

ZONING PRACTICE

October 2005

AMERICAN PLANNING ASSOCIATION



➔ ISSUE NUMBER TEN

PRACTICE IMPARTIALITY

A large, semi-circular conference table with black chairs and papers on it, set against a light green background. A large, bold black number '10' is superimposed over the lower half of the image.

10

Reducing Bias on Zoning Boards

By Jerry L. Anderson and Erin Sass Eastman

In most American cities, citizen boards have substantial power over zoning and planning.

A body called the board of zoning adjustment, or something similar, typically decides applications for variances and special permits. Another group, usually called a planning and zoning commission, approves subdivision plats and makes recommendations regarding zoning amendments to the city council.

These bodies, here collectively referred to as “zoning boards,” can affect one’s life in profound ways. It is the zoning board that decides whether your next-door neighbor can build a 10-foot fence or that recommends allowing a Wal-Mart across the street. It is the zoning board that decides whether you can build an addition onto your house. A zoning board decision may allow high-rise apartments for low-income residents to be built in your neighborhood, or allow a boarded-up drug house next door to be turned into a community center. These decisions may not be matters of life or death, but they can profoundly affect both quality of life and value of property. Even in cases where final authority lies with the city council, the zoning board recommendation carries great weight.

Who should be making these decisions? Despite the importance of these boards, relatively little attention has been focused on ensuring that they are balanced and fair. The mayor or the city council typically appoints board members. The appointments are subject to few, if any, restrictions. Often, those who have the largest interest in development activity are the most eager to serve. Although these individuals lend desirable expertise to the enterprise, the failure to appoint a cross section of interests may result in a biased board.

The preconceived interests of board members can be influential. At one zoning board meeting a few years ago, neighbors complained about the height of a fence a man had begun building in his backyard. The photos showed a nice, straight, wood-slat fence.

The fence builder asked for a height variance. One zoning board member gave his opinion: “I’ve been a contractor all my life, and this is a poor-quality fence.” With that, the board voted not to give the variance—without any discussion of the height of the fence at all.

This story illustrates the subjective nature of many zoning board decisions. A board stacked with contractors, realtors, developers,

IS THERE BIAS?

THE RESULTS OF TWO STUDIES

Although many people perceive that zoning boards are biased, very little research exists on the composition of these groups. In two recent studies, we first set out to determine whether zoning boards fairly represented a cross section of the community, and second, whether legal controls on board appointments



Development sprawls onto the prairie in West Des Moines, Iowa. In 2003, the city’s plan and zoning commission consisted of an architect, a construction manager, the president of an irrigation company, a developer, a landscape architect, an attorney, and a “homemaker.”

attorneys, and bankers may reach different conclusions than a board populated with schoolteachers and laborers. Bias can arise in many ways, either for or against a particular project. A realtor may be biased toward development of a subdivision, so he can sell the houses in it. A developer, on the other hand, may be biased against a new development because she fears the competition. According to Patricia Salkin, director of the Governmental Law Center at Albany Law School, ethical issues, including the perception of bias and conflicts of interest, “ha[ve] left many municipalities with a lack of civic interest for service on these boards, and the publicity tarnishes the delicate balance of public trust and integrity in government that those in the public service strive hard to maintain.”

might result in boards with less potential for bias. In 2003, we surveyed Iowa zoning boards and found that they were dominated by white-collar professionals, and that a large percentage of board members had some direct or indirect interest in zoning matters. In 2004, a follow-up study of Oregon zoning boards set out to determine whether that state’s stricter laws on board appointments helped create boards representing a broader spectrum of the community. An analysis of both studies follows.

The Iowa Study. In 2003, we conducted a survey of Iowa’s boards of zoning adjustment and planning and zoning commissions. Our survey, sent to all Iowa cities with populations of more than 1,000, asked about the occupations of board members and whether or not the

ASK THE AUTHOR JOIN US ONLINE!

From November 14 to 23, go online to participate in our “Ask the Author” forum, an interactive feature of Zoning Practice. Jerry L. Anderson and Erin Sass Eastman, will be available to answer questions about this article. Go to the APA website at www.planning.org and follow the links to the Ask the Author section. From there, just submit your questions about the article using an e-mail link. The author will reply, posting the answers cumulatively on the website for the benefit of all subscribers. This feature will be available for selected issues of Zoning Practice at announced times. After each online discussion is closed, the answers will be saved in an online archive available through the APA Zoning Practice web pages.

About the Authors

Jerry L. Anderson is the Richard M. and Anita Calkins Professor of Law at Drake University Law School in Des Moines, Iowa.

Erin Sass Eastman is an associate with Budd-Falen Law Offices in Cheyenne, Wyoming.

boards had conflict of interest rules to determine whether Iowa zoning boards fairly represent a cross section of the community. We also attempted to determine whether, based on the occupations of zoning board members, one could discern a systemic slant toward development interests.

The most significant finding of our survey was that zoning boards are dominated by members in professional or managerial occupations. However, the results vary widely by the size of the community. While small towns have a fairly representative board makeup, blue-collar citizens are dramatically underrepresented in larger cities. In addition, we concluded that the majority of those sitting on zoning boards stand to benefit, either directly or indirectly, from development.

No matter how one looks at the results of the survey, white-collar professionals (including those in professional, technical, and managerial positions) are highly over-represented on zoning boards. While only about a third of Iowa’s workforce consists of white-collar professionals, our survey showed that about 54 to 61 percent of zoning board members had white-collar professional jobs. Our survey also showed that in larger cities white-collar professionals comprise a larger part of zoning and planning boards. In the largest cities, 74 to 80 percent of board members were drawn from the white-collar occupational class. These results are set out in Tables 1 and 2.

Some gravitation toward white-collar board members may be inevitable. Those citizens may be more used to the public arena and may have more flexible schedules that allow them to participate. They may also be

TABLE 1: OCCUPATIONS OF BZA MEMBERS BY CITY SIZE (PERCENTAGE)

	Total	1,000– 2,499	2,500– 4,999	5,000– 9,999	10,000– 24,999	25,000+
Professional/Technical/ Managerial	54	41	58	64	70	74
Clerical/Sales	17	22	10	21	8	13
Service	7	8	8	3	6	3
Agricultural	4	4	6	4	3	0
Labor/Processing/ Trades	17	25	18	8	13	10

TABLE 2: OCCUPATIONS OF P&Z MEMBERS BY CITY SIZE (PERCENTAGE)

	Total	1,000– 2,499	2,500– 4,999	5,000– 9,999	10,000– 24,999	25,000+
Professional/Technical/ Managerial	61	50	65	64	75	81
Clerical/Sales	16	17	14	22	13	8
Service	6	8	5	6	6	4
Agricultural	3	4	4	4	1	1
Labor/Processing/ Trades	13	22	12	5	5	7

more likely to express an interest in serving. Nevertheless, overrepresentation of one occupational class may skew the board’s decision making. Robert Walker pointed out this danger in his 1937 study of zoning boards in large cities. He found that almost 85 percent of board members came from the white-collar group, which he found disturbing. He thought

that those members, because of their status and ties in the community, might be reluctant to alienate business associates by ruling against them. He also felt that they might tend to consistently favor economic expansion and development, as opposed to “the citizen point of view.” Despite these concerns, the Iowa survey indicates that board composition

has changed very little since Walker's survey in the 1930s.

The Iowa survey also looked at whether board members' occupations had a pro-development slant. We assumed, for example, that developers, realtors, architects, construction company employees, abstractors, appraisers, contractors, and construction engineers would favor increased development because of its direct impact on their occupations. The survey found that these direct-influence occupations accounted for 30 percent of the zoning board members. Other occupations, such as motel operators or hardware store owners, could be said to be indirectly affected by development. When those "indirect-bias"

TABLE 4: OCCUPATIONS OF OREGON ZONING BOARD MEMBERS

Occupations	Total	1,000–2,499	2,500–4,999	5,000–9,999	10,000–24,999	25,000+
Professional/Technical/Managerial	75	68	83	65	78	91
Clerical/Sales	6	6	5	8	10	3
Service	8	7	10	13	7	4
Agricultural	1	2	0	2	0	0
Labor/Processing/Trades	7	10	12	8	5	3
Unemployed/Housewife	3	7	3	3	0	0

TABLE 3: PRO-DEVELOPMENT BIAS (PERCENTAGE)

Type of Influence	BZA	P&Z Commissions
DIRECT (architects, developers)	30	30
INDIRECT (motel owners, lumberyard owners)	16	20
NO BIAS (teachers, factory workers)	54	50

occupations are taken into consideration, the percentage of board members with a pro-development bias rises to about half. The data are set out in Table 3.

While the data suggest that, overall, the majority of zoning board members do not have occupations directly affected by development, some individual boards are dominated by these interests. In West Des Moines, a city faced with significant sprawl issues, the plan and zoning commission included an architect, a construction manager, the president of an irrigation company, a developer, a landscape architect, and an attorney. Only one member of the board could be said to be without a pro-development bias: a homemaker. In some cases, however, homemakers may be married to developers. Another city's planning and zoning commission was stacked with a real estate agent, a developer, a banker, and a landscape contractor. Moreover, even on boards with less than a majority of "biased" members, those with direct interests may have disproportionate influence on board decisions.

The Oregon Study. Most states place no restrictions on who is appointed to zoning boards. A few have minimal restrictions, such as Iowa's law that says that the majority of planning commissions may not be made up of those engaged in buying and selling real estate. Oregon is known for its comprehensive control of planning at the state level and has a more restrictive control on board appointments. First, in an effort to achieve better occupational diversity, it prohibits more than two members from any one kind of occupation.



Shawn Lowe

➡ Monotonous suburban townhouses. Can a zoning board comprised of "pro-development" types, which may include architects, developers, realtors, and the like, make biased decisions that lead to sprawling development patterns?

TABLE 5: POTENTIAL PRO-DEVELOPMENT BIAS ON OREGON P&Z COMMISSIONS

Type of Interest	Percentage
Direct	24
Indirect	17
No Bias	59

Second, to avoid pro-development bias, it allows only two members to be engaged in buying, selling, or developing real estate (or to have recently been in that field).

A follow-up zoning bias study of Oregon set out to determine whether these restrictions resulted in better board composition. The results of the study are shown in Tables 4 and 5. The authors concluded that the occupational restrictions did not result in a reduction of white-collar overrepresentation. The overall percentage of professionals on Oregon zoning boards, in fact, is almost identical to that in Iowa, and again, the skew is more pronounced in larger cities, reaching 91 percent in cities with populations over 25,000.

Oregon's more stringent restriction on occupations related to development, however, did seem to have some effect, albeit modest. As Table 5 shows, the percentage of appointees with a direct interest in development activity dropped to about a quarter, while those with no bias rose to almost 60 percent. The Oregon law also seemed to reduce the number of boards dominated by members with development interests.

Nevertheless, we still identified several Oregon boards whose composition seemed problematic. The best illustration of the Oregon law's failure to eliminate occupational bias might be City #139. The city's zoning commission is composed of:

- Real estate agent
- Planner (engineering firm)
- Landscape architect
- Appraiser
- Architect (retired)
- Motel manager
- Small business owner

Every member of this board has at least an indirect occupational bias in favor of development. The first four members listed are directly involved in development activity, which may color their decisions. Preservation of open space, for example, would not provide

additional business for the landscape architect, the appraiser, the engineer, or the real estate agent. The architect, who would otherwise be in the direct bias category, is retired, but may retain connections and be influenced by his or her previous occupation. Finally, both the motel manager and the small business owner would be likely to favor growth, which would provide them additional customers. Moreover, every single commission member is drawn from the professional, managerial, and technical class. If this were an economic development committee or a chamber of commerce, this occupational composition would be desirable, but for a body that is supposed to be

ruling neutrally on zoning changes and special permit requests, a more balanced occupational mix would be preferable.

This unbalanced board may not violate Oregon's composition restrictions, however, because the law only limits the appointment of those "buying, selling, or developing" real estate. Occupations with substantial development connections, such as appraisers, landscapers, or even contractors, do not fall into the restricted category. Thus, while Oregon's law helps to reduce self-interest on zoning boards, we recommend the next section's modifications to better achieve that purpose.



ⓘ Many development and land-use issues come before ZBAs. Among them are variances for setback, parking allowances, and adaptive reuse (which may include rezoning). To make use of historic but increasingly obsolete homes in the residential district adjacent to downtown, this aging industrial community on the shores of Lake Michigan created a residential-office district. (top) Obsolete as residential uses, these structures now function as law offices and insurance agencies, complete with signage. (middle) A parking lot for nearby "residential offices." Many properties in the district are still occupied by homeowners. (bottom) The decision to allow this structure to be placed at the rear of the property with the parking up front destroys the block's cohesiveness.

Photos on this page: Michael Davidson

STEPS TO IMPROVE ZONING BOARD COMPOSITION

We start from the premise that appointing a broader cross section of the community will better represent the interests of all segments of society. Blue-collar workers, for example, may be less concerned about economic development and more concerned about the impacts of low-income neighborhoods. Second, we believe that boards should not be dominated by those with significant connections to development activity. There are several measures that could help achieve better zoning board representation.

Statute or Ordinance Restricting Appointments. Oregon has attempted to achieve a more diverse board by prohibiting more than two members from the same occupational type. Because the term “occupational type” is not defined, however, it does not prevent the overrepresentation of white-collar professionals. It may be difficult to achieve this goal of occupational diversity by statutory mandate. For example, a statute requiring at least one board member from a labor occupation and one from a service occupation might eliminate otherwise desirable board members or be difficult to fulfill in small cities with low populations in those categories. Some states, such as Michigan and Idaho, have a general admonition that boards should include a broad representation of interests. Although difficult to enforce, such a mandate would help encourage diverse appointments. We also recommend that city officials who appoint zoning board members be made aware of the benefits of board diversity, and that courts recognize that non-diverse boards may not be entitled to the degree of deference normally accorded.

A statute or ordinance can also prevent zoning board domination by development interests. A statute could, for example, prohibit appointing more than one-third of a board from those whose occupations are identified as directly affected by development. Unlike the Oregon statute, the restricted occupations should include not only real estate agents and developers, but also lenders, appraisers, landscapers, contractors, construction company employees, and real estate lawyers. The category could be broadly defined to restrict membership “of those whose occupations may be significantly impacted by development activity.”

Strong Conflict of Interest Law. Another approach is to enact a conflict of interest provision, which requires board members to refrain from participating in matters in which they have a direct or indirect interest. State laws regulating zoning board conflicts are rare and those that do exist fail to specify what interests are disqualifying. Some cities have adopted their own conflict rules or policies, with varying effectiveness. The vast majority of cities, however, operate without any explicit conflict regulations. We recommend that a city adopt a conflicts statute that is broad enough to cover even indirect interests, and is specific enough to guide board members’ decisions on recusal.

A model conflict of interest statute should address the most common aspects of conflicts of interest: (1) Personal interests that are directly or indirectly tied to the zoning decision; (2) financial interests that are directly or indirectly tied to the zoning decision; (3) associational ties, familial relationships, friendships, employment, or previous business dealings; and (4) prejudgment of the issues. Unless conflicts of interest are well defined, the statute will provide little guidance to board

members and force parties to rely on court interpretation to give the statute meaning. Case law shows that a court’s definition of a conflict can be difficult to predict.

For example, a conflict rule should not simply state that financial interests are a conflict. It should define what constitutes a financial interest. It should also explain what must be done if there is a conflict. We recommend that a zoning board member with a conflict not be allowed to participate in the decision in any form, because even non-voting



Michael Davidson

Vasko Molokovic

Timothy Lange

➡ More potential development quandaries for the zoning board. (left) Residential teardown in Chicago’s Edgewater neighborhood, six miles north of the Loop. The single-family home is a vestige of a less dense, more affordable past in this gentrifying area. Each of the three condos in the new “three-flat” sold for nearly \$400,000. A recent downzoning in the neighborhood should prevent future height and bulk violations. (right bottom) A small Victorian house with 21st-century extension. Many communities require such projects to go before the ZBA. (right top) Another home extension. Communities should be mindful that additions can help owners of old homes meet modern housing needs. The question is, at what point does the addition destroy the integrity of the structure?

A board stacked with contractors, realtors, developers, attorneys, and bankers may reach different conclusions than a board populated with schoolteachers and laborers.

participation may unduly influence fellow board members.

Reaching all “indirect” interests in a particular project may be difficult. Perhaps the landscape architect is without a stake in the project before the board but may want to do business later with the developer making the proposal. A statute broad enough to reach such an interest, however, may result in too many recusals. The problem illustrates why it is important not to appoint too many individuals involved in development activity.

Education. The most simple way to deal with bias is through education. Board members should be trained to recognize and avoid conflicts and learn the importance of impartiality. This training could be supported by state grants, especially to assist smaller cities. At the very least, a brochure or document which sets forth the conflict of interest policy and the importance of avoiding the appearance of impropriety, along with examples of impermissible conflicts, can be used. Mayors

and city councils, which appoint board members, should be educated regarding the benefits of appointing a broad cross section of the community to zoning boards. They should recognize the danger of appointing too many of those who may be directly or indirectly pro-development.

Other Options. Some options for controlling zoning board bias would require modifying the way zoning works. For example, the city council could curtail board discretion by adopting more stringent guidelines. Early zoning theory assumed that departures from the comprehensive plan would be infrequent. If all zoning decisions were required to be in strict accordance with a truly comprehensive planning document, the board’s power would be diminished, and leave little room for personal bias. Very few states actually require serious plan consistency, but public recognition of the enormous power vested in boards of dubious composition may encourage other states to follow suit.

Another option is to elect zoning board members—although it would be difficult to reduce bias through this method. A person willing to take the time to run for the zoning board would most likely be someone with extra money, someone who does not work two jobs to make ends meet, and someone who is willing to deal with the hassle of campaigning. Most frequently, this may be a white-collar professional and a person with a special interest in zoning matters. Members without vested interest in development might be attracted by compensation for service on the board.

A better option may be to use hired planning professionals as the primary decision makers, just as agency officials make preliminary decisions in other aspects of our lives.

These staff decisions could be appealed to the city council. If staff were removable only for cause, their decisions might be more insulated from political concerns. This solution would require, however, a major shift in thinking about how to handle zoning matters.

CONCLUSION

Zoning board members serve crucial functions in our communities. There is no doubt that their task is typically thankless. They spend countless hours poring over maps, plats, and covenants, and often will anger someone in the community no matter what decisions they make. It is important, therefore, that the community accept these public servants as neutral decision makers. While it is impossible to eliminate all self-interest, the recommendations above should help create a level playing field in which all community concerns will be weighed equally. Awareness of the problem may be the most important first step. Which occupations are represented on the board of your community?

Cover photo: A boardroom table. Concept design by Toby Zallman.

VOL. 22, NO. 10

Zoning Practice is a monthly publication of the American Planning Association. Subscriptions are available for \$65 (U.S.) and \$90 (foreign). W. Paul Farmer, AICP, Executive Director; William R. Klein, AICP, Director of Research.

Zoning Practice (ISSN 1548-0135) is produced at APA. Jim Schwab, AICP, and Michael Davidson, Editors; Julie Von Bergen, Assistant Editor; Lisa Barton, Design and Production. Copyright ©2005 by American Planning Association, 122 S. Michigan Ave., Suite 1600, Chicago, IL 60603. The American Planning Association also has offices at 1776 Massachusetts Ave., N.W., Washington, DC 20036; www.planning.org.

All rights reserved. No part of this publication may be reproduced or utilized in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without permission in writing from the American Planning Association.

Printed on recycled paper, including 50-70% recycled fiber and 10% postconsumer waste.

RESOURCES:

Anderson, Jerry L., and Erin Sass. 2004. “Is the Wheel Unbalanced? A Study of Bias on Zoning Boards.” 36 *Urban Lawyer* 447, 448–49.

Cordes, Mark. 1989. *Policing Bias and Conflicts of Interest in Zoning and Decisionmaking*. 65 N.D.L. Rev. 161.

Kmiec, Douglas W. 2004. *Zoning and Planning Deskbook*. New York: Thomson West. 2nd ed.

Salkin, Patricia E. 2002. “Avoiding Ethics Traps in Land Use Decisionmaking1.” (ALI-ABA Course of Study, Aug. 22-24). Accessed at: ls.wustl.edu/landuselaw/Articles/Salkin.pdf

Walker, Robert A. 1950. *The Planning Function in Urban Government*. Chicago: University of Chicago Press. 2nd ed.



ZONING PRACTICE
AMERICAN PLANNING ASSOCIATION

122 S. Michigan Ave.
Suite 1600
Chicago, IL 60603

1776 Massachusetts Ave., N.W.
Washington D.C. 20036



CAN BIAS ON ZONING BOARDS
UNDERMINE YOUR QUALITY
OF LIFE?

10

