

# Design Review Board - Orientation Manual

## V.A Development Decision Making



## V. B RIGHTS AND RESPONSIBILITIES IN PLANNING

### CONSTITUTIONAL RIGHTS AND RESPONSIBILITIES IN PLANNING<sup>1</sup>

#### Chapter 4

Community planning must balance many issues and countervailing forces while creating an outline or model for growth. A framework of rules and regulations, designed to limit and shape the authority of the planning process, covers constitutional rights, duties, and obligations of municipalities as a whole (and the citizens they represent generally), and property owners and citizens directly involved in the planning process.

Constitutional rights and responsibilities must be met and balanced in the heat of the moment, in cases that can tear at a community.<sup>1</sup> Citizens will cry for action before a lay group that is not always trained, or even specifically advised, on legal issues. This chapter will help public agencies identify the two constitutional issues most directly affected by planning—due process and the taking issue—and suggests when additional guidance may be needed.

“Due process” has two components: 1) “**Procedural**,” which says that a rule or action was properly adopted after proper notice and opportunity to be heard; and 2) “**Substantive**,” which means the rule or action gives adequate notice of what is intended or regulated and is reasonably related to a matter appropriate for government regulation.

“Taking is the right not to be deprived of property without just compensation.

#### A. Due Process

Due process is the primary constitutional issue dealt with in planning. Due process arises under the Washington State Constitution, Article I § 3, and Article V of the U.S. Constitution, as applied to state action through the XIV Amendment to the Constitution.

As applied to planning, due process most commonly takes these forms:

- **Procedural Due Process**—a right to have certain rules followed before significant changes occur to one’s rights, responsibilities, or property.
- **Substantive Due Process**—the right to have rules adopted which are reasonable in aim and scope, and which are targeted to objectives appropriate for municipal action.

Washington State is fortunate to have several decisions in which the courts have gone out of their way to articulate due process guidelines and principles. These are helpful in evaluating situations and making decisions.

#### 1. Procedural Due Process

Adequate notice is the prerequisite of any lawful municipal action. State law requires municipal agencies to establish regular meeting times and places, and to publish special notices for meetings held at other than regularly scheduled times. Failure to give proper notice of a meeting will invalidate any action taken at that meeting.

Planning cases require special, rather than general, notices. It is not sufficient merely to give notice that a meeting usually will occur. Courts have held:

*Procedural due process requires notice which is reasonably calculated under the circumstances to apprise affected parties of the pending action and to afford them an opportunity to present their objections.<sup>2</sup>*

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When a county enacts or amends a zoning ordinance, it is required by statute to give notice of the time, place and purpose of the meeting<sup>3</sup>. Where the board is to consider amendments must be available for review in advance of the hearing.

Finally, if an action of a council deprives a property owner of a right previously enjoyed, personal notice and hearing are required.<sup>4</sup> This would apply, for example, to a zoning ordinance that seeks to terminate existing practices (eliminate vested rights), rather than merely regulate or prevent new uses from occurring in the future. Personal notice and hearing would be required before taking effect.

Notices to “owners of record” may be inadequate in some cases with substantial effect on tenants, or when county records lag weeks or months behind local real estate transactions. (Addresses on record at the county often are mortgage companies more interested in having taxes paid on time than forwarding official notices to owners or tenants possibly affected by planning activities.)

**PRACTICE TIP: *Communities are encouraged to adopt notice policies reasonably calculated to notify interested or affected parties. Major changes may require extra notice, such as large signs on affected property or direct mail to owners of record and residents.***

#### 2. Substantive Due Process—Proper Exercise of the Police Power

Substantive due process is divided into cases which concern:

- *The overall property of the action taken, or the limits of the “police power” in general.*
- *The clarity with which the action is taken, known as the “vagueness” inquiry, and*
- *The connection between the action taken and the problem created by a project or proposal, known as the “nexus” inquiry.*

Two separate and district inquiries must be made:

- *The nature and purpose of the decision to use regulation, rather than acquisition, to secure the municipal rights in question.*
- *The nature of the municipal rights secured, and the reasonableness of the use remaining after the regulation is imposed.*

Both of these inquiries are considered part of the “taking issue.”

To analyze a municipal regulation under substantive due process challenge, courts will make a three-part substantive inquiry.<sup>6</sup> To understand the nature of the inquiry, planning commissions and their respective boards and councils should consider and address the following issues:

#### **Does the regulation seek to achieve a legitimate public purpose?**

In most cases, planning enactments seek to protect stated community values, the “object” or “purpose” of the planning effort will be deemed legitimate.

For example, regulations aimed at protecting public health and water quality seek to achieve a legitimate public purpose.<sup>7</sup> On occasion, a community may want to adopt planning rules that give one constituency a competitive advantage over another. Courts would certainly scrutinize this legislation closely. If improper purpose is shown, the presumption of validity may be overcome.

#### **Are the means used to accomplish the lawful purpose reasonably necessary to the stated objective?**

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Even when a stated aim is proper, courts will examine whether the means chosen are appropriate.<sup>8</sup> In protecting neighborhood values, for example, a municipality might require modern construction techniques and adequate storage before permitting modular housing in a community. The municipality could be challenged, however, if it assumes that modular housing is always inferior (a demonstrably false assumption) and seeks to ban modular housing or “mobile homes” to “protect the quality of single-family neighborhoods.”

#### **Is the chosen regulation unduly burdensome on the landowner?**

This inquiry aims at balancing the municipality’s interests with those of the property owner. The greater the public harm, up to a point, the greater the public intrusion warranted in solving the harm. The greater the intrusion on the use of property, the closer the scrutiny required—based on whether a less intrusive alternative would have accomplished the same result, or whether it is fair to make the property owner bear the burden of solving a community problem.

In making the “unduly burdensome” inquiry, courts and commentators have developed a list of inquiries to help evaluate the issues involved:<sup>9</sup>

- *The nature of the harm to be avoided.*
- *Whether less drastic protective measures are available and effective, and*
- *The economic loss suffered by the property owner.*

Another formulation asks these relevant questions:<sup>10</sup>

- **On the public side:** *the seriousness of the public problem, the extent to which the owner’s land contributes to the problem, the degree to which the proposed regulation solves the problem, and the feasibility of less oppressive solutions, and*
- **On the owner’s side:** *the amount and percentage of value lost, the extent of remaining uses (past, present, and future), the temporary or permanent nature of the regulation, the extent to which the owner should have anticipated such regulation, the extent to which the owner should have anticipated such regulation, and how feasible it is for the owner to alter present or currently planned uses.*

When a regulation fails to pass the balancing test, or where it goes too far (either on its face or as applied to a single parcel), the remedy is to invalidate the ordinance.<sup>11</sup>

### 3. Substantive Due Process—The Vagueness Inquiry

If a municipal regulation is to be enforceable, it cannot be unconstitutionally vague. People enforcing the regulation, and those affected by it, must have a sense of the nature and extent of the regulation and the conduct it permits or prohibits.

Courts have held ordinances unconstitutionally vague in the following context:

*An ordinance is unconstitutional when it forbids conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application...Such an ordinance violates the essential element of due process of law—fair warning<sup>12</sup>*

In the cited case, a zoning ordinance permitted a “limited degree” of manufacturing in a commercial zone. The question was whether certain machinery fell inside or outside the permitted uses. As stated by the court:

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*In the area of land use a court does not look solely at the face of the ordinance; the language of the ordinance is also tested in its application to the person alleged to have violated it. ...The purpose of the void for vagueness doctrine is to limit arbitrary and discretionary enforcement of the law.<sup>13</sup>*

The court invalidated the ordinance's proscription of "limited use" because, as applied to the machine in question, no one could know or understand the reasonable limitations intended.

A similar situation existed in a city where a design review ordinance called for buildings to be "in good relationship" with the surrounding views, have "appropriate proportions" and "harmonious colors," and be "interesting." In the transition between the old town and a nearby development area, the court found the design review commission could not express the code requirements in other than personal preferences. As such, the code as applied to the building in question was unenforceable.

While aesthetic issues can be difficult to articulate, communities may want to use a combination of words and designs to express the range of options in which a project should operate.

If a city wishes to enforce a "statement" or a "policy," it must first pass some ordinance or regulation that gives standing to the policy or statement. Mere expressions of preference, without more, cannot be a basis for denying land use decisions. As stated by the court:

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*...Commissioner's individual concepts [of "policy"] were as vague and undefined as those written in the code. This is the very epitome of discretionary, arbitrary enforcement of the law.<sup>16</sup>*

If a municipality is to avoid a claim of vagueness, it must create a standard (in words and pictures, if needed) that permits those involved in the process to understand what is expected or required.<sup>17</sup> Alternatively, the Legislature must set up a process for creating a standard that can be fairly and uniformly applied, and reviewed in subsequent cases.

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#### 4. Substantive Due Process—The Nexus Issue

The “nexus” issue involves the extent to which a municipality can impose a requirement on a particular individual to solve a specific problem or respond to a community need. There must be a logical connection between the problem the community is trying to solve, and the limitation, regulation or exaction sought by municipal action.

The earliest example of the “nexus” doctrine arises in a United States Supreme Court case known as **Nollan**.<sup>18</sup> In the **Nollan** case, the California Coastal Commission sought to require a property owner to dedicate a beach front public walkway as a condition to a request to remodel a home.

The court noted that a municipality could acquire a beach front walkway at any time by condemnation. The question in the case is whether the municipality could require the owner to dedicate the walkway without compensation, since the owner was seeking a permit to remodel the house on the lot.