

INDIANA CITIZEN PLANNER'S GUIDE

a publication of
The Indiana Planning Association,
a chapter of
The American Planning Association



This booklet is one in a series of publications of the Indiana Planning Association to be used as training materials for citizen planners: plan commission members, board of zoning appeals members, neighborhood organizations, and citizen committees. These materials are intended to supplement publications such as *Planning Made Easy* and *The Citizen's Guide to Planning*. IPA's materials contain information specific to Indiana. Users of these guides are strongly encouraged to read other, more general books on planning and zoning.

The information contained in these booklets are intended for informational purposes only and are not to be considered legal advice.

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In the Citizen Training Manual Series:

- Part 1 Plan Commission Basics**
- Part 2 Board of Zoning Appeals Basics**
- Part 3 Avoiding Pitfalls**
- Part 4 Communications**
- Part 5 Rules of Procedure**
- Part 6 Ethics**
- Part 7 Comprehensive Plans**
- Part 8 Zoning Ordinances**
- Part 9 Subdivision Control Ordinances**
- Part 10 Site Plan Review**

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Indiana Planning Association's Citizen Training Committee

K.K. Gerhart-Fritz, AICP, Chair

Teree L. Bergman, FAICP, Past Chair

Amy Schweitzer, AICP, Past Chair

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Part 1: Plan Commission Basics

-- by Teree L. Bergman, FAICP

Part 2: Board of Zoning Appeals Basics

-- by K.K. Gerhart-Fritz, AICP

Part 3: Avoiding Pitfalls

-- by K.K. Gerhart-Fritz, AICP and Gene Valanzano

Part 4: Communications

-- by Gene Valanzano

Part 5: Rules of Procedure

-- by Cynthia A. Bowen, AICP

Part 6: Ethics

-- by K.K. Gerhart-Fritz, AICP

Part 7: Comprehensive Plans

-- by Teree L. Bergman, FAICP

Part 8: Zoning Ordinances

-- by Timothy J. Porter, AICP and Teree L. Bergman, FAICP

Part 9: Subdivision Control Ordinances

-- by Jonathon Isaacs, AICP and Amy Schweitzer, AICP

Part 10: Site Plan Review

-- by Robert S. Cowell, Jr., AICP

INDIANA CITIZEN PLANNER'S GUIDE

Part 1: Plan Commission Basics *by Teree L. Bergman, FAICP*

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**Other parts of the Indiana Citizen Planner's Guide can be downloaded at
www.indianaplanning.org/citizen.htm**

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INDIANA CITIZEN PLANNER'S GUIDE

PART 1: PLAN COMMISSION BASICS

In this Part. . .

- *What plan commissions do*
- *How plan commissions are organized*
- *How to run a meeting and conduct a public hearing*
- *Making decisions*
- *Conflict of interest*

What Plan Commissions Do

In Indiana, as elsewhere, most plan commissions devote much of their time to considering petitions which require commission recommendation or decision. This guide offers advice on how to make those recommendations and decisions without losing sight of the commission's broader purpose and how to function effectively within the law. Serving on a plan commission is a difficult job and an important responsibility. Doing the job well involves more than showing up at meetings. It means learning about planning, about your community, listening to citizens, visiting sites involved in cases before the commission, and perhaps serving on subcommittees.

The primary duty of the plan commission is to develop and recommend to the legislative body a plan for the future of the community. This plan should form the basis for the commission's decisions and recommendations (see *Part 7 - Comprehensive Plans*). Unfortunately, few plan commissions succeed in making the overall plan their top priority. Constant pressures from property owners and developers command the commission's attention, and most meeting time is spent making recommendations on rezoning requests and decisions on subdivision proposals. Many commissions also find it difficult to adhere to the plan when they are confronted with a hearing room full of people advocating a position inconsistent with the plan.

Some commissions confuse the zoning ordinance with the plan, but the zoning ordinance is distinct from the plan. In Indiana, as in most other states, the law requires the community to adopt a plan *before* it adopts a zoning ordinance. This provision is sensible; the community should not adopt regulations until its citizens have decided on the goals they want to accomplish with those regulations.



IC 36-7-4-201

In the absence of clearly defined goals, we are forced to concentrate on activity and ultimately become enslaved by it.

- Chuck Coonradt



IC 36-7-4-601

Under Indiana law, plan commissions are responsible for the following:

- Preparing a comprehensive plan.
- Preparing a zoning ordinance and a subdivision control ordinance
- Making recommendations to the legislative body on proposals to amend the text of the zoning ordinance or subdivision control ordinance.
- Making recommendations to the legislative body on proposals to amend the zoning map (rezonings).
- Approving or denying proposals to subdivide land, based upon compliance with the subdivision control ordinance.
- Approving development plans.
- Assigning street addresses.



IC 36-7-4-405

City, town, and county councils, county commissioners, utility boards, solid waste boards, emergency preparedness boards, drainage boards, school boards and others often ask plan commissions for advice or recommendations on other matters. The list below includes typical subjects for plan commission consideration:

- Annexations
- Utility hook-ons and extensions
- Economic revitalization areas and tax abatement
- Tax policy
- School districting
- Extension, improvement, and abandonment (vacation) of public rights-of-way
- Neighborhood revitalization
- Locations for new public facilities
- Environmental protection



Exercise: Give reasons why your plan commission might be asked for advice on the items listed to the left. Give reasons why the commission would not be asked. Think of three other topics which the plan commission should consider in your community.

How Plan Commissions Are Organized

Types of Plan Commissions

There are two types of plan commissions available to most communities throughout Indiana: *Area* and *Advisory*.

There are two other types of plan commissions in Indiana. *Metropolitan* plan commissions are available to only three counties in Indiana (Marion, Delaware, and Vanderburgh), and a *Joint District* plan commission is available to only one county (Bartholomew). Basics on these plan commissions are not covered here.



IC 36-7-4-101
IC 36-7-4-102
IC 36-7-4-103

Laws governing area and advisory plan commissions are different. Those using the Indiana Code should check the applicability of a particular statute to the local plan commission.

Area plan commissions are cooperative efforts between a county and at least one municipality within the county. In jurisdictions using the area planning law, one commission serves the county and all municipalities that choose to participate. The area plan commission is a unit of county government, staffed by an executive director and any other employees included in the annual budget. Area jurisdictions are permitted and encouraged to adopt unified plans and ordinances: a single comprehensive plan, a single zoning ordinance, and a single subdivision control ordinance can apply to the county and to all participating municipalities. In a county having an area plan commission, a city or town that does not participate in the area commission may not exercise planning authority outside the corporate limits of the municipality. Nonparticipating municipalities may, however, form advisory plan commissions with authority for planning within the city or town.

Advisory plan commissions serve a county, city, or town. In Indiana, municipalities are empowered to plan for an area up to two miles outside the corporate boundaries. In counties with no comprehensive plan, municipal plan commissions may assume this authority from the county. In a county with a comprehensive plan, the municipal plan commission must request this authority from the county legislative body. (If municipal services are provided to the "extra-territorial area, the municipal plan commission may assume this authority from the county.) The county must adopt an ordinance granting this authority to the city or town. When a municipal plan commission assumes extraterritorial jurisdiction, it must file with the county recorder a map and description of the territory involved.



IC 36-7-4-205

Another option is available to cities and towns in counties with advisory plan commissions: the municipality may designate the county plan commission as the municipal plan commission. The city or town may then contract with the county to pay the county a proportionate share of the costs of planning services. This procedure is most often used by towns which are too small to adequately maintain a planning program. In these cases, residents of the city or town are eligible for appointment to the plan commission.



IC 36-7-4-410

Membership

The make-up of the plan commission is specified in the Indiana Code. The number of commission members varies with the type of commission (advisory, area, metropolitan, joint district). Memberships are of two types: citizen members, who do not hold any elective or appointive office in municipal, county, or state government, and members who are appointed to represent certain specific interests. Examples of the second type are the city engineer, the county surveyor, the county extension educator, and members of the park board, city council, county commissioners, and board of works. Citizen members are appointed "because of the member's knowledge and experience in community affairs, the member's awareness of the social, economic, agricultural, and industrial problems of the area, and the member's interest in the



IC 36-7-4-207
IC 36-7-4-208
IC 36-7-4-209

development and integration of the area."

There also are membership limitations based upon political affiliation. For example, if the mayor appoints five citizen members, no more than three may be of the same political party. This limitation does not preclude appointment of those who are not affiliated with a political party. For example, the mayor could appoint two Democrats, two Republicans, and one independent. In practice, nearly all those appointed do have a party affiliation, but it is not required.

Membership terms are four years, except for a new plan commission, where some initial terms are shorter to provide for staggered expiration dates, or for a member appointed to fill an unexpired term. Terms expire on the first Monday in January, except for those members appointed because of membership in another body (city council, park board, county commissioners, etc.); those members serve for four years or until the expiration of the term of office on that body. Any of these bodies may, at its first meeting in any year, appoint a different person as the representative.

Each member should know the appointing authority and the expiration date of his or her term. The commission should keep careful records regarding appointments. If appointments are not made in accordance with the legal requirements, the commission's decisions could be invalidated. A court could rule that the commission is illegally constituted and vacate every decision that commission has made!

Officers

Each plan commission must elect officers annually. Indiana law requires the commission to elect a president and a vice president. This election must be held at the first regular meeting of each year. The commission also may appoint or elect a secretary. The secretary need not be a member of the commission, and in many cases, the secretary is an employee of the municipality, county, or plan commission.

Administration

In order to carry out its functions, the Indiana law requires the plan commission to do the following:

- Adopt rules for the operation of the commission.
- Keep a complete record of proceedings.
- Adopt a seal.
- Assume responsibility for maintaining files and records.
- Certify all official acts.

If the commission has a staff, the staff will handle many of the administrative functions, such as preparing meeting minutes and maintaining files. Many commissions utilize staff from other departments, such as engineering, surveyor's office, or utilities

Quick Quiz: What type of plan commission does your community have? How many members serve on the commission? Who appoints them? Who appointed you? When does your term expire?



IC 36-7-4-217
IC 36-7-4-218

Quick Quiz: Who are the officers of your commission? When were they elected?



IC 36-7-4-401

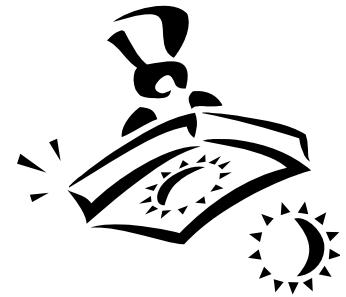


department to provide technical assistance. Sometimes these staff members meet regularly as a committee (see page 8).

If there is no staff, the commission must find a reliable means of handling its day-to-day operation. There may be a municipal or county office that can keep files and records, accept petitions, prepare agendas, etc. The commission may need to appoint one or more of its own members to perform some of these duties. All of the commission's files and minutes are public records, and they must be available to the public to review. The municipality or county is required to provide "suitable offices for the holding of meetings and for preserving the plans, maps, accounts, and other documents of the commission."

The commission may purchase a seal from an office supply company. There are standard designs to choose from, and the name of the commission will be added. It is a good idea to use the commission's full name on the seal, to make it easy to identify the commission. For example, the seal should say, "Blue County, Indiana, Advisory Plan Commission," or "Blue County, Indiana, Area Plan Commission."

The commission also needs to select someone who will certify official actions of the commission. Some commissions require only one signature, such as the secretary's; others require the president and the secretary. If the commission is concerned that each official act be verified by more than one person, two signatures should be required. For most plan commissions, duplicate verification is not needed, and one signature will suffice. One signature is simpler, especially if plans or final copies of minutes are signed at a time other than during the commission meeting.

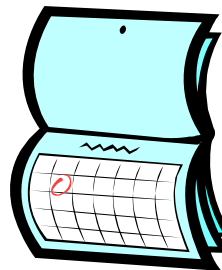


Quick Quiz: Who certifies your plan commission's actions? What does your official seal look like?

Rules of Procedure

Every plan commission must have rules of procedure. Indiana law requires these rules, and a good set of rules will make the commission's job easier. Below is a list of subjects typically covered in the commission rules of procedure:

- Meeting times
- Duties of officers and staff
- Establishment of committees
- Order of business
- Application procedures
 - Filing deadlines
 - Eligible applicants
 - Filing fees
 - Amending applications
 - Withdrawing applications



- Refiling after denial or withdrawal
- Definition of interested parties
- Notice requirements
- Hearing procedures
 - Order of testimony
 - Form and admissibility of evidence
 - Time limits on testimony
 - Sign-in requirements
 - Administering oaths
 - Cross examination of witnesses
 - Orderly conduct
- Continuances
- Conflicts of interest
- Communications outside of meetings
- Decisions
 - Approvals/favorable recommendations
 - Denials/unfavorable recommendations
 - No recommendation
 - Findings of fact
 - Dismissals
- Commitments and conditions
- Amendments
- Suspension of rules



Clear rules will be enormously helpful to the commission, to applicants, and to the public. While it is common for commissions to adopt Roberts' Rules of Order for the conduct of meetings and hearings, this usually is not a good idea. Roberts' Rules are extremely complicated, establish highly formal processes which make discussions difficult, and few people know these rules well enough to use them accurately. When plan commission decisions are challenged in courts, the first line of attack is the rule book. Cases can be remanded back to the commission for reconsideration if the rules aren't followed. A trained parliamentarian is needed to properly administer Roberts' Rules.

Rules are discussed in detail in *Part 5 - Rules of Procedure*.

Application Procedures

The commission needs to establish policies and procedures for accepting and processing applications. If the commission has a staff, the rules can delegate some or all of this responsibility to the employees. The commission needs to decide who is eligible to file applications for subdivisions, rezonings, and other matters. As a minimum, the owner of the property should be required to sign. The staff or commission should verify that those who sign an application are actually the owners as listed

in the county recorder's office. Often there are multiple owners, and they do not always agree. For example, there may be a husband and wife who both own property and are involved in a divorce or separation agreement. One spouse's signature in such a case is not enough. Many times, property is to be developed by someone other than the owner. The plan commission may want signatures of the developers as well as the owners.

Plan commissions need to have sufficient information to enable a reasoned decision. The commission should decide what information is necessary and should accept only applications which include that information. Application forms with checklists are useful. Incomplete applications should not be placed on the commission's agenda for hearing or decision.

Filing deadlines also should be established. These deadlines need to provide enough time for legal notices and for review.

Committees

Plan commissions are empowered to delegate some authority to an executive committee and to appoint citizens' advisory committees. Committees can be extremely helpful to the plan commission. They can expedite business, and they can provide a perspective from the broader community.

Executive Committee. The executive committee, which must have at least three and no more than nine members, may act in the name of the commission. Sometimes it is difficult to achieve a quorum of the entire commission for special meetings. The committee can make decisions on time-sensitive issues, and it can handle administrative matters without involving the larger group. The law requires a vote of the entire plan commission to establish an executive committee and to adopt the rules governing its operation. As an added protection, the law also provides that a person voting in the minority on any executive committee action may appeal the decision to the full plan commission. The executive committee cannot decide matters requiring a public hearing and a majority vote of all of the members of the commission. Examples of matters the executive committee could handle include personnel matters, recommendations to the legislative body on annexations or right-of-way vacations, and time extensions for applications or projects.

Plat Committee. Indiana law allows the establishment of a plat committee to decide simple subdivisions. This committee is discussed in *Part 9 - Subdivision Control Ordinances*.

Citizens Committees. Many plan commissions appoint committees of citizens to study specific issues and make recommendations to the commission. The range of possible topics is nearly unlimited. Common topics for study include economic development, housing, and protection of farmland. Creating a committee with diverse representation can also lessen the hostility surrounding controversial topics. The committee can



A committee is a group that keeps minutes and loses hours.

- Milton Berle

consider a variety of viewpoints and offer a reasoned recommendation to the commission. Many times opponents of an idea will be proponents after they are given an opportunity to participate in formulating recommendations.

Technical Review Committees. These committees can provide advice to the plan commission on issues requiring technical expertise. The most common type of technical review committee is one which evaluates subdivision proposals before they go to the plan commission. Subdivision technical committees are discussed further in *Part 9 - Subdivision Control Ordinances*. Plan commissions may want to appoint these committees for other types of advice, such as proposals for fill or construction in flood hazard areas, landscaping, drainage, waste disposal, erosion control, traffic impacts, etc. It can be extremely useful for the commission to have access to advice and information from persons who have special expertise.

How to Run a Meeting & Conduct a Public Hearing

It is important that commissions understand the difference between a public meeting and a public hearing. With a few exceptions (see *Part 3 - Avoiding Pitfalls*), all plan commission meetings are public meetings, but not every item of business requires a public hearing. A public meeting is simply a meeting which is open to the public; the public may attend and observe, but the audience does not have to be allowed to participate or make comments. A public hearing is a formal proceeding to receive public comment on a particular matter, such as a rezoning or a comprehensive plan.

Some commissions allow public comment on any agenda item at any time during the meeting; others allow such comment only during formal public hearings. There are advantages and disadvantages to both practices. Allowing unrestricted public comment makes the meetings less formal and gives the audience more of an opportunity to participate in the planning process. At the same time, it can unnecessarily drag out the meeting, increase dissension, make meetings less orderly, and diminish the ability of commission members to discuss issues among themselves.

Plan commission meetings and hearings can be productive or non-productive, efficient or a waste of time, orderly or chaotic. The choice is the commission's to make. This section offers some practical advice.



Meeting Time and Place

The meeting time should be as convenient as possible for all involved.

There are many factors which enter into this decision. Most commissions hold evening meetings. However, no one time suits everyone. It is recommended that the commission choose a regular meeting time, but the commission should be flexible enough to change the time in a particular situation, or to hold more than one meeting on the same topic to give ample opportunity for all those who want to participate.

A suitable meeting room will be conveniently located, accessible to persons with disabilities, large enough, and will have good acoustics. For some issues, it can be desirable to hold meetings in more than one location or to choose a site in a particular area or neighborhood. A new comprehensive plan or zoning ordinance affects the entire community, and in a jurisdiction with a large geographical area, multiple meetings in various locations afford a better opportunity for participation. If the commission is considering a new neighborhood plan, the public meetings should be held in the affected neighborhood, if possible.

Sometimes the commission may need to change the regular meeting place to accommodate an exceptionally large crowd. The city or town hall may be big enough for routine meetings, but a hearing on a new zoning ordinance or a landfill location may need to be held at the high school auditorium. Some commissions have found a need to make a provision for overflow crowds, because the number of attendees regularly exceeds the capacity of the room. Speakers and television monitors can be used in the hallways or in other rooms, to increase the capacity.

Chairing the Meeting

It is essential that the president, who chairs the meeting, understands how to make meetings run smoothly. The chair needs to fully understand the commission's rules and needs to follow them carefully. The chair should have a gavel and should not be afraid to use it, not only to open and close meetings, but to keep order.

The agenda should be followed, and discussion should not be focused on extraneous issues. Comments on each agenda item should be limited to relevant issues. If the plan commission has no authority over the color of a building, the chair should not entertain questions from commissioners or the public about the color of the building, and any comments about the color should be ruled out of order. Members of the audience frequently want to discuss issues that are not applicable to the plan commission's role. If the chair allows this discussion, the audience is misled into believing the commission does have authority in those matters.

The Chair should have a regular method for conducting the meeting. A typical routine would include the following:

- (1) Introduce commission members and staff
- (2) Explain the role of the commission



- (3) Explain the hearing purpose
- (4) Explain the hearing process
- (5) Read the agenda item
- (6) Request the name, address, and affiliation (e.g. neighbor, attorney, chamber of commerce) of each person who speaks
- (7) Thank the speaker for commenting

Meeting and Hearing Conduct

Common courtesy is the key to a successful meeting. The commission should display and demand good manners. Here are some of the basic principles:

- All comments and questioned addressed to the chair
- Everyone addressed with title of respect (Mr. Ms. etc.)
- Polite, courteous, business like tone and manner (no yelling, no smirking, rolling of eyes, no giggling, etc.)
- No side conversations or whispering (commissioners, staff, or audience)
- No personal attacks
- No threats
- No applause (it's distracting and intimidating)

There are several ways to keep public hearings on track. The public hearing should be formally opened and closed, and no public comment should be taken at any time other than during the hearing. The chair should have the authority to limit the length of time that people speak and to cut off irrelevant or repetitive comments. Some commissions require those who wish to speak to sign in prior to the hearing. These sign-in sheets eliminate the feeding-frenzy approach to public meetings, where people become agitated by a comment made by someone else and then rise to speak. There usually is less irrelevant and poorly thought-out testimony if speakers sign in. The sign-in sheets also provide the commission with a record of participants.

The rules can limit the length of individual comments, or provide the commission authority to impose time limits when necessary. Representatives of groups, such as attorneys or other spokespersons, can be given a longer time than individuals representing themselves. A range of options is available, but the rules must provide for them, and the time limits must be uniformly enforced.

Uniformed law enforcement personnel can sometimes be necessary. If meetings regularly attract persons who behave in a disorderly manner, uniformed officers should routinely attend. The commission could request a police presence only for meetings that are potentially contentious. Disorderly or threatening behavior should not be tolerated, and the chair should have the authority to order people to be removed from the hearing room if they do not maintain appropriate behavior.



Making Decisions

Deciding the Case

After a public hearing is concluded, the plan commission must arrive at a decision or recommendation. The issues often are complicated, and decision-making is likewise difficult. These decisions will be much easier if the community has a well-crafted comprehensive plan which the commission consistently uses as a guideline. While it sounds easy to use the plan and follow its guidance, in practice many plan commissions fail to do so. This section discusses the most common reasons why commissions do not act consistently or do not arrive at the decision that best fulfills the public interest.

Peer Pressure. Commission members do not want to offend their colleagues or appear to be unconventional or uncooperative. Commission members should be appointed to represent a variety of views, and there is no reason why decisions should always be unanimous.

Public Pressure. It is difficult to make a decision unpopular with a room full of people, especially in small towns where the commission members often know the audience members personally. Commission members should remember that the audience isn't always right; it doesn't represent the community as a whole. Many times, the audience doesn't even represent its own interests accurately; people fear consequences that will not occur (e.g., "If you approve this, my property value will drop."). After a project is complete, those who opposed it will sometimes agree that the project benefited, rather than harmed, their neighborhood.

Proposed land use changes generate emotional rather than rational responses from many people. As previously noted, people also tend to focus on issues not within the realm of the commission, such as the proposed design or cost of new houses in a nearby subdivision. It is the plan commission's job to sort through evidence and testimony and make reasoned decisions.

Members of the public frequently circulate petitions throughout the neighborhood and bring them to the commission, overflowing with signatures of people supporting their position. These petitions usually are not useful evidence. The commission has no control over the manner in which the petition is circulated, no way to know what the signature seeker told those who signed it, and no way to verify the signatures. In addition, many people will sign anything their neighbors ask them to sign, in an effort to promote neighborhood harmony. The commission should accept such petitions when they are offered, but the members should not give them a lot of weight.



I don't know the key to success, but the key to failure is to try to please everyone.
- Bill Cosby



Developer & Business Pressure. Developers and business people also often represent a particular view, one aimed at reducing their costs and increasing their profits. Sometimes development which offers the highest profit is not in the best interest of the community. All statements must be carefully evaluated. Comments such as, "We must have this many lots in order to make a profit," are not necessarily true. Additionally, even if the statement is true, the community does not have to accept inappropriate development in order to provide profits for a developer. The commission needs to review proposals on their merits.

Political Pressure. Occasionally, elected officials will lobby plan commissioners for votes. Commissioners appointed by elected officials or hired by them may feel obligated to vote as these officials request. Plan commissions are intended to be independent bodies, and commission members are obligated to cast votes that in their judgment promote good planning. These are matters of personal ethics and conscience (See *Part 6 - Ethics for Citizen Planners*)

Desire for Compromise. Plan commissioners have a natural desire for compromise. They want to find a middle position between developers and opponents. While such compromise might seem desirable, it often has a negative effect. Neither side gets what it wants, so everyone is unhappy. Developers quickly learn that the commission seeks compromise, so they ask for more than they want or expect, in order to end up with the project they initially desired. Compromise is not always bad, and sometimes the commission can broker a win-win solution, but regular and predictable compromise does not lead to good development.

Outside influences (ex parte communication). Commission members usually are active in the community. They interact with developers, business people, and neighborhood residents regularly. These interactions frequently result in efforts to influence the commission member's opinion or vote on a specific proposal. In most states, plan commissioners are expressly prohibited from engaging in these outside discussions, called *ex parte communications*, with applicants, proponents, or opponents of a matter pending before the commission. In Indiana, there is no statutory prohibition on ex parte communication for plan commissioners. (There is such a prohibition for Board of Zoning Appeals members, see *Part 2 - Board of Zoning Appeals Basics*).

Even in the absence of a law prohibiting ex parte communication, it is good practice for plan commissioners to refrain from such discussions. They interfere with due process and they are inconsistent with the goals of the open meeting law. In many communities, these communications are difficult or impossible to avoid. The best way to deal with these situations is for the commission member to explain that any information given will be shared with the entire commission at the public meeting. The commission member must then share the information as promised.



If commissioners fail to report these conversations, various commission members cast their votes based upon different information. Perhaps the outcome of a vote would be different, if every member had the same information.

Voting

Indiana law provides that plan commission actions are official only if taken by a majority of all of the members of the commission, regardless of how many members are present at a meeting. It is important that plan commissioners attend meetings and that they vote on the matters requiring official action. Plan commissioners should consider all sides of each issue and make a decision. In some controversial cases plan commissioners may abstain from voting as an easy way out. This practice is unfair to all, and the commissions rules of procedure should prohibit abstentions for any reason other than a legitimate conflict of interest. All members, including the chair, should vote on each issue.



IC 36-7-4-304

The form of voting is up to the commission, but it should be contained in the rules. Some commissions use voice votes, some use hand votes, some use ballots. If voice votes are used, they must either be by role call or provide for a role call when decisions are not unanimous. The votes are a public record. Voice or hand votes are the quickest, but not necessarily the best. Some observers argue that plan commissioners are less likely to be swayed by the votes of their colleagues if they use written ballots. If ballots are used, each should bear the name of the commission member casting the vote, and the ballots should be made part of the file. It is a good idea for the secretary to report the vote of each member, not just the numerical totals, so the public knows how each member voted.

Conflict of Interest

Plan commissioners in Indiana may not participate in a “zoning matter” in which they have “a direct or indirect financial interest.” The law also states that a comprehensive plan is not a zoning matter. In many parts of the U.S., the conflict of interest standard is stricter than the one used in Indiana, and commissions may want to adopt stronger standards in the rules governing conflict of interest. It is recommended that the standard remain fairly narrow, however, to avoid problems caused by commission members refusing to vote.



Plan commission rules should include a definition of a conflict of interest and a means for determining conflict in cases of uncertainty. Each commission member needs to be responsible for declaring any potential conflicts. It is recommended that in cases of uncertainty, the commission should make the determination. The potential conflict is publicly announced, and the commission members deliberate among themselves. The public should not be permitted to participate in this determination.

The rules also should specify the conduct expected from a member with a declared conflict of interest. The law says the member cannot “participate;” this language prohibits the member with a conflict from taking part in the discussion as well as voting. At minimum, the member should leave the commission table and join the audience. A better practice is for the commissioner to leave the hearing room until the matter is concluded.

Plan commissioners also may not represent another person in a hearing on a zoning matter before the commission. Commission members may represent themselves, but they cannot appear on behalf of another applicant.

Beyond the issue of conflict of interest is the broader topic of planning ethics. In recent years, the American Planning Association has conducted a dialogue on planning ethics and has sponsored research in this area. Planning ethics are discussed in more detail in *Part 6 - Ethics*.

Suggested Reading

Allor, David J. *The Planning Commissioners Guide*. Chicago: American Planning Association, 1984.

Indiana Code, 36-7-4, 200 Series, 300 Series, 400 Series.

Smith, Herbert H. *The Citizen's Guide to Planning*, Chapter 4. Chicago: American Planning Association, 1993 (Third edition).

Toner, William; Gil, Efraim; Lucchesi, Enid. *Planning Made Easy*, Chapter 1. Chicago: American Planning Association, 1994.



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INDIANA CITIZEN PLANNER'S GUIDE

Part 2: Board of Zoning Appeals Basics *by KK Gerhart-Fritz, AICP*

a publication of
The Indiana Planning Association,
a chapter of
The American Planning Association



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This booklet is one in a series of publications of the Indiana Planning Association to be used as training materials for citizen planners: plan commission members, board of zoning appeals members, neighborhood organizations, and citizen committees. These materials are intended to supplement publications such as *Planning Made Easy* and *The Citizen's Guide to Planning*. IPA's materials contain information specific to Indiana. Users of these guides are strongly encouraged to read other, more general books on planning and zoning.

**The information contained in this booklet is intended for informational purposes only
and is not to be considered legal advice.**

INDIANA CITIZEN PLANNER'S GUIDE

PART 2: BOARD OF ZONING APPEALS BASICS

In this Part. . .

- *What is the Board of Zoning Appeals?*
- *What are the duties of the Board of Zoning Appeals?*
 - *Variances of Use and Developmental Standards Variances*
 - *Special Exceptions/Conditional Uses*
 - *Appeals from Administrative Decisions*
- *The Decision-Making Process*
- *Preparing Findings of Fact*
- *Taking Action*
- *Appeals*
- *Reducing the BZA's Workload*

Test your Knowledge of the BZA:

The Board of Zoning Appeals is a quasi-judicial body, meaning:

- a) they have to wear long black robes at the meetings
- b) the board's actions are similar to those conducted by courts
- c) every new member gets a gavel, and they can fix traffic tickets

The answer is "b", because quasi-judicial refers to the actions of an agency, board or other government entity in which there are hearings, orders, judgments or other activities similar to those conducted by courts.



What is the Board of Zoning Appeals (also referred to as the board or BZA)?

Structure

According to IC 36-7-4-901, the board of zoning appeals is composed of one (1) division, unless the zoning ordinance is amended to establish an additional one (1), two (2), or three (3) divisions. The board of zoning appeals shall be either an advisory board of zoning appeals (under the advisory planning law), an area board of zoning appeals (under the area planning law), or a metropolitan board of zoning appeals (under the metropolitan development law).



IC 36-7-4-901

A board of zoning appeals has territorial jurisdiction over all the land subject to the zoning ordinance. If the board has more than one (1) division, all divisions have concurrent jurisdiction within that territory, except that a division of an advisory or area board of zoning appeals, may have only limited territorial jurisdiction (such as a historic district). The zoning ordinance must describe the limits of that division's territorial jurisdiction and specify whether that division has exclusive or concurrent jurisdiction within that territory. Refer to the above section of Indiana Code for more information regarding communities with metropolitan plan commissions.

Membership

Area, advisory and metro BZAs are to have five members, except that an area BZA established under the area planning law as a seven- (7) member board continues until otherwise provided by the zoning ordinance. See IC 36-7-4-902 for appointment and membership details. Note that any BZA divisions established after January 1, 1984 are to have five (5) members. IC 36-7-4-905 states that none of the members of a board of zoning appeals may hold other elective or appointive office, except as permitted by IC-36-7-4-902, in municipal, county, or state government. A member must also be a resident (not just a property owner) of the jurisdictional area of the board.

When an initial term of office expires, each new Advisory or Area BZA appointment is for a term of four (4) years, thereafter expiring on the first Monday of January, except membership of metro board of zoning appeals division is for a term of one (1) year. A member of a board of zoning appeals serves until his successor is appointed and qualified. BZA members are eligible for reappointment.

The appointing authority of a metro BZA may remove a member for any reason, without appeal. The appointing authority of an advisory or area BZA may remove a member from the board of zoning appeals only for "cause", citing written reasons for the removal (such as poor attendance). An advisory or area BZA member who is removed may appeal the removal to the county's circuit or superior court within 30 days.

If a vacancy occurs, the appointing authority shall appoint a member for the unexpired term of the vacating member. In addition, the appointing authority may appoint an alternate member to participate with the board in any hearing or decision if the regular member it has a conflict of interest or is unavailable to participate in the hearing or decision. Alternate members have all of the powers and duties of a regular member while participating in the hearing or decision.

Powers and Duties

The BZA's duties fall into three categories:

- (1) Granting of variances
 - (a) Developmental standards variances
 - (b) Variances of use (not available to area plan commissions)
- (2) Granting of special exceptions/conditional uses
- (3) Appeals from administrative decisions

Variances

BZA members often fall into two extreme camps: those that believe that variances should never be granted because everyone should play by the same rules and those who have listened to attorneys for the petitioner tell them that it is the BZA's job to grant variances! In this case a happy medium is the best attitude: variances should be granted, but only when warranted.

Yes, most of the BZA's efforts are devoted to hearing variance requests, but the BZA is under no obligation to grant those variance requests. The board is under an obligation to hear the request and then make a decision based on their findings.

Variances can sometimes significantly change the character of an area, and should be carefully considered. Variances can potentially derail implementation of parts of the comprehensive plan!

See IC 36-7-4-918.4 for Use Variances and IC 36-7-4-918.5 for Variances from Development Standards. Both sections state that the BZA shall approve or deny variances and may impose reasonable conditions as a part of its approval.

These two sections also say that both variances of developmental standards and use variances may be approved only upon a determination in writing (findings of fact) that the petition meets all of the required legal criteria.

So what are the required legal criteria for approval of a variance?

Developmental Standards Variance Criteria per IC 36-7-4-918.5

- (1) the approval will not be injurious to the public health, safety, morals, and general welfare of the community
- (2) the use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner
- (3) the strict application of the terms of the zoning ordinance will result in practical difficulties in the use of the property

Rule #1 — A variance is not automatically a bad thing! It is a way a community can solve problems created by applying the generalities of the zoning ordinance to specific situations — it introduces some needed flexibility to zoning regulations.

Rule #2 — Caution: Variances are meant to be a safety valve, but may become a "back-door" way of thwarting the zoning ordinance. Examples of this are asking for a variance to allow more density in a residential zoning district, instead of asking for the property to be rezoned to a district with a higher density.

Rule #3 — It is the applicant's responsibility to prove the request satisfies all the variance criteria; it is not the responsibility of the board of zoning appeals to make the case for them! You should require that the applicant submit written evidence that they meet the criteria.

What are “practical difficulties”? Several years ago, Monroe County, Indiana’s Board of Zoning Appeals decided to define practical difficulties with the help of their attorney. Monroe County still uses this definition, although there have been attempts to make the criterion a bit more stringent, so that it relies less on economic considerations. According to Monroe County’s BZA, practical difficulties are:

Significant economic injury that:

- (A) Arises from the strict application of the Zoning Ordinance to the conditions of a particular, existing parcel of property;
- (B) Is not as significant as the injury associated with hardship, that is, it does not deprive the parcel owner of all reasonable economic use of the parcel; and
- (C) Is clearly more significant than compliance cost.

Use Variance Criteria per IC 36-7-4-918.4

- (1) the approval will not be injurious to the public health, safety, morals, and general welfare of the community
- (2) the use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner
- (3) the need for the variance arises from some condition peculiar to the property involved
- (4) the strict application of the terms of the zoning ordinance will constitute an unnecessary hardship if applied to the property for which the variance is sought
- (5) the approval doesn’t interfere substantially with the adopted comprehensive plan.



IC 36-7-4-918.4

What is an “unnecessary hardship”? Monroe County’s Board of Zoning Appeals also decided to define unnecessary hardship with the help of their attorney. Monroe County still uses this definition, although there have also been attempts to make the criterion a bit more stringent, so that it relies less on economic considerations. According to Monroe County’s BZA, hardship or unnecessary hardship is a:

Significant economic injury that:

- (A) Arises from the strict application of this ordinance to the conditions of a particular, existing parcel of property;
- (B) Effectively deprived the parcel owner of all reasonable economic use of the parcel; and
- (C) Is clearly more significant than compliance cost or practical difficulties.



Example: Look up the variance criteria in the state law, then look at the criteria that your board uses — are they the same? Is anything missing from the state law list of criteria? If there are any missing criterion, then you have a problem that needs to be fixed! Do you have extra criteria that aren’t listed in state law?

- Use Variances: If there are extra criterion for use variances, you have a problem that needs to be fixed!
- Variances from Developmental Standards: If there is an extra criterion (or two) for developmental standards, it is all right! Indiana Code says that for developmental standards variances:
... your local ordinance may establish a stricter standard than the “practical difficulties” standard prescribed by state law.

Examples of extra developmental standards criterion:

- The variance granted is the minimum necessary.
- The variance granted does not correct a hardship caused by an owner, previous or present, of the property.

Discussion: Should your community follow a stricter standard for developmental standards variances than the state’s “practical difficulties”?

Test your Knowledge of the BZA:

When can you approve a variance?

- (a) when the board determines it meets the “no harm-no foul” test
- (b) when it meets all of the variance criteria
- (c) when no one shows up to speak against it

When can you deny a variance?

- (a) when you don’t have a quorum
- (b) if the applicant is a jerk
- (c) if all variance criteria haven’t been met

Test your Knowledge of the BZA:

Can a variance be conditionally approved?

- a) Yes
- b) No
- c) Waiting for Miss Cleo to call me with the answer

The board of zoning appeals may stipulate any number of conditions as part of their approval. They may also require the property owner to enter into written commitments, which are recorded in the County Recorder’s Office and are binding on future owners of the subject property. Written commitments formalize the conditions attached to a variance.

Rule #4 —While there is no maximum number of conditions that can be attached to a variance approval, if there are a great number, you may want to reexamine whether the proposed variance is really justified.

Sample Variance Request Worksheet – Developmental Standards

(1) the approval will not be injurious to the public health, safety, morals, and general welfare of the community (Consider whether granting the variance will hurt or potentially cause harm to the city or county – why or why not, and what harm can befall them?)

Criterion #1 met? No Yes If yes, any conditions?

(2) the use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner (Consider whether neighboring property will suffer any major negative impacts – what impacts can the neighbors realistically expect?)

Criterion #2 met? No Yes If yes, any conditions?

(3) the strict application of the terms of the zoning ordinance will result in practical difficulties in the use of the property (Consider what difficulties the owner would have developing the property according to the zoning ordinance standards – remember, higher cost is not an adequate justification for a variance)

Criterion #3 met? No Yes If yes, any conditions?

Developmental Standards Variance Worksheet

(4) Add additional criterion here

Criterion #4 met?	No	Yes	If yes, any conditions?
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If any of the four criteria have been checked as "no", the developmental standards variance request may not be approved.

If all four criteria have been checked as "yes", then a variance from developmental standards is justified.

Proposed Motion: _____

Conditions or Commitments: _____

Sample Variance Request Worksheet – Use

(1) the approval will not be injurious to the public health, safety, morals, and general welfare of the community (Consider whether granting the variance will hurt or potentially cause harm to the city or county – why or why not, and what harm can befall them?)

Criterion #1 met? No Yes If yes, any conditions?

(2) the use and value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner (Consider whether neighboring property will suffer any major negative impacts – what impacts can the neighbors realistically expect?)

Criterion #2 met? No Yes If yes, any conditions?

(3) the need for the variance arises from some condition peculiar to the property involved (Consider whether there is some unique problem with the site that makes it unable to meet ordinance standards – what is it?)

Criterion #3 met? No Yes If yes, any conditions?

Use Variance Worksheet

(4) the strict application of the terms of the zoning ordinance will constitute an unnecessary hardship if applied to the property for which the variance is sought (Consider what it would be like if the site were developed under the terms of the zoning ordinance – what would the difficulties be?)

Criterion #4 met? No Yes If yes, any conditions?

(5) the approval doesn't interfere substantially with the comprehensive plan (Consider whether there are any major conflicts with the comprehensive plan – what are they?)

Criterion #5 met? No Yes If yes, any conditions?

If any of the five criteria have been checked as "no", the use variance request may not be approved.

If all five criteria have been checked as "yes", then a use variance is justified.

Proposed Motion: _____

Conditions or Commitments: _____

Special Exceptions

After variances, the second most common BZA activity is to hear special exception requests. Special exceptions may also be referred to as special uses, contingent uses and conditional uses. IC 36-7-4-918.2 states that a board of zoning appeals shall approve or deny special exceptions, “from the terms of the zoning ordinance, but only in the classes of cases or in the particular situations specified in the zoning ordinance. The board may impose reasonable conditions as a part of its approval.” Note that the BZA may also require written commitments.

What exactly is a special exception? Indiana Code does not define the term, but it is generally understood to be a use of property that is allowed under a zoning ordinance under specified conditions — something that needs to be considered on a site specific basis. Indiana Code leaves it up to local government to define what uses in what zoning districts should be special exceptions, but examples might include institutional uses (i.e., schools), drive-through businesses, etc.

Indiana Code does not specify a set of criteria for use in considering special exceptions, again leaving it to the discretion of local government. Some communities use a general set of criteria for most, if not all, special exceptions, while others establish a separate set of criteria for each special exception use.

Special Exception Criteria Example: The City of Columbus, Indiana requires that before any conditional use (special exception) is issued, the BZA shall make written findings certifying compliance with any specific regulations governing the proposed use, and with satisfactory arrangements for a general set of criteria (where applicable):

- 1.Safe vehicular and pedestrian access to this property and proper access for emergency vehicles will be provided.
- 2.Adequate off street parking will be provided.
- 3.Refuse and service areas will be provided for this use.
- 4.All utilities necessary for this use are available.
- 5.Screening and buffering will be provided.
6. All proposed signs and exterior lighting must be described, together with an explanation of any glare, effect on traffic safety, and the compatibility of signs and lighting with other properties in this zoning district.
7. The proposed use will comply with minimum setback distances, yards, and other open space requirements.
8. This use will be in harmony with the neighborhood, will not cause undue noise, traffic, odors, safety, or environmental hazards, and will not have an adverse effect on neighboring property.

Exercise: Look up special exceptions (or special uses, conditional uses or contingent uses) in your zoning ordinance. Are there any criteria that your board must consider in making their decision?



Discussion: Are existing special exception criteria adequate? What changes should be made? If your community does not have criteria for special exceptions, draft a list of possible criteria for further discussion.

Appeals From Administrative Decisions

According to IC 36-7-4-918.1, the BZA shall review appeals from any order, requirement, decision or determination made by

- an administrative official, hearing officer, or staff member under the zoning ordinance;
- an administrative board or other body (except a plan commission) in relation to the enforcement of the zoning ordinance; or
- an administrative board or other body (except a plan commission) in relation to the enforcement of an ordinance adopted under this chapter requiring the procurement of an improvement location or occupancy permit.



An example of an appeal from an administrative decision would be if someone disagrees with how the planning staff interprets a provision of the zoning ordinance, and then appeals that interpretation to the board.

IC 36-7-4-919 says that if an appeal is filed with the board of zoning appeals, it must specify the grounds of the appeal and must be filed within the time limit and in the format prescribed by the board of zoning appeals' rules. The body being appealed (administrative official, hearing officer, administrative board, or other body) shall transmit all documents, plans, and papers constituting the record of the action in question to the BZA.



IC 36-7-4-919

The board may reverse, affirm, or modify the order, requirement, decision, or determination that is being appealed. For this purpose, Indiana Code gives the board all the powers of the official, officer, board, or body from which the appeal is taken. The BZA shall make a decision either at the meeting at which that matter is first presented or at the conclusion of the hearing, if it is continued.

The Decision Making Process

Public Hearing

All actions of the BZA (Variances, Special Exceptions and Appeals from Administrative Decisions) require public hearing. IC 36-7-4-920 requires the BZA to make public notice in accordance with IC 5-3-1-2 and IC 5-3-1-4 and give due notice to interested parties at least ten (10) days before the date set for a hearing. The party making the appeal may be required to assume the cost of notice.



IC 36-7-4-920

At the hearing, each party may appear in person, by agent, or by attorney. The planning staff and any other persons may appear before the board at the hearing and present evidence in support of or in opposition to the request.

BZA Contact

Planning staff may file with the board a written statement setting forth any facts or opinions relating to the BZA case. Other persons may not communicate with any BZA member before the hearing with intent to influence the member's action — this is often referred to as *ex parte* contact. See ***Citizen Planner's Guide, Part 6, Ethics*** for more information on *ex parte* contact.

Rules of Procedure

IC 36-7-4-916 requires the board of zoning appeals to adopt rules, which may not conflict with the zoning ordinance.

These rules shall address:

- (1) the filing of appeals;
- (2) the application for variances, special exceptions, special uses, contingent uses, and conditional uses;
- (3) the giving of notice;
- (4) the conduct of hearings; and
- (5) the determination of whether a variance application is for a variance of use or for a variance from the development standards (such as height, bulk, or area).

The BZA's rules may also address:

- (1) the allocation of cases filed among divisions of the board of zoning appeals; and
- (2) the fixing of dates for hearings by the divisions.

Once the rules adopted by the board of zoning appeals, they are to be made available to all applicants and other interested persons (and they should also be available and used by the staff and BZA).

Exercise: Review the adopted Rules of Procedure for your BZA. Are all the items listed in IC 36-7-4-916 addressed? Does your BZA follow these rules? Mark up the rules to indicate areas of possible changes, and discuss these with fellow board members and staff.

If staff or BZA members are unable to produce a copy of the rules, it is important that a set of rules be written and adopted by the board as soon as possible!



Preparing Findings of Fact

In addition to keeping minutes of its proceedings and a record of the vote, all BZA actions require the preparation of findings of fact to support that decision (IC 36-7-4-915). Indiana case law has established that it is not enough to make the required statutory determinations in the words of the ordinance (e.g., stating, “the approval will not be injurious to the public

health, safety, morals, and general welfare of the community”), but that the BZA must make findings that support those determinations (*Carlton v. BZA of City of Indianapolis, 1969, 245 NE2d 337, 252 Ind. 56*).

In effect, the board must add a “because” to each of the criterion, with a corresponding explanation, (e.g., “the approval will not be injurious to the public health, safety, morals, and general welfare of the community because...”). Case law has further established that trial courts are to remand appeals of BZA decisions back to the BZA to make findings of fact if the BZA has not previously done so (*Habig v. Harker, App. 1 Dist. 1983, 447 NE2d 1114*).

Indiana case law has also held that it was acceptable for the BZA to take over three months to adopt findings of fact after the hearing and decision (*McBride v. BZA of Evansville-Vanderburgh Area Plan Commission, App. 1 Dist. 1991, 579 NE2d 1312*). While this delay may have been acceptable to the court, the best action is for the board to stay current. This can be done by either:

- adopting findings as part of the motion on the case (either prepared by staff in advance to support the staff recommendation or proposed by a BZA member with the motion, using a self-prepared worksheet or petitioner’s written application to cite the findings), or
- adopting findings at the next BZA meeting, which have been prepared in the interim by planning staff, the BZA’s legal counsel or a board member.

Discussion: Does your BZA adopt findings of fact for each action? If so, what process is used? How well does that process work? How could it be improved? If your BZA does not currently adopt findings, immediately put a plan in place to remedy this.

Taking Action

The BZA must have a quorum, which is a majority of its membership (not a majority of those in attendance), in order to authorize any action as official (IC 36-7-4-910 and IC 36-7-4-911).

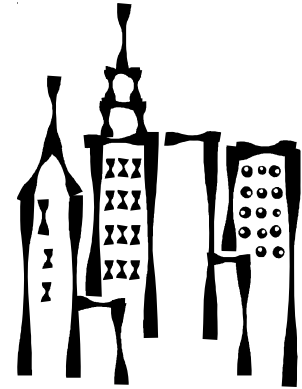
In the case where a BZA member has a direct or indirect financial interest, that member may not participate in the hearing or decision of the board. Indiana code allows an alternate member to participate in the hearing or decision in place of the regular member. See IC 36-7-4-909 for more information. If the BZA wishes to use alternate members, it is advisable to make appointments in advance and outline the process for using alternates in the BZA’s rules.

Additional Regulations for Some Counties

IC 36-7-4-918.6 requires that in counties with populations of 400,001 - 699,999 or 200,001 - 299,999, the BZA shall submit special exceptions, special uses and use variances to the legislative body for approval or disapproval, along with the BZA's recommendation (favorable, unfavorable or none). See Indiana Code for further details on timelines and action. Note that if the legislative body approves a petition, it must make the determination in writing.

Additional Regulations for Metropolitan Development Commissions

Metropolitan Development Commissions have additional regulations related to the BZA. IC 36-7-4-918.8 outlines how the Metropolitan Development Commission may act as the BZA to approve or deny developmental standards variances or special exceptions. See Indiana Code for more information.



Appeals of BZA Decision

IC 36-7-4-1003 states that each decision of the board of zoning appeals is subject to review by certiorari, basically a higher court. Anyone who is unhappy with a board of zoning appeals decision, may file with the circuit or superior court, in the county where the site in question is located, within 30 days of the decision, a petition setting forth that the decision is illegal in whole or in part and specifying exactly what makes it illegal. See subsection (d) for information related to communities having metropolitan plan commissions.



IC 36-7-4-1003

The BZA gets 20 days to after the petition is filed, to show cause why a writ of certiorari should not issue. If the BZA fails to satisfy the court, then the court may direct a writ of certiorari to the board. The board of zoning appeals shall then set forth the pertinent facts and data to show the grounds of their decision, which may include a transcript of the hearing before the board. The court make its determination and render its judgment with reference to the legality of the decision of the board of zoning appeals, on the facts set out in the return to the writ of certiorari, without further testimony. If the court determines that testimony is necessary, it may take evidence to supplement the facts disclosed by the BZA, but the review may not be by trial de novo (as if no prior BZA action had been held). In passing on the legality of the decision of the board, the court may reverse, affirm, or modify the decision of the board brought up for review. An appeal may be taken to the court of appeals from the final judgment of the court reversing, affirming, or modifying the decision of the BZA. This appeal must be taken in the same manner and on the same terms as appeals in other civil actions.

Reality Check — Are you working too much?

- Is there a waiting list to get on a BZA agenda?
- Do your BZA meetings last until the wee hours of the next morning?
- Are you scheduling special BZA meetings just to accommodate petitions

If you answered “YES!” to any of the above questions, your BZA could probably benefit from one or both of the following actions:

(1) Amending the Zoning Ordinance for Frequently Granted Requests

If it seems you are granting the same type of variance request frequently, ask the plan commission to consider whether an amendment to the ordinance is appropriate. This not only would save you time, but would also make the citizens of your community very happy.

Example: Ordinance regulations are typically written to fit new development, not older neighborhoods. When it is time to replace the old, structurally challenged garage with a nice new one, the property owner is told that they can't put it back in the same place, because the side and rear setbacks are now larger than when the first garage was built. Wouldn't a better solution be to amend the zoning ordinance to address standards for older development, instead of requiring everyone in the neighborhood to get variances?

(2) Appointing a Hearing Officer to Hear Cases

What is a hearing officer? An appointed staff member, board member, or attorney who can conduct hearings on certain variances or conditional uses/ special exceptions and approve or deny them. The hearing officer acts in place of the Board of Zoning Appeals. This works best on “routine” cases where there is little public opposition or no need to burden the petitioner or BZA with the full process.

How does the hearing officer process work?

- Petitioner files case, just like any other case for the BZA. Filing fees and public notice are still required.
- Staff prepares a case report, complete with recommendations and any appropriate conditions of approval. Approval must meet criteria that any variance or conditional use/special exception petition would have to meet at the BZA level.
- Hearing Officer conducts a formal public hearing, subject to all of the public notice rules of the BZA. Staff, Petitioner, Public, and Hearing Officer all have opportunity to comment on the case.
- Hearing Officer has three options: Approve petition, as submitted or with conditions; Deny petition, which can be appealed to the BZA; or Forward petition to the next hearing of the BZA for more public scrutiny



Hearing Officer benefits:

- Reduce the regular caseload of the BZA by removing minor, non-controversial cases
- Frees up time to concentrate on more significant cases
- Shortens the length of the full BZA hearings
- Minor cases can be processed through the system much more quickly than if they went to the BZA
- Greatly reduced timeline for process
- Non-controversial cases
- Cases with staff support
- Informal setting is more comfortable and user-friendly for petitioners
- One decision-maker rather than five-member BZA
- More convenient times for meeting than the once monthly BZA hearings in the evening

Implementing the Hearing Officer Process:

- Subject to Indiana Statutes: IC 36-7-4-923 and 924
- Adopt an amendment to the zoning ordinance which enables the Hearing Officer process
- Adopt an amendment to the Plan Commission/BZA rules and procedures to enable the process
- Hears cases in place of BZA, but subject to the rules & procedures of the Plan Commission

Personal Reflection: Are you tough enough?

It is tough to be a board of zoning appeals member, because you have to check your empathy and sympathy at the door. The BZA can not legally decide their requests based on compassion, only on whether the variance criteria are met. This will be easier for you (and the applicant) to bear if the applicant understands what you must legally base your decision on. This does not mean that a BZA member should be cold, mean or rude with an applicant, just that your compassion should not guide your decision. It is difficult not to be moved by tears and tragedy — if you are susceptible, it may be best to leave the BZA membership to someone else.

Other parts of the Indiana Citizen Planner's Guide can be downloaded at www.indianaplanning.org/citizen.htm

INDIANA CITIZEN PLANNER'S GUIDE

Part 3: Avoiding Pitfalls

by K.K. Gerhart-Fritz, AICP and Gene Valanzano

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INDIANA CITIZEN PLANNER'S GUIDE PART 3: AVOIDING PITFALLS

The planning and development process inherently contains potential problems. This section offers advice to help plan commissions and board of zoning appeals avoid creating more pitfalls.

In this Part...

Techniques for Avoiding Pitfalls

- *Engage in Regular Communication and Coordination*
- *Follow Due Process*
- *Prepare for the Hearing*
- *Stay in Control of the Hearing*
- *Avoid Emotions*
- *Beware of Takings*

Tools for Avoiding Pitfalls

- *Create a Plan for the Planners*
- *Maintain Basic Planning Documents*
- *Use Conditions and Written Commitments*
- *Avoid Relying on PUDs*
- *Beware of Variances*
- *Keep Good Records*

Simply put, avoiding pitfalls means being proactive about planning. Too often, plan commissions and boards of zoning appeals find themselves so caught up in their caseloads that they act in a reactionary way. It may seem easier and more expedient at the time to stick to only addressing the cases before you, but spending more group time up front working on the "big picture" will help lay a good planning foundation. Having a good planning foundation in place can have a huge impact in improving the quality of planning in your community and reducing problems you may encounter down the road. Planning pitfalls most typically happen when things aren't well thought out and details aren't tied down.

Planning pitfalls can also happen when communities establish rules and regulations, but then don't follow them. The first piece of advice in this section is an obvious, but sometimes disregarded general principle: you are given a lot of freedom to craft the rules and regulations for your community, so your board or commission needs to make sure you follow them! Now, what else can you do to avoid pitfalls in your community?

TECHNIQUES FOR AVOIDING PITFALLS

Engage in Regular Communication and Coordination

Too often in local communities, "the right hand doesn't know what the left hand is doing". Every department, board, commission and elected official has its own job to do. In most cases, we'd all be much better off if we knew a little bit more about what everyone else does. Not only could this attitude improve the whole planning process by making it more user-friendly, it could also benefit by a sharing of knowledge and expertise, making it less likely you will be caught unaware and contributing toward a better product. This sharing does not have to be only within the community, but can also be between adjacent communities.

Some basic steps that plan commissions and boards of zoning appeals can do to improve communication and coordination are:

- Consider appointing ex-officio members from neighboring plan commissions (e.g., a county plan commission member becomes an ex-officio member of a city plan commission).
- Set up advisory committee(s) to review applications. This is a particularly successful way to increase communication between local government departments and to make use of "in-house" expertise that could result in a better product (e.g., a subdivision review committee or a technical advisory committee).
- Ask commission or board members who represent other bodies to give a short report on their body's activities at each meeting (e.g., park board member on the plan commission reports on park activities).
- Send planning requests that are near the jurisdictional boundary to the adjacent jurisdiction for review and comment -- this process could be formalized through the use of inter-local agreements.

Follow Due Process

One of the biggest pitfalls planning bodies face is a legal challenge. Remember, anyone can file suit, whether the case has merit or not. Even if you've had very few legal challenges, that does not mean that you shouldn't be prepared. Procedural due process is where most plan commissions have the majority of their legal problems. Indiana judges typically will initially review a planning case to see if the plan commission or BZA followed due process or "rules of fair play." To make a defensible decision -- you must do the following:

Making defensible planning decisions is like defensive driving -- don't wait until you've had an accident to start!

- A) Give Adequate and Timely Notice:** Interested or potentially interested citizens should receive clear notice far enough in advance to study the proposal and prepare their response. Indiana law and local rules of procedure cover the specifics as legal minimums, and generally are not the best way to communicate. While we must follow the statute, there is no reason that your rules can't go over and above the minimum state law requirements for providing notice. What kind of notice do you give?
- B) Give Everyone an Opportunity to be Heard:** This is the major and most sensitive part of due process. Space, time and procedure must be adequate so local citizens feel they have had their say. Beware of limitations on how many people can speak at a meeting, of arbitrary time limits for speakers, of requiring people to sign up to speak before the meeting, and of not fitting everyone in the room. Listen to the weak voice as well as the loud.
- C) Disclose Everything (and Avoid "Ex-Parte Contact"):** Interested citizens should have an opportunity to see, hear and examine all statements and evidence considered by the plan commission (or BZA). However, that does not mean they should have unlimited access to planning officials. Generally, you should refuse to meet privately

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or talk privately with anyone about a case before you. Ex-parte contact is strictly illegal in Indiana for BZA members and, although not illegal, it is generally accepted as a risk for plan commissioners. If contact can't be avoided, disclose it at the public meeting. For more information on ex-parte contact, see the *INDIANA CITIZEN PLANNER'S GUIDE, Part 6: Ethics*.

- D) ***Avoid Conflicts of Interest or their Perception:*** Staff, plan commission and board members should not accept gifts, food, or travel costs from applicants, interested parties or their representatives. Even if it is innocent, it looks bad to others. You can use your rules of procedure to restrict these things. In any case, state law prohibits direct financial gain. Indiana Code 35-44-1-3 says that a public servant who knowingly or intentionally has a pecuniary interest in or derives a profit from a contract or purchase connected with an action by the governmental entity served by the public servant commits conflict of interest, a Class D felony. For more information on conflict of interest, see the *INDIANA CITIZEN PLANNER'S GUIDE, Part 6: Ethics*.
- E) ***Make the Decision in a Reasonable Amount of Time:*** Make decisions promptly. If information is missing or in conflict, it is appropriate to continue the case until a specified future meeting, so that the commission can be adequately informed when making a decision. Your rules of procedure should limit how often and/or how long a continuance may be granted. If necessary information is still not submitted after a couple of continuances, consider denying the case without prejudice, and let the applicant refile when he/she has all the necessary information.
- F) ***Prepare Findings:*** Decisions themselves are central to the practice of due process. Specific factual findings in support of a final decision made by the plan commission (i.e., subdivisions) and all decisions made by the BZA are essential. Findings should always be done for these cases, and are particularly important if the case is controversial, because it is more likely to end up in court. It is fine to direct staff to prepare the findings, but don't make them guess what you were thinking. State for the public record at the hearing your reasoning regarding the applicable criteria.
- G) ***Keep Complete Records:*** Make sure that everything important stays in the case file, and that the file is available for public review. Complete meeting minutes in a timely manner. Computerization is fine, just make sure you have electronic files for everything in the file, and that it remains accessible.
- H) ***Make Sure Your Rules are Clear and Follow Them:*** Think twice before using *Robert's Rules of Order* as the way to conduct your meeting. The rules are very complicated and if you make an honest mistake following them, the courts can still hold it against you! Consider instead spelling out a simple order of events in your rules. If you haven't reviewed your Rules of Procedure in awhile, get them out and read them. Ask about things you don't understand and update them as needed. For more information on rules of procedure, see the *INDIANA CITIZEN PLANNER'S GUIDE, Part 5: Rules of Procedure*.
- I) ***Act in the Public Interest -- for "The Public Good":*** While the public good is a somewhat elusive concept, and we may all have slightly different interpretations of what it is, it generally means that you must do what will generally benefit your community and your citizens in the long run. This should not be confused with a "majority rules" attitude.
- J) ***Be Fair:*** Be fair to everyone involved in the process. Especially if you don't like an applicant, it is important to provide the opportunity for a fair hearing. It is totally inappropriate for a planning body to demonstrate its prejudice against even the sleaziest

developer. One California court found evidence that a developer was so unliked that he could not get a fair hearing in one community, and ruled that the city had made a taking of his property, even though he had never applied for a rezoning! It is okay to apply strong conditions and use extreme diligence in enforcing them, but don't call a sleazy developer "out" before he ever gets to the plate. Due process is all about being fair to everyone involved in the planning process -- developer, citizens, etc.

- K) **Be Reasonable and Keep it in Context:** Plan commission and BZA are not judges hearing a murder trial. Don't allow attorneys for either side to bully, interrupt or threaten you or people who are speaking. Remember that the plan commission's job is to receive information about a proposal and make the best judgement you can. Use not only the evidence you have received, but also the plans and policies that have already been put in place to help you.
- L) **Be Consistent:** If you have consistently made the same decision on the same type of request, don't suddenly change that decision unless you have an excellent reason for doing so, and point out what is so markedly different about this request. Rely on the applicable criteria and you will make the appropriate decision. Don't get lazy though -- review the criteria anew for each case.

Prepare for the Hearing

Before the Public Hearing or Public Meeting -- While it seems like common sense to prepare before a public hearing or public meeting, it never hurts to remind yourself what needs to be done. Here are some basic hints for making the most of your time before the public hearing:

- Make sure that you only accept complete applications for docketing. Accepting incomplete applications is a disservice to everyone. Consider using an application packet that contains a checklist as a way to make it clearer what is required and what has been submitted. Establish a filing requirement for the petitioner to address required criteria in writing, as part of the application (this will ease the administrative burden associated with adopting findings of fact).
- Take advantage of review by multiple departments and organizations, preferably acting as a formal review committee. Get comments in writing, and share them with the applicant before the public hearing or public meeting, giving them time to respond.
- Visit the site on your own, but avoid talking with the applicant (ex-parte contact).
- Ask the staff to include a recommendation as part of their written staff report.
- Review the staff report prior to the public hearing/public meeting.

7 Habits for Highly Effective Application Review:

1. Start with an open mind.
2. Read the staff report at least once before the meeting (ASAP is best), and note any questions or concerns.
3. Unfold and review any maps or drawings.
4. Visit the site if at all possible.
5. Trust staff's review unless you have a good reason not to.
6. Rely on staff to do research for you.
7. Review the request with the applicable criteria in mind.

A Word about Public Hearings....

The public hearing is a legal requirement and also an obligation to your citizens. However, don't fool yourself into thinking that they are the ideal forums for communication. By nature, public hearings must be more formal and structured than a public meeting. There are typically a minimum number of public hearings specified by law, but the reality is that they may not be enough. As with ethics, we want to do more than meet the minimum legal standards.

The purpose of a public hearing is to hear testimony and the hearing should not be a forum for a public debate. If you do it right, you can also use a public hearing for education and to gain support for the plan. If you desire dialogue, discussion or negotiation, schedule a public meeting first.

Stay in Control of the Hearing

Know your Role -- Everyone has a role to play at the meeting or hearing. Do you know what your role is?

The President's or Chairman's role at the meeting:

- Welcome and introduction of body
- Explain purpose of meeting and ground rules for conduct
- Explain what is on the agenda and how the meeting will work (time limits, etc.) -- warn them about any continuances – including stating clearly that there will be no additional notice for the continued meeting
- Deliver a "play by play" or translation for the audience, when necessary ("that ends the applicant's presentation, now he can only respond to questions") and repeat/rephrase all questions
- Keep control of the meeting -- be firm when necessary and make sure all remarks go through you (not between opponents and proponents).
- At the end of the meeting say, "thank you" and tell them what's next.

The role of the board or commission member at the meeting:

- Be familiar with the material -- don't open your packet at the meeting
- Have a public discussion -- don't pass notes or whisper
- Don't use planning slang or buzz words
- Explain yourself -- why are you voting this way? State your findings of fact so the public and the staff understand you correctly
- Make sure your input is meaningful
- Be willing to make or second a motion

The staff's role at the meeting:

- Make effective presentations that include a recommendation
- Have everything ready and organized

The commission or board attorney's role at the meeting:

- Keep the board on track, regarding rules and consideration of appropriate criteria.

The applicant's role at the meeting:

- Be responsible for proving that his/her request satisfies all the criteria and ordinance standards

The audience's role at the meeting:

- You actually have several different audiences, all with different motivations and roles: surrounding property owners, regular meeting attendees, the press, etc.

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Make Sure You Are Set-up and Ready -- Room set-up can make a huge difference in the success of a meeting. Try these tips for a better meeting:

- Make sure the room is big enough for everyone, and that there are an adequate number of comfortable chairs.
- Make sure the acoustics are good
- Test all audio-visual equipment before the meeting
- Make sure the temperature is comfortable -- better too cool than too hot!
- Post the criteria on the walls or put them on handouts, so everyone knows what the considerations are.
- Provide agendas for everyone in attendance.

Base your Decision on Legal Considerations -- First of all, your decision must be based on applicable criteria from state law and local ordinances. There is no room for sentiment when it comes to planning decisions. State law is discussed below for rezonings, subdivision plats, plat vacations, variances, special exceptions and administrative appeals.

Rezonings -- In considering zoning ordinances or petitions for zone map change, **IC 36-7-4-603** requires that the "plan commission and legislative body shall pay reasonable regard to:

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

The above criteria are somewhat subjective in nature and can mean different things to different people, even when viewing the same set of facts. A result of this subjectivity is wide discretion in the decision-making authority of a plan commission. For this reason, it is essential that all activities of a plan commission be conducted in an open, public forum and that the plan commission make the public aware of the procedures and the options available to the plan commission prior to the start of the hearing. For more information on zoning, see the *INDIANA CITIZEN PLANNER'S GUIDE, Part 8: Zoning Ordinances*.

Subdivisions -- **IC 36-7-4-702** expects review to be objective, saying the plan commission shall determine if the plat qualifies for approval based on the standards prescribed in your subdivision control ordinance. The ordinance must include standards for:

- minimum width, depth, and area of lots in the subdivision;
- public way widths, grades, curves, and the coordination of subdivision public ways with current and planned public ways; and
- the extension of water, sewer, and other municipal services.

The ordinance may also include standards for the allocation of areas to be used as public ways, parks, schools, public and semipublic buildings, homes, businesses, and utilities, and any other standards related to the purposes of the subdivision control chapter. For more information on subdivision control ordinances, see the *INDIANA CITIZEN PLANNER'S GUIDE, Part 9: Subdivision Control Ordinances*.

Great news: state law allows your jurisdiction complete freedom in setting your own design and improvement standards in the Subdivision Control Ordinance -- take advantage of this gift by following them once you've determined what they are!

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Plat Vacations -- Indiana Planning Law allows a plan commission to approve or deny a petition for vacation of land. The plan commission shall approve the petition for vacation of all or part of a plat pertaining to the land owned by the petitioner only upon a determination that:

- Conditions in the platted are have changed so as to defeat the purpose of the plat;
- It is in the public interest to vacate all or part of the plat; and,
- The value of that part of the land in the plat not owned by the petitioner will not be diminished by vacation.

Remonstrance or objections to a proposed vacation may be filed or raised by any person aggrieved by the vacation only upon one or more of the following grounds:

- The vacation would hinder the growth or orderly development of the unit or neighborhood in which it is located or to which it is contiguous;
- The vacation would make access to the lands of the aggrieved person by means of public way difficult or inconvenient;
- The vacation would hinder the public's access to a church, school, or other public building or place; or,
- The vacation would hinder the use of a public way by the neighborhood in which it is located or to which it is contiguous.

If the plan commission approves a vacation of all or part of a plat, the plan commission is required to make written findings of the decision approving the petition and furnish a copy of the decision to the county recorder for recording. If the plan commission disapproves a vacation of all or part of a plat, the plan commission is required to adopt written findings that set forth its reasons for denying the petition and provide the petitioner with a copy.

VariANCES -- **IC 36-7-4-918.4** for Use Variances and **IC 36-7-4-918.5** for Variances from Development Standards say that the BZA shall approve or deny variances based on the listed criteria, and that the board may impose reasonable conditions as a part of its approval. Review is somewhat subjective. For more information on variances, see the *INDIANA CITIZEN PLANNER'S GUIDE, Part 2: Board of Zoning Appeals Basics*.

With respect to variances, there are two major types of variance petitions that may be considered by an Advisory or Metro Board of Zoning Appeals under Indiana Law, variances of use and variances of development standards. Area Boards of Zoning Appeals may only hear variances of development standards. A variance of use from the terms of the zoning ordinance may only be approved by a board upon determination that:

- the grant will not be injurious to the public health, safety, morals, and general welfare of the community;
- the use or value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner;
- the need for the variance arises from some condition peculiar to the property involved;
- the strict application of the terms of the zoning ordinance will constitute an unusual and unnecessary hardship if applied to the property for which the variance is sought; and,
- the grant does not interfere substantially with the comprehensive plan.

A variance of development standards from the terms of the zoning ordinance may only be approved by a board upon determination that:

- the grant will not be injurious to the public health, safety, morals, and general welfare of the community;
- the use or value of the area adjacent to the property included in the variance will not be affected in a substantially adverse manner; and,
- the strict application of the terms of the zoning ordinance will result in practical difficulties in the use of the property.

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Indiana Code says that, your local ordinance may establish a stricter standard than the "practical difficulties" for developmental standards variances.

Special Exceptions and Conditional Uses -- The BZA has the powers specified in the zoning ordinance to approve or deny special exceptions, special uses, contingent uses, or conditional uses. These decisions must be based upon the terms and conditions set forth in the zoning ordinance (**IC 36-7-4-918.2**).

Appeals -- Under appeals jurisdiction, the BZA is basically functioning as the zoning administrator to determine if the terms of the zoning ordinance are being properly interpreted and applied (**IC 36-7-4-918.1**).

In most cases, the board is also empowered to impose reasonable conditions on the grant of a petition. The ability of the board to consider and impose reasonable conditions is often a valid method of neutralizing the hostilities on both sides of an issue and establishing meaningful dialogue between opposing sides.

Make a Good, Clear Motion -- This part is where things often break down. Your motion should reference applicable criteria. The president should take a strong leadership role in bringing the group to a vote. Upon termination of the public hearing and any discussion between BZA or plan commission members, the president should call for a motion on the matter. Even if you do not feel strongly, someone should make a motion simply for the purpose of bringing the issue to a vote. If the motion is unsuccessful, any member may then propose another motion to the contrary, again for the purpose of bringing the issue to a vote. If that motion is unsuccessful for a request that is a recommendation to the legislative body (i.e., a rezoning) the plan commission should have a final motion to forward the petition to the legislative body with no recommendation. For BZA matters and matters where the plan commission makes the final decision (i.e., a subdivision plat), if all motions have failed to carry, the matter should be continued to the next meeting (either through motion or through provisions contained in the rules of procedure).

Are your planning activities a charade? Do your meetings have meaning? Take this quiz about your meetings to find out if you are missing the point:

1. Are you so comfortable that you have become apathetic? Yes No
2. Has the hectic pace caused you to lose sight of your purpose? Yes No
3. Are you overwhelmed by choices and without direction? Yes No
4. Have you gotten too big for your britches? Yes No
5. Does your leadership inspire you? Yes No
6. Are you afraid to say something that might rock the boat? Yes No
7. Are you just plain tired? Yes No

"Yes" answers mean your planning activities, including meetings, may not be working. The public's perceptions about plan commission and BZA are based largely on their impressions of the public hearing.

Avoid Emotions

The topic of local land use planning can be highly charged in many communities. Emotions can run high from the perspective of the petitioner, remonstrators, and decision-makers. Typically, the investment an individual, family or business makes in real estate represents the largest single investment they will ever make. This is especially true of individual homeowners and their families. Once things become emotionally charged for either or both sides of a planning issue, involved parties, including plan commission or BZA, can get caught up in the emotion of the situation. These represent some of the most dangerous times for plan commission and board members in which they may be swayed by the emotions of the issue rather than the facts presented. Decisions made on the basis of emotional reactions are most likely to be flawed decisions, which may be challenged in court.

One reason for planning requests to be emotionally charged is the public's basic misunderstanding of planning and zoning issues and procedures, and the fear associated with the unknown impacts of a proposed development. In all public hearings, but especially at public hearings in which controversial matters will be presented, plan commission or board members must remain calm and deliberate in their actions. Members should not "play to the crowd" by intentionally making comments to invoke crowd reactions.

Members have a responsibility to educate those in attendance about the proceedings. In order to avoid confusion and misunderstanding at public hearings, make sure everyone present understands what is being requested and what the BZA or commission can legally consider in making a decision. This can be done one or more ways:

- The president/chairman can explain at the beginning of the meeting
- Staff can make this information part of their presentation
- Post large signs on the wall (e.g., list of criteria for granting a variance)
- Provide those in attendance with hand-outs, in addition to just an agenda
- Include the information in the legal notification sent to surrounding property owners

In making its determination or final action, plan commission and board members are reminded that their position is one of a public trust and, as such, you must stay impartial in your deliberations and make decisions based upon the facts.

Beware of Takings

The idea of "Takings" is a constitutional issue that pops up in the local planning process. The ability of each plan commission or board to request "donations" from a developer in terms of cash contributions, dedication of lands for public uses, or the installation or improvement of public infrastructure will vary from jurisdiction to jurisdiction. The jurisdictional difference is based upon each community's adopted comprehensive plan content, zoning ordinance and subdivision regulations.

Basic Principals

The basic principals that must be maintained in any effort to obtain donations are:

- the request must be related to the contents of an officially adopted plan;
- the request must be equitably applied throughout the jurisdiction; and,
- the request must be in appropriate relationship to the impact of the particular development on the jurisdiction.

A practical application of the above may be found in a situation where there is a request for the dedication of public right-of-way for the future development of the roadway system. In many jurisdictions, such requests are commonly made and commonly agreed to by the developer who recognizes the dedications as a "cost of business" and realized that improved roadways in the future will benefit the proposed development. Problems tend to arise when:

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- a developer is new to the jurisdiction and attempts to rely on the written plans and ordinances in the preparation of a development proposal and then finds out the common method of doing business bears little relationship to the written plans and ordinances;
- when a developer is denied his zoning approval because he would not agree to specific dedication request; or,
- when the request bears little relationship to the proposed development.

To avoid problems of this nature, a jurisdiction has two primary options. It may:

- Adopt an Impact Fee Ordinance; or,
- Require or request written commitments in connection with the review and approval of a development plan.

Impact Fees

Impact Fees provide a jurisdiction with a mechanism to assess development projects to pay a portion of the costs associated with that development project in terms of municipal services. In order to legally impose impact fees, a major effort in terms of comprehensive and capital improvement planning is required.

Indiana Code establishes certain requirements for the imposition of impact fees. The following are minimum requirements for establishing impact fees pursuant to **IC 37-7-4-1300 - 1342**:

1. A Comprehensive Plan adopted pursuant to IC 36-7-4-500 Series;
2. An Impact Fee Advisory Committee;
3. An Impact Zone or set of Impact Zones for each infrastructure type covered by the proposed Impact Fee ordinance;
4. A Zone Improvement Plan, including:
 - a. Description of existing infrastructure in zone;
 - b. Determination of current level of service;
 - c. Establishment of a community level of service;
 - d. Estimate of development in the zone over next 10 years;
 - e. Estimate of cost for infrastructure to support a community level of service of projected development; and,
 - f. Description of sources of funds used to pay for infrastructure during past 5 years.

Once the foundation outlined above is established for the adoption of an Impact Fee ordinance, the Indiana Code then sets forth a series of procedures for the collection, use and refunding of any fees so collected.

Commitments / Conditions

The Impact Fee legislation discussed above specifically does not prohibit:

“Imposing, pursuant to a written commitment or agreement and as a condition or requirement attached to a development approval or authorization (including permitting or zoning decisions), an obligation to dedicate, construct, or contribute goods, services, land or interests in land, or infrastructure to a unit or to an infrastructure agency.” (**IC 36-7-4-1313**)

Under Indiana Planning Law, the ability of a plan commission to permit or require written commitments under the Advisory and Area Planning Law is tied directly to the zoning ordinance. If provided for in a zoning ordinance, a plan commission may permit or require the owner of property to enter into written commitments concerning the use or development of that property as described above.

An example of the planning effort necessary to request contributions (e.g., dedication of right-of-way as described above) in connection with commitments or conditions may include:

- a comprehensive plan (that provides for the creation of public ways and the preservation of the routes necessary for the development of public ways);
- a thoroughfare plan which identifies specific roadway needs and alignment;

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- a zoning ordinance which specified the circumstances under which a written commitment may be made, modified or terminated; and,
- subdivision control ordinance, which require the platting of the real estate.

Without the required planning efforts and public policy established by the legislative body through the adoption process, the request for the dedication of right-of-way may not be defensible, if challenged, by a developer. If a jurisdiction adopts an Impact Fee ordinance, IC 36-7-4-1313 provides that the owner may be entitled to a credit for any contributions against the Impact Fee, or that the cost of complying with a condition may not exceed the impact fee that could have been imposed.

TOOLS FOR AVOIDING PITFALLS

Create a Plan for the Planners

Just like the communities we serve, it helps if the plan commission and board of zoning appeals have their own plan to follow. Planning bodies need to be proactive in their planning efforts, which means following a set plan of work. Where do you start?

Many comprehensive plans contain an action plan in their implementation section that spells out assigned tasks, and this may be a good starting point for your community. However, even if your community has a comprehensive plan with recommended implementation tasks, it may not be detailed enough to cover what needs to be done. One way some Indiana planning bodies accomplish this is to hold at least one special meeting per year where they assess what happened the previous year and brainstorm what needs to be done in the current year, including plan updates, ordinance amendments, changes to rules, etc.

Maintain Basic Planning Documents

One of the most important ways to be proactive is to have, maintain, and utilize a current set of core planning documents. Those documents include a comprehensive plan, zoning ordinance, subdivision control ordinance (or a unified development ordinance), and rules of procedure for the plan commission and board of zoning appeals. It is not enough just to have these documents in place. If your documents are essentially the same as they were 20 years ago, then they need to be updated. There are new land uses, new technical materials and new community members that didn't exist when the document was first developed. If your community doesn't address these changes, then planning results will not only be less than they could be, but they may, in fact, be disastrous.

Sometimes things pop up before even the most diligent community can amend their ordinance or plan to address them. A good example of this is cell towers -- when they first appeared, many communities were forced to make decisions about them before they had time to change their comprehensive plan and zoning ordinance. What should you do in this situation? First and most importantly, don't disregard your current ordinance or plan, or you could find yourselves in legal trouble. Secondly, a good ordinance or plan is prepared for this contingency, with language that allows interpretation. For example, Hendricks County, Indiana's zoning ordinance says, "*Principal permitted uses or similar uses consistent with the purposes of this chapter (the zoning district) shall be as follows...*". Finally, you can be honest with the applicant and ask for voluntary written commitments that reflect what will be in those amendments. Many applicants will agree to do this voluntarily in order to generate good will with local officials.

Comprehensive Plans

A comprehensive plan is a guide to the future development of a community. It establishes a vision of what the community wants to look like in the future. The plan should provide a series of written recommendations, guidelines, policies, and/or strategies to help the community achieve its vision. One easy way to avoid pitfalls is to utilize and maintain an up-to-date comprehensive plan that

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clearly outlines the goals and objectives of the community. This plan, its goals, and objectives should be referred to and referenced whenever land use decisions are made. For more information on comprehensive plans, see the *INDIANA CITIZEN PLANNER'S GUIDE, Part 7: Comprehensive Plans*.

Zoning Ordinances

The basic rationale for a zoning ordinance is to protect the health, safety, and general welfare of the public, to implement the goals and policies of the comprehensive plan and to preserve and protect property values. When properly coordinated, the zoning ordinance will contain districts, use groupings and development standards that work together to help implement the land use policies outlined in the comprehensive plan. For more information on zoning ordinances, see the *INDIANA CITIZEN PLANNER'S GUIDE, Part 8: Zoning Ordinances*.

Subdivision Control Ordinances

Subdivision control ordinances are intended to protect purchasers of real estate by assuring them that the platted property has been reviewed and determined to be developable by the jurisdiction, and to protect the jurisdiction by making sure that property is developed to their standards. For more information on subdivision control ordinances, see the *INDIANA CITIZEN PLANNER'S GUIDE, Part 9: Subdivision Control Ordinances*.

Rules of Procedure

Both the plan commission and the board of zoning appeals need to adopt rules of procedure, which govern how they operate, including how meetings are run. For more information on rules of procedure, see the *INDIANA CITIZEN PLANNER'S GUIDE, Part 5: Rules of Procedure*.

Use Conditions and Written Commitments

The use of conditions should theoretically help make a decision better, but conditions often backfire, causing plan commissions and BZAs problems. Because the only record of conditions may be in the planning office, future property owners may not be aware of the conditions. There are two other major concerns associated with the use of conditions. The first is that if conditions are not clear or detailed, it can cause major frustration for staff, neighbors, and the developer, particularly as time passes and no one remembers what the original intent was. Another problem with conditions is when they are not valid.

Caution: Don't use conditions and written commitments as a way to make an invalid application acceptable -- these tools aren't meant to make a bad request palatable, but will make a good request even better.

The following addresses the validity of conditions and written commitments:

Rezoning -- Indiana Code doesn't mention conditions for rezonings, however, **IC 36-7-4-615** provides an opportunity for the local legislative body to set up written commitments in the zoning ordinance, and specify whether a written commitment may be used for a rezoning or PUD proposal. The property owner enters into written commitments, which are recorded in the County Recorder's Office and are binding on future owners of the subject property. Written commitments formalize the conditions attached to approvals and do not affect the validity of any covenant or easement created in accordance with the law. While written commitments are voluntary on the part of the property owner, if the owner does not volunteer the commitments seen as necessary by the commission, they do not have to approve the application.

Variances -- **IC 36-7-4-918.4** for Use Variances and **IC 36-7-4-918.5** for Variances from Development Standards says that the BZA may impose reasonable conditions as a part of its approval. Once granted, a variance runs with the land. Therefore, if a board decides to grant a petition subject to certain conditions, those conditions must relate to the specific elements of the

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use or development standards applicable to that property and not condition the grant on who the petitioner is. Written commitments can also be employed for variances.

Subdivisions -- IC 36-7-4-702 lists the following as acceptable conditions of primary approval:

- the manner in which public ways shall be laid out, graded, and improved;
- a provision for water, sewage, and other utility services;
- a provision for lot size, number, and location;
- a provision for drainage design; and
- a provision for other services as specified in the subdivision control ordinance.

It is also possible to ask the applicant to make conditions part of the deed restrictions or covenants for subdivision. Remember though, the City or County is not a party to these, so you may not enforce them; enforcement is up to the developer/homeowner's association.

While there is no maximum number of conditions that can be attached to an approval, if there are a great number, or if they are really significant, you may want to reexamine whether the proposed approval is really justified.

Avoid Relying on PUDs

Many Indiana communities rely on planned unit developments (PUDs) because their zoning ordinance has not been kept up to date. Since each planned unit development is essentially a "write your own" zoning district, any community that has a lot of PUDs makes administration and enforcement much more difficult for planning staff; each PUD becomes another zoning district, complete with unique standards and uses to learn. Additionally, it is much more difficult for everyone else (realtors, citizens, etc.) who wishes to know what is going on with a particular piece of property. It is possible to have a PUD ordinance with real performance standards in it, but most Indiana communities don't use them that way. PUDs are a good tool when used appropriately to further goals such as mixed-use development.

Beware of Variances

Variances provide a needed relief valve for zoning, however they can be misused. Beware of "back-door rezoning" that can occur when the BZA allows a use not normally allowed in a district or changes a standard in that district, which could otherwise be resolved with a rezoning request. If the BZA follows the required criteria, this should not happen.

Keep Good Records

One of the biggest problems that BZAs and plan commissions face is dealing with poor or incomplete records. It is essential that each case have an associated file that contains at a minimum proof of legal notice, application forms, all related correspondence, minutes, findings of fact (if applicable). Even if all these things are included in the file, it may still not be enough to make the decision clear. Certain key records deserve more discussion:

Minutes -- Minutes should be completed and adopted as soon as possible after the meeting is completed. While some planning groups in Indiana may wait months to adopt their minutes, the longer you wait, the less clear your memory is. It is not necessary to create an actual transcript of the meeting to serve as minutes. Minutes should contain a summary of the request, a record of public testimony, a summary of commission or board discussion, a record of motions and the final outcome, with the vote.

Findings of Fact -- No all cases require findings of fact, but for those that do, the advice is similar to that given for minutes. Complete and adopt findings as soon as possible. It is fine to

The Indiana Citizen Planner's Guide: Part 3 ~ Avoiding Pitfalls

direct staff to prepare the findings, but don't make them guess what you were thinking. State for the public record at the hearing your reasoning regarding the applicable criteria.

Zoning and Thoroughfare Maps -- Not only do the official zoning maps need to be updated each time there is a zone map change, it is also a good idea to annotate the maps, with references to variances, written commitments, etc. This will give a "heads up" to anyone checking on the property that there is more important information to be researched. It is also important to keep the jurisdiction's thoroughfare map up-to-date to reflect any changes in classification, alignment, etc.

Ordinance and Plan Amendments -- There is no excuse for not keeping today's electronic documents up to date. Still, someone has to take responsibility for getting it done in a timely manner. Make sure that you update documents on your web site at the same time, so that you do not cause confusion or errors to the users. It is still a good idea to follow the old practice of "recodifying" the ordinances occasionally -- you may discover some "lost" amendments.

Plat Maps and Tax Rolls -- While the official plat maps and tax rolls are not within the control of the plan commission or board of zoning appeals, it is important that these two things be kept up to date to ensure proper notification for planning cases. Forge a good relationship with these local government offices, and lend your support to their budget requests.

Paper Records -- Traditionally case files have been kept in paper form, but more and more communities are turning to electronic records because of space limitations. Make sure you check with the State of Indiana's Public Access Counselor regarding the *Indiana Access to Public Records Act* (which governs records of public agencies), before you consider destroying any paper records. If you are allowed to destroy paper copies, remember that once something is gone, there is no getting it back, so make sure you have a copy of everything before you take that action.

Computer Software -- One of the trickiest parts of planning administration is keeping track of deadlines and expiration dates (i.e., for bonds, etc.). Consider investing in a computer software program that will keep planning staff on top of these milestones.

INDIANA CITIZEN PLANNER'S GUIDE

Part 4: Communications *by Eugene Valanzano*

a publication of
The Indiana Planning Association,
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and is not to be considered legal advice.**

INDIANA CITIZEN PLANNER'S GUIDE

PART 4: COMMUNICATIONS¹

In this Part. . .

- *Importance of Communication*
- *Types of Meetings*
- *Conducting Public Hearings*
- *Requirements for Public Hearings*
- *Types of Communication*

Importance of Communication

The relationship between a citizen board and a community, various public agencies, and the local legislative body is critical to the board's success in gaining local confidence. The board must address and resolve difficult issues, often issues that are troubling the local community, and emotions can run high. A key element in establishing a strong relationship between a board and the community is the ability to make informed decisions that are consistently in the best interests of the entire community. In order for to make informed decisions, the board must

- clearly identify the issues
- gather input on the issues in a fair, orderly and predictable fashion
- encourage input from all sides of an issue; and,
- base the decision upon adopted policy and the facts presented in an open public setting

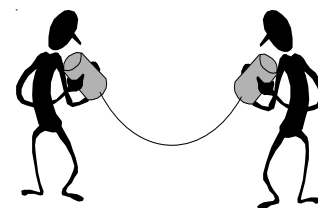
In carrying out these responsibilities, the board must convey to the public its impartiality, its fairness, and the process by which decisions and recommendations are made. The plan commission also must communicate to the legislative body (city or town council or county commissioners) the reasons for its recommendations. If citizen boards fulfill their responsibilities as they should, they will sometimes make decisions that are unpopular with the audience at a public meeting. Members need to ensure that those audience members understand the board's role, the relevant issues, and the basis for its action.

These communications take several forms, including public forums, public hearings, written and oral reports, and letters or memoranda. Some boards also use radio and television as communication media. There are skills involved in each of these types of communications. The primary focus of this module is the conduct of meetings, as these are the most common form of communication for citizen boards.

¹ The term "board" is used here to refer to any citizen board or commission, such as a plan commission or a board of zoning appeals, unless otherwise noted.

What we have here is a failure to communicate.
—Paul Newman
Cool Hand Luke

I think we're on the road to coming up with answers that I don't think any of us in total feel we have the answers to.
—Kim Anderson
Mayor of Naples, FL



Types of Meetings

A board, in its normal course of operation, may find the need to conduct a variety of types of meetings, including public meetings, public hearings, public forums, work sessions and executive sessions. Each type of meeting is discussed in this section, with explanations of the uses for each type and primary differences among them.



Public Meetings

Although the terms often are used interchangeably, there is a difference between a public “meeting” and a public “hearing.” The Indiana open door law uses the term “meeting,” to apply to all gatherings of the board, whether these are for the purpose of soliciting public comment or not. All meetings are open to the public, but the public need not be invited to speak unless there is a scheduled public hearing.

Plan commissions may hold two types of public meetings: regular and special. Regular meetings of the plan commission and board of zoning appeals usually are scheduled at least monthly. Sometimes the volume of planning and zoning activity in a community requires more frequent meetings. The board must maintain a permanent record of these meetings. Normally a secretary takes minutes at these meetings, and the minutes are approved by the board at the next meeting.

Occasionally a plan commission may determine that the public would be better served by discussing a particular issue at a special meeting. A time-sensitive issue that needs to be decided before the next regular meeting and a controversial issue that will involve lengthy discussion are examples of issues that might warrant a special meeting. These special meetings may be scheduled by the plan commission at a regular meeting, or they may be called by the president or any two members of the commission. If these special meetings are properly called and noticed, the commission may take official action at them.



Public Hearings

The Indiana planning and zoning enabling act requires formal public “hearings” on certain matters. The board holds public hearings for the purpose of taking public comment on matters presented for official action. Public hearings are subject to legal notice requirements under Indiana law.



IC 5-3-1

These hearings provide the opportunities for citizens to participate in the decision-making process by officially voicing their opinions and providing information to the board. A shorthand, stenographic, or electronic record may be made of public hearings. If these types of records are made, they must be retained under the public records law. When the law requires a public hearing, the board cannot take official action until after the hearing.

Exercise: Review the agendas for the past three meetings of your board. Is it clear which items require public hearings? If not, how could the agenda be changed?

As shown on the table below, the law requires public hearings for certain matters that come before a plan commission or board of zoning appeals.

Plan Commission	Board of Zoning Appeals
Adoption of Comprehensive Plan or plan element	Development standards variance
Amendment of Comprehensive Plan or plan element	Use variance
Adoption of zoning ordinance	Conditional use
Amendment of zoning ordinance text	Special exception
Amendment of zoning map (rezoning)	Contingent use
Subdivision of land	Administrative appeal

Public Forums

Public forums are held to gather information and encourage the exchange of ideas. Public forums tend to be informal, and often no permanent record is retained, although staff or board members present should take notes on the major issues discussed. No official action may be taken at a public forum. A public form does not require the attendance of board members; however, in order to be fully informed about community issues, as many members as possible should attempt to be present. If there is a chance that enough board members will attend a public forum to constitute a quorum, it is advisable to give media notice of the public forum.

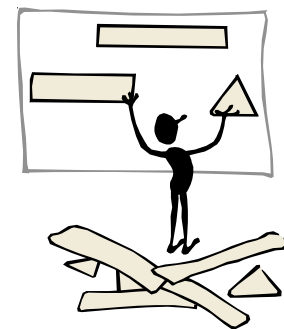
Exercise: Did your board hold any public forums during the past year? If so, were they effective? Were the topics appropriate for this type of meeting? If not, are there issues which should have been the subject of forums?

If the board has a staff, a public forum may be planned and run by the staff rather than by members of the board. The following are examples of information-gathering public forums:

- establishing community goals and objectives for a comprehensive plan
- gathering input to determine if ordinance should be revised
- soliciting input on proposed zoning ordinances.

Work Sessions

A board or a board committee may find it beneficial to hold work sessions to complete specific projects. The regular meeting agendas often are devoted to matters needing immediate action, and complex projects with no immediate deadline can be difficult or impossible to complete at these meetings. In addition, some topics may require special expertise not available on the board. Examples of work session topics include



- developing a new sign code
- reviewing or drafting a thoroughfare plan
- drafting new drainage regulations

A series of work sessions involving plan commissioners and/or other committee members can be useful.

As with public forums, it is not necessary for the group to maintain official minutes of these meetings, although the members may find it beneficial to do so. These sessions are subject to the open meeting law, so the media must be notified, and the public must be allowed to attend and observe, but those not on the committee need not be invited to speak at these meetings.

Executive Sessions

Executive session for public agencies such as plan commissions and board of zoning appeals are defined in Indiana law and permitted only for limited purposes. The most common reasons for executive sessions are as follows:

- discussing strategy with respect to the initiation of litigation or litigation that is pending or threatened
- receiving information about and interviewing prospective employees
- receiving information about an employee's alleged misconduct and discussing the employee's status or
- discussing a job performance evaluation of an individual employee.



IC 5-14-1.5

Conducting Public Meetings

The manner in which boards conduct public meetings and hearings speaks volumes to the community about the openness and fairness of the process and of the board's willingness to receive and consider information before making a determination or recommendation. Public hearings should be orderly and fair and allow for a thorough discussion of the issue at hand.

Board members should be aware that all their deliberations, except executive sessions (previously discussed), are a matter of public record. In the interests of a fair hearing, members should not discuss a case with any interested party outside of the public hearing. For boards of zoning appeals, Indiana law prohibits these outside communications; for plan commissions, it is good practice to follow the same rule.

All decisions must be based upon the record created by the various parties participating in the public hearing. If board members hold outside discussions, they may glean information not available to other members and may even base their votes on information not on the record. These ex parte communications are contrary to the concept of due process, and they deny the affected parties a fair hearing. If commission members do receive



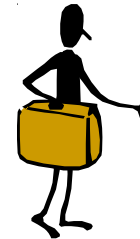
Exercise: Review your board's rules of procedure. What are the provisions for ex parte communication? Do the rules (and your practice) comply with the law and promote fair hearings?

information outside of the meeting, they should disclose this information at the beginning of the hearing. The suggestions contained in this section will assist board members in conducting open, orderly, fair and thorough public hearings and effective public meetings.

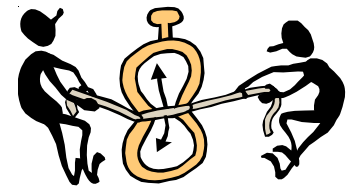
Tips for Effective Public Meetings

The following tips are based upon a list originally published in the *League of California Cities Pocket Guide* and reprinted in *Planning/Northwest* and in *Scanning Planning*.

1. The meeting should be conducted in a professional manner, demonstrating that the board members take their jobs seriously.
2. Individual board members should be well prepared. This preparation includes viewing sites on the agenda and reviewing materials provided by staff in the form of staff reports or related materials.
3. Applicants and the public should be treated fairly.
4. Applicants and the public should understand the decision-making procedures and that the staff role is to provide appropriate support and information to the board.
5. Copies of the meeting agenda should be available at the door. The audience should be kept informed as to which items are being heard and, where practical, the approximate time scheduled for the items on the agenda.
6. The chair should introduce the board and staff members present, since those in the audience may not know the participants nor their respective roles and responsibilities.
7. The chair should inform the public about the meeting process, appeal procedures, and any changes to the agenda such as requests for continuances or withdrawn applications.
8. The chair should keep the meeting moving by keeping board members, applicants, the public and the staff to the subject at hand.
9. The board should use the staff as a resource.
10. To expedite routine matters (i.e., approval of minutes and regular business items) the board may use a "consent agenda" in which all items or a selected group of items may be decided in one motion.
11. Each meeting agenda should provide an opportunity for miscellaneous matters such as letters from citizens, inquiries from board members about special projects, and discussion of board activities. Reports may be presented by the chair or staff at the appropriate time in the agenda.



Exercise: Evaluate the conduct of your board meetings. Are they orderly? Do they produce the information you need to make an informed decision? Do applicants and audience members leave feeling that they were treated fairly and that their ideas and opinions were considered? What steps could be taken to improve the meetings?



Orderly Conduct

Every citizen is entitled to voice an opinion to the board with respect to a matter scheduled for public hearing. Orderly conduct is essential to allowing all persons a reasonable opportunity to present their opinions. Disorderly conduct, such as shouting out or otherwise interfering with the proceedings, is an infringement on the right of the person speaking at the time. The board is well within its rights to require each person to wait for a turn to speak. The chair should formally open and close a public hearing. The public should not be invited nor allowed to speak at any time other than during the hearing.

A board may, by rule, establish procedures to govern the orderly conduct of a public hearing. Typically these rules

- require each speaker to provide his/her name and address for the record;
- require only one person speak at a time;
- require all testimony to be provided under oath (especially for boards of zoning appeals);
- establish a time limit, either per individual or for each side of an issue;
- establish the order in which testimony will be provided, including initial testimony, rebuttal, and staff comments;
- provide that the chair may limit repetitious or irrelevant testimony;
- provide that the chair may determine discourteous, disorderly or contemptuous conduct to be a breach of the privileges extended by the board and allow the chair to deal with such individual as is deemed fair and proper, including removal from the public hearing.

It is important that board and staff members conduct themselves professionally and not make statements or ask questions that could put the board in legal jeopardy. The transcript of a hearing can be used against, as well as for, the board. The chair should maintain a professional atmosphere for the meeting. Board and staff members should not address each other, applicants, audience members, or others by their first names, nor should they engage in extraneous conversation. If the board members address the applicant on a first-name basis or give the impression of personal relationships, the audience members can be led to believe that the hearing is not fair and impartial.

Don't talk to me while I'm interrupting.
– Michael Curtiz



Legal Requirements for Meetings

This section contains information on the Indiana open door law, making a public record, and notice requirements for public hearings. These issues must be properly addressed for any official action of the board to be deemed legal.

Open Door Law

The Indiana open door law states that “it is the intent of this chapter that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed.” This law requires all meetings to be “open at all times for the purpose of permitting members of the public to observe and record them.” It also requires that a copy of the agenda be posted at the entrance to the meeting and that minutes be kept indicating

- the date, time and place of the meeting;
- members present and absent;
- general substance of all matters proposed, discussed or decided; and,
- a record of all votes taken.

Minutes must be made available to the public for inspection and copying.

Any gathering of a quorum of the board can be considered a meeting under the open door law, and the media must be notified at least 48 hours in advance that the meeting is to take place. Special plan commission meetings require notice to the commission members at least three days before the meeting and to the media at least 48 hours in advance. If there are matters to be discussed that require formal public hearings, the hearings must be advertised and notice given to interested parties as required by Indiana law. The commission must notify the media of executive sessions and must state the purpose of the meeting.

Board members should be familiar with the following terms defined in the open door law:

Public Agency ~ Any advisory commission, committee, or body created by statute, ordinance, or executive order to advise a governing body of a public agency.

Official Action ~ means to

- (1) Receive information;
- (2) Deliberate;
- (3) Make recommendations;
- (4) Establish policy;
- (5) Make decisions; or
- (6) Take final action.

Deliberate ~ a discussion which may reasonably be expected to result in an official action under (3), (4), (5), or (6) above.



IC. 36-7-4-307



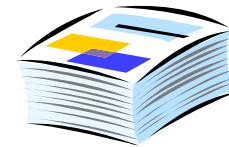
IC. 5-14-3

Boards and board committees must comply with the Indiana open door law for all meetings, even if there is to be no official action taken. This compliance assures the community that the planning process is open to all citizens of the community and encourages their participation. Citizen participation is the most critical step in educating the general public about planning issues and establishing a link between the board and the public.

I stand by all the misstatements.
– Dan Quayle

Making a Public Record

At any public hearing in which an official action is likely to occur, it is vitally important to the board that an accurate record be made of the proceedings. The minutes should need not and should not contain a verbatim transcript of the hearing. Rather, minutes should provide a recitation of the relevant issues discussed and the actions taken. The minutes or proceedings of executive sessions are not open records available for public review.



Many boards also keep a shorthand, stenographic or electronic record of the hearings. This type of public record can be critical to defending the actions of a board should a legal challenge be raised against any official action. It should be noted that if the record is made, the open records law requires that it be retained permanently, unless destruction of the record is authorized by the county's commission of public records.

Notice of Public Hearings


Notice of public hearings are typically provided in some combination of the following five forms:

- published notice;
- posting an agenda;
- individual notice;
- posted notice; and
- posting on the Internet.



 IC 5-3-1
IC 36-7-4

The Indiana planning and zoning enabling act requires that legal notice be given of all public hearings on the comprehensive plan, new zoning ordinances, amendments to zoning ordinances, and amendments to zone maps. These notices must comply with the requirements of state law. Published notice is required to be placed in a newspaper of general circulation at least one time, at least ten days prior to a public hearing.

 IC 36-7-4-604 (c)

Local radio stations often announce upcoming meetings. Many communities now also post meeting dates, agendas, staff reports, and other relevant documents on the Internet.

Indiana law also provides for "due notice to interested parties at least ten (10) days before the date set for the hearing. The commission shall by rule determine who are interested parties, how notice is to be given to them, and who is required to give that notice." Due notice as required by this section of the Indiana Code typically takes two forms:

Exercise: Review your rules of procedure. Do they define "interested parties"? Do they state how notice is to be given?

- individual notice mailed to affected property owners; and,
- posted notice placed on the subject property.

Individual notice is notice provided to "interested parties." The plan commission may, by rule, establish a notice requirement for the provision of notice to interested parties on a comprehensive plan, zoning ordinance, subdivision, or petition for zone map change. In that the "interested parties" in each of these situations may be substantially different, the plan commission may establish notice requirements for each type of hearing. For example, the plan commission may determine, by rule, that published notice shall be sufficient for public hearings on a comprehensive plan or zoning ordinance, because the entire community is affected by such an action and published notice is the only reasonable method of communicating with the community as a whole. While not required by law, many communities place display advertisements in the newspaper, in addition to the legal notice. Few people read the fine print of the legal notices, and the public is much more likely to see a display advertisement.



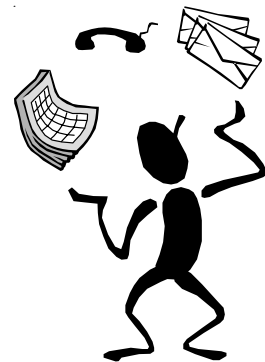
In the case of a petition for zone map change, subdivision plat or other form of zoning petition, the plan commission may determine that individual notice should take the form of a written notice provided to property owners adjoining real estate which is the subject of the hearing. The plan commission may, by rule, determine to what distance or how many ownerships surrounding a subject property the individual notice is to be provided.

"Posted notice" refers to the posting of a notice card, placard or sign on real estate which is the subject of a petition for zone map change, subdivision plat petition or other form of zoning approval to inform neighbors that a zoning action is pending before the plan commission. Many communities find this method highly effective; others object to the public contribution to sign clutter.

Establishing local rules for providing notice can make it easier for the local community to find out about issues pending before the board and allow citizens adequate time to inform themselves about the issues and organize their presentation to the board.

Types of Communications

A board from time to time, will have the need to provide clear internal communications between and among members, external communications with the legislative body and various other governmental agencies, and, most important, communications with the general public in the form of community education. These forms of communication are discussed in this section along with suggestions to make such communications as effective as possible.



Internal Communications

For a board to communicate effectively with the community, public agencies and the legislative body, it must first be able to communicate effectively internally in its deliberation on issues. One of the most important elements in assuring good communication among board members is a strong chair.

The chair must understand the board's rules of procedure and be responsible for the fair and equitable application of those rules. It is important to allow for each board member, and members of the general public, to express their opinions. The chair is in a unique position to encourage productive discussion of the issues while maintaining order. The chair must be organized and must keep the discussions focused on the issues over which the board has jurisdiction.

External Communications

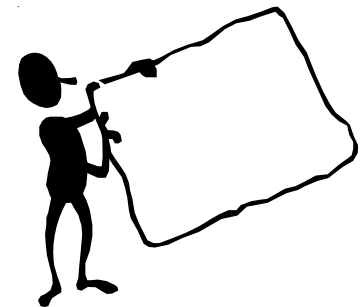
External communication between the board and various agencies is important to the success of planning efforts in a community. The actions of one agency may impact the operations of other agencies. For example, if a plan commission approves a major development without considering whether the school system, road system, sewer system, drinking water system or drainage systems are adequate, many other agencies may be substantially affected. To address these issues, the plan commission should establish liaisons with the agencies that deal with those topics and solicit comments.

Plan commissions in Indiana have an advisory role on most planning and zoning issues; they make recommendations to the local legislative bodies. In some communities, members of the legislative bodies also serve as members of the plan commission. In that the plan commission acts as the primary advisor to the legislative body though its power to make recommendations after conducting public hearings, it is essential for the plan commission to establish a good working relationship with the legislative body. A good working relationship can be obtained through several methods, including the following:

- providing written reports on pending issues,
- conducting joint work sessions or hearings on various issues of importance to the community, and
- attending meetings of the other body.

Citizen groups or neighborhood organizations can provide an efficient method of communication between boards and area citizens. Citizen groups may be issue-oriented, considering a topic such as sign regulations or home-based businesses, while neighborhood organizations tend to focus on issues that affect a specific geographic area, such as a drainage problem. In both instances, the board's recognition of such groups or utilization of such groups on advisory panels, when they are legitimate representatives of the group or area, can help the board understand issues more thoroughly than would otherwise be possible. Public hearings or meetings do not always afford the opportunity for obtaining complete and accurate information.

The communication and exchange of ideas on administrative policy matters is encouraged and maintained to optimize the use, mix and cost and administrative inputs in program results.
– Treasury Board of Canada



Community Education

A well-educated and well-informed public can be a strong supporter of the efforts of a board, especially in controversial matters. Such education and information can be made available to the public only if the board remembers that the public includes all elements of the community (i.e., merchants, business leaders, developers and residents). The needs of all sectors of the community must be balanced for a community have a healthy growth pattern and strong economic base. The board, through its use of public forums and its ability to establish citizen advisory groups with a balanced representation from the various sectors of the community, can work through controversial issues and develop an action plan that is endorsed by representatives of all sectors of the community.

Exercise: Choose a planning issue and develop a program for informing the community about the issue. What is the most effective way to get public input?

Written materials should be prepared with the audience in mind. Reports and brochures should use clear, commonly understood language; they should not be filled with planning jargon. Board and staff members also should use other forms of communication when possible, particularly visual materials such as maps, slides and videos. For many people, a picture really is worth a thousand words. As Internet use continues to grow, communities should consider developing their own web sites and community calendars.

Suggested Reading

Allor, David J. *The Planning Commissioners Guide*, Chicago: American Planning Association, 1984.

Smith, Herbert H. *The Citizen's Guide to Planning*, Chapters 1-3, Chapter 5. Chicago: American Planning Association, 1993 (Third Edition).

Toner, William; Gil, Efraim; Lucchesi, Enid. *Planning Made Easy*, Chapter 1. Chicago: American Planning Association, 1994.



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INDIANA CITIZEN PLANNER'S GUIDE

Part 5: Rules of Procedure *by Cynthia A. Bowen, AICP*

a publication of
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INDIANA CITIZEN PLANNER'S GUIDE

PART 5: RULES OF PROCEDURE

In this Part. . .

- *What are Rules of Procedure ?*
- *Are Rules of Procedure necessary?*
- *The Components of Rules of Procedure*
- *Adopting and Amending Rules of Procedure*

What are Rules of Procedure?

Rules of Procedure are documented procedures that have been established by either the plan commission or board of zoning appeals which provide for how each board shall conduct business. The rules of procedure should be used in conjunction with the jurisdiction's comprehensive plan, zoning ordinance, and subdivision control ordinance to implement the long-term vision for a community.

Specifically, Indiana Code provides enabling legislation allowing a board to establish rules of procedure and sets out the minimum requirements for those rules.

A plan commission should consult *IC 36-7-4-401, Duties; Advisory Planning*. In general, the statute states that each plan commission shall:

- Prescribe uniform rules pertaining to investigation and hearings;
- Keep a complete record of all the departmental proceedings;
- Record and file all bonds and contracts and keep and preserve all documents of the Plan Commission or department;
- Prepare, publish and distribute reports, ordinances and other materials relating to its activities;
- Adopt a seal;
- Certify all official acts;
- Supervise the fiscal affairs of itself and the planning department; and
- Prepare and submit an annual budget.

Board of zoning appeal should consult *IC 36-7-4-916, Board of Zoning Appeals; Rules*. In general these rules state that the board of zoning appeals shall adopt rules, which may not conflict with the zoning ordinance concerning the following items:



IC 36-7-4-401



- Provisions for the filing of applications;
- Applications for variances, special exceptions, special uses, contingent uses and conditional uses;
- Public notice requirements;
- Conduct of hearings; and
- Determination of whether a variance application is for a use variance or development standards variance.

The law also provide for other items that can be included in the rules but are not legally required: allocation of the docket for the board of zoning appeals; and how to determine dates for meetings.

For both boards, the rules that are adopted should be printed and made available to all applicants and the general public.

Quick Quiz: Does your board have rules of procedure? Where are copies of the rules kept?

Are Rules of Procedure necessary?

As documented above, Indiana Code provides for a variety of rules and procedures for the plan commission and board of zoning appeals to conduct business whether it is for interpretations on specific processes (re-zones, special exceptions, variances), membership or public notice.

All plan commissions and boards of zoning appeals should have rules of procedure that take the relevant requirements of state law and synthesize them into an easy to use document that makes the law easily accessible and comprehensible so that it is not necessary to research all the appropriate actions and requirements under state law when conducting board business.

Additionally, rules should be tailored to also include actions that specifically indicate how the board is run and how decisions are generally made. These rules should be periodically updated so they continually reflect how the board conducts business in its month to month meetings.

Finally, rules should be simple, easy to understand and easy to follow. As a general rule of thumb, do not cite or follow Robert's Rules of Order. Many boards still cite Robert's rules, however they are very formal and can be difficult to implement. If the board does not consistently follow them, the board can open itself up to having decisions overturned due to procedural inconsistency.

The rules are a necessary step in the governance of plan commissions and boards of zoning appeals, especially if there ever is a case where the board is sued. The rules will help to guide and protect the board in procedural administration which will leave a smaller margin of error.



The Components of Rules of Procedure

From community to community and from board to board, the rules of procedure will be different. In general, the local zoning ordinance should have very general and basic information regarding the duties and powers of the plan commission and board of zoning appeals to provide the necessary regulatory means for implementation of the community ordinances. The details of the board's composition, authority, and meeting dates and notices should be contained in the rules of procedure so that these details can be changed from time to time without going through the entire zoning ordinance amendment process.

Rules of procedure must contain the minimum requirements established by Indiana Code, and may include procedures which are more restrictive than the state law if the local boards believe such procedures are necessary. The rules should be consistent with local ordinances.

In general, there are some common elements that should be included in a plan commission or board of zoning appeals rules of procedure. A suggested outline of rules of procedure for each type of board follows. The list includes all requirements contained in Indiana Code, and some additional suggestions. Each board will want to tailor its rules best meet the needs of the community.

Plan Commission Rules of Procedure

To better understand the roles and powers of the Plan Commission, consult Part 1: Plan Commission Basics and Part 7: Comprehensive Plans of the Indiana Citizen's Planner Guide.

General Statement

This section should contain a statement indicating that the rules have been adopted by the plan commission and that the rules reflect the conduct of the commission's business.

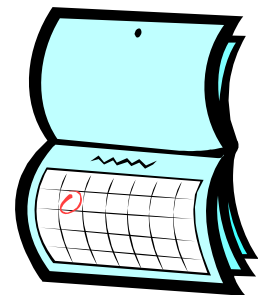
Powers of Board

The section should document the duties of the plan commission as it applies to the community. There are several powers that state law grants to plan commission including preparation, replacement, administration, and amendment of the zoning and subdivision ordinances; amendments to the zoning map; approval of subdivision plats; and site/development plan review.

Meetings

This section should document the types of meetings that are held by the plan commission: regular meetings, special meetings, executive sessions, cancellation policies, and recesses. Regular meeting times, dates, and locations should be established. Authority to call a special meeting and under what circumstances a special meeting is allowed should be identified, as well as when and how meetings are cancelled and/or rescheduled.

Quick Quiz: Are your rules of procedure easy to understand? Are they consistent with the procedures in Indiana Code? Are they consistent with how business is actually conducted?



The Indiana Open Door Law should also be cited in a plan commission's rules of procedure. Some plan commissions find it helpful to include a "late night meeting policy" that gives plan commissioners the option of continuing meetings that are dragging into the late hours of the night (or early hours of the morning).



Members and Officers

The section should specifically cite the applicable Indiana Code provisions for appointing members to the plan commission. (The number of plan commissioners depends on a couple of factors.) Who appoints members, how long each member serves, and any other requirements for members should be identified. Policies dealing with vacancies and removal of members should also be established.



IC 36-7-4-207

This section should document who will preside over plan commission meetings, the duties of those officers, when and how they should be elected and who will serve as staff to the commission including the planning director and attorney. Sub-sections could include election of officers, duties of officers, board staff, established plan commission committees, contracts/agreements (to prepare documents or act on behalf of the plan commission), and performance review of the staff.

The "members and officers" section should provide guidance for the conduct of board members. This section should spell out the different situations where a conflict of interest could occur and how it should be handled (notification of conflict of interest, disqualification) if a situation arises. The section should also cover ex parte contacts, expressions of bias, and presence to vote.

Filing Procedures

A section that incorporates, by reference, the application procedure and discusses the general rules for how applications will be handled is a vital part of a plan commission's rules of procedure.

If the plan commission prefers the staff to provide staff reports, then a sub-section is needed that indicates what will be incorporated in the staff report, if a staff recommendation is included, and when the staff report will be made available to the plan commission, the applicant, and the public. This portion might also include provisions for adding information to the application after the item has been added to the plan commission agenda.

Regarding agendas, the rules of procedure might include provisions for establishing the agenda or rules for when a particular petition/application is added to the meeting agenda.

Additionally, the section can also include provisions of how a plan commission will set its agenda and public notice requirements. It is especially important to be very specific in spelling out the details of public notice requirements if

the requirements vary from the minimum state requirements. Finally, the time period in which information should be to the planning office should be included so that additional information can be included in the public record.

The final sub-sections that are typically included in the rules of procedure for Plan Commissions are rules regarding the role and composition of the technical advisory committee.

Conduct of Meetings

This section should document how meetings are conducted. Items that should be included in this section are a definition of quorum; how and where minutes and records will be kept; representation of applicants at the meeting; withdrawal procedures; order of business (agenda); how public hearings will be handled including opening the hearing, comments by staff, presentation by applicant, presentation by opposition, rebuttal, closing of the hearing, board comments/questions; any waivers of rules; and the conduct by persons attending the meeting.

**“A committee is a group that keeps minutes and loses hours.”
Milton Berle**

Under this section, also include how the board will handle voting (by hands, paper ballot, etc.), and if unfavorable decisions are made on applications, when it can be re-filed before the board.

Suspension and Amendment of the Rules of Procedure

There may be situations that occur during a board meeting where the rules need to be suspended. These could include application issues, meeting time limit, etc. Rules need to be in place that allows the board to suspend its rules. Additionally, the board should be able to amend its rules from time to time. The last rule needed in this section is one of severability. Like a zoning ordinance, if some part of the rules is found invalid, then it does not void all the rules.

Board of Zoning Appeals Rules of Procedure

To better understand the roles and powers of the board of zoning appeals, consult *Part 2: Board of Zoning Appeals Basics* of the Indiana Citizen's Planner Guide.

General Statement

This section should contain a statement indicating that the rules have been adopted by the board of zoning appeals and that the rules reflect the conduct of the Board's business.

Powers of Board

The section should document the duties of the board of zoning appeals as it applies to the community. There are four powers that state law grants to boards of zoning appeals: variances, special exceptions, use determination and appeal of decision of the planning director or staff.

Meetings

This section should document the types of meetings that are held by the board of zoning appeals: regular meetings, special meetings, executive sessions, cancellation policies, and recesses. Regular meeting times, dates, and locations should be established. Authority to call a special meeting and under what circumstances a special meeting is allowed should be identified, as well as when and how meetings are cancelled and/or rescheduled.



The Indiana Open Door Law should also be cited in a board's rules of procedure. Some boards of zoning appeals find it helpful to include a "late night meeting policy" that gives members the option of continuing meetings that are dragging into the late hours of the night (or early hours of the morning).

Members and Officers

The section should specifically cite the applicable Indiana Code provisions for appointing members to the board of zoning appeals. Who appoints members, how long each member serves, and any other requirements for members should be identified. Policies dealing with vacancies and removal of members should also be established.

This section should document who will preside over board of zoning appeals meetings, the duties of those officers, when and how they should be elected and who will serve as staff to the commission including the planning director and attorney. Such sub-sections could include election of officers, duties of officers, board staff, contracts/agreements and performance review of the staff.

The "members and officers" section should provide guidance for the conduct of board members. This section should spell out the different situations where a conflict of interest could occur and how it should be handled (notification of conflict of interest, disqualification) if a situation arises. The section should also cover ex parte contacts, expressions of bias, and presence to vote.

Filing Procedures

A section that incorporates, by reference, the application procedure and discusses the general rules for how applications will be handled is a vital part of a board's rules of procedure.

If the board of zoning appeals prefers the staff to provide staff reports, then a sub-section is needed that indicates what will be incorporated in the staff report, if a staff recommendation is included, and when the staff report will be made available to the board, the applicant, and the public. This portion might also include provisions for adding information to the application after the item has been added to the board of zoning appeals agenda.



Regarding agendas, the rules of procedure might include provisions for establishing the agenda or when a particular petition/application is added to the meeting agenda.

Additionally, the section can also include provisions of how a board of zoning appeals will set its agenda, and public notice requirements, especially if your community's requirements include more than what state law. Finally, the time period in which information should be to the planning office should be included so that additional information can be included in the public record.

The final sub-sections that are typically included in the rules of procedure for board of zoning are rules regarding the role and composition of the technical advisory committee.

Conduct of Meetings

This section should document how meetings are conducted. Items that should be included in this section are a definition of quorum; how and where minutes and records will be kept; representation of applicants at the meeting; withdrawal procedures; order of business (agenda); how public hearings will be handled including opening the hearing, comments by staff, presentation by applicant, presentation by opposition, rebuttal, closing of the hearing, board comments/questions; any waivers of rules; and the conduct by persons attending the meeting.



Under this section, also include how the board will handle voting (by hands, paper ballot, etc.), and if unfavorable decisions are made on applications, when it can be re-filed before the board.

Suspension and Amendment of the Rules of Procedure

There may be situations that occur during a board meeting where the rules need to be suspended. These could include application issues, meeting time limit, etc. Rules need to be in place that allows the board to suspend its rules. Additionally, the board should be able to amend its rules from time to time. The last rule needed in this section is one of severability. Like a zoning ordinance, if some part of the rules is found invalid, then it does not void all the rules.

Adopting and Amending Rules of Procedure

Creating, adopting, and amending rules of procedure are much less difficult than the zoning ordinance. The simple procedure is below:

1. Write the rules. A plan commission or board of zoning appeals should obtain assistance from the staff and/or attorney with the initial set of rules and with any amendments to existing rules. Rules should be amended when they no longer reflect how the board conducts business.

2. Add the rules of procedure to the next (or an appropriate) agenda.
Members should have a copy of the proposed changes (or rules) and review them prior to the board meeting.
3. Review and make any additional changes. At the appropriate meeting, the board should review the rules in a public forum board and make any necessary additional changes.
4. The rules should be adopted by resolution. To make the rules valid, there should be a motion by a board member and a vote on adoption.

Other parts of the Indiana
Citizen Planner's Guide can
be downloaded at
[www.indianapanning.org/
citizen.htm](http://www.indianapanning.org/citizen.htm)

INDIANA CITIZEN PLANNER'S GUIDE

Part 6: Ethics by *K. K. Gerhart-Fritz, AICP*

a publication of
The Indiana Planning Association,
a chapter of
The American Planning Association



**Other parts of the Indiana Citizen Planner's Guide can be downloaded at
www.indianaplanning.org/citizen.htm**

This booklet is one in a series of publications of the Indiana Planning Association to be used as training materials for citizen planners: plan commission members, board of zoning appeals members, neighborhood organizations, and citizen committees. These materials are intended to supplement publications such as *Planning Made Easy* and *The Citizen's Guide to Planning*. IPA's materials contain information specific to Indiana. Users of these guides are strongly encouraged to read other, more general books on planning and zoning.

**The information contained in this booklet is intended for informational purposes only
and is not to be considered legal advice.**

INDIANA CITIZEN PLANNER'S GUIDE

PART 6: ETHICS

In this Part. . .

- *What are ethics and why are they needed?*
- *Indiana law and ethics*
 - Ex-parte Contact*
 - Conflict of Interest*
- *A Code of Ethics*
- *Practical Applications and Scenarios*

What are ethics and why are they needed?

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, morals define what people do. But as citizen planners, not philosophers, how do ethics fit in?

It is obvious that planning issues can involve a conflict of values. Huge private interests are often involved in planning issues. When these two factors collide, the result may be an explosive situation. All the participants need to employ the highest standards of fairness and honesty. The best way to insure this occurs is through regular thought, consideration, and discussions on planning ethics.

People generally operate according to some personal, unwritten code of ethics, but personal ethics are not always adequate when one becomes part of any group, including the plan commission or board of zoning appeals. 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 the highest ethical standards must be employed to maintain the public's trust. Plan commissioner and board of zoning appeal members have been given public authority that should be used with honor and integrity. Attitudes, behavior, attention to details, and decisions of the plan commission and board of zoning appeals can impact how the citizens feel about government.

Being a plan commission or board of zoning appeals member is not an easy job. The public tends to be cynical about government, and may not realize that these organizations only want to do what is best for the community. What might be best for the community, might not be best for each person individually.



**Divorced from ethics,
leadership is reduced to
management and politics to
mere technique.**

- James MacGregor Burns

Indiana Code & Ethics

Indiana State Statutes do not say a lot about ethics for plan commissioners and board of zoning appeals members. The only ethical situation directly addressed in Indiana Code is ex-parte contact for board of zoning appeals members.

Ex-Parte Contact

Indiana Code 36-7-4-920 (g) says that a person may not communicate with any member of the board of zoning appeals before the hearing with intent to influence the member's action on a matter pending before the board. Ex-parte contact occurs when contact is made outside of the official public venue (in this case a public hearing).

Indiana Code is silent on ex-parte contact for plan commission and legislative body members. The singling out of board of zoning appeals members may be because it is a quasi-judicial body, making its function different than other planning bodies. The board of zoning appeals makes binding decisions, while the plan commission often makes a recommendation to the legislative body. Does that mean that only members of the board of zoning appeals should worry about ex-parte contact? Some communities do expect the same standard for other planning bodies. For example, the Columbus, Indiana Plan Commission's Rules of Procedure state that all presentation of information on a pending petition must take place in an open, public meeting. Commission members are further discouraged from engaging in or initiating ex-parte communication.

If contact does occur outside a meeting, which is sometimes unavoidable in small communities, the best policy is to disclose that contact with the rest of decision makers at the public meeting - even if the rules or state law does not require such disclosure. The aforementioned Columbus Plan Commission Rules say that when ex-parte contact occurs, commissioners should ask the involved member of the public to share the information at the public meeting. If the member of the public refuses, then the member of the board/commission should disclose it. Note that these rules apply specifically to pending petitions thereby exempting any work on the comprehensive plan and/or ordinance amendments.

One issue that arises with the ex-parte contact law is when citizens have questions or want additional information regarding a pending petition. While the citizen may not be trying to "influence a decision," it still is best if the board member refers the citizen to the planning staff. The reasons for this are simple.

- 1) While the discussion may begin as an "information gathering session," the door will be open for discussion about opinions concerning the petition.
- 2) The official file, drawings, and all of the details about the case are on file in the planning office and can be reviewed by the concerned citizen.

Quick Quiz:

What is ex-parte contact?

- (a) the weird colored contact lenses people wear to parties
- (b) running into your "ex" at a St. Patrick's Day party
- (c) meeting or talking to someone outside of a public meeting setting



IC 36-7-4-920(g)

Rule #1 — Simply meeting the minimum legal requirements doesn't mean the behavior is automatically considered ethical!

Rule #2 — If contact with an interested party outside of the public meeting cannot be avoided, 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.

3) The board member may inadvertently provide the concerned citizen with misinformation - a real ethical problem.

The safest course of action is for the board member to politely tell the concerned citizen that pending petitions can not be discussed outside of the official public meeting, and that he/she should contact the planning staff for more information about the case.

The same ex-parte provision of Indiana Code also says that not less than five (5) days before the hearing, the planning staff may file with the board of zoning appeals a written statement setting forth any facts or opinions relating to the matter. This means planning staff may legally try to influence the board's decision by making a written recommendation on the case. The staff's recommendation must be made without any personal interests and after the staff has become thoroughly versed in the facts of the case and how the case relates to the comprehensive plan. This recommendation from the staff is one reason for employing staff.

Conflict of Interest

The "conflict of interest" issue is addressed in Indiana State Statutes for both the board of zoning appeals and the plan commission:

- **Board of Zoning Appeals** — **IC 36-7-4-909** 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 has a direct or indirect financial interest.
- **Plan Commission** — **IC-36-7-4-223** says that a commission member may not participate in a hearing or decision concerning a matter in which he/she has a direct or indirect financial interest.

Some communities adopt these standards in the rules of procedure for plan commission and Board of Zoning Appeals. This may help reinforce the idea that the community takes ethics seriously, especially if there are penalties involved, such as censure or a recommendation of removal. The bottom line is that anyone that has a direct or indirect financial interest should refrain from participating in the decision making process.

Direct or indirect financial interest means any type of economic loss or gain. 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.

Conflict of interest in Indiana Code only addresses a financial conflict of interest. There may well be other perceived conflicts of interest, such as religious, but these are harder to regulate. For example, a member's religion does not support use of alcohol, so that member refuses to vote for a bar, even if it meets all the criteria. This could be a non-financial conflict



IC 36-7-4-909
IC 36-7-4-223



of interest or it could be that member's interpretation of upholding moral standards of the community that are in "the health safety, morals, and general welfare" clause used to justify zoning. If a community wishes to further regulate conflict of interest for board and commission members, it could be added to the rules of procedure for that body.

A Code of Ethics

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

American Planning Association's ethical principles were derived from both the general values of society and from planning's special responsibility to serve the public interest. Just as in real life, 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 confidence.

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

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 all citizens 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;
7. Pay special attention to the interrelatedness of decisions and the long-range consequences of present actions.

Rule #4 — Ethical principles may sometimes appear to be in conflict with each other. No one said it would be easy.

Planning process participants shall 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;
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.

For Staff

American Planning Association 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. American Planning Association Members who are practicing planners should:

1. Strive to achieve high standards of professionalism, including certification, integrity, knowledge, and professional development consistent with the American Institute of Certified Planners 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;
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 the American Planning Association'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 - Code of Ethics:

While the American Planning Association's Ethical Principles in Planning contain a section for staff, those principles are only the beginning. Professional 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 that can arise. This code has recently gone through an extensive revision process, and can be seen at the organization's web site, www.planning.org.

Practical Applications & Scenarios

How does one work through an ethical problem? Try following these steps the next time an ethical dilemma arises:

- 1) Define the problem;
- 2) Collect all the facts and confirm that each is actually a fact;
- 3) Review ethical principles in planning or other guidance materials;
- 4) Identify alternatives and possible outcomes of each;
- 5) Select the best alternative — one that meets all ethical standards; and
- 6) Resolve the problem

When personal values and beliefs conflict with the values and beliefs of other members of the group, three options should be considered:

- 1) Loyalty: allegiance is owed to the community and appointing official;
- 2) Speak out: within the group and go public only if the issues are very serious (legal, etc.); and
- 3) Leave: be true to yourself if the issue can not be resolved.

Rule #5 The Golden Rule remains a great guideline. Treat others the way you want to be treated.

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 approvals. 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?

- 1) Disclose the personal interest and excuse yourself from the case
- 2) Disclose the personal interest, excuse yourself from voting, and then speak in favor of it.
- 3) Disclose the personal interest, but vote on the case because you do not benefit financially from it (so there is technically no conflict of interest).
- 4) Since you do not have a financial interest, go ahead and vote on the request

Things to consider:

- If it is a good proposal, the board will recognize that. There is no reason to jeopardize your credibility.
- American Planning Association'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 a personal interest
- Even if you decide not to participate, your relationship with board members might taint the opinions of others on the board or the public
- You may not realize that your brother has influenced your opinion, since you are around him so much.
- Would your answer be different if it were not your brother, but 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?

- 1) 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.
- 2) 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.
- 3) Forget the meeting and spend time straightening out your own problems.

Things to consider:

- If you don't have all the information that your colleagues do on the proposal, how can you meaningfully participate?
- American Planning Association'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 colleagues responsibility to whisper all the relevant information to you, but their interpretation of what was said before you got there may not be accurate.
- Would your answer be different if you were needed for a quorum, or if it is a controversial case?

Conclusion

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.

The first step in the evolution of ethics is a sense of solidarity with other human beings.
- Albert Schweitzer



Suggested Reading

The following resources are available through the Planners Book Service on-line store at www.planning.org/store

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

As veteran planner Carol Barrett points out, the most troublesome conflicts for planners are not between good and bad, they are between competing good, neither of which can be fully achieved. The 54 real-world scenarios described here typify the tough moral dilemmas that confront today's practitioners. Barrett offers a way to recognize the ethical conflicts that arise, analyze them using "practical moral reasoning," apply relevant sections of the American Planning Association Ethical Principles in Planning, and decide on the best course of action, discussing the pros and cons of each alternative. Five particularly complex scenarios are especially intended for group discussion.

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

This manual makes training planning commissioners and zoning board members easier. It covers the basics, including ethics. With chapters organized in discrete modules, it is ideal for both self-study and training use. A complementary training guide, TRAINING MADE EASY, is also available. The Ethics section includes basics, scenarios, role-playing, and appendices that include the American Planning Association's ethical principles in planning, a planning commissioner's creed, and procedures for fair public hearings.

Other parts of the Indiana Citizen Planner's Guide can be downloaded at www.indianaplanning.org/citizen.htm

INDIANA CITIZEN PLANNER'S GUIDE

Part 7: Comprehensive Plans

by Teree L. Bergman, FAICP

a publication of
The Indiana Planning Association,
a chapter of
The American Planning Association



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and is not to be considered legal advice.**

INDIANA CITIZEN PLANNER'S GUIDE

PART 7: COMPREHENSIVE PLANS

In this Part. . .

- *Why communities plan*
- *What is in a plan*
- *How the planning process works*
- *How to evaluate a plan*
- *How the plan is adopted*

Why Communities Plan

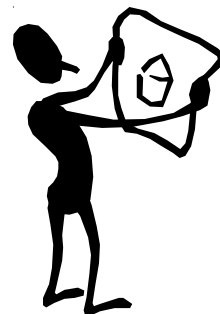
From the earliest settlements, communities in the United States have been laid out according to plans. Towns and villages usually were located on uplands, where there was safety from floodwaters. The buildings were arranged for efficiency in commerce and in the affairs of government. Farms were in the outlying areas, providing a buffer of green space for the town and protecting the town from the dust and odors from animals and cultivation. The settlers tried to select areas with abundant water, and to make the towns easier to defend, these pioneers also sought locations with clear views of the surrounding area.

In Indiana, Jeffersonville was originally laid out in 1802 according to a plan based upon ideas formulated by Thomas Jefferson. This plan called for a checkerboard pattern of undeveloped squares and subdivided squares. The idea was to create areas of permanent open space. The land speculators found the plan inhibiting, and in 1816, the Indiana legislature authorized the replatting of all the land. The original grid pattern is still the fundamental form of Jeffersonville. Indianapolis, as most Hoosiers know, was designed by Alexander Ralston, a land surveyor who established the streets radiating from the circle at the city's center. Ralston had worked with Pierre L'Enfant on the plan for Washington, D.C., which also is based upon a radial street pattern.

All development is planned to some degree, but there are differences as to who does the planning and as to the goals of the plans. Costs and profits often are motives for the layout and location of new development. Early factories were built adjacent to water bodies which served as sources of electricity as well as disposal areas for industrial waste. County seats were nearly always located in the center of the county, to minimize travel costs for those conducting business there, and city halls and county courthouses were located in the center of town for the same reason. Developers convert flat farmland to building sites, because the cost of grading and site preparation is low. To avoid the cost of building new

If you don't know where you're going, you might end up someplace else.

—Casey Stengel



You got to be careful if you don't know where you're going, because you might not get there.

—Yogi Berra

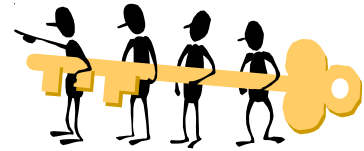
streets, property owners subdivide the frontages along existing roads for building sites. For the same reason, some landowners subdivide outlying parcels into house lots with gravel roads or driveways instead of streets for access.

Sometimes choices which lower costs and increase benefits for one person increase the costs for others. The factory on the river pollutes the water and kills the fish, costing the fisherman his livelihood. Houses on farm land remove land from production and create problems for the neighboring farmer when new residents complain of dust and odors. Buildings strung along the existing road frontages increase traffic and accidents as new driveways create points of traffic conflict. There are demands to increase public expenditures for more roads and improvements to existing ones. The ambulance driver has difficulty finding the house on the private gravel road, and the poorly maintained drive damages the ambulance.

One of the reasons communities engage in a planning process is to ensure that the needs of the whole community are considered, not just the benefits to individuals. Community planning is based upon a concept of the public interest. Some flexibility in the use of individual land is given up in exchange for creating a community in which the interests of all are considered. Plan commissioners are trustees of the future, and they have a responsibility to help prevent growth patterns which result in wasteful and inefficient use of public resources.

When communities plan, they establish and implement a public policy for the community. they create a guideline for decisions on development. Plans help a community achieve a character of its own, one that residents of the community recognize and support. If all our communities were the same, one plan would suffice for all. But each community is different, and a plan should enhance the unique characteristics of each place. One town may wish to emphasize its historical importance while another may pride itself on being a community of the future. Many Indiana cities, towns, and counties have a distinct character that makes them different from one another. A plan that works for one will not work for another. Through the planning process, residents decide what their community character should be. Attitudes and values also differ from one place to another, and a good plan will reflect the local culture.

Exercise: Give examples of undesirable development. These could be in your own community or elsewhere. What are the problems? Did anyone profit from the poor development? If so, who? Who is harmed by it? Why was it approved?



Exercise: Think of two Indiana communities or counties that have a distinctive character. What is that character? How do the two communities differ?

Planning offers many benefits for the community and its residents.

It lowers taxes . . .

- helps local government provide services efficiently
- ensures that developers pay their fair share of improvements such as streets, utilities and parks
- directs development to areas with sufficient capacity to support it (i.e., new subdivisions in locations where there are available classrooms, industries where utilities are available)
- coordinates development and future capital expenditures such as streets, sewage treatment plants, civic buildings, and schools
- saves paying for remedies for poorly planned development, such as purchasing right-of-way or easements to widen streets or extend utilities

It protects property values . . .

- preserves and enhances community character
- improves quality of life
- keeps adjacent uses compatible

It makes communities healthier . . .

- provides for safe streets and sidewalks
- prevents unwise development, such as residences in flood hazard areas or subdivisions without proper sewage disposal
- protects environmental quality

Exercise: Think of three ways planning could benefit your community.



Plan Contents

In Indiana, comprehensive planning is permitted by the 500 Series of Title 36-7-4 of the Indiana Code (see appendix). This law empowers cities, towns, and counties to adopt plans. Any plan adopted in Indiana must contain at least the following three elements:

- 1. A statement of objectives for the future development of the jurisdiction.*
- 2. A statement of policy for the land use development of the jurisdiction.*
- 3. A statement of policy for the development of public ways, public places, public lands, public structures, and public utilities.*

In addition, the law provides for a number of optional elements, including parks and recreation, flood control, transit, natural resource protection, conservation, flood control, farmland protection, education, and redevelopment of blighted areas. Most comprehensive plans in Indiana have some of these optional elements.

Indiana's minimum requirements for a comprehensive plan are much less complex than in most other states. The planners, lawyers, and legislators who drafted the law tried to make it flexible, so that it could

be used by large cities, small towns, and counties. They recognized that many Indiana communities do not employ trained professional planners and cannot afford to hire consultants. At the same time, the law makes it clear that communities cannot regulate land use and development if they have not first engaged in a process of thinking about the future.

Most plans contain maps showing future streets, desired future land use patterns, locations of future police and fire stations, and areas set aside for parks and open space. It is important to note, however, that these maps are not required in Indiana. What is required is that the community establish policies to guide growth. If they are thoughtfully and carefully drafted, these policies can lead to the community's desired future.

Maps are useful as visual representation of the community's plan. They can show patterns of land use and locations of proposed future streets. Land uses usually are divided into categories, and different colors or patterns are used to show areas for future residential, commercial, industrial, institutional, and agricultural uses. Normally, locations should not be overly specific. For purposes of the comprehensive plan, it is more important to establish the principle that a school should be located in a certain area than to designate the specific site for the school. The locations should be approximate, not exact.

In Indiana, municipal plan commissions are authorized under certain conditions to exercise planning and zoning jurisdiction over territory outside the corporate boundaries (see Part 1, Plan Commission Basics). If the plan commission has assumed this jurisdiction, the comprehensive plan must include all of the extra-territorial jurisdictional area.

The Planning Process

While each planning process should be custom-designed to meet community needs, nearly all contain the same core elements:

1. Evaluate existing conditions, including strengths and weaknesses, community character, demographics, natural features, etc.
2. Establish goals and objectives for the future
3. Identify alternatives for meeting the goals and objectives
4. Select the most desirable alternative
5. Devise and adopt tools to implement the plan (zoning, subdivision control, capital improvement programming, etc.)
6. Evaluate the success of the plan
7. Revise the plan

These steps are part of a continuing process. Plans must be evaluated, changed and updated as the community changes. These changes can be gradual, as through demographic trends, technological change, or slow

A policy might be that there be a convenience shopping area for each residential area containing 500 or more houses or 1,500 or more people. The policy might also say that the shopping area should be located on a collector or arterial street, should have safe access, and should be buffered from adjacent residences. A land use map might show a location meeting those criteria. What happens if the owner of that site doesn't want to develop a shopping area and doesn't want to sell the land?



economic growth or decline. Sometimes change is more sudden, such as the location of a large new industry in a small community, the loss of a major employer, or a natural disaster (flood, earthquake, etc.).

In Indiana, it is the plan commission's responsibility to prepare and adopt a plan and to recommend it to the city or town council or county commissioners for adoption. In preparing a plan, the commission may be assisted by staff, by consultants, by volunteers, or by any combination of the three.

Getting a community consensus is essential to a successful planning process. A plan that does not have the support of the majority of those who will be affected by it is doomed to failure. Plan commissioners are key players in arriving at that consensus. Not only do they share their own observations and views about the community, they can ensure that the full range of views is sought and considered.

Elected officials are essential to the planning process. The decisions they make determine the shape of the community. Their votes on such things as petitions for rezoning land, where to construct and upgrade public streets and utilities, where to locate public facilities and when to build them should be guided by the comprehensive plan. If they don't agree with the contents of the plan or don't understand what is in it, their decisions won't further the plan's objectives. Plan commissioners are essential to this process. Techniques for effective citizen participation are discussed in Part 4.

Effective Plans

Plans usually, but not always, consist of a combination of text and maps. Some plans are heavily oriented toward policy, and these usually consist primarily of text. Some are oriented toward community design and the desired physical form of the community, and these may be mostly maps, photographs and drawings. It is important that the format of the plan be suited to the community and its goals. Seaside, Florida, planned by a team of architects, relies on its physical design, and the plan consists almost entirely of drawings. In order to make the plan understandable to the public, it is a good idea to have a balance of text and graphic material (maps, drawings, photographs). Some people quickly grasp ideas expressed graphically. Others are verbal; they are more likely to absorb concepts expressed as written text. Most of us learn best with a combination of the two. Some features are common to most plans.

The fictional city of Grandville initiated a planning process. Community leaders wanted to make sure that their views were reflected in the plan, so they appointed themselves and their friends to a committee to prepare the plan. The committee developed a plan that they all agreed was just right for Grandville. When they held the public hearing, hundreds of local citizens came to object. They said the plan was too grand for Grandville. The committee members had worked hard to develop a plan that they knew would be good for the people of Grandville. But the people rebelled, and the plan was never adopted.

What are the strengths and weaknesses of this planning process? How would you structure the process? How might the plan be different under your process?



1. *Emphasis on physical development.*

Communities are affected by a variety of social and economic factors, and plans should take those into account. Many plans do contain policies concerning these issues. For example, the plan may contain strategies for combating unemployment or underemployment. It may have policies regarding are visual learners; they day care and education. At the same time, the physical development of the city is interrelated with these social and economic factors. For example, concentrating all low-income housing in a specific geographic area often leads to social problems in that neighborhood. The location of commerce and industry affects commuting time and street patterns which in turn affect the cost of building and maintaining roads.

2. *Comprehensive and general.*

The plan should include all of the physical elements of the community, and it should recognize the social and economic conditions which affect the community. It also should be general in nature; it is a guide to development, not a tool for determining the precise location of each feature.

3. *Realistic and practical.*

The planning process offers the opportunity to dream, but the plan should recognize what is possible in a given community. It is not useful to plan for the town to become a regional employment center with 15 years if the town has no interstate highway access, no airport, no sewer system, and no public water supply. The plan should be designed to build on strengths and to lessen weaknesses, and it should be developed with implementation mechanisms in mind.

4. *Long-range.*

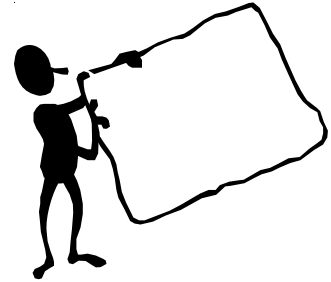
While short-range strategic plans are useful for specific objectives, the comprehensive plan should be long-range. Plans are implemented over relatively long time periods. The plan should have a long-range component aimed at shaping the community for 20-25 years.

5. *Easy to understand.*

There are no extra points for length or weight. The plan should be as simple and as clear as possible. The text should be well written; the format should be inviting to the reader. In Indiana, there is an extra incentive to keep the plan short: Indiana law requires that the plan be recorded in the office of the county recorder, and the community may have to pay for each page that is recorded.

6. *Reproducible.*

Many communities have failed to take into account the cost of reproduction of the plan in sufficient quantities. Some consulting firms produce plans filled with full-color maps and photographs or use odd-sized paper. These formats are acceptable, as long as the community has the resources to print enough copies. If the plan

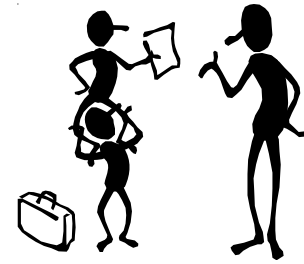


Plan test: Before the plan is distributed to the public, give it to several people who are not familiar with planning and ask them to read it. Can they understand it? If so, it's probably clear. If not, rewrite, reformat - whatever it takes!

commission intends to recover printing costs by charging for copies, the commission should consider whether the cost of a fancy report will be prohibitive for people.

7. *Reflects a community consensus.*

As noted previously, plans will not be implemented if they do not accurately reflect the community's goals and objectives. It must result from an effective citizen participation process. Elected officials will not be guided by the plan's policies unless these officials know that the plan represents the wishes of their constituents.

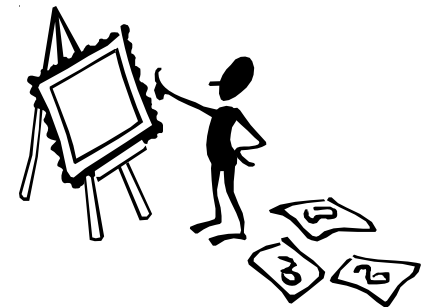


As the community works with the plan, and as conditions change, the plan commission will want to make changes. The commission should review the plan regularly and initiate amendments when they are needed.

Adopting the Plan

Indiana law specifies the procedure for adopting a comprehensive plan. The procedures vary somewhat, depending upon the type of plan commission the community has (advisory, area, metropolitan). In all cases, the plan commission has primary responsibility of preparing the plan and recommending it to the legislative body for adoption. The steps are outlined below. The law specifically provides that plans may be adopted as separate elements, such as land use, thoroughfares, parks, and community facilities. These steps apply to an entire plan or to a plan element.

1. Plan Commission prepares the plan.
2. Plan Commission holds a public hearing on the plan
3. Plan Commission adopts the plan by resolution and recommends it to the legislative body for adoption. (For metropolitan plan commissions, the commission decision is final; the legislative body does not act on the plan.) In a county, the legislative body is the board of county commissioners; in a city, it is the common council; in a town, it is the town council. Because area plan commissions are cooperative efforts between a county and at least one municipality in the county, area plans must be forwarded to more than one legislative body.
4. Legislative body adopts the plan by resolution. For area plan commissions, each participating legislative body adopts the plan.



It should be noted that the plan is not an ordinance; it is adopted by resolution. A resolution is more appropriate than an ordinance, because the plan is a guideline, not a regulation.

After the plan commission recommends a plan for adoption, the legislative body has three options: adopt the plan as recommended, adopt the plan with amendments, or reject the plan. If the plan is amended or rejected,

the law provides for the legislative body to return the plan to the commission with written reasons for the amendment or rejection. The purpose of this procedure (sometimes called the “ping pongTM” provision) is to encourage communication between the legislative body and the plan commission. The commission has 60 days to consider the amendment or rejection. If the commission agrees with a legislative body amendment, the plan is adopted, and the legislative body does not need to take further action. If the commission disagrees, the legislative body can amend the plan only if within 60 days it again votes in favor of the amendment. If the commission agrees with the rejection of the plan, it is rejected. Indiana law does not permit the mayor to veto a comprehensive plan.

An effective planning process will provide for participation by elected officials and will ensure regular communication. If the process has been well-designed, legislative rejection of the plan should not be a serious alternative, and any amendments should be relatively minor.

Amendments to an adopted plan may be initiated by the plan commission or by the legislative body. If the legislative body initiates the amendment, it may direct the commission to prepare and submit it. Unless the legislative body grants an extension of time, the commission must prepare and submit the amendment within 60 days. The procedure for adopting an amendment is the same as the procedure for adopting the plan.

Suggested Reading



Garreau, Joel. *Edge City*, New York: Doubleday, 1991.

Hiss, Tony. *The Experience of Place*, New York: Alfred A. Knopf, 1990.

Indiana Code, 36-7-4, 500 Series

Kunstler, James Howard. *The Geography of Nowhere*, New York: Simon & Schuster, 1993.

Smith, Herbert H. *The Citizen's Guide to Planning*, Chapters 1-3, Chapter 5. Chicago: American Planning Association, 1993 (Third edition)

Toner, William; Gil, Efraim; Lucchesi, Enid. *Planning Made Easy*, Chapter 2. Chicago: American Planning Association, 1994

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INDIANA CITIZEN PLANNER'S GUIDE

Part 8: Zoning Ordinance *by Timothy J. Porter, AICP &* *Teree L. Bergman, FAICP*

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INDIANA CITIZEN PLANNER'S GUIDE

PART 8: ZONING ORDINANCE

In this Part. . .

- *Historical perspective*
- *Purposes of zoning*
- *Zoning ordinance contents*
- *Developing the ordinance*
- *Adopting an ordinance*
- *Amending an ordinance*

A zoning ordinance divides a jurisdiction of a local government into districts or zones and regulates land-use activities, the intensity or density of such uses, the bulk of buildings on the land, parking, and other aspects of land use. The ordinance consists of a text and zoning map, both of which may be amended by the local legislative body.

Historical Perspective

The zoning ordinance is the most commonly used and oldest tool for implementing land use policy in the United States. New York City adopted the nation's first zoning ordinance in 1906. This ordinance was largely designed to decrease fire hazards by limiting building heights and providing more space between buildings. In 1913 at the Fifth National Conference on City Planning, held in Chicago, the Committee on Legislation report contained several model acts that would help shape land development in the coming years:

- Establishing a city planning department and giving it extra-territorial (three mile) planning jurisdiction and the authority to regulate plans of lots;
- Empowering cities to create from one to four districts and to regulate the heights of buildings constructed in each district;
- Authorizing the platting of civic centers;
- Authorizing the platting of reservations for public use without specifying the particular public use; and
- Authorizing the establishment of building lines on any street or highway.



...getting ready is the secret of success.

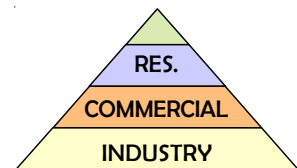
- Henry Ford

The right of communities to adopt zoning ordinances regulating the use of land is well established in U.S. law. The Standard State Zoning Enabling (SZEA) and the Standard City Planning Enabling Act (SCPEA), drafted by an advisory committee of the U.S. Department of Commerce in the 1920s, gave states the right to adopt and enforce zoning ordinances. In 1921 Indiana granted cities the authority to regulate the use of land and building bulk. In 1926, in *Euclid v. Ambler Realty*, the United States Supreme Court found that zoning is a valid exercise of police power, which local governments use to protect the public welfare. The court wrote:

The line which...separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions.the question of whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by abstract consideration of the building or of the thing considered apart, but by considering in connection with the circumstances and the reality. A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.

Although the courts have consistently upheld the right of communities to engage in planning and to adopt regulations to implement those plans, judges have placed limits on this right. Regulations that go too far and deprive a property owner of all economic use of the land are considered unconstitutional takings of private property without just compensation.

Early zoning ordinances set forth lists of permitted and prohibited uses. Usually the uses permitted were set forth in pyramid fashion; this is, a use allowed in a C-1 commercial zone is also allowed in a C-2 zone, and those allowed in a C-2 are allowed in C-3 and so forth. Many zoning ordinances were pyramidal, or cumulative, even between categories: residential uses were allowed in commercial districts, while both residential and commercial uses were allowed in industrial districts. During the 1950s and 1960s, many communities shifted to a strict separation of land uses, a practice that more recently has been criticized for creating sterile, inconvenient environments. In recent years local governments have tried innovative approaches to zoning, with varying degrees of success. Some of these approaches are discussed in this *Guide*.



Quick Quiz: Is your community's zoning ordinance cumulative?

Purposes of Zoning

A zoning ordinance is one of several tools used to implement comprehensive plans. It has been common in Indiana to confuse the zoning ordinance with the comprehensive plan, but they are not the same, and the distinction should be clear. The comprehensive plan is the guide for future development; it sets forth the community's vision and its statement of land use policy.

The zoning ordinance is a regulation designed to make the plan a reality. Plan commission members and/or staff should be able to explain the purpose of each zoning regulation in relation to its role in implementing the comprehensive plan.

Indiana Code lists the following purposes for local zoning ordinances:

- Securing adequate light, air, convenience of access and safety from fire, flood, and other danger;
- Lessening or avoiding congestion in public ways;
- Promoting the public health, safety, comfort, morals, convenience, and general welfare;
- Otherwise accomplishing the purposes of this chapter [Chapter 4 of the Indiana Code, Local Planning and Zoning].



IC 36-7-4-601

While some zoning regulations, such as limitations on building in flood plains and requirements for adequate setbacks and driveway access, are related to concepts of public health and safety, most fall under the broader and less defined category of "general welfare." Protection of property values, lower public costs, and enhancing the livability of residential neighborhoods are primary objectives.



There has been a continuing debate about the extent to which zoning ordinances may be used to accomplish aesthetic objectives. The U.S. Supreme Court upheld the right of communities to use zoning for aesthetics in a landmark 1954 decision, *Berman v. Parker*. Writing for the court, Justice William O. Douglas stated:

The concept of the public welfare is broad and inclusive...the values it represents are spiritual as well as physical. Aesthetic as well as monetary...it is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

According to Daniel R. Mandelker in his book *Land Use Law*, "A clear majority of courts hold that aesthetics alone is a legitimate governmental purpose in land use regulation." Most zoning ordinances contain regulations that at least in part are aimed at aesthetics. Building setback regulations, height limitation, landscaping requirements and sign regulations all have broad purposes, but community appearance is one of them.

Quick Quiz: Is your community's zoning code heavy on aesthetic value? Is this a priority for your community? Should it be?

Local zoning ordinances should be consistent with the purposes stated in Indiana code, and most important, the ordinance is an implementation tool; it is not a plan.

Zoning Ordinance Contents

A zoning ordinance contains two elements: text and maps. The two parts are equally important, and both should be carefully developed.

The zoning maps should be as clear as possible, so that staff and citizens can easily determine the zoning classification for a particular piece of property. Some communities draw the official zoning map on auditor's plat maps, so that each property is easily identified. If a base map other than a plat map is used, it is a good idea to use clear features, such as streets, clearly defined property lines, or railroad tracks, as zoning boundaries. The drawback to using plat books is that there are large numbers of maps for each community, and overall patterns of zoning are difficult to see. In these cases it is helpful to have an unofficial overall community map for display and reference, in addition to the official zoning maps in the plat books. A small map, 8.5" x 11" or 11" x 17" is useful as a quick reference for the public, board members, and elected officials.

Maps generally show each district as a different color or hatched pattern. If color is used, the following color scheme is generally used and accepted by planners. Yellow to orange should be used for residential districts. The least dense residential should be the lightest yellow, and the most dense should approach orange. Commercial districts are generally a variety of reds. The most intense commercial district should be the darkest red. Industrial districts are generally purple or grey. Recreational and agricultural districts are greens.

Geographic Information Systems (GIS) make preparing, maintaining, viewing, and printing zoning maps much easier. For communities that have the capability of producing such maps, electronic mapping systems are desirable. These can be printed at various scales, and maps of specific selected areas can be printed.

Each community's zoning ordinance text is different, as it should be. While communities may have similarities, no two are exactly alike. Goals and objectives are not identical, and their plans (if prepared properly) are uniquely suited to the local context. Different communities also have different attitudes toward land use regulation. Zoning ordinances vary greatly in the amount of detail and sophistication. Tools that are important in one community may not be suitable in another.

A common complaint about zoning is that it is complicated. While simplicity is desirable, it is not possible to have an ordinance that is comprehensive and effective in implementing land use policy and is also short and simple. Land use issues are complex, and by necessity, the ordinances that regulate land use are also complex. Nevertheless, there are things communities can do to make the ordinances more user-friendly.

Quick Quiz: Think about the zoning map in your community. Is it easily accessible? Is it easy to read and understand?



Ordinance texts should be written clearly. The same rules that apply to good writing also apply to good ordinances: use active voice, keep sentences as simple as possible, and use terms that are easily understood.

Illustrations are extremely useful in zoning ordinances. Some concepts that are difficult to grasp in words are easily understood through a graphic. Definitions of building height, intersection visibility triangles, and how sign area is measured all lend themselves to illustrations.

Preparing an annotated copy of the ordinance, with explanatory material, can be helpful for the public. Annotated versions for different districts can also be prepared. Maybe all the information dealing with residential districts is in one booklet, and all the information about commercial districts is in a separate booklet. While simplicity is desirable, it is important to note that the ordinance is a legal document, and sometimes complex language and technical terms are critical to the legal validity of the ordinance.

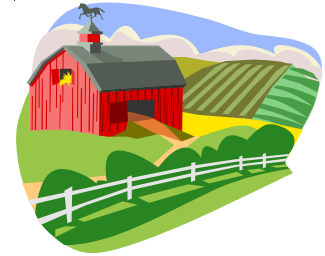


The actual zoning districts or classifications assigned to each parcel of property in a community are an important part of the text. A typical, modern list of zoning districts for a larger community may look like this:

Abbrev	District Name
A-1	Agriculture District
R-S	Single-Family Residential Suburban District
R-1	Single-Family Residential District
R-2	Two-Family Residential District
R-2M	Medium Density Residential District
R-3	Multi-Family Residential District
R-3H	High Density Residential District
R-MHP	Mobile Home Park District
C-1	Neighborhood Commercial District
C-2	Community Commercial District
C-3	Regional Commercial District
C-4	Commercial Office District
C-5	Commercial Entertainment District
C-6	Highway Commercial District
C-7	General Commercial District
C-8	Central Commercial District
M-1	Light Industrial District
M-2	Heavy Industrial District
O-S	Open Space District
RA	Regional Airport District
RANO	Regional Airport Noise Overlay District
RAAO	Regional Airport Airspace Overlay District
MO	Mining Overlay District
PUD	Planned Unit Development District

Agriculture Districts

The purpose of an agricultural district is to provide for and preserve viable agriculture lands and operations that can include grain and livestock production, forest and tree production, stables, pasture, government set-aside reserve programs and uses related to agriculture operations. These areas are generally located outside of a city or a developed area. Agriculture districts can be used by communities for land that is awaiting development and maybe appropriate for a variety of uses.



Agricultural district regulations should have provisions for multiple structures. These districts generally permit some single-family dwellings. However, zoning administrators should be cautious of the minimum lot size for new home construction. Permitting lots under 5 acres could result in an inefficient use of land resources and a development pattern that is expensive. A very large minimum lot size (20+ acres) will discourage new homes and driveways from “popping up” everywhere. (More on agricultural zoning on page 14.)

Residential Districts

The purpose of residential districts is to accommodate various types and styles of dwelling units. The number of residential districts in a zoning code varies depending on the size and make up of the community. It is not uncommon for a small community to have three residential districts. A larger community may have ten. Some examples of residential districts include single-family suburban, single-family, medium density, two-family residential, multi-family residential, mobile home community residential, high density residential, etc.

Residential district regulations generally cover types of dwelling units permitted, density (dwelling units per acre), setbacks, yards, lot coverage ratios, parking and driveway requirements, accessory structures, building height, etc. These regulations create the character of the neighborhood. There are some non-residential uses that are generally compatible in residential districts. Accommodations for these uses can be made through a list of special exception uses. Also, access to public utilities, the provision of public park and open space, and proximity to services should be considered during the development and the designation of residential districts.

Commercial Districts

The purpose of commercial districts is to accommodate providers of goods and services. Again, smaller communities may have as few as two commercial districts - say local business and general business. Larger communities may have up to ten different commercial districts. Some examples include neighborhood commercial, community commercial, regional commercial, commercial office, commercial entertainment, highway commercial, general commercial, and central business district commercial.



Commercial districts primarily differ in the type and size of businesses they accommodate and the clientele and service area of those businesses. For example, a large department store would be accommodated by a district that probably would not accommodate a small dentist office and vice-versa. Factors that should be considered when developing commercial districts include size and scale of the establishment, service area of establishment, intensity of use, traffic volume, character of the establishment, range of goods and services provided, access and location along streets, inter-circulation, convenience factors, proximity to other uses, and utility service needs.

Besides regulating the type and size of use, commercial district regulations generally include intensity, setbacks and yards, coverage, pedestrian and vehicular flow, landscaping, parking, and signs. Some commercial districts can also accommodate light manufacturing and warehousing. Accommodations for these uses can be made through a list of special exception uses.

Industrial Districts

The purpose of industrial districts is to accommodate manufacturing and warehousing uses. The number of industrial districts ranges from two to four in most communities. There is much less variation in the uses that are classified “industrial” than there are in commercial and residential. Industrial districts generally include light industry and heavy industry. Some communities might term this “closed” industrial and “open” industrial.

The differentiation between industrial districts is in the size and scale of the manufacturing facility. Also external physical characteristics, such as outdoor storage vs. enclosed storage, differentiate industrial districts. Industrial district regulations can include buffering criteria to protect adjacent land uses from appearance and noise associated with industry. Designation of industrial districts should take into account available land, utilities, and easy access to transportation networks.

Open Space & Recreational Districts

The purpose of this district is to protect, promote, and preserve a community’s public and semi-public park lands, recreational areas, woodlands, watersheds, water supplies, rivers, streams, wetlands, and other environmentally sensitive areas. These districts generally put limitations on development to protect the natural character of the environment.

Institutional & Office Districts

The purpose of an institutional and/or office district is to accommodate public and private institutions - such as schools and hospitals - and other office uses. These uses can be included in the “commercial district” uses, but some communities choose to create a separate district. Institutional districts generally provide a good buffer between residential districts and more intense uses such as commercial or industrial.

Quick Quiz: Does your community’s zoning ordinance have more than one industrial district? If so, what are the major differences between them?



Airport District

Airport districts are generally established to ensure the harmonious arrangement and development of land uses with a local airport; to encourage the types of land uses having maximum compatibility with aircraft operations; to protect the airport from the encroachment of incompatible land uses; and to protect and promote the public utility of the airport.



Basic Zoning Provisions

A well-drafted zoning ordinance should contain a purpose statement, definitions, administrative procedures, district use provisions, development standards, and a severability clause.

Purpose Statement

The purpose statement should reflect the state statute and the goals established in the comprehensive plan. In the event of lawsuits, judges often look at the purpose statement to determine whether the ordinance is aimed at a legitimate public purpose and whether the regulation at issue is a reasonable means of achieving that purpose.

In the absence of clearly defined goals, we are forced to concentrate on activity and ultimately become enslaved by it.

- Chuck Coonrad

In addition to stating an overall purpose, many ordinances contain specific purpose statements for individual zones (i.e., an agriculture district, neighborhood business district, heavy industrial district) and/or categories of regulations (i.e., signs, parking, landscaping). Including these individual purpose statements is good planning practice by letting the public know why the community established a certain zoning classification, category, or regulation. And, as with the overall purpose statement, these are helpful in the event of a lawsuit.

Definitions

Clear and complete definitions can prevent many zoning disputes. Poor definitions can thwart the aims of the ordinance. Communities have lost lawsuits involving the storage of salvaged goods on private property. The owner claimed the items were not “junk” as defined in the ordinance, and the judge agreed - much to the dismay of the neighbors. A better definition would have protected the community from this nuisance.



Administrative Procedures

The ordinance should contain the framework for its administration. These need not and should not be detailed and complex, as the rules adopted by the plan commission and the board of zoning appeals will supplement the ordinance provisions and include the detail. The ordinance itself, however, should contain these administrative elements:

- Map amendment procedures, consistent with Indiana law.
- Text amendment procedures, consistent with Indiana law.
- Method of interpreting district boundaries on the zoning map (i.e., zoning line is in the middle of the street right-of-way).
- Penalties for violation.
- Method of determining permitted uses that are not listed.

District Use Provisions

Zoning ordinances regulate the use of land; they establish districts and describe the uses permitted in each district. Many older ordinances are based upon the type of ordinance that was upheld in the landmark *Euclid v. Ambler* Supreme Court case. These ordinances divide the community into districts and list the uses permitted and prohibited in each district. Often the lists of uses in a zoning ordinance are detailed and extensive. This approach causes ordinances to become outdated quickly, because they are not adaptable to new or changed uses. It is common to find ordinances that specify the proper district for a telegraph office or a millinery shop but have no place for sun tan parlors, self-storage units, or mobile phone sales.

One way to avoid the problems associated with detailed use lists is to define categories of uses: neighborhood business, travel- or highway-oriented businesses, big box retail, etc. In this type of ordinance, each type of use is defined and examples are given, but there are no exhaustive lists. This approach requires more staff interpretation, but it is more flexible and less likely to be quickly out of date. A zoning ordinance may also include a detailed matrix as an appendix that lists and categorizes the detailed uses.

In 1999, a study was completed that resulted in the production of the "Land Based Classification System" (LBCS). LBCS provides a consistent model for classifying land uses based on their characteristics. The model extends the notion of classifying land uses by refining traditional categories into multiple dimensions, such as activities, functions, building types, site development character, and ownership constraints. Each dimension has its own set of categories and subcategories. These multiple dimensions allow users to have precise control over land use classifications. LBCS is accessible at www.planning.org/lbcs. It includes a wealth of information including the complete categorization of nearly every use imaginable.

Development Standards

Development standards are important in determining the character of a district. Will the downtown feature high-rise buildings, or will it have a lower profile? Will a residential neighborhood feature broad front lawns, or will the houses be close to the street? Will the lots be large or small? Will an industrial area have outside storage within view of the street? All these things are regulated through the development standards in the zoning ordinance. Development standards generally include yards, setbacks, bulk, density, coverage, height, accessory structure regulations, etc.

Severability Clause

In the event that the judge finds an ordinance provision invalid, it is important that the ordinance has a severability clause stating that if one provision is invalid, the rest of the ordinance remains in effect.



Quick Quiz: Are the permitted uses listed in your zoning code outdated?

Common Zoning Provisions

In addition to the most basic elements described above, most communities regulate other aspects of land development. These provisions also vary in complexity: a sign ordinance can contain just a few limitations on the size and height of signs, or it can regulate them according to use, street type, zoning district, function, etc. Each community needs to determine the types of regulations it needs to meet its goals and it needs to evaluate its ability to administer and enforce the ordinance. Some of the subjects most frequently addressed are parking, signs, landscaping, home-based businesses and non-conforming situations.

Parking

With the proliferation of automobiles came parking shortages. To combat this problem, communities began to establish minimum standards for parking. Most typical in zoning ordinances is a list of uses with the minimum number of parking spaces for each: 1.5 spaces per unit for an apartment complex, 1 space for each 3 beds for a nursing home, 1 space for each 250 square feet of floor area for offices, and so on.

The size and configuration of spaces usually are regulated also, with such requirements as minimum dimensions of 9 ft. by 18 ft. and minimum aisle widths of 24 feet. Many communities became overzealous in their parking requirements, resulting in land wasted in asphalt masses that are empty much of the time. There are several other approaches to parking regulation, such as allowing shared parking, smaller parking spaces for employee or small-car parking, and grassed or other unpaved areas for overflow parking.

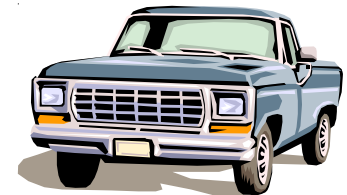
Rather than include lists of uses with minimum parking requirements, some communities adopt a published source, such as the *Institute of Traffic Engineers Parking Generation*, by reference. Planning Advisory Service Report Number 432, *Off-Street Parking Requirements* compares parking requirements for different uses from a variety of communities.

Landscaping

Many ordinances require landscaping, particularly in non-residential areas. In some communities landscaping is a high priority, while others consider it less important. The regulations can be simple or complex, ranging from a requirement of a landscaped area of specified minimum width to requirements for extensive landscaping and lists of acceptable plant species. In determining these requirements, communities need to consider their goals and policies as well as the capability of staff to administer and enforce the ordinance.

Signs

Sign regulation is often a highly charged issue, with businesses demanding large and numerous signs and others in the community favoring severe limitations on the size, number, placement, and design of signs. Many businesses are opposed to any local regulation that will prevent them from using standard sign packages offered by their corporations. Car dealers,



The doctor can bury his mistakes, but an architect can only advise his clients to plant vines.

- Frank Lloyd Wright

fast food chains, big box retail establishments and others want all their signs and buildings in all communities to look alike. For some communities, this standardization is precisely what they want to avoid.

As with landscaping requirements, communities need to consider the local goals and policies. Signs can be an important element in determining community character. One New England community requires all signs to have black letters on a white background. Several cities require signs to be of uniform height and setback to promote ease of viewing from a moving car. A community drafting these ordinances also should consult an attorney with knowledge in this subject, as signs have been the subject of several important court decisions. The U.S. Supreme Court has viewed sign regulation as a free speech issue and has limited the ability of local governments to regulate the content of signs. It is key to remember that the sign industry is well financed and inclined toward litigation.



Home-Based Businesses

The number of people operating businesses from their homes has increased dramatically in recent years, and with the increase has come reconsideration of the regulation of such businesses. Until the 1980s the most common way of regulating home occupations was to preclude outside employees and restrict the portion of the residence in which the business is conducted. The issue is complicated and requires careful thought. Is a weekly housekeeper, a pool service, or a landscape service an outside employee? If not, is a bookkeeper coming to a residence-based business a half day a week more disruptive than a housekeeper? What about a lawn care business operated from one's residence? Some businesses that include no employees generate traffic and parking problems as semi-trucks deliver inventory and a network of local distributors come to pick up orders or allotments. The key again is in assessing the community's goals and its ability to administer and enforce regulations.

Non-Conforming situations

Non-conforming situations are those that were legally established prior to the effective date of adoption of a zoning ordinance, but would be prohibited, regulated or restricted under the provisions of the adopted ordinance. Sometimes this situation is referred to as "grand fathered". It is typical in an ordinance not to allow the enlargement or expansion of a non-conforming situation.

Lots, buildings/structures and uses are different types of non-conforming situations. If a lot, building or use is not legally established prior to the ordinance adoption, it is not considered non-conforming. In other words, if the proper permits and procedures were not followed, then the use, building or lot would not be legally established.

Non-conforming lots are those platted prior to the effective date of an ordinance, having less than the required minimum lot area or minimum lot width required by the zoning regulations.

Non-conforming buildings or structures are those that exist on the effective date of the ordinance that could not be built under the terms of the new ordinance. They may not comply with maximum gross floor area; maximum lot coverage; building height limitations; minimum front, side and rear setbacks and yards; location on the lot; bulk; or other provisions of an ordinance applicable to buildings or structures.

Non-conforming uses are those land uses that exist on the effective date of the ordinance which would not be permitted by the provisions of the ordinance. Again, there are strict requirements for the continuation of non-conforming situations and once the non-conforming status is lost, the situation must comply with the ordinance.

Innovative Zoning Techniques

New land use issues have been brought to the forefront by new technology, changes in business practices, and societal changes. Several of those most commonly addressed in land use ordinances include wireless communication towers, sexually oriented businesses, and excessive lighting. There are several American Planning Association publications that address these topics, and communities drafting ordinances should consult these as well as seek competent legal advice.

Additionally, there have been a number of innovative approaches to zoning which have been used with varying degrees of success. Several examples are discussed here.

Performance Zoning

These ordinances contain requirements based upon the characteristics of a use, rather than on the category of use. A conventional zoning ordinance might list a printing plant as a permitted use in a particular district, thus treating a quick-print franchise in the same manner as a large commercial printing facility. Under performance-based zoning, the ordinance would instead regulate the size of the building, the amount of traffic it could generate, the types of vehicles making pickups and deliveries, and so forth.

Performance zoning offers several advantages:

- It bases regulation on characteristics of actual operation, rather than category of use.
- It promotes compatibility of uses.
- It is flexible allowing “mixed use” developments.

There are disadvantages as well:

- The standards often are difficult to quantify.
- Enforcement requires continual attention, special expertise and equipment.
- Characteristics may vary from one time to another.

Planned Unit Developments

Planned unit development provisions promote flexibility in land use while offering more certainty and better protection for neighboring property owners when new developments are proposed. Planned unit developments typically are intended for large parcels where mixed-use developments are proposed. These require up-front planning and design.

In Indiana, planned unit developments are approved by ordinance. Typically the ordinance would include a description of the uses permitted and a specific plan for the development of the property. Some PUD ordinances require a high level of detail: design, colors and materials to be used for buildings and signs, landscaping plans with the location and species of each plant, parking and circulation details and so forth. While a high level of detail is reassuring to neighbors, it can be costly and limiting for developers. Communities need to determine the level of regulation that works best for the local situation. The ordinance should contain provisions for amendment or modification of approved PUDs as well as provisions for dealing with abandoned plans or projects.

Development Plan Review

Many communities include site plan review or development plan review requirements in their zoning ordinances, particularly for large-scale developments such as shopping centers or apartment complexes. Indiana law refers to these as development plans, not to be confused with a planned unit development, discussed herein.

The zoning ordinance needs to specify the situations in which development plans are required and the standards by which those plans will be evaluated. These standards need to be objective and specific; a requirement that the new development be compatible and harmonious with its surroundings will not pass legal muster and will not provide guidance for developers. Site Plan Reviews are largely used by planning staff members to insure that the new development will meet the requirements of the zoning ordinance.

Design Requirements

Some communities have design review requirements in their ordinances. In the early years these were most commonly of two types: requirements that all buildings be of similar design or requirements that buildings not look alike. Some communities set up design review committees to evaluate the architecture of proposed buildings and to decide whether those buildings are acceptable. In recent years, cities such as Seaside, Florida, have been developed according to zoning codes based primarily upon design standards. These ordinances often contain more drawings than words, and they are intended to achieve a certain community character. Again, the standards must be specific and clear, as must the criteria for deciding whether the designs are acceptable.



Overlay Districts

The Overlay District serves as an additional layer of regulations in areas that are particularly sensitive. The underlying zoning district does not change, there are generally more requirements pertaining to the overlay.

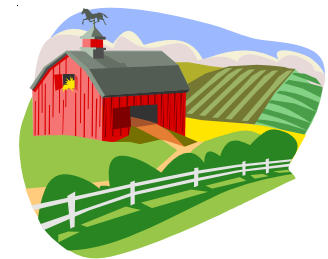
A common overlay district in many Indiana communities is a wellhead protection district. The purpose is to protect the community's wellhead or water source. Developments within a wellhead protection district maybe required to submit documentation to the local water utility company before development and then periodically to be sure that the community's water source is not contaminated.

An airport noise overlay district is different in that it remains in place unless the noise generated by the airport changes (adding a new runway for instance). The airport noise overlay district restricts noise sensitive uses such as residences, nursing homes, mobile homes, outdoor auditoriums and similar uses. Some uses are not only allowed but encouraged in Noise Overlay zones due to their compatibility with noise, such as: manufacturing, most commercial uses, agriculture, mining, and warehousing.

Quick Quiz: Does your community's zoning ordinance have any overlay districts?

Farmland Preservation

For many Indiana communities, especially counties, agricultural protection is of prime importance. There is nationwide attention now being given to protecting farmland. In Indiana, the Land Resources Council is charged with finding ways to address this issue. Farmland preservation is not just about food supply; it is about rural landscapes and lifestyle. There are several techniques available to retaining farmland and the rural character.



Exclusive agricultural zones allow only farming. Houses are considered accessory to farming operations. This land cannot be subdivided or developed for any purpose other than agriculture. If enforced, these zones are effective in protecting farmland. Many local legislative bodies, however, find it difficult to resist the pressure to rezone these areas for new housing developments and shopping centers. The opposition can be significant, as property owners perceive these zones to significantly reduce property values.

The large-lot zoning technique establishes a minimum lot size intended to discourage development. Typical sizes range from 5 to 20 acres. These lot sizes often are not large enough to promote the continuation of farming. Many experts believe the minimum size should be 40 or 80 acres; otherwise, the large area requirements simply waste land and drive up the cost of housing and of local services and infrastructure. Large lots can create the feel of more open space, and they provide better opportunity for properly functioning septic systems and private wells in areas where those are permitted or encouraged.

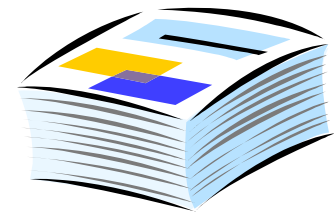
Purchase of development rights (PDR) programs pay landowners for the development rights to their property. An appraisal is made of the difference between the property value as agriculture land and its value if sold for

development. The landowner is paid the difference, and the land is permanently protected from development. Several states, including Michigan, Massachusetts, New Jersey, and Pennsylvania have these programs. Indiana recently adopted such a program, but the funding is limited. In Colorado, one county recently voted to increase property taxes to create a pool of funds for such purchases. One suggestion has been to pay for the development rights through a tax on new development.

Transfer of development rights (TDR) is relatively recent and not widely used. It involves establishing a base density and then allowing density credits to be taken from one area and applied to another. For example, assume the base density is one unit per acre. A community wishing to protect prime farmland could designate that farmland as “donor areas” and areas less good for farming as “receiving areas.” A developer could transfer 40 development right credits from a 40-acre farm and use them to create 80 ½ acre lots on land not designated for farming.

Developing the Ordinance

Preparing a zoning ordinance is one of the most challenging and important tasks a community will undertake. The public may not pay great attention to development of the plan (although they should), but the zoning text and maps are usually the subject of considerable interest and emotion. Drafting a good zoning ordinance is also a time-intensive proposition. Many communities adopt new plans but never adopt implementing ordinances, because the time involved is too great and the controversy is overwhelming. In communities where the staff is fully engaged in the day-to-day operation of the planning office, it may be necessary to hire an outside consultant to prepare the zoning ordinance.



The time between plan adoption and ordinance adoption should be as short as possible. Some localities prefer to begin the ordinance development even before the comprehensive plan is completed. By carrying out some of the work simultaneously, communities can achieve a better connection between the plan and the regulations. This concurrent process also serves as a reality check, as citizens consider whether a policy is really important enough to translate into a regulation. Without implementing ordinances, the plan is without significant effect.

The plan commission and staff should establish a work program for developing the zoning ordinance. The plan should include several elements: budget, committee structure, public participation plan, meeting schedule, and a timeline.

The commission also needs to decide what approach will be most productive. Some communities draft ordinances one section at a time, dealing with residential districts, then commercial, then industrial, then

parking, then signage, and so on. Others draft the entire document and then review it page by page. The advantage to the first approach is that the pieces are more manageable and can be considered in depth. The disadvantage is that the overall view is lost. Important sections might even be overlooked, and there might be internal inconsistencies. The second approach allows a better view of the overall context of the ordinance, but the review task may appear overwhelming.

The most important factor in ordinance development is the relationship of the ordinance to the comprehensive plan. As noted earlier, each regulation should clearly implement some policy contained in the plan. While there is no doubt that the citizen involvement is critical to the comprehensive planning process, there are differing opinions on citizen involvement in the development of a zoning ordinance. A broad range of interests should be represented among those guiding the ordinance development, but keep in mind that the zoning ordinance is so detailed that citizen involvement that focuses on every detail can easily hinder the development of the ordinance.

More than one Indiana county has spent enormous amounts of time and money developing a new zoning ordinance only to have the ordinance defeated because of vehement opposition at the public hearing. A properly constituted citizen committee can be an effective advocate for adoption of the ordinance after it is drafted. If the community uses an outside consultant, it is important for those involved locally to understand every provision. Those who will be governed by the ordinance provisions need to understand the implications of and the reasons for the various regulations.

With or without consulting help, it usually takes at least one year to develop a zoning ordinance. If a committee is appointed, the members should know that the time commitment will be significant and will last for one year or more.

Even though the zoning ordinance must be tailored to a community's individual needs, there is nothing wrong with borrowing ideas from other communities. Many ideas can be generated through perusing a variety of ordinances, a task that has become easier with the proliferation of public documents on the Internet. Regulations developed for one community often can be adapted to serve another. Some sections, such as penalty provisions and severability clauses, are nearly the same in all ordinances, especially ordinances within the same state, and there is no reason to rewrite these if they fulfill the local needs. It is important, however, when adapting provisions from other communities to have a legal review by competent counsel. Even within Indiana local zoning powers differ, because there are three kinds of plan commissions, and some have powers that others do not.

Adopting the Ordinance

Indiana Code specifies certain actions that local governments must take into consideration before a zoning ordinance can be adopted. This process involves the following steps:

1. The plan commission schedules a public hearing and publishes notice of the hearing in the newspaper at least 10 days before the hearing date. This notice must contain a summary of the contents of the ordinance and the entire text of any penalty provisions.
2. The commission holds the public hearing and accepts comment from interested parties.
3. The plan commission certifies the ordinance and recommends it to the legislative body (city or town council or county commissioners) for adoption.
4. The legislative body adopts, amends or rejects the ordinance. If it so desires, the legislative body may schedule a public hearing on the ordinance before it takes action. If the legislative body rejects or amends the ordinance, it must return the proposal to the commission with reasons for the rejection or amendment. The plan commission must then consider the rejection or amendment. If the commission agrees, the legislative action stands. If the commission disagrees, the legislative body must vote a second time.



IC 36-7-4-604



The commission must publish a notice of adoption, and any penalty provisions in the ordinance must be published in their entirety. The ordinance is not effective until 14 days after the penalty provisions are published.



IC 36-7-4-610

While this process may seem somewhat cumbersome, it is designed to ensure that there is a dialogue between the commission and the legislative body. There are time limits on the actions to be taken after the plan commission certifies the ordinance. The staff and commission should pay careful attention to these deadlines.



IC 36-7-4-606

The minimum steps required by statute usually are not enough for an effective and successful adoption process. It is a good idea to hold one or more public meetings before the formal public hearing. At these meetings, the ordinance can be explained and the public has an opportunity for questions and comments. It is likely that the commission or ordinance committee will want to make changes based upon these comments before advertising the ordinance for public hearing. Effective participation requires that copies of the ordinance be available for public review. In addition to having a copy available in the planning office, the staff should place copies in other places, such as the public library, that are readily accessible to the public. Ordinances usually go through several revisions before adoption, and it is confusing to have several different versions circulating in the community. Review copies should be dated and clearly marked as drafts.

Amending the Ordinance

Even the most carefully thought-out ordinance will need to be amended from time to time. There are two types of zoning ordinance amendments: Text amendments which include changing, adding or deleting written provisions in the ordinance, and map amendments which are commonly called “rezonings” but can also include adjusting zoning boundaries. The processes for these two types of amendments are different, and it is important that each type is handled correctly.

Text Amendments

Text amendments are handled in much the same manner as the adoption of the initial ordinance. The plan commission must hold a properly advertised public hearing on the proposal. The hearing notice must state the subject matter of the amendment. As with adoption of the initial zoning ordinance, the legislative body may adopt, reject or amend the proposed text amendment. If the council or county commissioners reject or amend the proposal, they must return it to the plan commission with the written reasons for the rejection or amendment, and the process is the same as for the initial adoption of the ordinance.



IC 36-7-4-607
IC 36-7-4-610

Map Amendments (Rezonings)

A typical plan commission agenda includes one or more requests to rezone property, or an amendment to the zoning map. The statute requires the plan commission and legislative body to pay reasonable regard to the following factors in considering a proposal to rezone land: the comprehensive plan; current conditions and the character of current structures and uses in each district; the most desirable use for which the land in each district is adapted; the conservation of property values throughout the jurisdiction; and responsible development and growth.



IC 36-7-4-608
IC 36-7-4-603

The local zoning ordinance text may contain additional criteria. The effectiveness of many comprehensive plans is determined by the care the plan commission and legislative body take in deciding rezonings. There often is considerable pressure from developers and from the public on these issues, and it is important that the decision be made based upon the adopted goals and policies for future land use.

Indiana law allows rezonings to carry written commitments. In some states these are called “conditional” rezonings. The commitments may be imposed by the city or county or offered by the applicant. Commitments are permitted only if the zoning ordinance provides for them. The ordinance must specify the circumstances in which commitments are required, the procedures for creating, amending, enforcing and terminating commitments. The commitments must be recorded in the office of the county recorder.



IC 36-7-4-615

While commitments can be a useful tool to ensure quality development that is compatible with its surroundings, they also can be overused and abused. Commitments should not be a substitute for a well drafted zoning ordinance, and they should not be used to satisfy every neighborhood demand. Each commitment requires mapping, tracking and enforcement, and they should be used only where they are really necessary or highly beneficial.

Conclusion

One of the most important characteristics of a zoning ordinance is its ability to bring development issues to the table at a public hearing. Any time a property owner wishes to change the current land use designation notice is given to the public. A meeting is scheduled. Those who are in favor of or against the proposal have the opportunity to speak to the plan commission and legislative body prior to any decision. The zoning ordinance gives the community a voice in the development of their community. No matter how large or small the community, the voices of the residents should help influence the decisions made or the process will be tainted.

References

Planning Advisory Service Report #432. *Off-Street Parking Requirements*. Editor David Bergman.



Other parts of the Indiana
Citizen Planner's Guide can
be downloaded at
[www.indianaplanning.org/
citizen.htm](http://www.indianaplanning.org/citizen.htm)

INDIANA CITIZEN PLANNER'S GUIDE

Part 9: Subdivision Control Ordinance

*by Jonathon Isaacs, AICP &
Amy Schweitzer, AICP*

a publication of
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a chapter of
The American Planning Association



**Other parts of the Indiana Citizen Planner's Guide can be downloaded at
www.indianaplanning.org/citizen.htm**

This booklet is one in a series of publications of the Indiana Planning Association to be used as training materials for citizen planners: plan commission members, board of zoning appeals members, neighborhood organizations, and citizen committees. These materials are intended to supplement publications such as *Planning Made Easy* and *The Citizen's Guide to Planning*. IPA's materials contain information specific to Indiana. Users of these guides are strongly encouraged to read other, more general books on planning and zoning.

**The information contained in this booklet is intended for informational purposes only
and is not to be considered legal advice.**

INDIANA CITIZEN PLANNER'S GUIDE

PART 9: SUBDIVISION CONTROL ORDINANCE

In this Part. . .

- *Subdivisions Defined*
- *History*
- *Purpose*
- *The Subdivision Control Ordinance*
- *Design Elements*
- *Financing Improvements*

The term “subdivision” is most commonly used to refer to a residential development. For instance, “Billy lives in the new subdivision off of Main Street.” While this is a correct use of the term “subdivision,” a “subdivision” does not have to be residential, nor does it always include roads, sidewalks, and other infrastructure that is associated with a new housing development.



Subdivisions Defined

A subdivision is a division of a lot, tract, or parcel of land into two or more lots, tracts, parcels or other divisions of land for sale, development, or lease. Subdivisions can include splitting one 80-acre tract of land into two 40-acre parcels without any infrastructure. It includes splitting one 80-acre tract into ten 8-acre lots for a business development with a street and drainage infrastructure; or it can mean splitting one 80-acre tract into 180 residential lots complete with roads, sidewalks, street lighting, and utilities.



IC 36-7-4-701(a)

The review of a subdivision of land is an additional process - aside from zoning - that allows a local government to influence the character of land development. One primary and often overlooked connection between zoning and subdivisions in Indiana Code is that within a zoning ordinance, a plan commission can determine in which zoning districts subdivisions of land are permitted. The more obvious connection between zoning and the subdivision of land is that the standards for development in the subdivision control ordinance should be consistent with (or reference) the standards for development contained in the zoning ordinance.

History

Governments began requiring subdivisions of land to ensure that proper land records were maintained. Also, a subdivision of land that has been recorded in the office of the local county recorder eliminates the need for a lengthy metes and bounds legal description of the property. After a subdivision of land is officially recorded, the lot is commonly referred to as a specific "Lot Number" in the "Name of the Subdivision." For example, "Billy owns Lot #182 in the Walnut Hills Addition to the Town of Monroe," or "the new store will be constructed on Lot #3 in the Westside Commercial Park Addition to the Town of Monroe."

Eventually, the requirement of recording and platting of land records and titles evolved into development controls. The initial development issues were lot width and area, block length, and access. This grew into reviewing actual construction standards for streets, alleys, sewers, and other infrastructure that ends up being accepted by the local government.

Purpose

While subdivisions of land still help create adequate land records and simpler legal descriptions, subdivisions of land also ensure that there are adequate public facilities and infrastructure to handle the development of the lots created by the subdivision. This includes accessibility through streets, street capacity, pedestrian ways, and/or alleys. It can also include water service, sewer service, treatment capacity, electricity, natural gas, drainage, and other utilities.

An official subdivision of land also includes a plan for long-term maintenance of infrastructure. It is common for the local government to take over the maintenance of the infrastructure - like streets and utilities. Sometimes the subdivision process includes the creation of a homeowners' association with annual dues to maintain other infrastructure like drainage swales, detention ponds, and/or common areas. The subdivision process generally serves as assurance to a potential lot purchaser that infrastructure is provided and perpetual maintenance is accounted for.

The subdivision of land process is one of the few opportunity for officials to influence internal design of a development. Unfortunately, it is easy to get caught up in making sure adequate utilities are provided and overlook the character of the subdivision. In Chapter 8 of *The Practice of Local Government Planning*, Richard Ducker states, "*The manner in which land is subdivided, streets are laid out and lots and homes are sold sets out the pattern of community development for years to come. Once land is divided into building sites and streets, land ownership is only rarely consolidated, land is rarely resubdivided, and a particular site is only rarely redeveloped.*"

Quick Quiz:

Is there an original plat in your community? What is the date on the plat?



It is no use saying, "we are doing our best." You have got to succeed in doing what is necessary.

- Winston Churchill

Subdivision regulations often give a community its only opportunity to ensure that new neighborhoods are properly designed." The review of a new subdivision is critical in the process of developing and/or maintaining a certain community character.

The Subdivision Control Ordinance

Most communities in Indiana have stand alone subdivision control ordinances. This means the subdivision ordinance is a separate document from the zoning ordinance and building ordinance. Recently, some communities have began implementing a "Unified Development Ordinance" that includes all of a community's development ordinances in one document: zoning, subdivision, building, and even unsafe building ordinances. If the subdivision control ordinance is a stand alone document, it should include some general provisions: purpose, intent, jurisdiction, violations, penalties, and definitions.

Indiana code calls for a plan commission to recommend an ordinance containing "provisions for subdivision control." The subdivision control ordinance **must** specify the standards by which the commission determines whether a plat qualifies for primary approval. Indiana Code requires a subdivision control ordinance to include standards for minimum lot width, depth, and area; public way width, grade, curves and coordination with existing and planned public ways; and the extension of water, sewer, and other services.

Indiana Code goes further to state that a plan commission **may** also include provisions for the allocation of area to be used as public ways; parks; schools; public/semi-public buildings; utilities; and "anything else related to the purpose" of the subdivision of land.

The general regulations included in most subdivision control ordinances include:

- Lot area, width, and length to depth ratio
- Block length
- Street width, alley width, cul-de-sacs length, turning radii
- Provisions to include utilities and appropriate easements for utilities
- Provisions for pedestrian access
- Monumentation and markers
- Subdivision name
- Street names
- Lot addresses

Today, many communities are taking subdivision control even further to include "real community character issues." These regulations can include



IC 36-7-4-702(b)



IC 36-7-4-702(d)

Quick Quiz:
Does your community's Subdivision Control Ordinance include any of the provisions Indiana Code considers discretionary?

requiring various sized lots in the same subdivision, including regulations for the provision of amenities such as parks and other recreational facilities, requiring conservation of naturally-sensitive lands, aesthetic regulations, and landscaping.

With all of the regulations usually included in a subdivision control ordinance, it's important to make sure that actual construction standards are not confused with design regulations. Construction standards are used during the actual construction of the subdivision's infrastructure. For example, thickness of asphalt and base materials for a local street are construction standards. This type of information best serves the community and the developer if it is contained within a construction manual (not the subdivision control ordinance) approved by the public works board.



Types of Subdivision

A Subdivision Control Ordinance often identifies different types of subdivisions. The most common are minor subdivisions and major subdivisions. Indiana Code does not spell out definitions for different subdivisions; it does, however, make provisions for a simpler procedure for subdivisions that do not involve the opening of a public way.



IC 36-7-4-701(d)

Minor and Major Subdivisions

Ordinances commonly define a "minor subdivision" and a "major subdivision." While this definition is up to each individual community, a minor subdivision of land usually has a maximum number of lots and does not necessitate the construction or installation of new infrastructure. These can also be called "a simple subdivision of land." For example, a minor subdivision could be defined as a subdivision that includes five or fewer lots and does not require construction of new public or private public ways or the installation of utility infrastructure. A major subdivision is usually defined as any subdivision of land that does not meet the definition of a minor subdivision.

Quick Quiz: What types of subdivisions are identified in your community's subdivision control ordinance?

Developers should be discouraged from creating a series of minor subdivisions as a way of bypassing the requirements of a major subdivision. The simplest way to do this is to specify that lots created as part of a minor subdivision of land are incapable of further separation unless the procedure and requirements for a major subdivision are followed.

There are many different types of major subdivision. The Subdivision Control Ordinance can establish minimum or maximum standards for certain types of subdivisions and also establish criteria about how they can be developed. Some local governments also establish additional types of subdivisions. This section looks at the most common types of subdivisions found in Indiana: Conventional, Traditional, and Open Space/Conservation.

Traditional / Neo-Traditional

Traditional subdivisions are historically found in the older parts of communities. Often, the "Original Plat to the Town/City" was created



before land use patterns were dominated by the automobile. As a result, traditional subdivisions are characterized by mixed use, smaller lots and setbacks, gridiron street patterns and narrow alleys.

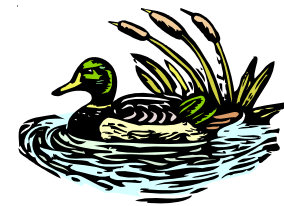
The traditional subdivision has recently been re-invented to include these same design principles. A traditional subdivision developed today may be called a "Neo-Traditional Development." Like the older parts of cities, these subdivisions create a mixed-use development of retail, office and residential and incorporates them together while creating a neighborhood with a pedestrian emphasis. Typically, home sites will have rear-loaded garages off of alleys. The home design emphasizes front porches and street-scape that encourages people to recreate in the front yard. These types of development welcome a mixture of uses that traditional zoning has separated.

Conventional Subdivisions

A conventional subdivision is most typically found in suburban areas. These subdivisions were first created after World War II during the first tier of suburban development. In the 1960s, traditional gridiron street patterns gave way to curvilinear street patterns in an attempt to soften the look of neighborhoods. Most subdivisions today continue to use the conventional subdivision style first developed in the 1960s.

Open Space / Conservation

An Open Space or Conservation Subdivision is characterized by clustering the developable lots in certain areas of the parent tract of land and preserving/conserving the remaining areas on the parent tract. These areas might be conserved because they are valuable natural habitats, beautiful woodlands, floodplain, or simply as an open space amenity to the lot owners. The key is that these undeveloped lands are actually platted as part of the subdivision, are never divided into lots, are never developed, and are maintained by a homeowners' association.



A Side Note On Condominiums

A condominium development is real estate in which a portion is designed for separate ownership and the remainder of the real estate is designated for common ownership solely by the owners of the portions. In Indiana, Condominiums were formerly referred to as Horizontal Property Regimes. Section 32-25 of Indiana Code states that condominiums are exempt from local subdivision control ordinances. The total land stays under one ownership interest while the buildings located on that undivided ground is sold to homeowners.

The result of this Indiana-wide legislation is that local governments lack any influence in the design and implementation of condominium developments unless the local zoning ordinance requires condominium developments to obtain development plan approval per the authority granted in Indiana Code 37-7-4-1400.

Procedure

The subdivision control ordinance should spell out the procedure for obtaining subdivision plat approval. While this Citizen Planner's Guide details the minimum requirements contained in Indiana Code, this procedure likely differs from community to community.

Some communities suggest or require a "pre-application conference" even though such a meeting is not mentioned in Indiana Code. A pre-application conference is a meeting between the developer (applicant) and the plan commission staff. City engineers, utility supervisors, and other public works planners can and should be involved in a pre-application conference. The conference includes quick review of the plat and filing requirements and general discussion.



The subdivision control ordinance should include a list of filing requirements. This is all the documentation that must be included in the filing of the subdivision plat application for the filing to be considered complete. It obviously includes drawings - streets, lots, utilities, drainage, etc. It may also include items like an affidavit from the property owner if the owner is not the developer, information on the proposed homeowners/lot owner's association, and other restrictions that will be part of the development.

Indiana Code requires a "primary plat application for approval" to be filed per the instructions in the subdivision control ordinance. The code goes further to allow communities to charge a fee for such filing. Indiana Code gives plan commission staff 30 days to review the submittal for completeness. If the submittal is found to be complete, the staff shall announce a date for a public hearing before the plan commission or before a plat committee that is an established committee of the plan commission. (Indiana Code 36-7-4-701(e) establishes the procedure for developing a plat committee.)



IC 36-7-4-706

The staff shall notify the applicant/developer in writing of the hearing date. Although Indiana Code requires the staff to give notice of the hearing to the public and to notify interested parties at least 10 days prior to the hearing, many local ordinances actually require the applicant/developer to bear the costs associated with this notice and sometimes bear the responsibility of doing it. Indiana Code allows the community to define who interested parties are and what constitutes appropriate notice.



Like any public hearing, the applicant/developer should be allowed to explain the plat and answer any questions the plan commission (or plat committee) might have. The public should be given the opportunity to speak in favor of or against the proposed plat. Unlike some other decisions a plan commission makes, if the proposed plat complies with all of the standards in the subdivision control ordinance, the plat shall receive "primary approval" from the plan commission. (This is why it is so critical to have a thorough subdivision control ordinance with well-written and well-tested standards. Indiana Code does require the plan commission to make written findings and a written, signed decision upon granting primary plat approval. The

findings might include items like: the application filing was complete; notice was given of the public hearing as required; and/or the proposed subdivision plat complies with all the standards included in the subdivision control ordinance.



IC 36-7-4-707

Similarly, if a subdivision plat does not comply with all of the standards in the subdivision control ordinance, written findings and denial of the subdivision plat must be signed. The plan commission official responsible for signing the findings and the denial/approval shall be identified in the subdivision control ordinance.

Note, a decision of the plat committee can be appealed to the plan commission following the provisions in IC 36-7-4-708.

At this point, the applicant/developer may choose one of two avenues.

One: the developer may begin installing all of the infrastructure per the approved primary plat and adhering to the community's specifications. Once the infrastructure is installed, tested, and approved by local officials, the developer offers the infrastructure to the local government. The local government, in turn, accepts the infrastructure (assuming it was built to the local government's standards and has passed all tests). For example, the right-of-way containing the streets built by the developer would be owned by the local government and the streets would be maintained by the local street department. Then, secondary plat (sometimes called final plat) approval is granted by the plan commission or plat committee. Indiana Code does not require notice or a hearing for secondary plat approval.

Two: secondary plat approval may be granted where improvements have not been made if the applicant/developer provides a bond in an amount determined by the plan commission to be sufficient to complete improvements. Again, the approval must come from the plan commission or plat committee and does not require notice or a hearing.



IC 36-7-4-710

Indiana code requires the plat to be signed by the plan commission official designated in the subdivision control ordinance before it is filed with the county auditor and county recorder.

Design Elements

One of the best opportunities to influence the character of a community is during the subdivision review process - particularly before primary plat approval. Since primary plat approval is approved simply by complying with standards in the subdivision control ordinance, it is paramount that standards reflect the community's physical and economic needs and desires.

The following design elements are a basic list that should be reflected in a subdivision control ordinance.

Natural Amenities

Should a community desire to protect natural amenities from development or influence the development around these amenities, the subdivision control ordinance must include provisions outlining guidelines for the development of or near natural amenities. Natural amenities may include streams, rivers, floodplains, wetlands, woodlots, prairie lands, and/or natural topography.

Accessibility and Circulation

The subdivision control ordinance should reference right-of-way widths contained in a community's thoroughfare plan (usually part of the comprehensive plan). When considering accessibility and circulation, a plan commission must consider street design: curbs or no curbs; straight or curvy; wide or narrow; the speed of vehicles on the street; onstreet parking or not; cul-de-sac length. How does one get into the subdivision from existing roads? Will undeveloped land around the subdivision eventually be developed? Should stub streets be required in certain areas? Are intersections safe? How about turning radii? Will school buses, garbage trucks, and emergency response personal be eager to travel down these streets or not?

Certainly, pedestrian accessibility and circulation should also be a consideration. Will sidewalks be required? Are there existing paths or trails that are accessible from the proposed subdivision?

Lots and Blocks

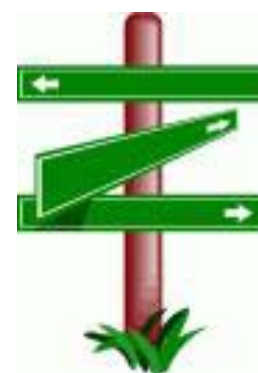
Lots should obviously meet the minimum zoning criteria (size, width, frontage, and width-to-depth ratios) and be buildable (include building setback lines). The subdivision control ordinance might address "flag lots" or "panhandle lots" which are those with enough frontage only for access. Do these lots create the type of character and development the community desires?

Block length should also be addressed in the subdivision control ordinance.

Street Names & Address

It is easy to overlook something as simple as the name of a street. However, it is critical that names of street extensions be consistent with the existing street. For example, if Hickory Avenue is extended, it should be called Hickory Avenue, not Hickory Street. New streets should have names that are not similar to existing streets - like Beach Street and Beech Street. Differentiated street names make the job of responding to emergencies quicker and more efficient. Also, be careful interchanging forms of directionals. Western Avenue is much easier to confuse with West Oak Street than a name that does not include any form of west.

Also, it is critical that addresses be consistent with the community's existing address scheme. While the plan commission does have the authority to change addresses, it is generally not well-received by the community. It is



so much easier to have the addresses on each lot on the plat.

Utilities and Drainage

Inadequate review of utility and drainage infrastructure can be a costly mistake for local governments. Utilities should be adequately sized for maximum build out of the subdivision and any future expansion of the lines to land that might develop in the future. Easements should also be adequately sized to handle all of the various utilities that will be necessary. The form certain utilities exist in can impact the character of the community; for example, underground versus overhead lines. Street lights are another example of how utilities can help create or detract from a certain character.

Drainage infrastructure is sometimes not accepted and maintained by the local government after the development is complete. The plan commission needs to make sure that arrangements are in place for perpetual maintenance of the swales and/or ponds.

Landscaping and Aesthetics

A subdivision control ordinance can address internal and external landscaping and aesthetic features. Items like street trees, buffering, entrances, and boulevards certainly impact the character of the community.

General Information

The plat should include a metes and bounds legal description of the entire subdivision as well as the contact information of the developer, land surveyor, and engineer. Often, a subdivision control ordinance requires specific language about approval on the plat. Also, a signatory line for appropriate plan commission officials should be included.

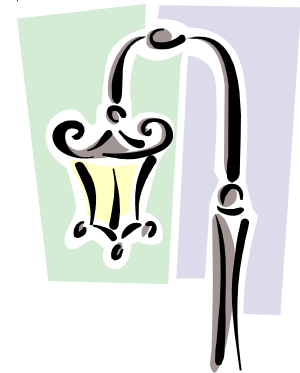
Plat Covenants and Restrictions

Covenants and restrictions (deed restrictions) are requirements that the developer may create to provide further protection for future homeowners. The covenants should spell out a mechanism for enforcement because the local plan commission/local government is generally not responsible for enforcing covenants. The mechanism normally created is a homeowner's association. Each owner of a lot is usually required to be part of and pay dues to the homeowner's association.

Financing Improvements

Land Dedication

In Indiana, it is most common for the developer to bear the cost for the right-of-way (which eventually becomes public or "common" land) and the cost of the infrastructure improvements developed onsite to serve the lots the developer is creating: streets, utilities, drainage, sidewalks, lift stations,



hydrants, etc. A developer should be able to recoup these costs in the sale of the individual lots. The right-of-way and infrastructure is “dedicated” to the local government for public use.

The local government bears the cost of perpetual maintenance of the infrastructure that becomes part of its existing systems. Should the local government request or require oversizing of lines/streets to accommodate future growth, the local government should be prepared to bear the cost of increased size.

Off Site Improvements

Occasionally, improvements are required off the site of the subdivision. For instance, a large residential subdivision or a commercial subdivision may require the addition of a deceleration lane or a turning lane on a street outside of the actual subdivision. Generally, the developer bears the cost of these improvements which are necessitated by the new subdivision. There might be some cases where a new subdivisions necessitates the need for a facility that is common to the community. In these cases, the developer bears a proportionate share of the costs of providing common facility.

Fees in lieu of dedication

Some community subdivision control ordinances call for developers to give fees in lieu of dedicating land for a specific improvement. For example, a subdivision of 50 lots might not require a complete new park. Rather than the developer setting aside a certain amount of land for a park, the developer will give money to finance a portion of the park. The key is that the subdivision control ordinance must be specific in how these fees are calculated and the fees must be used for the intended purpose.

Other parts of the Indiana
Citizen Planner's Guide can
be downloaded at
[www.indianaplanning.org/
citizen.htm](http://www.indianaplanning.org/citizen.htm)

INDIANA CITIZEN PLANNER'S GUIDE

Part 10: Site Plan Review *by Robert S. Cowell, Jr., AICP*

a publication of
The Indiana Planning Association,
a chapter of
The American Planning Association



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www.indianaplanning.org/citizen.htm**

This booklet is one in a series of publications of the Indiana Planning Association to be used as training materials for citizen planners: plan commission members, board of zoning appeals members, neighborhood organizations, and citizen committees. These materials are intended to supplement publications such as *Planning Made Easy* and *The Citizen's Guide to Planning*. IPA's materials contain information specific to Indiana. Users of these guides are strongly encouraged to read other, more general books on planning and zoning.

**The information contained in this booklet is intended for informational purposes only
and is not to be considered legal advice.**

INDIANA CITIZEN PLANNER'S GUIDE

PART 10: SITE PLAN REVIEW

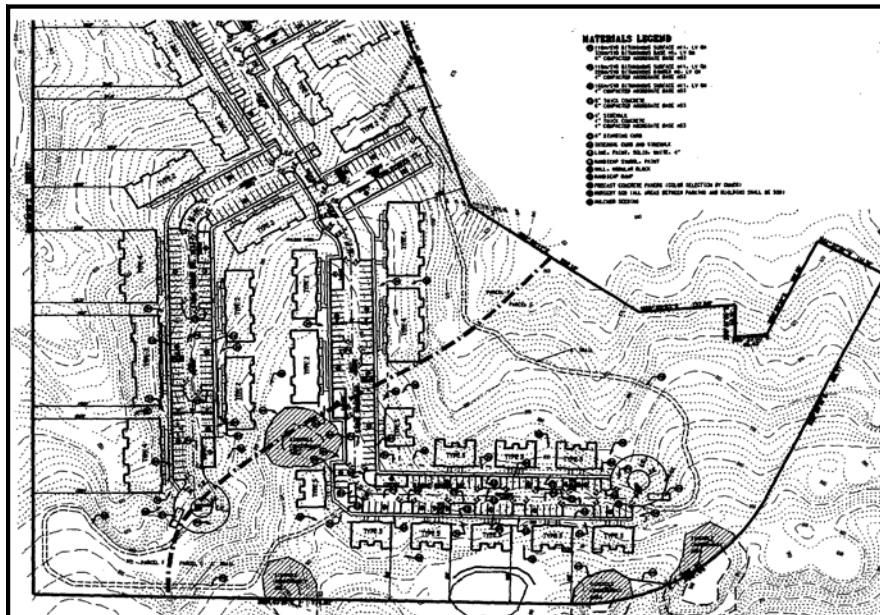
In this Part . . .

- *Defining a Site Plan*
- *Level of Review*
- *Who Conducts the Site Plan Review*
- *Procedures for Site Plan Review*
 - *Submittal Requirements*
 - *Development Standards*
 - *Comprehensive Plan*
 - *Documenting the Review*

Through site plan review, the plan commission reviews a proposal for a development balancing a property owner's rights with those of neighboring properties and the community at large. This is accomplished through the comparison of the development proposal with adopted plans and standards.

Defining a Site Plan

The *Growing Smart Legislative Guidebook* prepared by the American Planning Association defines a site plan as “a scaled drawing that shows the layout and arrangement of buildings and open space, including parking and yard areas, the provision for access to and from the public street system and, often, the location of facilities such as water and sewer lines and storm drainage systems.”



Site Planning is the art of arranging structures on the land and shaping the spaces between, an art linked to architecture, engineering, landscape architecture, and city planning.

- Kevin Lynch, *Site Planning*

Indiana Code uses the term “development plan.” It is defined as a specific plan for the development of real property that requires approval by the plan commission, satisfies the development requirements specified in the zoning ordinance, and contains the plan documentation and supporting information required by the zoning ordinance. For the purposes of this chapter, the terms “development plan” and “site plan” are one in the same.



IC 36-7-4-1400

Indiana Code goes further to state that a community can specify regulations that development plans must meet. These regulations can include:

- Compatibility of the development with surrounding land uses;
- Availability and coordination of water, sanitary sewers, storm water drainage, and other utilities;
- Management of traffic;
- Building setback lines;
- Building coverage;
- Building separation;
- Vehicle and pedestrian circulation;
- Parking;
- Landscaping;
- Height, scale, materials, and style of improvements;
- Signage;
- Recreation space; and
- Outdoor lighting.



Level of Review

Nearly all physical developments necessitate the submission of a site plan before a permit can be issued. On the simple side, before a permit can be issued for a garage, one must know the size of the garage, how it relates to other structures on the property, and its distance from property lines. On the more complex side, before a permit can be issued for a new shopping center, there are many issues that need to be addressed: building size, internal vehicular and pedestrian circulation, drainage, parking, and lighting - to name only a few. Obviously, the level of review for a new shopping center should be very different than the level of review for a new garage.

Quick Quiz:
Is the level of review consistent with intensity of the project in your community? Does it take too long to obtain approval for simple projects? Or is there not adequate review given to complex projects?

For simple projects, most zoning codes require that adequate information be provided to determine if the project meets the regulations of the zoning code. This is generally achieved through a sketch. This scenario would apply to a new home, a new garage, a room addition, a shed, a deck, and maybe a fence, depending on the details of the zoning ordinance. These are small scale projects that should require a quick and relatively simple level of site plan review.

Indiana Code allows communities to specify in which zoning districts a development plan is required to obtain plan commission approval. Generally, development plan approval is a prerequisite to obtaining any local permits. This type of review and approval should be reserved for more complex projects



IC 36-7-4-1401.5

like multi-family developments, commercial and retail establishments, industrial facilities, planned unit developments, and institutional developments.

The process for development standards variances, special exceptions and conditional use permits should include the review of a site plan. Again, the level of detail required should be consistent with the complexity of the project and/or request.

There can be some difficulty in deciding when projects involving the expansion of an existing facility should have to obtain development plan approval from the plan commission. This difficulty can be overcome by including criteria within the zoning code. For example, the zoning code might specify primary use additions, parking lot expansions, and/or projects involving one acre or more of land shall obtain development plan approval before an improvement location permit can be issued.

Who Conducts the Site Plan Review?

Again, who conducts the review can depend on the complexity of the project. A site plan for a new house, garage or deck may only need to be reviewed by the planner or a single plan commission staff member. Depending on the community, a site plan for a new house may need to be reviewed by a design standards committee to look for required design characteristics: roof lines, building facade details, and exterior materials.

Site plans that are prepared in combination with a conditional use, special exception, or variance request are generally reviewed by the staff and forwarded to the board of zoning appeals for additional review and approval. A site plan for a complex development - like a shopping center- should undergo the most thorough review starting with plan commission staff. In many communities, these types of plans are routed to various departments for additional review. It is not uncommon (and in many cases, preferable) for police, fire, utilities, traffic or street, surveyor or drainage, and/or engineering departments to review and comment on a site plan for a large development. After this type of routing process, the site plan along with the comments from the various departments are reviewed by the plan commission for comments, conditions, and/or approval.

Indiana Code states that a plan commission may delegate development plan approval. Delegation may be granted to staff, a hearing examiner, or a committee of the plan commission. The delegation must be clearly stated in the zoning ordinance and include the duties granted to the hearing examiner, the procedures for review, and procedures for an appeal. Many communities take advantage of this streamlined procedure, thus requiring only the most complex plans to be brought before the plan commission.

Quick Quiz

Does the zoning code in your community specify districts in which development plan approval by the plan commission is required? Are criteria for development plan approval specified, too?



IC 36-7-4-1402

If development plan review is delegated, it is very important that the review procedure stated in the zoning ordinance be used by the reviewer in exactly the same manner as it would be by the plan commission. Decisions of the reviewer should be documented in exactly the same manner they would be as if decided by the plan commission.

It is also important to note that a site plan decision made by the staff, hearing examiner, or committee can be made without a public hearing if the zoning ordinance provides for an appeal of the decision directly to the plan commission.

Procedures for Site Plan Review

A site plan for a new development project or a redevelopment project should meet all submittal requirements, meet or exceed all development standards that are part of the zoning ordinance, and be consistent with the comprehensive plan and other applicable plans.

Submittal Requirements

The first step in the site plan review process should be to verify that all items required to be shown on or accompanying the site plan have been provided. A zoning ordinance should provide a very specific list of required items. Again, the submittal requirements should reflect the complexity of the project. Examples may include the following:

- Application form and applicable fees;
- Name and address of the owner, developer, engineer, surveyor, etc.;
- Location of the project;
- Legal description of the subject property;
- Scale and north arrow;
- Location of buildings, required setbacks, parking and loading areas;
- Location and names of public roads providing access to the site;
- Location and ownership of all adjacent property;
- Layout and design of all proposed rights of way, easements, etc.;
- Location, dimensions, and design, of all proposed signs;
- Location, height, direction of illumination, for all proposed outdoor lights;
- Landscape plan;
- Contours with elevations of proposed finish grades;
- Location of any proposed outside storage areas;
- Erosion control plans;
- Copies of any other applicable permits; and
- Certification/seal of design professional.

If a plan meets the submittal requirements contained in the zoning ordinance, a detailed review of the development requirements should commence. If a plan fails to meet any of the submittal requirements, the



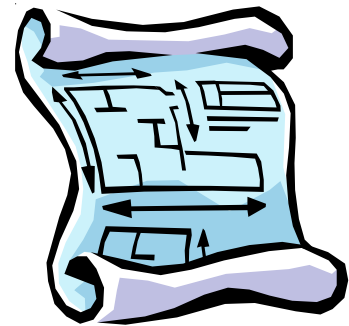
deficiencies should be conveyed in writing to the owner/developer/engineer. There should be no further review until all of the submittal requirements are met.

Development Standards

Indiana Code identifies a number of development requirements that may be included in the review of a development plan. It is very important that these requirements be “objective;” a project clearly meets the requirement or it does not. These standards must be clearly identified within the zoning ordinance. Often a zoning ordinance will have a development standards section with titles like “parking standards,” “driveway standards,” or “landscape standards.”

The process of review simply involves comparing what is proposed on the site plan to what is required by the standards prescribed in the zoning ordinance. It's easiest to go through the standards section checking each off after confirming the site plan meets or exceeds them. All dimensions and calculations should be verified and may include

- Yards and setbacks
- Parking spaces and aisles
- Loading dock standards
- Building height and lot coverage
- Density
- Size, spacing, and location of landscaping
- Sign size
- Driveway surfaces, locations and width
- Utility easement locations and dimensions
- Storm water pipes, culverts, and detention facilities
- Sidewalk and bicycle path locations and width



If a site plan fails to meet any of the development standards, the deficiencies should be conveyed in writing to the owner/developer/engineer. Occasionally, it may be necessary for the owner to secure a variance from one or more of the development standards.

Comprehensive Plan

Indiana Code states that the plan commission shall review a site plan to determine if it is consistent with the comprehensive plan. Further the Code states that the plan commission may impose conditions on the approval of a site plan if the conditions are reasonably necessary to satisfy the development standards specified in the zoning ordinance. The approval of a site plan may also be conditioned on the establishment of a bond or written assurance that guarantees the timely completion of proposed public improvements.



IC 36-7-4-1405

The plan commission should review the development plan against the comprehensive plan paying particular attention to language in the plan

related to land use and community and transportation facilities. It is appropriate at this time in the review process to ask questions about how the use is consistent with the community's comprehensive plan. It is important to identify proposed public investments that may impact the site plan (road expansion, park development, sewer line extensions, etc). It may also be appropriate to consider other items that may not be specified in the zoning ordinance, but are critical to obtaining development that best meets the needs of the community. These items may include, but are not limited to:

- Adequacy of buffers between incompatible uses
- The best location of parking areas relative to the circulation system
- Minimizing the impact to existing natural features
- Accommodating non-vehicular transportation
- Ensuring connectivity between developments

It is also appropriate to consider other adopted community plans. These may include neighborhood plans, overlay or corridor plans, capital improvement plans, downtown revitalization plans, etc. Often such plans will help the plan commission determine appropriate conditions of approval or other steps needed to approve the site plan. Any imposed conditions must be reasonable and supported by findings that relate to adopted ordinances and plans.

Documenting the Review

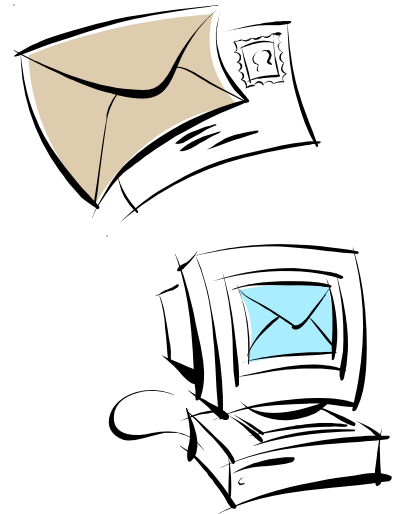
The results of the review should be adequately documented. The type and extent of the documentation is generally dependent on the complexity of the site plan.

Site plan review for a single family home may be documented simply through the issuance of an improvement location permit or a zoning permit. If denied, a simple letter identifying the basis for denial is sufficient. Site plan review for a more complex project is best documented with marked up plans, copies of correspondence, findings, improvement location permits and/or certificates of compliance.

In addition to written correspondence between the plan commission staff and the owner, it is helpful to include a "red-line" or marked up copy of the site plan that graphically explains the comments provided in the written correspondence. Being as thorough and detailed as possible in both the red-line plans and the written correspondence helps to avoid misunderstandings and unnecessary delays in the review of the site plan. It's important to note that a development plan may have multiple reviews by the staff and various departments before it actually is reviewed by the plan commission. Each review should be documented.

The plan commission (or plan commission staff) should include within the written correspondence findings of fact that link their comments or conditions back to specific sections of the zoning ordinance or adopted plans.

Plan commissioners should visit developments that have completed construction to see if the site functions as had been envisioned. The information gained from such visits can aid the planning commission in future site plan reviews and in making amendments to the comprehensive plan or zoning ordinance



These findings should be made part of the official record of each site plan review. Findings help clarify what the Plan Commission is used as a basis for its comments or conditions and help defend against any legal challenges to their decisions.

Once the plan commission is satisfied that the site plan review is complete and approved, a written approval should be provided to the owner. Often this approval is in the form of an improvement location permit or zoning permit. This permit should clearly state what has been approved, make reference to the approved site plan (with the date of the plans), and include any conditions of approval.

Some communities utilize a second permit referred to as a certificate of compliance or occupancy permit. This second permit is issued upon demonstration that all conditions of development plan approval have been met and that all construction has been completed. Upon issuance of this second permit the site plan review process may be considered complete and the file can be placed in permanent storage.



Suggested Reading

LaGro, James A. Jr. *Site Analysis*. John Wiley & Sons. 2001.

Russ. Thomas H. *Site Planning and Design Handbook*. McGraw-Hill. 2002.

Lynch, Kevin & Gary Hack. *Site Planning, 3rd Edition*. The MIT Press. 1984.

Meck, Stuart (general editor). *Growing Smart Legislative Guidebook: Model Statutes for Planning and Management of Change*. American Planning Association. 2002.

Solnit, Albert. *The Job of the Practicing Planner*. "How to Red-Pencil Site Plans" by Charles Reed. APA Planners Press. 1988.



Other parts of the Indiana
Citizen Planner's Guide can
be downloaded at
[www.indianapanning.org/
citizen.htm](http://www.indianapanning.org/citizen.htm)