Legal Issues Facing Planning Commissions & Zoning Boards

[Editor's Note: The following are edited excerpts from a telephone conference call / roundtable discussion held on November 13, 1995. The focus of the discussion was on legal issues that face planning and zoning boards. While our four attorney participants come from different parts of the country, they all have considerable experience in land use law. I hope their advice proves helpful in "flagging" certain issues for you. But please bear in mind that the legal issues discussed may well depend on your own state law and local ordinances. So please consult with your commission or board's own attorney.]

Carolyn Baldwin *is an attorney with the law firm of Baldwin & de Séve in Concord, New Hampshire. Her practice focuses on environmental and land use regulation. She has represented both applicants and opponents before local planning boards — as well as municipalities whose decisions have been appealed. Baldwin is currently on the Gilmanton Board of Selectmen (local governing body). She has also served as chairman of the Gilmanton Planning Board, and as a member and chairman of the Lakes Region Planning Commission. Baldwin authored, "The Role of the Lawyer," in Issue 11 of the PCJ.*

Charles Wolfe *practices law with the Seattle-based regional firm of Foster Pepper & Schefelman, where he chairs the firm's Environmental Group. His practice includes a mix of environmental and land use law. Like many land use attorneys, he has represented both municipalities and developers. Prior to returning to Seattle, Wolfe worked for the Hartford, Connecticut law firm of Robinson & Cole. While in Connecticut, he also chaired the Town of Marlborough Zoning Commission.*

Neil Lindberg *is an attorney and certified AICP planner who recently established Lindberg & Company, a planning and zoning consulting firm based in Draper, Utah. Before moving to Utah, Lindberg practiced law with the firm of Linowes & Blocher in Montgomery County, Maryland, primarily representing land developers. His first career, however, was as a city planner, working in Norwalk, California, and then for 11 years in Provo, Utah, where he was Assistant Community Development Director and Land Use Manager. Lindberg authored, "Special Permits: What They Are & How They Are Used," in Issue 3 of the PCJ.*

Richard Lehmann *practices law with the Madison, Wisconsin, firm of Boardman, Suhr, Curry & Field. His practice is entirely land use law, representing municipalities as well as private sector clients, including both developers and citizen groups. Lehmann has extensive experience in local government, having served at various times as a member of the Middleton, Wisconsin, Municipal Plan Commission; the Dane County RPC; the Madison City Council; and the Dane County Board of Supervisors. Lehmann is also a certified AICP planner, and did continuing education work as a member of the University of Wisconsin extension program for 10 years.*

Wayne Senville (Editor, PCJ):

Good morning. I'd like to start our discussion by asking each of you to identify a "legal" problem you've frequently seen planning commissions or boards encounter. I'd also hope you can suggest some approaches that commissions can take to avoid the problem you've identified.

Findings in Planning Decisions

Carolyn Baldwin:

One of the most common problems I've seen commissions encounter is to issue decisions without proper findings. What often happens is that a developer comes in and makes a lot of representations upon which the planning board relies in approving a plan, but that never get out of the minutes and into findings or conditions of approval. Because of that, things can come back to haunt the commission.

Representations are made such as, "Oh, of course we'll do this," and "Of course we'll do that." Unless those conditions are set forth very specifically in the approval, there's nothing to nail the developer down with. And he says, "Oh, well, I didn't really intend to do that." You've got problems if you end up in court, and try to say, "This was one of the conditions of approval and it wasn't met; therefore, he's got to do it or we're going to pull his bond," or whatever the case may be. I think that's one of the problems that I've seen loom up most often. The same thing happens when a commission denies something, but fails to make proper findings.

Wayne Senville:

Do you advise local boards to keep tape recordings of meetings?

Carolyn Baldwin:

I have mixed feelings about that. Most local boards in New Hampshire tape meetings, and the question then becomes, should you keep the tapes forever or should you destroy them after you have used them to help you put together the minutes? I've seen it cut both ways. I've seen tape recordings of a commitment by a developer come back to hit him in the face when he wanted to deny it. On the other hand, you get a lay board of people sitting around and it's awfully easy to take remarks out of context and find them wrapped around your neck in a court appeal. I've just finished doing a series of lectures for planning boards in the state of New Hampshire and that's a question that's often asked. I don't have a neat answer to it.

Neil Lindberg:

One thing that I've seen done, and it's relatively straightforward to produce, is preparing a "report of action." For each action item, the vote of the planning commission is noted, and any conditions that were imposed, as well as any representations that were made conditions of

the approval, are also noted for the record.

Impact Fees

Chuck Wolfe:

Let me raise an issue that's somewhat related to Carolyn's point about the importance of good findings. The Washington State Growth Management Act allowed for impact fees to be levied. Impact fees, as some of your readers will know, are a development-specific approach to help municipalities fund capital improvements that result from the impacts of new development. In other words, a sort of pay-as-you-go approach, helping to offset the impacts on sidewalks, parks, streets, and so on.

What has happened in Washington State is that we are finding new, or I should say renewed, concern with the relationship between the conditions of approval and the overall impact of a project itself. The traditional battles with regard to the question "Is government expecting developers to contribute too much?" has now become centered on the financial arena. So I would take Carolyn's concept of findings a little bit further, apply them to financial conditions of approval, and stress the importance of having the necessary justification in the record to justify what is requested of the developer.

Neil Lindberg:

In my experience in Utah and Maryland, planning staff and planning commissions too often ask for conditions of approval that go beyond their legal authority. Oftentimes the applicants don't challenge them because of the cost of going to court. But I think planning commissioners need to realize there is a limit beyond which they can't go, especially in light of the U.S. Supreme Court's *Nollan* and *Dolan* decisions — and that the burden is really on the commission to justify those conditions it imposes.

Richard Lehmann:

In Wisconsin, the development industry got behind impact fee legislation. The legislation was intended to take exactions out of the realm of case-by-case determination and require the municipality to adopt a separate ordinance, based on studies, plans, and needs assessment. The local ordinance is supposed to contain a formula by which a developer can tell, simply by plugging in how many dwelling units, how many lots, how much trip generation, whatever the factor may be, what his financial liability will be.

Neil Lindberg:

Utah recently adopted an impact fee bill too.

Carolyn Baldwin:

We've had this in New Hampshire for several years. It was adopted at the end of the '80s boom. But it's complex and difficult for a small town to deal with, because so much work is involved in creating the ordinance. But let me add a comment. Planning commissioners and board members need to understand the difference between requirements such as internal roads, and perhaps off-site roads that are impacted by a development in a major way, and things like exactions or impact fees on schools, parks, and other off-site facilities. Here in New Hampshire, we certainly can require any kind of internal road that the local regulations demand, as well as off-site road improvements. But when it gets beyond that, that's when the numbers get tough to figure out.

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Promises, Promises

by Ken Lerner, Assistant Editor

In a recent case here in Burlington, Vermont, a developer's architect presented a housing project to our planning commission. It was a 200-unit planned residential development in 10 buildings. During the hearing, he described the materials that would be used on the exterior of the buildings, and received approval. After the permits were issued, an issue arose as to whether the materials described during the hearing were part of the approval. The permit's written conditions did not include any reference to specific building materials.

A Vermont court found that the developer did not have to use the materials the architect referenced at the planning commission hearing. The court's rationale was that unless the conditions are set out in the permit, a future purchaser of the land and permits would have no way of knowing that additional requirements were part of the approval. Unfortunately, this ignores the "bait and switch" potential of applicants making promises during the hearing — without intending to actually carry them out.

Our response to this court ruling has been to add a "standard" permit condition to every permit issued which states: "This approval incorporates by reference all plans and drawings presented and all verbal representations by the applicant at planning commission meetings and hearings on the subject application to the extent that they are not in conflict with other stated conditions or regulations." So far this standard permit condition has not been tested in court. We have, however, noticed more requests for meeting minutes and tapes when attorneys or interested parties review project files.

We also use other standard permit conditions, and have found them to be a useful tool. They are pre-printed and include additional conditions providing information and administrative requirements on such items as the permit expiration date, other permits and certificates that may be required, appeals, and penalties for violations.

Ken Lerner also serves as Assistant Director of Planning & Zoning for the City of Burlington.

It is "The Law"

by Perry Norton

Reading the transcript of this conference call/roundtable sets in motion enough trains of thought to carry all the coal back to Newcastle.

We're all quite familiar with that basic principle of real estate value: Location, Location, Location. The legal profession has a similar line: The Law, The Law, The Law. It may not be "fair," but it is The Law, as lawyers constantly remind us.

Another "line," nicely reflected in the comments of the participants in this roundtable, is that called "Get It In Writing." Unfortunately all of us tend to be careless about this. We also tend to be careless about reading and understanding something when we do get it in writing. We joke around about the "small print" — until it stands up and bites us.

Zoning ordinances, building codes, subdivision regulations — these are basic elements of the law, land use law. Planning commissions interpret those laws in the decisions they make. But the courts might make different interpretations. So the firmer the knowledge a commission has of "the law," and how the courts of jurisdiction interpret the law, the better.

But this is not easy for people who are not lawyers, or who don't naturally "think" like lawyers (I resist the temptation to insert a lawyer joke at this point). And we don't have a lot of "training programs" that will bring newly appointed commission members up to speed, or experienced commissioners up to date. Museums and zoos are more demanding in the training of their wannabe "docents" then we are in the training of the volunteers who serve on the wide variety of boards and commissions that keep our cities and towns in good running order.

Retired planner and teacher Perry Norton authored the "The Emerging American Tribe" in Issue #17 and "Who Knows What Tomorrow Might Bring" in Issue #15 of the Planning Commissioners Journal.

Legal Issues...

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Pre-Judging Matters & Bias

Richard Lehmann:

The problem I'm most worried about these days is planning commissions prejudging matters coming before them. It's a difficult situation because planning commissioners have opinions on things — some have very strong opinions — and some are members of various neighborhood or citizen organizations. That's, in part, how they got to be planning commissioners. People at a commission hearing will also demand that the planning commission find a way to kill a project. I've heard that kind of testimony twice in just the past two weeks. At one of the hearings (I was serving as counsel to the planning commission), a member of the audience said it was my duty to find a way to kill the project, and make it stick.

Wayne Senville:

What advice would you give a planning commissioner, in terms of how they approach a hearing or listening to what's presented?

Richard Lehmann:

I advise commissioners to ask critical questions, even if they may agree with the person giving testimony. Genuinely probe both sides of a question.

One of the most interesting court cases I've come across recently involved a project in New York. It was a battle of experts, and everyone came in with their traffic engineers and thick reports and they plopped them on the table during the public hearing. None of the planning commissioners asked any questions. Somebody moved approve, somebody seconded it, and it was passed. The court overturned the commission's decision on the grounds that if the commission had any objectivity whatsoever, the members would have asked some questions.

Wayne Senville:

Have you dealt with situations where planning commissioner bias created problems?

> THE COURTS HERE CONSIDER NOT ONLY WHETHER THE PROCEEDINGS WERE ACTUALLY FAIR, BUT ALSO WHETHER THEY *APPEARED* TO BE FAIR.

Richard Lehmann:

We've got a case in Wisconsin that's fascinating. The chairman of the zoning board, in a meeting to set the ground rules for an upcoming public hearing, announced that he thought the applicant couldn't be believed about anything. He called her the "Leona Helmsley" of the community. He then went on to chair the public hearing. The applicant's proposal was turned down by a unanimous vote. But the decision was later overturned by the Wisconsin Supreme Court on the grounds that the chairman was obviously biased, and that this bias could have permeated the entire proceeding — even though it was not a 3 to 2 vote on which he was the deciding vote.

Carolyn Baldwin:

In New Hampshire it's tough to overturn a case because of bias, in part because almost everybody lives in a small town. Even in the city of Manchester with 100,000 people, everybody knows people who have been around for any length of time. I had one case where one member of a planning board, before the decision, went around telling people they should forget about opposing a project because the planning board had already made up its mind. The court shrugged it off and didn't see a problem.

Richard Lehmann:

The other related issue is public opinion and how public opinion is handled during a public hearing. A board shouldn't say, "Let's have a showing of hands on how many people support the project."

Chuck Wolfe:

In Washington State we have a judicial doctrine called the "appearance of fairness" doctrine. I mention it only to provide an example of one way a state has chosen to go. The courts here consider not only whether the proceedings were actually fair, but also whether they appeared to be fair.

Neil Lindberg:

I think the real key for planning commissioners is to ask themselves whether they have clear rules of procedure for the conduct of hearings and the processing of applications. The rules should spell out whether it is proper to have ex-parte contacts, and if there are ex-parte contacts, when and how should they be disclosed. Of course, your rules will need to conform to any requirements of your state law.

Changes to Development Proposals

Neil Lindberg:

Another frequent problem I've encountered is when the applicant gets an indication that the application isn't going to be accepted as it's proposed, and in the middle of the review process the application is tweaked a little to make it conform to what the applicant perceives is wanted, but also is something he or she can live with. So you can get continuous modifications to an original application. It is very difficult for the public to keep up with the changes.

Carolyn Baldwin:

I agree with you, it's very unfair when neither the planning board nor the public have a chance to review anything until the night of a meeting, and you try to figure out what it's all about and how you should respond to it. We've had some developers whose favorite trick is to come in with a plan 15 days in advance, as required by our state statute, and then march into the hearing and say, "Oh well, those plans aren't good anymore. Here's a whole new set." I advise planning boards to say, "Uh-uh, we either decide on what you submitted 15 days in advance like

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The Lawyer As Representative of the Applicant

by Carolyn Baldwin, Esq.

When the applicant brings a lawyer, listen carefully to the presentation, but don't assume that the lawyer is necessarily right on every point, either of law or of fact. Lawyers in this situation are advocates and as such will be selective in the points they make to the commission. Lawyers who have done their job will be familiar with the commission's ordinance and regulations, especially the sections that pertain to their clients' applications. But a lawyer's interpretation of a given section may differ from yours. Be consistent in *your* application of the rules.

Ask questions, but don't argue with the lawyer. Make notes of any points where you disagree, and the basis for your disagreement. Above all, don't let yourself be bullied by threats of litigation, unconstitutional takings and other bluster which may come your way. Make your decision based upon the law as set forth in your ordinances and regulations. Be sure that the bases for your decision are clearly stated in the motion or motions on which the commission votes. Courts do not lightly overturn planning commission decisions if they are in accordance with duly adopted regulations and are firmly based on factual findings.

[Editor's Note: The above is excerpted from Carolyn Baldwin's, "The Role of the Lawyer," which ran in Issue 11 (Summer 1993) of the Planning Commissioners Journal].

The Importance of Findings

by Gary A. Kovacic, Esq., and Mary L. McMaster, Esq.

Three recent trends are greatly increasing the importance of findings in land use decision making. The first of these trends is increased judicial scrutiny of land use decisions. The U.S. Supreme Court decision in *Nollan v. The California Coastal Commission,* which largely turned on the Court's inability to see an asserted connection between a required condition and a proposed project, illustrates the key role that findings can play.

The Nollans had sought a permit from the California Coastal Commission to tear down their beachfront bungalow and replace it with a larger home. The Commission conditioned approval of the Nollan's plans on a grant of a public easement across their property. The Supreme Court struck down the easement requirement on the grounds that there was not a sufficient "nexus," or connection, between the easement requirement and the actual impacts of the project the Nollans were proposing. The *Nollan* decision reinforces the importance in the local land use decision of findings which clearly explain the relationship between the proposed development and any conditions being imposed.

The second trend leading to the increased importance of findings is the expanding number and variety of factors that can, and sometimes must, be taken into account in land use decision making. Many courts and legislatures across the country are acknowledging and requiring consideration of a variety of impacts created by local land use decisions. Impacts related to such concerns as regional housing availability, wildlife habitat, and aesthetics, which in the past were not considered important in local land use decision making, are becoming increasingly significant considerations.

This trend can create two types of problems for local planning officials. Officials may fail to take into account factors that, in the past, were not important, but that now must be considered and discussed in their findings. Alternatively, officials can be led astray by the large number of impacts potentially involved in their decision. This may cause them to neglect to specify in their findings that their decision was based on the legally required considerations — not on the myriad of other possibly relevant, but not legally sufficient, factors that may have been discussed in the hearing on the case.

Increased community sophistication is the third trend that makes the drafting of good findings more important than ever before. As various groups and individuals become more knowledgeable of the legal requirements involved in land use decision making, they become increasingly able to identify and make use of land use findings (or the absence of them) to support their positions, and to judicially challenge those local decisions.

[Editor's Note: The above is excerpted from "Drafting Land Use Findings," which appeared in Issue 4 (May/June 1992) of the Planning Commissioners Journal. Kovacic and McMasters' also provided detailed guidelines to assist planning commissions in drafting better findings.]

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you were supposed to, or come back when you do it right."

Neil Lindberg:

Right, withdraw and start over. It's very hard in some small towns for that to happen, but I agree with you, that's what should happen.

I've also seen staff reports delayed until the day of the meeting. The planning commission hasn't had a chance to read them, so staff makes an oral report and says, "Well, we've been working with the applicant, and we suggest that this be approved because it conforms to X/Y/Z." I think the time frame in which that occurs should be slowed down a little so the planning commissioners, and the public, can keep up with the changes that may be occurring to a project.

Zoning Ordinance Advice

Wayne Senville:

Have any of you found any particular problem areas that tend to come up in local zoning ordinances that planning commissions should be on top of?

Richard Lehmann:

In Wisconsin we have dozens and dozens of communities that are simply not ready to deal with sprawl. Before they've had very limited development pressure, and now they're getting hit. They have very permissive zoning in place, and it can't deal with what they're facing.

Carolyn Baldwin:

That's certainly true in New Hampshire. The small town that thinks it doesn't need zoning because it has never had a problem, and then gets walloped with something. Then they wake up, but by that time the problem is already there.

Planning boards also often forget to read their zoning ordinance, and forget that they're bound by what's in their zoning ordinance. You can't approve something that's contrary to the specific requirements of your zoning ordinance.

Neil Lindberg:

For larger communities, where there's staff, I think ordinances are usually kept relatively up to date. But for smaller communities, I agree with Carolyn's comment that many times planning commissioners are unaware of what their ordinance says and that they approach cases on a very ad hoc basis. This ad hoc approach can also occur because older ordinance standards are often quite vague and so general as to be meaningless.

Dealing With Attorneys at Hearings

Wayne Senville:

Let me ask as a last question whether you have any advice or suggestions on how to deal with attorneys representing a party at a public hearing, especially if your board or commission doesn't have its own attorney present?

Carolyn Baldwin:

Just don't let them bully you.

Neil Lindberg:

I agree with that.

Carolyn Baldwin:

If you have a doubt about what the lawyer is telling you, if you're not comfortable with it and feel that perhaps the law isn't exactly the way he or she is telling it, table the matter until the next hearing and go ask your town attorney. You may save a lot of money by asking your town counsel when the question is raised, rather than waiting until somebody takes you to court.

Chuck Wolfe:

I know from my own experience of chairing a commission that many threats by an applicant's attorney really have no substantive basis whatsoever.

Neil Lindberg:

My suggestion for planning commissions is just to follow your procedures as you would in any other case — assuming, of course, your procedures are proper. Don't be intimidated by any particular threats of legal action. Just methodically move through your procedure.

Richard Lehmann:

These days with this aggressive property rights movement going on, people can come on — developer's lawyers, or developers who are also lawyers — and really blow smoke. If your municipal attorney is a generalist, I would encourage them to take some seminars on takings law and get into it in some depth so they can competently assist you. ◆