



Making Ethical and Defensible Planning Decisions

**Welcome to the Plan
Commission and BZA**

Quarterly Land Use Update

March 2, 2009

**Making Ethical and Defensible
Planning Decisions
Purdue Land Use Team
Land Use Update**

January 28, 2009

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Overview



- Decision Making Procedures
- Findings of Fact
- Ethical Issues and Problems

Know Your Job

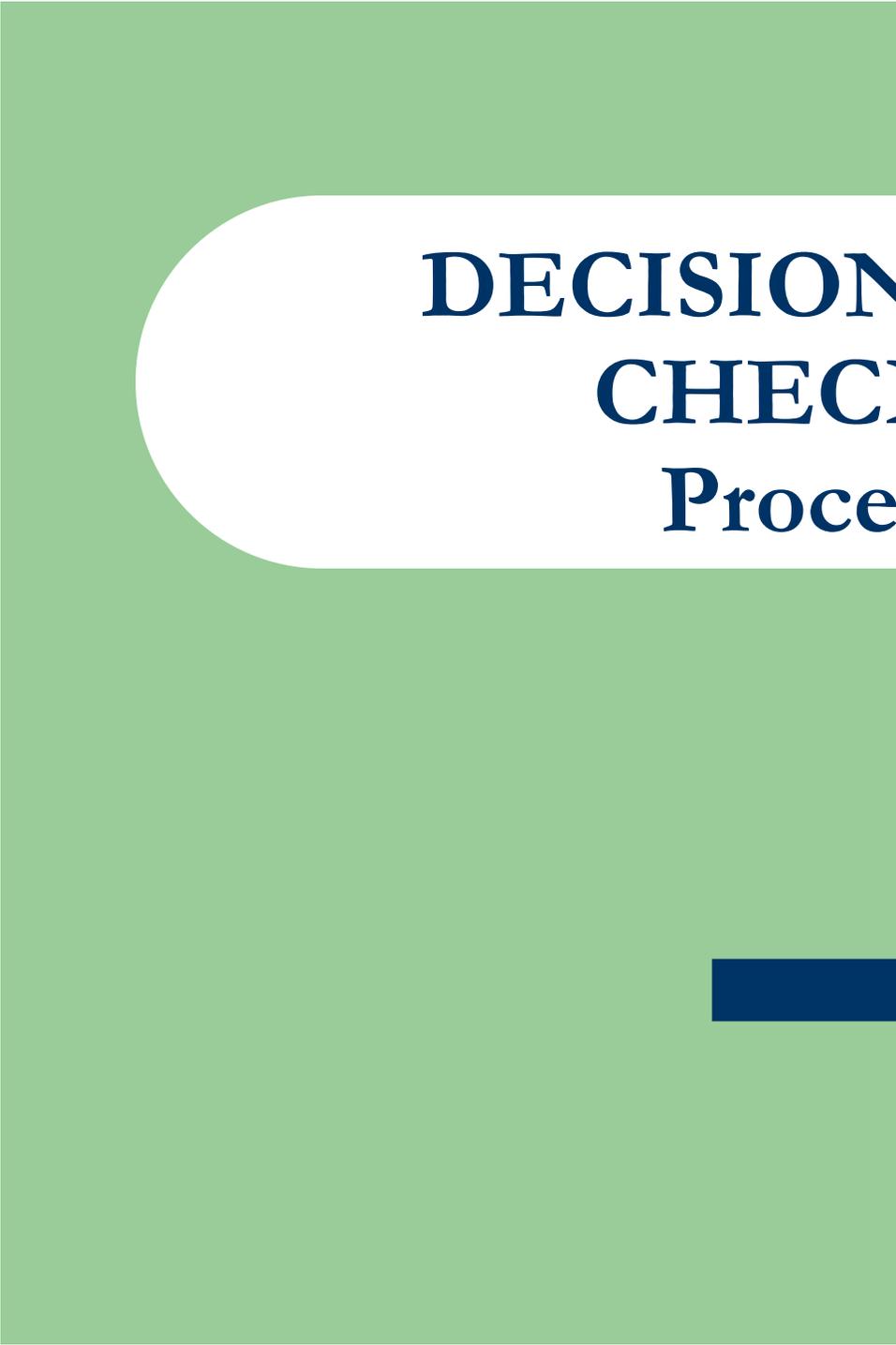
- You are part of a legal system of regulating private property
- Your decisions affect people's lives and property value
- We take that very seriously
- You have clear authority to do so, but there are rules
- People are **due** certain **process** safeguards in how you conduct your business

Know Your Job

- Your job is not to listen attentively at meetings and then decide whether or not you like what is being proposed
- Your job is to take testimony that allows you to determine if certain standards or requirements are met
- That means that you must direct your meetings to getting relevant information

Know Your Job

- Your job is also to plan
- While you have responsibility to process development requests, you must also be proactive
- You are not “development processing” commissions
- Comprehensive plans, area plans, topical plans
- How to carve out time to plan
 - Regularly scheduled work sessions
 - Annual work plans
- If the planning commission is not planning, then who is?



**DECISION MAKING
CHECKLIST:
Procedures**



Elements of Good Decision Making

- Notice
- Opportunity to Be Heard
- Full Disclosure
- Unbiased Decisions
- Timely Decisions
- Complete Records
- Clear Rules
- Defensible Findings
- Conclusions based on Findings

Beyond Legal

- Make sure that your procedures are legally defensible
- Consult with legal counsel when questions arise
- But, just because certain actions are legal does not mean they are good decision making

Notice

- Adequate and timely
- Should be reasonably calculated to apprise interested parties of a proposed action.
- Must allow time for all parties to prepare
- The average person must be able to understand the notice
- Legal requirements are *minimum* standards – you can exceed them

Opportunity to be Heard

- All parties must have an opportunity to be heard.
- All public hearings must be open to the public.
- How can you ensure opportunity to be heard with large crowds?

Clear Rules to Control the Meeting

- How can you ensure opportunity to be heard with large crowds?
 - Announce procedure
 - Sign in sheets
 - Time limits
 - Speakers recognized by Chair
 - Have a place for speakers to come to
 - Encourage testimony related to standards
 - Discourage duplicative testimony
 - Can prohibit irrelevant or vexatious testimony
 - Receiving written statements

Full Disclosure

- All parties must have full access to information, statements, and evidence relied upon by decision makers.
- Ex parte communications should be avoided.
- Avoid acting on information received at the last minute.

Unbiased Decisions

- The decision maker should be clear of bias or prejudice.
- Conflicts of interest must be identified and depending on the conflict, the commissioner or board member should be prepared to leave the meeting and not participate in discussions.

Timely Decisions

- Establish set time limits
- Decisions should be made within a reasonable time period.
- The decision maker needs to avoid having the process used as a delaying tactic.

Complete Records

- A full and clear record of the proceedings must be kept.
- Should include a record of the proceedings along with an evidence that is offered and relied upon by the decision makers.
- A non-involved party should be able to track the process in the future

Findings of Fact

- What are they?
 - Findings of Fact are a citation of specific facts about the application that the board finds to be true and which led to its conclusion that the application conforms or fails to conform to applicable criteria.

Findings of Fact

- Principles of Findings
 - You are not committees of compassion
 - Your decisions must be based on facts
 - The facts must address the standards
 - The burden of proof is on the applicant
 - Information is not the same thing as facts
 - Weighing of the evidence is your responsibility

Findings of Fact

- Principles of Findings
 - You do not have to believe everything you hear
 - Opinions without a factual basis are without merit
 - Public sentiment is not a basis for decisions
 - You can rely on personal knowledge, but make it a part of the record

Findings of Fact

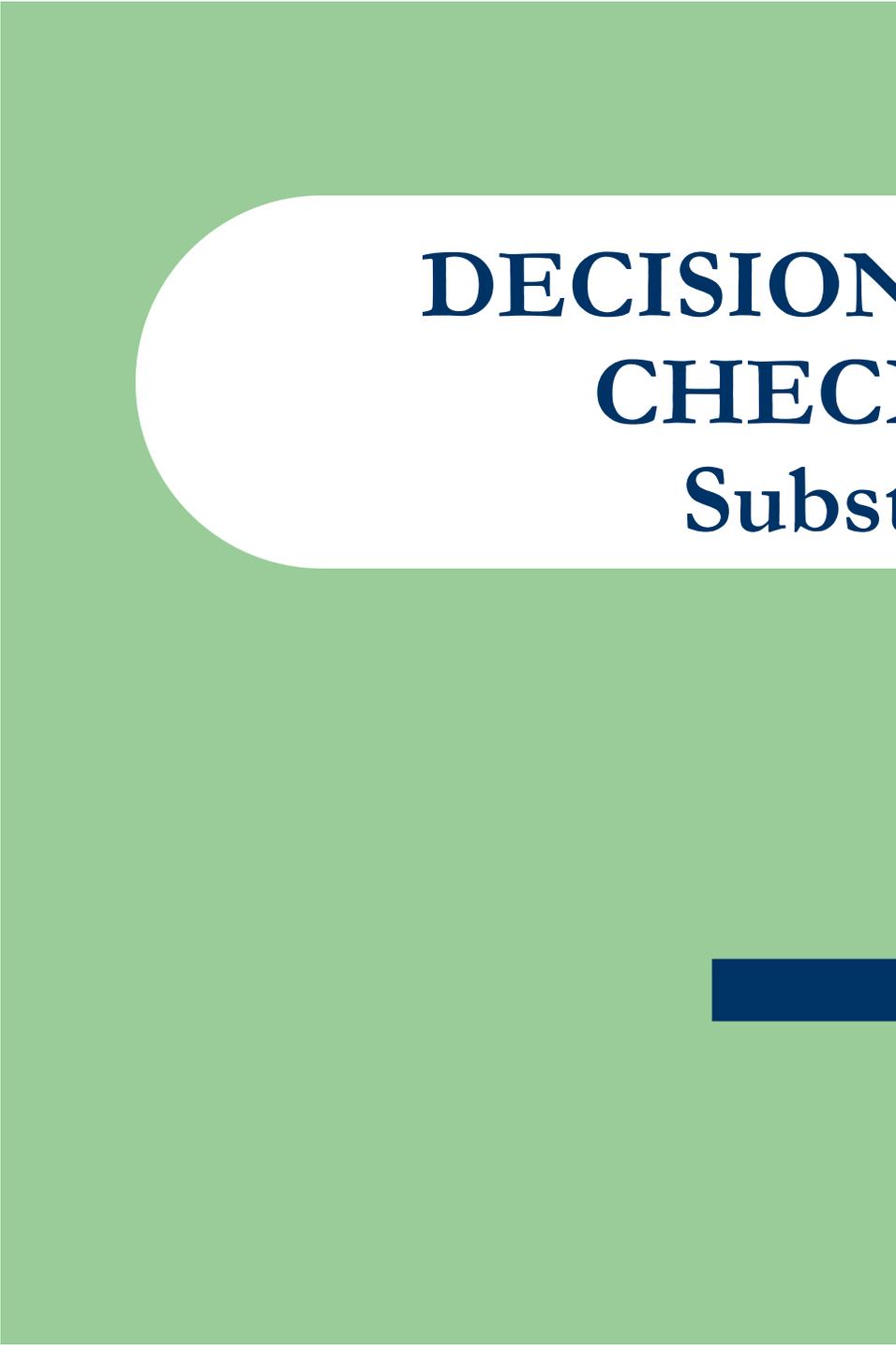
- Tips for Finding the Findings
 - Use the application process to put the burden on the applicant
 - Staff - Your first line of defense
 - Staff reports
 - Pre-application meetings
 - Announce the rules at the beginning of the meeting

Findings of Fact

- Encourage factual testimony
- Have the standards in front of you
- Ask questions designed to get evidence related to standards.
- Keep your records neat and complete
- Keep the evidence phase separate from the deliberation phase
- Deliberate the facts and standards
- Assess compliance explicitly

Findings of Fact

- Make careful notations with stated reasons
- Use minutes carefully
- Have a “package” of application, records, staff report, motion and minutes
 - Lists the record
 - Lists the standards
 - Reflects the weighing of the evidence
 - Determines compliance
 - Clearly states the decision with any condition



**DECISION MAKING
CHECKLIST:
Substance**



Does the regulation advance a legitimate public interest?

- Many zoning regulations have the intent and effect of accomplishing results that are not legitimate public policy objectives.

Is the regulation a reasonable way to accomplish that public interest?

- There may be many ways to accomplish a certain objective, but one must balance public interest and private interest. The particular regulatory approach should be reasonable in light of this balancing.

Can the relationship between the regulation and public interest be documented?

- A regulatory body should be able to show how the particular zoning regulation advances the public interest. Typically, this is best accomplished by ensuring that zoning decisions are made in accordance with a land use plan.

Does the regulation allow a reasonable economic use of property?

- The public interest being served by the regulation must be balanced with the private interests such that there is some reasonable use of the property possible under the zoning regulation.

Is the regulation fairly applied?

- Generally speaking, similarly situated property should be regulated equally. If not, care should be taken to document legitimate reasons as to why this is not the case.

How to Satisfy this Checklist?

- Through planning
- With a plan and supporting implementation tools, i.e. zoning
- The plan sets out the public interest goals, reasonable ways to accomplish them through objectives, and defensible implementation with zoning that is tied to the plan

Ethical Principles Overview

- Serve the public interest
- Provide notice of actions
- Provide full, clear, and accurate information
- Give citizens a meaningful opportunity to participate
- Be fair and unbiased
- Conduct public business in the public
- Disclose personal interests
- Do not abuse the power of public office
- Expand choice and opportunity

Problem #1

- Before a public hearing on a controversial zone change, one of the partners of the development company requesting the zone change introduces himself to you. You realize that your spouse has done accounting work for this individual in the past. Moreover you know your spouse hopes to land more work from this person in the future. **What should you do?**

Problem #1 - Response

- Declare an actual conflict of interest and recuse yourself from the hearing.
- You should leave the room during the entire hearing.

Problem #2

- At a local charity fund raising event, you are approached by the president of a homeowner's association from a neighborhood where a developer is seeking site plan approval for the construction of a shopping center. The individual is an old friend who wants to talk to you about what the community believes will be the impacts of the shopping center on the community. She begins to describe the traffic, storm water runoff, litter, and other problems that they anticipate.
- **How should you react?**

Problem #2 - Response

- Politely remind the person that you cannot discuss the application or any details about the development outside of the hearing.
- If the person continues to press the issue, you should excuse yourself from the conversation.
- At the hearing, disclose the contact as ex-parte and provide details about the conversation. Be prepared to recuse yourself if you have become potentially biased as a result of information you received.

Problem #3

- Prior to joining the Planning Commission, you were active with a homeowner's association which was concerned with the protection of a neighborhood. You successfully appealed decisions of the Commission that affected that neighborhood in the past.
- **Should you excuse yourself from voting on issues involving the district?**

Problem #3 - Response

- Yes.
- Unless you can guarantee the members of the Commission and any person with an interest in the proposed action that you are free of bias and will not benefit in any way from a decision to approve or deny the request.
- If there is any doubt, protect the integrity of the Commission and recuse yourself.

Problem #4

- You have a fellow planning commission member who appears before the planning commission either as an applicant on behalf of his own real estate developments or as an agent for an applicant.
- **How do you respond to this?**

Problem #4 - Response

- The appearance of impropriety is very high, as a sitting Commissioner is likely to have greater influence over other Commissioners than a member of the general public.
- Commissioners generally surrender their right to act as an advocate before the body on which they serve.
- A Commissioner should consider resigning from the Commission prior to acting as an applicant or agent for any matter to be considered by the Commission.

Problem #5

- In celebration of your fifth anniversary on the planning commission, a local developer sends you complimentary basketball tickets.
- **How do you handle this?**

Problem #5 - Response

- Kindly thank the developer for the gesture but return the tickets and remind the developer that you cannot accept gifts.
- Be prepared to announce the gift before the Commission the next time that developer makes an application.

Problem #6

- On your Commission, you have a Commission member who is regularly absent from Commission meetings. When he is present, he is unprepared and unproductive.
- **How do you handle this?**

Problem #6 - Response

- Commission members are expected to attend regularly scheduled meetings as part of their duties of office.
- If a Commissioner is unable to attend more than two meetings in a row, or more than **XXXXX** meetings in a calendar year, he/she should consider resigning from the Commission.
- If a Commissioner is unprepared he/she should abstain from voting on the issue.

Problem #7

- You are on a planning commission that is considering revisions to your zoning code. During the course of the meeting, representatives of a housing advocate group argue that the minimum lot sizes contained in the regulations will artificially drive housing costs up. On the other hand, you realize that there is a segment of your community opposed to affordable housing.
- **How do you balance these interests?**

Problem #7 - Response

- Oregon Statewide **Goal 10 (To provide for the housing needs of citizens of the state)** states:

Buildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density.

- Every city in Oregon has a responsibility to have land available to accommodate the housing needs of all of its citizens. “Less desirable” types of housing should not be confined to “back of the bus” locations.

Problem #8

- You were appointed to your Commission because of your strong relationship with the Mayor. The Mayor now perceives you as an ally on the Commission, often calling you to discuss issues to make sure you have the “Mayor’s perspective”.
- **How do you handle this?**

Problem #8 - Response

- Any discussion with the Mayor about an upcoming application may be considered an ex-parte contact.
- Planning Commission members are held to a higher standard for ex-parte contact than City Council members, who are expected to listen to citizen concerns outside of a Council meeting.
- For the record, this holds true for other Commissioners as well. DO NOT discuss an upcoming application with or attempt to influence any other Commissioners outside of a public hearing.



Questions

Email:

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More Information Sources Purdue Land Use Team

Publications, programs, etc. at Web Site

www.ces.purdue.edu/landuse/

Indiana Planning Association

Citizen Planner Training Manual

<http://www.indianaplanning.org/citizen.htm>