TOWN OF PAONIA
214 GRAND AVE
THURSDAY, MARCH 23, 2023
JOINT BOARD WORK SESSION AGENDA 5:30 PM
PAONIA BOARD OF TRUSTEES
PLANNING COMMISSION
ZONING BOARD OF ADJUSTMENT & APPEALS

https://us02web.zoom.us/j/88182470025
Meeting ID: 881 8247 0025
One tap mobile
17193594580

Roll Call

Work Session

1. Land Use Law Training

Adjournment

This is a Joint Work Session for the Board of Trustees, Planning Commission and the Zoning Board of Adjustment & Appeals. The primary focus of this public meeting is training for our Boards/ Committees to better serve our community and as such, public comment will not be taken.

AS ADOPTED BY:
TOWN OF PAONIA, COLORADO
RESOLUTION NO. 2017-10 – Amended May 22, 2018

I. RULES OF PROCEDURE

Section 1. Schedule of Meetings. Regular Board of Trustees meetings shall be held on the second and fourth Tuesdays of each month, except on legal holidays, or as re-scheduled or amended and posted on the agenda prior to the scheduled meeting.

Section 2. Officiating Officer. The meetings of the Board of Trustees shall be conducted by the Mayor or, in the Mayor's absence, the Mayor Pro-Tem. The Town Clerk or a designee of the Board shall record the minutes of the meetings.

Section 3. Time of Meetings. Regular meetings of the Board of Trustees shall begin at 6:30 p.m. or as scheduled and posted on the agenda. Board Members shall be called to order by the Mayor. The meetings shall open with the presiding officer leading the Board in the Pledge of Allegiance. The Town Clerk shall then proceed to call the roll, note the absences and announce whether a quorum is present. Regular Meetings are scheduled for three hours, and shall be adjourned at 9:30 p.m., unless a majority of the Board votes in the affirmative to extend the meeting, by a specific amount of time.

Section 4. Schedule of Business. If a quorum is present, the Board of Trustees shall proceed with the business before it, which shall be conducted in the following manner. Note that all provided times are estimated:

(a) Roll Call - (5 minutes)
(b) Approval of Agenda - (5 minutes)
(c) Announcements (5 minutes)
(d) Recognition of Visitors and Guests (10 minutes)
(e) Consent Agenda including Approval of Prior Meeting Minutes (10 minutes)
(f) Mayor's Report (10 minutes)
(g) Staff Reports: (15 minutes)
- **(1) Town Administrator's Report**
- **(2) Public Works Reports**
- **(3) Police Report**
- **(4) Treasurer Report**

(h) Unfinished Business (45 minutes)
(i) New Business (45 minutes)
(j) Disbursements (15 minutes)
(k) Committee Reports (15 minutes)
(l) Adjournment

*** This schedule of business is subject to change and amendment.**

Section 5. Priority and Order of Business. Questions relative to the priority of business and order shall be decided by the Mayor without debate, subject in all cases to an appeal to the Board of Trustees.

Section 6. Conduct of Board Members. Town Board Members shall treat other Board Members and the public in a civil and polite manner and shall comply with the Standards of Conduct for Elected Officials of the Town. Board Members shall address Town Staff and the Mayor by his/her title, other Board Members by the title of Trustee or the appropriate honorific (i.e.: Mr., Mrs. or Ms.), and members of the public by the appropriate honorific. Subject to the Mayor's discretion, Board Members shall be limited to speaking two times when debating an item on the agenda. Making a motion, asking a question or making a suggestion are not counted as speaking in a debate.

Section 7. Presentations to the Board. Items on the agenda presented by individuals, businesses or other organizations shall be given up to 5 minutes to make a presentation. On certain issues, presenters may be given more time, as determined by the Mayor and Town Staff. After the presentation, Trustees shall be given the opportunity to ask questions.

Section 8. Public Comment. After discussion of an agenda item by the Board of Trustees has concluded, the Mayor shall open the floor for comment from members of the public, who shall be allowed the opportunity to comment or ask questions on the agenda item. Each member of the public wishing to address the Town Board shall be recognized by the presiding officer before speaking. Members of the public shall speak from the podium, stating their name, the address of their residence and any group they are representing prior to making comment or asking a question. Comments shall be directed to the Mayor or presiding officer, not to an individual Trustee or Town employee. Comments or questions should be confined to the agenda item or issue(s) under discussion. The speaker should offer factual information and refrain from obscene language and personal attacks.

Section 9. Unacceptable Behavior. Disruptive behavior shall result in expulsion from the meeting.

Section 10. Posting of Rules of Procedure for Paonia Board of Trustees Meetings. These rules of procedure shall be provided in the Town Hall meeting room for each Board of Trustees meeting so that all attendees know how the meeting will be conducted.

II. CONSENT AGENDA

Section 1. Use of Consent Agenda. The Mayor, working with Town Staff, shall place items on the Consent Agenda. By using a Consent Agenda, the Board has consented to the consideration of certain items as a group under one motion. Should a Consent Agenda be used at a meeting, an appropriate amount of discussion time will be allowed to review any item upon request.
Section 2. General Guidelines. Items for consent are those which usually do not require discussion or explanation prior to action by the Board, are non-controversial and/or similar in content, or are those items which have already been discussed or explained and do not require further discussion or explanation. Such agenda items may include ministerial tasks such as, but not limited to, approval of previous meeting minutes, approval of staff reports, addressing routine correspondence, approval of liquor licenses renewals and approval or extension of other Town licenses. Minor changes in the minutes such as non-material Scribner errors may be made without removing the minutes from the Consent Agenda. Should any Trustee feel there is a material error in the minutes, they should request the minutes be removed from the Consent Agenda for Board discussion.
Section 3. Removal of Item from Consent Agenda. One or more items may be removed from the Consent Agenda by a timely request of any Trustee. A request is timely if made prior to the vote on the Consent Agenda. The request does not require a second or a vote by the Board. An item removed from the Consent Agenda will then be discussed and acted on separately either immediately following the consideration of the Consent Agenda or placed later on the agenda, at the discretion of the Board.

III. EXECUTIVE SESSION

Section 1. An executive session may only be called at a regular or special Board meeting where official action may be taken by the Board, not at a work session of the Board. To convene an executive session, the Board shall announce to the public in the open meeting the topic to be discussed in the executive session, including specific citation to the statute authorizing the Board to meet in an executive session and identifying the particular matter to be discussed "in as much detail as possible without compromising the purpose for which the executive session is authorized." In the even the Board plans to discuss more than one of the authorized topics in the executive session, each should be announced, cited and described. Following the announcement of the intent to convene an executive session, a motion must then be made and seconded. In order to go into executive session, there must be the affirmative vote of two thirds (2/3) of Members of the Board.

Section 2. During executive session, minutes or notes of the deliberations should not be taken. Since meeting minutes are subject to inspection under the Colorado Open Records Act, the keeping of minutes would defeat the private nature of executive session. In addition, the deliberations carried out during executive session should not be discussed outside of that session or with individuals not participating in the session. The contexts of an executive session are to remain confidential unless a majority of the Trustees vote to disclose the contents of the executive session.

Section 3. Once the deliberations have taken place in executive session, the Board should reconvene in regular session to take any formal action decided upon during the executive session. If you have questions regarding the wording of the motion or whether any other information should be disclosed on the record, it is essential for you to consult with the Town Attorney on these matters.

IV. SUBJECT TO AMENDMENT

Section 1. Deviations. The Board may deviate from the procedures set forth in this Resolution, if, in its sole discretion, such deviation is necessary under the circumstances.
Section 2. Amendment. The Board may amend these Rules of Procedures Policy from time to time.

File Attachments for Item:

1. Land Use Law Training

Joint Board Work Session

Land Use Law

Overview of Land Use Approvals and Process

Assembled by Leslie Klusmire, Interim Town Administrator
Reviewed by: Nick Cotton-Baez, Town Attorney
For March 23, 2023, Town of Paonia Work Session

This briefing summarizes the land use approval process and what decision-makers should know about dealing with land use issues. It is not a complete overview, and for specific issues, the Town will need to rely on expert staff and the Town Attorney for guidance on specific topics.

I rely heavily on quoted material from Donald L. Elliot, Managing Editor, Colorado Land Planning and Development Law, 12th Edition (CLE in Colo., Inc. 2021)

General Information

In Colorado, a municipality can either be statutory or home rule. The Town of Paonia is a statutory town, meaning its land use authority is restricted to those authorities granted in Colorado state statute.

A land use decision can be one of three types of actions:

1. Legislative: Example – "A local government acts in a legislative capacity (as opposed to a quasi-judicial or administrative capacity) when it initially enacts a zoning ordinance or regulation…applicable to an open class of individuals, interests, or situation, concerning the use of land within a municipality."[1]

   These actions are broad – such as enacting revisions to the zoning code that apply to everyone with land affected by the code revision. The Board of Trustees is the final approver of legislative acts.

   When considering a legislative decision, Planning Commissioners and Trustees can talk to people and solicit input from the public outside a formal public hearing process because they are enacting a law. You are not making decisions confined to a single property or involving one ownership. You are acting as a legislator when you consider and make general rules.

   A legislative act:

   - Considers public policy relating to matters of a permanent (law) or general character.
   - Is not generally restricted to a particular individual or entity.
   - Affects the legal rights of individuals in the abstract; for example, it affects all properties and property owners in a zoning district.

[1] (Donald L Elliot, Esq. Managing Editor 2021) pg 56

- Is prospective in nature.

For general legislative and policy-making discussions and matters, it is okay to lobby (and be lobbied) outside the meeting, to base your decision on your personal policy perspectives, and to base your decision on information you get from staff.

The Board of Adjustment is not involved in legislative acts.

2. Quasi-judicial: Example – "Adopting an ordinance rezoning one of a few parcels of land is [usually] a quasi-judicial activity… It involves applying a set of conditions to specific individuals, interests, or situations. Because a specific rezoning may grant a landowner property rights different than those of [their] neighbors, or deprive a landowner of rights enjoyed by [their] neighbors, fundamental principles of fairness and equal treatment come into play."[2]

   These actions involve the protected property rights of a specific person or entity. They generally apply to things like land use approvals or licenses. Quasi-judicial means decision-makers act like a judge because, in these matters, you are presiding over a process that invokes the due process clause. No person shall be deprived "of life, liberty or property without due process of law." Fundamental fairness must permeate the process at every level.

   Decisionmakers (even those who are recommending bodies and not the final decision-makers) involved in quasi-judicial proceedings include the Board of Trustees, the Planning Commission, and the Board of Adjustment.

   How do you act as a judge?

   - Consider facts presented by staff, the applicant, and affected parties that address the particular interest in question.
   - Hear the evidence and apply existing legal standards to the specific case.
   - Discuss the relevant evidence in the hearing and cite it as you form your final decision.
   - State for the record why you are voting the way you are going to vote, citing the specific evidence leading to your vote.
   - Be careful about using conditions of approval. Conditions need to be based on established legislation. If you have a legal basis for a condition, make sure the condition is enforceable and crystal clear. Avoid drafting conditions on the fly; have them drafted and reviewed by expert staff and counsel.
   - If your decision is challenged, your hearing is hearing, and the case isn't retried, appeal decisions are based on the record of what you did, including:
     - The procedure you used

[2] (Donald L Elliot, Esq. Managing Editor 2021) pg 57

- The evidence you considered
- The reasons for your decision

A quasi-judicial process is noticed; there are hearings, and records are kept of evidence decisions made by fair and impartial decision-makers.

<u>How do you conduct yourself as a fair and impartial decision-maker?</u>

- Stay neutral.
- Don't make any comments that indicate you have any opinion (prejudicial).
- Don't get involved with the issue outside the hearing.
- Make sure you don't have a conflict of interest. If you think you might, disclose it before the hearing and get legal advice as to whether you can participate in the hearing.
- Avoid ex-parte discussions:
  - Do not meet with the applicant or anyone else outside the hearing to discuss the pros/cons of the request and how you might decide the case
  - Do not communicate with your fellow decision-makers before the hearing to persuade them why they should vote yes or no.
  - Do not attend meetings where folks for or against the application are discussing the application, even if you are not participating
  - Avoid any contact or communication that would seem unfair to anyone involved in the process.

  It requires firm boundaries to avoid ex-parte communications in small towns where people are used to walking up to you in the grocery store and stating their viewpoints. A good response is along the lines of:

  > *"Thanks for your interest (or email, letter, etc.), but I can't talk to you about this application outside of the upcoming hearing. I'd like to hear your views, but because this is a specific (property rights/licensing) case, I need to hear and consider the evidence only within the public hearing process. Please plan to attend the meeting if you can. You can also send written comments to the Town Clerk before the hearing, and they'll include your comments in the hearing materials."*

  If you can't stop comments before you've heard them, I also recommend disclosing them at the beginning of the hearing by saying: "Mr. Smith approached me with his opinion, and while I told him I could not talk with him, I still caught part of his comments as I was leaving the conversation. I invited him to the meeting or to submit written comments. Because Mr. Smith is not here this evening, I will paraphrase his opinion so that the applicant and other interested parties may respond."

3. Administrative actions: Example: A new business applies for a sign permit. Town staff reviews the application and ensures it meets all the criteria for a code-compliant sign at the specific location it will be installed. If yes, the staff issues the permit.

   Generally speaking, administrative actions are minor approvals with concrete criteria to meet for approval. They are typically reviewed and approved by staff. The Town of Paonia Code sometimes assigns what should be quasi-judicial approvals to staff. We recommend overhauling the zoning and subdivision chapters of the code so that processes are clear and the proper approval authority is clearly assigned.

Zoning actions

"The general purpose of zoning is to regulate uses of land and the physical improvements to land in the interest of the public welfare, without imposing undue burdens on landowners."[3]

"Once a municipality … has adopted standards and procedures to govern its zoning process, those standards and procedures must generally be followed, or the rezoning may be invalid. The fact that local governments have broad powers to adopt new land use regulations as legislative acts does not mean that they … can make up new rules on a case-by-case basis in areas where it has never before been regulated. The governmental entity can require that the proposed use meet applicable development criteria. Still, it may not condition the use on its review and approval of the use unless the municipality's … zoning code provides adequate review standards or criteria to do so."[4]

Rezonings

If the rezoning complies with the comprehensive plan, it only needs to bear a reasonable relationship to the general welfare of the community. "If the rezoning would be in conflict with the comprehensive plan, however, the applicant generally needs to show that either:

1. "An error was made in establishing the current zoning; or
2. "There has been a change in the conditions of the neighborhood that supports the requested zoning change.

"Importantly, a local government cannot provide that rezoned property "automatically" reverts to its former zoning classification should certain conditions not be met. It needs to affirmatively rezone the property."[5]

"Reasonableness" and Nexus

[3] (Donald L Elliot, Esq. Managing Editor 2021) pg. 56
[4] (Donald L Elliot, Esq. Managing Editor 2021) pg 87
[5] (Donald L Elliot, Esq. Managing Editor 2021) pgs 96-97

"Zoning regulations must bear at least a reasonable relationship to some legitimate government interest, such as protecting the health, safety, morals, or welfare of the public. …a zoning regulation that does not bear a reasonable relationship to a legitimate government interest is unconstitutional. … a regulation as applied to specific property must not create an excessive burden on the owner, even if the regulation is reasonably related to a legitimate government interest."[6]

If fees, such as processing or development impact fees, are charged, they must be rationally set – the fee must only offset the reasonable cost of services.

Requirement that Codes be clear and easy to interpret

To "satisfy due process clauses of the state and federal constitutions, zoning ordinances must be sufficiently clear so that a reasonable landowner can understand the regulations and plan his or her land use accordingly. … a zoning ordinance must establish sufficient standards against which the zoning authority's enforcement actions may be measured. A zoning ordinance that lacks sufficient standards vests unreviewable discretion in the zoning authority and is void for vagueness or as an improper delegation of legislative powers. …To prove that a regulation is unconstitutionally vague, a challenger must show that the regulation either: 1) fails to provide fair notice of what conduct is prohibited or 2) fails to provide authorities with sufficient standards for non-arbitrary enforcement. This standard is difficult to satisfy. If people of common intelligence can readily understand a regulation's meaning and application, it will not be held to be unconstitutionally vague."[7]

There have been complaints about past administrative land use decisions in the Town of Paonia. Some of those problems resulted from unclear, contradictory, and difficult-to-interpret code language. Rewriting the code will significantly enhance the ability of the Board of Trustees, Planning Commission, Board of Adjustment, and staff to make fair decisions.

The Interim Town Administrator and Attorney have recommended that both the zoning and subdivision codes be completely revised because they have conflicting information and are difficult to interpret.

Non-Conforming Uses

"A nonconforming use is a use that was lawful prior to the adoption of a zoning regulation prohibiting the use, but that does not comply with the requirements of that regulation. Taking preliminary steps towards establishing a use that is later made nonconforming is not the same as having a pre-existing nonconforming use. In order to be treated as a nonconforming use, the use must actually exist prior to the zoning change that made it nonconforming. … the use must have been actually permitted under the prior version of the zoning code. Owners of property with nonconforming uses are often given the right to continue the prohibited use as a "legal

[6] (Donald L Elliot, Esq. Managing Editor 2021) pg 74
[7] (Donald L Elliot, Esq. Managing Editor 2021) pgs 75-76

nonconforming use" in order to allow them time to recoup investments in the property made when the use was lawful. This concept is sometimes referred to as "grandfathering."[8]

"An owner's right to continue a nonconforming use is not absolute, however, and zoning powers are frequently used to restrict such uses and to cause their removal over time. Accordingly, the owner usually has no absolute right to the indefinite continuation of a nonconforming use. The Colorado Supreme Court has stated that zoning provisions allowing nonconforming uses should be strictly construed, and zoning provisions restricting nonconforming uses should be liberally construed."

"The most common restrictions on nonconforming uses are:

1. "A ban on enlargement or expansion of the nonconforming use;
2. "A ban on a change in the character of the nonconforming use to cover new or additional nonconforming uses;
3. "A ban on replacement of the structure containing the nonconforming use if it is destroyed beyond a threshold value (normally 50 to 80% of the assessed or fair market value); and
4. "A ban on restarting the nonconforming use or any other nonconforming use after the use has become inactive for a stated period of time.

"If the owner loses the value of his or her investment for some reason not associated with the zoning ordinance, the justification for allowing the continuance of a nonconforming use disappears because the owner no longer has the opportunity to recoup any investment in the nonconforming use. For example, suppose the building containing the nonconforming use is destroyed by fire. In that case, the owner's investment in that particular building is gone, and the owner stands in the same relation to the zoning regulations as anyone else.

"The right to a nonconforming use runs with the land. Buying, selling, or leasing the property does not terminate the right to continue a nonconforming use and does not constitute an unlawful extension of the use.

"In 2003 … the General Assembly amended various local government powers to prohibit the use of "amortization" as a way of compensating landowners for the elimination of nonconforming uses and structures in general. A new [statute] was added: "Notwithstanding any other provision of law to the contrary, a …town… shall not enact or enforce an ordinance, resolution, or regulation that requires a nonconforming property use that was lawful at the time of its inception to be terminated or eliminated by amortization." … This statutory prohibition on termination or amortization of nonconforming uses and structures likely overrules many earlier Colorado court cases holding that nonconformities may be terminated, eliminated, or curtailed."[9]

[8] (Donald L Elliot, Esq. Managing Editor 2021) pg 91
[9] (Donald L Elliot, Esq. Managing Editor 2021) pgs 92-94

Non-Conforming Structures and Signs

"Typically, a landowner is entitled to maintain and operate a nonconforming structure subject to reasonable limitations. For example, zoning regulations often provide that an owner may not alter the structure in any manner that increases the degree of nonconformity. In addition, an owner may be prohibited from replacing a nonconforming structure with another nonconforming structure. If a nonconforming structure is destroyed by a casualty, an owner will often lose the right to rebuild the structure, or will lose that right if reconstruction or restoration is not commenced within a certain prescribed period."[10]

Non-Conforming Lots

"A third type of nonconformity occurs when a platted lot is too small or has too little frontage for the zoning district in which it is located. Usually this occurs when the lots were platted as old-style townsites before modern subdivision statutes were in place or before an area began to develop with larger lots. … many local governments require that the building constructed on a nonconforming lot meet all setback requirements in the zone district, which can limit the size of the building that can be constructed. Some jurisdictions limit the use of nonconforming lots to a situation where the owner does not also own adjacent lots (i.e., where the owner cannot cure the nonconformity by merging two small lots into one larger lot)."[11]

Conditional and Special Uses

"In general, "permitted" uses or "uses by right" in a specific zone district are uses that cannot be denied in that zone district unless they fail to meet applicable development criteria. In contrast, a "conditional" or "special" use is a use that is generally compatible with the permitted uses in a particular zone under certain circumstances, but the government has greater discretion to deny an application if the proposed use does not fit in with its specific surroundings or meet certain conditions. A conditional or special use often involves potentially harmful aspects associated with the use, such as additional traffic, odor, noise, or the presence of hazardous materials. Before allowing a conditional or special use, a municipality… often requires additional review of the proposed use and sometimes imposes specific conditions in order to mitigate the potential impacts of the use.

"Approval of conditional or special uses is not considered a form of relief, but merely an alternative use of the land. … it is not necessary for a landowner applying for a conditional or special use to show undue hardship. Instead, the applicant must meet those standards established by the local zoning regulations applicable to the dependent or special use. Some city … codes mandate that public hearings be held before a special use permit is issued, which allows neighboring landowners to voice concerns about the proposed special uses. Other municipal … zoning rules allow conditional uses with only minor impacts to be approved by

[10] (Donald L Elliot, Esq. Managing Editor 2021) pg 94
[11] (Donald L Elliot, Esq. Managing Editor 2021) pg 95

staff, while large, more complex conditional uses require a public hearing. The Colorado Supreme Court has held that, where a municipality has significant discretion to approve or deny a special use , neighboring landowners do not have a property interest in a special use permit hearing or the outcome of that hearing sufficient to invoke constitutional due process protections.

"Conditional and special uses are distinguishable from variances, in that variances are intended to provide relief from zoning regulations, while conditional or special uses are expressly provided for in the regulations, albeit usually with some limitations, and they are generally approved by the planning commission or governing body rather than by a board of adjustment."[12]

Variances

"Variances are typically reviewed and granted by a Board of Adjustment and are used to authorize an otherwise prohibited aspect of a use or structure in situations where the strict, literal application of a particular regulation would result in exceptional and undue hardship to a property owner. Typical situations involve exceptionally narrow, shallow, or unusually shaped lots. …In statutory municipalities, the standard is that the variance promotes the spirit of the zoning ordinance, secures public safety and welfare, and does substantial justice.

"In order to obtain a variance, the property owner usually has the burden of proving that such a variance is needed to avoid unnecessary hardship or is reasonably necessary for convenience or the public welfare. The alleged hardship generally cannot be self-inflicted and must be of a type peculiar to the property owner (that is, a hardship not generally shared by others). …Finally, most jurisdictions do not allow the variance process to approve a use of the land not permitted by the zone district (i.e., a "use" variance). The ability to engage in a use not permitted by the zone district, unless it is a legal nonconforming use, almost always requires a rezoning to a zone district where the desired use is listed as either a "permitted" or "conditional" use."[13]

"The following are typical criteria that one must meet to obtain a zoning variance:

1) "The existence of exceptional and extraordinary physical circumstances.
2) "Strict application of the zoning code would cause undue hardship.
3) "The hardship is not self-imposed.
4) "Granting the variance would not adversely affect adjacent properties.
5) "Granting the variance would not change the character of the zone district.
6) "Granting the variance would not adversely affect health, safety, and welfare.
7) "Granting the variance would not impair the intent of the zoning code."[14]

[12] (Donald L Elliot, Esq. Managing Editor 2021) pgs 97-98
[13] (Donald L Elliot, Esq. Managing Editor 2021) pgs 98-99
[14] Jordon C. May, https://frascona.com/considerations-in-obtaining-a-zoning-variance/

Financial hardships do not constitute a hardship for granting a variance.

Public Noticing of Zoning Actions:

The Town "must provide at least one public hearing with at least 15 days prior published notice before adopting any regulations, restriction, or boundary decision. If the owners of at least 20 percent of the land included in a rezoning or the land located within 100 feet of a parcel of land proposed for rezoning file a protest, then the affirmative vote of at least two-thirds of the municipal council will be necessary to adopt the rezoning."[15]

Board of Adjustment:

"Statutory municipalities must appoint a five-member Board of Adjustment to hear appeals from any administrative decision made pursuant to the zoning ordinance and to hear and decide any other matters provided in its creating ordinance. .. The Board of Adjustment can vary or modify the application of the regulations relating to the use, construction, or alteration of buildings or structures or the use of land within a single zone district so that the spirit of the ordinance is observed, the public safety and welfare are secured, and substantial justice is done."[16]

This is not a blanket authority to approve whatever an appellant asks. It means that after examining the reasoning behind the administrative action being appealed, the Board of Adjustment can determine a reasonable interpretation supported by the intent of the municipal code that is different from the administrative interpretation and vote to approve the Board's interpretation.

"Spot" Zoning

"Spot zoning, which is the application of a zoning designation to a specific parcel of land that is inconsistent with the surrounding area, plan guidance, and other zoning restrictions, is prohibited in Colorado on the theory that a local government cannot act merely to benefit a single landowner, but must act to benefit the general public. The test for determining whether a particular action constitutes spot zoning is whether the action is designed to relieve a certain piece of property from zoning restrictions in spite of –rather than in conformance with –the jurisdiction's comprehensive plan."[17]

Short-term rentals

"a Colorado court was recently called upon to determine whether short-term vacation rental use of a home constituted a residential or commercial use. The Court held the use was

[15] (Donald L Elliot, Esq. Managing Editor 2021) pg 59
[16] (Donald L Elliot, Esq. Managing Editor 2021) pg 60
[17] (Donald L Elliot, Esq. Managing Editor 2021) pg 78-79

inherently residential rather than commercial because the property was being used for "living purposes." The court was interpreting covenants.

Regulation of short-term rentals is a hot topic in Colorado as many communities see their long-term rental stock, ordinarily available to lower-income workers and residents, disappear as those units are converted to short-term rentals. Any attempt to include language in the municipal code to address this issue needs to be reviewed by an attorney with land use law experience.

Manufactured Homes

There is confusion about installing manufactured homes in the Town of Paonia. The Colorado General Assembly has explicitly limited the zoning powers of statutory municipalities ruling that they "cannot prohibit manufactured homes that meet the basic standards of the municipal" building code. "However, if a zoning ordinance restricting manufactured housing to certain districts is rationally related to public welfare, it will be upheld. Public perceptions about the incompatibility of manufactured homes with site-built homes, tax base erosion, and property devaluation are legitimate public welfare concerns."[18]

In a review of the Town's actual language regarding manufactured homes, there are two back-to-back definitions which is a problem. They seem to require that manufactured homes meet the Town's building code requirements or the requirements of HUD. The reference to HUD requirements should be removed.

Signs

"Regulation of signs, billboards, and other forms of outdoor advertising raises concerns under the First Amendment of the U.S. Constitution because of the potential for infringement on freedom of speech. ... Signs can be regulated by zoning for traffic safety or aesthetic reasons.

"An attempt to ban or otherwise regulate a sign on the basis of its content or message alone, however, is unconstitutional. Regulations that focus on the message on the sign (as opposed to its size, shape, color, location, or lighting) are subject to strict scrutiny by courts and are typically invalidated. Sign regulations restricting non-commercial messages more strictly than commercial ones are typically invalidated as content-based regulations…."[19]

"The US Supreme Court determined that "differing maximum size, height, and duration standards for different types of temporary signs (e.g., temporary event, political, or real estate signs) was a form of content-based regulation."[20] Due to this ruling, most cities remove differing standards based on the type of sign.

[18] (Donald L Elliot, Esq. Managing Editor 2021) pg 66
[19] (Donald L Elliot, Esq. Managing Editor 2021) pg 80
[20] (Donald L Elliot, Esq. Managing Editor 2021) pg 81

"…ordinances imposing procedures for the approval of specific types of signs must contain adequate procedural safeguards for applicants, and may not vest unbridled discretion in local approving authorities…Local regulations much contain sufficiently definite standards and must not be vague…In order to avoid an unconstitutional "prior restraint" on protected speech, local regulations must both include a time frame for local action on the application and provide for prompt administrative review of appeals of the permit decision at the local level."[21]

Churches

Churches and fast food restaurants tend to be classified as "special" or conditional uses because they pose unusual traffic burdens on roads and impact neighborhoods. Churches have special protections that land use decision-makers need to be aware of.

"The physical structure and location of churches may generally be regulated by zoning. The Colorado Supreme Court has upheld the constitutionality of a zoning ordinance allowing churches to locate within a particular zone district only after obtaining a permit granted by an administrative body following review." An appeals court further ruled that "a zoning regulation that completely bans a religious group from a certain limited area does not interfere with First Amendment rights, since the group was not entirely prohibited from practicing its faith."[22]

Congress passed the Religious Land Use and Institutionalized Persons Act, whose key provisions are as follows:

- "No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution – a) is in furtherance of a compelling governmental interest; and b) is the least restrictive means of furthering that compelling governmental interest."[23]

The Act specifically prohibits three types of regulations:

1. "Equal terms. No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.
2. "Nondiscrimination. No government shall impose or implement a land use regulation that discriminates against any assembly or institution based on religion or religious denomination.
3. "Exclusions and limits. No government shall impose or implement a regulation that ---
    a. Totally excludes religious assemblies from a jurisdiction; or

[21] (Donald L Elliot, Esq. Managing Editor 2021) pg 81
[22] (Donald L Elliot, Esq. Managing Editor 2021) pg 82
[23] (Donald L Elliot, Esq. Managing Editor 2021) pg 83

b. Unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."[24]

Colorado's freedom to Gather and Worship Act prohibits any local government from "enacting or enforcing any ordinance, resolution, regulation, or other restriction that specifically limits when or how frequently individuals in the state may meet upon private residential property to pray worship, or otherwise study or discuss issues related to religious beliefs."[25]

Subdivisions

"…the word "subdivision" is used to describe three separate but related concepts:

1) "The process by which land is divided into lots, tracts, and parcels – usually for redevelopment.
2) "The combination, recombination, or reconfiguration of lots, tracts, and parcels of land; and
3) "The resulting area of subdivided land after the process is complete."[26]

"The subdivision plat concept was initially developed to achieve two principal goals:

1) "to avoid the need to repeat the cumbersome "metes and bounds" legal description of a parcel of land each time it is sold; and
2) "to ensure that each parcel of land sold for development has sufficient size, shape, utilities, and access to function for its intended purpose.

It "evolved into a vehicle for dedicating land of easements for public use, including streets, trails, alleys, drainage facilities, and parks. On the face of most plats is a statement of dedication signed and acknowledged by the owner and holders of interests in the land and a statement of acceptance by the local government. This document is recorded and becomes the basis for conveying property described by lots and blocks or tracts. Among other things, subdivision regulations establish the minimum standards for the format, content, and design of plats."[27]

In statutory towns, the Planning Commission "develops and adopts subdivision regulations… and may also implement the …town's major street plan for up to three miles outside the municipal boundaries…."[28]

"…the subdivision process helps to ensure that each lot offered for sale is appropriately sized and shaped for its intended use and has appropriate access to the public street network.

[24] Ibid.
[25] (Donald L Elliot, Esq. Managing Editor 2021) pg 83-84
[26] (Donald L Elliot, Esq. Managing Editor 2021) pg 126
[27] (Donald L Elliot, Esq. Managing Editor 2021) pg 128
[28] (Donald L Elliot, Esq. Managing Editor 2021) pg 129-130

"…the subdivision process helps to ensure that the lots that are offered for sale are arranged in a way that makes adequate provision for the infrastructure and utilities that are needed to service them," including streets and alleys, storm drainage, water, sewer, communications, power lines, street lights, fire hydrants and other public areas that are needed to mitigate the impacts that the residents will have on public services."[29]

"In some cases, land is affected by physical conditions (e.g., natural hazards, wetlands, steep slopes, ditches, existing uses, etc.) or legal encumbrances [easements].

"Although the subdivision process often follows (or is processed concurrently with) zoning approvals [rezoning, PUD, conditional or special uses], it can occur independent of zoning actions."[30]

Subdivision Review Process

1. Application with supporting data: Can occur in two to three phases: sketch plan, preliminary plat, and final plat.

   "Statutory towns require proof of adequate electrical and natural gas service to the subdivision and access to the state highway stem in accordance with state requirement."[31]

   A 2008 statute requires that "applicants for plats containing 50 or more single-family equivalent units (or fewer if the local government chooses) demonstrate that the water supply is adequate to serve the proposed development and lists criteria that the local government must use in determining whether the applicant has, in fact, demonstrated adequate supply."[32]

2. Review by referral agencies: "Although there is no specific statutory requirement for municipal referrals, municipalities commonly require" them.[33]

   "The applicant for a subdivision is generally required to provide written notice to all owners or lessees or mineral interests… in the initial application. The statute excepts boundary adjustments or applications for the platting of a single additional lot from the definition of "application for development," so notice of these subdivision types is not required. The notice must include the date and time of the initial public hearing and must be provided not less than 30 days before that hearing. Notices of subsequent hearings are provided by the local government to owners or lessees, or mineral interests who register for such notices. Mineral owners must be accorded the same rights and

[29] (Donald L Elliot, Esq. Managing Editor 2021) pg 128
[30] (Donald L Elliot, Esq. Managing Editor 2021) pg 129
[31] (Donald L Elliot, Esq. Managing Editor 2021) pg 131
[32] (Donald L Elliot, Esq. Managing Editor 2021) pg 68
[33] (Donald L Elliot, Esq. Managing Editor 2021) pg 131

privileges as surface owners throughout the review process and at public hearings." If this is a review issue, reviewing state statutes for details will be necessary.[34]

3. Public hearings: "Generally, public hearings must be held first before the Planning Commission, and then (usually) before the … municipal governing body. …in statutory municipalities, the applicable statute delegates the approval authority over plats to the Planning Commission.

   Statutory towns are held to a rigorous approval schedule. "Once the plat is submitted to the Planning Commission for approval, the Planning Commission must approve or deny the application within 30 days, or it is deemed approved – unless the applicant agrees to a different schedule."[35]

4. Final action accepting or rejecting the subdivision plat: "Denial of a plat or plan must be in accordance with the resolutions, ordinances, or regulations provided to the applicant, with reasons stated upon the record. Any conditions imposed by the local government must be based on duly adopted standards."[36]

5. Appeal: "Regardless of whether the subdivision is approved, the landowner or other aggrieved party" may appeal the decision.[37]

What Information Do You Need to Conduct a Complete Review?

"Municipalities have extensive discretion regarding data and analytical requirements, but often they are similar to the statutory requirements that apply to counties." Typical application requirements include the following:

- Property ownership – including proof of ownership and the signatures of all property owners on the application. (This avoids wasting time on an application the owners don't know about or don't approve of).
- Physical characteristics of the site including topography, geology, and soils, by a registered engineer. May also include location of trees.
- Proposed development plant including number of dwelling units, non-residential floor area, off-street parking, etc.
- Water and sewer demand projections by a registered engineer.
- Stormwater management or facilities by a registered engineer.
- Cost of proposed public improvements by a qualified contract or a registered engineer.

[34] (Donald L Elliot, Esq. Managing Editor 2021) pg 132
[35] (Donald L Elliot, Esq. Managing Editor 2021) pgs 132-133
[36] (Donald L Elliot, Esq. Managing Editor 2021) pg 133
[37] (Donald L Elliot, Esq. Managing Editor 2021) pg 134

- Adequacy of proposed water supply, sewer service, and drainage systems by a registered engineer. The applicant does not have to have water delivery or storage infrastructure in place, nor do they need to show actual water right ownership.
- Adequacy of proposed year-round street access by a registered engineer.
- Adequacy of proposed electric power, natural gas service, and solar access by a registered engineer. "Statutory …towns may use subdivision regulations to "protect and assure access to sunlight for solar energy devices by considering in subdivision development plans the use of restrictive covenants or solar easements, height restrictions, side yard, and setback requirements, street orientation and width requirements, or other permissible forms of land use controls."
- Dedication of schools, parks, streets, and other public areas – or payment in lieu of dedication, and
- Guarantees of necessary public improvements (often towns will require posting of a bond or letter of credit to ensure all improvements are installed to code)[38]

Minor Subdivisions:

"In most jurisdictions, the subdivision regulations include a "minor subdivision" process for small subdivisions that do not require dedication of land for public purposes, or lot combinations; lot splits boundary adjustments, and/or other low-impact divisions that the jurisdiction has decided as a matter of public policy should not require full subdivision review. Minor subdivision processes vary considerably in terms of their application requirements, substantive standards, and review procedures."[39]

Impact Fees

Municipalities may charge impact fees to cover the future costs of improvements that can be reasonably assumed to be needed due to growth and calculated proportionately as future impacts to public land and infrastructure. Impact fees may not be used to remedy existing deficiencies in public infrastructure. These typically are applied to major street expansion or development, parks, open spaces, trails, school sites, and drainage/utility easements.[40]

They can also be applied to capital improvements that are reasonably assumed and calculated proportionately for capital improvements needed to serve growth. In Paonia's case, a fee could be adopted to assist in developing future water storage, a new wastewater treatment plant, and upsizing service lines.

[38] (Donald L Elliot, Esq. Managing Editor 2021) pg 134-135
[39] (Donald L Elliot, Esq. Managing Editor 2021) pg 139
[40] (Donald L Elliot, Esq. Managing Editor 2021) pg 142-143

The downside of impact fees is that these costs are passed on to buyers, which could drive up the cost of housing.

Vested Rights

"There are two different types of vested rights in Colorado. A "common law vested right" has been defined by the courts to protect a landowner from the imposition of new or different regulations after the landowner has reasonably, and to their detriment, relied in good faith on government approvals granted for the project pursuant to earlier regulations. In such a case, the landowner must obtain a favorable court ruling to prove that a common law vested right exists."[41] "A landowner or developer may acquire vested rights to a zone district designation when there has been substantial detrimental reliance and expenditure based on that zone designation."[42]

Regarding subdivisions, a "landowner who has received final plat approval but has not received approval of or a permit to construct water and sewer improvements does not have a vested right to construct water and sewer improvements. An application for a final plat that is not consistent with the zoning regulations for an area will not create any vested rights. The Colorado Court of Appeals has held that owners had not reasonably relied on an invalid prior zoning resolution when they did not know about the prior zoning resolution at the time they submitted the subdivision plat."[43]

In 1987, Colorado passed the Colorado's Vested Property Rights Act. "The Act defines a "vested property right" as the "right to undertake and complete the development and use of property under the terms and conditions of a "site specific development plan." The Act provides that local governments must define what constitutes a "site specific development plan. … Once a statutory vested right is established, a local government is precluded from taking any zoning or land use action that would "alter, impair, prevent, diminish, impose a moratorium on development, or otherwise delay" the development or use of the property in any way except as set for in a "site specific development plan." For purposes of subdivision plat approvals, this statute only governs those plats approved on or after January 1, 1988. Any plats approved before that date will not vest development rights."[44]

Site Specific Development Plan: "For a landowner or developer to establish a statutory vested right, the local government must first approve a site specific development plan. Local governments have discretion to determine what exactly constitutes a "site specific development plan." The statute suggests that a planned unit development, a subdivision plat, a

[41] (Donald L Elliot, Esq. Managing Editor 2021) pg 190
[42] (Donald L Elliot, Esq. Managing Editor 2021) pg 195
[43] (Donald L Elliot, Esq. Managing Editor 2021) pg 196
[44] (Donald L Elliot, Esq. Managing Editor 2021) pg 201

specially planned area, a planned building group, a general submission plan, a preliminary or general development plan, a conditional or special use plan, or a development agreement all might be identified as site specific development plans."[45]

"If a local government has not adopted an ordinance or resolution before January 1, 2000, stating what constitutes a site specific development plan that would trigger a vested right, then a vested right would be created upon the approval of any of the documents listed in the paragraph above. The statute does not appear to prevent a local government from acting after January 1, 2000, to specify its own local definition of a "site specific development plan."

After reviewing the Town's municipal code, it appears that the Town of Paonia does not have a definition for 'site specific development plan' nor does it address vested rights. Vesting would default to the criteria in state statute.

"The statute specifically provides that a "site specific development plan" does not include a variance, a preliminary plan as defined in CRS 30-28-101(6), or any of the following:

- "a sketch plan as defined in CRS 30-28-101(8)
- "a final architectural plan
- "public utility filings
- "final construction drawings and related documents specifying material and methods for construction of improvements.

"A site specific development plan can only be approved after notice and a public hearing by the local government with land use jurisdiction over the property. The approval of a site specific development plan may include terms and conditions that are reasonably necessary to protect the public health, safety, and welfare. Although a conditional approval will result in a vested right, failure to abide by the terms and conditions will result in the forfeiture of the vested property rights.

"Within 14 days after the approval of the site specific development plan, a notice must be published regarding the approval of the site specific development plan, and that vested rights will attach to that plan, although the statute does not assign responsibility to the local government for publication. The local government's approval and grant of appeals do not begin to run until the notice is published.

A vested right general has a duration of three years from the date of approval unless there is a longer time period expressly authorized by the local government. "A vested property right, once established as provided in the statute, precludes any zoning or land use action by a local government or pursuant to an initiated measure that would "alter, impair, prevent, diminish, impose a moratorium on development, or otherwise delay the development or use of the

[45] (Donald L Elliot, Esq. Managing Editor 2021) pg 201

property as set forth in a site specific development plan." An approved statutory vest right "runs with the land" and can be exercised and enforced by subsequent landowners.[46]

Prescriptive Easements

In older towns, there can be a public utility line or street that does not have a recorded easement or right-of-way in place.

"Colorado statute allows roads to be designated through prescription if the roads have been used for 20 consecutive years by the public without interruption or objection on the part of the owner. A claim of prescription requires proof of four elements;

1) "a "claim of right";
2) "Public use adverse to the landowner's interest;
3) "Continuous use by the public for 20 years; and
4) "That the landowners had actual or implied knowledge of the public's use and made no objection.

"A claim of right does not have to be made by the governmental entity that ultimately takes responsibility for the road. Such overt acts may include signage, maintenance [grading, snowplowing], inclusion in county road maps, and construction of roadway improvements. Roads acquired by prescription need not have any specific dimensions and may include footpaths as well as vehicular ways."[47] In order to affirm and enforce a prescriptive right, a party must bring a quiet title action in a court of competent jurisdiction.

Creation of a Housing Authority for the Management of Affordable Housing

While not a land use issue, I've detected a misunderstanding about the role of housing authorities in developing and managing affordable housing. I've included DOLA's explanation of the role of housing authorities to clear up any confusion.

"A public housing authority is a public entity that has a specific set of special powers and authorities. A major benefit of housing authorities is the ability to use additional financial resources to devote to critical community projects in light of restrictions imposed on local governments by the TABOR Amendment. After enactment of TABOR in 1992, local government growth was restrained by requiring voter approval for any increases in revenues, spending, and additional debt. Housing authorities can be considered enterprises rather than local districts as long as their annual grant revenue from state and local governments is less than ten percent of their total budget. As government-owned businesses authorized to issue their own revenue bonds, housing authorities, and urban renewal authorities can make expenditures that won't

[46] (Donald L Elliot, Esq. Managing Editor 2021) pgs 200-202
[47] (Donald L Elliot, Esq. Managing Editor 2021) pgs 150-151

be counted against the local or county government limits imposed by TABOR. Local interpretation varies, however, as it relates to TABOR restrictions.

“Housing Authorities have the power to:

- Determine whether housing conditions are unsafe, unsanitary, or substandard and investigate methods for improving such conditions.
- Study and make recommendations on plans addressing the clearing, re-planning, or reconstruction where unsafe, unsanitary, or substandard conditions exist. Provide housing accommodations for low-income persons in cooperation with the local jurisdiction.
- Prepare, implement, and operate projects including the construction, reconstruction, improvement, alteration, or repair of any project.
- Assume by purchase, lease, or other means any project undertaken by any government or by the city or county.
- Act as an agent for the federal government in connection with the acquisition, construction, operation, or management of a project.
- Arrange with the city or with a government for the furnishing, planning, re-planning, opening, or closing of streets, roads, roadways, alleys, property options, property rights, or for the furnishing of property services in connection with a project.
- Lease or rent dwellings, accommodations, lands, buildings, structures, or facilities included in any project, and establish and revise associated rents or charges.
- Access buildings or property to conduct investigations or to make surveys.
- Sell, exchange, transfer, assign, or pledge property to any person, firm, corporation, the city or county, or government.
- Receive exemption from the payment of property taxes or special assessments to the state or any subdivision of the state.

This means housing authorities have some specific abilities that local governments typically lack:

- Ability to apply for loans, grants, and contributions from government or other sources designed for specific authority purposes.
- Ability to acquire property by purchase, lease, operations, eminent domain, gift, grant, bequest, or devise from any person, firm, corporation, or city government.
- Ability to borrow money on terms.

“For jurisdictions where housing authorities already exist, it is essential for local elected officials to partner with the housing authority and determine how best to utilize these unique abilities to address unmet housing needs in the community. Partnership can include providing and combining funding sources, identifying and directing residents to other useful social services

provided by public sector agencies, and advocating for affordable housing at all different income levels.

"Role for Local Government: Where possible, contributing funds from local housing trust funds and other federal housing assistance programs or other local resources to support federal housing assistance program funds that are received by the PHA can improve the quality of assistance provided to residents while serving more households. Due to the fact that local elected officials play a large role in framing affordable housing in their community and should act as the champion for more affordable housing development, it can be especially beneficial to create working relationships with the HA in your jurisdiction to align the manner in which affordable housing and housing that receives public subsidy are presented to residents."[48]

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[48] (Affairs 2022)

Basics of Variances

by Robert Widner, Esq.

Zoning regulations reflect the judgment of the local governing body – typically based on recommendations from the planning commission – on what land use regulations are needed to implement the policies set out in the local comprehensive plan. At their core, zoning regulations are designed to promote the statutory goals of protecting and promoting the "health, safety, and welfare" of the community. Given this, why do zoning codes include a mechanism for the issuance of variances, authorizing the use of a piece of property in a manner that would otherwise be prohibited by the zoning regulations?

The answer is that variances are essential for legal reasons and for reasons of fairness. Most zoning regulations, by both necessity and practice, employ general language and are uniform in application to an often-diverse collection of properties. A zoning regulation, when strictly applied to a particular property, may have the effect of denying a property owner all reasonable use of his or her property. Without the mechanism of variances, property owners would have no method of seeking relief other than going to the courts.

Variances are divided into two general types: area variances (sometimes called dimensional variances) and use variances. The most common variance is the area variance. Area variances authorize a deviation from the zoning regulations that govern physical location and improvement of a property, for example, setback, building height, lot width, or lot area.

In contrast, a use variance authorizes a use of property that would otherwise be prohibited within the property's zone district. The effect of granting a use variance is often similar to a change in the property's zone district classification.

Many states *prohibit* use variances, or authorize localities to prohibit them in their zoning codes. This is in recognition of the fact that: (1) allowing changes of use through variances can dramatically undermine the stability of neighborhoods, and (2) changes of use are much better considered by the legislative body through the zoning amendment process, not property-by-property through individual variance requests. Planning commissioners should carefully review their state law and local ordinances to determine if the granting of use variances is lawful in their jurisdiction.

> VARIANCES ARE NOT APPROPRIATE MERELY BECAUSE THE VARIANCE WOULD PERMIT A MORE PROFITABLE USE OF THE PROPERTY.

The Variance Process

In most communities, consideration of a variance request requires a public hearing, with notice given to neighboring property owners. Variance applications are usually reviewed by a "zoning board of adjustment" or "board of adjustment and appeals," typically appointed by the local governing body. In some communities (if allowed under state law) the authority to hear and decide variances is conferred upon planning commissions or reserved to the governing body itself.

Regardless of the composition of the reviewing board, the board acts in a quasi-judicial manner when considering variance applications. In most circumstances, the reviewing board's final decision regarding a variance request is subject to judicial appeal in the state courts.

Standards for Approval of Variances

The procedures and standards applicable to the granting of a variance vary widely among local governments. It is difficult, if not impossible, to summarize the diverse legislation and extensive body of judicial decisions governing variances. Moreover, these judicial decisions are largely based upon specific factual circumstances underlying the particular variance decision.

Nevertheless, some common threads can be found in most state and local variance criteria owing to the fact that variance provisions trace their origins to the same source: the model Standard Zoning Act published by the U.S. Department of Commerce in 1924. The Standard Zoning Act included the following brief criteria for the issuance of a variance:

"To authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done."

The requirement that a "special (or unique) condition" exist and an "unnecessary hardship" be demonstrated by the owner remain widely imposed requirements in many statutes and local regulations governing variances.

However, a variety of other standards for approval of variances have evolved. For example, some state statutes or local ordinances require the property owner demonstrate that there exist "practical difficulties" caused by the strict application of the zoning regulation that precludes the owner's reasonable use of the

continued on page 6

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property. The practical difficulty standard has evolved, in many jurisdictions, to be a lesser or more accommodating standard for variances than the unnecessary hardship standard. Additionally, many local governments will reject a request for a variance where the need for the variance was the result of the owner's actions, often-times phrased a "self-created hardship." *Self-Created Hardship.*

Even given the diversity of standards applicable to variances in communities across the country, some fairly uniform principles can be culled from the wealth of judicial decisions involving variances:

• Variances are most appropriate to address unique or special physical characteristics of the property that prevent reasonable use under the requirements of the applicable zoning regulations. These circumstances may include unique topography such as steep slopes, water bodies, wetlands, or other natural features that are atypical within the community or within other properties in the same zone district.

• Variances are not appropriate merely because the variance would permit a more profitable use of the property.

• Variances are also not appropriate to accommodate the particular limitations, characteristics, habits, or hobbies of the owner or occupants of the property. Because variances run with the property and are not usually limited to ownership, the fact that a zoning regulation would effectively prevent an owner from engaging in a particular hobby would not justify the granting of a variance to the regulation.[1]

The Effect of a Variance

It is important to keep in mind that the granting of a variance does not change the zone district or zoning classification of the affected property. Instead, a variance is a limited change or modification of a specific standard or restriction associated with a particular property. A variance should be memorialized in written form, identifying the property affected and employing clear and specific language to denote the zoning standard being modified and the extent of the permitted modification. Many administrative problems arise as the result of poorly documented variances or variances that fail to provide sufficient detail to determine the permissible extent of the granted modification.

Zoning regulations in some communities authorize the reviewing board to impose conditions upon the issuance of a variance. These conditions may enable the reviewing board to mitigate or eliminate potential adverse impacts upon adjacent property or the neighborhood caused by the variance. In addition, conditions may be authorized that would limit the duration or term of the variance where a limitation is justified based on the evidence presented to the reviewing body. One common condition to the granting of a variance is that the proposed development be commenced or completed within a specified time.

Planning Commission Role in Variances

Planning commissions should recognize that variances are an integral part of zoning, providing a "safety valve" that allows property owners, in certain limited situations (and in compliance with the strict criteria for issuance of a variance), to develop their property in a manner that would not otherwise be allowed under the zoning code.

On the other hand, variances should clearly be the exception, not the rule. To ensure this, planning commissions should keep abreast of the types of variance requests submitted within the jurisdiction, the basic circumstances underlying the request, and the final decisions on the request made by the reviewing body.

The frequent granting of variances may indicate a failure on the part of the zoning board to adhere to the ordinance's criteria for approval of variance requests. However, numerous requests for variances concerning the same standard or restriction of a zoning regulation may highlight a need for review of that standard and its suitability within the affected zone district. In contrast, relatively infrequent requests for variances and issuance of variances should signal that the process is working well. ◆

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1 There are, however, some limited exceptions to this general rule resulting from laws such as the federal Fair Housing Amendments Act and Americans with Disabilities Act where the variance might present an opportunity for a reasonable accommodation to a handicapped owner. Where such circumstances are present, the reviewing board should always seek legal advice.

Self Created Hardship

The self-created hardship standard provides that an owner cannot use his own ignorance or actions (or that of the prior owner) as a justification for the granting of a variance.

Variance requests based upon self-created hardships are quite common. Property owners who make unwise or poorly planned development decisions may later find that a variance is necessary either to properly complete the project or to accommodate some desired change in construction. In some circumstances, owners either unknowingly or intentionally construct buildings or engage in uses that violate the zoning regulations, only to later argue that the variance is necessary to prevent the expense and waste associated with the destruction of the building or cessation of the use.

Denying variance applications that are based on self-created hardships is a sound practice. To grant such a variance would excuse or reward an owner's lack of reasonable diligence. Not surprisingly, owners in communities that routinely grant such variances quickly learn to ask for forgiveness after the fact.

Doing Due Process Right – Practical Tips for Municipal Leaders

Presented by Sam Light, CIRSA General Counsel

Introduction

Presentation Overview

- Power to make land use, licensing and other “property rights“ decisions at a local level is a significant, important and cherished power.

- And can be a source of claims/disputes/litigation. Given the significant risks in this area, including potential for federal constitutional claims, CIRSA and its members share a keen interest in reducing risks in this area.

- QJ training is one of our core services. We focus on “suggestions for success” in your role as quasi-judicial decisionmakers – best practices – which in turn will reduce risk for your City or Town and you individually.

- This presentation is a training resource only and not intended as legal advice. In case of any inconsistency between the presenter’s remarks and views of your City or Town Attorney…your Attorney’s views prevail!

Doing Due Process Right

The Quasi-Judicial Role

- As you know, the governing body often is acting as "legislators"—i.e., making general policies and rules that apply generally (for example, when working on general updates to the municipal code).

- But other times you act as "judges," deciding specific cases where you apply the general rules to specific persons/property. For these "quasi-judicial" matters—which include many land use and licensing applications—municipal officials are called upon to essentially act as judges—and therefore must behave like judges.

- In this role municipal officials are required by law to provide "due process" and a failure to provide due process exposes you and your entity to liability.

Doing Due Process Rights

Legislative Acts

- Adoption of a general health/safety ordinance
- Approval of a master plan
- Adoption of general amendments to the zoning or licensing ordinances
- Annexation
- Adoption of tax

Quasi-Judicial Acts

- Rezoning
- Liquor licensing – new license, suspension or revocation of existing license
- Conditional or special review use request
- Certain subdivision and development applications
- Employment appeal hearing

Note: Determination of whether a matter is legislative or quasi-judicial depends in part on your entity's own ordinances – consult your entity's attorney.

Doing Due Process Right

The Quasi-Judicial Role

- Quasi-judicial "rules of engagement" have a familiar source: "No person shall be…deprived of life, liberty, or property, without due process of law."

- At the municipal level, for land use and other decisions affecting property rights, the governing body (and other QJ bodies) and its members are responsible for delivering the due process required by the Constitution.

- What are the key characteristics of a quasi-judicial process? Notice, a hearing, and a record-based decision made by a fair and impartial decision-maker—that's you!

- All decision-makers in the process—those making recommendations and those making final decisions—must commit to providing due process. Each step in the process is a critical building block!

Doing Due Process Right

Some Legal Context

"Quasi-judicial proceedings must be conducted in accordance with procedural due process. And, fundamental fairness is the cornerstone of due process." – *Colorado Court of Appeals*

- Thus, a fair hearing is critical to reaching a good decision and ultimately defending it.

- Generally, if your decision is legally challenged, your hearing is "the hearing" and reviewing judges don't "retry" the case—rather, they base their decision upon a review of your record, including:

  - The procedures you used;
  - The evidence you considered; and
  - The reasons for your decision.

Doing Due Process Right

Some Legal Context

- And, quasi-judicial decisions aren't usually overturned because the judge didn't "like your decision."
- Rather, they more likely overturned because the quasi-judges either made an arbitrary decision or—as a group or because of individual behavior—deprived one or more participants of fundamental fairness.
- A reviewing judge will judge your conduct against the way he/she would behave as a judge – so keep the "judge" frame of mind when processing and conducting yourself in a quasi-judicial matter.
- And, individually and as a group…honor due process…do the things that judges would do, and don't do the things that judges wouldn't do!

Doing Due Process Right

Some Practical Tips to Ensuring Fair Process

- Don't make up your mind before the hearing.
- Don’t make prejudicial pre-hearing statements.
- Don't speak with one side or the other before a hearing (ex parte contacts, more in a moment).
- Don't participate if you have a financial or other personal interest in the matter (code of ethics).
- Don’t sign any “pro” or “con” petitions.
- Don’t be a witness in your own hearing. Instead, have the parties provide you with information.

Doing Due Process Right

Some Practical Tips to Ensuring Fair Process

- Discuss and consider quasi-judicial matters only at the duly notice public hearing; that is:
  - Wait until the matter has arrived on your agenda and is “ripe” for you to hear, deliberate and decide.
  - Don’t engage in pre-hearing “buzz”—you get to make the decision but with that power comes the responsibility to be fair and unbiased and follow the QJ rules of engagement.
- Once your body has made its recommendation or decision, let the decision speak for itself and even if you held a minority view, recognize the member’s need to respect the body’s decision.

Real-Life Scenarios – What do You Think?

"We are in the middle of processing a very controversial application for a marijuana establishment. One of our decisionmakers has posted frequently to social media that he is adamantly opposed to marijuana establishments in our jurisdiction. Is this a due process concern? If so, what should he (or we) do?"

"We recently approved a controversial development and resolved the Fire District's concerns with a condition of approval that requires the developer to obtain a fire access over the neighbor's land. The neighbor said at the hearing that he's willing to grant the access. One member who voted against the project (it was a 4-3 vote) has approached the neighbor to ask that he not grant the easement." Concerns?

Doing Due Process Right

Practical Tips for Running a Good Hearing

- The way the quasi-judicial body runs its hearings—and how the members conduct themselves in hearings—significantly impact your risk profile and the community's trust and confidence in your work.
- Follow "best practices" for hearings:
  - Use your script and follow it throughout.
  - Use and expect civility; that applies to all meetings and participants.
  - Chair: Recognize and exercise your prerogative to maintain order.
  - Maintain formality and engagement; limit distractions.

Doing Due Process Right

Practical Tips for Running a Good Hearing

- Stay focused on the matter and issues at hand and directly manage the crux issues to get the necessary and relevant information.
- Use opportunities to “recalibrate” if discussion is straying off topic/off task.
- Consider steps to manage the flow: e.g., don’t engage or allow others to engage in free-wheeling “back-and-forth” during staff, applicant, or public comments.
- Don’t stray the course for insistent questioners. Better to hold questions until a defined question period and to instead let the questioner know they’ve been heard and move on.

Doing Due Process Right

Avoid Ex-Parte Communications

- A critical duty of the quasi-judge is to avoid “ex-parte” contacts, meaning any “outside the hearing” discussion with an interested party about the subject matter of the hearing. Examples:
  - Meeting with the applicant outside the hearing to discuss the pro/cons of the request and how you might decide the case.
  - E-mailing your fellow decisionmakers before the hearing to persuade them why they should vote yes or no.
  - Attending meetings where folks for or against the application are discussing the application, even if you’re not participating.
- If it were your application and your property interests at stake, would these activities seem fair to you?

Doing Due Process Right

Avoid Ex-Parte Communications

- A proceeding loaded with “ex-parte” contacts is a clear path to having your decision overturned and, as important, having the integrity of your process eroded.
- When we advise against ex-parte contacts, we are protecting your ability to participate in the decision-making, and your ultimate decision.
- An ex-parte contact can be problematic whether with the applicant, citizens, or in some instances, staff.
- Or, even in the hearing itself (i.e., no texting or e-mailing about the subject matter of the hearing within the hearing itself).

Doing Due Process Right

Avoid Ex-Parte Communications

- Arm yourself (and staff, arm your quasi-judges) with knowledge you need when persons want to talk about a pending quasi-judicial matter outside the hearing. Keep some "talking points" ready; e.g.:
  - "Thanks for your interest [or e-mail, etc.] but I can't talk with you about this application outside the upcoming hearing. I'd like to hear your views but because this is a specific property rights case, I need to hear and consider the evidence only through our public hearing process. Please plan to attend the hearing if you can. If you can't attend, you can send written comments to our staff and they'll include those comments in hearing materials."
- Consider having a short explanation, or "FAQs," on the quasi-judicial process on your website.

Doing Due Process Right

Avoid Ex-Parte Communications

- Contrast – For general legislative and policy making discussions—for example, when the governing body is looking at generally applicable changes to ordinances or regulations—it is okay: to lobby (and be lobbied) outside the meeting; to base your decision on your own personal policy perspectives, and to base your decision on information obtained from most any source.
- But, for a quasi-judicial matter, it is not. Rather, just like a judge presiding over a trial, because of constitutional due process requirements, you must make your decision based on the evidence presented to you at the hearing, and you must base your decision upon legal standards, and you may not engage with interested parties about the case outside the hearing.

Real-Life Scenarios – What do You Think?

"Our ordinances allow the Clerk's office to revoke certain types of licenses if the license holder commits a felony. The Police Department has let me know that a transient merchant has been charged with a felony. Given the seriousness of the charge, we think it is best to immediately send the merchant a letter revoking their license." Concerns?

"Board member Nile is unable to the upcoming Board hearing on a rezoning request. Over the weekend he emails Board member Tami to tell her she should vote no because the request is inconsistent with the master plan. Tami responds to Nile and copies in Board member Bruce, telling them both that traffic impacts are also a huge concern. Bruce, in his "Reply all" response, says he went to the developer's neighborhood meeting and "it did not go well." Concerns?

Doing Due Process Right

Deliberations Matter

- Once you've heard the staff and applicant presentations, heard public comment and asked your questions, it's time to deliberate ☺!
- Discussion of the evidence and the criteria is critical; this is where:
  - You as quasi-judges formulate the bases of your impending decision.
  - The applicant and others obtain an understanding of your position.
  - The reviewing judge looks to understand why you decided the matter as you did (and whether it comports with your criteria and the law).
- So Deliberate – Talk Amongst Yourselves!

Doing Due Process Right

Deliberations Matter – Tips

- Focus on the key issues.
- Focus on the relevant decision-making criteria:
  - In quasi-judicial matters, you must make your decision based on the relevant existing criteria and not on the basis of personal preferences, or irrelevant or non-existent standards, or considerations that don't apply to the application in front of you.
  - Have the criteria at the ready and ask questions as needed ("Staff, remind me, what's the rule that applies to this issue?")
- Discuss the relevant evidence that has been presented to you.
- Remember - when you are prepared to discuss the criteria, you will arrive at a discussion of the defensible reasons for your decision.

Doing Due Process Right

Deliberations Matter – Use the "Rule of Why"

The Rule of Why In Action:

Mayor: "I'd like to thank everyone for their comments on this development plan. Now it's time for the Board to deliberate. Who would like to start the discussion?"

Member Sam: "I would, thank you Mayor. I think we've heard a lot of differing opinions here and I just want to say I'm adamantly opposed and I'm voting no."

Member Tami: "Sam, may I ask: Why do you intend to vote no?"

Member Sam: "I'm voting no because it doesn't meet our standards."

Member Nile: "Sam, why doesn't it meet our standards? I have concerns too that I'll mention in my comments but if you'd tell me what standards concern you and why you think they aren't met, that will help frame our discussions."

Member Sam: Yes, I'd be happy too. I think the height limit is an issue because…".

Doing Due Process Right

Deliberations Matter – Closing Out the Hearing

- All quasi-judges should have—and take—the opportunity to speak during deliberations.
- When getting ready to act, make sure the decision document is accurate and reflects your criteria, findings, desired conditions, etc.
    - If conditions of approval are being added or revised, be sure they are appropriate; follow your attorney and staff suggestions.
- Take the time you need to prepare the proper decision document, even if it requires another meeting.
- Similarly, if you are single decisionmaker—e.g., a Clerk empowered to revoke a license or a supervisor affording procedural rights—use your decision document to show your thought process.

Doing Due Process Right

Due Process and Administrative Process

- While our focus in this presentation has been due process for quasi-judicial bodies, due process requirements can apply to a multitude of other municipal decisions made by individuals, ranging from employment decisions, to termination of utility service, to certain types of election decisions made by the election official.
- While what "process" is "due" will vary depending upon applicable laws, the interests at stake, and the deprivation at issue, the key concepts we have discussed here—**notice, opportunity to heard, and a fair and impartial decision**—are of universal importance.
- Embrace the spirit and intent of these concepts! Confer with your counsel on what is required and, in cases of doubt, err on the side of process!

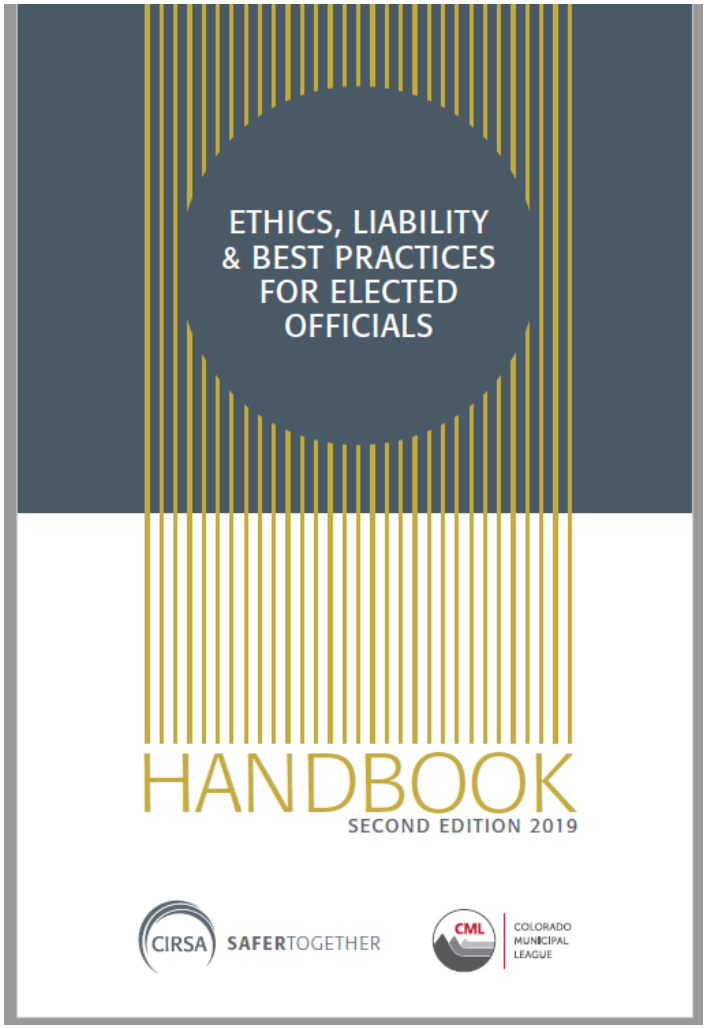
Conclusion

- The most important job for quasi-judges to is provide great process!
- Therefore, respect, follow, and be a champion of the fair and due process that you are set up to provide. Avoid process flaws and other acts that can cast doubt or create a sense of unfairness.
- Know that ***if*** you've carried out your hearing fairly and properly, and ***if*** you've issued a decision that is based on your hearing record and the applicable criteria, then your decision will withstand legal challenge...
- …And interested parties and citizens will have faith and trust in how you handle quasi-judicial matters concerning their property. That's a great place to be!

Conclusion

Thank you for your public service and the opportunity to present!

Resources



CIRSA Webinar on Quasi-Judicial Proceedings Basic Training & Best Practices: https://www.cirsa.org/wp-content/uploads/2020/05/Quasi-Judicial-Proceedings.mp4

CIRSA Elected Officials Handbook: https://www.cirsa.org/wp-content/uploads/2019/06/EthicsLiabilityBestPracticesHandbookForElectedOfficials.pdf

CIRSA Elected Officials Resources: https://www.cirsa.org/safety-training/elected-officials/.

Doing Due Process Right

Speaker Bio

Sam Light is General Counsel for the Colorado Intergovernmental Risk Sharing Agency (CIRSA). Previously Mr. Light was a partner with the Denver law firm of Light | Kelly, P.C., specializing in municipal and other public entity law, insurance law and defense of public entities and elected officials. Sam is a frequent speaker on municipal law and has practiced in Colorado since 1993.

About CIRSA

Colorado Intergovernmental Risk Sharing Agency

- Public entity self-insurance pool for property, liability, and workers' compensation coverages.

- Formed by in 1982 by 18 municipalities pursuant to CML study committee recommendations. Member-owned, member-governed organization.

- Not an insurance company, but an entity created by IGA of our members. Total membership today stands at 282 member municipalities & affiliated entities:
  - 278 are members of the PC pool
  - 139 are members of WC pool

- CIRSA views proactive approaches to risk management as critical member services – is a win-win.

PACKET MODIFICATIONS

March 23, 2023

Addition of the Town Attorney's Power Point presentation

TOWN OF PAONIA
LAND USE & DUE PROCESS

Board of Trustees
Planning Commission
Board of Adjustment

March 23, 2023

Disclaimer

This presentation has been prepared for general informational purposes, and is not legal advice. The information in the presentation is intended to help the Town's land use authorities understand the area of law to help them ask the right questions. No person viewing this presentation should act or refrain from acting based on any information provided in this presentation, as specific circumstances may require special consideration. The Town Attorney has an attorney-client relationship with the Town of Paonia government. This presentation does not establish an attorney-client relationship with any other person or entity; all such persons and entities should contact an attorney for advice on specific legal issues.

Overview

- Town's land use authority
- Understanding your role
- Land use & subdivision applications
- Due process duties that come with land-use decision making
- Best practices for hearings
- Tips for avoiding trouble as a quasi-judge
- Tips for good deliberations, including a case study
- Issues related to closing out the hearing process
- Land use decisions in court
- Vested rights
- Time for questions/general discussion

Town's Land Use Authority

- Delegated by the State of Colorado by statute
  - Local Government Land Use Control Enabling Act of 1974, Title 29, Article 20, Part 1, C.R.S.
    - Enables local governments to regulate the use of land within their respective jurisdictions through zoning & subdivision regulations
  - Planned Unit Development Act of 1972, Title 24, Article 67, Part 1
    - The Planned Unit Development (PUD) is a zone district category that is designed to allow for more flexible site design and development than that allowed within traditional zone district categories
- Limited by:
  - US constitutional principles such as due process, equal protection, and takings limitations impose restrictions on land-use planning
  - Parameters of State Law: Planning and Zoning, Title 31, Article 23, Parts 1–3, C.R.S.

Understanding your role

- At times, you act as "legislators"—i.e., making general policies and rules that apply generally
  - e.g., when working on the comprehensive plan and general code updates
  - Planning Commission and Board of Trustees
- Other times, you act as "judges," deciding specific cases where you apply the general rules to specific persons/property
  - e.g., land use & subdivision applications
  - For these "quasi-judicial" matters—which include most land use applications—you are essentially acting as judges and therefore must behave like judges
  - In this role you are required by law to provide "due process" and a failure to provide due process exposes you and the Town to liability
  - Planning Commission, Board of Trustees, Board of Adjustment

Your "quasi-judicial" role

- At a very basic level, your charge is to determine the rights of a specific person/entity to do something with a specific piece property

Land Use Applications

Chapter 16, PMC

- Amendments to Ch. 16 or Zoning Map – Ch. 16, Art. 14, PMC
  - Planning Commission (PC) & Board of Trustees (BOT)
- Special Review Uses – Ch. 16, Art. 4, PMC
  - PC & BOT
- Planned Unit Development (PUD) – Ch. 16, Art. 5, PMC
  - PC & BOT
- Home Occupations – PMC § 16-11-20
  - BOT
- Variances & Appeals of Administrative Interpretations/Decisions – Ch. 16, Art. 15, PMC
  - Zoning Board of Adjustment (BOA)

Subdivision Applications

Chapter 17, PMC

- Major Subdivision – Ch. 17, Art. 6, Div. 2
  - PC & BOT
- Minor Subdivision – Ch. 17, Art. 6, Div. 3
  - Town Administrator (recommendation) & BOT
    - **Code needs work to address conflicts!*
- Planned Unit Development (PUD) – Ch. 17, Art. 3
  - Simultaneous hearings may be held for the review and approval of a subdivision and PUD involving the same land
  - Planning Commission & Board of Trustees

Questions so far?

Decision-Making

- Remember: at a very basic level, your charge is to determine the rights of a specific person/entity to do something with a specific piece property
- In other words, decisions implicate property rights
- No State, or local government acting by and through enabling authority bestowed upon it by the State, may "deprive any person of life, liberty, or property without due process of law."
- So, what does "due process of law" entail?

Requirements of Due Process

- Quasi-Judicial Principles are designed to ensure due process:
  - Notice and an opportunity to be heard
    - Notices given by mail, posting, publication
    - Right to present and challenge evidence and testimony; creation of a record
  - Fair and predictable procedures
    - Consistent processing Criteria are available and easily understood (e.g., variance criteria)
  - An impartial decision maker (the PC, BOT, & BOA)

What is a Quasi-Judicial Hearing?

- A simplified trial
- A process whereby legal standards are applied to a specific set of facts developed at a hearing

Conducting the Hearing

- The hearing procedures "need not be overly strict or unduly rigid." Thus:
  - Formal rules of evidence don't apply
  - No "formal" examination of witnesses
  - Chairperson rules on evidence issues
  - Hearsay can be admitted
  - Documents need not be certified
  - Hearing can be informal– but not a "conversation"
    - Create a clear record!

Conducting the Hearing

- But, "the relaxed procedure" is not a license to violate fundamental fairness:
  - Interested parties must have a meaningful opportunity to be heard
  - Provide parties time to present, respond and object to evidence
  - Keep a clear record of evidence submitted
  - Stay on topic and relevant standards

Best Practices for Hearings

- Have an opening script; this is an opportunity to explain how the hearing will proceed
- Have a list of applicable decision-making criteria
- Clearly identify what options for action are available
- Follow uniform rules of procedure for conduct of your hearings – helpful to you and the public

Questions?

Avoiding Trouble as a Quasi-Judge

- Fundamental fairness requires a fair, unbiased and impartial quasi-judge, **both in fact and appearance**
- Land use decisions are not overturned because the reviewing judge didn't "like your decision"—legal rules are deferential to the substance of what you decide
- Rather, they more likely overturned because the quasi-judges—as a group or because of individual behavior—deprived the applicant or other participant of fundamental fairness

Avoiding Trouble as a Quasi-Judge

- Don't make up your mind before the hearing
- Don't speak with one side or the other before a hearing (ex parte contacts)
- Don't participate if you have a financial or other personal interest in the matter (ethics)
- Don't make your decision on the basis of irrelevant or non-existent criteria

Avoiding Trouble as a Quasi-Judge

- Don’t participate if you know you can’t be fair and unbiased
- Don’t participate in a decision if you weren’t there for the entire hearing (or didn’t at least listen to the rest on tape)
- Don't make your decision based on things you “know” but did not “learn” at the hearing – For example:
  - Don’t get on Google and offer your own evidence.
    - Use proper avenues to get the information you need within the hearing process
  - Don’t offer evidence of your own experiences as the basis for your decision
    - Aren’t you in essence saying “I’m voting for/against the application based on my own testimony?”
- Do ask for advice on criteria or application of criteria to facts.

Site Visits/Drive-Bys?

- "Site visit" is used to describe an intentional visit to a site for which an application has been submitted to the subject land use authority
- Site visits can be problematic because
  - They raise the risk of *ex parte* contacts; and
  - They can heighten the "judge as a witness" problem
    - i.e., offering your own testimony
- Always ask what would be gained by a site visit that cannot be gained by presentation of evidence at the hearing?
- At the end of the day, in small towns "drive-bys" and "site visits" happen

Site Visits (continued)

- If you do a drive-by or make a site visit, you are likely to develop impressions about an application *outside of the hearing*
  - Can be a clear path for an applicant to appeal your decision to the District Court!
- Those impressions may find their way into the hearing record
  - "I drove by the site and it doesn't look like there's enough space on the site to serve your required off-site parking."
- If impressions find their way into the hearing record, the applicant must be given an opportunity to respond/rebut
- If you believe your site visit may impact your ability to decide an application on facts developed at the hearing, disclose and do not participate in the remainder of the hearing or vote

Questions?

Ex Parte Contacts

- A critical duty of the quasi-judge is to avoid "ex-parte" contacts, meaning any "outside the hearing" discussion with an interested party about the subject matter of the hearing
- A proceeding loaded with "ex-parte" contacts is a clear path to having your decision overturned and, just as important, having the integrity of your process eroded
- When we advise against ex-parte contacts, we are protecting your ability to participate in the decision-making, and your ultimate decision
- An ex-parte contact can be problematic whether with the applicant, citizens, or in some instances, staff

Dealing with ex parte contacts

- **Keep your "talking points" ready:**
  - "I'd love to hear your views, but as a BOA member, I can only consider evidence presented at the hearing. Please attend the hearing on ____ so that I can hear and understand your viewpoint."

Deliberations Matter

- Board discussion of the evidence is critical; this is where:
  - The Board formulates the bases of its impending decision (after the close of the public hearing)
  - The applicant and others obtain an understanding of your position
  - The reviewing judge looks to understand why you decided the matter as you did (and whether it comports with your criteria and the law)
  - Deliberate – Talk Among Yourselves

Questions?

Decision Criteria

- In preparing for the hearing & deliberation, consider:
  - What are the key issues?
  - What relevant questions do I have that will help me decide those issues?
- Remember - when you are prepared to discuss the criteria, you will arrive at a discussion of the defensible reasons for your decision.
- Case Study

The Irregular Lot Example

- Evidence presented at hearing:
  - The applicant is the owner of an irregularly-shaped residential lot. The front lot line is not perpendicular to the side lot lines, and the applicant wishes to build a house that does not meet the minimum 20-foot front setback along the entire frontage.
  - The property is irregularly shaped, as recorded on the original subdivision plat in 1972. The property is currently undeveloped.
  - No other lot in the neighborhood is irregularly shaped, but other lots have been granted setback variances.

The Irregular Lot Example

- Evidence continued:
  - To construct a reasonable house on the parcel and meet the minimum 20-foot setback along the entire frontage, the applicant would have to site the house very far back on the property, resulting in a very large front yard, but a very small rear yard affording minimal utility and privacy.
  - In order to maximize the amount of useful back yard, the applicant would like to site the house with a reduced front setback. The front setback would be only 5 feet at the southern corner of the house; the setback would increase to a minimum of 20 feet at the northern corner.
  - The only alternative would be to build a much smaller house, or to have no usable backyard.

The Irregular Lot Example

PMC § 16-5-10(c), Variances

- Where, by reason of exceptional narrowness, shallowness or shape of a specific piece of property at the time of enactment of the initial ordinance codified herein, or by reason of exceptional topographic conditions or other extraordinary and exceptional situation or condition of such piece of property, the strict application of any regulation enacted under this Chapter would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the owner of such property, the Board of Adjustment may authorize, upon an appeal relating to said property, a variance from such strict application so as to relieve such difficulties or hardship; provided, however, that:
  1. The variance granted is the minimum necessary to alleviate such practical difficulties or undue hardship upon the owner of said property.
  2. Such relief may be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of the general plan or this Chapter.
  3. The circumstances found to constitute a hardship were not created by the appellant, are not due to or the result of general conditions in the district and cannot be practically corrected.

The Irregular Lot Example

- Who makes this decision?
- What questions do you have?
- What further evidence, if any, do you need?
- What findings should the body make in its decision?
- Should the body grant the variance?

Closing Out the Hearing

- While deliberating and getting ready to act, maintain focus on what is pending before you.
- Understand your options and work towards an option, which in hearings will include:
  - Approve, approve with conditions, or deny a land use application
  - Affirm or overturn order, requirement, decision or determination made by the Town Administrator (BOA)
  - Continue for further consideration and/or action at a future date
    - Do you need further evidence to make your decision?

Land Use Authorities in Court

- Colorado Rule of Civil Procedure Rule 106(a)(4): Is a rule established by Colorado Supreme Court for appealing quasi-judicial decisions.
- District Court – "On the Record Review":
  - Decision will be overturned if reviewing body has exceeded its jurisdiction or abused its discretion
  - The plaintiff must overcome the legal presumption that the reviewing body's actions are proper
  - But, there must be proper procedures & competent evidence to support the decision
  - Court reviews the authority record, not new evidence
  - Usual remedy is to set aside the decision, which results in a new hearing before the land use authority

Constitutional Claims

42 USC Sec. 1983

- But, a litigant could pursue a claim under federal law, which can include a claim for money damages.
- For example, 42 USC Section 1983 states:

  "Every person who, under color of any statute, ordinance, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States … to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress."

- Does not itself establish or create any substantive rights. It is a remedy in money damages for violations of constitutional or other federally protected rights.

Section 1983

- Actions of government entities and public officials in the course of their responsibilities will be considered actions "under color of law."
- For liability under Section 1983, there is no monetary limit on the damages a plaintiff can win.
- Additionally, a plaintiff who "substantially prevails" in a Section 1983 claim will be entitled to an award of attorneys' fees.
- Attorneys' fees can far exceed any damages award – a nominal damages award can support hundreds of thousands of dollars in attorneys' fees.
- This is why procedural fairness in quasi-judicial hearings is so critical: it's a constitutional right that can be enforced through Section 1983 and the remedies available for a constitutional violation.

Lessen Your Risk? Have a Good Process!

- **IF** your hearing has been carried out fairly and properly, and **IF** your decision has been issued based on facts in the record and application of proper legal criteria, then:
  - Decision will be upheld;
  - Other recourse (such as a claim of a constitutional violation) will likely be unavailable or unsuccessful; and
  - The general risk of dispute and will be reduced.
- But **IF** there are process flaws or a lingering sense of unfairness, opponents and/or a denied applicant may be more inclined to seek legal redress.

Can I "undo" a land use decision?

- Land use decisions often lead to the establishment of "vested rights" to do something with a particular property
  - Statutory (approval of "site specific development plan")
  - Common Law (detrimental reliance)
- Land use authorities are prohibited from interfering with vested rights
- Landowners can prevent land use authorities from interfering with vested rights by asserting "equitable estoppel" in court
  - To prevail in an estoppel defense, a property owner must demonstrate the land use authority's interference with a statutory vested right gained through approval of a "site specific development plan," or a common law vested right established through substantial steps taken by the owner in genuine (good faith) and reasonable reliance upon a building permit or upon the zoning that was in place at the time the development was originally undertaken.
- Very fact specific

QUESTIONS?

THANK YOU FOR YOUR SERVICE!