

CHAPTER 6

ETHICS

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IN THIS CHAPTER...

What are Ethics and Why Do We Need Them?

Indiana Law & Ethics

A Code of Ethics

Practical Applications & Scenarios

Closing Thoughts

Suggested Resources

WHAT ARE ETHICS AND WHY DO WE NEED THEM?

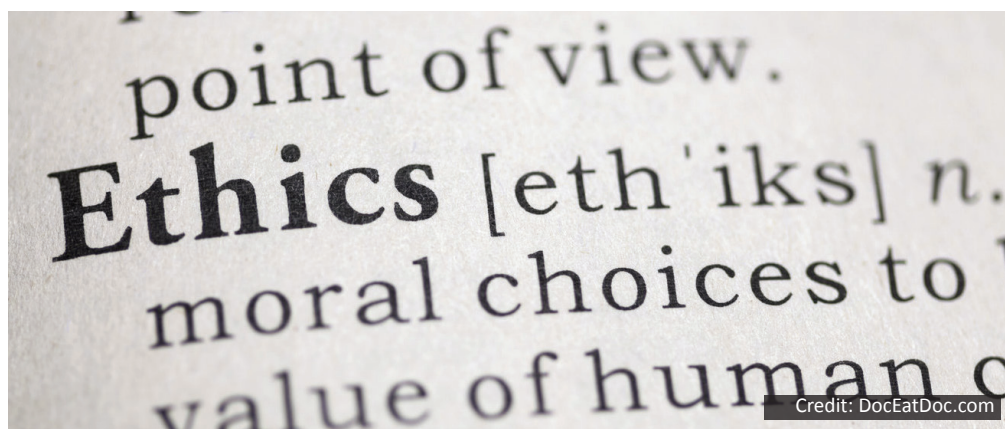
Ethics is officially a formal field of philosophical inquiry -- the philosophical study of morality. There is a difference between ethics and morality; ethics suggest what people ought to do, while morals define what people actually do. Ethics go beyond simply what is required by law. But we are citizen planners, not philosophers, so how do ethics fit in to what we do?

We know from our first-hand observations that planning issues can involve a conflict of values. We also know from that same experience that there are often huge private interests involved. When we put these two factors together, the result may be an explosive situation. Because of this, all the participants need to employ the highest standards of fairness and honesty. The best way that we can assure that we employ fairness and honesty is through regular thought and discussions on planning ethics -- this action will then influence our daily behavior (and our monthly behavior at the planning meetings).

Most of us operate according to some personal, unwritten code of ethics. But our personal ethics are not adequate when we become part of any group, including the plan commission, board of zoning appeals (BZA), or legislative body. In that case, being ethical means that everyone in the group must cooperate to follow a common standard of behavior.

Planning requires a very high degree of public trust and we must exhibit the highest ethical standards in order to not only win the public trust, but also keep it. As a plan commissioner or BZA member, you have been given public authority and you should use that authority with honor and integrity. What you do and how you act at a planning meeting can impact how the citizens of your community feel about the entire local government.

Being a plan commission or BZA member is not an easy job. The public tends to be cynical about government, and may not realize that you only want to "do the right thing." How do you know what the right thing is?



INDIANA LAW & ETHICS

What does Indiana state law say about ethics for plan commissioners and BZA members? Not much! The only ethical situations it addresses are *ex parte* contact (for BZA members only) and conflicts of interest.

Ex Parte Contact

What is *ex parte* contact?

- a) Those weird colored contact lenses that young people wear to parties;
- b) Running into your "ex" at a party; or
- c) Meeting or talking to someone outside of the official public meeting setting?

See, learning can be fun! Bad puns aside, as you may have guessed, the answer is "c"; *ex parte* contact occurs when contact is made outside of the official public venue (in this case a public hearing). What does the law actually say? IC 36-7-4-920 (g) says that a person may not communicate with any member of the BZA before the hearing with intent to influence the member's action on a matter pending before the board (note that Indiana State Law exempts staff reports and recommendations).

Did you notice that the state code is silent on *ex-parte* contact for plan commission and legislative body members (e.g., county commissioners, town or city councils)? This singling out of BZAs may be because they are a quasi-judicial body, making their function different than other planning bodies. Does that mean that only the BZA should worry about *ex-parte* contact?

The answer: no. It is also important that every community have a discussion about *ex-parte* contact standards for the plan commission. Plan commission members need to discuss this issue as a group. Indiana law dictates that some local government staff members and elected officials serve by virtue of their position (i.e., the City Engineer on the city's advisory plan commission, a County Commissioner on the county's plan commission, etc.), it may not be possible to avoid interacting with the public. Local experts like the City Engineer or County Surveyor may have information that the applicant needs or the surrounding property owners are interested in. Local elected officials may feel that their constituents have a right to contact them and talk about their concerns. One option for addressing this concern may be to exempt certain members of the plan commission from *ex-parte* contact restrictions due to their elected or appointed position.

Regardless of whether members are exempted or not from *ex-parte* contact, remember that the goal is to ensure that everyone has the same information. With this in mind, the Columbus Plan Commission's Rules of Procedure (Article III, Section 2) state that all presentation of information on a pending petition must take place in an open, public meeting. Commission members are further discouraged from initiating *ex-parte* communication. Regardless of the outcome of your discussion, your plan commission should amend its rules to clearly state what the standard is for *ex-parte* contact for plan commission members.

Rule #1 -- Make sure you don't break any laws, but remember that simply meeting the minimum legal requirements doesn't mean you are automatically acting ethically!

See Chapter 2 of the Citizen Planners Guide, Board of Zoning Appeals Basics, for more information on the BZA.

TIP: In this day and age, almost every community has a web site. Those web sites often list the community's plan commission and BZA members, sometimes even with their contact information. This inadvertently makes it easier for *ex-parte* contact to occur. If you must list members, add a warning with the membership lists letting the public know that they may not contact BZA members outside of the public meeting per Indiana State Law, IC 36-7-4-920 (g), and also add a warning for any related plan commission rules in your jurisdiction.

Chapter 6: Ethics

Rule #2 -- If you can't avoid contact with an interested party outside of the public meeting, disclose the details of that contact "on the record" at the meeting.

Rule #3 --When in doubt, declare! Publicly disclose any relationship, etc. that may be perceived as a conflict by others. Perception can easily become someone's reality, distorting his or her trust of the planning process and all local government.

If you do have contact outside of a meeting, which is sometimes unavoidable in our small Indiana communities, it is always the best policy is to disclose that contact with the rest of your group at the public meeting, even if your rules or state law don't explicitly require it. The Columbus Plan Commission Rules say that when ex parte contact occurs, commissioners should ask the party to share information at the public meeting -- if they refuse, then the member should disclose it. Note that these rules do exempt the commission's comprehensive plan and ordinance amendment work, which is a different set of circumstances that requires lots of public input and opinions.



Getting back to Indiana's law on ex parte contact for BZAs, how do you know if the person contacting you will try to "influence a decision?" What if they just want information? If the person in question asks for information about the case, it is always the best policy to refer them to planning staff for information. Planning staff will have the official case file in their offices, complete with all the detailed information. If you take a risk and talk to the questioner, it might not only lead to an "ex parte" situation, but you could also accidentally misinform him or her about the details of the case – creating a whole new ethical problem. The safest course of action for a citizen planner is to politely tell the questioner that your policy is not to discuss cases outside of the public hearing, and that he/she should contact appropriate staff for more information about the case.

Please note that IC 36-7-4-920 (g) also says that not less than five (5) days before the hearing, the staff may file with the BZA a written statement setting forth any facts or opinions relating to the matter. This essentially means planning staff may legally try to influence the BZA's decision by making a written recommendation on the case. Staff's recommendation is presumably made without any personal interests and after they have become thoroughly versed in the facts of the case, so it really is a different situation. Contact with planning staff is not considered ex parte contact.

Conflict of Interest

The next ethics subject is "conflict of interest," and there are Indiana laws for both the plan commission and BZA:

- Board of Zoning Appeals -- IC 36-7-4-909(a) says a board of zoning appeals member may not participate in a hearing or decision of that board concerning a zoning matter in which he/she has a conflict of interest, which includes the following:
 - The member is biased or prejudiced or otherwise unable to be impartial; or
 - The member has a direct or indirect financial interest in the outcome of the decision.
- Plan Commission -- IC-36-7-4-223(c) says that a plan commission member may not participate in a hearing or decision concerning a matter in which he/she has a conflict of interest, which includes the following:
 - The member is biased or prejudiced or otherwise unable to be impartial; or
 - The member has a direct or indirect financial interest in the outcome of the decision.

Conflicts of interest are intended to be self-determined. The member should state for the record that there is a conflict and then leave his/her seat with the commission. Note that the intention is that the member with a conflict of interest may not participate in the hearing or decision in any way. The member is not technically required to leave the room unless the board's or commission's rules require it, but it is better to voluntarily leave the room so that there is no appearance of trying to influence the decision. Because the member with the conflict is banned from participating in the hearing or decision, he/she is not allowed to return and testify during the public hearing portion of the meeting and is not permitted to vote on the decision.

Financial Conflict of Interest

What are some examples of direct and indirect financial interest? Ownership of property involved in a petition or employment by a party involved in the petition would be a direct financial interest. Indirect financial interest would include situations where a family member owns property involved in a petition or is employed by someone involved in the request.



Credit: datapronigeria.com

Discussion: What are some other examples of personal bias that might occur for plan commission and BZA members? What should you do if you are unsure if you have a conflict of interest? What should you do if you feel another member is biased on a subject, but he/she still wants to participate?

Rule #4 -- Ethical principles may sometimes appear to be in conflict with each other; acting ethically is not always the easiest course.

Conflict of Interest Due to Lack of Impartiality

Indiana Code was amended in 2011 to add bias, prejudice, or lack of impartiality as a conflict of interest. This conflict is intended to be self-determined. An example might be that a board or commission member's religion doesn't support the use of alcohol, so he/she feels unable to vote for a project that includes a bar, even if it meets all the ordinance criteria. Another example might be that the member has a strong dislike of the applicant that will make it impossible for him/her to consider the application objectively.

What to Do if there is a Potential Conflict of Interest

Conflicts of interest are intended to be self-determined. If you think you have a conflict, do the following:

- Alert the Planning Director and the BZA or commission's attorney as soon as possible.
 - Discuss the situation with them. Indirect conflicts of interest may be tricky, so it is a good idea to get a second and third opinion about whether there is a conflict; and
 - Determine if you have a conflict of interest or not. If you do, make sure that at minimum you follow your local rules. Let the Planning Director know that you have a conflict so that he or she may call upon an alternate to take your place at the meeting. There should be a formal statement, either via an in-person declaration or written statement, on the meeting record that you are not participating due to a conflict.

If you think another member has a conflict, do the following:

- Alert the Planning Director and the BZA or commission's attorney before the meeting.
 - Tell them why you are concerned. You should not be repeating idle gossip, but should be passing along information that could harm the integrity of your group's actions or decision; and
 - It is better to let the professionals address your concerns privately than to confront another member directly. It is not appropriate for you to wait and make accusations at a public meeting.

The key with both these situations is to make sure that all members are aware of the state law and what your rules require. This should be accomplished with regular ethics training for your group. Don't wait until there is a problem to address this issue!

Substitution of Alternate Members

Board of Zoning Appeals

Note that if a BZA member recuses himself/herself due to a financial conflict of interest or a conflict of interest due to lack of impartiality, Indiana Code (IC 36-7-4-909 (b)(2)) allows an alternate member to substitute for that regular member during the application's public hearing, discussion, and voting.

Plan Commission

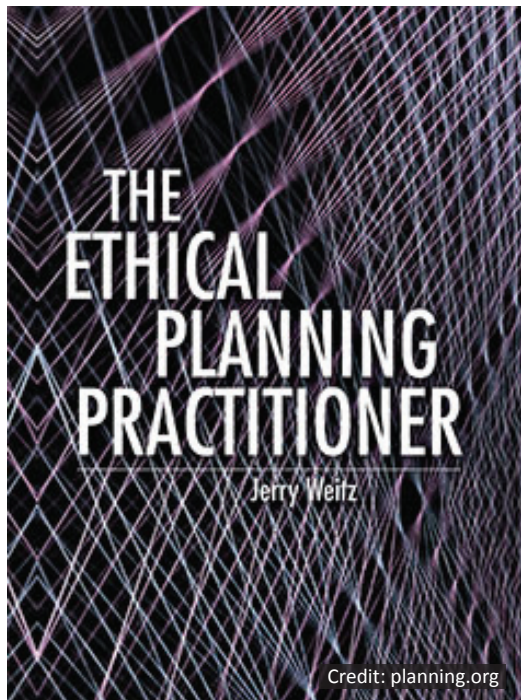
Note that if a plan commission member recuses himself/herself due to a financial conflict of interest or a conflict of interest due to lack of impartiality, Indiana Code (IC 36-7-4-223(d)(2)) allows an alternate member to substitute for that regular member during the application's public hearing, discussion, and voting.

Action: Your board or commission should consider making changes to your rules to further define the procedure regarding conflicts of interest and the use of alternates. It is important to work with planning staff and your attorney to develop these rule changes. While adopting standards regarding what a member with a conflict should do in the rules is not legally required, it may help reinforce the idea that your community takes ethics seriously. This is especially true if there are penalties involved, such as censure or a recommendation of removal. The bottom line is that everyone is subject to the prohibition on participating when there is a direct or indirect financial interest, or when the member is biased.

A CODE OF ETHICS

The American Planning Association (APA) adopted a set of "Ethical Principles in Planning" for citizen planners in 1992. These ethical principles challenge not only plan commissioners and BZA members, but also everyone else involved in the planning process to broadly define all personal interests (not just financial) and to publicly disclose those interests.

The APA's ethical principles derive from both the general values of society and from planning's special responsibility to serve the public interest. The basic values of our society may conflict or compete with each other, and that may be seen in these principles. For example, the need to disclose full public information may compete with the need to respect confidences.



Plans and programs often represent a balancing of divergent interests. Ethical judgments also may require a conscientious balancing, based on a specific situation and the entire set of ethical principles. Following are APA's Ethical Principles in Planning:

APA's Ethical Principles in Planning – For Citizens and Elected Officials

The planning process must continuously pursue and faithfully serve the public interest. Planning Process Participants should:

- 1) Recognize the rights of citizens to participate in planning decisions;
- 2) Strive to give citizens (including those who lack formal organization or influence) full, clear, and accurate information on planning issues and the opportunity to have a meaningful role in the development of plans and programs;
- 3) Strive to expand choice and opportunity for all persons, recognizing a special responsibility to plan for the needs of disadvantaged groups and persons;
- 4) Assist in the clarification of community goals, objectives, and policies in plan-making;
- 5) Ensure that reports, records, and any other non-confidential information which is, or will be, available to decision makers is made available to the public in a convenient format and sufficiently in advance of any decision;
- 6) Strive to protect the integrity of the natural environment and the heritage of the built environment; and
- 7) Pay special attention to the interrelatedness of decisions and the long-range consequences of present actions.

Planning process participants continuously strive to achieve high standards of integrity and proficiency so that public respect for the planning process will be maintained. Planning Process Participants should:

- 1) Exercise fair, honest, and independent judgment in their roles as decision makers and advisors;
- 2) Make public disclosure of all "personal interests" they may have regarding any decision to be made in the planning process in which they serve, or are requested to serve, as advisor or decision maker;
- 3) Define "personal interest" broadly to include any actual or potential benefits or advantages that they, a spouse, family member, or person living in their household might directly or indirectly obtain from a planning decision;

- 4) Abstain completely from direct or indirect participation as an advisor or decision maker in any matter in which they have a personal interest, and leave any chamber in which such a matter is under deliberation, unless their personal interest has been made a matter of public record; their employer, if any, has given approval; and the public official, public agency, or court with jurisdiction to rule on ethics matters has expressly authorized their participation;
- 5) Seek no gifts or favors, nor offer any, under circumstances in which it might reasonably be inferred that the gifts or favors were intended or expected to influence a participant's objectivity as an advisor or decision maker in the planning process;
- 6) Not participate as an advisor or decision maker on any plan or project in which they have previously participated as an advocate;
- 7) Serve as advocates only when the client's objectives are legal and consistent with the public interest;
- 8) Not participate as an advocate on any aspect of a plan or program on which they have previously served as advisor or decision maker unless their role as advocate is authorized by applicable law, agency regulation, or ruling of an ethics officer or agency; such participation as an advocate should be allowed only after prior disclosure to, and approval by, their affected client or employer; under no circumstance should such participation commence earlier than one year following termination of the role as advisor or decision maker;
- 9) Not use confidential information acquired in the course of their duties to further a personal interest;
- 10) Not disclose confidential information acquired in the course of their duties except when required by law, to prevent a clear violation of law or to prevent substantial injury to third persons; provided that disclosure in the latter two situations may not be made until after verification of the facts and issues involved and consultation with other planning process participants to obtain their separate opinions;
- 11) Not misrepresent facts or distort information for the purpose of achieving a desired outcome;
- 12) Not participate in any matter unless adequately prepared and sufficiently capacitated to render thorough and diligent service; and
- 13) Respect the rights of all persons and not improperly discriminate against or harass others based on characteristics which are protected under civil rights laws and regulations.

APA's Ethical Principles in Planning – For Staff

APA members who are practicing planners continuously pursue improvement in their planning competence as well as in the development of peers and aspiring planners. They recognize that enhancement of planning as a profession leads to greater public respect for the planning process and thus serves the public interest.

APA Members who are practicing planners:

- 1) Strive to achieve high standards of professionalism, including certification, integrity, knowledge, and professional development consistent with the AICP Code of Ethics;
- 2) Do not commit a deliberately wrongful act which reflects adversely on planning as a profession or seek business by stating or implying that they are prepared, willing, or able to influence decisions by improper means;
- 3) Participate in continuing professional education;
- 4) Contribute time and effort to groups lacking adequate planning resources and to voluntary professional activities;
- 5) Accurately represent their qualifications to practice planning as well as their education and affiliations;
- 6) Accurately represent the qualifications, views, and findings of colleagues;
- 7) Treat fairly and comment responsibly on the professional views of colleagues and members of other professions;
- 8) Share the results of experience and research which contribute to the body of planning knowledge;
- 9) Examine the applicability of planning theories, methods, and standards to the facts and analysis of each particular situation and do not accept the applicability of a customary solution without first establishing its appropriateness to the situation;
- 10) Contribute time and information to the development of students, interns, beginning practitioners, and other colleagues;
- 11) Strive to increase the opportunities for women and members of recognized minorities to become professional planners; and
- 12) Systematically and critically analyze ethical issues in the practice of planning.

Each and every group involved in planning your community would be well advised to adopt APA's Ethical Principles in Planning. A good time to introduce this idea would be at the beginning of a planning process, such as a comprehensive plan update. For plan commissioners and board members, these principles can actually become part of the group's rules of procedure.

American Institute of Certified Planners (AICP) Code of Ethics

While APA's Ethical Principles in Planning contain a section for staff, those principles are only the beginning. Certified planners have their own separate professional code of ethics to follow. The American Institute of Certified Planners (AICP) is the American Planning Association's professional institute, and planners that are accepted into the organization are offered codes, rulings, and procedures to help negotiate the tough ethical and moral dilemmas they face. This code can be seen at the organization's web site at www.planning.org/ethics.

Rule #5 -- The Golden Rule remains a great guideline. Ask yourself: Would you want it done to you?

PRACTICAL APPLICATIONS & SCENARIOS

Since our values may at times be in competition, some cases may present conflicting ethical issues. For example, is fair housing or protecting the environment more important? How do you work through a complicated ethical problem as a group? Try following these steps the next time your BZA or plan commission faces an ethical dilemma:

- 1) Define the problem;
- 2) Collect all the facts (make sure they are actually facts);
- 3) Review ethical principles in planning and other guidance materials;
- 4) Identify alternatives and their possible outcomes;
- 5) Select the best alternative -- one that meets all ethical standards; and
- 6) Resolve the problem.

Agreeing on a set of ethics may be easier said than done. What do you do if you find that your personal values conflict with those of the rest of your group? There are three choices to consider:

- 1) Loyalty -- show your allegiance to your community and appointing officials;
- 2) Speak out -- within the group -- go public only if very serious (legal, etc.); or
- 3) Leave -- you owe allegiance to yourself if you can't resolve.

Ethical Scenario #1 -- My Brother, the Developer

Your brother has made a small investment in a real estate development that will come before your board or commission for approval. No one knows that your brother is involved in the project. You believe it is a good proposal, and that your brother's influence has led to a good design. What should you do?

- a) Disclose the personal interest and excuse yourself from the case;
- b) Disclose the personal interest, excuse yourself from voting, and then speak in favor of it;
- c) Disclose the personal interest, but vote on the case because you do not benefit financially from it (so there is no technical conflict of interest); or
- d) Since you do not have a financial interest, go ahead and vote on the request.

Things to consider:

- If it is a good proposal, your fellow board members should recognize that, so there is no reason to risk your ethics;
- APA's Ethical Principles requires that you disclose any personal interests -- it also says potential benefits to a family member (even if not part of your household) should be considered as a personal interest;
- Even if you don't participate, your relationship might taint the opinions of others in your group or the public;
- You may not realize that your brother has influenced your opinion, since you are around him so much;
- If this happens regularly, you should resign your place in the group; and
- Would your answer be different if this were a good friend or neighbor?

Ethical Scenario #2 -- You Arrive Late!

Work and family issues have been crazy lately. You receive your packet a few days before the meeting, but are too busy to read it. You don't have time to visit the site before the meeting. On the day of the meeting, an important phone call comes just as you are about to leave your office. When you finally get to the meeting, you have missed the staff presentation and part of the public hearing. What should you do?

- a) Quickly look through your packet as the public hearing is wrapping up, and rely on your neighbor to whisper and fill you in on anything important before you vote;
- b) Wait until the public hearing is complete, and a vote has been taken before you take your place with the group, ready to hear the next case;
- c) Forget the meeting and spend time straightening out your own problems; or
- d) Other



Things to consider:

- If you don't have all the information that your colleagues do on the proposal, how can you meaningfully participate?;
- APA's Ethical Principles requires you not to participate in any matter unless adequately prepared and sufficiently capacitated to render thorough and diligent service;
- If you participate, your perceived failure to take the request seriously might negatively affect the public's opinion of the entire board or commission (or even all local government officials);
- Not only is it not your colleague's responsibility to whisper all the relevant information to you, but their interpretation of what was said before you got there may not be accurate;
- If this happens regularly, you should resign your place in the group; and
- Would your answer be different if you were needed for a quorum, or if it is a controversial case?

Ethical Scenario #3 – The Bad Developer

The economy has been slow lately, so you are excited to see that there is a big project on this month's agenda. When you begin to review your packet of information, you find that the applicant is a developer who you consider to have a very bad track record in your community and you've heard rumors of problems in the surrounding area. You look through the staff report, but can't help feeling major reservations about this proposal. What should you do?

- a) Call planning staff before the meeting and warn them you will be recusing yourself at the meeting due to your dislike of the applicant (lack of impartiality);
- b) Call planning staff before the meeting and ask them about what went wrong with the previous local development effort(s) of the applicant(s), and ask them to also contact surrounding communities to see what their planners think about the applicant;
- c) Go to the meeting and decide at the close of the public hearing whether you can be objective or not, and whether you should excuse yourself from voting;
- d) Participate in the hearing and vote against the application, in order to prevent poor development in your community; or
- e) Participate in the hearing knowing that if you do decide to vote in favor of the applicant, you will attach several strong restrictions, in the form of written commitments and financial guarantees to the approval.

Things to consider:

- It is possible to be bad at something without being unethical or even a bad person;
- What kinds of standards were in place when the developer's previous project was constructed? It may not be the developer's fault if your community's previous ordinances and rules were outdated or inadequate;
- What steps were undertaken (inspections and enforcement) by staff during the developer's previous work in your community to ensure that it was implemented correctly? If your community did not take on this responsibility, there are likely many substandard and noncompliant developments;
- APA's Ethical Principles says you should exercise fair judgment – can you do that? Even more important, can you meet the expectations of Indiana Code when it comes to objectivity?; and
- We are all human. It is possible to dislike someone but still be professional. If your feelings about the developer are overwhelming and you do not think you can be reasonable about their request, it is best to recuse yourself.

CLOSING THOUGHTS

It's easy to preach to others, but harder to admit our own fault. All of us are guilty of human frailty, and sometimes stray from the straight and narrow in small ways or large. Regular exposure to planning ethics, through reading and discussion, will help keep us all on track.

SUGGESTED RESOURCES

APA Ethical Principles in Planning <http://planning.org/education/commissions/>

The Citizen's Guide to Planning, 4th Edition, by Christopher Duerksen, C. Gregory Dale, FAICP, Donald Elliott, FAICP, APA Planners Press, 2013

The Ethical Planning Practitioner, by Jerry Weitz, FAICP, APA Planners Press, 2016

Everyday Ethics for Practicing Planners, by Carol D. Barrett, FAICP, APA Planners Press, 2002.

Planning Made Easy, by Efraim Gil, Enid Lucchesi, and William Toner, APA Planners Press, 1994.