



**HAYS AREA BOARD OF ZONING APPEALS MEETING
AGENDA
JANUARY 8, 2014
8:15 A.M.**

- 1. Call to Order by Chairman:**

- 2. MINUTES: Consider approval of the minutes from the December 18, 2013 meeting (extended from the December 11, 2013 public hearing):**
ACTION: _____

- 3. TRAINING SESSION AUDIO CONFERENCE PROGRAM – Conducting the Zoning Board of Appeals Hearing (Approximately 60 minutes)**

- 4. OTHER:**
ACTION _____

Enclosed: Draft Minutes
Copy of Application & Supporting Documentation

If you will be unable to attend please contact the Planning, Inspection and Enforcement office at 785- 628-7310. Thank you. Any person with a disability and needing special accommodations to attend this meeting should contact the Planning, Inspection and Enforcement office (785-628-7310) 48 hours prior to the scheduled meeting time. Every attempt will be made to accommodate any requests for assistance.

**DRAFT MINUTES
HAYS AREA BOARD OF ZONING APPEALS
Continued Meeting
COMMISSION CHAMBERS IN CITY HALL
MINUTES
DECEMBER 18, 2013
8:15 A.M.**

1. CALL TO ORDER: The Hays Area Board of Zoning Appeals met on Wednesday, December 18, 2013, a continued meeting from December 11, 2013, at 8:15 a.m. in Commission Chambers of City Hall for cases #20-13 and #21-13.

Roll Call:

Present: Lou Caplan
Gerald Befort
Thomas Lippert
Shane Pruitt
Jerry Sonntag

Chairman Lou Caplan declared a quorum was present and called the meeting to order.

City Staff Present: Jesse Rohr, Superintendent of Planning, Inspection and Enforcement, Nicholas Willis, Stormwater/Water Conservation Superintendent, and Linda Bixenman, Administrative Secretary of Planning, Inspection and Enforcement.

2. MINUTES: There was a motion by Tom Lippert with a second by Jerry Sonntag to approve the minutes from the December 11, 2013 with the following amendments noted on page 3 by Tom Lippert: strike last sentence in first paragraph; 5th paragraph first sentence, Tom Lippert expressed concern; 6th paragraph, correct name to "Larry"; paragraph 7 to remove "for the same". Jesse Rohr noted a correction on paragraph 6 should be "3 gallons".

Vote: Ayes: Lou Caplan
Gerald Befort
Thomas Lippert
Shane Pruitt
Jerry Sonntag

3. CASE #20-13 and 21-13 Chase Technology LC, Larry Schaffer, Owner – 1112 E 27th St – variance request and special use for car wash request ZONED "C-2": Jesse Rohr presented the above property on the overhead visual.

This is a continued public hearing on the two above cases that were tabled from the December 11, 2013 meeting to give the board a chance to review the cases in light of the new information; specifically as follows:

1. Water Conservation
2. How it would affect abutting property owner to the west
3. Traffic Issues along 27th
4. Safety along the sidewalk on the east side
5. Screening on the south side

Larry Shaffer thanked the board for their consideration of the appeal. He is asking for a 22 foot variance to reduce the building setback on the east front yard property line (General Lawton Rd) from the required thirty- five feet to thirteen feet to allow for the construction of a “state of the art”, green technology four bay car wash; two automated and two self-serve and equipment room.

He handed out information to show the difference in water savings from the “Soft Touch” (high density foam material equipment) to the “Touchless” (high water pressure equipment). There were two scenarios for each type of equipment; a basic wash and a top wash. Total water consumed for the “Soft Touch” was 44 gallons for a total wash versus 75 gallons for the “Touchless”; a 63% savings per wash. In comparing the water savings from his two locations, the new equipment would save 60% of water. He was not able to compile the numbers from water usage from his Great Bend car wash that has the new equipment since he had to replace a water line.

Nick Willis recommended that the board require that the car wash comply with the water conservation language as recommended by City Staff as follows: specifically the plumbing, landscaping and the equipment to meet section 415 of the IAPMO’s 2012 Green Plumbing & Mechanical Code Supplement. It is to meet the efficiency standard maximum usage of 40 gallons per wash for in-bay automatic carwashes and the spray wands shall use no more than 3 gallons per minute. The requirements are not to be tied to a specific manufacturer.

Tom Lippert asked Jesse Rohr if there were any restrictions with the entrance in close proximity to the intersection of 27th Street and General Lawton Road. He pointed out that the drive-thru entrance on the property to the north (Kaiser Liquor) was in line with this drive- thru entrance. Also with a rough measure, the structure would be the same distance from the east property line as the proposed request.

Jesse Rohr stated “that is a good point”. He assumed that because it was a different plat is one of the reasons of a lesser setback and also that the structure was built before zoning regulations were adopted.

He had reviewed the close proximity of the drive-thru to the intersection with John Braun, Assistant Director of Public Works. Because 27th Street and General Lawton being a non-controlled intersection, and the way the proposed car wash will be configured, he had no concerns of this type of use and location of the entrance. There would be no benefit in moving the entrance further west since it is a narrow lot.

Tom Lippert asked if there were any restrictions associated with the proposed 4 foot setback on the west side of the property. Jesse Rohr explained that within a “C-2” General

Commercial and Service District, there are no setback requirements for the side yard and rear yard property lines to abutting properties. In this case, there are three front yard building setback requirements and no restrictions on the west side; although if a structure is within 10 feet of the property line, they are required to construct the structure with fire resistant materials. They would meet the fire resistant material requirements since the building would be constructed with concrete.

Lou Caplan asked if the area between the east property line and the curb was the city easement. Jesse Rohr answered that it was the city right of way. Other than the area of the sidewalk, the owner is allowed to use the right of way for landscaping or parking.

Lou Caplan asked if there was anyone in the audience for comments.

Mario Gutierrez, neighbor to the west, stated that he believes the car wash would benefit the community and the city. He had no concern for the use or the location. The only thing he asked is that there is room on the east side of his property for parked cars to back out of the parking stall. He and Mr. Shaffer plan to incorporate a way to compliment the back (south) of both lots. One recommendation by Mr. Shaffer was to expand the back driveway for another exit for both businesses.

Mr. Gutierrez pointed out that there were so many accidents at 27th and General Lawton Road. Ideally, it would be good to have a light at that intersection.

Tom Lippert asked how to avoid the tendency of a customer to drive across the sidewalk if they decided not to wait in line in the drive thru line next to General Lawton Road. Safety is dear to his heart. He suggested building a curb to keep from jumping the sidewalk or another exit for an out. Jesse Rohr added that landscaping is also a possibility.

Jerry Sonntag asked if there would be any impact of stormwater runoff. Jesse Rohr stated that the trigger for stormwater management is the increase of the impervious surface by 10,000 sq feet. He found by figuring the impervious surface that it is unlikely they would be affected by stormwater management.

Shane Pruitt asked how it would affect traffic if there was another exit along General Lawton. There may be the confusion if it is an entrance instead of an exit. Jesse Rohr recommended it would be best to address with a curb.

Shane Pruitt asked if he had suggestions for screening requirements on the south. Larry Shaffer stated that at his other car wash he has Sky Rocket Junipers to catch the trash and use for a noise barrier. He had reservations about constructing a fence; it would be full of graffiti. Using Google maps, Jesse Rohr showed the trees at the other car wash.

Tom Lippert asked if there was a restriction on the space between the street curb and building setback. Jesse Rohr stated that historically it is landscaped area. The sidewalk is to be free and clear. Cars cannot overhang the sidewalk.

Lou Caplan entertained a motion.

Case # 20-13 - Variance

Tom Lippert moved, Shane Pruitt seconded the motion in regard to case #20-13 to grant the twenty-two foot variance to reduce the east front yard building setback from the required thirty-five feet (35') to thirteen feet (13') as per the proposed site plan at 1112 E 27th St to construct a car wash based on the consideration that it meets the five statutory requirements subject to the following conditions:

1. To install a privacy fence or sufficient landscaping to the south for the purpose of buffering the sound and catching the trash from the lot.
2. Strong consideration to have a curb between the lot and the sidewalk on the east edge of the property.

Vote: Ayes: Lou Caplan
Gerald Befort
Thomas Lippert
Shane Pruitt

Nay: Jerry Sonntag

Case # 21-13 (Exception)

Gerald Befort moved, Shane Pruitt seconded the motion in regard to Case #21-13 to approve the exception for a special use permit for a car wash at the location of 1112 E 27th Street.

Tom Lippert asked to incorporate the recommended conditions into the motion.

Gerald Befort moved, Shane Pruitt seconded to restate the motion in regard to Case #21-13 to approve the exception for a special use permit for a car wash at the location of 1112 E 27th Street allowed within a "C-2" General and Commercial Service District with a special use permit. It is to be subject to the following Conditions:

1. Plumbing shall be constructed to be able to easily disconnect water used in car washing from the potable system and connect it to an alternate water supply. Water supplied for domestic uses shall be plumbed separately to allow for continued potable water usage.
2. Landscaping shall be limited to xeriscaping. Any irrigation water shall be metered separately and piping shall be installed to easily switch water source to non-potable supplies. Screening shall be required where the lot abuts the residential area to the south.
3. Efficiency of equipment shall meet section **415.0** of the IAPMO's 2012 Green Plumbing & Mechanical Code Supplement. The facility shall not use the exemption allowed for bus and large commercial vehicle washes. Any

subsequent changes to the facility or failure to maintain equipment in proper working order causing water usage to exceed allowable amounts under this code shall be reason for the immediate revocation of the special use permit.

Section 415.0 reads as follows:

415.0 Automated Vehicle Wash Facilities. The maximum make-up water use for automobile washing shall not exceed 40 gallons (151 L) per vehicle for in-bay automatic car washes and 35 gallons (132 L) for conveyor and express type car washes. Spray wands and foamy brushes shall use no more than 3.0 gpm (0.06 L/s). Spot-free reverse osmosis discharge (reject) water shall be recycled. Towel ringers shall have a positive shut-off valve. Spray nozzles shall be replaced annually.

Vote: Ayes: Lou Caplan
Gerald Befort
Thomas Lippert
Shane Pruitt

Nay: Jerry Sonntag

Larry Shaffer thanked the board for their consideration of his requests.

The board adjourned at 9:00 a.m.

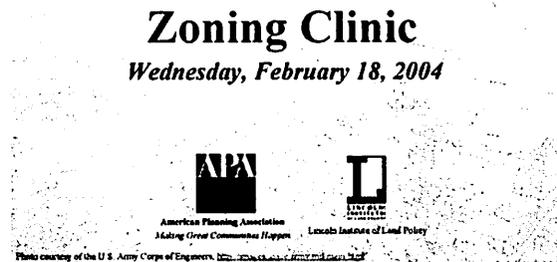
Submitted by: Linda K. Bixenman, Administrative Secretary,
Planning, Inspection and Enforcement

AMERICAN PLANNING ASSOCIATION

Zoning Clinic

Transcript

February 18, 2004



Davidson: Welcome. I am Michael Davidson with APA's Research Department. This audioconference and web conference is brought to you by the American Planning Association and the Lincoln Institute of Land Policy. The APA is a membership organization promoting safe, healthy and well-planned communities. And the Lincoln Institute is an education institute dedicated to research and education on the subject of land and its uses. Our moderator for the series is Stuart Meck, a Senior Research Fellow with APA and a former planning director. Stuart, we are ready to begin.

Meck: Hello, this is Stuart Meck with APA's Research Department in Chicago. Welcome, everybody. Today's topic is Zoning Board of Appeals, also called the Zoning Board of Adjustment -- what it is, how it functions, why we have them and how BZAs or ZBAs can function more effectively. Later in this program, I'll talk more about the history of these boards. But by way of introduction, our panel of experts is here today to help you do your job better as a board member, a planning commission or staff. And we hope this next hour can provide some useful answers and fresh perspectives to all of you.

This is our ninth season of audioconferencing and as usual, we have a remarkable geographic diversity. Today we have 115 sites from Lakewood, Florida to Gilroy, California, which I believe is the Home of Garlic, to Sioux Falls, South Dakota. Welcome, all.

And for those of you who downloaded the PowerPoint agenda, I'm going to cue you with the phrase "Next slide" when it's time to change the slide. So let's go to Slide #2.

Slide Number 1

Zoning Clinic

All of the reading materials for this audio conference are included on this CD-ROM.

Return to the Main Menu and scroll down to the Supplemental Reading Materials section.

Finally I want to remind you that we have gone paperless and you can find links to documents and websites that are mentioned in the audioconference on the website itself. All our listeners can visit the website at any time to download these materials. So be certain you take note of the address on the screen or on the registration packet we mail to you. Don't forget to ask questions, you will need to fax your questions in using the fax question form. And we're going to be taking questions for the next 30 minutes or so. Fax them to 312-431-9985.

Slide Number 2

Speakers:

<u>Jeri Parish</u> Commissioner Zoning Board of Appeals Country Club Hills, Illinois	<u>Stuart Meek, FAICP</u> Senior Research Fellow American Planning Association Chicago, Illinois
<u>Jim Driscoll</u> Principal Driscoll and Hunter Resolution Services Seattle, Washington	<u>Michael Davidson</u> Research Associate American Planning Association Chicago, Illinois
<u>Dwight Merriam, FAICP</u> Partner Robinson & Cole, LLP Hartford, Connecticut	

Next slide. Let's meet our panel of national experts. With us is Jeri Parish. Jeri is the Advertising Manager for APA's *Planning* magazine and *The Journal of the American Planning Association*. In her other life, she is a commissioner serving on the Board of Zoning Appeals with the City of Country Club Hills, Illinois, which is one of the southern suburbs in Cook County. And she has been on the board for twelve years. Jeri, hello.

Parish: Hello, Stuart.

Meck: Jim Driscoll is a hearings examiner in Washington and a principal in the firm Driscoll and Hunter. He is the author of the publication *You Be the Judge*, which is written for land use decision makers. Welcome, Jim.

Driscoll: Glad to be here, Stuart.

Meck: And we welcome back Dwight Merriam to this audio conference. Dwight has participated in past audioconferences on legal issues. And he is a planning and land use attorney with Robinson and Cole in Hartford, Connecticut. Hello, Dwight.

Merriam: Hello, Stuart.

Meck: And finally Mike Davidson, my colleague, who is a researcher in the APA Research Department and co-editor of *Zoning Practice*. He's going to be taking questions from our audience.

For the next 55 minutes or so, we're going to talk about the ZBA's functions and how those functions may differ from state to state. We'll talk about how the ZBA's approach to decision making works and how BZA members can improve the conduct of hearings and the quality of fact finding. We'll discuss an alternative to the ZBA used in some parts of the country, one that Jim is familiar with -- a hearings examiner -- a zoning hearings examiner.

Slide Number 4

Stuart Meck:
What are the ZBA's functions?

Jim Driscoll:

- Two primary functions:
 - Hear appeals
 - Grant or deny variances
- Some ZBAs have the authority to grant special exceptions or conditional uses



Photo courtesy of <http://www.colli.com>; Dan Burden, photographer

Let's go to the next slide and begin with Jim. Jim, what are the ZBA's functions?

Driscoll: Well, Stuart, the ZBA has numerous functions. It has an advisory role, which advises the city councils and the cities on zoning, types of zoning and the comprehensive plans and things of that nature. However, the main function that we would look at today is their quasi-judicial function. That's where they hear appeals of decisions made by administrative officers in connection with applications for permits. They also hear the permits themselves in some circumstances, such as a variance or conditional use permit. In doing so, the boards hold hearings, they make findings, they create the record on which their findings are made and they issue decisions. These decisions are binding. They go with the land, usually. And they are enforceable by the local communities.

Also in some communities, the zoning boards have the authority to make recommendations to the legislative body on other types of permits, be it plats and that. But for the most part the authority in the quasi-judicial hearing is related to variances and conditional use permits or special use permits. It all depends on what language your community uses in defining them.

Slide Number 5

Stuart Meek:
Are these functions only held by the ZBA or can other entities perform these functions? Are there differences from state to state?

Jim Driscoll:

- Sometimes the planning commission functions as the ZBA
- Charters can allow an appeal from the ZBA to the legislative body
- Hearing examiners

Meek: Let's go to the next slide. And let me ask you, Jim, the functions you just described -- only held by ZBAs? Or can other entities perform these functions? What I'm really saying is are there differences from state to state?

Driscoll: Yes, there are. And you have to look at your state enabling act and your local legislation to determine just exactly what your authority is. Sometimes the planning commission will function as a ZBA. And this, however, becomes a bit of a problem if there is an appeal

because who does the appeal go to? Can it go to a planning commission? Or it usually ends up in the city council. And anybody who has sat through a city council meeting knows that sometimes these types of appeals get heard, oh, about 1:30 in the morning.

In some communities, the hearings examiners hold them. We'll be discussing that a little bit more later on in this proceeding. And then in some other jurisdictions -- very rarely, though - there is a commission set up just for the sole purpose of hearing one particular type of variance or conditional use permit. That is really the minority, though. The majority of states do have zoning boards hearing these type of permits.

Stuart Meck:
What kinds of powers does your ZBA have?

Jeri Parish:

- **Empowered to:**
 - Adopt rules necessary for proper conduct of meetings and hearings
 - Find facts and make recommendations to the city council
- **Not empowered to make final decisions**

Meck: Let's go to the next slide and turn to Jeri. Jeri, you serve on a ZBA here in Illinois. What kind of powers does your ZBA have and what kinds doesn't it have?

Parish: Well, Stuart, we have the power to adopt rules necessary for the proper conduct of our meetings and hearings, provided those rules are consistent with Illinois statutes. My board is a fact-finding board. Therefore we make written recommendations to the city council. We do not have the power to make final decisions.

Stuart Meck:

What kinds of variances are there?

Dwight Merriam:

- Bulk and area variances
- Use variances
- Zoning administrators sometimes interpret what uses are the same, and citizens can appeal these decisions
- Speculate that 90-95% of granted variances would be illegal if challenged in court

Meck: Let's go to the next slide and turn to Dwight. Dwight, what are the categories of variances? Are there more than one?

Merriam: Well, Stuart, variances probably come in at least two flavors, and maybe one variation of that. And I think most of our listeners are probably mouthing the words right now. First of all, the bulk and area variances. I sometimes call them dimensional variances. That's like the person who wants to encroach three feet in a fifteen-foot wide side yard set back in order to add a carport. And I suppose I would throw in with these signs and parking variances as well. They are the most typical ones that are approved.

And then there are use variances. Remember, Stuart, that a variance, regardless of whether it's a dimension or use variance, is asking for permission to do something that is otherwise illegal under the ordinance. And use variances are highly disfavored. They're prohibited in some states by common law and by statutory law. They would be somebody, for example, wanting to put a gasoline fueling station in a residential area.

And then I would say there is probably one variation. I'm not sure it's really a variance, but it's a little like curbside justice where the zoning enforcement officer interprets the ordinance to allow a use. I think probably a pretty good example is one we see again and again -- a country club that puts up a tent periodically for weddings and banquets and so forth in the summer. And the zoning enforcement officer says, well, that's not a permanent structure. It's not a banquet hall. It's a temporary use that's accessory to the country club. And they let it go.

So I think those are the two or three types. You know, the late Donald Hagman -- you remember him, Stuart?

Meck: Yes.

Merriam: The late Donald Hagman in his book said that probably 90 to 95% of the variances are granted illegally. I think that's true, whether they're dimensional or use. But most people don't challenge them. Variances add some flexibility to the otherwise tight joints of our zoning ordinances, and that's the role they play.

Meck: Don Hagman was a Professor of Law, I believe, at UCLA.

Merriam: Yes, that's correct. And now Julian Juergensmeyer is a co-author of his treatise, which is still out there and I think still reflects that 90% rule.

Stuart Meck:

For a variance petition to be acceptable what criteria must it meet?

Dwight Merriam:

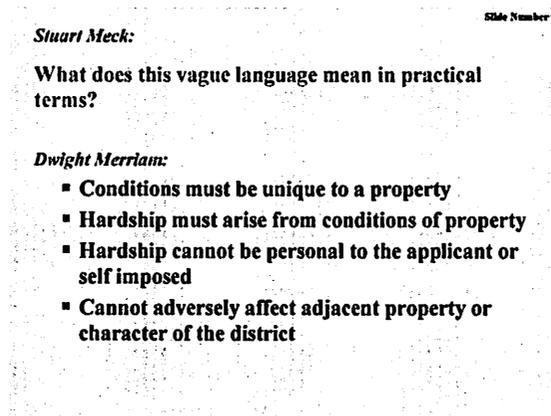
- Presence of special conditions
- Unnecessary hardship
- Practical difficulties
- Not contrary to the spirit of the ordinance
- Exact nature of criteria may differ from state to state

Meck: Okay. Let's go to the next slide and stay with Dwight. Let's talk about the criteria. For a variance petition to be acceptable, what criteria must it satisfy?

Merriam: Well, almost always somebody is going to claim that there is a special condition, whether it exists or not. The familiar litany is "unnecessary hardship and practical difficulties" -- wonderful terms that defy clear definition.

We do want to see that the proposed variance is consistent with the spirit of the ordinance. This does vary. These tests vary and their application vary tremendously from state to state. You really need to look at the state statutes and the common law just to give you a couple of examples of how they can vary. In New Jersey, public utilities are held to a lesser

standard. They also have a D type variance from a subsection where you find it for special reasons, which does not require a showing of hardship. But usually we look for a practical difficulty and unnecessary hardship with some special conditions on the site.



Meck: Okay, this is really vague language. What does it really mean in practical terms?

Merriam: Well, it means a lot of work for lawyers, Stuart. That's pretty important. But in practical terms, as you can see on this slide here --

Meck: We're on Slide 9 now.

Merriam: Yes. We're looking for conditions that are unique to the property. The classic one that everybody remembers from their law training and planning school or in law school is the rock outcrop that keeps you from building a house except one that encroaches in what would otherwise be a side yard or rear yard setback. There is a case about a triangular lot that if you applied all the setbacks and side yards, you'd end up with ten square feet. So it has to be something peculiar to the lot -- the shape or the physical characteristics.

It can't be something that arises from other than the conditions of the lot. For example, one case -- an antique car collector asked for a variance for a bigger garage. Well, that's not a hardship that arises from the lot. Another case, a family with an asthmatic child asked to put a porch in a side yard. No, that doesn't arise from something that's unique to the lot. You don't get a variance for that.

The hardship, of course, can't be self-imposed. The triangular lot case -- suppose that you were the subdivider. You laid out nine lots and you've left this crummy piece of triangular lot at the end and then you ask for a variance. You're quite unlikely to get it because you created that hardship by laying out the other nine lots.

We've seen a number of cases, which I think are terribly interesting, of people building in violation and then asking for a variance. If they build intentionally in violation, they are not likely to get a variance in most states.

Meck: Imagine that.

Merriam: Yeah, imagine that. But Stuart, the really interesting ones are where they hire a surveyor and the surveyor makes a mistake or the contractor makes a mistake and they put this addition on the house. They find out it's in the side yard's setback. Is that the owner's problem? Well, it probably isn't if the contractor is independent of the homeowner. So it can get very complex. APA filed an amicus brief on a case in New York where they had to lop off twelve stories of a building that was built incorrectly and could not get a variance. And we just had a case in Connecticut where they had to lop off the side of a building because they built illegally.

The last category, Stuart, quickly, is if somebody buys with knowledge. If you buy that triangular lot that I talked about and you knew you only had ten square feet, do you get a variance? Maybe. That's the short answer.

Stuart Meck:

Slide Number 10

What gives you the most difficulty when reaching a decision?

Jeri Parish:

- Height variance of 4 feet to allow for a fourth story
- Senior citizens complex administered by the Chicago Archdiocese with funding from HUD
- Some residents were opposed to HUD-funded construction, fearing depreciation in home value
- Concluded that the variance would not adversely affect the adjacent property or character of the neighborhood

Meck: Well, let's go to the next slide and back to Jeri. Jeri, the language that Dwight has been talking is common to many zoning codes. We have the excerpt from the Country Club Hills zoning code on the website. People can look at it. Which part of it gives you the most difficulty when you're making a zoning decision?

Parish: Well, Stuart, let me answer that question by telling you about a case that came before our board. The case involved a variance to a height requirement for the construction of a senior citizen's complex. Now our ordinance states that the maximum building height permitted is 12.2 meters, or 40 feet. The developers asked for a variance to increase the height by four feet, the reason being that they wanted to add an additional story to this structure, increasing from three stories to four.

Now this complex was to be administered by the Chicago Archdiocese with funding from HUD. The proposed location of the complex was to be in a neighborhood of very upscale homes and the architectural rendering showed that the complex would blend in very well with the neighborhood. The neighborhood residents, however, did not want any HUD funded construction in their neighborhood and they were vocal. They were very, very vocal in their opposition. They gave a litany of reasons from fearing that the property would not be kept up to depreciation in home value.

But our conclusions of findings stated that the variance would not adversely affect adjacent property or the character of the neighborhood, and we recommended the variance to the city council. Still, this was a very unpopular decision.

Slide Number 11

Stuart Meck:
What happened when the matter went to the city council?

Jeri Parish:

- The Archdiocese pulled out of the project and the Council never made a decision on it

C. Park

ZONING CODE
CHAPTER 15

Meck: Let's go to the next slide. What happened when the matter went to the city council?

Parish: Well, the Archdiocese pulled out of the project and the council never made a decision on it.

Meck: So in this case, it really turned on the question of impact to the surrounding area, which was one of the criteria that Dwight talked about.

Parish: Yes, yes.

Slide Number 12

Historical background on Zoning Boards of Appeal

Stuart Meck:

- Standard State Zoning Enabling Act, 1926
- Served as the basis for most zoning legislation in the United States
- Lead drafter Edward Murray Bassett
- Debates over a board's authority to modify the zoning ordinance
- Compromises resulted in vague language



Meck: Well, let's go to the next slide, and I thought I would just provide about a minute or so of historical background on why this language is so vague. And in fact, it turns out that there are some good reasons for it.

The Zoning Board of Appeals was a creation of the Standard State Zoning Enabling Act, which was drafted in the 1920s by an advisory committee of the U.S. Department of Commerce. It was appointed by Commerce Secretary, and later President, Herbert Hoover. And this legislation served as the basis for most zoning statutes in the country. We have a copy of it on the website.

The ZBA idea was based on a similar board in New York City, which adopted the nation's first zoning ordinance in 1916. So what the drafters of the Standard State Zoning Enabling Act did was they took this idea that was created for New York City and grafted it onto

the model for the nation. Interestingly enough, the advisory committee's biggest debate was over the powers of the ZBA. And the lead drafter of the act was the man who had actually drafted the New York City zoning code, Edward Bassett, who was a New York City attorney. And he favored a ZBA with very broad authority to vary or modify the terms and conditions of the zoning ordinance.

It turns out this was the biggest tug-of-war. There was a substantial minority of the committee, including the famed landscape architect and planner, Frederick Law Olmsted. And he opposed giving boards such powers. He in particular was concerned about backdoor zoning code amendments. There was a lot of horse trading concerning this particular section of the zoning act. But eventually Bassett, basically by the strength of his personality and the forcefulness of his opinion, won out.

And if you look at the Standard State Zoning Enabling Act, in contrast to other sections, there is no cautionary commentary in the ZBA section about the consequences of delineating a ZBA's authority broadly or narrowly. So it's no surprise today that we have a very difficult time with phrases like "practical difficulties" or "unnecessary hardship" or "special conditions" because the zoning act, the model act, never really defined what these terms were.

Slide Number 13

Stuart Meek:
How does an appeal or variance petition come to the ZBA?

Jeri Parish:

- Determination made on an application for a permit
- Applicant may disagree with the determination or desire a variance
- Meetings are called by the chair
- Hearing notices are published two weeks prior to the hearing, and notice is provided to neighboring property owners

Let's go to the next slide -- #13 -- and return to Jeri. Jeri, how does an appeal or a variance petition come to the ZBA in your community?

Parish: Well, the building, planning or our zoning official makes a determination on an application for permit. And the determination may involve an interpretation. Or the zoning ordinance may not permit what the applicant wants to do. The zoning administrator advises the applicant -- always in writing -- what alternatives are available. Now, all of our meetings of the

board are held at the call of the Chairman or the City Clerk. A hearing is scheduled. The notice is published about two weeks prior to the meeting. And the notice is also provided to the neighboring property.

Slide Number 14

Stuart Meck:

How are hearings conducted?

Jeri Parish:

- Meetings held once a month
- Staff sends agenda two weeks prior to meeting
- No discussions outside of the public meeting
- Site visits
- Plaintiff comes before the board
- Board listens to and records testimony



Photo courtesy of <http://www.ecoindicators.org>. Dan Barden, photographer

Meck: Let's go to the next slide. How do you conduct your hearings?

Parish: We hold our hearings once a month. ZBA commissioners are sent an agenda by the staff about two weeks prior to the meeting. This agenda is reviewed and we brush up on the zoning code relevant to that appeal. We have to be very careful, Stuart, that we do not discuss any issues outside of a public hearing. Often I do a site visit and so do my other board members, because many times we've run into each other at the site. And although it's tempting, still, we do not discuss the appeal. The plaintiff comes before the board. Our board listens to testimony and records it.

Meck: Do you record the testimony with a tape recorder? Or do you have a court reporter there?

Parish: We have a tape recorder.

Slide Number 15

Stuart Meck:
How are hearings conducted?

Jeri Parish:

- Try to keep testimony within 20 minutes
- Planning director plays a key role
- The municipal attorney may be present for difficult issues
- Findings of fact
- Write findings for recommendation to the City Council



Photo courtesy of <http://www.ci.milwaukie.or.us> Dan Fladen, photographer

Meck: Tape recorder, okay. Let's go to the next slide. Jeri, do you have time limits?

Parish: No, we do not have any set time limits. But we try to keep the testimony within, say, 15 to 20 minutes. And we do this by guiding the plaintiff if the testimony is redundant. If the plaintiff has witnesses, they are always given the opportunity to speak after being sworn in. The floor is open and then closed to the public.

Our planning director plays a real key role. She reads the notice, answers questions, offers clarifications when needed. Sometimes if a case is especially difficult, we might have a municipal attorney present, although this doesn't happen very often. Finally, we go to the findings of fact and write conclusions of findings for recommendation to the City Council.

Now I might add that the Board keeps minutes of these proceedings, showing the vote of each member upon each question. It keeps records of the examinations and other actions. And these findings are filed in the office of the City Clerk and is a matter of public record.

Slide Number 16

Stuart Meck:
In what order does testimony proceed, and how do you keep the witnesses focused?

Jeri Parish:

- Applicant is identified and sworn in
- Testimony can also consist of: photos, maps, outside reports
- Keep the witness focused by:
 - Asking leading questions
 - Identifying redundant testimony
 - Identifying the facts



Meck: Let's go to the next slide -- #16 -- and Jeri, I'd like you to talk about testimony and the mechanics of doing findings of fact. In what order does the testimony proceed? One problem I used to run into is keeping the witnesses focused. How do you do that?

Parish: Well, first of all, before any testimony is given and at the start of the hearing, our board chairman describes the rules of procedure. The testimony starts with the applicant who has identified himself and is sworn in. The entire hearing is recorded.

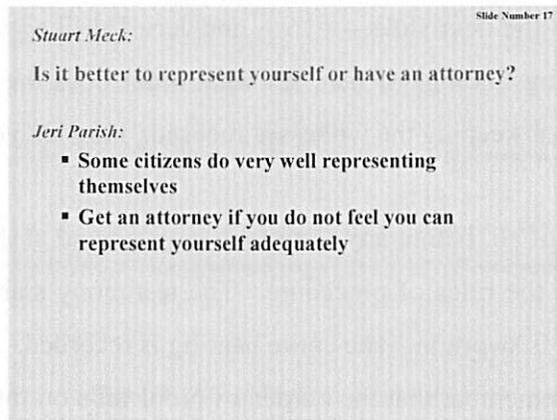
It is important to remember that the burden of proof falls on the applicant. So other than verbal testimony, testimony may also consist of photos, maps, outside reports or any other methods that the witness needs to prove his case.

How do we stay focused? Well, that can be a challenge sometimes. But we have to ask very leading questions to get the appropriate testimony out of the applicant and witness. Sometimes there is redundancy, say, from the second and third witness. We always let that second and third witness know that prior testimony has been recorded and we encourage other witnesses to offer new testimony if they have it, but not to repeat what has already been said. It's important to get factual testimony from the plaintiff and the witnesses so that we can adequately make a rationale, findings of fact and make a determination.



Meck: How is the room set up? Is the room set up so that everybody can see the exhibits and things?

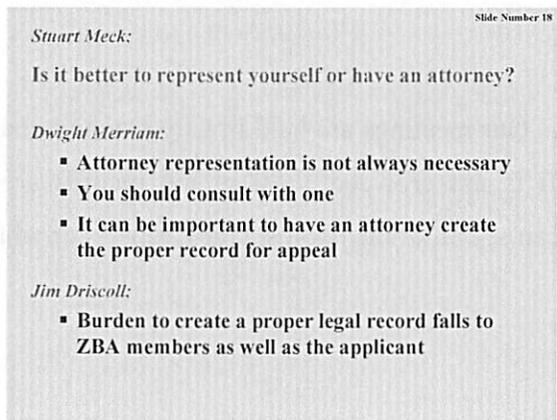
Parish: Absolutely. Our meetings are held in City Council chambers. The room is open and wide, brightly lit. It is not crowded. All of the records are right there in the front. Everything is so that you can see all of the photos, maps, reports or whatever may be presented.



Meck: Let's go to the next slide -- #17. I want to ask you, Jeri, is it better to represent yourself? Or is it better to have an attorney?

Parish: Well, we have had attorneys that have spoken for developers when a variance is requested. But you know, Stuart, some plaintiffs come to the hearing very, very well prepared. They have records -- again, the photos and maps. And some of them even have the zoning code that applies to their case.

Still, my answer would be that if you feel you cannot represent yourself adequately, get an attorney.



Meck: Okay, next slide -- #18. Well, Dwight and Jim, how do you feel about whether you need an attorney or not. Dwight?

Merriam: Well, you heard what Jeri said. Get yourself an attorney. I think really, Stuart, it depends on can you afford to lose. If you want to put a garden shed in the back in part of your rear yard setback and if you lose your variance request, you can live without it. That's fine. But if your next door neighbor has got a variance application pending to put a 50-dog kennel in his backyard, you better make sure you win and stop him. So I think, like Jeri says, if you think you might be over your head, at least consult with a lawyer. Buy an hour of his or her time and tell him what's going on, because there are lots of mistakes to be made on procedure. There are lots of mistakes that you can make handling something like this yourself. So I guess it depends on how important it is.

And I guess it depends in part whether you're in a record appeals state or not. If you're in a state that the only thing that goes up is the record from the hearing, that record better be perfect. And you may need some help from a lawyer in preparing that record. You might be the only one at the hearing, but you might seek that help in advance.

And then finally, I guess what I tell people if they're going to go it alone, and sometimes it's better for them to go it alone -- not everybody loves lawyers, you know, Stuart -- I can see some our listeners smiling. Sometimes strategically, I tell a client, "Go without me." But if you get in a situation and it starts to turn ugly and bad, you can ask the board -- and I bet Jeri would agree with this -- you could ask the board, "Can we continue this hearing for a month? I think I'm in over my head. I think I need some help. I think I need to figure out what I need to present. Will you please continue this hearing?" And in most cases, a board or a ZBA will continue it under those conditions.

Meck: Let me ask Jim. Jim, how do you feel about it?

Driscoll: Well, I would echo what Dwight has just said. People have got to realize that their property and their residence is usually the biggest investment they're ever going to make in their life. And if they're going to be seeking some change or if the property next door to them is going to be changing in some manner, it would make a lot of sense to have an attorney representing you to protect your interests. However, I would also agree with Jeri that there are a lot of people that know how to do this who can come before the zoning boards or the hearings examiner without an attorney.

With or without an attorney, though, I think that this raises a point that there is a real challenge upon any board who is acting on variance requests, and that is the burden of creating a proper legal record that specifically addresses the application that's been made. The zoning board members should know and must know what the criteria are for the approval or denial of a variance or a conditional use permit. And if they do know, then both the lawyer-less or the lawyer-ful party is going to at least get a fair shot before the board. So I would say that an attorney is valuable to have, but it's not a total necessity. But it is totally critical in this process to have a board that knows what they're doing and creating a record as well as applying the criteria to that record.

Meck: So the board makes the decision and it favors the applicant, even though the applicant did meet the burden and an opponent challenges it and the record doesn't show evidence to support the decision, then the board is going to lose. So it's in the board's interest to create the record, right?

Driscoll: That's correct.

Stuart Meck:
Tell us about the hearings examiner system and where it is used?

Jim Driscoll:

- Washington, Oregon, Florida, Maryland
- Over 20 states have enabling legislation
- Wide authority
- Administrative appeal
- Report to planning commission or legislative body
- Everett, Washington rules

Meck: Let's go to the next slide. Jim, there is an alternative to the zoning board of appeals, and that's the hearings examiner. Why don't you tell us a little bit about this system and where it's used and how well it works?

Driscoll: Okay. The hearings examiners are individuals who are retained by local jurisdictions for the purpose of holding hearings in the same manner that zoning boards do. They are used most commonly in the West, with the States of Washington and Oregon being the most common places. But Florida and Maryland also have active hearings examiners systems.

Over the years I've done different research about hearings examiners, and I have found approximately 20 states have enabling legislation that would allow for hearings examiners. But it seems like Washington, Oregon, Florida and Maryland are the only ones that are really implemented to a great degree. I may be wrong in that. There may be some listeners out there that say, "He doesn't know what he's talking about. We use it here."

Meck: Idaho has it, I believe.

Driscoll: They have enabling, but isn't that common. It came about in the State of Washington because there were so many conflicts of interest. The State of Washington appellate courts said that a land use hearing not only had to be fair, but it had to appear to be fair. So they said that if there was even the potential of a conflict of interest, such as contributing to somebody's campaign or employment of somebody's relative or having past knowledge of somebody's business, anything of that nature could be considered an appearance of fairness issue.

Well, the Washington Legislature decided that rather than fool around with appearance of fairness any longer, they would just create the office of Hearings Examiner, and this is an office where the hearings examiner conducts the hearings, he develops the record, he meets with the parties oftentimes in pre-hearing conferences. He sets the agenda. He controls the hearing and he or she then takes the matter under advisement and drafts findings of facts based upon the record that's developed.

There are some benefits to it. Obviously you eliminate a lot of conflicts. Another benefit to it is that you get legally defensible decisions and you usually get records that can be defended should they go to court. The downside of it is that the decision comes out about a week or two after the hearing. Nobody makes their decision right on the spot. But for the most part, I would venture to guess that almost every community in the State of Washington and the State of Oregon who have gone to the hearings examiner system would not switch back.

Meck: We have some examples on the website of materials on hearings examiners, one of which is the Everett example -- Everett, Washington, which is where Boeing is. I believe it's north of Seattle. Am I correct?

Driscoll: You're right. It's about 30 miles north of Seattle. I have been the hearings examiner of the City of Everett for about 23, 24 years. And on the webpage for the City of Everett, we have the rules of procedure and a fairly complete description of the hearings examiner system. That system in Everett has been one of the premier systems in the entire State of Washington.

Meck: Do you periodically prepare any type of report on your activities?

Driscoll: Yes, Stuart, I do. I make a yearly report to the local city council or the board of commissioners, if it's a county. And during that report I give them background as to the number of cases that have been heard, the type of issues that have been heard and so on. I also advise them of different ordinances that I have had difficulty in interpreting, and I make suggestions to them as to where they are vague, where they should be changed and what should be done. The city council then takes it under advisement and has the planning commissions in the various communities draft the new legislation taking into consideration my suggestions. So it's kind of a checks-and-balance type system. And it works very well because we've had situations where we've had the vague language for variances. And after the city council has taken my recommendation, they have come back with new ordinances, or at least made them less vague -- let's put it that way.

Stuart Meck:

How are findings of fact made?

Dwight Merriam:

- **Listen to the evidence**
- **Write down evidence grouped under criteria**
- **Adopt decision**
- **Don't make decisions in haste; postpone if necessary**
- **Be disciplined; reduce what is said to writing**

Meck: Let's go to the next slide and go back to Dwight. Findings of fact, Dwight -- how do you make them?

Merriam: Well, findings of fact are important for everybody in all jurisdictions. And it's a matter of simply paying attention to the evidence. Maybe after this teleconference, if the listeners go back and take a look at what we put forward in Slide 9 -- the four criteria -- they could organize the evidence they hear under those criteria. If they just parrot that criteria and say, "Well, this is unique. It's not self-created. It arises from conditions on the lot. And it's not going to adversely affect adjacent property," that doesn't help anybody. But if they list under what's unique about the property, like the triangular lot case -- the lot is triangular shaped. There is only ten square feet remaining to build a house. It arises from conditions of the property, not the person creating it. And then describe what the evidence was that supports that. And then make sure that you prove the negative -- that it wasn't self-imposed. This triangular shaped lot was created in 1922, long before zoning. The lot was purchased as it was.

And then adopt that decision in a formal way through a vote and through discussion of exactly what's in it. I think the decisions that are made quickly are probably the ones that are most easily challenged. So people need to slow down and think about how they marshal that evidence and report it in the findings of fact. It is important to write it down. Ones that are taken from oral statements that are made during the meeting are sometimes not as good as ones that are written out.

Slide Number 21

Stuart Meck:

Why are findings of fact important?

Dwight Merriam:

- Describe the rationale for the decision
- Form the record for review in court



Photo courtesy of the Collection of the Supreme Court of the United States, Franz Jantzen, photographer

Meck: Let's go to the next slide -- 21. Now even though they're difficult for groups to make, why are they important?

Merriam: I think in the difficult cases, many of our boards and commissions like to decide by consensus. And when they have tough cases, they sort of have soft decisions. So in the first instance, it's critical to show clearly what the rationale was for the decision. And then it's also absolutely important to make sure that the court knows exactly the basis for the decisions so that the court can then decide whether that comports with the law of the state.

Slide Number 22

Stuart Meck:

How can you do a good job in presenting testimony and recording the relevant facts?

Dwight Merriam:

- Preparation
- Dress rehearsal
- Marking exhibits
- Presentations that everyone can see and hear
- Graphic materials tied to verbal testimony
- Agenda materials ahead of time
- Local government attorney present

Meck: Let's go to the next slide and stay with Dwight. How do you do a good job, whether you're an opponent or proponent, in presenting testimony and getting down to relevant facts?

Merriam: Well, in the 26 or 27 years of doing this, I found that nothing works better than being well prepared. Even in the most modest of presentations, if a layperson is doing it themselves, they ought to do a little bit of a rehearsal -- practice it in front of a spouse or a friend and say, "What do you think of my presentation? Do you understand it?" Get the exhibits all lined up in advance and properly marked and in a format that they can be put into the record. If you have a big model or something like that, take a picture of it and put that in the record rather than put the model in. But have your pictures lined up and labeled and have your maps all ready to be put in and have adequate copies so that you don't have an awkward situation of saying, "Well, I'd like to leave it with you, but this is for my Aunt Bessie and it's kind of a family heirloom map."

So you want them all in advance. You want to make sure that when you refer to these exhibits -- I mean, forget about television courtroom business. But do refer to these exhibits in a businesslike way. Say to the board -- remembering that that tape recorder is on and you might actually be speaking to a judge later -- so you point out here, "Well, Mr. Jones wants to put his kennel here. I'm pointing out on Plan 1-B that he proposes to put the kennel back here by the 36-inch oak tree shown on the plan. And you see that's only 22 feet from my kitchen, which is at this corner. And now I'm going to mark right on the map with a red pen where my kitchen is. So it has a big impact on me." Now the judge picking up that plan will know exactly where the kennel is going to be, will know how close it is to your kitchen and so forth.

Make sure that the board has all the materials they need in advance, and board members, make sure to get it out to others. And then I noticed Jeri commented whether the government's attorney was going to be there or not. I suppose it's pretty much the same as whether you're going to have your lawyer there. And that is it depends on the seriousness of the matter, the repercussions for the community, whether it's possible to take another shot at it later or whether this is the one and only chance you have to decide on it. But generally it's better to err on the side of a little more preparation, a little more time. You know, Stuart, that ounce of prevention -- worth a pound of cure. You can save a lot of your legal fees by buying an hour or two of your county attorney's time in a difficult hearing rather than have him or her defend you in an appeal.

Meck: Sure. You know, listening to you, I was thinking back on my own experience with these types of presentations. And the most effective, well prepared presentation I ever saw

in years of working with the ZBA was one that was given by an owner of a small Italian restaurant who wanted to put on an extension of his store, which would have encroached into the front yard setback area that was arbitrarily set anyhow. And he showed up at the hearing with a rendering of the building mounted on foam core. He had a written statement that was key to the criteria in the zoning code. And then finally he showed up with three of his sons and told the board of zoning appeals members that if they granted the variance, he would build the addition and then eventually turn the business over to his sons -- who also brought their wives. And it was not surprising that he got the variance. You would have had a heart of stone to turn him down.

Merriam: Well, that's true. And laypersons are often the most compelling witnesses. One of the best witnesses I ever saw was a young mother who took a video from the windshield of her car with her baby in her lap, driving slowly around the area that was to be developed. And it was sort of a Blair Witch Project video. But it was very compelling and it went into evidence and the commission voted for her side.

Slide Number 23

Stuart Meck:
What is inappropriate testimony?

Jim Driscoll:

- Personal comments

Jeri Parish:

- Offering incentives to commissioners
- Foul language
- Obnoxious behavior
- Extreme displays of emotion
- Straying from facts

Meck: Let's go to the next slide and talk about what's out of line in testimony. Let's talk to Jim first, and then to Jeri.

Driscoll: You talk about compelling witnesses testimony, and I get the out-of-line testimony. Okay. Well, out of line testimony is kind of like the old Justice Stewart comment

about pornography. He can't define it, but everybody knows what it is. And you probably can't define what out of line testimony is, but you know it when you see it in a hearing.

But the best way to have people avoid doing it, I believe, is have the planning board or the zoning board, before every hearing, set the limits and set the standards of the hearing. The worst thing they can do is to allow cheering and booing and hissing and make it sound like an Oprah show -- or worse, Jerry Springer show. That's not what they're there to do. Take as much emotion out of this and just say, "We're here for the facts. We don't want you to be cheering out there for anybody because it puts us in a difficult situation where we have to either show our bias one way or another when we're trying to be fair. So help us by not cheering." That gets a lot of the showboating out of the way because the people realize that they are performing now for the decision-maker and not the audience. And remember, the decision-maker is the one making the decision. So if the board can take that and do that from the very outset, they're going to get a lot less out of line testimony.

I just want to mention, too, that you refer to *You Be the Judge*, the book that we wrote a few years ago. And I believe that's on the website.

Meck: That's right.

Driscoll: We talked about how to conduct a hearing, how to control these witnesses in that book. And if anybody would desire a copy of that, they can just e-mail us to our website itself. The printing and mailing costs are ten dollars, but they cover a lot of these different things -- DriscollHunter.com. There's my free ad.

Meck: That's all right. Jeri, out of line testimony -- probably never happens in Country Club Hills.

Parish: Well, it rarely happens in Country Club Hills. I do agree with everything Jim said. The only thing that I would add would be to offer an incentive to commissioners -- discount coupons at the local eatery or theater tickets -- it won't work. I'd also go with -- and we have not had this -- but foul language or any kind of obnoxious behavior, displays of emotions -- we want you to stay with the facts. That's it. Just give us the facts so that we can make a

decision. And give us the facts in an even tone without the emotions so that we can do our jobs. That's all we ask.

Slide Number 24

Stuart Meck:
How do you manage to remain objective?

Jeri Parish:

- Not always easy since the plaintiff is often someone you know
- Must maintain appearance of fairness
- Avoid *ex parte* communication
- Recuse yourself from hearings in which you may have a personal interest



Meck: The next two slides are 24 and 25. Jeri, let's stay on with you and talk about conflicts of interest and the general problem of living in a small town where you know everyone. How do you manage to remain objective? I used to find myself, when I used to live in a small town shopping at 11:30 at night so I wouldn't run into anybody I know. And what would happen is I would run into everybody else from the city staff doing the same thing. Then I want Dwight and Jim to respond as well. Jeri?

Parish: It's interesting you should mention shopping at night so you don't run into someone. I've done that several times. It's not always easy. The plaintiff, as you know, is very often someone you know. And you just have to keep an impartial attitude, Stuart. You must always show that appearance of fairness, and you cannot base your decisions on outside influences.

Now our board is also very careful of *ex parte* communications. You know, when we're confronted outside of the hearing or before a meeting, you cannot show hostility. You cannot show favoritism. And we encourage the plaintiffs to address the issues always at the hearing. We avoid conflicts of interest by recusing ourselves from any hearing that may benefit us in any way or in which we might have a personal interest.

Stuart Meck:

How do you manage to remain objective?

Dwight Merriam:

- Light of day test
- It's up to the individual board member to resolve conflicts of interest
- Leave the room if you recuse yourself from a vote

Jim Driscoll:

- Hearings examiners were created to ensure the appearance of fairness

Meck: Okay, Dwight, what's your test?

Merriam: I think the best thing that people can do is what I and others call the "Light of Day Test." If the people are out there in the audience that you respect and your peers and others knew about the relationship, would it make you feel uncomfortable. And if you feel that way, that's the time to surface it. Surface that relationship if it saw the light of day, it would make you uncomfortable.

In most of these cases, you should surface them before the meeting or hearing by calling the chair or calling the chief elected official or the manager or the municipal attorney and saying, "You know, I've got an interest in a partnership that the applicant is involved in. But it's got nothing to do with this application. What do you think about it?" Or "I'm a real estate broker, and if this is approved, there is a chance that I, along with several other brokers from the various agencies in town, would get a listing. I could make some money off of this. Is that a problem?" And just surface it. And if everyone decides that, if you can vote objectively, then you just surface that at the time of the hearing if you think it's important enough to do so and say, "This is the situation, but I can vote objectively and I'm going to sit."

If you're not going to sit -- if you've decided that you should recuse yourself, please leave the room. I have seen too many board members who have such a personal or financial interest in the outcome of a proceeding get too excited during a meeting, jump up and start to participate, and that's a very uncomfortable thing for all concerned. Just leave the room. Somebody will come get you later.

Meck: Jim?

Driscoll: Well, this is kind of the big question here as far as conflicts of interest in hearings examiners because this is the main reason that the hearings examiner system was created in the State of Washington. We live outside the communities in which we service as the examiners. We have no financial interest at all. We don't even have friends in those cities. We more or less are just outsiders that come in and make the decision.

I know that isn't much help. That answer isn't much help to the people listening because they're all members of the board. But I would echo what has just been said by Dwight, and that is do not hide it. If you have a conflict of interest or a potential conflict of interest, make it known at the outset and clear the air. Because, if you don't it could come back to haunt you. That's going to be a lot worse when it comes back to haunt you than it is when you are clearing the air.

Meck: When I was a planning director, whenever I encountered hostility at BZA or Planning Commission meetings I would pretend that I had an invisible alter ego. And the hostility was directed at the Bad Stuart Meck. And I would vow at the end of the hearing to have a talk with him.

Merriam: Okay, Stuart. We can get you some professional help.

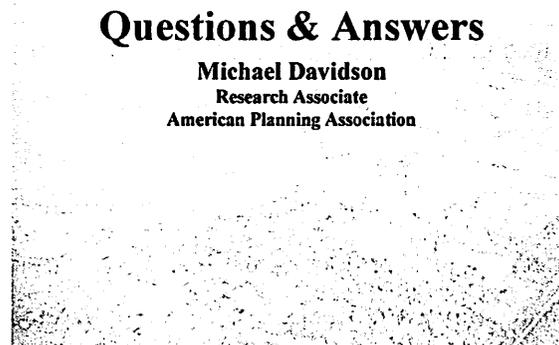
Meck: I know, I understand.

Driscoll: Did the people say, "Oh, the Bad Stuart is the one who made the decision on that one"?

Meck: Yes. In fact, I actually had Dwight come to my board of zoning appeals meeting and he sat --

Merriam: Yes, to see what it was like. Thank goodness the Good Stuart was there. But Stuart, you know, when you were hiding out at the market at 11:30 and all those people showed

up, did it ever occur to you that they were at 11:30 so that they wouldn't bump into you during the day?



Meck: Oh, that's true. That's true. That's crossed my mind. Well, let's talk to Mike Davidson. Mike, we want to stop for a moment and tell our audience about *Zoning Practice*.

Davidson: Yes, Stuart. You know, over the years *Zoning News* articles have been used as principle reading material for our audioconferences. And we hope that listeners have found them very useful. Now through the hard work of APA staff and input from subscribers, *Zoning News* has become *Zoning Practice*. This APA favorite is even more engaging, more comprehensive and more hands on, but still committed to the same end -- that is helping planners and zoning officials use zoning as a smart development tool to create communities of lasting value.

For more information about *Zoning Practice* and a free sample issue, listeners can visit the Zoning Clinic page of our website at www.planning.org/audioconference/znc1.htm.

Meck: Well, let's go to the first question.

Davidson: Yes, let's continue on with our first question.

Driscoll: That's out of line testimony.

Davidson: Okay, back to more important matters. Bill Ford from Kendall County ZBA in Yorkville, Illinois asks a two-part question. What kind of variance errors are most common -- procedural or substantive? And should affirmative votes as well as negative votes give basis for a decision?

Meck: Who wants to take the first crack at that one? Any of you could answer that one, obviously. Dwight, why don't you go first? And Jeri and Jim.

Merriam: Well, across the board, procedural errors predominate -- problems with notice, problems with overcrowded rooms, problems with *ex parte* evidence. But part of this teleconferences is to eliminate some of those. So the substantive errors become as important as well. Findings of fact will avoid most of the substantive errors.

Meck: Jim?

Driscoll: I agree. The courts are not inclined to become the zoning board of the community. They realize that that's not their duty. They're there to protect the rights of the people appearing at the hearings. And so they are much more inclined to look at the procedure used and how the decision was reached than get in there and try and change the setback on Jones Street, for example.

Findings of facts usually would come from the affirmative vote because you're taking a specific finding that you're basing your positive decision on. And if you're denying it, you are taking a specific fact from that hearing to support your decision. So the affirmative votes would be much more controlling and much more influential than the negative votes.

Merriam: Stuart, I would say that anybody who is a party to this proceeding -- the applicant, the opposition neighbor, whoever -- should feel free and should be encouraged to submit draft findings of fact because they control the evidence. They know what's going on. That could be very helpful to the board in organizing. And boards should wait and decide two weeks or a month later if they have a tough case and they really need to organize their decision so that they have a good, strong decision.

Meck: Jeri, what's your response to this?

Parish: It all starts with factual testimony. That's the beginning of the whole hearing. And once we get that factual testimony, then we can make our findings of fact. But it has to start with step one -- the testimony.

Meck: Okay, Mike, another question.

Davidson: Yeah, another two part question, this time from Gunnison, Colorado -- how much contact should a board have with staff after the staff report has been mailed and before the public hearing? And then isn't this still considered *ex parte*?

Merriam: Good question. It depends on which state you're in. This is a narrow question which is really part of a larger issue. This is contact with the staff after the report is done but before the hearing. In most states in this country, that would be perfectly permissible for the board to talk to the staff all it wanted prior to the hearing so long as they just represented during the hearing anything new that came out and made sure it was part of the record. But I don't know what the law is in Colorado.

Driscoll: One thing I would do to eliminate this is to have the staff draft a very thorough staff report. And if there are specific issues they want to bring up, put it in the staff report. I do not have contact with the members of the staff after the staff report is submitted other than to set the time if there is a change in time or if they're going to hold the hearing in a hall instead of the city council chambers -- something of that nature. But as far as substance goes, I would never have contact with them because they have provided me with facts and information and now I want to hear from both the applicant and the opponents on it, and then we'll bring it all out at the hearing itself.

Meck: I want to chime in here because my philosophy on this is that once you've prepared the staff report, your next contact about the case itself should be at the public hearing. I would never call up a commissioner, or even if the commissioner called me, I would say, "Well,

look, if this is a point that you feel wasn't clear on my staff report, I'll write a follow-up to it." But I would never discuss the case with the ZBA members after I prepared my staff report and before the hearing took place.

Merriam: Stuart, I think that makes a lot of sense. But if the staff report was deficient because it didn't contain an analysis of whatever -- the traffic impacts or something -- then that board member has got to have a way of getting the staff to go back and rethink that and do something.

Meck: Let's have another question, Mike.

Davidson: This is a question from Leo Smith, who sits on the Madison County, Georgia Planning Commission. He has a comment and then a question. "I have heard that the Supreme Court ruled that only the governing authority can approve conditional use permits, as is the case with rezonings. Can a board other than the governing authority such as the zoning board of appeals approve conditional use or special use permits?"

Driscoll: I'm not familiar with any Supreme Court cases that have said that. It might be in Georgia. I don't know if it's the Georgia Supreme Court or the U.S. Supreme Court. But in all the jurisdictions I sit in, the hearings examiner does have the jurisdiction to approve conditional use permits, and that issue has never come up. Now if it is a U.S. Supreme Court case, I'd be very interested in learning the citation of that case.

Meck: Yeah, I've never heard of that either.

Parish: No

Davidson: Okay, should we go on to another question?

Meck: Yeah, let's go on to another question.

Davidson: Okay, another one from Colorado. This is an interesting question. This is from Cherry Hills Village, Colorado, and this comes from the Community Development Director. "The city is considering changing from a board of adjustment and appeals to a hearing officer. The city charter requires and defines the function of the BOA. We are considering having a two to three member BOA and have them rotate as hearing officer. The hearing officer would be responsible for variance and appeals. Are you aware of any other jurisdictions that utilize this format and what are some of the difficulties in establishing this type of process.

Driscoll: I presume they're talking to me. I'm aware of cities having rotating hearings examiners. The City of Bellevue, Washington, I know, has a rotating system where they have about five or six hearings examiners on and they rotate each examiner for a specific case. That's about the only one I know of and I know it works well. Bellevue has done that for years and years and years.

The difficulty I imagine might happen with that is you might not get the consistency you want with decisions. You might find someone who is very easy on variances and then the next examiner is very difficult on variances. So you're going to have a lot of people judge shopping, waiting -- "Whose turn is it to decide the variance? Oh, it's the hard guy. Well, call me up when the easy guy is up there." It can work if you have some kind of protective measures in there, too.

Meck: Mike, let's take some more questions and just go to the end with the questions.

Davidson: Okay. This question is a Washington State question -- Colfax, Washington. "It is said many requests for variances imply codes should be changed. To make variance decisions administrative, can you recommend a good code? Example of how to do this, such as percentage of encroachment into setbacks if adjacent landowners are okay?"

Meck: I would recommend a model. I'm just going to jump in here. The State of Oregon publishes a model land development code, which is available on their website. It's called "A Model Land Development Code for Small Communities." And it was drafted by an Oregon consulting firm. And part of what I do here is read other people's ordinances. And this is about the best model I've ever seen. If they are members -- this is an obvious one -- if they're

members of the Planning Advisory Service, obviously they can contact us and we can look in our files.

One more question, Mike, for all of us.

Driscoll: One moment -- if that's in Colfax, Washington, they should go onto our webpage and leave their name and number and I will contact them when I get back to my office and just discuss it with them because there may be some Washington communities that may also be applicable.

Meck: Oh, thanks, Jim. Thank you. Mike, one more question.

Davidson: Yes, we've had two questions on the same topic. "Why do you say 90 to 95% of granted variance would be illegal if gone to court?"

Meck: Dwight, you said it.

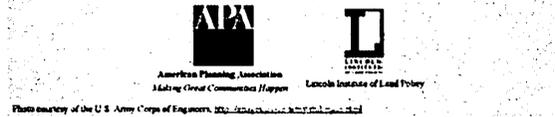
Merriam: Because they are. Because the elderly widow who wants a carport for her used Buick doesn't have a practical difficulty or unnecessary hardship. But nobody cares and they grant these dimensional variances all the time.

I saw a two-lot subdivision one night. I was waiting my turn. The lawyer ahead of me said, "I know this is not really a hardship, but you know, my client was tragically burned in an accident. Here is a letter from his hospital bed. And basically he was saying, "I really need the money and you can really do these two lots where only one is allowed." They gave him the variance. Nobody cared. The two lots were fine. It was no practical difficulty or unnecessary hardship except for the tragic accident the man had had.

And one after another they are like that. I never want to have to defend against a variance granted because they're very, very difficult to get one that truly meets those criteria in most states. That's just the reality. But the fact is, they let them go because they're the right thing to do for the individuals in the neighborhood.

Zoning Clinic

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Meck: Okay, well, that ends our program. We're going to post some of the responses to the remaining questions on the audioconference website. We'll do that in about two to three days. Make sure you check the audioconference website because we actually are continually adding material up until the very last minute, and there is a lot of good material in there.

On behalf of the American Planning Association and the Lincoln Institute of Land Policy, which is based in Cambridge, Massachusetts, I want to thank our panelists for a very stimulating hour. I want to thank Carolyn Torma, our Director of Education and Peter Wilhelm, our Education Assistant. Peter put together the PowerPoint presentation that you're using today. Thank you to Armando Carbonell and Judith Martin of the Lincoln Institute for assistance and content development.

Now remember, you can e-mail education@planning.org to ask questions of our speakers through the end of today. We do look at your evaluations. I stand by the fax machine and watch them as they come in, giving us all 5s. So please fax in those evaluation forms to 312-431-9985. And don't forget our next audioconference is May 26. The topic is *Suburban Place Making*. We're going to be back with a final 90-minute program in this year's series on June 23. What are you doing that day, Dwight? The program topic will be *Land Use Planning and Environmental Law*. This is a very good program -- very popular last year.

Again, this is Stuart Meck for the American Planning Association in Chicago. Thank you and keep on planning.