

## Drafting Defensible Regulations

City staff interpret and apply local ordinances every day. These laws are typically drafted or revised by staff, consultants, or attorneys, and are sometimes challenged—both informally in discussions at “the counter” or formally in development review committees, public hearings, and even court. The good news is that courts give great deference to ordinances, and challengers bear a high burden of proof. But cities must be careful not to provide a foothold to argue illegality, lack of authority, or arbitrariness.

So before you compose your city’s next ordinance, here are a few things to consider.

**AUTHORITY.** Does your city have the authority to regulate what you want to accomplish? Authority to take a certain action must exist under home-rule powers or statutory authority, which can vary by state. Cities who skip this question can waste a lot of time and energy on a problem over which they have no authority.

**RATIONALE AND SCOPE.** Why does the city want to regulate this? Recitals at the beginning of an ordinance are very important and should be succinct. Everyone regulated by the ordinance, future city staffers, and elected officials should be able to readily understand why the law was adopted and its purpose.

**ANALYZE YOUR GOAL.** Discuss it thoroughly with staff and attorneys. Think through unintended consequences. For example, agricultural zoning districts often don’t include height limitations, which can lead to unconsidered land uses such as wind turbines, rocket launches, and large religious statues. Also, realize that you cannot solve everything with one law. Define the scope of the problem clearly and use that definition as your touchstone.

**CLARITY AND CONSISTENCY.** Describe the activities, procedural steps, and standards of the regulation clearly, understandably, and in logical order. Write in plain English, not plannerese or legalese. The ordinance must establish a norm or standard clearly enough that a person of common intelligence can understand what conduct is required or prohibited. Leave out words like *herein*, *hereafter*, *pursuant*, *thereto*—anything that makes you “sound like a lawyer.” Similarly, avoid acronyms. If you can’t, include a glossary or set of definitions for technical terms.

Beware of shortcuts. Don’t use internal shorthand to describe something particular to city staff, and do not get sidetracked trying to “streamline” the regulations at the expense of clarity. The

law should be as long as it needs to be to clearly establish the key components of the regulatory scheme. Standards for administrative decision making must be spelled out in a clear manner that can survive a vagueness or delegation of authority challenge. Charts, tables, pictures, and figures can be useful, but they can also be a source of ambiguity and conflict. Review them carefully.

If you are taking examples of a regulation from another city, mold them to your local situation. Don’t leave in references to home-rule charters if your city doesn’t have one, for instance.

An ordinance should also be consistent with itself and the rest of the city code. Defined terms should be used consistently unless there is a strong reason for a specific definition, as can be the case in telecommunications or regulations of uses protected by the First Amendment. If you use multiple terms for the same concept, judges will presume that you meant different things.

**LEGAL REVIEW.** Bring in your lawyer early—it’s easier and less expensive than litigation. Various constitutional protections may affect what you are attempting to regulate. At a minimum, your lawyer should be involved in final review. No city wants its own lawyer finding a hole or flaw in an ordinance at the public hearing simply because it’s the first time he or she has seen it.

Planning processes protect individual substantive and procedural due process rights. Regulations dealing with property rights, in particular, must be adopted in accordance with statutory and constitutional principles of due process. Due process takes time, as does thorough review of materials by staff—and by the attorney. Shortcuts may backfire.

An ordinance should go through many drafts and should be carefully vetted. “Sleep on it” so you and legal counsel can review it with fresh eyes. Read it out loud. Walk an imaginary applicant through the regulatory and permit process. Does the ordinance accomplish what you want it to? Do the steps make logical sense? Is this how the process will actually occur? Is it clear and understandable to a nonplanner? Are the criteria clearly stated?

### Conclusion

You can pay for clear drafting either up front or after the fact, but you *will* pay. Litigation can cost tens of thousands of dollars and last for years. Overly rushed or “penny-wise and pound-foolish” efforts to keep costs down on the front end can result in your city losing the beneficial effects of the ordinance and frustrate the reasonable desires of residents, businesses, and property owners.

If you roll the dice on whether anyone will care enough to challenge, you must be prepared for the consequences.

—Kimberley Mickelson, JD, AICP, David S. Silverman, AICP,  
and Susan Trevarthen, FAICP

*Mickelson is a planner and land-use attorney in Houston and a visiting association professor of practice at Texas A&M University. Silverman is a partner with Ancel Glink Diamond Bush DiCianni & Kratthefer, PC, in Chicago, specializing in local government, land use, and economic development matters. Trevarthen is a town attorney in Fort Lauderdale, Florida, and chairs the Municipal Land Use and Zoning Law practice of the law firm of Weiss Serota.*



Nonverbal communication can say as much as spoken words. Their body language sends a message of exclusion and rejection.

## Credibility, Respect, and Power

### PLANNING TOOLS

**PLANNING COMMISSIONERS** spend a lot of time choosing the right words to avoid sending the wrong message, but it is equally important to monitor the nonverbal communication signals that accompany your words. In fact, research shows that more than 93 percent of communications effectiveness is determined by eye contact, body language, facial expressions, and voice quality.

When you are trying to send important messages like “I am telling you the truth” or “I respect you,” or when you are establishing the power positions of the parties, the nonverbal signals you send can be even more important than the particular words you speak.

Understanding nonverbal communication can help you monitor your own physical cues and understand what other

people are telling you, even when they’re not speaking out loud. Here is how this applies to planning commission meetings.

### Honestly, now . . .

People involved in high-tension civic discussions often feel very distrustful, and planning commissioners need to carefully monitor both incoming and outgoing nonverbal signals of honesty. How can you tell if a witness is exaggerating or lying? How can you make sure you aren’t inadvertently sending signals of dishonesty? Here are some tips on how to enhance your own credibility and assess the straight story from other people.

We are very suspicious of people who won’t look us in the eye. Speakers rated as “sincere” make eye contact three times more often than “insincere” speakers. Maintaining sincere eye contact doesn’t mean staring like an unblinking lizard.

Honest speakers blink between 10 and 20 times per minute. To not appear dishonest, avoid excessive blinking when facing a news camera or when sitting on a brightly lit podium, where strong lights may naturally trigger a lot of blinking.

Stress and tension can cause delicate nerves in the face to tingle, so people who are lying often scratch their noses, touch their cheeks, and rub their eyes more frequently than calmer, more truthful speakers. The same response can also thicken the consistency of the saliva. Stressed or tense speakers (whether honest or dishonest) often lick their lips, swallow, or clear their throats more often than relaxed and happy speakers. Have a glass of water available when you are making a stressful presentation.

People with something to conceal often hide their hands. In stressful situations, keep your hands where people





Sen. Carl Levin (D-Mich.), former Sen. Mary Landrieu (D-La.), and Sen. Jack Reed (D-R.I.) display varying levels of skepticism during a hearing. Landrieu, who has her mouth covered, is the least receptive.

can see them. People who talk with their hands are also perceived as being more confident.

## Show respect

It is easy to say you want to treat citizens with respect, but what should you actually do to demonstrate it?

Start by paying attention. Abandon other activities competing for your attention. Set aside reports and turn off your cell phone. Put your pen down as soon as a citizen approaches the microphone to indicate that you are now turning your attention to the speaker. Needless to say, turning away from the witness to exchange private whispers or jokes with a fellow commissioner is an obvious and inappropriate misdirection of attention.

Leaning forward is an effective way to convey attention to and interest in a speaker. By inclining forward in your chair, you create a more intimate environment between you and the speaker that seems to exclude distractions. Leaning back can signal that you feel distanced from the speaker or are unwilling to get personally interested in the issues.

No matter how big the audience is, genuine, respectful eye contact involves looking at one individual at a time. Select



Supreme Court Chief Justice John Roberts positively reinforces his testimony during his confirmation hearing with forceful, but not domineering, hand gestures.

one audience member and make personal eye contact with that citizen, then look at another part of the audience and make eye contact with another individual. Even if you cannot make personal eye contact with each person in the room, attendees will perceive that you are respecting each citizen as a unique individual.

We have a natural tendency to make more eye contact with people we know

and like, and with an individual who has asked a question and is now listening to the answer. In an audience setting, however, looking exclusively at one person for too long can actually send messages of disrespect to everyone else. If you have something to say of interest to one audience member, assume that it is of interest to everyone, so shift eye contact regularly.

Some planning commissioners who process information best when it is in writing might alternate between looking at the witness and looking at staff reports and other printed materials, trying to link what they are hearing to the written evidence before them. Other commissioners are such focused listeners that they need to eliminate visual distractions that could compete with auditory evidence. These commissioners may close their eyes to listen to a witness, seem to stare straight “through” the speaker without really seeing anything, or gaze vaguely at their desk or off into space. While these can be effective strategies to help commissioners balance verbal, written, and visual input, they can send the inadvertent message that the commissioner isn’t really listening.

It is very important to keep your hands away from your mouth whenever you are speaking or listening. Studies have shown that roughly three-fourths of people who cover their mouths when listening are hiding thin, compressed lips that indicate disapproval. Concealing your lips while listening sends the signal that you don’t like the person you are listening to, that you disagree with what is being said, or that you don’t want to be involved in the discussion.

These negative nonverbal signals are often accompanied by positive but insincere cues such as nodding one’s head or smiling, but the rejection message always prevails. A savvy audience can often predict the planning commission’s vote simply by watching what happens when various supporters and opponents are testifying. If too many audience members start covering their lips while you are speaking, you aren’t getting through. Take another approach.



# On Being an Effective—and Satisfied —Planning Commission

## LAW

"WHY DO WE EVEN bother?"

If you have served on a planning commission, chances are you've heard this statement—or maybe even made it yourself—on more than one occasion. Typically, this lament is triggered by a city council decision that fails to follow the planning commission's recommendation. Stung by the rejection of their advice, planning commissioners uttering these words wonder if their contributions are even necessary (or appreciated).

As a current city council member who served on a planning commission for nine years (and has advised city councils and planning commissions as a city attorney for over 20 years), I can tell you that your contributions are, in fact, necessary. But the value of those contributions should not be measured by whether your recommendations are adopted by your city council. Instead of focusing on whether the city council adopts your recommendations, expend your energy making sure those recommendations are supported by evidence, based on relevant policy arguments, and produced by an objective and fair process that earns credibility with all stakeholders.

As you strive to be an indispensable part of your city's planning infrastructure, here are three things that might help you be more effective and less frustrated:

**EMBRACE THE FREEDOM OF NOT BEING THE CITY COUNCIL.** Some planning commission members arrive at their "why do we even bother" moments in part because they are trying to play the same role as the city council. As a planning commissioner, you'll want to avoid this for at least a couple of reasons.

First, council members are elected;

planning commissioners are not. As elected officials, council members are directly accountable to the residents of the community. Describing the unique position council members occupy, L.P. Cookingham (one of the deans of the local government management profession) once wrote: Council members spend a great deal of time and energy monitoring the mood of your city. It's harder than it looks; don't be in a hurry to try to do it for them.

Never forget that the council, to the best of its ability, expresses the will of the people. There will be times when you will not understand why the council takes certain actions, but you will see that the council is generally right, and the members express public opinion as they see it and as they learn it from their constituents.

Second, council members are required to juggle a broad range of priorities. In addition to the issues that planning commissioners study, the council is responsible for the city's finances, public works, public safety, and many other issues. They must both understand and balance the competing interests of all of these areas every day without being experts in any one area.

As planning commission members, you have the luxury of focusing exclusively on planning issues. You should embrace the freedom to develop that expertise unburdened by the roles of balancing priorities and determining what is politically

possible. Recognizing that your role is that of an expert advisor to the council—and not a "mini-council member"—will help you be more effective and less frustrated as a planning commission member.

**GET ON THE SAME PAGE WITH YOUR CITY COUNCIL.** If you find that your city council frequently disregards your recommendations, it may be a sign that the planning commission and the council have different ideas about the community's goals. Rather than focusing on the individual decisions, take a step back and examine your community's long-range goals. Are the recommendations you are making consistent with those goals? If they are—and the council is rejecting them—the real issue may be that the council is not on board with those goals.

Your community's long-range goals should be articulated in a comprehensive plan. The planning commission and city council each bring critical ingredients for successfully crafting and amending that comprehensive plan. As planning commissioners, you contribute expertise in land-use planning; the council contributes expertise in what residents of the community will support and how land-use planning objectives fit with other city priorities. If you work with the council to craft (and continually refine) a document that incorporates all of this expertise, you will have fewer "why do we even bother" moments.

**BE OBJECTIVE AND CREDIBLE EXPERTS.** Focusing on being an expert advisor to the council is a necessary, but not sufficient, part of being an effective planning commission. It is critical, in addition to being an expert advisor, that the commission earns a reputation with the council and community stakeholders as an objective evaluator of land-use applications and

honest broker of community discussion and research in crafting and refining long-range land-use goals.

Here are a few of the many tools to consider using to help reassure the council and community stakeholders on this front:

**PROHIBIT EX PARTE COMMUNICATIONS** in evaluating site-specific applications. Limiting input by applicants and interested residents (both in favor and opposed to any given application) to written submissions or testimony at a noticed public hearing reassures those observing the process that all of the information you consider when evaluating an application is in the record presented to you and available to the applicant and interested members of the public.

**KEEP AN OPEN MIND.** Resist the temptation to make up your mind until you've had a chance to hear from all stakeholders and your colleagues on the planning commission.

**DIRECT—DON'T BE DIRECTED BY —CONSULTANTS AND STAFF.** Use outside experts to tell you the answer, not the question to ask.

**ENGAGE STAKEHOLDERS** in meaningful ways in policy-making processes. Many of your most valuable experts in charting long-range goals will be stakeholders in your community who know the community from firsthand experience.

As a member of the planning commission, you can be an effective and essential part of a city's land-use regulatory infrastructure if you understand your role, get on the same page with your city council, and earn a reputation as an honest broker of planning expertise for your community.

—Kevin Staunton

*Staunton is a city council member in Edina, Minnesota. Prior to his election in 2014, he served nine years on the Edina Planning Commission, including two years as its chair. Professionally, he is an attorney licensed to practice in Minnesota, where he has served as the city attorney in Excelsior since 1996.*

## HISTORY

### A SAFE PASSAGE FOR WILDLIFE



Chicago's Burnham Wildlife Corridor comprises about 100 acres running along Lake Michigan's shoreline south of the city center.

**DEVELOPMENT IS OFTEN RESPONSIBLE** for the fragmentation of wildlife habitat. One tool that planners have used to mitigate some of the negative impacts of disconnected habitats is a wildlife corridor. The idea comes out of the work of famed biologist E.O. Wilson, who studied the effects on isolated populations of various species in the 1960s. The basic theory is that plants and animals can travel between isolated patches of habitat by using a "corridor" of undeveloped or restored greenspace and thus reduce the loss of genetic diversity.

Critics of the strategy point to the lack of scientific research showing the effectiveness of corridors. Some studies have shown that to be successful, corridors must be significantly wider than most currently are, since many animals tend to avoid edges and prefer more room to maneuver.

—Ben Leitschuh

*Leitschuh is APA's education associate.*

## RESOURCE FINDER

Autonomous vehicles will take to the roads in the coming years. Is your community ready?

### APA RESOURCES

#### **When Autonomous Cars Take to the Road**

Erick Guerra  
Planning, May 2015  
[planning.org/planning/2015/may/autonomouscars.htm](http://planning.org/planning/2015/may/autonomouscars.htm)

#### **Planning for the Autonomous Vehicle Revolution**

Joseph DeAngelis  
APA Blog, June 2016  
[planning.org/blog/blogpost/9105024](http://planning.org/blog/blogpost/9105024)

### WEB RESOURCES

#### **Why Aren't Urban Planners Ready for Driverless Cars?**

Eric Jaffe  
CityLab, December 2015  
[tinyurl.com/nl8t6fv](http://tinyurl.com/nl8t6fv)

#### **Imagining the Driverless City**

Patrick J. Kiger  
Urban Land, October 2015  
[tinyurl.com/jthwrp6](http://tinyurl.com/jthwrp6)