

## DECISION-MAKING

### Types of Commission Decisions

Planning commission decisions can be either legislative or quasi-judicial (adjudicative) in nature. Substantive due process (**reasonableness** of decision) rules apply to legislative decision making while procedural due process (**fairness** of the process) rules apply to quasi-judicial proceedings.

#### *Legislative Decisions*

Legislative decisions are decisions that make or interpret policy. The decisions may be broad ranging, such as recommending the adoption of a comprehensive plan or recommending priorities for the capital improvements program, or very specific, such as recommending amendments to the platting code or advocating for a new staff member. The key element of legislative decisions is that they apply equally (or are meant to apply equally) to everyone in the community or to everyone in a class of persons, not just to a specific individual. Another element is that the legislative body has discretion to adopt or not adopt the legislative proposal. A law that sets speed limits is legislative because it applies to and affects all those persons who drive and the legislative body has discretion as to which limit to adopt or whether to adopt any speed limit at all. In Alaska, a rezone is legislative. It affects all those with property in the area that is rezoned and the

legislative body has the discretion to approve or deny the rezoning.

Although there may be statutory rules that govern legislative proceedings, there are no procedural due process rules that apply to legislative proceedings. Courts are hesitant to invade the procedural realm of the legislative branch government. However, if a rezone was clearly contrary to the comprehensive plan, a court could easily find such an act to be arbitrary and capricious, no matter how many hearings were held or how many persons supported the rezone.

#### *Quasi-Judicial Decisions*

Generally, quasi-judicial proceedings involve decisions that have a direct effect on the rights and liabilities of a single person or, occasionally, a small group of identified persons. Quasi-judicial proceedings deal with matters in which a determination will be made on whether a person has shown that they have met all the established requirements that give them a right to a permit or other entitlement. The commission must determine whether, from all the evidence presented, the required standards have been met.

Variations and certain types of permits are examples of entitlements that must be granted if the applicant is able to show that their request or proposal meets all the required standards. Quasi-judicial proceedings also occur when the commission sits as a Board of Adjustment



### Decision-Making

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- Conflict of Interest
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“The very first thing a new commissioner needs know is about the meeting routine. They need to know how votes are cast and recorded and they need to know about the unwritten rules that the old hands usually observe.”

- Faye Palin,  
MSB Planning Commissioner

to hear appeals from the decisions of administrative officials, such as the building official or planning director. A proceeding to determine whether a previously granted permit should be revoked is also a quasi-judicial proceeding to which the full array of procedural due process rules apply. Platting approval is also a quasi-judicial proceeding.

### Due Process

“No person shall...be deprived of life, liberty or property without due process of law;...”

- Fifth Amendment to the U.S.  
Constitution

These words in the U.S. Constitution and similar words in the Alaska Constitution give rise to a number of rules applicable to the decision-making process of most planning commission proceedings. These are rules that the courts have found necessary to ensure that a person whose rights are at stake in a governmental proceeding receives the process that is due them. See Due Process rules at right.

### Ex Parte Contacts

Direct communication between a citizen and a commissioner is common for planning commissioners because of their visibility in

the community and the nature of their work. Discussions with commission members outside the public forum can be a beneficial way to exchange information and help keep commissioners informed of residents' attitudes. However, a distinction must be drawn between contact on general or legislative matters and contact on quasi-judicial matters that are currently before the commission or scheduled to come before the commission. While such contact may be permissible in a proceeding on a legislative matter (where the contact is known as lobbying), it is impermissible in quasi-judicial proceedings.

### What Does Ex Parte Mean?

*Ex parte* is a Latin term that means, "from or on one side only." It is the label for private communications between an interested party in a quasi-judicial proceeding (i.e., variance, conditional use permit, or subdivision approval) and a member of the body that is hearing the matter. One or more members of the commission will have received evidence that may influence their vote, but the other parties to the proceeding will be unaware of this evidence and will not have an opportunity to rebut it or to take it into account in presenting their arguments. This is a problem. Just as it would be unfair to let only one side of a proposal to present evidence at a hearing, it is also unfair to permit any side to present evidence to the decision makers in private. The essential feature of an *ex parte* contact is that someone with an interest in a quasi-judicial



### The Due Process Rules

Key to the decision-making process is the principle of due process. The due process clause is the most important, pervasive, and frequently encountered constitutional principle. The fundamental concept underlying due process law was embodied in the Magna Carta in 1215. The framers of the U.S. Constitution incorporated this important phrase in the Fifth Amendment as a limitation on the power of the federal government. The ratification of the Fourteenth Amendment after the Civil War took the phrase “due process of law” and used it to limit the actions of state government.

The principle of due process contains two basic components:

#### Procedural Due Process

This requires that before any person is deprived of life, liberty, or property, he must be given a fair hearing or an opportunity to be heard and defend against proposed action to be taken against him.

What does this mean in the context of planning? Provide adequate public notice. The notice must be sufficient enough to make all interested persons aware of the matter, where additional information may be obtained, and when and where to participate. The notice should be well in advance of the hearing or meeting.

There must be a fair hearing before an impartial tribunal (i.e., the planning commission). Interested persons must be given a reasonable opportunity to present their case. This means an orderly, well-run hearing at a reasonable time and at a reasonable location.

Keep a record of the public process. This means that all information/evidence used in the decision and the actual decision made (staff reports, minutes, testimony, and resolutions) must all be kept as part of the “record”.

#### Substantive Due Process

This requires that no person may be deprived of life, liberty, or property under circumstances that are unreasonable, arbitrary or capricious. This constitutes a major limitation on the police power of the states and is relevant to the concept of “takings”.

What does substantive due process mean in the context of planning? Once again, it is about fairness and ensuring that the commission’s decision is not arbitrary or capricious, and that all decisions are based on the facts in the case.

Remember, the recurring principal that supports the procedural due process rule is **fairness**. The recurring principal that supports the substantive due process rule is **reasonableness**. The lack of required due process in a commission proceeding forms the basis for the reversal of a commission decision. It is more important to be fair than “right”.

### Procedural Due Process

- ✓ fair hearing
- ✓ notice
- ✓ accurate record
- ✓ impartial





decision before the commission – an applicant, a representative of an applicant or an opponent of the application – is attempting to influence a vote outside the public forum. Unless corrected, *ex parte* communications can result in a violation of procedural due process.

### **What To Do When It Occurs**

*Ex parte* contact can occur in a number of ways, and many are quite innocent and unintentional. Telephone calls, informal meetings, lunches, or even a casual encounter on a street corner all present opportunities for citizens to express facts or an opinion about a quasi-judicial matter to a commissioner. As soon as a commissioner senses that he or she are about to be involved in an *ex parte* contact, he or she should stop the citizen and explain that commissioners are not permitted to hear anything about the matter except at the hearing. The commissioner should recommend that the citizen submit their comments in writing to the commission or appear and testify on the record along with the other citizens who are concerned about the matter.

If discussion of the matter comes up among members of an association at a meeting of the association the commissioner is attending, the commissioner should attempt to have the discussion put on hold until the commissioner can leave the room.

Site visits, whether by an individual commissioner, a commission subcommittee,

or the entire commission must be handled carefully, particularly if the applicant or an opponent is present and attempts to point out particular features of the site or provide other information relevant to the application. If you have any questions regarding making a site visit, consult your municipal attorney to determine if there will be a problem with the quasi-judicial proceeding before the commission. And, don't forget that a site visit by the commission, a commission subcommittee, or the lesser of a quorum or 4 members is subject to the Open Meetings Act. Adequate public notice of such a site visit must be given and the public must be able to attend and observe the visit.

### **Correcting Ex Parte Contacts**

If you have been involved in an *ex parte* contact under any circumstance, you may be able to overcome the fairness problem by disclosing the contact and the substance of what was related to you at the beginning of the hearing. This will get the evidence you received on the record and out in front of the interested persons. Then, you should state whether you believe that the contact has swayed your view of the matter and whether you can give an unbiased view to all the evidence presented.

### **Conflict of Interest**

As public officials, commissioners have a duty to make decisions in the best interest of the public without the influence of personal interests. When a commissioner has a financial interest in a matter before

the commission, that commissioner has a conflict of interest and usually may not participate in the decision on the matter.

### *What Constitutes a Conflict of Interest in Alaska?*

AS 29.20.010(a)(4) requires that each municipality (including home rule) adopt a conflict of interest ordinance which provides that:

(4) a municipal employee or official, other than a member of the governing body, may not participate in an official action in which the employee or official has a substantial financial interest.

However, the law does not provide us with a definition of what "substantial financial interest" means nor does it tell us what procedure to follow to determine whether a substantial financial interest exists. Because these essential details are missing in the statute, each municipality should address them in the ordinance that the statute requires it to adopt. While other subsections of this statute set out a procedure that could allow a governing body member to participate in a decision in which the member has a substantial financial interest, these subsections do not apply to any other municipal body, such as a planning commission. The subsection that applies to planning commissions (and platting boards) quoted above, is absolute: if a member has a substantial financial

interest in a matter, that commissioner is prohibited from participating in official action on that matter.

### *What Constitutes a Substantial Financial Interest?*

How much interest must there be to constitute a substantial financial interest? You must review the conflict of interest ordinance your municipality has adopted because an interest that rises to a substantial financial interest in one municipality may be defined as not substantial by another municipality. For example, one municipality might define a substantial financial interest as the ownership of any amount of stock in a corporation. Another municipality might define it as ownership of more than one tenth of one per cent of all the outstanding shares of a corporation. In the first example, one share of AT&T would be sufficient to prohibit a commissioner from participating in a commission matter involving an application by AT&T for a tower permit. In the second example, a commissioner who owns 200 shares of AT&T would not have a substantial financial interest in AT&T.

Another factor that should be addressed in the conflict of interest ordinance is the effect of financial interests held by certain persons who are related to the public official. For example, the financial interests of a spouse are almost always viewed as being held by the public official for conflict of interest purposes. The interests of dependent children and parents is also





often included. Some ordinances include the interests of independent children, grandchildren, parents, grandparents, brothers, sisters, aunts, uncles, cousins, and other more distant blood relatives. Your conflict of interest ordinance should tell you which of your relatives' financial interests would be deemed to be yours for conflict of interest purposes.

### *What To Do If You Have a Conflict of Interest*

If you think that you might have a conflict of interest in a matter coming before the commission, do not wait until the meeting to raise the issue unless that is the procedure in your conflict of interest ordinance. In any event, if you have any doubts, you should contact your municipal attorney or request your planning director to raise the question with the attorney well before the meeting. Your attorney is the best person to evaluate your possible conflict of interest.

If your ordinance provides that the commission determines whether a conflict exists, having your attorney's opinion on the question beforehand will help the commission make an informed decision on the conflict question. This will avoid unnecessary delays that might occur if the commission decides to seek the attorney's advice on the question.

If you have a conflict of interest, your ordinance may require that you publicly declare the conflict and abstain from voting on the matter. To meet the

requirements of the statute, it should require that you abstain from participating in any way in the decision. This would include the discussion and debate that precedes the vote on the matter. In fact, the recommended practice is for the commissioner with the conflict to vacate his or her seat and leave the room during the discussion of the matter and until the decision has been disposed of. This reduces the possibility and appearance that the commissioner's presence is affecting or influencing the decision.

### *Appearance of Fairness*

A discussion of conflicts of interest often includes consideration of the appearance of fairness doctrine. Simply stated, the doctrine requires that not only must hearings be fair, there must not even be an appearance of unfairness; even if no actual unfairness exists, the mere appearance of unfairness must be avoided. The application of this doctrine improves the appearance of the integrity of the commission and its decisions. However, its application often makes the concept of "substantial financial interest" irrelevant because it can require abstention when there is no financial interest at all.

Fairness is the touchstone of procedural due process and is the basis for the courts' creation of the appearance of fairness doctrine. While procedural due process has a place in quasi-judicial proceedings, some courts have imposed the appearance of fairness requirement on legislative proceedings.

**Financial Disclosure**

Alaska's Public Official Financial Disclosure Law, AS 39.50, must also be considered in relationship to the conflicts of interest requirements. In fact, in the past, it was called the Conflict of Interest Law, even though it has never regulated or prohibited conflicts of interest. It only requires that certain public officials, including planning commission members, annually file a statement disclosing the official's financial interests held during the preceding year. Public financial disclosure is intended to discourage public officials from promoting a private or business interest in their performance of a public duty and to assure that public officials are free of the influence of undisclosed private or business interests in their official acts. The law is further intended to develop accountability in government by permitting public review of the personal finances of office holders.



Members of a municipal planning commission must file the disclosure statement with their municipal clerk. You should be able to obtain from your municipal clerk a copy of the instruction manual published by the Alaska Public Offices Commission (APOC) that explains the requirements of the law. Failure by a commissioner to make a timely disclosure required under AS 39.50 will not jeopardize commission decisions; however, it will subject a commissioner to civil fines imposed by the Public Offices Commission

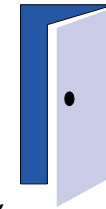
or possible misdemeanor prosecution by the state.

AS 39.50 requires that each financial disclosure statement be an accurate representation of a commissioner's financial affairs and, to the extent known, the financial affairs of specified family members for the prior calendar year. It must be filed under oath.

AS 39.50.145 allows municipalities to exempt themselves from the financial disclosure requirements of AS 39.50 upon an affirmative vote of the residents. Your municipal clerk or the Alaska Public Offices Commission can tell you whether your municipality has exempted itself from the financial disclosure requirements of AS 39.50.

**Open Meetings Act**

Alaska's open meeting law (AS 44.62.310) has been in effect since Statehood; however, until 1980 there was no mention of the act in any court decisions. Since 1980 there has been an increase in litigation concerning the Open Meetings Act. This interest in the act should cause local planning commissions to carefully examine their practices to ensure compliance with the Act.

**What legal basis do you use for your decisions?**

- ✓ Federal and state constitutions
- ✓ State enabling legislation (AS 29)
- ✓ Municipal charter
- ✓ Local regulations
- ✓ Procedures in your code
- ✓ Commission bylaws



### *What Does the Act Require?*

AS 44.62.310(a) provides that:

All meetings of a governmental body of a public entity are open to the public [with certain exceptions].

The purpose of the act is to ensure that the public has a reasonable opportunity to observe governing body decision making. Decision-making involves not just the voting on a matter, but the discussion and argument leading to the vote and the information gathering process as well. The Act gives the public the opportunity to observe, but not the right to speak or give testimony at meetings. The local ordinances usually provide specifically for the right to be heard at meetings.

Municipal assemblies, city councils, boards, commissions, committees, and similar bodies with authority to establish policies, make decisions, advise, or make recommendations are covered by the Act. The Act further provides that any action taken contrary to the Act is voidable. In general terms the Act requires:

**Open Forum.** Any fact gathering, investigation, or discussion regarding public business, formal or informal, must be open to the public.

**Reasonable Public Notice.** Unless a legitimate emergency exists, reasonable

public notice should be provided for all meetings of the commission. The notice must include the date, time and place of the meeting. It is common to provide a week's notice or longer. Notice of commission meetings must be posted at city hall or borough headquarters and must be given in a consistent fashion for all commission meetings.

**Teleconferencing.** Meetings held by teleconference must be open to the public and must meet Open Meeting Act requirements, including giving notice of the teleconference site locations and having available commission materials at teleconference sites.

**Open Voting.** Except for a vote to organize the commission, the voting shall be conducted so that the public knows the vote of each person entitled to vote.

**Executive Session.** Specific procedures must be followed in order to hold an executive session, that is, a session in private behind closed doors.

### *How is the Act Interpreted?*

The act is interpreted liberally and in favor of openness. Any discussion of public business by a majority is definitely a meeting; however, a majority may not be required for a violation of the Act to occur. For all bodies with eight or more members, a gathering of four members is sufficient. A meeting encompasses every step of the decision-making process including

information gathering and preliminary and informal deliberations where no decision is made. To be safe, whenever commissioners are gathering facts, exchanging ideas, suggesting strategies, or otherwise dealing with matters of substance, they should be alert to the possibility that they are engaged in a meeting of a public body and must comply with the Act.

### *What Happens If the Act Is Violated?*

The Alaska Supreme Court has taken a stern view of violations. Any action taken by the planning commission in violation of the Open Meetings Act can be made void by the court.



When the commission follows the procedures required by the Open Meetings Act, political or legal problems are seldom raised. It is when the procedures are ignored, either intentionally or unintentionally, that the public and the press may become alarmed and assume the worst about secret meetings. Planning commissioners should ensure that proper procedure is followed at all times.



