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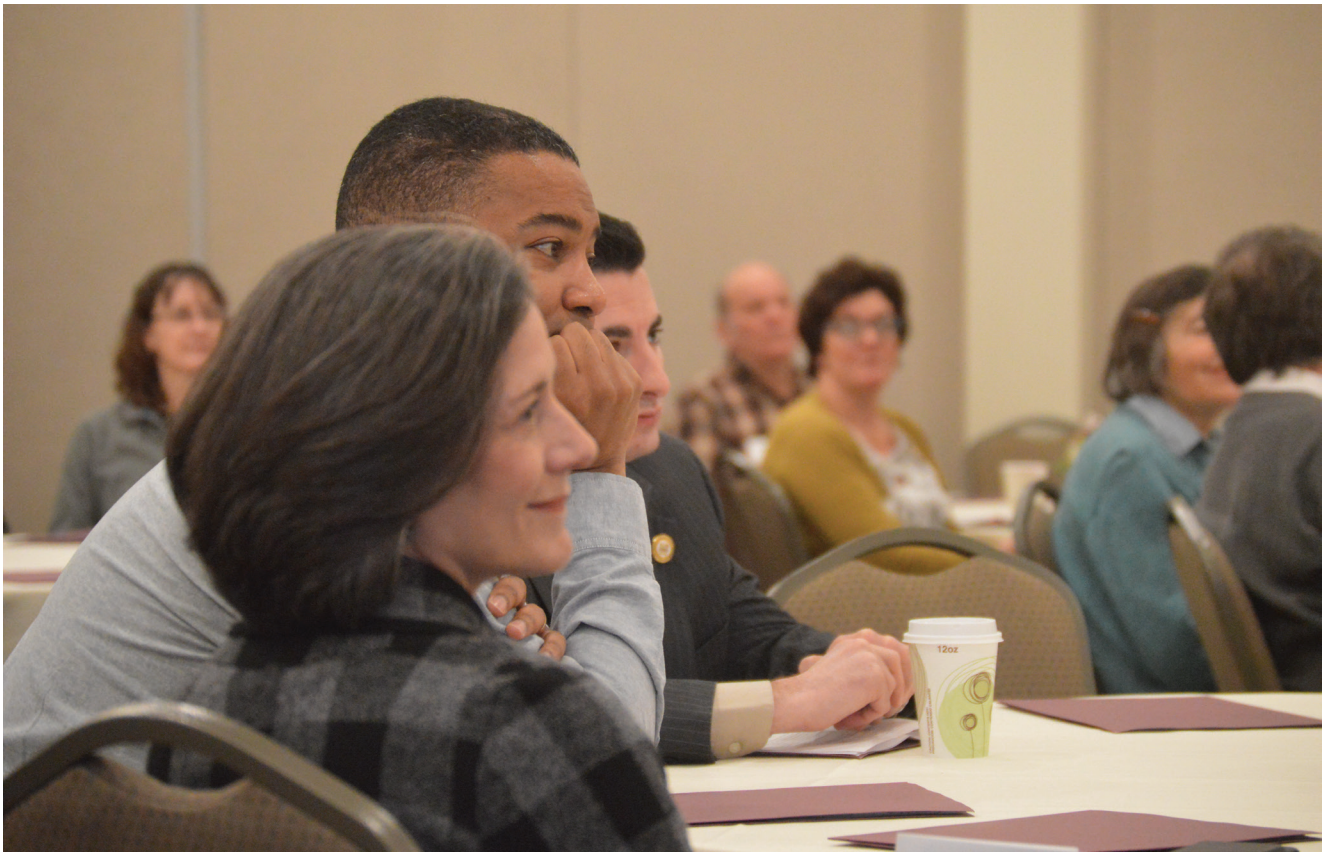

The Montgomery County Planning Commission in Pennsylvania hears from members of the community at a local meeting.

Running Efficient, Effective (and Shorter) Meetings

BEST PRACTICES

PLANNING COMMISSIONERS HAVE A TOUGH JOB. In most towns, these good-hearted volunteers agree to serve to give back to the community. Some commissioners start with a loose understanding of land use, zoning, or how local government works. Many know even less.

Armed with little more than a civic-minded desire to contribute, commissioners are commonly (and rightfully) surprised when they are thrust into heated disagreements over controversial development proposals. Things get less comfortable when the shouting objectors include neighbors, lifelong friends, and even family members. It's relatively common to hear commissioners question (off the record, of course) why they agreed to serve—or how good intentions resulted in "lost invitations" to the annual block party.

Many of these awkward situations are avoidable, and nearly all of them can be attributed to a lack of planning commission support. Mandatory training has taken root unevenly, and municipalities and local planning agencies can only do so much with limited resources. There's an undeniable need for professional development help.

Until funding or legislative resources are more widely available, commissioners are forced to learn by doing. That includes spending more personal time educating themselves on how to run focused, effective public meetings. Perhaps more than any other skill, a commission's ability to understand and apply the appropriate standards can make (or break) a meeting, a commission, and, in many cases, the public's confidence.

Review standards: the commission's best friend

So, what standards must a commissioner consider?

Your local plan and zoning code provide guidance. Plans set the vision, goals, and policy guidance, while the zoning code contains objective standards that commissioners must evaluate and apply to the facts presented during a meeting. Despite the arguments, emotional appeals, and personal testimonials baked into most (if not all) public meetings, a planning commission really only has one job. It must make a recommendation indicating whether a proposal meets the applicable standard of review. That's it.

These objective criteria bring transparency, order, and a degree of predictability to a commission's proceedings. That's

Sticking to zoning codes and other objective criteria helps maintain orderly, transparent proceedings, such as at this meeting in Oakland, California.

important. Hewing to the publicly available plan and review standards not only makes for a more focused meeting, but it can promote confidence in the commission's proceedings and, on a broader level, local government. Even if an applicant or resident disagrees with the commission's recommendation, they can respect the process if they understand the factors the commission considered.

For commissions that handle zoning issues, let's look at the standards. Each zoning approval request generally comes with different review standards. For example, zoning variances require commissioners to consider whether a unique, land-based hardship exists, if approving a variance will alter the neighborhood's character, and whether a variance is consistent with the community's master plan.

Commissions reviewing conditional use (sometimes called special use) requests consider whether a proposed use will harm neighboring property values or negatively impact the neighbors' use and enjoyment of their property.

There are different standards when considering a rezoning request, including the trend of development in the area, whether the property historically has been underutilized, and if rezoning a property promotes the public health, safety, and welfare. When reviewing planned developments, a commissioner may find the community has five, 10, or 15 different standards to consider when reviewing the planned development proposal.

All of this may seem overwhelming, and that's a perfectly reasonable reaction. The goal, however, is not to confuse or intimidate. Rather, the standards are designed to provide commissioners with a rational structure to guide public meetings. Gaining a working understanding of the relevant factors will allow commissioners to ignore irrelevant testimony, focus on what matters, and provide clearer, more useful recommendations to their elected officials. In other words, standards help commissions do their job.

The consequences of ignoring the standards (or worse yet, creating them on the fly) are real. First, the commission will deprive elected officials of the advice they are statutorily authorized to receive. A commission that misapplies the standards forces elected officials to reweigh the evidence that the commission mishandled, in addition to considering all other factors within their purview. It also can create an instant creditability gap and encourage elected officials to ignore future commission recommendations.

Second, it can increase the chance of litigation. Comments made by commissioners on the record that are unrelated to the review standards or suggest personal bias create golden opportunities for attorneys seeking to challenge a community's zoning decision. A seemingly offhand comment by a commissioner can quickly become an allegation in a zoning lawsuit.

Finally, and on a more practical level, misapplying the standards leads to longer, more confusing meetings that tend to frustrate all parties—the applicant, the public, and the commission. Remember, few good decisions are made after 10 p.m.

What's a commissioner to do? Aside from familiarizing yourself with the plan and the relevant standards before each meeting, which is always an excellent idea, commissions should require applicants to submit written responses to the zoning standards. Ultimately, it's the applicant's burden to prove that he meets the standards. These need to be made in writing.

Commissions in communities with more staff resources should ask them to analyze the standards, either verbally during the meeting or, better yet, in a written staff report to the commission. A community's professional planning staff is uniquely positioned to provide an unbiased analysis of whether relevant standards are met.

Alternately, some communities rely on a standards worksheet the commission reviews and completes at the conclusion of testimony. The commission, typically led by the chair, will read each standard and ask for input from the commissioners concerning whether it has been met and what facts support that conclusion. This deliberative process not only focuses the commission on what matters, it also demonstrates to the public exactly what factors the commission is considering. The basis of the decision needs to be part of the written record of the meeting.

A hallmark of a strong commission is a group of individuals who aren't afraid to ask an applicant, the public, or a fellow commissioner how a comment relates to the relevant standards. It's an inherently reasonable question. After all, the commission's job is to evaluate whether the standards have been met. ■

—Gregory W. Jones, AICP

Jones is a planning attorney with Ancel Glink Diamond Bush DiCianni & Krafthefer, PC, in Chicago.

In 1978, when New York City prevented Penn Central Transportation Co. from constructing offices on top of Grand Central Station because of the city's Landmarks Preservation Law, the Supreme Court ruled it did not constitute a government taking in violation of the Constitution.

Legitimate Land-Use Planning, Policy, and Regulation

LAW

LAND-RELATED ACTIVITIES—comprehensive planning, zoning regulations, subdivision controls—are a major part of what planning commissioners do. And it is common as part of these activities to hear landowners make a variety of claims about their land, about planning, and about planning regulation: "It's my land and I can do what I want with it!" "The right to do what I want with my land is what it means to be an American!" "My property rights are guaranteed in the Constitution!"

But planning and land-use regulation are as American as those claims. While zoning and environmental regulation are 20th century inventions, they have clear links to actions taken by colonial cities and states. The history of the meaning of the "takings clause" of the Bill of Rights actually favors planning and planners' proposals. Land—especially the private property that so many Americans cherish—is not what many think it is. And in fact, it never has been.

An age-old American tradition

Land-use regulations—what many would often consider onerous land-use regulation—were commonplace in colonial times. Colonial Virginia regulated tobacco-related planting practices to require crop rotation and prevent overplanting. Colonial Boston, New York City, and Charleston all regulated the location of businesses such as bakeries and slaughterhouses, often to the point of excluding them from their city limits. Colonial-era laws allowed residents' land to be flooded (over their objections) to promote economic development (for waterwheels).

Land-use regulation is an integral part of American history, culture, and law. We have always actively managed our land-use relationships.

Why? While as Americans we prize individualism, we have always lived with a paradox: I trust myself to be a good and responsible land manager; I just don't trust you. Land-use regulation is our response to a lack of trust in each other.

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To ensure public order and security of property values, I agree to restrictions on my property because the same restrictions keep you from using your property as you please. Ultimately, I benefit more from the guarantees I get from the restrictions to your property than the costs I bear from those same restrictions on my property.

What about the takings clause? Land-use and environmental regulation are often subject to accusations of "you're taking my property, and the Constitution doesn't allow that." This isn't true. The takings clause is the final 12 words of the Fifth Amendment of the Bill of Rights: " . . . nor shall private property be taken for public use, without just compensation." Landowners argue that certain types of regulatory actions—especially those that substantially reduce the economic value of their land—are precisely those that require compensation. Alternatively, if the public is not willing to compensate, then the landowner expects the regulation to be repealed.

That landowners can even make this argument is itself a 20th century development. From the time of its adoption in 1791 until the 1920s, the takings clause was only about one thing: the physical expropriation of land by government. It was not written to deal with the issue of regulation, and was not understood as having any relationship to government's right to regulate. Through the early part of the 20th century, the U.S. Supreme Court placed virtually no limit on government.

This changed in 1922 when the Court introduced the idea of regulatory takings. In the case of *Pennsylvania Coal v. Mahon*, the Court found that, "The general rule . . . is, that while property may be regulated to a certain extent, if regulation goes *too far* it will be recognized as a taking" (emphasis added). So now a regulation could be equivalent to a physical taking. If it was, then compensation was required. But the Court did not say where the line was between regulation that "goes too far" and regulation that does not. A few years later, in 1926, the Court made clear that zoning was not a regulation that went too far.

Are irate landowners correct when they argue for limited and compensated government regulation? Rarely. For all practical purposes, most of what governments do is legitimate, reasonable, and necessary, given the complex balancing act of the greater public interest and individual burden.

And what of land itself? The way we own and control land reflects 18th century ideas that democracy and market economies require a strong and enforceable set of privately owned property. This form of property treats the natural world as a bundle of rights: What is in actuality a whole can be fragmented. A property owner is entitled to its soil, trees, air, water, minerals, plus the right to control access and use and transfer land through gift (inheritance), lease, or sale. The rights to use or transfer apply to land as a whole as well as individual rights within the bundle. This is the basis of the idea that water rights, air rights, mineral rights, etc., can be separated from the bundle—and it gives rise to our ability to create conservation easements and transferable development rights.

What is less understood is that there has long been controversy over what is and should be included in the bundle, and that the bundle is not static, but has changed radically. What I own in 2017 is different from I would have owned in 1917 or 1817.

At the time of the American Revolution, founder Benjamin Franklin declared, "Private property is a creature of society, and is subject to the calls of that society whenever its necessities require it, even to the last farthing." To Franklin, there was no sacrosanct private property bundle, and there were no limits to society's need to change that bundle for social purposes. And change it did, most often in response to changes in technology or changing social values.

In the early 20th century, landowners lost their air right "to the heavens above" because of the invention of the airplane. Suddenly, we needed air highways. A part of everyone's air right was "taken" for a "public use"—but nobody was compensated. In the 1960s, commercial property owners lost their right to exclude consumers on the basis of race, gender, ethnicity, etc. Home owners can still do this, but not commercial property owners (even though they had for hundreds of years). Were they compensated when society changed their property bundle? No! This process continues, as technology and social values (for example, values about environmental goods) evolve. Will it ever end? Probably not.

Is your job difficult? Yes. Will people be mad at you? Yes. But are you on solid ground, with a strong basis in American history, culture, law, and policy practice as you engage in land-related activities? Most definitely. ■

—Harvey M. Jacobs

Jacobs is a professor in the Department of Planning and Landscape Architecture (Urban & Regional Planning Program) at the University of Wisconsin-Madison, where he teaches courses and does research on land policy and social conflict over property rights.

RESOURCES

Property rights are an evolving concept; learn how they developed and what is most germane to contemporary planning.

APA RESOURCES

Lucas at 25, Michael Allan Wolf Planning, July 2017: planning.org/planning/2017/jul/legallessons.

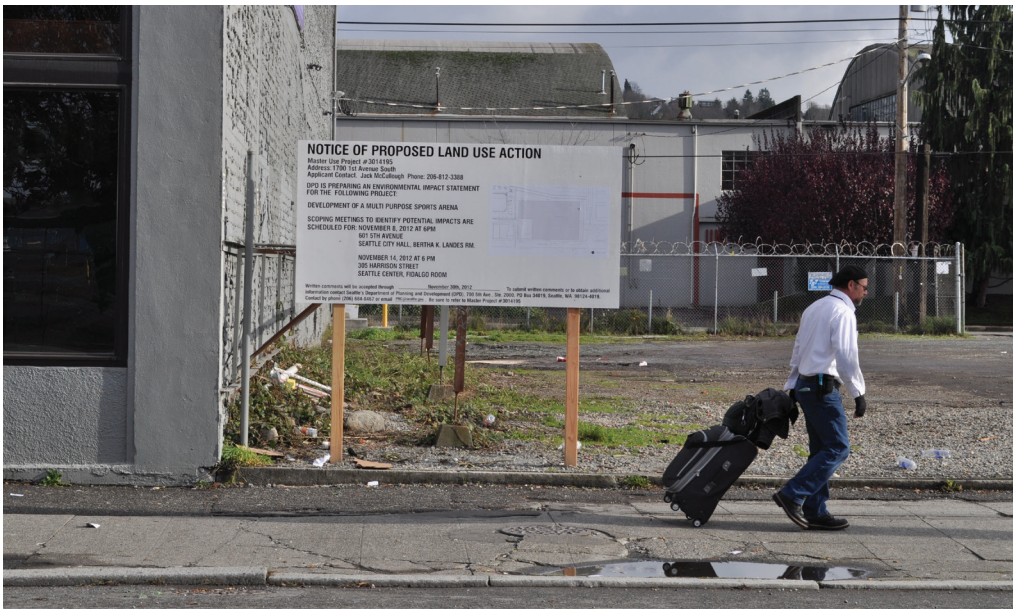
2017 Planning Law Review, On-Demand Education: planning.org/events/course/9130408.

2016 Planning Law Review, On-Demand Education: planning.org/events/course/9109264.

OTHER RESOURCES

Land Use and Property Rights in America, Lincoln Institute of Land Policy, 2017: tinyurl.com/yc792w98.

Who Owns America? Social Conflict over Property Rights, ed. Harvey Jacobs, University of Wisconsin Press, 1998: uwpress.wisc.edu/books/0492.htm.



Notifications like this one posted in Seattle have specific requirements for content, size, and location.

Due Process and Quasi-Judicial Hearings

PLANNING TOOLS

UNLIKE LEGISLATIVE DECISIONS such as the adoption of a revised land development code, quasi-judicial decisions require heightened procedural due process requirements because they involve the application of adopted regulations to a particular applicant's property. While this article addresses common processes, jurisdictional requirements can vary.

Providing notice

While procedures vary across municipalities, the process usually begins with providing notice of the subject property's hearing to make sure anyone potentially affected by the application can prepare for and attend it. There are several types of notice: letters mailed to all property owners within a certain distance of the subject property; postings in newspapers that meet the municipality's requirements; alerts on the local government's website; and signs posted at the subject property.

Local governments differ on who should provide such notice: municipal staff or the applicant. When staff provides notice, the government can ensure it is done properly; however, when the applicant is responsible, the municipality can save time and money—provided protections are in place to ensure it was done properly, like requiring a picture of any notices posted on the subject property.

Municipalities should have specific regulations for size, height, location, and color of the signs, as well as font size. Otherwise, applicants might post a sign that is difficult to read or located in an obscure location to minimize potential opposition.

In many jurisdictions, courts strictly enforce notice requirements and will invalidate a board's decision if the process was flawed. Some jurisdictions require anyone complaining to demonstrate he suffered prejudice due to flawed notice, such as receiving inadequate time to retain expert witnesses.

Requesting continuances

Continuances may be requested by the applicant or opposing neighbors due to scheduling conflicts with their attorneys or expert witnesses. Local governments should consider adopting regulations that allow the city manager or county administrator to grant certain requests.

Although continuances should be granted for good cause, they should not be used as a tool to wear down any opposition forced to attend multiple hearings. Additionally, municipalities should consider adopting regulations requiring that the cost of re-advertising the hearing be borne by the party requesting the continuance. Some jurisdictions allow local governments to avoid these costs by continuing the hearing to a specific date when the request for a continuance is granted.

Ex parte communications

Ex parte communications are discussions between decision makers beyond the quasi-judicial hearing. Board members are required to base their decision on evidence presented during the hearing. Relying on information provided elsewhere could violate due-process rights. Fundamental fairness dictates that all parties are informed of all facts.

In the real world, *ex parte* communication happens—in the grocery store, at the ballfield, on social media. Full disclosure of such communications helps minimize the adverse effect of such communications. A written memo to the case file stating when the *ex parte* communication occurred, who made it, and what was communicated is necessary. Similarly, all related emails and letters received by decision makers should be included in the case file. The key is to create a level playing field so the applicant and opposing neighbors can address all information. Failure to properly disclose *ex parte* communications can lead to a board's decision being set aside.

"LAND USE NOTIFICATION FOR BASKETBALL STADIUM" BY JOE MABEL, WIKIMEDIA (CC BY-SA 3.0)

Sworn testimony and cross-examining witnesses

Some jurisdictions require that all witnesses who testify at the quasi-judicial hearing be placed under oath and be subject to cross-examination by the opposing party. Others do not require sworn testimony or allow for cross-examination of witnesses. Still others only allow the applicant to cross-examine witnesses, not opposing neighbors.

I recommend that all witnesses be placed under oath during a quasi-judicial hearing. Quasi-judicial hearings are similar to judicial proceedings. Everybody who testifies in court is placed under oath to increase the testimony's reliability. In many instances, hundreds of thousands of dollars may be at issue in a quasi-judicial hearing. Accordingly, the procedural due-process requirements mandated for a court hearing for a $100 speeding ticket should equally apply to a quasi-judicial hearing in which significant property rights will be determined.

For similar reasons, I recommend that all witnesses be subject to cross-examination. A crucial component in a judicial proceeding, cross-examination is often essential to determining the truth of a matter and exposing any flaws in a witness's direct testimony, such as not having the credentials to provide an expert opinion. Indeed, it could be argued that cross-examination is even more important in quasi-judicial hearings than in court; disclosures mandated by the rules of court regarding potential witnesses are not typically applicable to quasi-judicial hearings.

Failure to protect the procedural due-process rights of an applicant and opposing neighbors could result in a court overturning a board's decision on procedural grounds—even before determining whether the board correctly applied the substantive requirements of the local government's land-use regulations. ■

—David A. Theriaque

Theriaque is an attorney specializing in zoning and land-use law with Theriaque & Spain in Tallahassee.

The Islamic Cultural Center of New York is protected under the Religious Land Use and Institutionalized Persons Act.

Planning and Religious Protection

HISTORY

DUE TO THE VARIETY OF RELIGIOUS BELIEFS and the ways local governments can impact them, creating federal standards for freedom of religion has been a delicate, evolving process.

In 1993, Congress enacted the Religious Freedom Restoration Act. Four years later, it was found unconstitutional by the Supreme Court, and Congress went back to the drawing board. In 2000, the Religious Land Use and Institutionalized Persons Act was created, protecting individuals and houses of worship—for all religions, including "new, small, or unfamiliar ones"—from discrimination in zoning and landmarking laws. Today, RLUIPA remains the principal guidance for planning within the context of religious freedom. Download APA's RLUIPA info packet at planning.org/pas/infopackets/eip23.htm.

—Carolyn Torma

Torma is a former director of education for APA.

[redacted]

RESOURCE FINDER

The U.S. Constitution guarantees freedom of religion under the First Amendment. For more on how zoning and local regulations come into play, check out the following publications and podcast.

APA RESOURCES

Defining Religious Exercise, Evan Seeman
Planning, May 2016: tinyurl.com/ycn79phz

Sex, Guns, and God! The 1st and 2nd Amendments and Local Regulation, podcast with Adam Simon and Dan Bolin, 2013: http://tinyurl.com/y9txbtk5

Regulating First Amendment Land Uses, On-Demand Education: tinyurl.com/ybl8lz7p

OTHER RESOURCES

Zoning for Religious Institutions, Eric Damian Kelly, FAICP
Planning Commissioners Journal, Fall 2009: tinyurl.com/ybtza6gl

Local Government, Land Use, and the First Amendment: Protecting Free Speech and Expression, Brian J. Connolly
American Bar Association, 2017: tinyurl.com/ycpc8ako

Zoning Gets Religion, David L. Hudson Jr.
ABA Journal, 2004: abajournal.com/magazine/article/zoning_gets_religion