditional Use Permit.

B. If the City Council revokes any permit under this section, the holder of the permit shall have a right to appeal the revocation of the permit. The holder must file the appeal with the City Recorder within fifteen (15) days of the date of the notice that the City has revoked the Conditional Use Permit.

C. Upon receipt of the appeal, the City Council shall set a hearing on the appeal at its next regularly scheduled meeting which is more than fifteen (15) days after the time the City Recorder received the appeal. The City shall supply the permit holder of the time, date and place of the hearing at least fifteen (15) days before the hearing. At the hearing, the permit holder shall have the right to be heard on the revocation.

TIME LIMIT:

Action authorized by a Conditional Use Permit must commence within one (1) year of the time the permit is issued. If the permit holder has not commenced action under the permit within this time, the permit shall expire and the holder must apply for a new permit. The Planning Commission may grant an extension for good cause shown. Only one extension may be granted and the maximum extension shall be six (6) months. In order to obtain an extension, the permit holder must apply for an extension in writing before the expiration of the original permit. The application must be submitted to the City Recorder and the application must describe the cause for requesting the extension.

A conditional use runs with the land because it is an objective permit–it doesn't matter who owns it, but only that the conditions are fulfilled. There is nothing about a change in ownership that creates an objective change to the permit issues. That is not to say that a city must be indifferent to ownership. A condition of a permit for an environmentally challenging use, for example, could

include a requirement that the permit holder demonstrate adequate financial responsibility to address any accidental hazardous condition that they may create. This might include proof of insurance, experience in the industry, a minimum capitalization ratio, or something along these lines. These conditions would then transfer to the new owner, who would also have to meet the same criteria in order to maintain the CUP.

Alternatively, a city may issue a one year CUP. However, most owners would not invest in anything significant if the CUP lapses in a year.

Generally, public opinion testimony is inappropriate with respect to a conditional use permit application. Evidence against a conditional use permit application must not be based on public opinion. Public clamor is not evidence. The opinion of expert witnesses qualified to testify in their field of expertise can be substantial evidence if proper information is provided supporting the qualifications of the persons expressing the opinions.

Conditional use permits are always "administrative" decisions. As such, the standard for review on appeal is whether there is substantial evidence in the record to support the decision. A conditional use permits decision is subject to appeal within 30 days. It is not subject to referendum.

Checklist

Conditional Use Approvals

_____ 1. Determine that the land use ordinance allows the requested use as a conditional use in the zone where the property is located.

_____ 2. Determine that the application contains the information required by ordinance for processing the conditional use application.

_____ 3. Determine that all application fees have been paid.

_____ 4. Place the item on an agenda for the land use authority, if the land use authority is composed of a board or commission that includes more than one person.

_____ 5. Provide the required notice of a public meeting (or, if required by local ordinance, public hearing) to consider the application. State law requires no specific notice for conditional use permits. If the land use authority is the planning commission or the council, the Open and Public Meetings Act requires 24 hours notice prior to a public meeting. Local ordinances may require additional notice.

_____ 6. Provide the applicant with the staff report three days in advance of the public meeting or hearing before the land use authority.

_____ 7. Review only those standards that are written in the ordinance that apply to the consideration of the application. (If there are no standards, approve the application as if it were a permitted use without imposing conditions.)

_____ 8. Conduct the meeting or hearing that is required by the ordinance as part of the consideration of the application.

_____ 9. The land use authority should consider only the application, the relevant and credible evidence that concerns the negative aspects of the proposed use in the proposed location, and only to the extent that the ordinance requires mitigation for specific aspects of a use (i.e. traffic, noise, smell, light, etc.).

_____ 10. After considering the ordinance-based standards and the evidence, identify the potentially negative aspects of the proposed use in the proposed location.

_____ 11. Either:

a. Approve the use as proposed; or

b. If appropriate, impose reasonable conditions supported by substantial evidence in the record that cause the application to:

(i) Comply with the standards in the ordinance; and

(ii) Mitigate the potentially negative aspects of the proposed use that are required by standards in the ordinance; or

c. Deny the use and adopt findings supported by substantial evidence in the record why the application:

(i) Does not comply with the standards in the ordinance, and

(ii) Cannot be mitigated by additional conditions.

_____ 12. Preserve the record of the proceedings to document the law and evidence that was considered by the land use authority before it made a decision related to the application.:

Notes and Practice Tips

Be certain that the local ordinance contains standards and criteria for the conditional use. Any conditions placed on a project must relate to these standards and criteria as detailed in the local ordinance.

Regulations That May Help You Do Your Job

Utah Code Title 10 Chapter 09
The Municipal Land Use Development and Management Act
http://www.le.state.ut.us/~code/code htm

10-9a-504. Temporary land use regulations.

(1) (a) **A municipal legislative body may, without prior consideration of or recommendation from the planning commission, enact an ordinance establishing a temporary land use regulation for any part or all of the area within the municipality if:**

(i) the legislative body makes a finding of compelling, countervailing public interest; or

(ii) the area is unregulated.

(b) **A temporary land use regulation under Subsection (1)(a) may prohibit or regulate the erection, construction, reconstruction, or alteration of any building or structure or any subdivision approval.**

(c) A temporary land use regulation under Subsection (1)(a) may not impose an impact fee or other financial requirement on building or development.

(2) **The municipal legislative body shall establish a period of limited effect for the ordinance not to exceed six months.**

(3) (a) A municipal legislative body may, without prior planning commission consideration or recommendation, enact an ordinance establishing a temporary land use regulation prohibiting construction, subdivision approval, and other development activities within an area that is the subject of an Environmental Impact Statement or a Major Investment Study examining the area as a proposed highway or transportation corridor.

(b) A regulation under Subsection (3)(a):

(i) may not exceed six months in duration;

(ii) may be renewed, if requested by the Transportation Commission created under Section **72-1-301**, for up to two additional six-month periods by ordinance enacted before the expiration of the previous regulation; and

(iii) notwithstanding Subsections (3)(b)(i) and (ii), is effective only as long as the Environmental Impact Statement or Major Investment Study is in progress.

10-9a-508. Exactions.

(1) A municipality may impose an exaction or exactions on development proposed in a land use application if:

(a) an essential link exists between a legitimate governmental interest and each exaction; and

(b) each exaction is roughly proportionate, both in nature and extent, to the impact of the proposed development.

(2) (a) If a municipality plans to dispose of surplus real property that was acquired under this section and has been owned by the municipality for less than five years, the municipality shall first offer to reconvey the property, without receiving additional consideration, to the person who granted the property to the municipality.

(b) A person to whom a municipality offers to reconvey property under Subsection (2)(a) has 90 days to accept or reject the municipality's offer.

(c) If a person to whom a municipality offers to reconvey property declines the offer, the municipality may offer the property for sale.

(d) Subsection (2)(a) does not apply to the disposal of property acquired by exaction by a community development or urban renewal agency.

10-9a-509. Approvals

When a land use applicant is entitled to approval. Exception. Municipality may not impose unexpressed requirements. Municipality required to comply with land use ordinances.

(1) (a) An applicant is entitled to approval of a land use application if the application conforms to the requirements of the municipality's land use maps, zoning map, and applicable land use ordinance in effect when a complete application is submitted and all fees have been paid, unless:

(i) the land use authority, on the record, finds that a compelling, countervailing public interest would be jeopardized by approving the application; or

(ii) in the manner provided by local ordinance and before the application is submitted, the municipality has formally initiated proceedings to amend its ordinances in a manner that would prohibit approval of the application as submitted.

(b) The municipality shall process an application without regard to proceedings initiated to amend the municipality's ordinances if:

(i) 180 days have passed since the proceedings were initiated; and

(ii) the proceedings have not resulted in an enactment that prohibits approval of the application as submitted.

(c) An application for a land use approval is considered submitted and complete when the application is provided in a form that complies with the requirements of applicable ordinances and all applicable fees have been paid.

(d) The continuing validity of an approval of a land use application is conditioned upon the applicant proceeding after approval to implement the approval with reasonable diligence.

(e) A municipality may not impose on a holder of an issued land use permit a requirement that is not expressed:

(i) in the land use permit or in documents on which the land use permit is based; or

(ii) in this chapter or the municipality's ordinances.

(f) A municipality may not withhold issuance of a certificate of occupancy because of an applicant's failure to comply with a requirement that is not expressed:

(i) in the building permit or in documents on which the building permit is based; or

(ii) in this chapter or the municipality's ordinances.

(2) A municipality is bound by the terms and standards of applicable land use ordinances and shall comply with mandatory provisions of those ordinances.

Exactions

An exaction is a requirement to donate land or infrastructure to the municipality that is imposed on an applicant as a condition of development approval. An exaction requirement is allowed only to offset the off-site impacts of the proposed development. To be legal, an exaction must be roughly proportionate in kind and quality to the cost of the impact of the development on the municipality.

Checklist

Imposing Exactions on Applicants
(For Administrative land use approvals)

_____ 1. Determine that the land use ordinance requires an exaction on the application being considered. If an application complies with the ordinances in place when it was submitted in complete form, and all application fees were paid, then it is entitled to approval.

_____ 2. If the ordinance provides for specific exactions, determine how the application will burden public services provided by the municipality.

_____ 3. Determine what the net burden created by the development will be, taking into account offsetting factors such as:

_____ a. Impact fees, which will be collected from the applicant, that may offset burdens created by the development;

_____ b. Property that the applicant proposes to provide to the municipality for public improvements, which do not serve the proposed development, or which exceed the size needed to serve the proposed development, but which the municipality wishes to accept; and

_____ c. Other factors that mitigate the real impact of the development on each public service that may be the subject of an exaction.

_____ 4. After considering the burdens imposed, and any offsetting factors, identify the cost that the municipality would bear to offset the burdens created by the proposed development on a specific public service. Do not analyze costs/ burdens borne by other governmental entities.

_____ 5. Impose exactions that place burdens on the development that are roughly equivalent to the impact that the development will have on public services provided by the municipality. The precise mathematical equivalent is not required.

_____ 6. Support the decision to impose exactions with substantial evidence in the record indicating that each exaction:

_____ a. Is provided for by ordinance; and

_____ b. Addresses a burden created by the proposed development; and

_____ c. Offsets a burden that the municipality itself will bear absent the exaction; and

_____ d. Imposes a burden on the development in terms of dollars and cents that is roughly equivalent to the cost that the municipality would have to pay to offset the net burden created by the development (after considering offsetting factors), absent the exaction.

Notes and Practice Tips

Exactions are often misunderstood and can be a challenging source of conflict between a local jurisdiction and a developer. Consult professional advice if the exaction or the exaction methodology is contested.

Temporary Land Use Regulation (TLUR, a.k.a. moratorium)

Sometimes, the best planning and foresight falls short of the public interest. In very limited circumstances, the jurisdiction can suspend the extended process for adopting or amending land use regulations and can adopt a temporary land use regulation without more than 24 hours notice and without the participation of the planning commission.

For obvious reasons, there are many limitations on this power. First, the temporary regulation can last for no more than 180 days. Second, it can be adopted in only two distinct circumstances:

1. If there is no zoning whatsoever. This circumstance would occur in a newly incorporated jurisdiction; or
2. In the event of a public emergency (compelling, countervailing public interest).

Checklist

Adopting a Temporary Land Use Regulation (TLUR)

_____ 1. Determine that a compelling, countervailing public interest demands the suspension of the land use regulation process, by-passing the process of planning commission review and recommendation, by-passing advance public notice and discussion, and enactment of an immediate land use regulation.

_____ 2. Place the TLUR ordinance on an agenda for the legislative body.

_____ 3. Provide 24-hour notice of the meeting. (A public hearing is not required by state law.)

_____ 4. Conduct at least one public meeting.

_____ 5. The legislative body publicly reviews the matter and considers any relevant evidence and opinion related to whether or not the proposed TLUR ordinance is justified by a compelling, countervailing public interest.

_____ 6. The legislative body takes a vote and approves or denies the TLUR ordinance for a specific time period that does not exceed 180 days.

_____ 7. Preserve the minutes of the meetings and hearings as required by law.

Notes and Practice Tips

A compelling, countervailing public interest is one that is vital and relatively urgent. Substituting the preferences of one land use authority over its predecessor does not represent a compelling, countervailing public interest; antiquated or illegal codes may. The justification for a TLUR should be a significant issue of health, safety, and welfare.

Special requirements are provided in state law for temporary regulations related to proposed transportation corridors, which may be effective for up to 18 months. The relevant statute is 10-9a-504 where specifics about the process involved are outlined.

SAMPLE TLUR Ordinance
(to be adopted by the Council with 24 hour notice)

AN ORDINANCE ESTABLISHING TEMPORARY REGULATION PERTAINING TO RESIDENTIAL, SUBDIVISION AND COMMERCIAL DEVELOPMENT WITHIN THE MUNICIPALITY OF_____.

WHEREAS the municipality has been experiencing growth which has had a major impact on the public facilities and public welfare of the residents; and
WHEREAS it is proposed that the city (town)of _____ impose a six-month moratorium on approval of residential, subdivision plats, and new commercial developments to allow time for the following issues to be resolved or addressed:
(Examples)
1- Master planning
2- Drafting of new ordinances
3- Lack of fire facilities
4- Questions about water resources

NOW THEREFORE BE IT ORDAINED by the governing body of _____ that:

1. The public health, safety, and welfare of _____residents requires that a moratorium be, and is hereby placed, on all residential, subdivision, and commercial development approvals. This moratorium shall be in place for the entire area within the city (town) of _____. The moratorium shall apply to all development applications after this date. The moratorium shall be in place for a period of not more than six months.

The six-month time period shall be used to develop proper planning in order to protect the public interest and to promote organized development by allowing time for city (town) of ____ to_____ (amend its general plan, review its ordinances and fees, etc.) and to adequately manage the process.

The moratorium shall run from the date of this ordinance and expire on the ___day of ___ of 200_.

2. This ordinance shall take effect immediately upon passage.

DATED this _____day of ____ 200_.

SIGNED:

_____ Mayor

Attest:
_____Recorder

Nonconforming Use/Noncomplying Structures Updates to Consider Including in Your Land Use Ordinance

Title 10 Utah Municipal Code
Chapter 9a Municipal Land Use, Development, and Management Act
Section 511 Nonconforming uses and noncomplying structures.

1. Clarify who makes the decision in this area in your land use code
It is recommended that the Planning Commission or another designated Land Use Authority deal with these two items.

2. Definitions Amendments:
Many cities and towns still need to amend their ordinances pertaining to nonconforming uses (NCU). In 2006 the legislature made some changes to this area of land use. Most of you will have amended you codes to reflect the change but if not here are the League's recommendations. Most will need to add a new concept: Non-complying structure (NCS). The simplest fix is to substitute your existing ordinance definition for these.

Here are the state definitions:

A. *"Noncomplying structure" means a structure that: (a) legally existed before its current land use designation; and (b) because of one or more subsequent land use ordinance changes, does not conform to the setback, height restrictions, or other regulations, excluding those regulations, which govern the use of land.*

B. *"Nonconforming use" means a use of land that: (a) legally existed before its current land use designation; (b) has been maintained continuously since the time the land use ordinance governing the land changed; and (c) because of one or more subsequent land use ordinance changes, does not conform to the regulations that now govern the use of the land.*

3. Demolition in natural disaster:
Further, most cities and towns have a code provision, which allows the city to order the demolition of a nonconforming use/noncomplying structure if the building is partially destroyed by fire or other natural calamity. The State requires each city and town to repeal such an ordinance and thereby allow the reconstruction of an NCU/NCS that succumbs to a natural disaster.

4. Elective Provisions:
Here is a list of elective provisions that deal with expansion and termination of NCU's. In these areas the State gives you the choice to add these provisions to your code if you so choose. You cannot rely on the State code and must have specific provisions detailed in your land use ordinance on these items.

10-9a-511
2) The legislative body may provide for:
(a) the establishment, restoration, reconstruction, extension, alteration, expansion, or substitution of nonconforming uses upon the terms and conditions set forth in the land use ordinance;

(b) the termination of all nonconforming uses, except billboards, by providing a formula establishing a reasonable time period during which the owner can recover or amortize the amount of his investment in the nonconforming use, if any; and

(c) the termination of a nonconforming use due to its abandonment.

5. Establishment of legal existence:

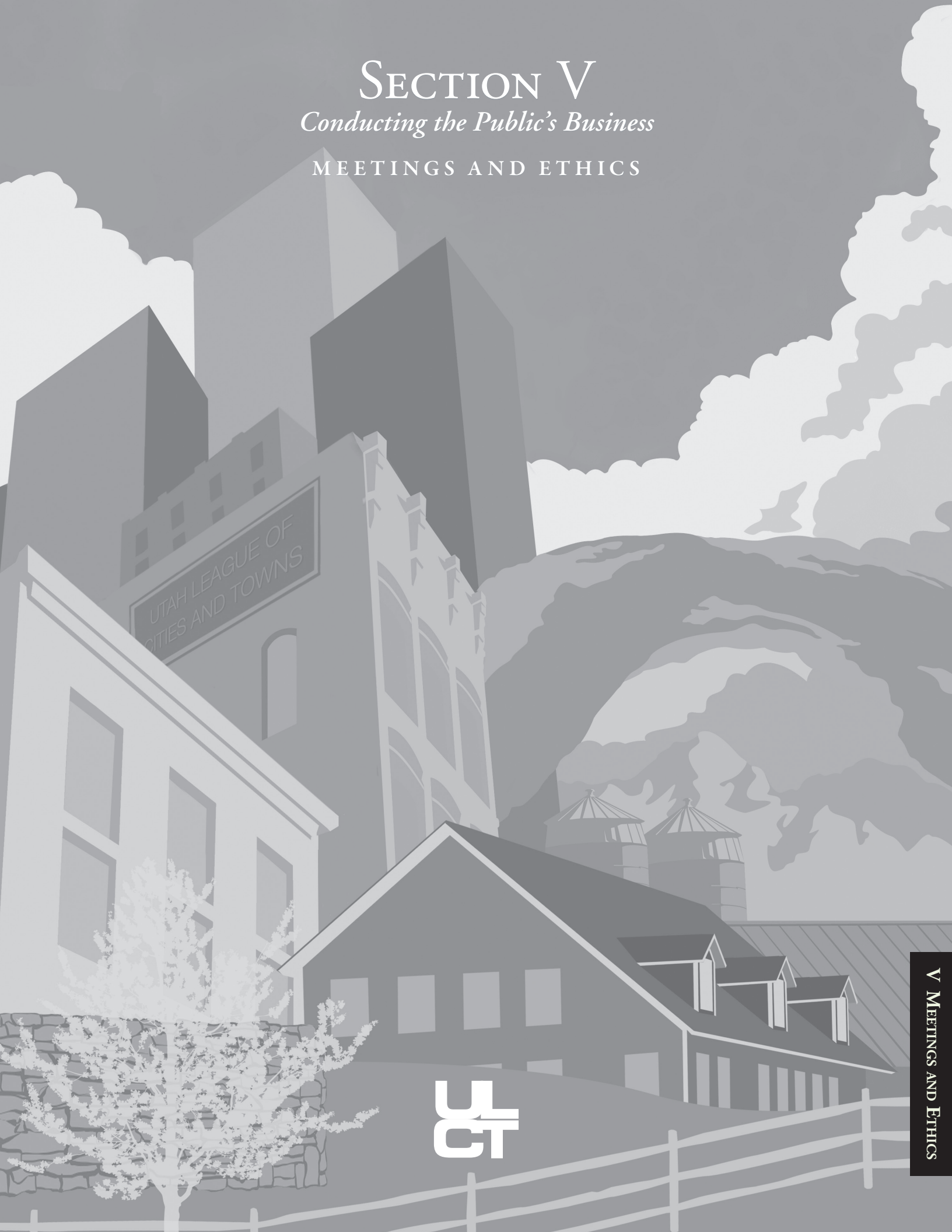
10-9a-511 (4) (a) Unless the municipality establishes, by ordinance, a uniform presumption of legal existence for nonconforming uses, **the property owner shall have the burden of establishing the legal** existence of a noncomplying structure or nonconforming use.

Municipalities need to address in your code the criteria that establishes how "legal existence" is proven by an applicant. In other words what documentation will the municipality accept to demonstrate the use was legal at one time? For example, zoning codes, county taxes affidavits, inspection reports, you need to specify in your code what evidence you will accept.

Section V

Conducting the Public's Business

MEETINGS AND ETHICS



Making Life Better: Why Cities and Towns Exist

David Church, ULCT

This chapter is not about the purpose of life, it is about the purpose of your city or town. What is municipal government all about? Why do cities and towns exist? Contemplation of the big questions can help in understanding and solving the smaller issues.

Cities and towns are voluntary organizations. Nobody has to live in an incorporated municipality and no community was required to incorporate. A person has no practical choice but to live in a state or a county, but the decision whether to live in an incorporated city or town, and which city or town to live in, while not always the primary factor, is at least a factor in people's life decisions. It is also true that communities' decisions to incorporate are voluntary. Not all communities have chosen to do so. Some historical pioneer communities, such as Fairfield, Daniels, and Central Valley chose to incorporate in the recent past even though they may have been in existence for as long as their incorporated neighbors. Other historical communities have never felt the need to formalize their existence through incorporation.

Why do communities formalize their existence by incorporating and why do people choose to live in incorporated communities over the unincorporated county? The reasons behind these decisions are also the purposes for which local governments exist. The purposes fall into three general categories: to provide services, to develop and preserve a sense of community, and to provide local control.

Local government exists to makes life better. It brings clean water to homes and takes dirty water away. It builds streets, cleans streets, and then makes them safe. Residents can put garbage out on the curb in the morning and be assured it will be gone when they come home at night. These, and many more services, are provided and relied on almost without thought.

The first and foremost purpose of local government is to provide services. People long ago learned that some useful and necessary services are more efficiently provided by the group rather than individual effort. Examples of these types of services are public safety, water supply, and waste water disposal. The provision of public services has always been, and should continue to be, the primary reason cities and towns exist.

Second, developing and preserving a sense of community is an often overlooked role of local government. People like to belong. Preserving an existing community or building a new sense of community is in many ways as important as providing services. Everybody needs a place to be from and a place to go home to. People's identities are tied to where they are from. One role of local officials is to make that place special. This is the reason that festivals, town days, and community events are planned and held. Arts councils and youth recreation leagues are not a waste of time and money. They are part of what builds a sense of belonging and place. No one ever identifies themselves

as being from service district number five. Everyone deserves to have a hometown. One of the jobs of a local official is to make sure this happens.

The third main reason to incorporate, is the desire to have local control. While this is certainly important, it is the most over emphasized. Self government at the local level is important and desirable, and cities and towns have been delegated a lot of power by the state legislature. Since most local officials are part time volunteers, it is really neighbors telling neighbors what they can and can not do. This can and does lead to abuses and hard feelings. Local officials do, among other things, tell people how big their houses have to be, how many and what kinds of dogs they can own, the height of their fences, the color of their brick, and where they can park and walk. Local government can be the most intrusive government and the heaviest handed.

It seems that most people now view local government as the government that tells people what they cannot do with their property. If someone builds too big or too small the neighbors run to the city. If someone does not clean their yard, a complaint is made to the mayor. If a farmer wishes to sell to a developer, the city is asked to stop him. This attitude is probably a result of the high growth the state has undergone and the emphasis that this has placed on land use issues. While land use control is an important issue with cities and towns, it should never become the primary purpose and focus of local government.

Local control is important if it is used to further the first two purposes: providing services and building the sense of community. If it is used for something other than these purposes, it can be seen as an abuse of authority. Two maxims should be considered when using power: first, just because you can, doesn't mean you should; and second, just because you got away with it, doesn't make it right.

Every once in a while, a local official needs to take inventory of him or herself and evaluate how he or she is doing. One good way of doing this is to examine what you are spending your time doing. Take a look at the agendas from the council meetings of the past year. If the agendas consist mostly of broad policy issues or are services oriented, then congratulations. If the agendas items are mostly the granting or denying of permits, subdivision approvals, or other regulatory type acts, then shame on you. Remember, you are building a community, not a subdivision. The emphasis should always be on providing needed services at reasonable cost and building and preserving a welcoming place. All other things will take care of themselves.

Forms of Municipal Government

David Church, ULCT

One of the difficult things about municipal government in Utah is determining what form of government a particular city or town is operating under. The potential forms of government are established by the legislature with the limited exception that the Constitution of Utah provides that any incorporated city may frame and adopt a charter for its own government. Currently, the only Utah city that has a municipal charter is Tooele. This section does not apply to Tooele. All the rest of the Utah cities and towns are operating under one of the forms of government created by the legislature.

The legislature can change the forms, functions, and powers of local government almost at its whim. Over the past 50 years it has done so on more than one occasion. The history of these changes can help in understanding current municipal forms of government.

The traditional form of municipal government that persisted since territorial times was government by committee. There were no legislative or executive branches. The committees were called commissions, boards or councils depending on the size of municipality and the existing state code. They varied in number of members depending on the era, law and population of the municipality. Almost always there was a chief officer usually called a mayor, but in past times in towns they were also called town presidents.

It was not until 1959 that the Legislature provided for options from the traditional form. It did so by an act entitled Strong Mayor Form of Government Act, which enabled cities of the first and second class to adopt, at their option, a strong mayor form of government. The Mayor was known as "strong" because he or she now had individual executive powers. That legislation was significantly innovative since it not only vested municipal government in a mayor and a board of commissioners, it also expressly separated the executive and legislative powers by vesting the former in the Mayor, as chief executive officer, and by vesting the latter in the board of commissioners.

In 1975, the legislature repealed the Strong Mayor Form of Government Act and enacted substantially similar provisions in what was known as the Forms of Municipal Government Act. This Act provided for optional forms of government known as council-mayor and council-manager forms and made them available to all municipalities, regardless of their classification. The council-manager and council-mayor options separated the legislative and executive functions of government. The council-mayor form mimicked the federal and state systems and has a legislative branch and an elected executive (mayor). The council-manager optional form had an elected legislative body, which hired a professional executive officer (city manager). This is a mimic of the private business corporate form of governance. The only way a city or town could have either optional form of government was if an election was held. The election could occur either when the city or town is incorporated

or at a special election held for that purpose. Once an optional form was established it could not be discontinued or changed without another election.

In 1977, when the Utah Municipal Code was last comprehensively re-written and re-codified, it was simple to tell what traditional form of government any city or town had. The form was established by class of city or town. There were four classes of municipalities-- towns and cities classed by population as third through first class. Towns had a five-member council form of government. Third class cities had a six-member council form of government; second class cities had a three member commission form of government; and first class cities had a five member commission form of government. All forms had a mayor as part of the council or commission. This mayor had some individual ceremonial, administrative and executive powers that other members of the body did not have. It was not long before all second and first class cities opted for one of the then available optional forms of government—council-mayor or council-manager form—and the commission form existed in statute only and not in practice.

At about this same time the legislature also provided that cities and towns that were in the traditional five or six member council form of government could, by ordinance, create the position of city manager and transfer some of the mayor's administrative and executive powers to this position. This enabled the traditional form cities to have a system that mimicked the council-manager form of government without holding an election to change to that form.1 Needless to say this was very controversial among some mayors. They did not like having their powers taken from them and given to a hired professional that did not answer directly to them. To assuage these concerns the legislature gave these traditional form city mayors a vote on whom to hire or fire as a city manager, but did not take away the enabling authority to create the position or give the mayor a vote on the ordinance creating the city manager position.

In 2008, the legislature repealed the Optional Forms of Municipal Government Act and most of the former references to commission, and rewrote and recodified the provisions on the five and six member council forms of government in what is now called the Forms of Municipal Government chapter of state law.[2] This new law clarified the respective powers and duties of the mayor and council in the available forms of government and got rid of the council-manager form referred to above, thus leaving three forms of government: 1. the five member council form; 2. the six member council form; and 3. the council–mayor form, as the only options for cities and towns (unless they want to do their own charter).

Municipalities that had the now repealed council-manager optional form of government were grandfathered into that form. These municipalities are West Valley City, Orem City, Cottonwood Heights, West Jordan City, Holladay City, and Brian Head Town. They will remain in this form,

[1] This authority was found first in Utah Code 10-3-926 and later in Utah Code 10-3-830 now both repealed. References to these sections of law are still sometimes found in some municipal ordinances or codes.

[2] Utah Code 10-3b-101 et seq.

governed by a repealed section of state law, until their voters or the legislature changes their respective minds.

Municipalities that had previously adopted the mayor-council optional form continue on in the new mayor-council form of governments. Those municipalities are Logan, Ogden, Hooper, Marriott-Slaterville, Salt Lake City, South Salt Lake City, Taylorsville City, Murray City, Sandy City, and Provo City. They will have this form of government, which is now re-established in state law[3], unless they change by vote of their electors or the legislature changes its mind again.

Municipalities that were either five or six member council forms remained in that form of government. Towns are specifically assigned to be five member council forms. The law also froze in place the ordinances passed before May 5, 2008, that created the position of city manager, or established other administrative systems, policies or procedures in cities and towns that had the traditional five or six member council forms of government.[4]

The current Utah municipal code establishes the beginning (default) form of municipal government for the three available forms. It allocates powers and duties between mayors and councils and generally defines the forms of government. The following then is just the starting point, or default provisions, found in the state code. These can be changed, or may already have been changed, by local ordinances.

Each municipality that is organized under the five or six member council form of government will have a governing body that exercises both legislative and executive powers. It is government by committee. The governing body in the six member council form is a council of six members; one of whom is the mayor and the remaining five are council members.[5] The five member council governing body is a council of five persons; one of whom is the mayor and the remaining four are council members.[6] Mayors in these forms have power that council members do not have.[7] They are established in law, but subject to change by local ordinance. The mayor's administrative and executive powers can be voluntarily delegated by him or her or taken from him or her by the council. The administrative and executive powers can then end up in the hands of the council or in appointed officers. What these powers are, and the limitations on the council taking them, will be more fully described in the subsequent chapters of this handbook. The council, which includes the mayor, is the legislative body of the city or town. Council members have their vote and the potential to have administrative powers but not direct grant of such, by the legislature. This will also be discussed in the section on municipal councils.

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[3] Utah Code 10-3b-201 et seq.

[4] Utah Code 10-3b-104(2).

[5] Utah Code 10-3b-301.

[6] Utah Code 10-3b-401.

[7] Utah Code 10-3b-104 and 10-3b-302 and 402.

Cities organized under the council-mayor form of government have two branches of government—legislative and executive.[8] The mayor is the chief executive officer, and does not sit on or chair the council. The council is limited to legislative matters only. The mayor has a veto. Local ordinances cannot change these basic roles and duties. All of this will be more specifically discussed in the following sections of this handbook. These duties and the separate branches are set in legislative stone. They can only be changed by acts of the legislature or with a vote of the municipal electors changing the form of government to the six or five member council forms.

The end result of the 2008 legislation is that you cannot tell what the powers and duties of any individual mayor, council-member, city manager, or city administrator are in any city or town, simply by knowing what its population is, what officers it has, or by an examination of the current state code. All of these may be helpful, but you have to also know the history of the municipality's form of government and examine its individual ordinances, to know the form and the power and duties of the individual officers of any municipality.

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[8] Utah Code 10-3b-201.

Open and Public Meetings Act

David Church, ULCT

In order to understand the Open and Public Meetings Act, it is only necessary to understand the public policy behind it. The Act specifically says that it is the intent of the legislature that the state and its political subdivisions exist to aid in the conduct of the people's business and that they are to take their actions openly and that their deliberations are to be conducted openly.[9] The Act is so important that it specifically requires that the chair of every public body sees that the public body is trained at least annually in how to comply with the Act.[10]

It is clear from this statement of policy that all meetings of official bodies of cities and towns, with very limited exceptions, are to be open to the public. But it is not just having the meeting open to the public that is the policy of the State of Utah; the policy is that the deliberations be conducted openly. If you keep these two policies in mind, it is easy to comply with the Open and Public Meetings Act. If you cannot or will not comply with the Open Public Meetings Act, you are not cut out for public office. Get out now before it is too late. You don't go to the swimming pool if you're embarrassed to be seen in a swimsuit. A good public official has to have the courage to bare some skin and conduct the public's business in the open, even if their political cellulite will show.

For purposes of the Act a "meeting" is defined as the convening of a public body when a quorum is present. It includes workshops and executive sessions even though the Act does not define either. The definition also includes electronic communications. The definition of "meeting" is qualified by the description that it must be for the purpose of discussing, receiving comments from the public about, or acting on a matter over which the public body has jurisdiction or advisory power. "Convening" is defined to mean the calling of a meeting of a public body by a person, authorized to do so, for the purpose of either discussing or acting on a matter over which that public body has either jurisdiction or advisory power. These very broad definitions are intended to include almost all gatherings of the city council or other committees of a municipality.

The exceptions to the definition of meeting are very narrow. They include a chance meeting, a convening of a public body that has both legislative and executive responsibilities where no public funds are appropriated, and where the meeting is convened just to implement administrative matters.[11] Social meetings are also not subject to the Open and Public Meetings Act[12] although there does not appear to be any definition of what a social meeting is.

The Open and Public Meetings Act applies to more than just the city council or governing body of a city or town. It also applies to planning commissions, and the boards of adjustment, land,

[9] Utah Code 52-4-102.

[10] Utah Code 52-4-104.

[11] This could apply to small fifth and fourth class cities and towns where individual council members have administrative departments but should only be used in very few circumstances.

[12] Utah Code 52-4-208.

appeal authorities, and the legislative body of the city. As long as this group consists of two or more persons, was officially created (by constitution, statute, ordinance or resolution), has the power to expend, disburse, or is supported in whole or part by tax revenue and has authority to do the public's business, it is governed by the act.[13] The intent of this is to include all committees, commissions, or other groups that may be carrying out anything that looks like the public's business if they are supported by public funds. It is clear to me that all advisory commissions or committees are to be included if they are officially set up by ordinance or resolution even if they only are recommending bodies.

It is always important to remember, however, that if there is no quorum of the body it is not a meeting. For example, any two council members and the mayor of a six member council form of government could get together to discuss any matter without it being a meeting, but no three council members in that form of government could get together to discuss a public matter without it constituting a meeting.

The Utah Open and Public Meetings Act attempts to ensure that the meetings of a public body are open to the public by requiring certain minimal notices be given about when a meeting is to be held and what is to be considered at the meeting.

These minimal notice provisions require that any public body that holds regular meetings, such as the regular city council meetings, give public notice at least annually, of the anticipated meeting schedule. The notice must include the date, time, and place of the scheduled meetings. In addition to this annual notice of regular meetings, each meeting must have its own notice. This notice must be given at least 24 hours prior to the meeting and needs to consist of the agenda, the date, time, and place of the meeting.

Both the annual notice and the notice requirements for each meeting are satisfied by posting the written notice at the principal office of the public body or at the building where the meeting is to be held and providing a copy of the notice to at least one newspaper of general circulation within the jurisdiction of the public body or to a local media correspondent. It is not necessary that a city or town pay the newspaper to publish its agenda or annual meeting schedule. The purpose of this media notice requirement is to give the press the opportunity to attend the meetings, not to provide advertising revenue to the newspaper.

Cities and towns are encouraged in the Open Meetings Act to provide notice electronically through websites and the like. The State of Utah now has a website called the Utah Public Notice Website and all cities or towns with an annual budget of over $1,000,000 are required to post their meeting notices on this website.

When there are unforeseen circumstances and it is necessary to hold an emergency meeting, the notice requirements can be disregarded and the best notice practical needs to be given.[14] An

[13] Utah Code 52-4-103(7)(a).

[14] Utah Code 52-4-202(5).

emergency meeting cannot be held unless an attempt has been made to notify all members of a public body and a majority of the public body approves calling the meeting.

It is not enough to just give notice of the meeting. The agenda that is required for each public meeting must also provide enough detail to notify the public as to the topics to be discussed and the decisions that may be made. If an item is not on the agenda, no final action can be taken on that item. However, at the discretion of the chair of the meeting, an item not on the agenda, brought up by the public, can be discussed, if no final action is taken on the matter.

Generally all parts of meetings are required to be open to the public. There are however some circumstances when a portion of a meeting or all of a meeting may be closed to the public. These are intended to be very limited exceptions and every meeting, even one anticipated by the body to be closed to the public, must be convened and begin as a public meeting. A public body may close portions of its meetings to do the following[15]:

a) Discuss the character, professional competence, or physical or mental health of an individual.

b) Hold a strategy session to discuss collective bargaining.

c) Hold a strategy session to discuss pending or reasonably imminent litigation.

d) Hold a strategy session to discuss the purchase, exchange, or lease of real property when public discussion of the transaction would disclose the appraisal or estimated value of the property under consideration or prevent the public body from completing the transaction.

e) Hold a strategy session to discuss the sale of real property.

f) Discuss the deployment of security devices.

g) Investigative proceedings regarding criminal conduct.

h) Certain meetings of the state Independent Legislative Ethics Commission.

j) Some meetings held by county legislative bodies on commercial matters.

k) Some meetings of the state Alcoholic Beverage Control Commission.

l) Some meetings involving the state Higher Education Assistance Authority.

m) Some meetings of the Child Welfare Legislative Oversite Panel.

Closed meetings have by custom, not by definition, often been referred to as executive sessions. The Open Meetings Act specifically requires that if a workshop or executive session is being held on the same day as a regularly scheduled meeting of the public body, then the workshop or executive session must be held at the same location as the regularly scheduled meeting with certain limited

[15] Utah Code 52-4-205

exceptions.[16] The purpose of this appears to be to discourage a public body from holding secret pre-meetings, outside the view of the public, prior to the official public meeting.

Before any part of a meeting may be closed for one of these valid reasons, the public body must be called together in an open meeting. At least two-thirds of the members of the public body present must vote to close the meeting, before it can be closed. No closed meeting is allowed except for the reasons mentioned above. The reasons for holding the closed meeting and the vote either for or against the proposition to hold the meeting are to be entered into the minutes of the public portion of the meeting.

Even if a meeting or portion of a meeting is closed for the proper reasons a public body is still limited in what can be done in the closed meeting. No ordinance, resolution, rule, regulation, contract, or appointment can be approved at a closed meeting. In addition it is not permissible to interview a person applying to fill an elected position in a closed meeting.

The law requires that written minutes be kept of all open meetings and that an appropriate record of closed meetings be kept that may include at least a recording and perhaps written minutes as well. The minutes and record of both closed and open meetings must include certain minimal detail.[17] The written minutes of an open meeting must include the date, time, and place of a meeting; the names of the members present and absent; the substance of the matters discussed or decided on, including a summary of the comments made by members of the body; a record, by individual member, of the votes taken; the names of any person who made comments in the meeting; the substance, in brief, of the comments made; and any other material a member of the public body requests be entered in the minutes. The minutes of an open meeting in which a portion is closed must also include the reason for holding the closed meeting, where the closed meeting will be held, and the vote by member to close the meeting. The closed meeting's recording and minutes must include the date, time, and place of the meeting; the names of the members present and absent; and the names of other persons present except where disclosure would infringe on the confidence necessary to fulfill the purpose of closing the meeting. These minutes of public meetings are public records and are available to the public within a reasonable time after the meeting. The city or town must adopt a policy defining what is reasonable for getting the minutes approved as final and must make draft minutes available to the public at the same time they are available to members of the public body.

All open meetings must also be recorded. The recordings can be digital or tape. The recording must be labeled with the date, time and place of the meeting and are public documents that must be made available to the public for its listening pleasure or for copying. The recording must be complete and unedited. In addition, the Utah Open and Public Meetings Act gives the public the right to record

[16] Utah Code 52-4-201.

[17] There is no provision for closing a meeting to discuss the general category of personnel. It is never appropriate to close a meeting to discuss general personnel matters. You can close a meeting to discuss an individual.

any open meeting. This recording could include either audio recording or video recording of the meeting. You do not, however, have to let this recording interfere with the conduct of the meeting.

The closed portion of the meeting must also be tape recorded and detailed written minutes may be kept of that meeting. These tape recordings and minutes of the closed portion of a meeting are protected records under the Government Records Access and Management Act and, therefore, should not become public except under the provisions of that Act. Disclosure of the information discussed in a closed meeting without the permission of the public body may be a violation of the Utah Municipal Officers and Employees Ethics Act.[18]

There is a limited exception to the requirement that a closed meeting be taped. Meetings in which the competence or physical or mental health of an individual is discussed or the deployment of security devices is discussed do not need to be taped. The public body holding the meeting can have the chair or presiding officer sign a sworn affidavit affirming that the sole purpose for closing the meeting was to discuss only those issues. The purpose for this exception is that when discussing an individual, frank and open discussions are important, and the presence of a tape recording device or minutes may impede this open and frank exchange of ideas. If individuals are meeting to discuss deployment of security personnel or devices, it may very well compromise the security of these devices to have a tape recording or detailed minutes available.

The purpose of requiring the digital or tape recording of closed meetings is that any person who feels like there has been a violation of the law regarding the closed meeting has a right to take this recording or the detailed minutes and have a judge review what went on. If the judge determines that the public body discussed matters in the closed session that were inappropriate, he will then make these matters public.

It is a criminal offense to knowingly or intentionally violate the Open and Public Meetings Act.[19] The attorney general and the county attorneys of the state are charged with enforcing the Open and Public Meetings Act. The Office of the Attorney General is required to give annual notice to public bodies of any changes in the open meetings law and the presiding officer of all public bodies is required to give annual training on the law to the members of the public body.

Private individuals can also enforce the Act by bringing suit. They may bring suit to enjoin or force compliance with provisions of the Act. If the private individuals prevail, the court may award reasonable attorneys fees and court costs to the successful plaintiffs.

The best way to avoid problems with the Open and Public Meetings Act is to err on the side of public openness. When in doubt, the meeting should be open. City councils and other committees or commissions of cities should not attempt to violate even the spirit of the Act. It is important that the meeting not only is conducted in public, but the deliberations be conducted openly. It is not appropriate for members of public bodies such as city councils and planning commissions to conduct their deliberations privately and then in the public meeting just perfunctorily hold the vote.

[18] Utah Code 10-3-1304(2)(a).

[19] Utah Code 52-4-305.

Open and Public Meetings

The business of the public must be conducted in open and public meetings of which the public has been notified and to which the public is invited. Any body of two or more individuals with the authority to make decisions on behalf of the public is subject to the Open and Public Meetings Act. The land use authority may, in certain circumstances, be a single individual. However, more often, it is the planning commission or the council.

Generally speaking, open and public meetings are required whenever a "quorum" of the body meets. A quorum is a majority of the appointed or elected members of the body (for example: three of five members).

Checklist

Conducting an Open Meeting

_____ 1. Determine if the entity holding a meeting is a "public body" which consists of:

- _____ a. Two or more persons, who:
- _____ i. Are part of a body created by rule, ordinance, or resolution; and
- _____ ii. Expend, disburse, or is supported in whole or in part by tax revenue; and
- _____ iii. Are vested with the authority to make decisions regarding the public's business.

_____ 2. Determine if the entity is holding a "public meeting is."

- _____ a. In the presence of a quorum or majority of the members of a public body who meet
- _____ b. for the purpose of discussing, receiving comments from the public about, or acting upon a matter over which they have jurisdiction.
- _____ c. A public meeting is not a chance meeting or a social gathering.

_____ 3. Prepare an agenda with reasonable specificity of the topics to be considered. List each topic as a separate agenda item.

_____ 4. Place a public notice of the meeting 24 hours in advance, including the date, time, place, and agenda of the meeting.

- _____ a. At the principal office of the public body, or, if there is no principal office, at the building where the meeting is to be held; and
- _____ b. By providing notice to at least one newspaper of general circulation within the jurisdiction of the public body or a local media correspondent; and
- _____ c. For public bodies associated with a municipality with an annual budget of more than $1 Million, on the Utah Public Notice Website.

_____ 5. Make an audio or video recording of the meeting from beginning to end.

_____ 6. The presiding officer should make a statement at the beginning of the meeting identifying the date, time, and place of the meeting for the tape.

_____ 7. Allow any member of the public to also make an audio or video recording of the meeting, so long as the recording does not interfere with the conduct of the meeting.

_____ 8. Do not discuss any item not on the agenda unless the item is:

_____ a. Raised up by a member of the public; and

_____ b. Allowed by the presiding officer of the public body.

_____ 9. Do not take action on any item not on the agenda.

_____ 10. Prepare written minutes of the meeting that include:

_____ a. The date, time, and place of the meeting;

_____ b. The names of the members present and absent;

_____ c. The substance of all matters proposed, discussed, or decided, which may include a summary of comments made by members of the public body;

_____ d. A record, by individual member, of each vote taken;

_____ e. The name of each person recognized by the presiding member of the public body to provide testimony or comments;

_____ f. The substance, in brief, of the testimony or comments provided by the public; and

_____ g. Any other information that any member requests be entered in the minutes or recording.

_____ 11. Make the recording and minutes of the meeting available to the public within a reasonable time after the meeting.

_____ 12. Preserve the tape recording as a permanent record in complete and unedited form.

Checklist

Conducting an Electronic Meeting

(In addition to the normal procedures required for public meetings)

_____ 1. Adopt a resolution, rule, or ordinance establishing procedures, limitations, and conditions governing electronic meetings.

_____ 2. Prepare an agenda with reasonable specificity of the topics to be considered, as one would for any public meeting. Indicate on the agenda that the public body may also conduct an electronic meeting.

_____ 3. Place a public notice of the meeting 24 hours in advance, including the date, time, place, and agenda of the meeting:

_____ a. At the principal office of the public body, at the location where the public body would normally meet if not holding an electronic meeting, and at one or more anchor locations (these may all be the same location); and

_____ b. By providing notice to at least one newspaper of general circulation within the jurisdiction of the public body or a local media correspondent; and

_____ c. For public bodies associated with a municipality with an annual budget of more than $1 million, on the Utah Public Notice Website..

_____ 4. Notify the members of the public body 24 hours in advance that they may participate electronically and provide a description of how the members will be connected to the electronic meeting.

_____ 5. Provide space and facilities at the anchor location so that interested persons and the public may attend and monitor the open portions of the meeting.

_____ 6. Arrange for comments from the public, if accepted, for open portions of the meeting.

_____ 7. Follow the normal procedures for recordings, minutes, and other aspects of open and closed meetings.

Checklist

Conducting a Closed Meeting

_____ 1. Determine if the entity holding a meeting is a "public body" which consists of:

- _____ a. Two or more persons, who
- _____ i. Are part of a body created by rule, ordinance, or resolution; and
- _____ ii. Expend, disburse, or is supported in whole or in part by tax revenue; and
- _____ iii. Are vested with the authority to make decisions regarding the public's business.

_____ 2. Determine if the entity is holding a "public meeting." A public meeting is;

- _____ a. In the presence of a quorum or majority of the members of a public body who meet for the purpose of discussing, receiving comments from the public about, or acting upon a matter over which they have jurisdiction. (A public meeting is not a chance meeting or a social gathering.)

_____ 3. Prepare an agenda with reasonable specificity of the topics to be considered. List each topic as a separate agenda item. Indicate on the agenda that the public body may also conduct a closed meeting and generally state the topic of the closed meeting, but do not provide a statement that violates the confidential purpose of the closed meeting. The location of the closed meeting must be announced.

_____ 4. Place a public notice of the meeting 24 hours in advance, including the date, time, place, and agenda of the meeting:

- _____ a. At the principal office of the public body, or, if there is no principal office, at the building where the meeting is to be held; and
- _____ b. By providing notice to at least one newspaper of general circulation within the jurisdiction of the public body or a local media correspondent; and
- _____ c. For public bodies associated with a municipality with an annual budget of more than $1 million, on the Utah Public Notice website.

_____ 5. Make an audio or video recording of the meeting from beginning to end.

_____ 6. The presiding officer should make a statement at the beginning of the meeting identifying the date, time, and place of the meeting for the tape.

_____ 7. Allow any member of the public to also make an audio or video recording of the meeting, so long as the recording does not interfere with the conduct of the meeting.

_____ 8. During the open meeting, a member of the public body must make a motion to close the public meeting:

_____ a. The motion should state the specific justification for the closed meeting by citing one of the purposes provided for in statute. A closed meeting is only justified to discuss:
(Section 52-4-204 of the Utah State Code)

(a) discussion of the character, professional competence, or physical or mental health of an individual;

(b) strategy sessions to discuss collective bargaining;

(c) strategy sessions to discuss pending or reasonably imminent litigation;

(d) strategy sessions to discuss the purchase, exchange, or lease of real property, including any form of a water right or water shares, if public discussion of the transaction would:

(i) disclose the appraisal or estimated value of the property under consideration; or

(ii) prevent the public body from completing the transaction on the best possible terms;

(e) strategy sessions to discuss the sale of real property, including any form of a water right or water shares, if:

(i) public discussion of the transaction would:

(A) disclose the appraisal or estimated value of the property under consideration; or

(B) prevent the public body from completing the transaction on the best possible terms;

(ii) the public body previously gave public notice that the property would be offered for sale; and

(iii) the terms of the sale are publicly disclosed before the public body approves the sale;

(f) discussion regarding deployment of security personnel, devices, or systems;

(g) investigative proceedings regarding allegations of criminal misconduct;

(j) discussion by a county legislative body of commercial information as defined in Section 59-1-404.

_____ b. The presiding officer must then ask for a vote to approve the holding of a closed meeting.

_____ c. Two-thirds of the public body must vote to approve closing the meeting or it cannot be closed.

_____ d. The vote of each person for or against holding the closed meeting is to be noted in the minutes of the open meeting.

_____ 9. Make an unedited audio or video recording of the entire meeting, from beginning to end.

- _____ a. The date, time, and place of the meeting;
- _____ b. The names of members present and absent; and
- _____ c. The names of all others present except where the disclosure would infringe on the confidentiality necessary to fulfill the original purpose of the closed meeting.
- _____ d. Written minutes of a closed meeting are optional.

_____ 10. During the closed meeting:

- _____ a. Only discuss matters that are allowed as topics of a closed meeting; and
- _____ b. No official vote taking any action may be conducted in a closed meeting. No ordinance, resolution, rule, regulation, contract, or appointment can be officially approved in a closed meeting.

_____ 11. At the end of the closed meeting, adjourn the public body, or go back into a public meeting and finish the public meeting in the normal manner. If an official action is to be taken, adjourn the closed meeting and reconvene in the public meeting before taking a motion and conducting a vote on the action.

_____ 12. Prepare written minutes of the open portion of the meeting that include:

- _____ a. The date, time, and place of the meeting;
- _____ b. The names of the members present and absent;
- _____ c. The substance of all matters proposed, discussed, or decided in the public portion of the meeting, which may include a summary of comments made by members of the public body;
- _____ d. A record, by individual member, of each vote taken;
- _____ e. The name of each person recognized by the presiding member of the public body to provide testimony or comments;
- _____ f. The substance, in brief, of the testimony or comments provided by the public; and
- _____ g. Any other information that any member requests be entered in the minutes or recording.

_____ 13. Make the recording and minutes of the open meeting available to the public within a reasonable time after the meeting.

_____ 14. Preserve the recording of the closed meeting, and minutes (if prepared) as a protected record under the GRAMA statute. The recording and minutes (if prepared) are only to be disposed of in conformity with the approved records retention schedule adopted by the municipality and approved by the appropriate state authorities. The recording and minutes (if prepared) are available to the court if litigation is filed and access to the record of the closed meeting is requested.

Notes

Closed Meeting–Purposes. Purposes of a closed meeting:

1. **Individuals.** Discussion of the character, professional competence, or physical or mental health of an individual. 52-4-205(1)(a) But only if the person presiding signs a sworn statement affirming that the sole purpose for closing the meeting was for this purpose. No recording need be made of a closed meeting held for this purpose; 52-4-206(6)
2. **Collective Bargaining.** Strategy sessions to discuss collective bargaining; 52-4-205(1)(b)
3. **Litigation.** Strategy sessions to discuss pending or reasonably imminent litigation; 52-4-205(1)(c)
4. **Purchase of Property.** Strategy sessions to discuss the purchase, exchange, or lease of real property, but only if public discussion would:
   a. Disclose the appraisal or estimated value of the property under consideration; or
   b. Prevent the public body from completing the transaction on the best possible terms; 52-4-205(1)(d)
5. **Sale of Property.** Strategy sessions to discuss the sale of real property if public discussion of the transaction would:
   a. Disclose the appraisal or estimated value of the property under consideration; or
   b. Prevent the public body from completing the transaction on the best possible terms; and
   c. The public body previously gave public notice that the property would be offered for sale; and
   d. The terms of the sale are publicly disclosed before the public body approves the sale; 52-4-205(1)(e)
6. **Security.** Discussion regarding deployment of security personnel, devices or systems; 52-4-205(1)(f), but only if the person presiding signs a sworn statement affirming that the sole purpose for closing the meeting was for this purpose. No recording need be made of a closed meeting held for this purpose; 52-4-206(6)
7. **Criminality.** Investigative proceedings regarding allegations of criminal misconduct; 52-4-205(1)(g)
8. **Quasi-Judicial Deliberations.** By decree of the courts, and not by statute, a public body acting in a quasi-judicial manner may deliberate behind closed doors. In the land use context, this would apply to an appeal authority, which acts in a quasi-judicial manner (10-9a-701(3)(a)(i)) which therefore may exclude the public from its deliberations much as a jury would when making a decision about the facts or law of a given matter. Other public bodies acting in a judicial manner also qualify for this exception to the Open and Public Meetings Act. It is important to note, however, that the information gathering phase of a quasi-judicial process must take place in an open meeting. *Dairy Product Services v. Wellsville,* 2000 UT 81, par 60

Government Records and Public Access to Them

David Church, ULCT

All cities and towns must comply with the Government Records Access and Management Act.[20] This is sometimes referred to as GRAMA. The purpose of the Act is to standardize both records access and management. The intent of the Act is to make it possible for all public records of government to be available to the public, while protecting the privacy rights of individuals.

Most records of a city or town must be public and available at reasonable times and places for inspection and copying. There are possible criminal sanctions for an individual who wrongly refuses access to a record and for an individual who wrongly discloses a properly classified record.[21]

Every city and town must comply with the Act. Each must appoint one or more "records officers" who are the individuals appointed by the chief administrative officer of the city or town to work with state archives in the care, maintenance, scheduling, designation, classification, disposal, and preservation of records.

The words *designation* and *classification* refer to the act of placing individual records or records series in one of four classifications: public, private, controlled, or protected. Private, controlled, and protected are terms of art that refer to specific classification possibilities.[22] Most records must be public. Some records must be classified as private.[23] These include records about a person's welfare benefits; medical history and conditions; library records; current and former employee's home addresses, social security numbers, and marital status. This list is not a complete listing of what must be private but only an example. Before any record is disclosed, the records officer should be consulted to insure that privacy rights are maintained. Examples of controlled records include reports from medical doctors about an individual. An example of a protected record is a trade secret or criminal investigation information. A records officer in any city or town should carefully review the definitions of each type of record and make a trained and reasoned determination of in what category any record must be placed.

Every person has a right to inspect a public record free of charge during normal business hours of the city or town.[24] You cannot charge someone to find or look up the record for them. If it is a public

[20] Utah Code 63G-2-101 et seq.

[21] Utah Code 63G-2-801.

[22] What most records are classified as is defined in Utah Code sections 63G-2-302, 304, 305.

[23] Utah Code 63G-2-302.

[24] Utah Code 63G-2-201.

document, the public has the right to see it. The public also has a right to have a copy of a public record. You can charge a person the reasonable fee to cover the actual cost of providing a record to someone.[25] The fee should not be a profit center for the city or town. It must be formally approved by the city or town's governing body by ordinance or resolution. The fee should not be used as a method of discouraging public access to records.

A person making a request for a record must furnish the governmental entity with a written request containing his name, mailing address, daytime telephone number, if available, and a description of the records requested that identifies the record with reasonable specificity. As soon as reasonably possible, but no later than ten business days after receiving a written request, or five business days after receiving a written request if the requester demonstrates that expedited response to the record request benefits the public rather than the person, the governmental entity shall respond to the request by the following:

> (i) Approving the request and providing the record.
>
> (ii) Denying the request.
>
> (iii) Notifying the requester that he or she does not maintain the record and providing, if known, the name and address of the governmental entity that does maintain the record.
>
> (iv) Notifying the requester that because of one of the extraordinary circumstances allowed by law,[26] it cannot immediately approve or deny the request and giving the details why and when the city or town will be able to provide the record.

Any person who requests a record to obtain information for a story or report for publication or broadcast to the general public is presumed to be acting for the benefit the public rather than a person.

There may be times when a request is made for information that is not contained in one record but could be compiled from several different records. No governmental entity, including cities and towns, is required to create or compile a record in response to a request for information.[27] The city or town could, if it wanted to, rather than deny such a request, agree to create or compile the requested information for a negotiated fee.

One of the great problems with records request is how to handle the "serial requester." By this I mean the person who continually asks for the same records over and over again. The law specifically

[25] Utah Code 63G-2-203

[26] The extraordinary circumstances are specified in 63G-2-204(4).

[27] Utah Code 63G-2-201(8)(a).

provides that the governmental entity is not required to fulfill a person's request if the request duplicates prior records requests made by that same person.[28]

If the city or town is denying a request it should give a notice of denial that includes a description of the denied records, the reasons for the denial, including citations to the law relied on in making the determination to deny and a statement that the requester may appeal the decision and how to do so.[29] If the city or town fails to provide the requested records or issue a denial within the specified time period, that failure is considered the equivalent of a determination denying access to the records.

The law contains an appeals process for those wishing to either appeal a classification decision or an access decision. Cities and towns may by ordinance set up their own appeals process. The ordinance can also assist the city in document management issues such as retention schedules and fees for copying. The ordinance adopted must meet the standards of the law and be filed with the state archivist.[30] If an ordinance is not adopted then the provisions of state law apply. There is significant benefit in having an ordinance that tailors the act to the individual municipality. This includes the ability to handle the appeals process in-house and the ability to have some control over the records retention schedule.

If a city or town fails to provide a record and is wrong in doing so there is the possibility that the city or town will have to pay the requester's reasonable attorney's fees incurred in forcing the city or town to comply with the records request.[31]

The best way to handle records and records request is to have a well trained records officer and a friendly attitude toward the issue. Members of the public, including the news media, have a right to view and have copies of most records created in a city or town. It is the city or town's obligation to keep these records in a manner that makes inspection of them convenient. The fees charged for any copying done should not be a profit center for the city or town. It can be an imposition to respond to request for records. Many city and town officials consider it to be interference with the real job of running the municipality. It is not. One of the services that should be provided to the public is reasonable and timely access to public records and information.

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[28] Utah Code 63G-2-201(8)(a)(iv).
[29] Utah Code 63G-2-205.
[30] Utah Code 63G-2-701.
[31] Utah Code 63G-2-802

The Municipal Officers' and Employees' Ethics Act

David Church, ULCT

All municipal officers and employees must abide by the Municipal Officers and Employees Ethics Act.[32] The stated purposes of this state law are to establish standards of conduct for municipal officers and employees and to require a disclosure of actual or potential conflicts of interest between public duties and personal interests. The Act does two things: 1) It sets up a disclosure system for conflicts of interest; and 2) it describes crimes specific to public service.

The ethics law applies to all elected and appointed officers and employees of a city and town. These include persons serving on special, regular, or full-time committees, agencies, or boards whether or not they are compensated for their services. It applies to both full and part-time employees.

The law makes it a crime to commit the following:

(1) Disclose or improperly use private, controlled, or protected information acquired by reason of an official position or in the course of official duties in order to further substantially the officer's or employee's personal economic interests or to secure special privileges or exemptions for the officer or employee or others. Private, controlled or protected information is information that has been classified as such under the Government Records Access and Management Act.

(2) Use or attempt to use an official position to further substantially the officer's or employee's personal economic interest or secure special privileges for himself or others.

(3) Knowingly receive, accept, take, seek, or solicit, directly or indirectly for himself or another, a gift of substantial value or a substantial economic benefit tantamount to a gift that would tend to improperly influence a reasonable person in the person's position to depart from the faithful and impartial discharge of the person's public duties or that a reasonable person in that position should know under the circumstances is given to him or her primarily for the purpose of rewarding the person for official action taken.

(4) An officer or employee may not receive compensation for assisting any person or entity in any transaction with the city or town without making a written and oral disclosure to the mayor and public.

The exceptions to the above are for an employee or officer to receive an occasional non- pecuniary gift having a value of less than 50 dollars or an award publicly presented or a loan made in the ordinary course of business, or a political campaign contribution actually used in a political campaign. An economic benefit tantamount to a gift includes loans at substantially less than commercial rates and compensation for services at a rate substantially higher than fair market value.

[32] Utah Code 10-3-1301 et seq.

In addition to any penalty contained in any other provision of law, any person who knowingly and intentionally violates the above referenced sections of the Act (not the disclosure requirement discussed below) must be dismissed from employment or removed from office and is guilty of the following:

(1) A felony of the second degree if the total value of the compensation, conflict of interest, or assistance exceeds $1,000.

(2) A felony of the third degree if:

(a) the total value of the compensation, conflict of interest, or assistance is more than $250 but not more than $1,000; or

(b) The elected or appointed officer or municipal employee has been convicted twice before of a violation of this chapter and the value of the conflict of interest, compensation, or assistance was $250 or less.

(3) A class A misdemeanor if the value of the compensation or assistance was more than $100 but does not exceed $250.

(4) A class B misdemeanor if the value of the compensation or assistance was $100 or less.

There is a disclosure requirement of the ethics law as well. Two types of disclosure may be required—written and oral. An officer or employee is required to make a disclosure in writing and file it with the mayor. This written statement must be sworn and include certain minimal information about the conflict of interest. A simple sample disclosure form is contained in the appendix. The second required disclosure is oral and must be made in an open meeting to the members of the body of which he is a member immediately before the discussion about the topic involved in the conflict of interest. An appointed officer who is not a member of a public body or a municipal employee must also disclose the information required to his or her immediate supervisor.

The following must be disclosed:

(1) Agreements to receive compensations for assisting any person or business entity in any transaction involving the municipality.

(2) Whether an officer or municipal employee is an officer, director, agent, or employee or the owner of a substantial interest in any business entity that is subject to the regulation of the municipality.

(3) Interests in a business entity doing business with the municipality.

(4) Any personal interest or investment by a municipal employee or by any elected or

appointed official of a municipality which creates a conflict between the employee's or official's personal interests and his public duties.

(5) The nature of the personal conflict of interest including, if applicable, the position held and the nature and value of a business interest held in a regulated business or one which is doing business with the municipality.

If the conflict involves an agreement for compensation to assist a person in their business with the municipality, the disclosure must contain the following:

(1) The name and address of the officer or municipal employee.

(2) The name and address of the person or business entity being or to be assisted or in which the appointed or elected official or municipal employee has a substantial interest.

(3) A brief description of the transaction as to which service is rendered or is to be rendered and of the nature of the service performed or to be performed.

The officer or employee should file the disclosure statement upon first getting elected or appointed and again when there is a change in the nature of the conflict. In the case of a contract with the city, ten days before the date of any agreement between the elected or appointed officer or municipal employee and the person or business entity being assisted or ten days before the receipt of compensation by the officer or employee, whichever is the earlier.

The oral disclosure must be made in the open meeting of the governing body on the record before any discussion of the relevant material takes place. The written disclosure is to be made in a sworn statement filed with the mayor. The mayor must report the substance of all such disclosure statements to the members of the governing body, or he or she may provide to the members of the governing body copies of the disclosure statement within 30 days after the statement is received by him. The oral disclosure statement is to be entered in the minutes of the meeting. The written statement is public information and must be available for examination by the public.

If any transaction is entered into in connection with a violation of the disclosure requirements the municipality performs the following:

(1) Must dismiss or remove the appointed or elected officer or municipal employee who knowingly and intentionally violates the Act from employment or office.

(2) May rescind or void any contract or subcontract entered into pursuant to that transaction without returning any part of the consideration received by the municipality.

Any complaint against a person, who is under the merit system, charging that person with a violation of the Act, must be filed and processed in accordance with the provisions of the merit system. If the

person charged with the violation is not under any merit system, then the complaint is filed with the mayor or city manager. The mayor or city manager investigates the complaint and must give the person an opportunity to be heard. A written report of the findings and the recommendation of the mayor or city manager must be filed with the governing body. If the governing body finds that the person has violated the Act, it may dismiss, suspend, or take such other appropriate action with respect to the person.

In addition, complaints of criminal conduct will be investigated by county attorneys, and in some cases, the Utah Attorney General's office.

The Act does not require anyone who complies with the disclosure provisions to abstain from voting or participating in the discussion. The Act does not prevent a person who appropriately discloses the conflicts from doing business with or in the municipality. The Act sets out a minimum standard of ethics. Once an appropriate disclosure is made of the conflict of interest, it is presumed that the officer's or employee's personal sense of propriety and values along with public scrutiny will guide the officer or employee to do the right thing.

Enforcing the Ethics Act

One of the difficulties with any required system of ethics is how to enforce it. To some extent, the very nature of ethics should be self enforcement. Those with ethics don't need to have a standard of conduct forced on them. The problem of enforcement only arises when somebody is accused of unethical conduct and either denies it or does not recognize the conduct to be below standard.

Ethics are mostly a matter of personal definition. I define what is ethical for me, and you define what is ethical for you. It is considered rude and meddling to tell others what their ethics should be. There is, however, a minimum standard of ethical conduct for municipal employees and officials. This is the Municipal Officers and Employees Ethics Act.[33] Since it is a standard set by state law it needs to be enforced.

The enforcement is two fold. The criminal portions of the Act are enforced like any other crime through the criminal justice system. Complaints go to the appropriate agency such as the county attorney or attorney general's office and are investigated to see if there has been a crime committed which can be prosecuted. Complaints could also be taken to the panel of judges, who meet at regular intervals to determine whether a grand jury should be impaneled.

The non criminal portions of the Act (the disclosure provisions) are investigated by the city or town. If a complaint is against an employee who is a merit employee, the complaint is processed in accordance with the provisions of the merit system. If the complaint is against a non merit employee or an officer of the city, the complaint is to be filed with the mayor or city manager. The mayor or city manager is to investigate the complaint and give the person an opportunity to be heard. The mayor or city manager must then make written findings and recommendations to the governing body. The governing body can then dismiss, suspend, or take other appropriate action against the individual.

A difficulty arises if the complaint is against the mayor or city manager. Who is to then investigate? Another difficulty is if there is a finding of an ethical violation that is does not arise to the level of being a crime. Can you dismiss a member from the council? The Ethics Act states that if an officer or employee knowingly and intentionally violates certain portion of the Ethics Act they act be dismissed from office. But what happens if a council votes to dismiss a member of the council and that council member refuses to accept the dismissal? There is a section of state law that provides that if an elected official willfully omits to perform any duty or is guilty of misfeasance or malfeasance of office then he or she is guilty of a class A misdemeanor and is removed from office.[34] It appears that before an elected official can be removed from office, he or she would have to be actually convicted of a crime

[33] Utah Code 10-3-1301 et seq.

[34] Utah Code 10-3-826.

such as misfeasance or malfeasance of office. It would not be sufficient that a governing body just found the person had only violated the disclosure portions of the Act. This is more fully discussed in the next section to this handbook. However, a governing body can sanction a council member or mayor, short of dismissal from office, for a violation of the Ethics Act. The Act specifically authorizes appropriate action with respect to the person. This might include a public reprimand or withholding a portion of a salary as a civil penalty. It should include rescinding or voiding any transaction which the city entered into in violation of the Ethics Act including not returning any consideration the city may have received in the unethical transaction.[35]

If you feel that an officer or employee has violated the Act you should seek to enforce it through appropriate means. It is not fair to make a public accusation of an ethical violation or conflict of interest for political purposes. If a crime has been committed, the appropriate investigation and screening by a prosecutor should be allowed to take place. If there is a problem with an undisclosed or inappropriate conflict of interest, the mayor or manager should be allowed to investigate, and the accused should be allowed to explain before there is a public sanction. The practice of using an accusation of a conflict of interest to influence someone's vote or prevent someone from voting is, in my opinion, rude and inappropriate.

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[35] Utah Code 10-3-1312.

What Planners Wish Their Planning Commissioners Knew

by Jim Segedy, Ph. D., FAICP, and Lisa Hollingsworth-Segedy, AICP

Lisa recently visited with Paulding County, Georgia's Planner, Chris Robinson, whose career has included work at two regional planning commissions, two counties, one city, and one state agency. She asked him "over the years and in all the places where you have worked as a planner, what did you wish your planning commissioners knew?"

Chris' answers started us down a road studded with memories of our own experiences over the years as we worked to empower planning commissioners at their job. It never hurts to remind ourselves who we are, and what we're doing on the planning commission in the first place.

So with our thanks to Chris for his perspective, and apologies to David Letterman, here's our Top Ten List of things planners wish their planning commissioners knew. One caveat: each state has slightly different planning and zoning laws, and local commissions' procedures will vary. Still, the basic ideas we set out should be relevant for most of you.

10. The responsibilities and duties of being a planning commissioner. Planning commission involvement is not an appointment to accept for status or just to add to your resume. It involves training, study, and preparation for every meeting. You will need a clear understanding of the commission's role in administrative and legislative actions, as well as legal issues such as due process, "takings," preemption, and more.

Planning commissioners are responsible for working together to ensure that the community grows and develops according to the vision established in the plan. As you consider an appointment (or accepting a re-appointment) carefully consider the significant commitment required, from the amount of time involved in preparing to make informed decisions to the (potentially lengthy) meetings each month.

9. Proper adoption of the zoning ordinance, map, and amendments is very important. Planning commissioners should be familiar with their state's code language that spells out the procedures for how a zoning ordinance and/or map can be amended. Requirements for advertising and public hearings are the most common items addressed, but some states specify additional standards.

> STAFF ARE A RESOURCE TO YOU AS PLANNING COMMISSIONERS TO MAKE YOUR DELIBERATIONS EASIER BY ASSEMBLING THE INFORMATION YOU NEED BEFORE YOU MEET.

8. The relationship between the comprehensive plan and the zoning ordinance. Your comprehensive plan (or master plan, or something similar) is the critical guidance document for your community. It likely contains an examination of current conditions, identifying goals and objectives for the future, and a general framework for how to achieve those goals – and why. The plan establishes the framework for decision-making and the public purpose for local government regulations pertaining to land use.

7. The definition of "hardship" when granting a variance. Typically, a variance from the zoning code's standards is allowed only when there is a "hardship on the property." In other words, the property cannot be developed under the current rules because of specific conditions on the site or its unusual configuration. "Hardship," as the word is defined in zoning codes, does not relate to the financial well-being of the property owner, or whether the site could generate greater profit (that is, more than a "reasonable return") if a variance were granted. As one of the leading treatises on zoning law states, "the courts have consistently held that a variance may not be granted solely on the ground that such relief will enable the applicant to make a greater profit."[1]

The technical zoning definition of hardship is too often ignored by planning and zoning boards (the body authorized to grant variances differs from state to state). One consequence of this, and of too readily granting variances, is that the community's zoning ordinance and comprehensive plan will be undermined. Bottom line: it is important to know the criteria in your ordinance for granting variances, and then make decisions in accordance with those criteria.

6. Politics is for politicians – not planning commissioners. In most places, planning commission appointments are made by elected officials. Sometimes these officials have "expectations" about their appointees and the decisions they are called on to make. This has the potential of damaging the commission's integrity as an independent body. As Greg Dale (who has frequently written on ethical issues for the *PCJ*) has noted: "As a planning commissioner you have an ethical obligation to remain in a position of objectivity and fairness. Any time you take a position at the urging of an elected official, you run the risk of tainting your credibility as an objective decision-maker."[2]

One of the fundamental purposes behind the creation of planning commissions early in the 20th century was to

1 *Anderson's American Law of Zoning*, 4th Edition, Sec. 20.23, p. 495.

2 "Who Do You Work For," in *PCJ #16* (reprinted in *Taking a Closer Look: Ethics & the Planning Commission*; for details: www.plannersweb.com/ethics.html).

provide for an independent, non-partisan, body to provide advice to the governing body on planning, zoning, and other land use matters, As planning historian Laurence Gerckens has noted, "it is worth recalling that citizen planning commissioners were put into that position … to provide insights into the problems and potential of the community, and to provide leadership in the solution of problems before they arise."[3]

5. "Health, safety, and welfare." These three words are the foundation upon which a community's comprehensive plan and land use ordinances are built. Planning commission decisions should be based on impacts on the health, safety, and welfare of the community, not just on the welfare of any one individual or group.


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Planning commissioners should also be familiar with the concepts of "due process" and "takings" so they are not "buffaloed" by applicants who will argue that an adverse decision will violate one or both of them.[4] Your by-laws and/or zoning ordinance should contain a checklist or form that will keep you on track and document due process and findings for approval or denial.

4. Conflicts of interest – and how to avoid them. As a planning commissioner, you are called upon to check your personal interests at the door of each meeting. It is critical that you keep the community's best interests in focus, not how the proposal may impact your own business, property, or income. You and your fellow commissioners should be familiar with your commission's rules on conflicts of interest (which we hope your commission has!) and scrupulously adhere to them.

It is also important to put aside personal feelings about either the applicant or members of the public who may be testifying. Jim recalls that during his term as a planning commissioner, he heard fellow commissioners say, "they seem like nice people," or "my kid plays soccer with the their kid." These should have nothing to do with your review of a project. If you can't focus on making objective decisions based on your ordinance's criteria, you probably shouldn't be serving on a planning commission.

3. The role of planning staff. If your community employs planning staff, it is part of their job not just to ensure that development applications are complete, but to conduct a basic evaluation of the permit request against the standards contained in your ordinance. In some communities, staff may also prepare recommended findings based on their technical review of the application. But staff should never direct you how to vote, and you should always independently evaluate the recommendations you receive, the material presented by the applicant, and any testimony or public comments you hear.

Staff are a resource to make your deliberations easier by assembling the information you need before you meet. Most staff welcome questions from commissioners in advance of the meeting. This can help keep the meeting on track and keep you as a planning commissioner well informed.

2. Site visits to subject properties are important. Looking at photos and maps just isn't the same as seeing the site and observing the conditions that may be impacted by a proposed development. Driving by the site for a quick look usually isn't as revealing as getting out of your car and walking around the site. Issues involving scale or density, for example, can seem abstract without a real feel for the specific area potentially affected by the project.

Some planning commissioners are reluctant to go on site visits because they are concerned about running afoul of Sunshine Laws, or even trespassing. Site visits are fact-finding missions, so as long as you restrict conversations to details of the permit request and don't stray into the area of discussing possible decisions, you should be fine. Of course, be guided by advice your commission receives from its legal counsel on site visits.

1. Why avoiding ex-parte communications is critical. Decisions must be made on the basis of fact – and in the light of day. Information gathered should come through appropriate channels: the permit application; maps and photos that support it; what you observe on a site visit; clarifications provided by your staff; and public hearing comment. If your decision is based, even in part, on information you privately received from the applicant or from someone opposing a project, you are – in our opinion – leaving yourself open for a court challenge.

However, in the review process for this article, we heard from one planner who informed us that ex-parte communications are allowed in her jurisdiction, though members are encouraged to report the content of such communications at the commission meeting and to remain objective.

Your best bet is to follow the communication and decision-making standards spelled out in your planning commission by-laws and/or your zoning ordinance procedures. If your commission or board doesn't have provisions addressing how to handle ex-parte contacts, set aside some time to develop them. ◆

Jim Segedy is the Director of Community Planning for the Pennsylvania Environmental Council. Lisa Hollingsworth-Segedy is the Associate Director for River Restoration for American Rivers' Western Pennsylvania Field Office. They both thank Chris Robinson for his contributions to this column.

3 "Community Leadership & the Cincinnati Planning Commission," *PCJ #18* (Spring 1995).

4 *Editor's Note:* for a good overview of procedural due process and "takings," we'd recommend respectively "Procedural Due Process in Practice," by Dwight Merriam, FAICP, Esq., and Robert Sitkowski, AIA, Esq."(*PCJ #31*); and "Taking on Takings Claims," by Dwight Merriam (*PCJ #60*). Both articles are included in our publication, *Taking a Closer Look: Planning Law* (2008). For details: www.plannersweb.com/law.html.

Dealing With Contentious Public Hearings

by Wayne Senville

One of the toughest challenges facing planning commissioners is how to deal with contentious public hearings. Most commissioners, at some point or another, find themselves facing a crowd of angry citizens, and sometimes angry project applicants.

Since public hearings can involve controversial issues, it's not surprising when they become the focal point for strong emotions. When the temperature in the meeting room rises, it can also become more difficult for planning commissioners to consider the testimony and reach well-reasoned decisions. Planning board members may sit there wondering why some of the controversial issues couldn't have been resolved earlier. From my own experience serving on a planning commission, I can attest to the fact that I certainly felt that way on more than one occasion!

Over the past year, I asked a number of planners and planning commissioners what can be done to improve the public hearing process. The results are distilled in a dozen tips, grouped into two categories: Before the Hearing and During the Hearing. In some cases there are cautionary notes that go with the tip. But one piece of advice that applies to all of them: be sure to go over any proposed changes in your commission's procedures with your municipal attorney. What may be perfectly acceptable practice in one state or community, may be unlawful in another.

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"It was a bear of a meeting."

I also want to invite you to continue the discussion on our PlannersWeb blog. Post your comments on our new Public Hearings Resources Page: www.plannersweb.com/hearings.html. Share what's worked – and what hasn't – in your own community. The aim is for all of us to learn from each other.

Before the Hearing

1. Consider Conducting Preliminary Project Reviews

One common approach to reducing the likelihood of contentious public hearings is to have preliminary project reviews. The idea is that less formal meetings before the public hearing can hone in on aspects of a project that might be problematic, giving applicants some feedback before they invest substantial time and money in preparing detailed plans and drawings.

A pre-application meeting can be especially helpful when a controversial project is about to enter the pipeline. Staff can identify to the applicant potential trouble spots with what is being proposed. Several planners I spoke with found this a very useful practice, particularly when input from various municipal departments (e.g., public works, engineering, and fire) is coordinated.

Pre-application meetings can also take the form of a meeting held before the planning commission, open to the public. In some places this is called a sketch plan or conceptual review. These names reflect the fact that the applicant is basically sketching out in broad terms what they'd like to do, without providing detailed plans. Sketch plan review can also be helpful in identifying potential concerns before the development application is finalized. *Sketch Plan Review, p. 14.*

One other approach is to have a more specialized advisory board – focusing on design review or conservation issues – conduct a preliminary review of the

The Origins of Public Hearings in Planning & Zoning

Public hearings were essential components of both the Standard State Zoning and City Planning Enabling Acts of the 1920s. These model laws served as the basis for most states' planning and zoning enabling laws, and their provisions largely remain the law today.

It's fascinating to see the reasoning behind the public hearing requirement. Here's the explanatory note from the Planning Enabling Act:

"The public hearing … has at least two values of importance. One of these is that those who are or may be dissatisfied with the plan, for economic, sentimental, or other reasons, will have the opportunity to present their objections and thus get the satisfaction of having their objections produce amendments which they desire, or at least the feeling that their objections have been given courteous and thorough consideration. The other great value of the public hearing is as an educating force; that is, it draws the public's attention to the plan, cause some members of the public to examine it, to discuss it, to hear about it, and gets publicity upon the plan and planning. Thus the plan begins its life with some public interest in it and recognition of its importance."

project and forward its recommendations to the planning commission. Often, these citizen boards include members with special expertise or training, and can provide valuable insights on challenging aspects of a project. The downside, of course, is that they add another layer of review, lengthening the process.

• *Salem, New Hampshire* Town Planning Director Ross Moldoff, AICP, notes that preliminary meetings (called "conceptual discussions" in Salem) "can help flesh out the major issues by giving the planning board a chance for input, and letting abutters raise their concerns before the applicant is locked into a particular layout." As Moldoff further explains: "We don't have any criteria to identify such projects, but it's anything large or complex. Most applicants appreciate the opportunity for feedback before they do all the costly engineering work."

• Carolyn Baldwin, a long-time New Hampshire land use lawyer, echoes Moldoff's endorsement of these preliminary discussions. Even though, she notes, "comments at this stage are not binding on either party," the informal pre-application process "gives both the board and the applicant an opportunity to assess any public opposition and take steps to ameliorate the objections, if possible."

• "There is nothing more frustrating as a planning commissioner," says David Foster, a member of the *Santa Cruz, California,* Planning Commission, "than to have a project come for the first time to the commission with six months of design and engineering work behind it and a vested interest by both the applicant and city planning staff in the plans as prepared." As Foster observes, "this often results in the commission feeling that they are being obstructionist to request anything more than color or window placement changes." "Early review of schematic designs," he says, "can really open the door to much more creative thinking about things like building massing and possible variances that might allow for a better fit with the neighbors and dealing with site constraints."

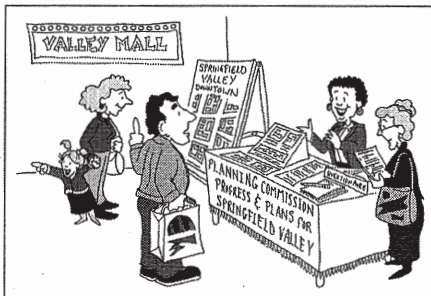
There are potential downsides to informal, preliminary meetings. *Woodstock, Connecticut,* Town Planner Delia P. Fey, AICP, raises two red flags. First, if there are no submission standards, applicants can come in with presentations ranging from "the equivalent of a sketch on the back of a paper bag" to "professionally prepared plans." Second, the planning commission may be "worried, correctly, about predetermining their vote and may not give very clear advice to the applicant." As a result, Fey notes, "the applicant sometimes leaves seeming to be more confused than when they came in."

Connecticut land use attorney Timothy Bates also advises that these kind of meetings should only occur before a development application is filed. Once an application has been filed and the formal review process begun, Bates notes, "it is inappropriate for discussions to occur in any substantive way outside the public hearing process" since they would constitute ex-parte contacts.[1]

• *Brookline, Massachusetts,* Director of Planning & Community Development Jeff Levine, AICP, says that: "Having a 'design advisory team' of professionals who live in the community can be a good middle ground between just staff and the full planning board. The only drawback is that residents call for a design advisory team on projects that are really too small to have this additional layer of review, but that is the exception."[2]

2. Hold a Meeting in the Neighborhood

Another strategy that can reduce the likelihood of contentious hearings is to request an applicant to first meet with abutters and other neighbors. These meetings are usually organized by the applicant, though sometimes neighborhood associations sponsor them.



What's Planning Got to Do With This?

Let's not forget that perhaps the single most effective way of reducing the number of contentious hearings is by dealing with difficult issues during the long-range planning process. After all, planner Anne Krieg reminded me during a phone conversation, isn't this one of the points of putting together a comprehensive plan?

Elaine Cogan has also observed that "people with strong opinions always will find ways to be heard. But isn't it at least as valuable, or even more informative, to learn what less vocal but still concerned folk think? In an ideal world, we can engage them before the controversy erupts."

– From Now that You're on Board (Planning Commissioners Journal 2006).

Some cities and counties require neighborhood meetings on applications that have to go through a public hearing process (not applications that can be approved administratively). Most planners I spoke with saw value in neighborhood meetings, especially for larger or controversial projects – though several added cautionary notes.

• *La Paz County, Arizona,* Community Development Director Scott Bernhart, AICP, CFM, told me that he's "had success with work sessions in a community setting (in one case on site) with several planning commissioners present to observe neighborhood concerns." Bernhart adds that "these published and open meetings are normally conducted by the developer or a representative with staff attending."

• Florida planner Larry Pflueger says that one of the benefits of early neighbor-

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1 For more on the problem with ex-parte contacts, see Greg Dale's "Ex-Parte Contacts," *PCJ* #2 (Jan./Feb. 1992) and "Revisiting Ex-Parte Contacts," *PCJ* #70 (Spring 2008); available to order & download respectively at: www.plannersweb.com/wfiles/w516.html and .../w129.html.

2 Brookline's "Major Impact Project" review process, which outlines the Design Advisory Team process is set out in Sec. 5.09 of the city's zoning bylaw; available through: www.brooklinema.gov/planning.

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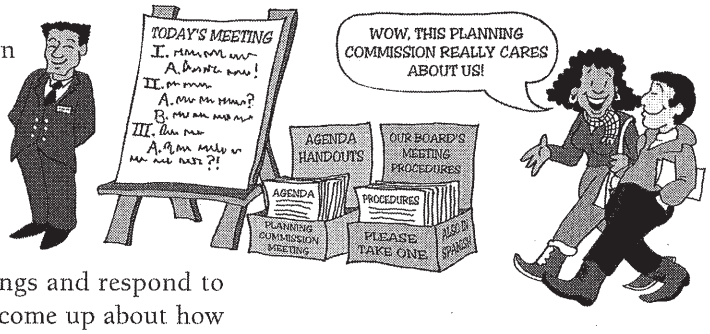
hood meetings attended by planning staff is that "they tend to dampen local criticism because the people get to look at the proposal before it gets into the official planning board review process." Pflueger believes that, "most of the time it seems that people fear the unknown so if the project is brought to them, they can see what is really being proposed rather than just hear the rumors about the project."

A related benefit, Pflueger notes, is that staff hear "what the real and perceived problems may be ... and if the problems cannot be put to rest at the neighborhood meeting, staff at least know what to concentrate on during its review and can point out the problem to the planning board prior to its meeting so that the board is not surprised when people show up."

• In *ARVADA, COLORADO*, applicants for rezonings, major subdivisions, PUDs, and conditional use permits are typically required to hold a neighborhood meeting at least twenty-one days before the planning commission hearing.[3] According to Senior Planner Gary Hammond, planning department staff (but not commissioners) attend these meetings and respond to any questions that come up about how the development review process works.



Hammond has found neighborhood meetings helpful since they give applicants a clearer sense of neighbors' concerns and an early opportunity to respond to them. At the same time, the meetings often "work to quell rumors residents have heard about what is going in." Copies of a summary of the meeting are provided to the planning commission before the public hearing. Applicants must indicate how they intend to address (or why they are unwilling or unable to address) concerns, issues, or problems expressed during the meeting.

• In *LAFAYETTE, COLORADO*, says Community Development Director Phillip Patterson, AICP: "We require applicants to provide comment cards to the participants of neighborhood meetings. This way the developer/applicant isn't in a position to 'summarize' the neighborhood's comments." Patterson also adds "we caution applicants on the format of their neighborhood meetings." As he explains: "Formal meetings, where a single presentation is made to a large group, can cause issues. While many of the attendees may be opposed to the project and are willing to speak, there may be others who support the project but are uncomfortable speaking out before their neighbors." As an alternative, "we encourage an open house type format where there are many representatives from the applicant available to speak one-on-one with members of the public."

While neighborhood meetings are also required for certain projects in *BAR HARBOR, MAINE*, Planning Director Anne Krieg, AICP, adds this note: "They seem to be effective in fleshing out the issues outside the hearing process, but they can backfire too, as they often give abutters a sense of empowerment that they don't have." That's because, she says, "the final review, deliberation, and decision rests with the planning board ... and when the planning board approves something the neighbors didn't like, but meets the ordinance, there is animosity at the end."

3. Have a Plan for Citizen Participation

Do you have a plan for how you involve the public in zoning and comprehensive plan amendments, as well as site

Editor's Note: The following is from Bar Harbor, Maine's land use ordinance.

Sketch Plan Review

A. Contents. Prior to requesting a review of a proposed subdivision plan ... an applicant shall submit a preapplication sketch which shall show ... the proposed layout of the streets, lots and other features in relation to existing conditions. The sketch plan shall be accompanied by:

(1) A copy of that portion of a USGS topographic map encompassing the site;

(2) Any written request for the waiver of submissions that the applicant intends to submit pursuant to §125-63;

(3) An outline of data on existing covenants, medium-intensity soil survey and soil interpretation sheets, and available community facilities and utilities, and by information describing the subdivision proposal such as number of residential lots, typical lot width and depth, price range, business areas, playgrounds, park areas and other public areas, proposed protective covenants, and proposed utilities and street improvements.

... C. Review of sketch plan ... the Planning Board shall entertain brief public comment on the proposal for the limited purpose of informing the applicant of the nature of any public concerns about the project so that such concerns may be considered by the applicant in preparing his/her application.

(1) Upon its review of a preapplication sketch plan, the Planning Board shall:

(a) Set a date for a site inspection ... within 30 days;

(b) Make specific suggestions to be incorporated by the applicant in subsequent submissions;

(c) Act on the applicant's request for submission waivers, if any;

(d) Determine the need to hold a neighborhood meeting in accordance with §125-74A.

... F. Rights not vested. The submission or review of or public comments about a preapplication sketch plan or the conduct of a site inspection shall not be construed to be a substantive review of the proposed subdivision as defined by 1 M.R.S.A. § 302...

3 For the text of the Arvada ordinance: http://arvada.org/city-services/land-development-code. Then look for Article 3.1.6 - Neighborhood Meetings.

plan, subdivision, planned development, and conditional use application reviews? The extent and methods of public participation may vary, but it makes sense to have written procedures or protocols in place and available to the public.

• Arizona law requires cities and counties to adopt procedures for "early and continuous public participation."[4] In *GLENDALE, ARIZONA*, for example, the city requires applicants to prepare a Citizen Participation (CP) Plan for staff review.[5] According to Tabitha Perry, a principal planner for the city, depending on the circumstances, the applicant may be asked to hold a neighborhood meeting before the public hearing.

The purpose of the CP Plan, Perry says, "is to ensure that applicants pursue early and effective citizen participation in conjunction with their land use applications." It gives them the opportunity "to understand and try to mitigate any real or perceived impacts their application may have." As a result, she observes, "most of the times we don't get any surprises" at the planning commission public hearing. *Citizen Participation Plan*

• When complex plans or zoning amendments are at issue, it is especially important to provide citizens with the opportunity to provide input early in the process. As Eric Damian Kelly and Barbara Becker have noted in their book *Community Planning: An Introduction to the Comprehensive Plan:* "At a public hearing on a complex plan – whether 23 pages or 223 pages – that has evolved from a year-long effort by the planning body, it is much more difficult for citizens to participate meaningfully ... At that stage in the planning process, both the planning body and the project budget are likely to be nearing exhaustion."[6]

Editor's Note: The following is excerpted from the City of Glendale, Arizona's zoning ordinance. The ordinance requirements are implemented in the city's "Citizen Participation & Public Notification Manual," available to download on our Public Hearings Resource page: www.plannersweb.com/hearings.html.

Citizen Participation Plan

... (d) At a minimum the citizen participation plan shall include the following information:

(1) Which residents, property owners, interested parties, political jurisdictions and public agencies may be affected by the application;

(2) How those interested in and potentially affected by an application will be notified that an application has been made;

(3) How those interested and potentially affected parties will be informed of the substance of the change, amendment, or development proposed by the application;

(4) How those affected or otherwise interested will be provided an opportunity to discuss the applicant's proposal with the applicant and express any concerns, issues, or problems they may have with the proposal in advance of the public hearing;

(5) The applicant's schedule for completion of the citizen participation plan;

(6) How the applicant will keep the planning department informed on the status of their citizen participation efforts.

(e) The level of citizen interest and area of involvement will vary depending on the nature of the application and the location of the site. The target area for early notification will be determined by the applicant after consultation with the planning department. ...

4. Conduct a Site Visit

After an application for a development project has been filed, but before the public hearing, many planning commissions conduct a site visit. Besides the benefits this provides commissioners in being able to better visualize the proposal, it can also serve as a vehicle for resolving – or at least understanding – neighbors' concerns.

Site visits call for staff or the Chair to go over the "ground rules" right at the start of the walk, and then make sure that discussions take place only when everyone in the group is together.

Anne Krieg has found that site visits "allow discussions to be a little more informal." But she also notes that during site visits she often becomes "the conversation police" in order to "make sure there isn't any unintentional ex-parte communication."

• Ken Lerner, Assistant Planning Director for *BURLINGTON, VERMONT*, has noted that: "Site visits are a critical part of the review process for major projects. We formally announce the time and place of any site visit during the public hearing on a project. Members of the public are welcome to attend. In order to help avoid ex-parte contacts and inappropriate comments during the site visit, we have prepared 'site visit guidelines' which are distributed to all those attending the site visit. In addition, either the commission Chair or a staff member verbally summarizes the guidelines at the start of the visit."[7]

Author's note: Having participated in quite a few site visits myself, I can attest to the above points. As a planning commissioner, I've seen neighbors and the applicant engage in conversations during site visits that have clarified important issues and concerns. But I've also heard concerns raised about commissioners who veer off into private side conversations with either representatives of the applicant or with neighbors. Even if they

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4 See Arizona Revised Statutes, "The governing body shall: adopt written procedures to provide effective, early and continuous public participation in the development and major amendment of general plans. ..." Title 9, Sec. 461-06. For rezonings, " ... adjacent landowners and other potentially affected citizens will be provided an opportunity to express any issues or concerns that they may have with the proposed rezoning *before* the public hearing. Title 9, Sec. 462-03 (emphasis added). Similar provisions apply to counties.

5 Glendale's "Citizen Participation & Public Notification Manual" (Sept. 1, 2009) is available to download on the PlannersWeb Public Hearings Resource page: www.plannersweb.com/hearings.html

6 Eric Damian Kelly and Barbara Becker, *Community Planning: An Introduction to the Comprehensive Plan* (Island Press, 2000), p. 118.

7 These Guidelines are included in a Sidebar to Greg Dale's, "Site Visits: Necessary But Tricky," *PCJ* #39 (Summer 2000); available to order & download at: www.plannersweb.com/wfiles/w346.html.

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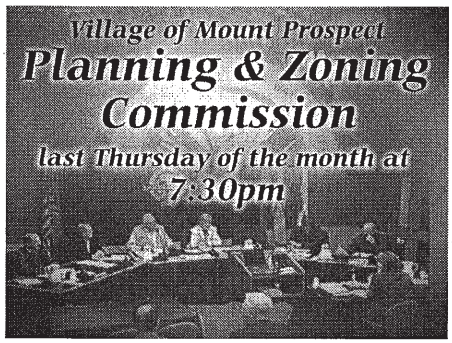
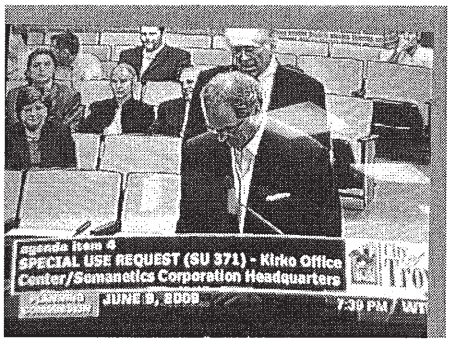
were just chatting about the weather or last night's ball game, someone observing from several yards away may believe something of greater substance was being discussed.

5. Make Your Meeting Noticeable

Providing adequate notice of meetings at which a project will be reviewed is essential. As Christine Mueller points out, the number one complaint she hears in *Dearborn County, Indiana*, is people saying "we didn't know about it."

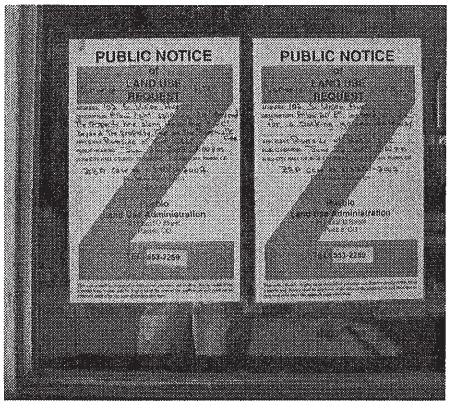
Many planners and planning commissioners may view this as the kind of complaint that no amount of notice will ever totally eliminate. Nevertheless, it makes sense to review your public notice policies to see if you're consistently reaching those who might have a concern about a project. In today's online age, there's also really no excuse for not posting information about upcoming hearings on your municipal web site and using other online tools.





The Village of Mount Prospect, Illinois, and the City of Troy, Michigan (above) are among the growing number of communities that broadcast their planning commission meetings live.

- Carolyn Braun, Planning Director for *Anoka, Minnesota*, suggests that when mailing out notices: "Include an additional paragraph – beyond the legal text – that explains, as simply as possible, the proposed development or request. Also, make it clear that comments can be mailed or emailed if they cannot make the meeting."
- Little things can also make a difference, such as making sure that application notices are designed to be highly visible, and spot checking to see that notices are not hidden behind screen doors or tucked away in obscure locations. A growing number of cities and towns, like *Pueblo, Colorado* (photo below) have switched to bold, easy-to-spot zoning notice signs.



- Web sites and online social media can supplement posted and mailed public notices. For example, just in the past several months dozens of cities have started to use Twitter to announce upcoming meetings and post links to agendas and meeting minutes (see some of the municipal "tweets" posted on Nov. 15, 2009).

- Cable television has enabled many communities to broadcast public hearings. Some are even experimenting with allowing for public comment to be provided interactively. Cable can also allow for summaries of upcoming meeting agendas to be broadcast a few days in advance. For several years in *Burlington, Vermont*, the local public access channel broadcast a twenty minute show during which one of the city's planners took viewers on a "tour" of projects on the next agenda, providing a visual overview of each project.

6. Review the Agenda

It can be quite helpful for the Planning Director to meet with the Chair in advance of the meeting to go over the agenda and discuss the likely time requirements for each project. They can also identify potential problems or areas of controversy. The end result is having

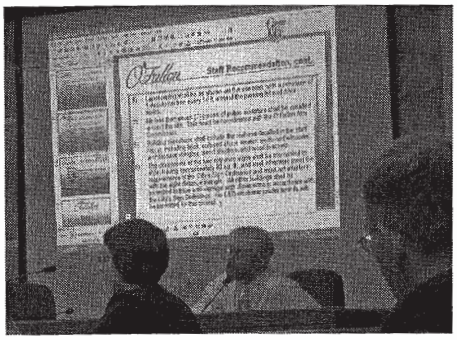
Online Tools & Public Participation

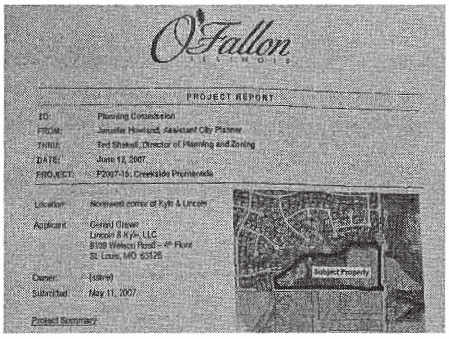
In a thoughtful series of articles on his web blog, Rob Goodspeed, a PhD student in urban studies and planning at MIT, addresses public participation in light of the rapidly increasing use of the Internet. For Goodspeed, online tools can supplement the use of public hearings. They are valuable in providing additional opportunities for public input and in allowing citizens to track issues and projects they're most interested in.

As Goodspeed notes: "The Internet is the ideal 'home base' for any multidimensional strategy for several reasons. It is increasingly the repository for disclosing government information. For this reason government officials often post meeting minutes, reports, and other documents of presumptive public interest."

"Also its persistent character means it is ideal to store reference or archival information for review at any time and place with a connection."

See "The Internet as a Participation Tool," Goodspeed Update (http://goodspeedupdate.com/2008/2225; posted June 26, 2008).





In O'Fallon, Illinois, staff recommendations and project reports are available as handouts and displayed on the hearing room screen.

the Chair more comfortable in running the meeting. It also almost goes without saying that all members of the commission should have the meeting agenda and packet in hand at least several days in advance.

• *PCJ* columnist Elaine Cogan suggests putting controversial items early in the agenda. "Too often, planners still put [the issues which most concern the public] last or next to last on the agenda even though they are well aware of one or more matters certain to attract a big crowd. It is no wonder that people get restless and cranky if they have to sit through several hours of deliberations that do not concern them."[8]

During the Hearing

7. Make Your Introductions Count

Open your meeting by introducing members of the commission and staff, and then explain how the meeting will be conducted and when public comments will be allowed. These first few minutes can go a long way towards reducing tensions at public hearings.

It's important to remember that for many members of the public, this may be their first time at a planning board meeting. Things that may seem matter-of-fact to you as a commissioner may seem mysterious or confusing to members of the public – a problem compounded by the jargon and acronyms often used when discussing planning issues. The only remedy is to take the time to go over the basics and explain terminology that's likely to be unclear.

Related to this, be sure to have plenty of copies of the agenda available, as well as handouts related to the applications under review, such as project summaries or staff recommendations.

• David Preece, AICP, Executive Director of the *Southern New Hampshire* Planning Commission, offers several common-sense suggestions: (1) have the Chair, not staff, start the meeting by going over its purpose, and describing the basic ground rules; (2) remember to have a sign-in list so people can receive a copy of the minutes and be alerted to any future meetings related to the application; and (3) have staff provide as objective as possible overview of each application.

8. Stay on Target

Planning commission meetings can go more smoothly, and take less time, when applicants clearly describe their project and how it meets the land use ordinance's review criteria. While the quality of the presentation is largely out of the commission's hands, planning staff can help ensure that pertinent, helpful information is provided.

Public confusion and anger at meetings can also be reduced when staff provide a clear summary of the project, an explanation of the relevant review criteria, and, if it's your community's practice, their recommendations on how the project meets or fails to meet these criteria. Consider also making any written staff

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Mediation & Consensus Building

by Kate Harvey

Across the country, many permit decisions on local land use applications unnecessarily end up in protracted litigation. While some of these disputes may in fact require litigation, many end up in court because the parties were never offered an opportunity for another way to resolve their dispute.

Several studies by the Lincoln Institute of Land Policy and the Consensus Building Institute have demonstrated that mediation and consensus building can be effective in resolving land use disputes.

Mediation is a way to resolve disputes that relies on the assistance of a trained neutral who works with the parties to develop voluntary solutions that are acceptable to all the parties.

Consensus building uses a set of techniques to help many diverse parties reach mutually acceptable agreements. It usually relies on non-partisan professionals to facilitate the process and typically includes five key steps: convening; clarifying responsibilities; deliberating; deciding; and implementing agreements.

These processes create opportunities for parties to understand and align divergent interests, develop creative solutions, build agreement on outcomes that all parties find acceptable, and plan for resolving "predictable" disputes related to implementation. Successful mediation and consensus building processes require selecting the right case, at the right time, and matching them with appropriate neutral assistance.

Increasing the use of mediation and other facilitated processes in the land use permit and appeal processes can reduce the burden on valuable judicial resources, save the parties time and money, and perhaps most importantly, resolve disputes that otherwise would divide the community into opposing camps.

Kate Harvey is an Associate at The Consensus Building Institute, Inc., where she works as a facilitator, mediator, researcher, and project manager. For a more in-depth look at this topic, including responses to frequently asked questions, see "Building Consensus: Dealing with Controversial Land Use Issues & Disputes," by Lawrence Susskind & Patrick Field in PCJ #48, Fall 2002, available to order & download at: www.plannersweb.com/wfiles/w168.html

8 Elaine Cogan, "First on the Agenda is the Agenda!" *PCJ* #49 (Winter 2003); available to order & download at: www.plannersweb.com/wfiles/w251.html.

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recommendations available to the public; this can reduce public distrust of the review process and allow for better focused comments.

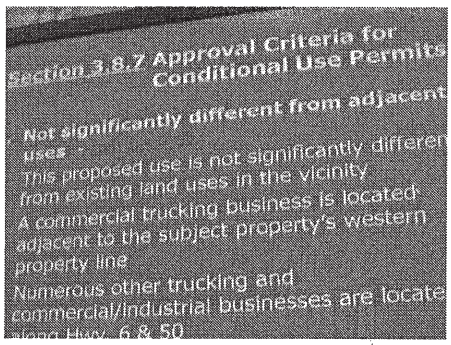
• *Wichita, Kansas*, planning consultant and attorney C. Bickley Foster, AICP, recommends using check lists to help keep a planning commission or zoning board on track and avoid technical errors. "We have hearing and decision making check lists for all zoning and subdivision matters, including sample motions. These were tested again last year when we provided consulting assistance on five casino cases. We have found them to be very useful, especially for contentious public hearings."

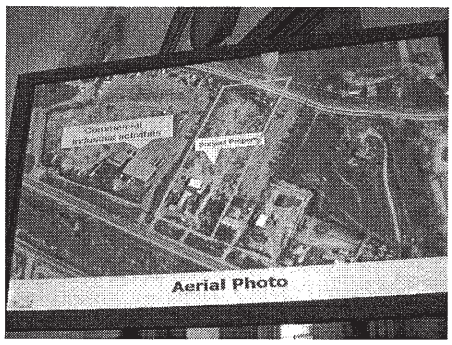
9. Have Visible Information

With laptop computers and screens or monitors readily available, there's little reason why maps, photos, charts, and other exhibits shouldn't be visible to all attending the hearing. There can be nothing as frustrating for a member of the public than not being able to see what an applicant is showing members of the planning commission.

Some communities also require applicants for larger projects to provide 3D models – either actual, physical models or computer simulations.

• Delia Fey told me how the use of laptops and projectors at planning meetings has been a big plus in her town of *Woodstock, Connecticut* (population 7,800): "Applicants used to bring their plans in and put them on an easel for the Commission to see. The audience could hear it but couldn't see it. Now, we have joined the modern age and require the applicant to bring digital images so we can project them on the screen with the laptop and computer projector. Even for a small town, it is not that expensive to do. That way everyone, including the audience, is looking at the same plans."





The display of information can be of great benefit to members of the public. Top row: Mesa County, Colorado, Planning Commission public hearing; bottom left: Jefferson City, Missouri, Planning Commission hearing; bottom right: hearing before the O'Fallon, Illinois, Planning Commission.

• In *Mesa County, Colorado*, and *O'Fallon, Illinois*, planning department staff also post the review criteria and their recommendations for each application on large monitors in the meeting room while giving their summary of the project. This clearly informs the public just what is relevant to the commission's review.

• Phillip Patterson says that in *Lafayette, Colorado*, "for larger developments we have been asking developers to present 3D models of their projects using Sketchup [a software program] to create fly-bys so that the planning commission and the public can get a better sense of the scale of the project and the actual design."

10. Allocate Time to Foster Useful Input

One challenge facing planning commissions when dealing with controversial applications is how to allow the applicant and members of the public adequate time to provide their presentations, comments, and questions – and, at the same time, avoid having hearings drag on late into the night.

There is also the need to get constructive input in a way that is helpful to the commission in reaching its decision. While many planning commissions set specific time limits for comments by members of the public, there may be better approaches, especially for complex projects. This includes opportunities for input and discussion in advance of the hearing (see also Tips 1-3).

• For complex applications, attorney Timothy Bates recommends setting, in advance of the hearing, time limits for the applicant and for any major interveners or abutters who have hired experts. Bates also suggests that "the Chair should encourage everyone who wishes to speak, but also say that if someone else has said more or less what they were going to say, they can limit their comments to endorsing the position previously taken."

• Another time-saving recommendation from Bates: "Avoid, if at all possible, having the Secretary read into the record letters and reports. The Secretary should report what letters and reports have been received and generally what they say and enter them in the record." As Bates explains, "forcing an unhappy public to sit there while each letter is read word for word simply raises the anger level."

Get Some Training

Planning Director David Preece recommends holding a planning commission training session to discuss how to run and participate at meetings, and how to deal with difficult behaviors that may come up.

Former *PCJ* Editorial Board Member Wayne Lemmon offered an interesting option.[9] "In the typical public hearing format, you get a long list of pro and con speakers that line up for hours of very repetitive three-minute statements. What I have seen work effectively is this: if there are organized or even just semi-organized groups (citizens for the plan / citizens against the plan), invite their leaders to make organized presentations of, say, fifteen minutes each, limiting those invitations to just the primary factions that can be identified. You'll get truly articulate and well-marshaled arguments for and against. Moreover, the speakers (particularly the opponents) finally get a feeling that they've had a chance to lay out all their arguments."

According to Lemmon: "Another benefit of this is that emotional and over-hyped comments are minimized, and the overall tone of the meeting is much more civil. You still get to do a general hearing, but after the formal presentation session, the speaker list is much shorter."

• David Preece suggests that the Chair not allow "back and forth" debates between members of the public and the applicant as this can be time-consuming and distracting.

11. Stay Cool: Recesses, Continuances, and Multi-Session Hearings

Don't be afraid to take a short recess during your meeting. Staff may be able to quickly resolve a question that has come up, or you may get an opinion from your legal counsel on an important point.

Continuing a hearing to your next meeting can also allow for a cool-off period, or give the applicant a chance to respond to suggestions from commissioners and the public.

With complex hearings it sometimes makes sense to divide the hearing into two sessions, rather than hear from the staff, applicant, supporters, and opponents, and have questions and discussions from commissioners, at a single meeting. If this is planned and announced in advance, it can also lower the heat at the initial session, as everyone knows that no immediate action will be taken.

• In *MANCHESTER, VERMONT*, says Planning Director Lee Krohn, AICP: "The use of a brief, mid-hearing recess has worked remarkably well on several occasions. We were able to resolve a key question of law or practice, and then keep the hearing moving forward. Since we had a crowd in the meeting room, it was simpler for the board and me to go to a small room to discuss in deliberative session, rather than inconvenience everyone else who would then have to mill about in the hallway. In other cases, we've simply called a five or ten minute recess to let everyone stretch – which can also help quite a bit in calming down overheated persons or emotions."

• Gary Gelzer, Chairman of the *GOODYEAR, ARIZONA*, Planning Commission, told me that: "When we run into a situation where things are not going well, or when staff is recommending a denial, yet the applicant is insisting that we have the hearing and reach some sort of decision, we have come up with the following that we usually offer during the hearing: 'Mr. Applicant, would you like a continuance or a denial?' and then some additional comments on having heard both the pros and cons for the case. This offer, right from the dais, either by myself or one of the other commissioners, usually halts most testimony in its tracks. Then a hasty conference between the applicant and their lawyer takes place. The next pronouncement from the Chair is 'I would suggest you work with staff to get these concerns ironed out so that we can make a decision on this case at the next meeting.' "

• Scott Wood, Assistant Director of the *NEW ALBANY, INDIANA*, City Plan Commission, explains that "we have used tabling to help cool temperatures down, but only when the plan commission has some element that seems to be a 'deal breaker' and they want staff to work with the applicant to see if there's some way to make it palatable for all parties."

Wood cautions, however, to be careful with this tactic "because the developer often gets the feeling that if they satisfy staff then the board or plan commission will also go along ... when they don't go along, I get the grief!"

Florida planner Larry Pflueger

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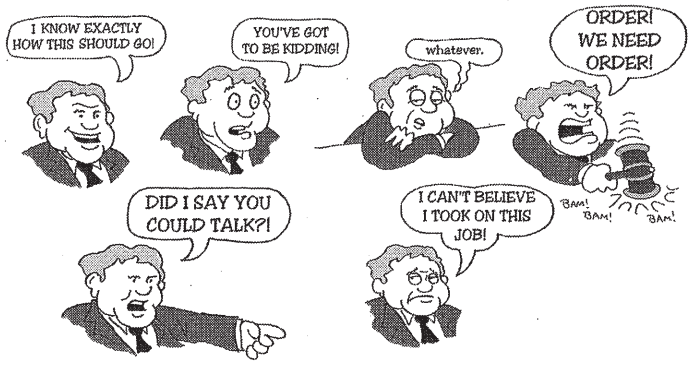
Chairing the Meeting

"The critically important role of the chair of a planning board cannot be overemphasized. The planning process suffers if the chair is either weak and unfocused or too strong and intimidating. Always show fairness and do not express your personal opinions, except when it is time to vote. If you must speak out, turn over the gavel to your vice chair. However, exercise that prerogative sparingly. Fairness also means you give everyone a chance to speak and deal quickly and decisively with those, either commission members or the public, who try to dominate the discussion."

Excerpted from Elaine Cogan, "On Being An Effective Commission Chair," from Now That You're on Board: How to Survive ... and Thrive ... as a Planning Commissioner (Planning Comm'rs Journal 2006).



9 Wayne Lemmon passed away last winter, not long after providing feedback for this article. Lemmon was a long-time member of the *Planning Commissioners Journal's* Editorial Advisory Board, and author of "Proforma 101: Getting Familiar With a Basic Tool of Real Estate Analysis" (*PCJ* #65, Winter 2007) and "The New "Active Adult" Housing" (*PCJ* #51, Summer 2003).

continued from previous page

advises that: "The continuance should be to a date and time certain. That way, neither party can play games with the process, for example, the government stringing the applicant along over an extended period of time to get concessions it otherwise might not have obtained."

• In *LAFAYETTE, COLORADO*, says Phillip Patterson "a technique that we have used that has been very successful is to require a controversial or very technical development plan to have two hearings before the planning commission." As he explains: "The first hearing is only the presentation by staff and the applicant. The planning commission can ask questions for clarification purposes, and the public is invited, but planning commission and public comments are held until the second meeting. The purpose of this two-part hearing process is to give the planning commission and the public the opportunity to fully understand the proposal prior to hearing public comments. This has assisted in focusing public comments on the specifics of the development plan, and reduced, but not necessarily eliminated, inaccurate, irrational, and emotional comments."

12. Show Respect

The single most important factor in "lowering the temperature" of public hearings is the model set by the Chair and members of the commission. If planning commissioners remain respectful of each other, of the applicant, of the public, and of staff, the odds of having a fruitful public hearing will be significantly improved. [10] At least that's my observation from having served on a planning commission for over ten years, and having attended meetings in a variety of cities and towns across the country.

Being respectful includes obvious, but too often forgotten, points like: arriving on time; not engaging in side conversations during the hearing; being polite to members of the public; and staying awake and attentive throughout the hearing!

It can be hard for commissioners to maintain their composure in the face of verbal assaults from members of the public. In fact, the commission – through its Chair – has an obligation to maintain decorum in the hearing room. But this doesn't negate the need for commissioners to control their temper and show respect.

• Attorney Timothy Bates notes that it is important for the Chair "to caution the public against cheering or jeering and inform them that while the Commission is anxious to hear the substance of any concerns, it cannot be swayed by the popularity or lack thereof of a particular project."

• Over the years, *PCJ* columnist Elaine Cogan has provided numerous tips on how planning commissioners can best deal with difficult members of the public.[11] But Cogan also reminds us that: "It is important that you show respect to the questioner even when you doubt the question. People ask stupid questions... hostile ones... tough ones... all of which you and your colleagues should answer as well as you can, but always respectfully. Sometimes, you and a citizen will have to 'agree to disagree,' but you should never show anger or lose your temper."[12]

SUMMING UP:

Public hearings are an essential component of local democracy, allowing for public input on development applications, zoning cases, and comprehensive plan amendments. Given the significant role that public hearings play, it's not surprising that on complex or controversial projects they can become acrimonious. There are a number of ways, however, in which planners and planning commissioners can reduce the heat at hearings, while ensuring that they serve as an important and productive vehicle for public input.◆

Wayne Senville is Editor of the Planning Commissioners Journal. His previous articles and reports for the PCJ include "Libraries at the Heart of Our Communities," PCJ #75 (Summer 2009); "Downtown Futures," PCJ #69 (Winter 2008); "Crossing America," PCJ #68 (Fall 2007); and "Bright Ideas," PCJ #61 (Winter 2006). Senville has also served on the Burlington, Vermont, Planning Commission (1991-1999, and 2008-present, including three years as Chair).

Editor's Note:

Our "Consultants"

Thanks to the following individuals for providing feedback in the preparation of this article: Allan Slovin; Anne Krieg; C. Bickley Foster; Carolyn Baldwin; Carolyn Braun; Christine Mueller; Cynthia Tidwell; David Foster; David Preece; Delia Fey; Gary Gelzer; Gary Hammond; Jeff Levine; Jon Slason; Larry Pflueger; Lee Krohn; Mike Gurnee; Phillip Patterson; Rob Goodspeed; Ross Moldoff; Scott Bernhart; Scott Wood; Tabitha Perry; Timothy Bates; and the late Wayne Lemmon. A special thanks also to others who replied anonymously to questions we posted on the Cyburbia.org web site.

They're Not Necessarily Wrong

"Though the worst personal traits often come out at public hearings, people are not necessarily wrong because they are angry, obstreperous and noisy ... as annoying as they may be, try to overlook these so that you can understand and respond to the substance of their comments."

– Elaine Cogan, "Show Respect to All," in Now that You're on Board: How to Survive ... and Thrive ... as a Planning Commissioner (2006).

10 Commissioners should never berate staff in public. It is uncalled for and can threaten the effective functioning of the commission. For more on this point, see Elaine Cogan's "Staff Needs a Little TLC, Too," *PCJ* #3 (Mar./Apr. 1992); available to order & download at: www.plannersweb.com/wfiles/w440.html.

11 See, e.g., "Dealing With Difficult People Requires Finesse," *PCJ* #7 (Nov.Dec. 1992); available to order & download at: www.plannersweb.com/wfiles/w407.html, and "Meaningful Dialogue With the Public," *PCJ* #73 (Winter 2009); www.plannersweb.com/wfiles/w153.html.

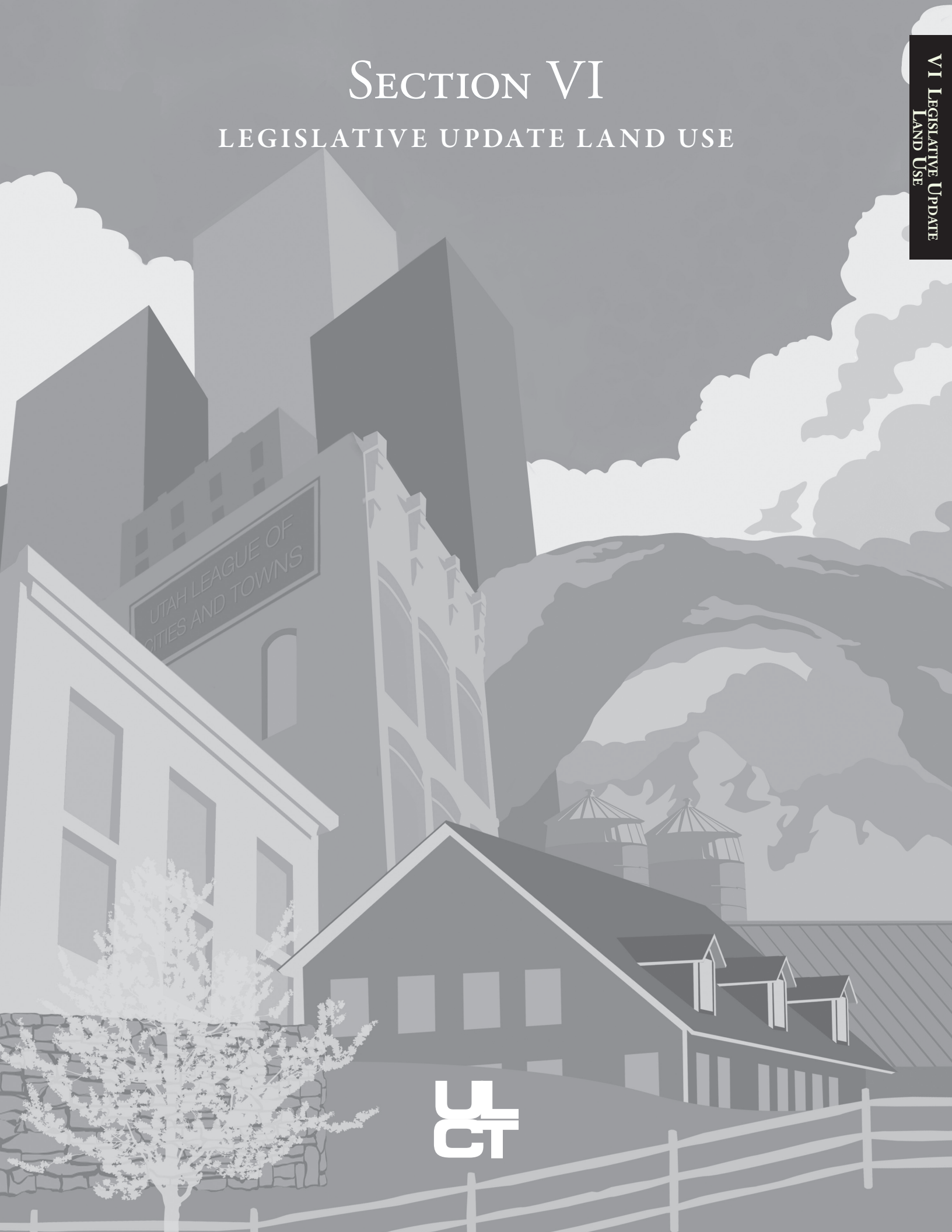
12 "Show Respect," from *Now That You're on Board: How to Survive ... and Thrive ... as a Planning Commissioner* (Planning Comm'rs Journal 2006).

Our Favorite Land Use Websites

Utah State Code	http://le.utah.gov/UtahCode
Utah Chapter American Planning Association	http://www.utah-apa.org
Utah Land Use Institute	http://www.utahlanduse.org
Planning Commissioners Journal	http://plannersweb.com
Local Government Commission	http://www.lgc.org
Utah Housing & Community Development	http://housing.utah.gov
The Atlantic Cities Place Matters	http://www.theatlanticcities.com
Land Use Ordinance Library State of Utah Governor's Office of Planning and Budget	http://www.planning.utah.gov/library
Wasatch 2040	envisionutah.org
Website for Codification	municipalcodeonline.com

Section VI

LEGISLATIVE UPDATE LAND USE



GENERAL LEGISLATIVE *Session* 2016

Land Use

- ULCT interim commitment (Land Use Task Force)

HB 32 Subdivision Base Parcel Tax Amendments

- Action Required

HB 78 Abandoned Road Amendments

HB 115S1 Beekeeping Modifications

- ULCT interim commitment

HB 144S1 Food Freedom Act

HB 161 Agriculture Parcel Amendments

HB 223S3 Local Historic District Amendments

- Action Required

HB 224 Impact Fee Revisions

- ULCT interim commitment

HB 232 Scenic Byway Amendments

HB 248 Municipal Disconnection Amendments

HB 315 Bee Keeping Amendments

HB 360S2 Land Use Amendments

HB 368 Short-term Rental Tax Amendments

HB 409 Short-term Rental Amendments

- ULCT interim commitment

HB 413 Falconry Amendments

HB 414S1 Zoning Amendments

HB 431 Affordable Housing Revisions

- Action Required

SB 86 School Building Coordination

- Action Required

SB 150S2 Metro Township Amendments

SB 161S2 Highway Signage Amendments

May 2016
Land use ordinance review
Items to consider updating or amending
As suggested by the Utah League of Cities and Towns

Items to review in your land use codes:

1. Remove criminal penalties for Land Use Code violations (2016 Gen. Session SB187S1: misdemeanors are now only infractions).
2. Remove any conditional use that your City expects to deny. Make sure you have standards of review in place for those that you keep.
3. Conduct a Word search throughout your code for stale concepts, such as:
   - "approve, deny or approve with conditions"
   - "in its sole discretion"
4. Does your code read in active voice? Or passive voice? (unclear) Strive for objective clear language. If you don't understand it how can you enforce and how can the public know how to develop their land?
5. Ferret out ambiguity: Could a reasonable person interpret your land use restrictions differently?
6. Does your Council issue Conditional Use Permits/Subdivisions? Should they?
7. Does Council attend Planning Commission meetings? Sit on the Planning Commission?
8. Are development fees based on a % of construction value?
9. Are staff reports sent to applicants at least three days before a hearing/meeting?
10. Does your code postpone vested rights?
11. Are subdivision/engineering standards codified?
12. Have you updated your Impact Fees in this decade?
13. Are non-conforming use permits tied to the applicant or the address?
14. Do you have an independent appeal process? What is your appeal process?
    And finally consider annually updates of your codes!

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