

Making Your Opinion Known

by C. Gregory Dale, AICP

Participation in public affairs and engaging in civic discourse are well-established traditions in our democracy. As a planning commission member you are probably interested in a wide range of public policy issues and often would like for your individual voice to be heard beyond the planning commission chambers. However, are there ethical constraints to how you can make your opinion known as an individual?

Consider this hypothetical situation: a proposed development project is heard by your Planning Commission on several zoning and site plan approval issues. The Planning Commission ultimately recommends approval of the project to City Council (in your state, the governing body makes the final decision after receiving the planning commission recommendation). You were in the minority, having voted against the project because you believed its parking layout failed to conform to certain design criteria in the zoning ordinance.

As part of the proposal, the applicants are also requesting certain tax abatements. Under your ordinance decisions on tax abatements are not considered by the Planning Commission, and are within the sole review of the Council. As an individual, you oppose the use of tax abatements to encourage development. However, this was not a factor in your vote as a planning commissioner.

When the project comes before your Council, you decide to appear as an individual and voice your opposition to the tax abatements. You also urge the council to require the developer to revise the proposed parking layout. You are surprised, however, when a City Council member becomes upset that you are appearing before the council to voice an opinion about the project. The council member tells you that your testimony is

inappropriate since you have already had your say in the process as a Planning Commission member. As a new planning commissioner you are confused and perplexed by this reaction.

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Is the city councilor right? Was it inappropriate for you to testify – or did you have the right to express your views?

"THE RIGHT THING TO DO"

By the way of background, as I have indicated in many previous columns, you have a responsibility as a public official to protect the integrity of your office. The bond of trust between the planning commission and the community is paramount, as is protecting your credibility as a planning commission member. Having said this, does this mean you have "forfeited" your right to express your opinion as an individual outside of the context of planning commission meetings?

As a general principle, I believe it is important to make a distinction between the question of whether or not you "have the right" to engage in certain activities, and the question of whether it is "the right thing to do." Certainly, you have the right to engage in a wide range of activities, even though your conduct may not necessarily be the right thing to do under the circumstances. In the hypo-

thetical situation I posed, what is the right thing to do?

Let me offer some thoughts to help work through this question.

A starting point is to consider whether your comments are related to an issue that comes within the purview of the Planning Commission. If your remarks are unrelated to planning matters, you should feel comfortable in speaking out as an individual.

For example, the way in which your local government handles a labor issue in the Police Department is a public policy issue on which you may have a strong opinion. Voicing that opinion to your governing body is completely appropriate, and should not raise any concerns. Similarly in the hypothetical posed, since the Planning Commission has no say in tax abatement decisions (please note, this is only for purposes of the hypothetical – there very well may be planning commissions that *do* have a role in this!) you should be able to speak before the City Council on this issue.¹

As a Planning Commission member you do not give up your ability to speak out on a range of civic issues. You should be careful, however, in how you do so. You should make it clear that you are not speaking as a Planning Commission member, but as an interested citizen. Even so, do not be surprised if some people believe you are using the "mantle" of the Planning Commission to give your comments greater impact than those

¹ This would clearly be the case if you were speaking about tax abatement policy in general. However, since you are raising the issue with respect to a specific project your commission reviewed you are edging closer to an area which might be inappropriate for you to comment on. Much depends on the norms of your community, as I will discuss in the balance of the article. However, I would find it unusual for a community to consider it inappropriate for a planning commissioner to be able to speak out before the governing body on an issue that was not before the commission for consideration.

from an “average citizen.”

But what about the second part of the hypothetical, where you addressed the council about a site plan issue that was considered by the Planning Commission, and on which you were in the minority? Was it appropriate for you to address the Council about this?

COMMUNITY NORMS OF APPROPRIATE CONDUCT

Your first step should be to consult with your Commission’s legal counsel. There may be instances in some states where it is not appropriate to engage in this activity, particularly when your commission acts in a “quasi judicial” capacity.

If there are no legal restrictions, I would suggest you need to consider the “norms” of your community. In many communities, when a planning commissioner is involved in review of a project it would be considered inappropriate for that commissioner to try to have a “second bite at the apple” by going before the governing body to argue for another outcome.

Remember, the planning commission should express its opinion in written findings and recommendations that the governing body receives. When a commissioner in the minority feels strongly, the appropriate place to make note of this would be in a minority or dissenting statement attached to the commission’s decision or included in the minutes. A judicial analogy is helpful. In those states where planning commissions make final decisions subject only to court review, the court will ordinarily not allow a dissenting commissioner to appear in court to testify and argue that the commission’s decision was wrong.

There are other communities, however, where the norm may be that it is acceptable for planning commission members – including those who disagreed with the majority decision – to appear before the governing body to explain their position. This is often the case in smaller counties, cities, or towns where a planning commission’s written decision is cursory in nature, without a detailed explanation for its recommendation.

But even in some communities where the planning commission does provide the governing body with a well-reasoned written recommendation, the community norm may be that it is acceptable for planning commissioners to come before the governing body to voice their opinion.

And then there are the communities where the norms are unclear, or have never been articulated. That’s where most of the problems – and hard feelings – will arise.

In any case, should you choose to come before the governing body to voice your opinion, you should expect that some may view your efforts as an abuse of your authority.

BEING PROACTIVE

As with many of the issues I have addressed in this column over the past ten years, the best approach is to be proactive – that is, to know how to handle anticipated situations before they occur. Your planning commission may find it helpful to discuss in a work session how minority views can be expressed – coming up with guidelines for what is appropriate. Better yet, bring up the subject at a work session between commissioners and governing body members. Both bodies can then reach an understanding of what will, or will not, be considered appropriate, thereby clarifying the community’s norms.² Having the ground rules spelled out in advance will not only avoid hard feelings in the future, but make it easier for new (or potential) commissioners to know what is expected.

Let me be clear: in highlighting the role of a community’s norms of acceptable conduct, I am not approaching this from the standpoint of your legal rights. If you have a question about whether there are legal restrictions against certain behavior, please consult your planning commission attorney or other legal counsel.

If your desire to speak out on an issue ultimately conflicts with the norms of your community, you will need to bal-

² A joint session might also consider the converse question not covered in this article: are there times when it is inappropriate for a governing body member to testify before the planning commission on a matter?

ance the effect your action will have on the credibility and integrity of the planning commission against the importance of your expressing personal views on the issue. In balancing these, remember that when you accept appointment as a planning commissioner you are accepting responsibility associated with being a public official – and being part of a body which needs to work together on a variety of important matters. ♦

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