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MEMORANDUM

Planning Commission meeting of April 22, 2009

TO: Planning Commission Item H-2

FROM: Lee Plemel, Director *LP*

DATE: April 13, 2009

SUBJECT: Discussion regarding Planning Commission meeting procedures for reviewing and acting upon applications

The purpose of this item is to allow the Planning Commission to discuss procedural matters in the review of applications, at the request of Chairman Kimbrough. The attached information from a recent American Planning Association web seminar regarding Planning Commission review and decisions is included for the Commission's general information and to assist in the discussion.

The Planning Commission may discuss various aspects of review of applications. Staff would like to offer some discussion regarding the Commission's action on applications, specifically regarding motions with required findings and items where several alternatives may be offered and/or considered.

In taking action on an application, the Planning Commission must make legal findings to justify the action, whether to approve, deny or approve an application with conditions. These required findings are found in NRS and the Carson City Municipal Code for the various application types. Included in each staff report (for action items) to the Planning Commission is a recommended motion and recommended findings for that motion. Staff writes the findings based on each individual application and the findings are part of the record. For most applications that are generally non-controversial, the recommended Planning Commission motion includes a statement by the Commission that the action is "based upon the finding contained in the staff report." As long as these findings are accepted by the Commissioners, they should provide a valid legal basis and record for the Commission's decision.

However, it is within the Commission's discretion to modify or add to the findings. While this is generally not necessary with non-controversial items, this may be appropriate where recommended conditions of approval are modified or, particularly, where the action is contrary to staff's recommendation. This can be accomplished by a Commissioner including additional findings as part of a motion, or it could be appropriate on more controversial projects to take a short recess to work with the Deputy District Attorney and staff to prepare appropriate written findings for the proposed action.

Another issue that can be difficult to bring to Commission consensus is where a number of alternatives are being considered, whether provided by staff or based upon Commission

discussion. In such an instance, the Commission may consider taking separate motions on each component of the application where there is not a clear consensus. For example, it may be difficult (or impossible) to construct a single motion where a majority of the Commission agrees on all the various aspects of the motion. While this is not typically needed for review of the vast majority of applications, providing separate motions and action on individual aspects on the application can provide a clear record of the overall decision and why that decision was made, when appropriate.

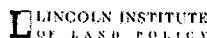
Staff will continue to do our best to provide guidance in staff reports on taking action on alternatives. However, there will certainly be instances where the commission modifies the recommended action by staff. This discuss will help Commissioners and staff have a better understanding of the process, options and expectations in deliberating on applications.

Please contact Lee Plemel, Planning Director, with any questions regarding this item.

Below: Excerpt from the Planning Commission Bylaws regarding the order of business for the review of a project application during a meeting.

f. *Public hearings. Each project shall be announced by the Chairman as listed on the Agenda. The order of the project hearing shall be:*

- (1) *presentation of the staff report;*
- (2) *questions by the Commission of staff;*
- (3) *presentation by the applicant or applicant's representative.*
- (4) *questions of the Commissioners of the applicant;*
- (5) *opening of the public testimony portion of the hearing;*
- (6) *comments by members of the public in support or opposition to the proposed project;*
- (7) *questions of Commissioners of the public;*
- (8) *a rebuttal period with a time limit established by the Chairman;*
- (9) *closure of the public hearing;*
- (10) *Commission deliberations;*
- (11) *Commission motion and action;*
- (12) *announcement of the date for the Board hearing, the requirements for an appeal, and the last date to file an appeal (if required).*



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A Guide to Gathering Facts and Evidence

February 18, 2009

Conference resources online
[www.planning.org/
audioconference/infordec](http://www.planning.org/audioconference/infordec)

Fax: 312-786-6727
E-mail: education@planning.org

Today's Speakers



David A. Theriaque, Theriaque Vorbeck & Spain



Martha Mason Semmes, AICP, Town of Purcellville, Virginia



Eric Damian Kelly, FAICP, Ball State University and Duncan Associates



Carolyn Torma, American Planning Association

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The Site Visit

How should the site visit be conducted?



Martha Mason Semmes:

- Collect facts that cannot be easily determined from other sources; visualize development
- Provide notice
- Property owner, applicant, staff
- Staff take notes and provide a written summary at the next meeting
- No decisions can be made at site visit

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APA

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The Site Visit

How do you view the site visit from a legal perspective?



David Theriaque:

- Site visit can be ex parte communication
- Should be a visual inspection, no give and take
- Disclose anything that will affect decision
- Commissioners sometimes visit the site on their own

APW

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Planning and Environment

The Site Visit

How do you view the site visit from a legal perspective?

Eric Kelly:

- Florida has the most rigorous standards; 15 states with quasi-judicial rule
- Useful to look at the land
- No evidence can come from the visit
- Staff gives site visit report; commissioners correct or add

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Planning for Sustainable Development

The Staff Report

What needs to go into the staff report?

A small, dark rectangular portrait of a woman with short, light-colored hair, wearing a dark top. The image is partially cut off on the left.

Martha Mason Semmes:

- Background information
- Applicable development standards for review; e.g., for special use permit
- Analysis of application
- Staff Recommendation

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The Staff Report

Any concerns about staff making recommendations?

David Theriaque:

- Prefer staff to make alternate recommendations
- Staff provide analysis of various recommendations
- Discuss possible conditions

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The Staff Report

What facts and evidence should be gathered when there is no staff?

Eric Kelly:

- Consider increasing fees to pay a planner on retainer
- Must have someone verify what's in the application
- Helpful to have planner and attorney create a checklist

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Testimony in Meetings and Hearings

What must the commission consider?

Eric Kelly:

- Do not consider who is applying, who is opposed or in support, how many support or oppose
- Do not rely on information outside the record
- Get staff to disclose information
- Consider the comprehensive plan
- Deal with every criteria for the decision

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Planning for a Sustainable Future

Testimony in Meetings and Hearings

What constitutes substantial competent evidence?

A small, dark, square portrait of a man with short hair and a mustache, wearing a dark suit and tie.

David Theriaque:

- What a reasonable person would use to make a reasonable decision
- Testimony from:
 - Experts in their area of expertise
 - Lay person with personal knowledge

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2013 APV & Environmental Hearings

Testimony in Meetings and Hearings

How can commissioners sort out irrelevant testimony?

Martha Mason Semmes:

- Chair can remind commissioners of criteria for evaluating applications
- Checklists are useful to review in meeting

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Linking to the Plan

How are courts looking for the connection to the plan?

David Theriaque:

- FL: must comply with comprehensive plan
- Statutes can be more restrictive than the plan

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American Planning Association
Intergovernmental Practice

Preparing the Record

How can commissions approach findings and official records?

A small, square portrait of Martha Mason Semmes, a woman with dark hair, wearing a dark top.

Martha Mason Semmes:

- Staff report summary includes findings and alternative draft motions as a starting point
- For zoning boards, motion must include each specific finding
- Applicant deserves more than “no”; commission to explain decision
- Helps create defensible public record

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American Planning Association
Meeting Smart Growth

Preparing the Record

Does the attorney need to draft the motion?

Eric Kelly:

- Motion should come from the floor
- Have a checklist to shape the motion
- Focus on the contested issues
- Listen to both sides, but the evidence resolves the problem

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Preparing the Record

Advice for preparing a proper record for defensible decisions?

 David Theriaque:

- Controversial meetings:
 - Staff meet with attorney to prepare
 - Have attorney draft the findings and attend the meeting
- Everything presented must be introduced into the record and kept
- Courts only look at the written record; supporting materials must be described

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Planning Practice Committee

Preparing the Record

What about long, technical reports?

A small, square portrait of a man with dark hair and a beard, wearing a dark shirt. He is looking slightly to the right of the camera.

Eric Kelly:

- Planning director can summarize
- Call attention to pertinent passages and read important information in oral testimony
- Allow time to read long documents

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Planning Practice and Professionalism

Preparing the Record

Adjourn a meeting before a decision has been reached?

A small, square portrait of a woman with dark hair, wearing a dark top, looking slightly to the right.

Martha Mason Semmes:

- No; option to continue discussion to later meeting
- Statutory deadlines for action
- Appropriate when:
 - Additional research needed
 - New information needs more deliberation
 - Insufficient time to hear all
- Executive session in certain circumstances

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Planning for a Sustainable Future

Preparing the Record

What about executive sessions?

Eric Kelly:

- Not needed unless:
 - Discussing strategy for litigation that has been filed
 - Addressing personnel issues
- In unruly meetings, better to keep the meeting going and reach a decision
- Matter of trust and respect

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Fax: 312-786-6727

E-mail: education@planning.org

Q & A

David A. Theriaque

Martha Mason Semmes, AICP

Eric Damian Kelly, FAICP

David Morley, *question taker*

Carolyn Torma, *moderator*

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The logo for the Lincoln Institute of Land Policy, featuring a stylized 'L' icon followed by the text 'LINCOLN INSTITUTE OF LAND POLICY'.

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Making Motions and Creating a Record

Eric Damian Kelly, FAICP



3/Stockphoto.com, Konstantin Schild

Courts in many states are taking increasingly close looks at local land-use decisions. Judges try to defer to local decisions, but many will no longer accept the simple argument, "We are the government, so trust us." In challenges to local decisions, courts today often ask "How did they reach that decision?" Typically, if the court finds a logical explanation in the record before it, and that explanation conforms generally to statutory guidelines, the court will uphold the local decision. Where the court reads the record and remains puzzled about how the decision was reached, it may well reverse the decision or send it back for further review.

One good way to build a record that effectively tells your story—the story of your commission's consideration, discussion, and resolution of the issue—is through findings of fact. Findings of fact should respond to the statutory criteria for making a particular decision. The following example for a rezoning in Indiana shows the statutory criteria, then follows with a series of questions designed to make a record of the commission's finding or opinion on each criterion.

Statutory Criteria

In preparing and considering proposals under the 600 series (Indiana state statutes relating to local planning), the plan commission and the legislative body shall pay reasonable regard to:

1. The comprehensive plan;
2. Current conditions and the character of current structures and uses in each district;
3. The most desirable use for which the land in each district is adapted;
4. The conservation of property values throughout the jurisdiction; and
5. Responsible development and growth.

[from Indiana Code 36-7-4-503]

Suggested Motions to Make a Record

- The proposed rezoning is (is not) consistent with the comprehensive plan. [Specify particular inconsistencies or acknowledge minor inconsistencies that the commission decides are not critical.]
- The proposed rezoning is (is not) compatible with the character of current structures and uses in the district to which it is being rezoned and those around it. [Specify particular inconsistencies or acknowledge minor inconsistencies that the commission decides are not critical.]
- The proposed rezoning is (is not) compatible with such uses in the district to which it would be rezoned.
- The proposed rezoning will (will not) contribute generally to the conservation of property values throughout the (city/county/town/parish), with particular regard to neighboring properties. [If not, briefly specify why.]
- The proposed rezoning is (is not) consistent with adopted policies and practices for responsible development and growth. [If not, briefly specify why.]

Findings of Fact

This subject has been covered in various education products and publications. For more on the subject, refer to the following:

"Developing a Complete and Effective Record: Part One"

Kimberly Mickelson

The Commissioner, Summer 2006: 3.

"Findings of Fact"

Stephen Sizemore, AICP

The Commissioner, Spring, 2005: 3.

"The Role of Staff in Relation to the Planning Commission"

Vince Papsidero, AICP

The Commissioner, Fall 2004: 1-2.

The Northwestern Indiana Regional Planning Commission has published a "Sensible Tools" handbook for use by local officials. The handbook was written by the author of this article and includes a number of checklists of questions to guide different types of planning decisions. It is available for free download at <http://nirpc.org/transportation/pdf/Sensible%20Tools%20Handbook%20Report.pdf>.

"Legal Issues in Site Plan Review"

Stephen Sizemore, AICP

The Commissioner, Summer, 2004: 3.

"Introduction to the Zoning Board of Appeals"

CD-ROM Training Package, 2007

The program contains a discussion of how to develop findings of fact. The training package is available through APA's PlanningBooks.com www.PlanningBooks.com

Developing a Complete and Effective Record; Part One

Preparing a complete, effective, and accurate record of a planning commission or zoning board's (hereafter referred to as "board") operations is very important. Land development decisions involve individual property rights and are governed by clauses in state and the federal constitutions, as well as by state and local laws. A procedural misstep during the application, public hearing, or deliberation process can result in a decision being legally challenged and possibly overturned. Board members must master the basics of conducting meetings, preparing motions, and creating records. This two-part feature will also discuss the often confusing task of reaching decisions on complex applications, and especially how to make clear and understandable motions that include everything the board wants to require.

The Basics

Every board member should prepare by spending time with the planning staff. Make certain you understand how the processes work. Obtain copies of relevant ordinances and other pertinent materials, such as rules of procedures. Develop a thorough understanding of the state and federal laws that shape the context of your decision making.

An effective record starts with a good agenda. Come to meetings prepared with a firm knowledge of the agenda. Insist on clear and organized agendas. Check to see that you have good rules of procedure. Rules of procedure help the chair maintain order, eliminate confusion, and provide the public with meeting guidelines. The chair should view "the gavel as a friend." Emotions often run high at board meetings. Because legal challenges can be very costly, it is important to maintain order to ensure a clear record of decision. While some attorneys advocate using Robert's Rules of Order for board procedures, these rules can be excessively complicated for a small board. Some basic rules of order will get boards through most matters.

Running the Meeting

The chair first asks for presentations of the items on the agenda. Depending on local rules, the chair

next opens the hearing for public discussion. Third, the chair closes the public discussion, if it was open, and asks for a motion or discussion from the board members with a motion to follow.

On large or complex development applications, it may be daunting to boil everything down to an understandable motion. Don't underestimate the "understandable." Board members must understand what is being voted on. For that reason, avoid motions stated only in the affirmative. If you want to vote to disapprove an application, state the motion as "I move to deny...."

How do you summarize and make a clear motion? A substantive, or main, motion will generally state a definitive action: approval or denial. It's simple when the motion is to approve. For example, a subdivision plat meets all requirements of the ordinances and state law. The motion is "Move to approve the application for Greenacres Subdivision as presented."

For complex motions, the challenge is different. If a rezoning request for 200 acres has multiple district changes, uses, and project phases and the hearings and discussions have gone on for hours in several sessions with neighboring residents packing the meeting room and exceeding its capacity, your inclina-



1. "Move to..." and then describe the action (approve, disapprove, or approve with the following conditions).
2. If the motion has conditions, changes, or other recommendations, state the conditions and the reasons for them.
3. A main motion must be seconded.
4. Main motions may be amended. Amendments may be "friendly," that is, incorporated by the board member who made the motion into the original motion and approved by the person who seconded the motion. Or they may be rejected from the main motion, and in that case, the amendment must be voted on separately.
5. Any board member may ask to divide a motion. If the motion contains conditions, for example, members may consider each condition separately. Take care so that what remains is really an effective outcome, and does not contradict itself. This is also true for amendments.
6. The main motion is restated for the record.
7. The chair calls for a vote on main motion. The vote is recorded in the record. □

tion is to approve with a long list of conditions. In this case, the staff or advising attorney should assist you in stating the motion. If you need time to prepare the motion, especially to explain conditions or reasons, the chair should call a recess, or if there is time, table the item to another meeting. (Look for more discussion of this in the second article.) Similarly, if you feel the staff report is not clear, or the information presented by all parties combined is not sufficient to enable you to make a good decision, ask staff to prepare additional information or to bring back answers to specific questions. You may have time restrictions on approval of certain projects, such as subdivision plats, so be mindful of those limitations.

The Elements of a Good Motion

The board chair runs the meeting and does not make motions or vote.



Peter Wilhelm

Findings of Fact

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Unless the commission expressly states these links, its decision is left unexplained. The parties involved and the public are likely to perceive the decision as irrational, arbitrary, and unfair. If the decision is challenged, a court will look first for findings of fact in the record. If it sees none, or if the findings do not support the decision, the court will almost surely invalidate the decision or order the commission to make adequate findings of fact. The lack or inadequacy of findings of fact is one of the most common reasons courts overturn commission decisions.

When Are Findings of Fact Required?

Generally, findings of fact are required in any discretionary land use decision that applies a law, regulation, criterion, or standard to a specific set of existing facts, as determined from evidence presented at a hearing. These are commonly known as adjudicative, quasi-judicial, or administrative decisions. They include decisions on applications for conditional or special use permits and variances, and may include decisions on requests for subdivision and site plan approvals. In some states, they may include rezoning decisions.

What Are Findings of Fact?

Findings of fact are difficult to define (and few statutes or courts do so). They are not mere recitations of the required conclusions set out in the development regulation. But they

remember grade school tests? You connected items in column (a) to those items in column (b) with which they were most closely related. That's what findings of fact do--link (a) each conclusion a commission must make to reach a decision to (b) those facts presented the commission that support the conclusion.

are more than restatements of factual evidence presented, for they must reflect the commission's determination, and often its choice, of:

- What the actual facts are--i.e., What evidence is or is not credible? Which of conflicting evidence is the more credible?
- Which facts relate to and support the conclusions the commission makes. The commission may approve an application, deny an application, or impose conditions on approval; and
- How those determined facts reasonably lead to the required conclusions. Although findings of fact need not fully explain or describe how the stated facts support a conclusion, they must at least state enough to show a logical connection between the facts and the conclusion. For example, where approval of a special use permit requires a determination that the proposed development will not endanger the public health or safety, one finding of fact might refer to a traffic study's conclusion that the development will generate a volume of traffic less than the traffic capacity of the adjacent street, and thus can be safely accommodated by the surrounding road system.

How Are Findings of Fact Made?

One process is for the commission to make a final decision and ad hoc findings of fact right after receiving and discussing evidence. This can be time consuming, however, and often results in incomplete and ambiguous findings of fact.

Alternatively, the commission might hear and discuss the evidence, and make a provisional decision to approve or deny the application, but only summarize the factual findings and evidence relied on to reach the required conclusions. It then directs the staff to draft a resolution detailing conclusions and findings of fact consistent with the commission's discussion and summary. It is then submitted for approval at the commission's next meeting. This method provides the best opportunity for well-drafted findings of fact, but the delay can be a problem if the law requires the final decision within a set time period. At times, commissioners may also inadequately summarize the evidence and factual findings supporting their decision, and then unfairly rely on staff to "make it right."

Using a third method, the staff prepares a report that includes a resolution of approval or denial with well-drafted findings of fact. The commission then adopts, modifies, or at least uses the report as a template for coming up with alternative findings of fact. This allows a quick

decision and eases the commission of the burden of drafting findings on the spot. But this may not work well if the hearing presents unanticipated, new evidence, or if the commission substantially disagrees with the action and findings recommended by the staff.

No matter which method is used, commissioners should familiarize themselves with the required conclusions applicable to a particular decision. They should consider what aspects of development each conclusion implicates, and how. They should also pay close attention to all the evidence presented them, whether as part of the application, impact studies, staff report, or hearing testimony. This makes it easier for commissioners to evaluate "material" and "substantive" evidence and distinguish it from irrelevant and insignificant evidence, or mere opinion.

Do Findings of Fact Have to Be Written?

In most states, decisions requiring finding of fact must be in writing, either separately, in a resolution, or as part of the minutes of a meeting. Even if not required to be written, findings of fact should be written, to minimize any confusion about what the commission decided and why. □