

ORIENTATION FOR PLANNING/ZONING OFFICIALS AND EMPLOYEES – PART II

This course has been approved for three of the six hours of orientation training required for NEW planning/zoning officials and employees

Thursday, October 30, 2014

9:00–10:00 A.M.

LEGAL TOPICS IN PLANNING AND ZONING

Mark W. Tollison, Greenville County Attorney

John K. DeLoache, SCAC Staff Attorney

- Planning Framework and Preemption
- Constitutional Issues
 - Takings
 - Due Process
 - Equal Protection
 - First Amendment
- State Law Issues
 - S.C. Code Statutes
 - Vested Rights
 - Pending Ordinance Doctrine
 - Estoppel
 - Exactions
 - Impact Fees
 - Appeals and Mediation
- Land Development Regulations and Agreements

10:00–10:10 A.M.

BREAK

10:10–10:55 A.M.

LEGAL TOPICS IN PLANNING AND ZONING, CONTINUED

- Common Land Use Issues that Involve Competing Concerns
 - Manufactured Homes
 - Billboards and Signs
 - Telecommunication Towers
 - Religious Activities
 - Adult Entertainment Businesses
- Special Local Actions
 - Spot Zoning
 - Moratoria
 - Initiative and Referendum
 - FOIA
- Questions and Comments

10:55–11:05 A.M.

BREAK

11:05 A.M.–12:30 P.M.

ETHICS IN PLANNING


Cathy L. Hazelwood, Deputy Director and General Counsel

S.C. State Ethics Commission

- Overview of the S.C. Ethics Reform Act
 - Rules of Conduct
 - Recusal
 - Statements of Economic Interests
- Communication with County Council Members, Other Planning/Zoning Officials and Staff
- Questions and Comments

**Legal Topics in
Planning and Zoning**

Mark W. Tollison, Greenville County Attorney
John K. DeLoache, SCAC Staff Attorney

 **South Carolina
Association of Counties**

Planning Framework

- Sources of Authority for Local Planning
 - Home Rule Act
 - SC Code: Chapter 9 of Title 4
 - 1994 SC Local Government Comprehensive Planning Enabling Act
 - SC Code: Chapter 29 of Title 6
 - Court Decisions

The Importance of the “Law”

Legal issues can crop up during the planning process and there is value in being mindful because:

- The Constitution always applies
- State law often trumps local laws
- Actions are subject to challenge
- Liability can be an issue

Court Decisions

Rulings by Courts can directly impact planning programs by expanding, confirming, or restricting local regulations.

- Courts will often look to see if a law “goes too far.”
- Is the law even-handed or does it target a particular group?
- Was the process fair?

“Preemption”

- There is a clear hierarchy in lawmaking superiority
- Top Down -- Federal to State to Local
- Local ordinances and rules must be consistent with State law

Constitutional Issues

- Fifth Amendment “Takings”
- Due Process
- Equal Protection
- First Amendment
 - Freedoms of speech and religion

“Takings”

- Fundamental Constitutional Principle
- Fifth Amendment extends protection to property rights
- “Private property shall not be taken without just compensation.”

Eminent Domain

- Government Entities have the Power to condemn private property for public use
- Requires the payment of just compensation
- Just Compensation – The standard for property payments under 5th Amendment usually measured by fair market value

Takings

- Per Se Taking: Two types of actions are deemed a per se taking.
 - Permanent physical occupation
 - Deprivation of all economically beneficial use
 - *Lucas v. SC Coastal Council* (1994)
- Regulatory Taking: Indirect acquisition of property rights through regulation.
 - *Penn Central v. City of New York* (1978)

Evaluating a Takings Claim

- Has the action denied all economically beneficial use of property?
- What is the character of the government action? Does it seek to reduce/prevent harm?
- Does the action burden one individual with regulatory costs that should be borne by whole community?
- Has the action interfered with reasonable investment backed expectations?

Due Process of Law

- Fifth Amendment states that . . .
 - no person shall be deprived of life, liberty, or property without due process of law
- Not the same standard as the Character of Government Action under *Penn Central*
- There are two principle areas of Due Process: *Substantive* and *Procedural*

Substantive Due Process

- Substantive – Property Rights focus
 - The governmental action or regulations must reasonably further legitimate interest
 - Must avoid being arbitrary and capricious

Procedural Due Process

- Procedural -- Individual Rights focus
 - Timely and Adequate notice
 - Opportunity to be heard
 - Fairness/Bias/Conflict

Equal Protection Clause

- Works to ensure that we are treating similarly situated persons and property in a similar way under similar circumstances
- Fourteenth Amendment states that no state shall . . . deny to any person within its jurisdiction the equal protection of laws
- Reasonable classification rationally related to governmental interest may be upheld

First Amendment Issues

- Produces commonly known Freedoms of Speech and Religion
- Speech -- "prior restraint" claims can result from control over content
 - "Vague" and "Overbreadth" -- Caution
 - But proper time, place, and manner -- Upheld

First Amendment . . .

- Religion – “free exercise” impacts locations and activities
 - RLUIPA - land use regulation should not operate to impose “substantial burden” on religious exercise

State Law Issues

- Statutes
- Vested Rights
- Pending Ordinance Doctrine
- Estoppel
- Exactions
- Impact Fees
- Appeals and Mediation

State Code Provisions

- 1994 Planning Act
- Home Rule Principles
- Other Stray Laws

Vested Rights

- When rights have accrued to the property or applicant to allow pursuit of an approved development or use
- §6-29-1510 puts certain vested rights directly in the Code

Pending Ordinance Doctrine

- Early Enforcement
- Denial of permit application if conflict to pending and later enacted zoning ordinance
- Not found in State Code but acknowledged as lawful by the SC Supreme Court
- Key to getting "pending" status -- when Council has resolved to consider certain action and advertised its intention via public hearing notice

Estoppel

- Legitimate reliance on local official's interpretation, statements, approvals
- Recent cases have highlighted reliance problems

Exactions

- Exactions are development approvals conditioned on provision/contribution of public facilities
- Constitution requires “essential nexus” between local objectives and exaction

Impact Fees

- Impact Fees must comply with State law and are tied to Capital Improvement Plans
- SC Code §6-1-910

Appeals

- Legal challenges and appeals in court can involve and impact planning and zoning decisions
 - Exhaustion of administrative remedies
 - Standard of review typically lends a certain amount of deference to legislative decisions and local fact finding

Mediation

- Amendments to 1994 Planning Act provide a shorter track to Alternative Dispute Resolution forum on appeals from local decisions

Land Development Regulations and Agreements

- Subdivision Regulations
- Development Agreements
- Planned Development Districts
- Special Tax Districts

Common Land Use Issues Competing Interests

- Manufactured Homes
- Billboards and Signs
- Telecommunication Towers
- Religious Activities
- Adult Entertainment Businesses

Manufactured Housing

- Local Codes cannot impose construction or safety standards
- Zoning restrictions are available
- Exclusionary plans may pose a problem
- Placement of conditions that are aesthetic-based have been upheld

Billboards and Signs

- Can present: Takings, Amortization, and First Amendment issues
- Commercial (business advertising) and Non-commercial (political) Distinction
 - Regulation of political signs
 - On-premise vs. off-premise signs

Wireless Telecommunication Towers

- There are significant exceptions under Federal Telecommunications laws which purport to preserve local zoning authority regarding the placement, construction, and modification of personal telecommunication service facilities

Wireless Tower Rules

- Under Federal Rules . . .
 - Must act on any request to construct facilities within a reasonable period, no “unreasonable discrimination” among providers
 - Decisions to deny wireless service facilities shall be in writing, supported by substantial evidence
 - Citizens' generalized expressions of concern about aesthetics and potential decreases in property values cannot serve as substantial evidence

Religious Based Uses

- Holding regularly scheduled worship services in single-family districts is not protected
- Zoning provisions prohibiting church-related activities in a single-family residence outlawed by State law
- Watch out for Federal RLUIPA claims on church location and/or expansion denials

Adult Entertainment Businesses

- Adult Entertainment Businesses (SOBs) enjoy First Amendment protections
- Subject to regulation due to negative secondary impacts but not based on content of the “speech”
- Negative secondary effects studies of sexually oriented businesses are recognized by the courts, but should include local stats

More Adult Businesses

- Regulation should serve substantial governmental interest of preventing harmful secondary effects while allowing alternative avenues of communication
- Cannot impose an outright ban
- "Time, place, and manner" rules work
- Zoning is a strong mechanism to balance community aims and speech
- Licensing must have prompt judicial review

Special Local Actions

- Spot Zoning
- Moratoria
- Initiative and Referendum

Spot Zoning

- Singling out a single parcel
- Benefiting owner to detriment of adjacent properties
- Hard to define – Court review will likely examine:
 - Corrections with little harm to fix prior inappropriate zoning
 - Adherence to Land Use Element of the Comprehensive Plan

Permit Moratoria

- Putting on the Brakes
- US Supreme Court has upheld
- SC Supreme Court has never ruled directly on issue of zoning or land development moratoria
- Watch out for vested rights (previously issued permits or approved plats)

Initiative and Referendum

- Zoning on the Ballot
- SC Supreme Court has invalidated zoning changes using State law that provides mechanism for adopting ordinances by referendum
- But .. lawful for use in an advisory manner

Freedom of Information Act

- State FOIA covers Planning Process
 - Compliance with Notice Requirements
 - Adequate meeting notice to public
 - Including Workshops, Subcommittees
 - Agenda Postings
 - Executive Sessions - Limited

Questions and Final Comments

**THE ETHICS, GOVERNMENT ACCOUNTABILITY,
AND CAMPAIGN REFORM ACT OF 1991**

**SCAC Orientation for Planning and Zoning
Officials/Employees – Part II**

Ethics in Planning

October 30, 2014

First scenario: A planning commissioner works for a real estate firm and his boss makes a presentation before the commission seeking something. You don't have a boss and you make the presentation before the commission on behalf of a client. On behalf of your own property. You share office space with a realtor, but are not in business with the realtor and she makes a presentation before the commission. You used to be in business with a realtor, but the firm was disbanded six months ago, and the former partner makes a presentation before the commission. You do not know the person making the presentation before the commission, but you bought or sold the property within the last year. Within the last five years. Within the last five minutes.

Second scenario: A board of zoning appeals (BZA) member is taken to lunch by a developer about to appear before the BZA. Substitute employee for member, if you'd like. The developer is your BFF from college. Is your newest BFF since you joined the BZA. The developer never takes anyone to lunch unless he has a matter before the BZA.

Third scenario: A city planning office employee who reviews development plans is also an Amway distributor. When the developer brings in the plans, it helps to place an order for lots of Amway. The employee doesn't sell Amway, but has an order form on his desk for Boy Scout popcorn, Girl Scout cookies or the WORLD'S GREATEST CHOCOLATE. Everything goes very smoothly with a box of thin mints.

Fourth scenario: A planning commissioner owns property and the issue before the commission is about property adjacent to her property. The property is in the same neighborhood, but not adjacent. A re-zoning issue is going to impact every property owner on three blocks and there are 100 property owners, of which one is a planning commissioner. There are 10 owners, of which one is a planning commissioner.

Final scenario: The last issue which you worked on as a planning commissioner was a TIF. Let's call it the Horizon Redevelopment TIF. You were a fervent supporter. After your term expired, you were asked to represent a party to the TIF before the planning commission. A TIF was on the agenda after your term expired, but you did not have the pleasure of working on one. Your term expires and the planning commission wants to hire you to work on the TIF. A party to the TIF wants to hire you, but does not want you to make any appearances before the planning commission.

I. RULES OF CONDUCT

A. Section 8-13-100 various definitions:

(1)(a) “Anything of value” or “thing of value” means:

- (i) a pecuniary item, including money, a bank bill, or a bank note;
- (ii) a promissory note, bill of exchange, an order, a draft, warrant, check, or bond given for the payment of money;
- (iii) a contract, agreement, promise, or other obligation for an advance, a conveyance, forgiveness of indebtedness, deposit, distribution, loan, payment, gift, pledge, or transfer of money;
- (iv) a stock, bond, note, or other investment interest in an entity;
- (v) a receipt given for the payment of money or other property;
- (vi) a chose-in-action;
- (vii) a gift, tangible good, chattel, or an interest in a gift, tangible good, or chattel;
- (viii) a loan or forgiveness of indebtedness;
- (ix) a work of art, an antique, or a collectible;
- (x) an automobile or other means of personal transportation;
- (xi) real property or an interest in real property, including title to realty, a fee simple or partial interest in realty including present, future, contingent, or vested interests in realty, a leasehold interest, or other beneficial interest in realty;
- (xii) an honorarium or compensation for services;
- (xiii) a promise or offer of employment;
- (xiv) any other item that is of pecuniary or compensatory worth to a person.

(b) “Anything of value” or “thing of value” does not mean:

- (i) printed informational or promotional material, not to exceed \$10 in monetary value;
- (ii) items of nominal value, not to exceed \$10, containing or displaying promotional material;
- (iii) a personalized plaque or trophy with a value that does not exceed \$150;
- (iv) educational material of a nominal value directly related to the public official's, public member's, or public employee's official responsibilities;
- (v) an honorary degree bestowed upon a public official, public member, or public employee by a public or private university or college;

(vi) promotional or marketing items offered to the general public on the same terms and conditions without regard to status as a public official or public employee; or

(vii) a campaign contribution properly received and reported under the provisions of this chapter.

(3) “Business” means a corporation, partnership, proprietorship, firm, an enterprise, a franchise, an association, organization, or a self-employed individual.

(4) “Business with which he is associated” means a business of which the person or a member of his immediate family is a director, an officer, owner, employee, a compensated agent, or holder of stock worth \$100,000 or more at fair market value and which constitutes five percent or more of the total outstanding stock of any class.

(11)(a) “Economic interest” means an interest distinct from that of the general public in a purchase, sale, lease, contract, option, or other transaction or arrangement involving property or services in which a public official, public member, or public employee may gain an economic benefit of \$50 or more.

(b) This definition does not prohibit a public official, public member, or public employee from participating in, voting on, or influencing or attempting to influence an official decision if the only economic interest or reasonably foreseeable benefit that may accrue to the public official, public member, or public employee is incidental to the public official's, public member's, or public employee's position or which accrues to the public official, public member, or public employee as a member of a profession, occupation, or large class to no greater extent than the economic interest or potential benefit could reasonably be foreseen to accrue to all other members of the profession, occupation, or large class.

(15) “Family member” means an individual who is:

(a) the spouse, parent, brother, sister, child, mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, grandparent, or grandchild; or

(b) a member of the individual's immediate family.

(16) “Gift” means anything of value, including entertainment, food, beverage, travel, and lodging given or paid to a public official, public member, or public employee to the extent that consideration of equal or greater value is not received. A gift includes a rebate or discount on the price of anything of value unless it is made in the ordinary course of business without regard to that person's status. A gift does not include campaign contributions accepted pursuant to this chapter.

(18) “Immediate family” means:

- (a) a child residing in a candidate's, public official's, public member's, or public employee's household;
- (b) a spouse of a candidate, public official, public member, or public employee; or
- (c) an individual claimed by the candidate, public official, public member, or public employee or the candidate's, public official's, public member's, or public employee's spouse as a dependent for income tax purposes.

(20) “Individual” means one human being.

(21) “Individual with whom he is associated” means an individual with whom the person or a member of his immediate family mutually has an interest in any business of which the person or a member of his immediate family is a director, officer, owner, employee, compensated agent, or holder of stock worth \$100,000 or more at fair market value and which constitutes five percent or more of the total outstanding stock of any class.

B. Section 8-13-700, et al. rules of conduct

1. May not use official office/position for financial gain — knowingly. §8-13-700(A).
2. Recusal provisions for conflicts. §8-13-700(B).
3. May not receive or give anything of value with intent to influence (Anti-Bribery Statute). §8-13-705.
4. May not accept an honorarium for speaking engagements in one’s official capacity. May accept payment for actual expenses. §8-13-715.
5. May not accept additional money for assistance given while performing one’s duty. §8-13-720.
6. May not use confidential information gained through employment for personal gain. §8-13-725.
7. Representation prohibitions. §8-13-740.
8. May not cause the employment, promotion, or transfer of a family member to a position in which one supervises. Prohibits discipline of one’s family member. §8-13-750.
9. Post employment restrictions. §8-13-755. (Government lawyers see Rule 407 of Appellate Court Rules, Rule 1.11 Successive Government & Private Employment).
10. Breach of ethical standards for an employee participating in procurement to resign and accept employment with a person contracting with the governmental body. §8-13-760.

11. May not use government personnel/materials in an election campaign.
§8-13-765.

II. PENALTIES

A. Section 8-13-320(10)(I) The written decision as provided for in subitem (k) may set forth an order:

(i) requiring the public official, public member, or public employee to pay a civil penalty of not more than \$2,000 for each violation;

(ii) requiring the forfeiture of gifts, receipts, or profits, or the value thereof, obtained in violation of the chapter, voiding nonlegislative state action obtained in violation of the chapter; or

(iii) requiring a combination of subitems (i) and (ii) above, as necessary and appropriate.

B. Section 8-13-705(F) provides for imprisonment of not more than 10 years and a fine of not more than \$10,000 and that the person is permanently disqualified as a public official or forfeits public employment.

C. Section 8-13-1510 provides in part for increasing late filing penalties, up to \$5,000 per form, and that a person could be prosecuted in magistrate's court for a first offense failure to file a form.

D. Section 8-13-1520 provides that a violation of the Rules of Conduct is a misdemeanor and on conviction one may be fined not more than \$5,000 or be imprisoned not more than one year or both. A person guilty of violating the campaign reporting provisions is guilty of a misdemeanor, and must be fined a minimum of \$5,000 and a maximum 500 percent of the amounts that should have been reported, and may be sentenced to up to one year in prison.

E. Section 8-13-780 provides that the Commission may issue a public reprimand.

III. STATUTE OF LIMITATIONS

Action cannot be taken on a complaint filed more than four years after the violation is alleged to have occurred. §8-13-320(9)(d).

IV. STATE ETHICS COMMISSION website is <http://ethics.sc.gov>.

- Electronic filing and public reporting
- The Ethics Reform Act
- All advisory opinions