

THE PLANNING COMMISSION
ONE ATTORNEY'S VIEW

BY DAVID L. CHURCH

One of the most important required committees in Utah municipalities is the planning commission. Membership of planning commissions consists, by in large, of dedicated volunteers who perform this service out of love for their community and interest in the subject. However, for some reason some planning commissions and planning commissioners are continually in dispute with their city or town council or with the land owners who have to deal with them. This is unfortunate and in my view is a product of misunderstanding the role of the planning commission and its members.

Every Utah municipality is required to pass an ordinance establishing a planning commission¹. The ordinance is required to define the number and terms of the members of the planning commission and alternate members if any. This can and does change from city to city. There is no required number on a planning commission nor a magic or best number. In theory a planning commission could consist of one or fifty. In addition the ordinance must indicate the mode of appointment. This implies that perhaps someone other than the mayor (or the city manager in the city manager optional form of government) could be given the right to appoint planning commission members by the ordinance. I do not believe this would be a proper interpretation. Mayors or city managers, depending on the form of government in the city, clearly have the statutory authority to appoint, with the advice and consent of councils, persons to the city commissions including the planning commission.² To be consistent with the other provisions of the Utah Municipal Code, the mode of appointment of planning commissioners in the ordinance would have to be limited to things other than the power of appointment. The ordinance must also contain the procedures for filling vacancies and removal from office. This has been an overlooked provision in most ordinances and the source of some contention and even law suits. The best practice is to make this section fairly specific and have definite standards of conduct and attendance for commission members. Without these specifics it may be difficult to remove members from a commission prior to the expiration of their term in office.

The ordinance should also detail the authority of the planning commission. Every planning commission is required, by state law, to have a role in the municipality's establishment of its basic land use control policy. This authority given by state law cannot be taken from the planning commission by the city or town council. This minimum role consists of making recommendations to the city or town council for a general plan and amendments to the general plan and recommendations to the city or town council land use ordinances, zoning maps, official maps, and amendments. The planning commission must also be involved in making recommendations on proposed subdivision plats.

¹ Utah Code 10-9a-301

² Utah Code sections 10-3-809(2)(h), 10-3-1219(d), and 10-9-1226(2)(7)

No other powers or duties need be given to the planning commission by the city or town and the planning commission does not have any other inherent powers. Many commissions try to involve themselves in matters such as business licensing, animal regulations and nuisance enforcement. This is appropriate only if the city or town ordinances specifically delegate these responsibilities to them.

The city and town land use ordinances, which the planning commission has made recommendations on, must identify a land use authority and an appeal authority for every land use decision applying the adopted city or town land use ordinances.³ The planning commission may be designated in the land use ordinances as the land use authority in the city for making land use decisions or they may be designated as the appeal authority for appeals from land use decisions, but the planning commission cannot be the deciding authority and the appeal authority on the same issues. For example if the planning commission is given by the city or town ordinance the authority to review and approve site plans then some other person or body must be given the authority to appeal the decisions of the planning commission on site plans.

The ordinance setting up the planning commission should also establish the details of how the commission operates and the rules of procedure of the planning commission. The ordinance may also fix per diem compensation for the members of the planning commission, based on necessary and reasonable expenses and on meetings actually attended. This section of state law should be read to say that planning commissioners may be reimbursed for their services but it is not paid employment.

It is not uncommon for members of a planning commission to get “cross wise” with the city or town council. This is understandable since the primary purpose of the planning commission is to make reasoned recommendations to the council about the general plan and the land use ordinances, but the city or town council is under no obligation to take the recommendations of the planning commission. It is not a rare occurrence for members of a planning commission to become invested in their recommendations. These recommendations are the product of long public processes and hard decision making. It can appear disrespectful to the process and the efforts of the planning commission when the council ignores the recommendations of the planning commission and goes off on its own. There is no solution to this source of conflict. Decisions regarding the general plan and the adoption of land use ordinances are legislative acts that are intended to be made by elected policy makers and not by appointed commissioners. Council members should respect the recommendation of the planning commissions, but in the end they need to vote for their own constituents according to their own consciences.

It is also not uncommon for city and town councils to become frustrated with their own planning commissions. This is generally not because of any recommendation made by the planning commission, but when the commission is acting as a land use authority and granting or denying permits and approvals. The principle source of this frustration is

³ Utah Code section 10-9a-302.

a planning commission's attempt to exercise discretion in granting or denying these permits. Utah law is very clear that a landowner is entitled to approval of a land use application if the application complies with the city or town's ordinance.⁴ It is specifically stated in Utah law that a land use authority cannot impose any requirement on an applicant for a land use permit that is not specifically expressed in either state law or local ordinances.⁵ In addition the law states that if a proposed subdivision, with limited exceptions, complies with the city or town ordinances, it must be approved.⁶ What this means is that the planning commission, when acting as a land use authority, has very little discretion on whether or not to grant or deny the permit. If the land owner's application complies with the ordinances, the commission (or any other appointed land use authority) must approve it, and if it does not comply then the planning commission must deny the application. This is regardless of whether or not the planning commission, or the public, thinks that the application is a good or bad idea. In addition if the city or town ordinances are ambiguous they must be interpreted by the city or town in favor of the land owner.⁷ When a planning commission ignores the law and approves (or denies) a land use application in violation of the city or town ordinances it creates trouble and unnecessary conflict for the city or town council. This, no matter how well intentioned, is never in the public interest.

There are, I believe, some basic rules for members of a planning commission to follow that will help the planning process and avoid conflict between the planning commissions and the city or town councils.

First, planning commissioners must understand and appreciate the dual role that they may play. When they are making a recommendation on a general plan or on a land use ordinance they are a part of the political, legislative process. They have broad discretion in what their recommendation can be. They can listen to the public even if it is just uneducated clamor. When the planning commission is acting as a land use authority it has little discretion. The land owner's application either complies with the ordinances or it does not. An individual planning commissioner's opinion of the merits of a proposed land use application is not relevant to the process. Any individual commissioner's opinion, and any of the public's comments and concerns, are relevant only to the extent that they speak to issue of compliance with the existing law.

Second, planning commissioners must understand that the planning commission is intended to shape policy not make policy. It is not a representative body and has no constituency. Commissioners do not represent neighborhoods or points of view. The role is not to act as a gate keeper. Their role is to be experts in planning and the local ordinances. They are to make reasoned recommendations and apply the ordinances as written. If a planning commissioner wants to be a policy maker he or she just needs to

4 Utah Code section 10-9a-509(1)(a)

5 Utah Code section 10-9a-509(1)(e)

6 Utah Code section 10-9a-603(2)

7 *Brown v. Sandy City Bd. of Adjustment*, 957 P.2d 207, 210 (Utah Ct. App. 1998) and *Patterson v. Utah County Bd. of Adjustment*, 893 P.2d 602, 606 (Utah Ct.App.1995).

put their names on a ballot and win an election. Until they do so they should not attempt to make policy. They should be content with just shaping policy and administering the ordinances as written.

Third, planning commissioners should respect the public process and the due process rights of the land owners. All meetings of the planning commission must comply with the Utah Open and Public Meetings Act.⁸ This means that both decisions and deliberations of a planning commission must be public. A public hearing is required by law for many of the things that a planning commission may be involved in and can be held by many planning commissions on other matters as a matter or routine. The purpose of a public hearing is to receive information from, and give information to the public. It is not to seek the public's approval or permission to do something. In my opinion it is never appropriate to poll the members of the public in attendance at a meeting to see what they think. The people in attendance at any meeting are not necessarily representative of the residents of the city or town as a whole. They are at the meeting because they have a position that is so strongly held that they will leave their TV's and come to a meeting. While what they say matters, the volume and number of repetitions does not. A public hearing should be a time that the planning commission listens and learns. It is not a time to convince or argue with the public. Procedural due process requires that an applicant for any permit be given notice of any meeting regarding his or her application; the right to be heard; and a fair hearing or decision. Utah law requires that the applicant be given specific notice of the date, time and place of any meeting where the application is being considered and also be given copies of any staff reports regarding the application at least three days before the meeting or hearing.⁹

Lastly, it is important to remember that being on a planning commission is about public service. One of the primary roles of a planning commission is to help the landowner accomplish with his land what the landowner desires in a manner consistent with the city's plans and ordinances. Many planning commissioners seem to enjoy frustrating the plans of the landowner. They take delight in telling people no—instead of how. Some planning commissioners feel that it is their role to force an applicant to do what the commissioner would do if the commissioner owned the property. These attitudes do not serve the public.

A planning commission fulfills its purpose when it acts in a manner supportive of the policy and policy makers. It is not intended to be adversarial to the council. It is not a check or balance to the council. It is not there to slow growth or frustrate land owners. It is there to add professionalism, fairness and common sense to the planning and land use control process. It only serves this valuable function when it works within the constraints of the law and without regard to public prejudice and the clamor of the crowd.

⁸ Utah Code sections 52-4-1 et. seq.

⁹ Utah Code sections 10-9a-202.