

Public Participation in Planning Decisions

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Legislative Decisions

Governing board hearing – State statutes require that the governing board hold a hearing before acting on any proposed amendment to a planning and development ordinance. Planning board hearings are not specifically required by state law, but many ordinances mandate a hearing by the planning board as well.

Public notice of governing board hearing -- State law mandates specific notice of the required governing board public hearing:

1. Newspaper -- An advertisement for the hearing must be published twice, in separate weeks, with the first notice at least 10 but not more than 25 days prior to the hearing.
2. Mail – For zoning map amendments, first class mailed notice must also be sent to the affected and abutting properties.
3. Posting – On-site posting of a hearing notice is required for all zoning map amendments. If multiple parcels are proposed for rezoning, it is not necessary to post each parcel, but sufficient notices must be posted to give reasonable notice of the proposed action.

Conducting the hearing. The hearing on rezonings is legislative. Speakers need not be under oath and they can express opinions about the wisdom of the proposed action. Unduly repetitious or irrelevant testimony can be barred. It is appropriate to have signup sheets and reasonable time limits can be imposed. For example, each speaker could be limited to a set time (such as five or ten minutes each), each side in a rezoning dispute could be given a set time to present their case, or a total length could be set for the hearing. It is acceptable to allow only a single person to speak to represent a group with similar concerns (with perhaps a show of hands by all those who agree).

Findings -- Unlike quasi-judicial decisions, no written findings of fact are required for ordinance adoption, repeal, or amendments. However, the planning board must provide a written comment that addresses plan consistency and the governing board must adopt a written statement on each zoning amendment decision that addresses plan consistency and how the decision is reasonable and in the public interest.

Quasi-judicial Decisions

Burden. The person requesting a variance or special/conditional use permit has the burden of producing sufficient evidence for the board to conclude the standards have been met. If insufficient evidence is presented, the application must be denied (or the board can continue the hearing to a later date to receive additional evidence). Once sufficient evidence is presented that the standards are met, the applicant is entitled to a permit. If conflicting evidence is presented, the board must determine which facts it believes are correct.

Oaths. Those offering testimony are usually put under oath. This reminds witnesses of the seriousness of the matter and the necessity of presenting factual information, not opinions or speculation. All of the witnesses may be sworn in at one time at the beginning of the hearing or each witness may be sworn in as they begin to testify. While oaths may be waived if *all* of the parties agree, many local governments routinely swear in all witnesses, including the staff members and attorneys who are making presentations. If a witness has religious objections to taking an oath, they may affirm rather than swear an oath. The oath is generally administered by the chair of the board receiving the testimony (it may also be administered by the city or county clerk or by any notary public).

Cross-examination. Parties have the right to cross-examine witnesses. The board can establish reasonable procedures for this, such as allowing questions to be posed only by a single representative of a party. Board members are also free to pose questions to anyone presenting evidence.

Hearsay. Hearsay evidence and opinion evidence (unless offered by a properly qualified expert witness) is generally not allowed. If that is the best evidence available the board can receive it, but the board may well decide to limit the weight or credibility it gives such evidence.

False testimony. A person who deliberately gives false testimony under oath in a zoning hearing is subject to criminal charges for perjury.

Outside evidence. Persons affected by a decision have the legal right to hear all of the information presented to board members, to know all of the “facts” being considered by the board. Therefore members of the decision-making body are not allowed to discuss the case or gather evidence outside of the hearing (what the courts term *ex parte* communication). Only facts presented to the full board at the hearing may be considered. It is permissible for board members to view the site in question before the hearing, but they should not talk about the case with the applicant, neighbors, or staff outside of the hearing. If a member has special knowledge about a site or case, the member should disclose that at the hearing.

Time limits. While unduly repetitious or irrelevant testimony can be barred, an arbitrary time limit on the hearing cannot be used. It would not be appropriate, for example, to limit each side in a variance proceeding to ten minutes to present their case. It is acceptable to allow only a single witness representing a group with similar concerns.

Exhibits. Witnesses may present documents, photos, maps, or other exhibits. Once presented for consideration by the board, exhibits are evidence in the hearing and become part of the record (and must be retained by the board). Each exhibit should be clearly labeled and numbered as it is received into evidence.

The application for the permit and any correspondence submitted as part of the application file should also be entered into the hearing record and may be considered by the board. Most application forms are designed to solicit sufficient information for a decision. It is a good practice to have a person familiar with the information in the application (usually the applicant or an agent of the applicant) available to answer any questions the board may have about the written submissions.

Quality of evidence. There must be "substantial, competent, and material evidence" to support each critical factual determination. Key points need to be substantiated by the factual evidence in the hearing record; the findings cannot be based on conjecture or assumptions. For example, for the board to find that neighboring property values would be significantly reduced by a proposed project, there must be some testimony in the record to support that finding, such as testimony from a Realtor about the impacts of a similar project elsewhere in town or presentation of facts that would allow a reasonable person to conclude property values would go down. Where conflicting evidence is presented, the board has the responsibility of deciding how much weigh to accord each piece of evidence.

Record. Complete records must be kept of the hearings. Detailed minutes must be kept noting the identity of witnesses and giving a complete summary of their testimony. Any exhibits presented should be retained by the board and become a part of the file on that case. Though not legally required to do so, most boards make audiotapes of the hearings in case a transcript is needed if the case is appealed to the courts.

Findings. Written findings of fact are required to be made by the board making the final decision on a quasi-judicial matter. The board must specify what it determines the facts to be and must document the basis for the decision. Simply repeating the standards for the ordinance and noting each is met is generally not sufficient, especially where there is conflicting evidence. It is useful for the staff and board to have a clear and common set of terminology relative to "standards," "findings," "findings of fact," "decisions," and "orders."