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Procedure Followed by Second Class Cities in Granting Changes to the Zoning Ordinance as Exemplified by the Lexington-Fayette County Planning Commission

Charles E. English
University of Kentucky

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PROCEDURE FOLLOWED BY SECOND CLASS CITIES IN GRANTING CHANGES TO THE ZONING ORDINANCE AS EXEMPLIFIED BY THE LEXINGTON-FAYETTE COUNTY PLANNING COMMISSION

With the rapidly increasing urbanization of the Lexington area, has come a realization that thoughtful, intelligent and creative planning is necessary to the creation of a community adequate for the needs of modern life. The effective control of land use and building construction and location is essential to the realization of community planning and the ultimate needs of the community. These goals are accomplished through a plan of comprehensive community zoning.

The planning and zoning of the Lexington area is conducted through the Lexington-Fayette County Planning Commission. Under the provisions of the Kentucky enabling statute, the planning commission is a recommendatory body with final decision resting with the local legislative bodies. Even though the action of the planning commission is advisory only, its recommendations carry great weight in view of the fact that "The legislative body may approve or disapprove the Commission's report, but may not alter the report in any material respect." Hearings on proposed amendments to the zoning ordinance constitute an important function of the planning commission. Practically speaking, a decision of the body adverse to the legislation halts the legislative process and defeats a measure before it sees the light of day. This points up the tremendous importance of such hearings as an integral part of the zoning process. It is the purpose of this note to discuss the procedure followed by the Lexington-Fayette County Planning Commission in conducting hearings prior to approving or disapproving proposed changes in the local zoning law.

Before discussing how interested parties are heard by the Planning Commission, it ought to be established that they should be heard.

The Planning Commission Should Hear Interested Parties Before Changes in the Zoning Law

The statute enabling second class cities to enact a zoning law vaguely directs the commission to hold a hearing before it finally changes any zone. A strict interpretation of the statute might not require a hearing for aggrieved property owners whose petitions met the disfavor of the commission. In contrast, the statute in first class cities requires a public hearing before "any proposed adjustment is ap-

2 KRS § 100.890 (1959).
proved or disapproved.\(^3\) There is no apparent reason why the legislature would intend to differentiate hearing requirements for first and second class cities. There are two compelling reasons for granting public hearings regardless of the final disposition of the petition by the commission.

First, the only way the planning commission can tell whether the proposed change is in keeping with the objectives of its master plan is to give the petitioning party an opportunity to be heard. The primary objective of a planning agency is to assume that each new improvement, which is made in the city, makes its full contribution to the transforming of the present community into an increasingly better one. To accomplish this objective, it is essential that a fairly definite plan of this better future community should be developed. This is the master plan, which shows in general outline the city’s desirable future development, the appropriate uses of private land and the general location and extent of all necessary or highly desirable public facilities, all in appropriate relation to each other and in scale with the expected population and financial resources of the community. It is essential that the master plan be projected from a long range point of view. However, it is clearly impossible to be certain about all features of community development many years in advance, for unforeseen conditions are certain to develop. Therefore, a master plan is never completed but must be adjusted frequently to meet new conditions and needs as they arise.\(^4\) If a good plan was originally adopted, its outlines and objectives need not and should not be changed. Nevertheless, there is a continuing need for study and reexamination of its application.\(^5\) The planning commission should exercise the highest degree of discretion in changing the master plan. All changes in the zoning ordinance should be analyzed in terms of conformance or non-conformance with the objectives of the master plan. If after careful consideration, the planning commission decides the proposed change is in keeping with the overall objectives of the master plan, it should be approved. However, if the petitioner has not established that the proposed change is in keeping with the plan’s objectives, it should be disapproved. The only simple and sound way that the planning commission can decide whether a petition should be approved or disapproved is to afford the parties an opportunity to make a full disclosure of their case in a public hearing.\(^6\)

\(^3\) KRS § 100.053 (1959).
\(^4\) International City Managers Ass’n, Local Planning Administration 50-51 (2d ed. 1948).
\(^6\) The master plan of an area should be constantly reappraised. This is not to say that it should be changed without reason. To employ the traditional procedure
Second, to hold that a hearing is not required would give the statute an unconstitutional interpretation. As previously mentioned, constant or periodic reappraisal of the master plan is inherent in the basic concept of zoning. Very often the planning commission's refusal to grant an amendment to the zoning ordinance deprives the owner of the greater part of the value of his property. To allow the commission to refuse a petition for a zone change without giving a property owner an opportunity to be heard ignores the reappraisal concept. Also, although no cases have been found on this point, such a procedure would seem to amount to a deprivation of property without procedural due process of law. Property owners have a right to have their zoning classification reconsidered as conditions change. Any decision limiting the right of an owner to use his property in any way he sees fit, affects his property rights. Due process of law guarantees the right to own, use and protect ownership of property. If these rights can be reappraised without a hearing or without the right to answer adverse arguments or refute adverse testimony, then Section 1 of the Kentucky Constitution which says that all men have an inalienable right to acquire and protect property is meaningless.

**Nature of a Planning Commission Proceedings**

The problem of what procedure a local zoning board should follow in conducting public hearings has been a constantly recurring one in administering the zoning ordinance in Lexington as well as most other urban communities. The enabling statute requires no standard rules of procedure for conducting hearings and merely directs the commissions to formulate their own orders of business and procedure. However, the Kentucky Court of Appeals has stated:

A hearing by a zoning commission is not a trial although it is quasi judicial. . . . The proceeding affords an opportunity for interested persons to be heard in justification or opposition of a proposed action. Their evidence should be received as aiding the Commission in discharging its duties in a manner consistent with the preservation of the common interests and the general welfare as contemplated by the zoning ordinance.  

The court's holding that hearings by a zoning commission are of a quasi-judicial nature is significant from the procedural aspect.

followed in legislative or rule making type administrative proceedings would hamper the reappraisal concept by not allowing open discussion and argument on the proposed change. Communication by written brief would be both time consuming and would not allow full disclosure of pertinent points by either side.

7 KRS § 100.340 (2) (1959).

8 Hamilton Company v. Louisville & Jefferson County Planning and Zoning Commission, 287 S.W.2d 434, 436 (Ky. 1955). In adopting a master plan because of the broad policy considerations and great number of parties affected, the planning commission probably acts in a quasi-judicial capacity.
Courts have traditionally categorized the proceedings of administrative bodies into two groups—those performing judicial functions and those performing legislative functions. If the process resembles the legislative enactment of a statute the commission proceeding is quasi-legislative in character. In the absence of a statutory requirement to the contrary hearings by this type of body are a matter of grace. When granted these quasi-legislative hearings simply involve the presentation of arguments by invited parties without the opportunity to present formal evidence or to know the arguments of the other side. If on the other hand the body performs functions that resemble a court's decision of a case, it is held to be a quasi-judicial body. In a quasi-judicial hearing the participating parties normally have a right to notice and full participation in the hearing. This includes an opportunity to present evidence, to cross-examine adverse witnesses, and to have the tribunal make a determination on the record. The basic procedural difference in the two types of proceedings is the opportunity of each party to know and to meet the evidence and arguments on the other side in a quasi-judicial proceeding. In view of these considerations the Kentucky Court of Appeals' holding that a zoning commission acts in a quasi-judicial capacity is manifestly important.

Decisions by the planning commission on proposed changes to the zoning ordinance are an important aspect of the zoning process. A decision by the commission adverse to the proposed amendment can halt the process at the outset while a favorable report usually assures prompt legislative enactment of the change. This process which affects the valuable property right of a relatively few parties resembles a court's decision of a case. However, in reaching this decision, technical rules of procedure are not recommended. Simple rules that will insure justice should be the norm that guides such a board in its deliberations. Any hearing involving one's legal rights is subject to the protection of the general rules of fair play which govern society and this is true whether the hearing is before a court of law or a commission. In this respect the Kentucky court's

9 See 1 Davis, Administrative Law Treaties § 7.01-7.20 (1958).
10 Yokley, Zoning Law and Practice, § 115 (1953); Branche v. Board of Trustees, 141 N.Y. S.2d 477 (1955). See also Louisville & Jefferson County Planning & Zoning Commission v. Ogden, 307 Ky. 362, 210 S.W.2d 771 (1948). "The functions of the Commission is in part quasi judicial, and while proceedings before it may be informal yet its decisions carry the presumption of fairness and correctness." As a basis for this holding, the court cites Goodrich v. Selligman, 298 Ky. 863, 183 S.W.2d 625 (1944), a case involving proceedings of a zoning board of adjustment. It would seem to follow from these holdings that proceedings of zoning boards of adjustment and planning commissions are similar in nature and subject to the same general standards of procedure.
holding that hearings by planning commissions are quasi-judicial in nature was wise because of the procedural formalities inherent in such a hearing.

Present Rules of Procedure Followed by the Lexington-Fayette County Planning Commission.

Pursuant to the statutory directive requiring planning commissions of second class cities to formulate orders of business and procedure the Lexington-Fayette County Planning Commission has adopted a two-stage hearing process for property owners desiring changes in the local zoning laws.

To initiate the action in the first stage of the process, the Planning Commission requires that any person (public or private) desiring a change in the zoning regulations must file a petition with the commission setting forth the desired change together with data, maps, studies, etc. justifying the change. On the basis of this data, the planning staff studies the petition and makes a written recommendation to the Commission as to whether the proposed change is in keeping with the objectives of the master plan of Fayette County. Next the commission holds a preliminary hearing on the proposed change. The petitioner is given a copy of the recommendation of the planning staff at this hearing. At the preliminary hearing the only person heard is the petitioner or his counsel. He is allowed to present any evidence or argument in support of the proposed amendment that he sees fit. The Planning Commission patiently listens to all evidence the petitioner wishes to offer, occasionally asking questions on points of interest. At the conclusion of petitioner's evidence the Commission adjourns to executive session to decide whether the proposed change is in keeping with the goals of the master plan. The Commission may decide that there is no serious objection to the proposed amendment and decide to hold a second-stage public hearing. However the Commission may decide that the proposed amendment is not in keeping with the objective of the master plan. If the latter position is taken, the only recourse left the petitioner is to appeal the decision of the Planning Commission to the circuit court and show that the Commission acted arbitrarily or capriciously in its disposition of the petition. If the Commission

12 Normally, a second stage or public hearing is granted only if the Planning Commission does not object to the proposal. However, the Planning Commission may, in its discretion, grant a public hearing when they are undecided to test public reaction to the proposal.

13 Hatch v. Fiscal Court of Fayette County, 242 S.W.2d 1018 (Ky. 1951). No case has arisen where the court has found that the board did act arbitrarily, capriciously, or illegally and therefore, it is undecided what action the court would take if it so found. Would the court hold a trial de novo or simply direct the
denies the petition at this stage of the process it gives no notice of the denial to the affected parties and no reasons for its actions.\textsuperscript{14}

If the Commission has found no serious objections in the proposed amendment the findings and conclusions are embodied within a preliminary report. The preliminary report is the initial step in starting the second-stage proceedings. A date, time and place for a public hearing is set after the preliminary report has been approved by the Commission. Public notice is given. All interested parties are given an opportunity to appear before the board, either in behalf of the proposed change or in opposition to it. Parties appearing before the Commission may question or cross-examine other parties on relevant issues. The Commission is often liberal in allowing interested persons to voice lengthy opinions either in support of, or in opposition to the amendment. After the public hearing, the Commission adjourns to executive session to consider the petition. If a majority of the Commission decides that the proposed amendment should be approved, a final report embodying the result of the Commission's judgment is sent to the appropriate legislative body for action.\textsuperscript{15} In making its final report the Commission may subtract from, but cannot add to its preliminary report. The appropriate legislative body may approve or disapprove the Commission’s report, but may not alter the report in any material respect.\textsuperscript{16}

\textbf{Adequacy of Present Procedure}

Does this procedure fulfill the procedural requirements of a quasi-judicial hearing? While it would be more than adequate to fulfill the requirements of a quasi-legislative hearing it seems to fall short of fulfilling the requirements of a quasi-judicial hearing. The local bar has also recognized this problem and has appointed a committee to study it. The present procedure has some desirable procedural requisites and with the elimination of a few major problems would comply with the procedural requirements of a quasi-judicial proceeding.

\textsuperscript{14} The entire first-stage proceeding is extra statutory—Rules and Procedure Lexington-Fayette County Planning Commission and Board of Adjustment (July 1958).
\textsuperscript{15} The second-stage proceeding is based on the requirements of KRS § 100.390-100.420 (1959).
\textsuperscript{16} The provision restricting the alteration of preliminary reports is to fulfill the notice giving requirement of KRS § 100.390. If the commission could rezone a piece of property into a different use classification than that for which notice was given, the notice of the nature of the proposed change would be ineffective to interested parties.
The principal shortcoming of the present procedure is that the petitioning party is not apprised of what the commission believes is important in the case, and what its decision will be based upon. It is elementary that fair procedure requires a quasi-judicial body to advise the parties at some time before the proceeding is closed of the issues which it proposes to decide so that the petitioning party may know what claims he must meet and so he may intelligently determine what evidence he ought to offer.\textsuperscript{17} The key to notice is the opportunity to prepare. Under the present procedure, the applicant is put to his proof on broad issues, such as public interest, convenience and necessity. In fact the ground upon which the commission decides the propriety of a grant may be narrow. Specification of the issues appropriate to the character of the particular proceeding is one of the basic elements of fair procedure. The concept of notice in the administrative process is analogous to the overall trend of modern court pleading. A court has observed:

> The whole thrust of modern pleading is towards the fulfillment of a notice giving function and away from the rigid formalism of the common law. It is now generally accepted that there may be no subsequent challenge of issues actually litigated, if there has been actual notice and adequate opportunity to cure surprise.\textsuperscript{18}

At first glance it might appear that a requirement such as this would impose an undue burden on the planning commission because ordinarily laymen need legal advice in the formulation of technical issues. This is not true for two reasons. First, the only notice necessary is an informal communication to the parties of what the commission believes to be the important considerations in deciding the case so that the petitioner will have an opportunity to prepare his case with special attention to those considerations. If during the consideration of the petition, the commission feels that unconsidered or unnoticed issues become important, they could be verbally called to the attention of the parties prior to the decision of the case so that the parties will at least have an opportunity to meet the new issues. Leave to prepare on unnoticed issues should be granted to surprised parties in the commission's liberal discretion. Second, it is generally agreed that a member of the municipality's legal staff should be present to advise the lay members of the council on legal questions.\textsuperscript{19}

Even when unfairness does not result from undue generality, inefficiency often results. Greater specification may be desirable even

\begin{footnotes}
\item[18] Kuhn v. Civil Aeronautics Board, 183 F.2d 839, 841-842 (D.C. Cir. 1950).
\item[19] 1 Yokley, Zoning Law and Practice § 115 at 269 (1953).
\end{footnotes}
though it is not formally required. Hearings may be considerably shortened and issues narrowed by specific and simply stated notice to the petitioning party as to what the commission considers important in the case.20

Cross Examination of the City Planner at the Public Hearing.

A strong argument can be made for at least requiring the planning staff to submit a brief or simply to make written recommendations with reasons to the planning commission and interested parties prior to the hearing.21 Should the commission go further and require the city planner to offer oral testimony subject to cross examination? If the petitioning party is given a copy of the planner’s recommendation prior to the hearing, it is doubtful that any useful purpose could be served by subjecting the city planner to cross examination on the written recommendation per se. Interested parties will be apprised of the planner’s position and will have adequate time to prepare arguments and evidence to rebut an unfavorable recommendation. The only purpose an opponent could hope to accomplish is to harass the witness by lengthy cross examination. The real purpose of cross examination in administrative hearings is to discredit unforeseen evidence for which there was no opportunity to prepare to contradict. To allow cross examination where the parties are already apprised of the testimony to be offered would be time consuming with a very minor offsetting advantage to the examiner. However this is not to say that the planner should not be cross examined upon a showing of need by affected parties.22

Even if the planning staff submits a written recommendation before the hearing to the planning commission and the interested parties, it may be necessary for the city planner to offer oral advice in the course of the hearing. The city planner and his expert staff perform an

20 See, Report Attorney General’s Committee on Administrative Procedure 63 (1941).

21 Under the procedure currently followed by the Lexington-Fayette County Planning Commission, the city planner makes a written report to the commission on all petitions, but the report is not given to the interested parties. An important advantage would result if the Commission required the written report to be given to both the Planning Commission and interested parties in advance of the hearing date. The written report would provide advance notice to the parties of what the city planner considers important in the petition. The written report can also be used for two other advantageous purposes. First, the report would provide a record of the case for future reference by the Commission and the parties if they wish to appeal. Second, the report could serve as a basis for a short written opinion by the Commission on the case which would be more certain than oral testimony. The lawyer knows from reading past decisions what a court thinks to be controlling issues or facts. Without written decisions in a similar case or notice in a particular case, the lawyer is in front of a blank wall when he presents a case to the planning commission.

important advisory service to the planning commission. The commission should be able to avail itself of the advice of the city planner during the course of the hearings on any point not considered in the staff’s original recommendation. Unforeseen problems may develop in the course of the hearing. And to delay or postpone a hearing on the petition until another meeting so that the staff could prepare written memorandums on the point would be both time consuming and expensive. The only reasonable solution to the problem is for the commission to allow the city planner to participate in the public hearing. But where the city planner interjects new matter into the hearing, the opposing counsel should be allowed to test its basis and to discredit such testimony by cross examination because of the lack of opportunity to prepare contra or rebutting evidence. The principal argument against such a requirement is that skilled lawyers will so distort the planner’s testimony by cross examination that it will be of no value to the commission and grossly unfair to the planner to require him to testify. Conversely while the city planner may be harried by cross examination, his position would be no worse than any other witness who is cross examined. An important consideration in this respect is that city planners will be appearing before a group of people who are aware of his qualifications and the weight to be accorded his judgment. These people are not likely to be led astray by the skilful techniques of cross examination used by experienced attorneys. Interested parties should at least have an opportunity to test the planner’s judgment and understanding of problems arising in the course of the hearing. It would be unfortunate if the planner could influence the commission with his expert knowledge without revealing it or at least giving the opposition a chance to meet it.

Hearing the Planning Staff Behind Closed Doors.

A constantly recurring practice that lawyers appearing before the commission strongly object to is the commission’s practice of hearing the city planner’s view on the proposed change behind closed doors. The planning commission adjourns to executive session at both the preliminary (first stage) hearing and public (second stage) hearing. Thereafter the commission at a private hearing behind closed doors hears testimony and listens to reports of the city planner and his expert staff. The commission accepts the evidence of the city planner and the staff without any guarantee of accuracy and without his being subject to cross-examination. No record of the private hearing is made and no one can tell what facts were presented or what reasons were given against the requested zoning. The petitioner cannot tell whether the testimony offered against his requested zoning change was competent
or whether it was given by people who had knowledge of the facts, or by some person who had an adverse personal interest against the applicant. The applicant has no conceivable means to ascertain what facts are elicited in the secret session and, more important he does not have an opportunity to meet such evidence.

There are only two possible grounds for justifying the practice:

1. The city planner's principal function is to offer expert advice to the Planning Commission and his value to the commission as an advisor would be materially decreased if he had to offer the advice at a public hearing subject to cross-examination.

2. The planner is not a lawyer and he cannot be expected to be both chief witness and advocate for his side.

However, requiring the city planner to present his views in the public hearing subject to cross-examination and rebuttal would not materially impair his value as an advisor. The commission could still request advice from the planner and the only difference would be that interested parties would have an opportunity to meet or rebut the advice. As to the second justification, it is true that the city planner cannot be expected to lead the opposition against every case heard by the planning commission; but he certainly should lead the opposition against proposals which do not conform to the objectives of the master plan. It was previously suggested that an attorney from the city's legal staff be present at the public hearings\(^2\) and there is no reason why he could not aid the planner in strongly contested cases. Finally the public interest in a fair and impartial public hearing overshadows the small advantage to be gained in allowing the city planner to testify behind closed doors.

If the planning commission can act on an application on the strength of matters presented at a private hearing of which there is no record, then it would be within the power of the commission to decide an application in any way it desires, regardless of the record before it and upon any capricious reasoning it may choose to adopt. In such a case there would be no practical\(^2\) remedy whatever which the applicant could pursue because even the court could not weigh unknown evidence.

In *Giordano v. City Commission of the City of Newark*,\(^2\) the Supreme Court of New Jersey was confronted with the problem of a zoning board acting on secret evidence. The lower court held that a resolution of the Commission recommending a zoning variance after a public hearing cannot be permitted to rest upon information received

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\(^2\) Kuhn v. Civil Aeronautics Board, 183 F.2d 838, 841-842 (D.C. Cir. 1950).

\(^2\) A possible solution would be to require a de novo hearing.

at a secret session. At the public hearing the board’s attention was
called to the fact that there was no evidence showing that the existing
zone would cause the required unnecessary hardship to the petitioner.
Nevertheless the variance was permitted. In upholding the reversal
of the zoning commission’s decision, the court said:

No determination can be permitted to rest upon undisclosed find-
ings or information dehors the record. If such could be, the parties
would be denied the essence of a hearing, they would be kept in
ignorance of the things controlling the action of the board, and due
process would be flouted. The rights of the parties can only be pro-
tected . . . by a full disclosure on the record of the facts relied upon
for the board’s findings.25a

The New York court struck the action of the State Water Com-
mission based upon secret evidence.26 The Commission after a
public hearing denied an application for temporary use of under-
ground water for domestic, industrial, and fire hydrant purposes.
Despite the facts presented at the hearing showing a need for the
water based on population growth and other factors, the Commis-
sion denied the application based on a report of its staff engineer
which was not presented at the hearing. In reversing the Commission
the highest New York tribunal said:

The Commission may with entire propriety give heed to the views
which its executive engineer may express as to the merits of the
respondent’s present application. In this instance, however, the Com-
misson has adopted, as decisive of respondent’s application, the
views of its executive engineer, without affording the respondent
an opportunity either to test by cross-examination the basis of the
executive engineer’s conclusions or to offer evidence material to those
conclusions.26a

It is not proper for an administrative authority to base a quasi-
judicial decision upon evidence obtained without the presence of
and notice to the parties. The action of an administrative board
exercising quasi-judicial functions when based on information of which
the parties were not apprised and which they had no opportunity to
contradict amounts to the denial of a hearing. The reason for this is
that due process and a fair hearing require that all parties shall be
afforded an opportunity to examine, analyze, explain or rebut the evi-
dence and subject the witness to cross-examination.27

A contrary rule would make it impossible for a reviewing court to
examine whether administrative findings have a sufficient foundation

25a Id. at 589, 67 A. 2d at 455.
26 New York Water Service Corp. v. Water Power & Control Commission,
26a Id. at 31, 27 N.E. 2d at 224.
in evidence. Even though it appeared that the administrative decision was not based upon evidence, the manifest deficiency could always be explained under the theory that the commission had before it extraneous and unknown information to support its findings.

This position was well stated in a 1958 New York decision:

The real worth of a hearing with the right to test the testimony of witnesses by examination and cross-examination and to argue the admissibility and significance of exhibits is destroyed if the ones who decide the matters in issue may acquire evidence outside of the hearing room in the absence of the parties and their attorneys and then base their determination, even in part, on such information... Furthermore, no adequate or intelligent judicial review is possible unless all the essential evidentiary material upon which the administrative agency predicates a quasi-judicial determination is in the record and before the court.28

Action of Planning Commission Based on Own Knowledge.

A closely analogous problem is that the commission may employ its own knowledge in arriving at a decision without giving the participating parties any notice. The members of the Fayette County Planning Commission make it a usual practice to view the affected property before any action is taken by them. Courts are not in agreement as to whether the facts observed by the board at such an occasion may constitute a proper basis for its decision. The better view allows knowledge gained by an administrative authority from a view of the premises to be made the basis of a decision if the pertinent facts are brought to the timely attention of the parties.29

The latter view is illustrated by a recent New York case where a board of zoning appeals relied on their personal knowledge and physical inspection of the area in granting a variance in a light industrial area. In reviewing the decision of the board, the court stated:

It is well established law that a board may act upon its own knowledge of conditions and/or its own personal inspection... [But when] a Board does so act, it is incumbent upon it to set forth in its return the facts known to the members, but not otherwise disclosed.30

In most instances when the commission considers the changing of a zoning ordinance, they should view the affected neighborhood. The commission members have an obligation to ascertain relevant facts and to administer the master plan to those facts according to their best judgment for the general welfare, as well as for the interests of private parties.31 The evidence and rights of the affected

parties should be given consideration, but the decision must in a large measure rest upon the judgment of the commission. All of the evidence upon which the board bases its action should not only be set forth in the decision, but should also be disclosed to the parties prior to the commission's final decision. This will allow the petitioning party an opportunity to counteract it.

**Should Planning Commissions Write Their Opinions?**

When the local Planning Commission decides to disapprove a proposed amendment and to deny the petition, no findings or reasons are given for the decision. The affected parties are given no formal notice of the Commission's decision. The usual practice is to watch the newspapers to determine what action has been taken. This practice is bad even though the statute may not expressly require second class cities to make findings and give reasons supporting their actions. Other courts have uniformly said that even where enabling statutes do not expressly require zoning boards to set forth the basis and reasons for their decisions, it is both commendable practice and proper procedure for each decision to adequately set forth the grounds and the reasons for its having been made.

At least one court has gone so far as to reverse a zoning board for failure to set forth grounds for its decisions. A Rhode Island zoning board denied a petition for an exception under the zoning ordinance of the city of Warwick to conduct a public bathing beach. The board did not set forth the grounds for its decision, but merely recited that it unanimously agreed to reject the petition. The Rhode Island Supreme Court in reversing the decision of the zoning board said:

> While this Court will not ordinarily interfere with the decision of a zoning board of review unless such board has clearly abused its discretion, yet, even though there be stenographic or otherwise substantial report of the meeting, we do not intend to speculate as to the grounds on which such a board bases its decision. This applies with even greater force when, as appears in the record before us, the board took into consideration information which allegedly was within its own knowledge or secured from outside sources, but of which not even the substance is disclosed anywhere in the record brought up for review.

There are several cogent reasons why a planning commission should give a written basis for its decision in each case. By far the

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most prominent reason discussed in judicial opinion is the facilitation of judicial review. While there is no statutory provision authorizing a review by the courts of the findings of a zoning commission of a second class city, the Kentucky Court of Appeals has held that courts have inherent power to prevent an administrative body from proceeding illegally, arbitrarily, or capriciously. Normally a court case is appealed on the record of the entire proceeding. However the planning commissions are not required to keep a record and written findings are the only way the reviewing court can determine whether the commission decided the case on evidence and law, or upon arbitrary and extra-legal considerations. A written opinion is a great common law safeguard against arbitrariness. When a decision is accompanied by findings of fact, the reviewing court can decide whether the decision reached by the commission follows as a matter of law from the facts stated as its basis.

Another closely related reason for requiring written findings and reasons is to help interested parties plan their cases for rehearings, judicial review, or appeal.

Furthermore a disappointed party, whether he plans further proceedings or not, deserves to have the satisfaction of knowing why he lost the case. Zoning restrictions limit the individual’s free use of his real estate in the interest of the general public good. The administration of power of that nature demands the highest public confidence. Anything which tends to weaken that confidence and to undermine the citizen’s sense of security for his individual rights is against public policy. A written decision whether appealed or not, gives the public greater confidence that the decision makers have judiciously considered the matter. Confidence and trust in the planning commission is absolutely essential to citizen support of effective planning. Without citizen support, planning cannot be effective.

The final and most important reason from the planner’s point of view for requiring written findings and reasons is to prevent judicial usurpation of the planning function. One of the most common criticisms of the court review of the planning commission’s actions is that the court is substituting its determination for the specialized opinion of the planning commission. Courts will be less likely to over-

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35 Hatch v. Fiscal Court of Fayette County, 242 S.W.2d 1018 (Ky. 1951).
36 KRS § 100.340(2) (1950), “It shall ... keep a record ...” While there is no Kentucky case in point as to the extent of the record required, it is generally believed that all that is required is a “sketchy” record of what happened—(cases decided, members voting, etc.). But see 1 Yokley, Zoning Law and Treatise § 115, at 268 (1953), “While Planning Commissions promulgate rules governing hearings, the proceedings are usually informal, though every well organized commission has its proceedings recorded by a reporting service.”
throw the decision of a planning commission as being arbitrary or
capricious if the commission renders a concise finding of facts and
gives substantial reasons for its actions in terms of the master plan.
Judge Frank's observation seems entirely convincing, "Often a strong
impression that, on the basis of the evidence, the facts are thus-and-so
gives way when it comes to expressing the impression on paper." 37

The practical reasons for requiring written administrative findings
and reasons are so powerful that the requirement has been imposed
with remarkable uniformity by virtually all federal and state courts
irrespective of a statutory requirement. 38

Recommended Reforms

1. Interested parties should be given adequate notice of what the
planning commission considers important in deciding the case.

2. The city planner should be cross-examined on any oral testi-
mony that he offers at the public hearing, but ordinarily he should not
be cross-examined as to the planning staff's written recommendation.

3. No witness, including members of the planning staff, should be
heard in executive session.

4. Information gained by physical inspection of the affected area
which will influence the commission's result should be disclosed to
interested parties before a decision is reached.

5. The planning commission should make written findings and give
written reasons for its actions.

These suggestions are simple, inexpensive and time-saving. While
the above recommendations may require more time for the commis-
sion to write opinions, considerable time will be saved by giving inter-
ested parties notice of the crucial issues in their case and the conse-
quent elimination of impertinent matter. In the observance of the
foregoing reforms, which are elemental in the conduct of any quasi-
judicial public hearing in our democratic scheme of government, the
planning commission will find, as will the citizen who appears before
the commission, that all matters needed for the board's information can
be orderly assembled and the rights of all interested parties will be
thereby protected.

Charles E. English

37 United States v. Formess, 125 F.2d 928, 942 (2d Cir. 1942).
38 See, 2 Davis, Administrative Law Treatise § 16.05 (1958).