Keeping out of hot water: Land use decision-making for Planning Commissioners, City Administrators, and Planners

Planners Network Meeting
Baker City
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A Little History

- 1919 – Oregon legislature permits cities to zone private land
- 1947 – Oregon legislature permits counties to zone private land
- 1963 – Oregon legislature establishes the Exclusive Farm Use (EFU) zone and the uses it allows

State and Local Responsibilities

- Cities and Counties
  - Adopt plans and codes in compliance with statewide goals
  - Address local vision and needs
  - Make land use decisions
  - Enforce codes and ordinances
  - Provide assistance to the public

A Little History

- 1973 – Sen. Bill 100 creates the Land Conservation and Development Commission charging it with adopting statewide planning goals
- 1975 – First 14 goals become effective
- 1976-86 – LCDC acknowledges all city and county comprehensive plans

State and Local Responsibilities

- State
  - Set land use policy (goals and rules)
  - Acknowledge city and county plans
  - Enforce goals
  - Review plan amendments
  - Administer periodic review requirements
  - Provide technical assistance to cities and counties
Comprehensive Plan
- Establishes a “vision”
- Guiding land use document for local government
- Comprehensive document that guides land use, infrastructure development, conservation of natural resources, economic development, etc.

Zoning & Development Code
- Specific regulations designed to implement comprehensive plan policies
- Regulates uses, location, density, height, setbacks, etc.
- Sets forth the criteria or standards that each application must meet in order to be approved
- Includes zoning, permitting procedures, development standards, and subdivision and partition standards

Types of Decisions
- Legislative Land Use Decision
  - Adoption and amendment of policies and ordinances
  - Large geographic area, many ownerships
  - No action required
  - Adopted by elected officials
  - Role of planning commission is to make a recommendation
  - Usually at least two hearings

- Quasi-judicial Land Use Decision
  - Application of pre-existing criteria and requiring exercise of discretion
  - Single or few ownerships
  - Action required
  - Planning staff, hearings officer, or planning commission makes the initial decision; local appeal possible
  - Opportunity for a hearing is required

- Ministerial Action
  - Application of pre-existing criteria and requiring no exercise of discretion
  - Usually one site
  - Action required
  - Staff makes the decision, with no appeal opportunity
  - No hearing
Notice requirements

- Legislative – general notice and “Measure 56” notice
- Quasi-judicial – to property owners within a prescribed distance and others who request it
- Ministerial – none

Planning Commission Hearing

- Quasi-judicial Procedures
  - Chair opens hearing
    - Chair describes proceedings
    - Raise-it-or-waive-it statement
    - Announcement of criteria
    - Declaration of ex parte contact, bias, conflict of interest
  - Staff report
    - Proposed findings and recommendation

Planning Commission Hearing

- Quasi-judicial Procedures (continued)
  - Testimony
    - Applicant
    - Other Proponents
    - Opponents
    - Neutral
    - Applicant’s rebuttal
  - Requests for continuance and leaving the record open

Planning Commission Hearing

- Legislative Procedures
  - Ensure everyone has the opportunity to participate
  - No need to separate proponents and opponents
  - No concerns with ex parte contact or bias, but conflict of interest concerns remain

Findings

- Findings include statements of:
  - Relevant facts
  - How each approval criterion is satisfied by the facts
  - The facts relied upon and the justification for the decision
Findings

- Purposes of findings include:
  - Aiding careful consideration of criteria by the reviewing body
  - Establishing what evidence the reviewing body relied on
  - Explaining how the conclusions are supported by substantial evidence

Findings

- Tips for making good findings:
  - Identify all of the applicable criteria
  - Address each criterion separately
  - State the fact that leads to the conclusion
  - Where there is inconsistent evidence, state there was conflicting evidence, but the hearings body believed certain evidence for certain reasons

Findings

- Tips for making good findings:
  - Articulate the link between the project impact and the conditions being imposed
  - Avoid findings that restate the law
  - Put them in clear, understandable language

Findings

- Common problems with findings:
  - Failure to address each criterion
  - Deferring a necessary finding to a condition of approval
  - Generalizing or making a conclusion without sufficient facts
  - Failure to establish causal relationship between facts and conclusions

Fairness

- Ex Parte Contact
  - Applies only to QJ decisions
  - Must be declared and described at the outset of a hearing
  - Site visits are ex parte contact
  - Doesn’t necessarily lead to disqualification (appearance of bias)

Fairness

- Conflict of interest
  - "Actual conflict of interest" means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person’s relative or any business with which the person or a relative of the person is associated.
Fairness

- Conflict of interest
  - "Potential conflict of interest" means any decision by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of the person or the person’s relative, or a business… unless the pecuniary benefit or detriment arises out of the following:

Fairness

- Conflict of interest (potential, continued)
  - Any action in the person’s official capacity which would affect to the same degree a class consisting of all inhabitants of the state, or a smaller class consisting of an industry, occupation or other group including one of which or in which the person, or the person’s relative or business with which the person or the person’s relative is associated, is a member or is engaged.
  - Membership in or membership on the board of directors of a nonprofit corporation.

Fairness

- Potential conflict of interest
  - Announce publicly the nature of the potential conflict prior to taking any action thereon

Fairness

- Actual conflict of interest
  - Refrain from participating as a public official in any discussion, debate, or vote
  - Unless the vote is needed for a quorum

Fairness

- Bias
  - Prejudice or prejudgment of the facts to such a degree that an official is incapable of making an objective decision based on the merits of the case.
  - Does not require recusal

If there is time...

- 120/150-day rule
- Burden of proof
- Commission bylaws