

APPROVED
Spring City Corp
Planning and Zoning Commission
Training Meeting Minutes
Spring City Hall
February 26, 2009

Roll Call: John Gavril (presiding), Noel Bertelson, Lawrence Gardner, Clarence Sorensen (Zoning Administrator), Greg Hansen, Lonnie Brewer (Alternate). **Absent:** Michael Black & Cheryl Bartholomew (Alternate).

Attending: Quay Von Hansen (Board of Adjustments), Jerry Johnson (Board of Adjustments), Matt Franks (Board of Adjustments – came in late), Deborah Dahl, Melynda Haveron, David Church (Attorney for Utah league of Cities and Towns) & Dennis Watson.

Meeting called to order 5:55 pm.

Expression of Choice: There was no expression of choice.

Introduction: John Gavril introduced David Church.

David Church:

Today is the 26th of February and David I will let you start out and do your thing.

Thank you, I'm glad to be invited down. As he said my name is David Church. I am the attorney for the Utah League of Cities and Towns, been an attorney that represents Municipalities for more than 30 years now. I've been involved in local government all that time it's good to be down here again this isn't the first time I've been to Spring City numerous times I was here speaking with the board of adjustments training them on how to hold a hearing. Some years before that previous planning commission, and on various other things.

I brought a couple of things down; I don't know if I have enough copies but if not you can always make copies. We have enough to share a hand out and a hand book Planning Commissions and Land Use Authorities in was put out by the Utah League of Cities and Towns last year. I know some of them are floating around here.

Should I pass them out?

Yes and then there is short presentation I wrote for another group two years ago. Let me start out by getting a little information. How many have you served on a Planning Commission for any significant length of time. Are we knew, old, Mr. Church asked each member how long they had been on the Planning Commission.

Any time you want to interrupt me with a question feel free to do so. I'll ask questions as you when you think of them and not have to remember them.

Let me start out by giving you some broad background so that you understand where the commission fits in the scheme of things. The way it works is this, If a city or town in Utah, wants to be in the business of controlling the uses of land, if a city wants to tell people what they can and cannot do with their land the state legislature requires that you have a Planning Commission. And the reason for that is this, the idea is that private property under our American traditions and State Constitution is very important. Interference with private property rights is taken very seriously and so our legislature and the legislature of most states state, we understand that some kind of government control of private property is necessary. And we understand that if we have control of the use of the property by government it should be by local government and not state government. Not by state planning, regional planning, county planning but by the local - those close to the citizens - the local cities and the local towns. But we also understand that people get in office or are elected to office are subject to the whims of the voters. They might feel pressure about various things. They might worry about how it will affect the next time they get elected. So if you want to be in the land control business, we are going to require you have a body of experts who advise the politicians. And this body of experts is the planning commission. And we are going to have a system where the politicians cannot enact laws that deal with the local control of land use. Until they get some advice or recommendations from this body of experts. In Utah we have a system that says, all right, town council Spring City, Ephraim where ever it is, if you want to pass a zoning ordinance you first have to run that zoning ordinance by a planning commission and get their recommendation. If you want to amend your current zoning ordinance you first get the recommendation from your planning commission. If you want to have subdivision control, you first have to get a recommendation from the Planning Commission. So, first and foremost, your role as planning commission, your role as a member of the planning commission is a role where you are thought of or required to become experts in planning and land use control and serve to advise the town council. Your role isn't to represent an idea or it isn't to represent an area of town it isn't to represent the community some places the Planning Commission see's themselves as someone who needs to protect citizens from the town council. Your primary role is to act as a body of experts, who have more knowledge than the politicians who can make decisions without worrying about if your are elected or not elected. You can make decisions without worrying what the public thinks or doesn't think who is in favor or not in favor, but wise informed decisions and recommendations to the town council.

In Utah the State Statue says every town shall have a Planning Commission, Every city has to have a planning commission. If you don't you can't be in the Zoning Business. And that your own local ordinances will decide the number of planning commissioners, the term of office and the qualifications, how they are appointed or not appointed. That's all by local ordinance. So somewhere in Spring City there is an ordinance that says that you have five commissioners, if you do, and so many alternates, if you do, and what the

terms are. That is all up to you, but you must have an ordinance by State Law that creates that. And then the state law says, at the very least, the planning commission has these powers. They have to have power to make recommendations as to what the towns land use control ordinances are. You don't get to decide what they are but you get to recommend what they should be. You have to be involved in creation of the General Plan. You don't get to decide what the general plan is, but you get to recommend to the elected officials as to what the general plan is to be. And you get to be involved in the subdivision process. Both in creating the subdivision ordinance and making recommendations on the platting of ground. You don't get to decide what the subdivision ordinance is, or you don't get to decide whether something should be subdivided, you make recommendations on how it should be. So as you can see the minimum requirements for the state law is that you are recommending body, your client the person seeking your recommendation is the city or town council. You are there to act as a panel of experts for them. Supposedly you can do this without – because you have more time to study the issues and bring certain expertise that they don't have and because most importantly you are appointed and not elected people. So you don't have to worry about a constituency. You are not going to run for election based on the decisions you make. So that is the minimum requirement for State Law.

Now the State Law also allows the city or town council by ordinance to delegate to you almost anything else they want you to do. So most often you might have delegated to you what they call the Land Use Authority. The persons who say yes or no to permits. You might be delegated with the authority where you were the appeal authority. The body who hears appeals. Now from what this gentleman says, you have a Board of Adjustments who is the appeal authority. All that is possible. And you can be asked to do other things by the town council. There's nothing that limits what they can delegate to you. The State Law requires them you to have a certain function - but other things can be delegated to you.

Any questions about that so far? Pretty straight forward then. The way you function is in many respects is dictated by State Law. Because you are a public body created by State and Local ordinance. You are required to comply with the Utah Open Public Meetings Act. Which means that all of your meetings must be noticed properly, and that the public has to be invited to attend and watch you work. The noticing requirements are basically, you need to have an agenda posted at least 24 hours in advance for every meeting. You have to have a quorum to function in the meeting or it is not a meeting. You have to post an agenda with the place of the meeting, You have to send that agenda to the state agenda website. Whatever they are calling it officially so people can look up on line and see. And if it is a required public hearing which is different than a public meeting. Sometimes you might hold a Public Hearing, you might be required to publish or notice that public hearing according to whatever the rules are for the type of public hearing you are to have. So that's very appropriate, and important that Planning Commissioners get together as a quorum. Outside of the Public to make your decisions. Now you can get together with less than a quorum and it is not a meeting. But because you are an official public body you can't hold secret meetings under state law. If you do you are violating the Open Public Meetings Act. You can't meet and discuss difficult questions without the public present that would be a violation, but you also don't

need to let the public speak at every meeting. A public meeting means that the public gets to come and watch you meet, but a public hearing means the public comes to speak. You can allow the public to speak at your meetings if you wish if it is not a public hearing. Now your rules for procedure to conduct meetings are up to you. You can adopt whatever rules and procedures you want. You can have a chair, as you probably do, and I'd be willing to bet that you are following some type of simple rule guide or order with motions, seconds and votes. But you can have whatever rules you want.

Now let me talk about the general kinds of functions that you might participate in. In local government we do like all government we do three basic things. Sometimes we act as legislatures, we make laws. Sometimes we act as administrators, or executives, and we apply laws. And sometimes we act as judges, judicial we make determinations and decisions between two contesting things. We may enter into judgments. Now in towns not like the State or Feds, we do not have branches of government. It's mixed. Now as Planning Commissioners depending on what your ordinance say you may have or operate in any three of those areas in the same meeting, depending on what your agenda is. Now since you have a Board of Adjustments, it is unlikely that you are acting in the judicial function, as an appeal authority. But sometimes you are acting in a legislative capacity, in the law making process. And sometimes you are acting in the executive portion or administrative, applying the laws or executing process. It is important to understand that those are two completely distinct functions and you do them differently. When you are acting as a legislator, or in a legislative process, the things that you are doing are making recommendations on what the ordinances should be. Or making recommendations on what the amendments to the ordinances should be. Or making recommendations on what the general plan should be or amendments to the General Plan. Or making recommendations as to what the subdivision ordinance should be. When you are doing that you are acting as part of the legislative process. In that function, you have a great deal of discretion. If a matter comes to you and it says so and so wants us to rezone his property from acre lots to ½ acre lots. I know you guys still have large acre residential lots down here. What is your smallest zone down here? One point six acre lots (1.06) answered by unknown. So somebody comes in and states that he thinks that is silly – I know you have had this argument over the years – I've been involved in this – I think 1.06 acre lots is silly and someone comes in with that application, and the city council says Planning Commission give us a recommendation. You are acting in a legislative capacity. When you make that recommendation you are going to, uh if the law recommends that if there is a zone change application that a public hearing or at least one public hearing be held. Now you can hold more and I think your ordinances say that, that public hearing will be held by the planning commission, right now doesn't it?

Lawrence Gardner: They are invited to all our meetings so you can go to either city council or the planning commission.

At least one public hearing must be held. You have to give a recommendation. When you give your recommendation for that there are no necessary standards for you to follow you are acting as the legislative process. You get to use your discretion. Whatever you individually decide or as a group decide, is maybe reviewed by somebody. It may be reviewed and questioned by somebody but the level of review and the level of

questioning even if it went to court is, well is it reasonably debatable? Did they follow the right rules, the right process? Did they make a recommendation that had something to do with – it's almost this simple – were they on task and was the recommendation have to do with what they were asking? Broad discretions, same on deciding on what the general plan should be. You get to do whatever you want and make whatever recommendation you want. Now when it goes to the town council, they are the legislative body, because they were elected. They get to make the final decision. They also have to use broad discretion on what it should be. So when you are enacting laws you have a great deal of leeway. When you are acting in the administrative or the executive side, the examples of that is if someone comes in and says all right I see what your laws are I'm here to apply for a permit. You've written the rules now and I'm going to follow them I want to subdivide my property, I will meet your current ordinance. Or they come in with a , I want to build a house on your 1.06 acre lots. I see what your rules are and this is what I am proposing. When you are acting in that capacity you don't have broad discretion. The law has been written and the land owner has a right now, that if he complies with the law he gets his permit. You are then acting in an administrative or an executive function. If you do have this ability. I don't know, what is it that is brought to you? Site plan permits, building permits, subdivision permits? For sure, you might see a commercial site plan. When you are acting in that capacity, you are not being asked what the plan should be you are being asked to apply the law. You don't have broad discretions, if they meet the ordinance they are entitled to the permit. If they do not meet the ordinance they are not entitled to the permit and you can't give them one. Your there then to administer the ordinance. To execute the policy. And your boundaries are set by your own ordinances. That have been written previously. Now is somebody comes in and they say, I'm here for my application. This is my permit; I think I've met your ordinance. And you look at it and say you don't meet it. And they say for example, Well I can't meet it because I have these special circumstances then they have the opportunity to apply to the Board of Adjustments. But as a planning commission, you don't have to the right to vary it for them. The town council doesn't have the right to vary it, you've got a Board of Adjustment or appeal authority who has that right. If they come in and they say, I think I meet your ordinance. And you look at it and you say, you don't meet it. For example they say, well I can't meet it because of these special circumstances. Then they have the opportunity to apply for a variance from the Board of Adjustments. But as a planning commission you don't have the right to vary for them. The town council does not have the right to vary them. You have a Board of Adjustments or Appeals Authority who has that right. If they come in and say, "I think I meet your ordinance and you say and look at it you say, well you certainly do meet our ordinance, but this is the stupidest silliest idea I've ever heard. You don't have a right to say, you meet the ordinance but we are not going to approve it because we did not anticipate that anyone would be this dumb. If they want to do it they have the right to do it. And the reason for that is very simple. You've got the right to write the ordinance, the town council and the planning commission they got to create them. Once they are created you have to live with them. The land owner did not get to right them. But if he is willing to obey them he gets his permit. It's really two separate functions, so on any one night on a Planning Commission you might see Agenda item number one, should we they city council or property owner has a proposal to amend the zoning planyou discuss that you have broad discretion. We are not going to amend

the ordinance, we are not going to change your zone. It is a stupid idea, we like these large lots, we like these big side yards, we are not going to amend it.

Next item down, Subdivisions approval. Next guy comes in and says I think I meet the ordinance. You look at it and if he met it, you must say yes. Doesn't matter if the neighbors come in and say they don't want it subdivided. He meets the ordinance and he is entitled to approval. Any questions about that?

Noel Bertelson: Sometimes it comes up that the ordinances the Board members have a different interpretation of what it means. How do you resolve that?

Very simply, A board member will have an interpretation. A board will eventually decide on an interpretation, by majority rule. And the land owner or any agreed party will have the right to appeal a dispute to the land use authority, or the Appeal Authority has three general areas of authority. They get to do variances, and they get to appeal arguments, or get to decide arguments about what the ordinance means and they get to hear appeals as to the application of the ordinance. So theoretically, an applicant can come in and say I think I meet the ordinance, I understand what it means, I think I need it. And you could say you don't know what it means, you don't meet it and they can appeal and say what does this paragraph mean. Or an applicant can come in and say here is my plans, and you say sorry it doesn't meet the ordinance and you are not disagreeing what the ordinance means, you are disagreeing if the plan meets the ordinance and they can appeal that. Or they could come in and say there is no way possible that I can meet the ordinance, I have this hardship and need this variance, and they can take that on. But, one of the important things to remember on what the question is, If your ordinances are vague, or ambiguous the courts have said that all ambiguity is to be resolved in favor of the property owner. A lot of people think they should be resolved, or ambiguities should be resolved in the favor of the city's or towns. But the law clearly says that since zoning is in degradation of private property rights, if it is ambiguous or capable of more than one interpretation the interpretation that broadens property rights and limits government will be the one the courts take. Now if it's not capable of more than one interpretation, then they are going to apply the ordinance. The courts will apply your ordinances they'll require you to live with them and they'll require the property owner to live with them. If they are passed appropriately and you follow the right procedure. Any general questions about those two roles?

Lawrence Gardner: Well, now you said that the planning and zoning are the ones who recommend the changes in the ordinances or are basically writing the ordinances to be approved by the city council.

Or the city council could write it and send it to you and say to you would you recommend this or not. You don't have, you are not the gatekeeper, a lot of f Planning Commissions get the idea that it can't be done unless they give permission before it be done in Planning. Because of the nature of recommending. You don't have the right or sole right to initiate changes. As a citizen or resident can come to you and say I think this is a good idea. Now you won't have to hear that. You'd say, fine but a majority of our

commission doesn't want it on the Agenda. A town council could say to you, we want a recommendation on this give us one. Now if they do that, you are going to have to give them a recommendation. Now the recommendation may be "we think this is a bad idea." But once you have given a recommendation, whether it is favorable or negative. The council can then go on, to then take your recommendation and do what they want with the proposal.

Lawrence Gardner : If we are the ones making the recommendations, and so on, and there is a question as to meaning about the ordinance. The board of adjustments will be the one who decides what that really means, even though we are the ones who wrote it.

That's right. The analogy to that is, is going on right now, the state legislature is in session The state legislature is going to pass a bunch of laws. If someone has a question about one of those laws means, they don't go back to the state legislature for an answer. They go to the courthouse. Now the judges will look at the legislative history, they will look at the legislature said or didn't say, what the language is and there are rules of construction. But you wouldn't go to a individual legislature and ask what it means, because an individual legislature might have had looked at that and said, we'll I've looked at that and I voted yes. And the guy sitting next to him reads it and he says, we'll I know what that means and I voted yes too. And it is two different things in their head. All you know is the council voted yes or the planning commission recommended yes. But what those words actually mean to an individual commissioner or council member they voted on it you have to trust the words. You don't get to go back and say what did you really mean by this.

Lawrence Gardner: So that it behooves the commission to do a good job of writing and recording the recommendation.

We'll yea it should be written well. It shouldn't be sloppy. It should be easy to understand. And the other thing you have to remember is that a land owner that is a stranger to the process will read it, buy ground, and attempt to have it applied to him. And they are entitled to do that without coming to you and asking what it means. They get to come in here and get a copy of it and say what is the zoning on my property? What am I allowed to do? And the day they come in supposedly we can tell them. Cause it is all written out. Now sometimes we make mistakes and there are ways to correct those. Now, let me tell you the process that is required on all the zoning ordinances. As you know you need one public hearing to adopt a zoning ordinance. When I zoning ordinance, any land control ordinance. If it is an ordinance that tells people what they can and can't do with their property it's going to be a land use control ordinance. And it has to go through the Planning Commission for a recommendation and it's going to have at least one public hearing and it's going to have to be adopted by the elected council. And it's going to have to be in writing, in front of them, when it is adopted. It doesn't have to be perfect but it can't be one of these minute ordinances. Where it only appears in the minutes, a piece of paper that is actually there. If it is a zoning map, the map is there. Years ago, this just reminded me, I represented Spring City in a lawsuit. I'll bet it's eighteen years ago, with the trailer court guy, an Allred. Sued the town and said that I

have the right to do this, and the city council said no you don't it isn't zoned. The issue came down to had Spring City appropriately adopted a zoning map. What is the zoning map? I hate to say it but no one could find the zoning map. No one could find the zoning map, there was one on the wall. And they said it's right there, and I said you don't understand your records your ordinances, there must be something adopting a zoning map. With a date it was adopted. Now you guys didn't have maps as most places have all over the place. Some guy came from home and said this is the official map. And it was different than the one on the wall. Now this was back in the days when it was more expensive to print a map and things like that now, we can print them more easily. Literally, the judge stated we lost at court because we could not prove that there was actually a map. Now Boulder town, lost the same kind of thing at the state supreme court, couldn't prove what the map was, couldn't prove that they had adopted a map. Pleasant Grove city, in one case couldn't prove they adopted a zoning ordinance. Everybody had a copy of it and it had been handed out to everybody. Some applicant who was mad and said we want to see the original ordinances and the adopted map. We want to see if what you hand out was actually adopted and passed, they could not find proof that it was actually passed. It had been reprinted off so many times. So the process is important on that, the original document is on file. And the other thing that is important is you have to give at least 10 days notice of your public hearing, when it says public hearing, that means the public gets to speak and comment on it. It has to be properly noted as such. The purpose of a public hearing is not to convince the public as to what is right, it is not to argue with the public. The purpose is just to listen to them and get their comments. The purpose isn't to see how many people show up in favor of one thing opposed to another. It is not an election. You don't count the house. It's for you to be educated by the public. Now on matters that are not legislative, on this administrative executive side, there is no room for what they call public clamor. It doesn't matter how many people are in favor of a subdivision or against a site plan or in favor of a site plan. All that matters is does it meet the ordinance. The only relevant public comment on those things is does it meet the ordinance or does it not meet the ordinance. Now on the legislative side, public clamor, perfectly all right. It doesn't matter, you can listen to reasons good and bad why you passed the ordinance one way or another. But on the executive administrative side public clamor shouldn't play any role in it.

Now we still have a process where a public hearing is required on every subdivision but we don't know why, the legislature might change that this time around. Right now you must give three days notice, at least, when a subdivision is proposed to you. It must be appropriately noticed and published on the property. There is no other required public notices on anything other than the general plan. General plans should be done less often.

That's the basic structure of the Planning Commission. Now let me talk basically about the planning process that we have. So you can be skillful in that kind of thing. I know that you are, but for the newer members here. The idea is this, think of it as kind of constructing a house, or building. The general plan is that you are acting as an architect. It's the plan. When you do the subdivision ordinances and the zoning ordinances, those are not the plans. Those are creating the tools to build the plan. Your subdivision ordinances and your zoning ordinances are meant to be used to get the plan done. So if

your subdivision, if your plan is inconsistent. With your subdivision and zoning ordinances, your ...there is something wrong. If for example you have a plan that says, we have a plan to whole part as future higher density adventure. So the land owners look at that plan and say good. This is good investment property. But the zoning map shows it still low density residential so of course, the land owner is going to say, I see you plan is that this is going to be higher density and they pop the public this is higher density and the council says this is lower density, we are not going to do it. And the guy is going to say, well, if that is your plan tell me when you are going to do it. Because the zoning ordinance and the subdivision ordinance, as I say you want to keep them in mind as a tool to get the plan done. And then when somebody comes in for a permit from you you are the carpenter using the tool. To build that plan, the plan isn't any good you are not going to get a good product. If the tools that you have built aren't any good you aren't going to get a good product. So I always start with the broad picture, is your plan what you want? If your plan isn't what you want then you need to get that plan changed. After you get that plan set in stone, and I know that you guys have a plan that most of you are in favor of and everyone in the community, you want to make sure that those tools, those ordinances will actually get you to that plan. And maybe its all accomplished. Maybe your plan is written for a historic district and we are going to stay the way we are this is it. And that is fine. It is a simple straight forward plan. And then its having the courage to stay with it. IN the face of changing times.

That's the basic big planning picture. You've got to start big. You've got to start thinking about that zoning, subdivision ordinance this is not the end of the deal It is a tool and the most important document is the plans. Let me talk about the broad legal kind of things. As I said the State Legislature clearly set these things to us and put them in the law. First, the statue states that if the applicant comes in a meets your ordinance they are entitled to approval. They've also said that they are entitled to approval under the ordinances that exist on the day that they filed a substantially complete application. So if a guy comes in and says, here's my application, here is my fee today is the first of April and in fact he's right he has a substantially complete application he gets the laws that are in effect on the first of April. If you look at his application and say, dang, we have to change that it may be too late. Now if an applicant hears that the Planning Commission is considering changing the ordinances and tries to race you to the gate. The applicant loses. If it is well known publically that you are changing or there is a change in process you have the right to say. We have a change in process, we are not going to apply this to you. But if your change in process is not completed within 180 days then you are out of luck. And he gets to go with what the laws are the day he filed the application. An applicant has the right to a relatively quick determination on his application. After he waits a reasonable amount of time he has the right to write you a letter or the town a letter, or the city a letter telling you he has waited long enough give me a decision, you have 30 days to give him a decision. Or excuse me 45 days. Now that seems like a long time to land owners and it seems like a short time to the Planning Commission and City Council. They have to wait a reasonable amount of time, the law doesn't say what a reasonable amount of time is but the land owners think that a couple of meetings is more than enough to make up your mind. Sometimes we take months on parts of decisions.

The law says that you must provide the land owner with an appeal mechanism. For quick and ready appeal as the dispute arises. The authority disputes whether you have made a mistake or not made a mistake or is in dispute of a meeting of an ordinance you've got to give them a quick in-house deal. So he doesn't have to sue. It is beneficial to us, so we don't have to be sued on each decision or fight. So you have the board of Adjustments to decide those things.

If you are the decision making body, you cannot also be the appeal body. So if you have the power to make the final decision on anything you cannot be the guy that reviews the decision. You can't sit on both committees. No members on the Planning Commission and No members on the Board of Adjustments or vice versa. Any questions about those?

Noel Bertelson: If Planning and Zoning looks at a permit that turns down and the Board of Adjustments turns it down and it goes to the City Council the council cannot approve it right?

It does not go to City Council there is no process where it goes to city council if it has gone to the Board of Adjustments.

Lawrence Gardner: It goes to court.

The appeal authority, they can set it up that way, where they can be the appeal authority and the Board of Adjustment are the intermediate appeal authority, but you have to have a final appeal in front of that appeal authority before it goes to court. Now you need to make it clear in your ordinance which will be the final appeal authority is because and you can have a different appeal authority for every different issue, if you want to. You can have an authority that hears variances, one group that hears this and another group that hears that but the key is a trained independent group that gets to hear the appeals. And that is final for the towns process. Now who that is up to the ordinances.

Noel Bertelson: The permit is to be signed off by the council.

If the Board of Adjustments says we give them the variance the permit is as ordered then when the city council gets that they are acting on their decision and they can sign off on it. And that is the key, it is an administrative function executively. You always have to keep in mind when am I acting in a administrarily capacity the lawyers say and when do I have discretion. When I have discretion people are saying or asking you what do you think the law means and you have the discretion to say what the law means. When you are acting in the administrative position they are not asking you may I do something they are asking you, how can I do something. Your job is, and if you keep this in mind you will get along better with everything, the people who are against it and the people who are for it. Your job primarily is that when a land owner comes in, is the land owner and help that land owner accomplish that land owners goals in a manner that is consistent with your ordinances. It is not to delay it, it is not to be an impediment, it is not to talk him out of it, it is to help him accomplish him what he wants to do in a manner consistent with your rules. Now very often, we get the idea that we don't want something, change or growth. But those things happen, that may not be what you are asked to consider. Whether it is a good or bad idea, you are being asked how can I do this. And as public

servants we are there to tell them how to accomplish this. Now this doesn't mean that you ignore your ordinances or rules, you tell them how to get or accomplish what he wants to do consistently. And if in the end you can't accomplish this within your ordinances, your job is to tell them no. Or her no. But if they can accomplish this consistently with your ordinances your job as Planning Commissioners is to help them do it. To make it quick and easy. Get it done. And then everyone is happy. Any other questions on that?

Lawrence Gardner: I've heard this as a rule of thumb, and maybe you would correct me if I am wrong. In terms of writing an ordinance or recommending one, the rule of thumb is that you don't make a law or ordinance telling someone when they cannot do something then its presumed that it can be done.

Well, yes. Let me say that we start out with the premise that in America, that I own the ground and I can do whatever I want with it as long as I do not create a nuisance. There is a body of common law nuisances and I'm just starting out as talking about but before we write any statues or federal or State rules, or anything, just historical common law that we inherited from our forefathers. You own the ground and you can do whatever you want as long as it is not a nuisance. And common law nuisance basically means that you are not doing something that is not nefarious to someone's health or safety. You are not causing them to get sick, not interfering with their property rights inappropriately. So we start from that premise. I can do whatever I want it is my back yard. Limited by common law nuisance. Now, we have the right to limit that land owners rights but it is a function of limiting. If we do not limit they still have that original right to do it. So we are not giving people, some commissioners and city councils believe you are giving people rights. And so they say these are the things that you can do on your property. This and nothing more. That in actuality, because we are Americans we start out with, I know what I can do, tell me what I can't. And our ordinances are really are zoning out ordinances and not zoning in. And so the courts have agreed with you with your statement that says, if it is not clearly zoned or limited the land owner has the right to do it.

Lawrence Gardner: So it is a health safety issue.

That's right, if it is not nefarious. Then there is the whole thing about public nuisances as supposed to private nuisances, and who can enforce it. But that nuisance law is a whole different body of law. It is not a body of land that control the zoning things. Nuisances laws is your place stinks, its making me sick. That has nothing to do with zoning laws. Now it has something to do with zoning laws because we have the right to zone out a feed yard, from residential areas. That is a different issue, the feed yard may or may not stink. We presume that they do, but they may not. But a guy could have a yard that stinks that is not a feed yard and still is a nuisance. So you can see there are several things. But yes there is a common, but it is important to remember where we start from. We start from the premise that I can do whatever I want but we are enabled by Federal and State law to limit people's rights but it is actually an act that is limiting and so you have to be good with your drafting to limit it.

Lawrence Gardner: Let's take that a step further, This is a Historic Town and we have a historic district. I guess my question is how far can we go saying we want people to be historic.

Very, very, very far. If you really want to and do it right.

Lawrence Gardner: Because at one point we had a training session where they came down to us as a group, and they said if you want the ordinance to stand, and not be thrown out by the courts it has to be backed up with health, safety, or general welfare.

Well, yes. But that is the source of our power general welfare is very broad and protects historic structures has been upheld by the courts as being in the general welfare of the clause for cities and towns. Aesthetic things, beauty, life, air, space, the way things look- all that is within your power. Local government is very powerful. We like to pretend that the State and Federal government is intrusive to your private lives but there is no government more intrusive than local government. And we have the power to do that, it's called the police power, and it is based on health, safety, and welfare but that can be broadly interpreted. The limiting factor is you actually have to be diligent and do it in advance. You don't get to do it in retrospect. But if you write good ordinances that protect your historical district, support will uphold those ordinances. That's just life. The courts say don't buy in a historic district if you don't want to be stuck with it. One of the problems is in stream changes, In the zoning law you've got the concepts as the Grandfathering, grandfathered or pre-existing rights. A use that is legal on the date that an ordinance changed or a structure that is legal on the day that an ordinance changes is to remain legal. Within zoning. Now you can have laws that provide for those things that phase out over time and have rules about reconstruction but those rules are severely limited. For example, if someone builds a building that is currently legal and you change the ordinance to say that those type of buildings will never be built again, that guy gets to maintain that non conforming building forever.

John Gavrilla: What about transfer of property from one person to another?

It goes with the property. The use of the structure goes with the property under state law.

Noel Bertelson: The structure is damaged and you want to replace the structure with something similar or that they want is that or any size they want?

They can build the same structure. Cannot enlarge the structure but can maintain or replace the structure. Forever. So if a guy has a six room motel in an area and it's now zoned commercially the legal use comes in and says I'm going to build a Marriot with 300 rooms the answer is no. You can maintain your six room motel. But the guys 6 room motel burns down and comes in and says I'm going to rebuild this 6 room motel state law is going to say go ahead. Wasn't your fault that it burned down.

Noel Bertelson: But it has to be exact in size. Maybe not exact but can rebuild.

Guy comes in and says I'm going to build or I'm going to remodel, he gets to remodel or maintain. He gets to put the new roof on.

Quay Hansen: Would you define grandfathering for us.

It has to be the legal use the day the ordinance was passed, and it is grandfathered. If it was not a legal use, it isn't grandfathered, it doesn't matter how long it was there. This is the common thing. You have your first zoning ordinance ever. You need to know when that was. Everything in existence since the first day it passed was grandfathered. Every structure, every use, every side yard. I mean obviously, If someone builds something in violation of the law after that ordinance is passed it doesn't matter how long it has sat there, it never gets grandfathered. It was illegal from the beginning, it never gains legal status.

Lawrence Gardner: Can you make them tear it down?

Yes, theoretically.

Noel Bertelson: This is a situation that we have, we have lots that are less than 1.06 acre that are grandfathered. They cannot put houses or structures on them and still meet setbacks.

Yes they can. That is a classic case where the Board of Adjustments will give them a variance for the current setbacks. Because it is a legal building lot and it wasn't of their own creation. It does create a hardship for them that is unique to them and not self created. Everybody else who owns a legal building lot can build a house. I can't build a house. Why can't you build a house because your minimum house size is 1,000 square feet and it won't fit on my lot. So the question is what kind of variance to you have to give him. Is it size or setbacks? Well, I think that is a question for the city to decide. Which is more important? The minimum home size or the setbacks?

Noel Bertelson: Planning and Zoning commission would normally see that permit and turned him down because it doesn't meet the current requirements. And the Board of Adjustments would look at it and

Let me say a good Planning and Zoning Commission would say look we understand that there is this kind of conflict. We've seen this come up and we are now writing rules that will apply and the rules that will apply are that are on these historical lots that are all too small. These are the rules where we are going to allow smaller home size or allow different side yards for these lots. But once you see the problem and see that it is there instead of burdening your Board of Adjustments each time to make a decision, you need to write some rules. Especially if you have these smaller lots. Any other questions about that? It is really straight forward system. We get to write whatever rules we want within reason. Once we write them we are stuck with them and the land owners get to rely on them. If there is a dispute both sides get a fair hearing in front of independent dispute for a resolution of some sort. From that that resolution body gets to go to District Court. Everybody's happy. The idea in the State law now is that people are entitled to a quick decision, they are entitled to walk in on any day and say, what are the laws that apply to my property. And to be able to rely on them getting good information to what that is and rely on the information that is given. That they don't have to come and say and meet a moving target. It is a target that has been set for them, the day they walk in with an

application. They don't get to beat you to the post when you are changing it. And if you hear about somebody doing a project and you don't get to rush out and change the law to be fair. That's just a fairness thing. Any other general questions? Anything that I haven't covered?

Let me just talk a little about some things that are a concern. I do a lot of defense work for cities when they get sued. I can tell you what happens when we get beat and when we win. What times were successful in defending land uses. First, we never win when we screw up the procedure, which means if we didn't hold the right meetings, the right notice, and can't prove that our ordinances are what they say they are we don't have a record or map that has been adopted. Or when the ordinances was adopted or those kinds of things. On the substance, we almost always win. If it is just an argument, for example, I want my property zoned to half acre they won't win, we win 100% of those. If it is a change in law the land owners, the courts say we are not going to be a super planning commission, we are not going to interfere with the local decisions, they followed the right procedure, we are not going to win. We lose 100% of the time when claims say I comply with the ordinance and they won't give me my permit. We get no sympathy from the courts at all on those cases. The judges look at the ordinances, look at the application, and say tell me how this doesn't comply. And if the response on our side is, it does but it isn't a good thing for the city, or it is a bad idea. That's when they say tough luck you wrote the ordinance live with it. One of the most complicated things, When is it a taking, you are taking my property rights, it is a constitutional thing. You've taken my property without compensation you have violated my constitutional rights. A regulatory taking is a real thing in the United States. A government can take property by one of two ways. Your government either occupies it, we take it for a road or whatever. And if you do that you owe compensation obviously. But government can also take property through regulation. Sometimes you can go too far and it amounts to a taking though regulation. For someone to win on a regulatory taking claim they literally have to prove that your zoning ordinance has taken all value away from the property. Not some, but all value. A guy cannot win if he comes in and says if you let me zone commercially, it's worth one million dollars, but as residential it's worth \$50,000.00. That is not a taking. Now the other side of regulatory taking is, if your ordinances make no sense. That they don't further a legitimate government purpose. It can be a regulatory taking. So for example, this is very difficult for a land owner to prove, if you zoned or had a zoning ordinance that took less than full value for the property, but was for some crazy type of purpose, theoretically there could be a regulatory taking. But other than that when people come in and state that you've violated my constitutional rights you've taken my property. It is highly unlikely that . Every time we make a zoning decision we increase some property values and decrease others property values. We don't get to take the profit when we increase it and we don't get the loses when we decrease it.

John Gavrilla: Can you give us an example of that?

An increase or decrease or a regulatory taking? Well the famous case of regulatory taking is that Lucas case out of South Carolina where the South Carolina Coastal Commission places the uses on beaches and zoned out and put in controls that made it so that you couldn't build beach front housing. Now both sides agreed for purposes of court that the

property was worth zero if you couldn't build a house on it and millions if you could. The US Supreme Court said well if, in fact it is worth zero, the government buys the land because the value is at zero. The same thing is as if they had gone in and occupied it for a public purpose. Now the other side of that is if the government or the land owner had proven if you could build houses on it would be worth millions. But without houses the property is worth \$250,000 as grazing ground or agricultural or it had residual value it would not have been a taking. It is a mere diminution of value. But if you take 100% of the value, which is very unlikely in this state, then you could have a regulatory taking. If you just decrease the value you don't. Now, on the other side of the regulatory taking, If you have a series of zoning regulations that necessarily don't take all the value but they in effect there is some residual value left but the regulations are so onerous and don't make any sense for a public purpose theoretically the courts can say you have an effect turn this hillside... the best example is the Lake Tahoe ordinance about zoning regulations around Lake Tahoe effect the water supply. It is a very complicated regulatory thing because it is right on the California/Nevada border. And they have this group, that have regulations for the use of the ground and they have people who want to use the ground and put houses in that, and they have some regulations to keep the water clean. The argument made is that these regulations in effect, have turned this private property into nothing more that public park. No one is saying that the property doesn't have value, but they are saying it is so regulated that in effect, they've turned the hillside into a public park. And if you go that far, then it could be a regulatory taking. Even though the property trades, buys and sells for lots of money. The way I look at it is this, the lawyers get real complicated, they lawyers get way complicated. The way you look at this is you say, you look at your regulations and you say do these regulations-what is the purpose behind these regulations? And if the purpose is well we want to maintain the look, feel, of our community we want to keep things neat and tidy, we want to make it preserve property values, then you are probably going to have someone stand up, but if you look at regulations and ask what is the purpose of this and you say the regulations are that we don't want anyone to build on that then it might be at risk. But it is perfectly all right for any community to preserve our agriculture lifestyle. WE are not going to allow any land splits. No one does this do you know why? Because the people who own the ground also run the towns and that is all right. People who live next to those farms what people to stay in farms forever, but those people are not because it doesn't pay any money. But it would be legal to have ordinances that say by the way all agriculture land remains agricultural. Forever and ever, no more houses. That is not going to happen.

It has been an hour. Is there anything else you want or need to talk about? Any other questions? Thank you for the invitation. You can call me any time you'd like and ask questions.

Adjournment:

End of meeting - Meeting ended at 7:00 p.m. by David Church.