

# MICHIGAN PLANNER 'E-dition'



American Planning Association  
Michigan Chapter

Making Great Communities Happen

A Publication of the Michigan Chapter of the American Planning Association

## Michigan Planner E-dition-September 2011

The *E-dition* continues to deliver valuable information on planning basics and current planning trends through a wide variety of featured topics. Each *E-dition* includes articles about planning and zoning procedures, policies, and applications (particularly useful to newly elected and appointed officials), combined with more advanced topics (for the veteran planner). These articles will often contain links to additional resources and web sites, allowing you to explore topics in as much or little detail as you wish. Read on... and enjoy MAP's newest member benefit, electronically available for your ever-changing needs.

### Dear Amy,

Autumn in Michigan means cool weather, serious football and gearing up for MAP's annual *Planning Michigan* conference. In addition to recently updated conference information, this September issue of the E-dition contains original articles and links for members to important training events in the coming months.

Stay connected at [planningmi.org](http://planningmi.org).

### Planning Michigan 2011

We've been planning awesome breakout sessions and coordinating impressive national speakers to join us at the Amway Grand Plaza Hotel in Grand Rapids for this year's *Planning Michigan* conference on October 19-21.

#### General sessions and keynote addresses include:

**Robert Ogilvie, Ph.D** (Program Director, Planning for Healthy Places), **Barbara Sporlein** (Planning Director, Minneapolis, MN), and **Chris Duerksen, Esq.** (Principal, Clarion Associates) will share national strategies to inspire sustainable change, to keep planning efforts focused and to further innovate your zoning practice.

#### In This Issue

[Featured Article: Nine Golden Rules of Defensible Decision-Making](#)

[Community Highlight: Wayne, Michigan](#)

[Education Opportunities: Regional Councils Act WEBINAR](#)

[ZBA ZONE: Gathering Information](#)

GRAND RAPIDS  
2011



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**Bill Rustem** (Director of Strategy, Office of Governor Rick Snyder), **Gary Heidel** (Executive Director, MSHDA), **Adrian Hemond** (Lobbyist, GCSI), and **Arnold Weinfeld** (Strategic Initiatives Director, MML) will share their experiences as state policy leaders and give insight about the impacts on local government as we look forward.

*Planning Michigan 2011* is set to be another "can't miss" educational event and with only a month left of the early bird rate, [register today](#) to secure your spot in Grand Rapids in October.

### **MAP Board Member E-lection**

Board elections will be conducted electronically this year for the 1st time. With two positions open and two members up for the job, the election will kick off mid-September as scheduled. Link to [planningmi.org](http://planningmi.org) to read candidate's [Mark Miller](#) and [Steve Schnell's](#) position statements. Don't forget to cast your vote between September 19th and October 12th at [votingplace.net/map](http://votingplace.net/map).

### **Featured Article**

## **Nine Golden Rules of Defensible Decision-Making**

By: Rodney Nanney, Principal  
[Building Place Consultants](#)

In almost any crowded public meeting on a controversial site plan, special use, rezoning, or other difficult land use issue you will find a proverbial elephant sitting on the backs of the decision-makers at the front of the room. What is this elephant?

**It is a question...**

The Elephant in the  
Public Hearing Room

**Will we be sued  
over this?**

[2011 Planning Michigan Conference](#)

[October 19 - 21, 2011](#)

Be sure to book your room at the [Amway Grand Plaza Hotel](#) before October 3rd to secure the MAP room block discounted rate.

[Sponsor & Exhibitor Info](#)

## **ZBA ZONE Gathering Information**

**Before decisions can be made by a zoning board of appeals, information must be gathered to facilitate the decision making process.**

Information is gathered from many different sources including documents submitted by the applicant, public input, site analysis, and review of the zoning ordinance and other applicable municipal codes.

[READ MORE...](#)

**MICHIGAN PLANNER** the online

Did you miss the debut issue of the *E-dition* distributed [July 2011](#)?

To help make the *E-dition* more tangible to members on-line and off, all *E-dition* original issues are available at

## **Community Highlight Wayne, Michigan The Ripple Effect**

*Building consensus within a Michigan community is proving to make a difference, from the inside out. The City of Wayne is a classic southeastern Michigan community that is taking their hard times and turning their downtown into something everyone can be proud of.*

*Creating open communication through the use of social media outlets and developing strategies for consensus by focusing stakeholder concerns are some of the techniques that are helping to revive this Michigan downtown.*

*The following article highlights the City of Wayne and the effects of the ripples that the citizens are creating in their own pond. This transformative strategy is a positive example of how to "Be the pebble," as the Ripple Effect promotes, and could easily be transferred to many communities across the state.*

### **The Wayne Ripple Effect**

By: Natalie Burg | Published by [metromodemedia.com](http://metromodemedia.com)  
August 4, 2011

When residents, business people and all-around lovers of the city of Wayne gathered in February to raise downtown revitalization funds, each was asked to write his name on a smooth river rock with a silver pen, to be dropped into a bowl of water.

By the time 125 people walked through the door, the pile of shimmering, submerged rocks was beginning to make a point: the grassroots movement known as the Ripple Effect is getting big.

[READ MORE...](#)

*Special THANKS! to [Metro Mode Media](#) and Author Natalie Burg for permission to share this article.*

### **Quick Links**

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[Corporate Members](#)



**Know someone who needs to become a MAP member?**

Forward this email on and help expand the online Michigan land use community.

[Click here to learn more about a MAP membership](#)

Do you want more information on a particular planning basic or hot trend? Let us know We are always happy to take requests for article topics and value the opportunity to give members resources they need.

## Nine Golden Rules of Defensible Decision-Making

By: Rodney Nanney, Principal  
[Building Place Consultants](#)

In almost any crowded public meeting on a controversial site plan, special use, rezoning, or other difficult land use issue you will find a proverbial elephant sitting on the backs of the decision-makers at the front of the room. What is this elephant?

It is a question...

So, the worst has happened and the answer to this question is "Yes!" A disgruntled applicant has threatened or filed a lawsuit against the town and each of the board or commission members personally. Lawsuits are relatively cheap to file, and it costs even less to make the threat. It is also true that a board member or commissioner may be named as a defendant in land use or development litigation if the individual participated in the decision-making process.

Now before all of our citizen-volunteers dash off to pen their resignation letters, please read on: It is extremely rare that personal liability is imposed in such cases, as it must first be proven that the individual acted maliciously or was grossly negligent. Otherwise, he or she should be dismissed from such cases on the grounds of governmental immunity.

To minimize the chance of finding yourself in these circumstances, ALWAYS follow the nine golden rules of defensible decision-making:

### **RULE 1: MAKE INFORMED DECISIONS**

ALWAYS strive to make informed decisions based upon the best information available. The board or commission Chair should request a vote only after first verifying that the agenda item and its probable impacts are well understood by all members.

One of the worst violators of this rule is the decision-maker who waits to open and read the meeting packet until just before the start of the meeting. To be prepared for the business to be discussed at the meeting, take time to become familiar with the agenda items at least several days beforehand.

The Elephant in the  
Public Hearing Room



### **Nine Golden Rules of Defensible Land-Use Decision-Making:**

- 1. Make informed decisions**
- 2. Do not exceed your authority**
- 3. Deliberate in public**
- 4. Ask for advice**
- 5. Document decisions**
- 6. Avoid exclusionary zoning**
- 7. Correct errors immediately**
- 8. Respect constitutional rights**
- 9. Express your opinions**

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Stay familiar with your zoning ordinance and master plan, and keep them close at hand. If you haven't already done so, consider this your permission to make margin notes, highlight, and "bookmark" your copies so you can find key information quickly during the meeting.

During the meeting it's easy to get bogged down in technicalities and procedural distractions. While Robert's Rules of Order are important, the best decisions come through keeping focus on the key "big picture" issues related to the agenda item.

## **RULE 2: DO NOT EXCEED YOUR AUTHORITY**

ALWAYS strive to act in good faith, and NEVER exceed the scope and authority you have been granted. If you are unsure of the boundaries of your office or your authority in a given circumstance, ask for professional advice before you act.

## **RULE 3: DELIBERATE IN PUBLIC**

ALWAYS deliberate and discuss agenda items exclusively during the public meeting. All deliberations should be in the open. To the best of your ability, avoid talking to the owner, developer, applicant, and your neighbors about the agenda item outside of the public meeting, and be especially careful with email correspondence that involves the applicant, neighbors or fellow decision-makers.

The keys to a defensible decision on a difficult issue are to:

- Consistently apply all adopted standards and regulations, no matter the specifics of a particular case;
- Look out for the best interests of the entire community, not just the people at the public hearing, an applicant or an opponent;
- Beware of decisions that would have the effect of completely excluding a lawful land use; and
- Avoid even the appearance of "under-the-table" dealings by choosing to not meet as a group outside of the public meeting, other than for purely socializing purposes.

### **What about site visits?**

A joint site visit by a majority of the Planning Commission must be preceded by public notice under the Open Meetings Act. Do not enter the site without written permission from the owner, unless the site is normally open to the public.

## **RULE 4: ASK FOR ADVICE**

NEVER hesitate to ask for advice from a land use professional. Technical assistance (legal, planning, zoning, engineering, environmental, etc.) should always be made available to board and commission members and other decision-makers when needed. For development

applications, the application fee should cover the cost for planning and engineering consultant reviews. If it does not, then this would be a good time to update your community's fee schedule.

## **RULE 5: DOCUMENT DECISIONS**

ALWAYS document decisions through detailed motions. This builds a firm and defensible foundation under the decision and any conditions or limitations imposed by the board or commission. The absence of such documentation severely diminishes the legal defensibility of the board or commission's action.

Most land use decisions in Michigan require a written statement of the commission's relevant findings and conclusions related to the specifics of the agenda item. "Findings" are facts specific to the case, while "conclusions" are results or reasoned judgments reached by the decision-makers through the deliberative process.

Carefully phrase the motion, as it may have to withstand court scrutiny. Include references to relevant sections of the ordinance and staff, consultant or agency reports. Whenever possible, make a motion in the affirmative (i.e. "to approve" or "to recommend approval of"). A motion to deny means that a "yes" is actually a "no," which can create confusion and opportunities for error.

### **What's in a Motion?**

- Summary of the request and the proposed action (to approve, to deny, or to recommend an action in some cases)
- Conditions placed on an approval (if any)
- Statement of relevant findings of fact and conclusions that support the proposed action and conditions

## **RULE 6: CORRECT ERRORS IMMEDIATELY**

ALWAYS go back and correct yourself when you discover that a procedural error has been made during the decision-making process. Upon identifying an error, the board or commission should immediately re-start the process from that point with the deficiencies corrected. It is better to hold a "do-over" public hearing than to take an action that would be vulnerable to challenge on a technicality.

## **RULE 7: AVOID EXCLUSIONARY ZONING**

NEVER take an action that would have the effect of completely excluding a lawful land use, or that would impose unreasonable conditions on an approval. Examples of lawful land uses to be aware of include churches and other religious land uses, mobile home parks, and "adult uses" or sexually oriented businesses.

## **RULE 8: RESPECT CONSTITUTIONAL RIGHTS**

NEVER take an action that would have the effect of violating the constitutional rights of an applicant or another citizen. If you are not familiar with the Bill of Rights, the first ten amendments to the U.S. Constitution, take time to get to know them.

Examples of constitutional rights that typically come up as part of land use litigation include the right to due process of law (see Rules 1–6) and a prohibition on the “taking” of property for public use without just compensation (see Rule 7).

### **Religious land uses and RLUIPA**

The federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) prohibits unequal treatment of religious land uses (churches, synagogues, temples, etc.) and similar non-religious assembly uses (theaters, auditoriums, fraternal organizations, etc.). To conform to the intent of RLUIPA, we recommend that these uses be combined into a single new use category called “institutional uses,” subject to a single set of standards.

Professional and legal advice early in the decision-making process is key to defensible decision-making for cases that could involve RLUIPA.

### **Freedom to petition the government**

Respect the rights of citizens to “petition the government for a redress of grievances.” A key to success in cases that require a public hearing is to always err on the side of ensuring that all have ample opportunity to be heard. Speaking in public is an unfamiliar and sometimes emotional experience for many, so be sure to thank everyone that chooses to speak up at a hearing.

#### **1st Amendment:**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

“Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech.”

“(The 1st) Amendment affords special protection to speech in the home, (so) the Supreme Court has accorded special “reverence” to yard signs, holding that the available alternatives to yard signs are not ‘adequate alternatives.’”

[Fehribach v. City of Troy, MI (2004)]

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## Freedom of speech

Local sign regulations can often become a source of indefensible decisions. As the coming year brings another election season, our focus here will be on one small but very significant example: political and opinion signs.

As noted in *Fehribach v. Troy*, yard signs for campaigns, ballot issues, and other expressive purposes are given a strongly protected status ("reverence") by the courts.

In other words, our right as American citizens to display a yard sign that states our personal opinion that "The Mayor is a Fink" should not be infringed!



What does this mean for decision-makers? Locally, you can regulate maximum sign area, height, and location of yard signs. You can also prohibit "obscene material" as defined in state law, and require such signs to be kept out of the road right-of-way. However, no permit or fee should be required to put up a political, opinion, or election-oriented sign.

Time limits (such as "a maximum of 30 days before an election") also cannot be enforced against such signs, so as long as you keep your "Mayor = Fink" yard sign in good repair, it can be lawfully displayed for as long as you wish to express your constitutionally protected opinion.

## RULE 9: EXPRESS YOUR OPINION

This is the last "rule," but it may also be the most important: ALWAYS express your opinions as a board member, commissioner or other decision-maker. Do not let any threat of litigation or other intimidation tactic prevent you from expressing your thoughts, concerns, preferences, and recommendations during the public meeting.

The keys to success under this rule are to keep the discussion focused on the specifics of the matter under consideration, and to avoid personal issues and personality clashes that may unintentionally provide ammunition to attack the decision.

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It is never too late to improve your community's efforts at defensible decision-making. Even if you are well educated and schooled in decision-making procedure, there is always more that can be done to strengthen the foundation under your community's land use and development decisions. These Nine Golden Rules are not a foolproof form of pest control against land use and development litigation, but following them consistently will help significantly to lift the "Will we be sued?" elephant off your back and keep him out of the public meeting room all together.

## ***About the Author***

*As the principal planner and [Zoning Guru for Building Place Consultants](#), Rodney C. Nanney is an innovative provider of solutions to community planning, zoning, and local economic development challenges. Mr. Nanney is a recognized zoning expert and the creator of the Building Place Notebook, an online newsletter covering planning, zoning, and economic development in Michigan.*

*An accomplished writer and public speaker, he also has the gift of being able to effectively communicate planning and zoning concepts in plain language for many to understand.*

*For more information from Rodney and Building Place Consultants, [click here](#).*

*NOTE: All graphics and photographs were created or taken by Rodney Nanney*

## GATHERING INFORMATION

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Before decisions can be made by a zoning board of appeals, information must be gathered to facilitate the decision making process. Information is gathered from many different sources including documents submitted by the applicant, public input, site analysis, and review of the zoning ordinance and other applicable municipal codes.

Applicants are generally required by a community to provide information adequate to ensure that the request can be understood. Specific application requirements should be listed in the community's zoning ordinance. Application submittal requirements should be consistently applied to all applications. All application materials become part of the official record of the request.

### **Typical submittal requirements include:**

**Application form.** A community typically requires a written application for each request. The application form will specify the type of relief being sought (e.g., use variance, non-use variance, or appeal of an administrative decision), ownership information, and site data (e.g., site location, location of structures, site size, zoning district, etc.).

**Written response.** With all requests, the burden of proof is on the applicant, therefore, the most important information submitted is a written description of why approval of the request is warranted. For use and non-use variances, the ordinance must outline a list of review criteria in accordance with the Michigan Zoning Enabling Act. The applicant must explain how their application meets the criteria. For appeals, interpretations, and other approvals within the ZBA's authority, there may or may not be criteria set forth in the ordinance. However, the burden of proof still exists, and the applicant must provide a written explanation of the situation and the requested relief.

**Other Information.** The ZBA or staff can require that additional information be submitted in order to fully evaluate the application. In the case of a use variance, for example, detailed information about the proposed use, such as operation information, should be requested. For non-use variances, a scaled drawing is necessary to understand the dimensions being considered along with existing site conditions. Other helpful data may include photographs, aerial photos, slides, or videotape.

In addition to application materials, ZBA members should review all available and relevant information needed to make a decision.

## **Additional sources of information could include:**

**Information from staff.** ZBA members should ask for additional information from the community's staff. For example, some cases may warrant review of the community's master plan or special studies to understand the community's master vision for the area in which the subject site is located. In addition, it may be important to evaluate data on lot sizes and /or lot configuration in the vicinity of the site in order to determine whether an extraordinary circumstance exists. Any information you receive individually should also be made available to each of the other members.

**Site visits.** Visiting the site can assist in understanding existing site conditions in the context of the application. Site visits can also help ZBA members determine whether conditions of approval are warranted. The following are important tips when visiting a site:

- Site visits should be made individually rather than as a group. Group visits, even with less than quorum, raises several issues. A site visit with the majority of the membership requires that the meeting be posted in accordance with the Michigan Open Meetings Act and that steps be taken to ensure accessibility in accordance with the Americans with Disabilities Act (ADA). In addition, it is difficult for the visiting members (even if there is no quorum) to avoid talking amongst themselves about the proposal, which violates the spirit of the Michigan Open Meetings Act.
- Look closely at traffic conditions, natural features, surrounding land uses, adjacent structures, development patterns, and general neighborhood characteristics.
- Visit the site in the most appropriate context to address your questions and concerns. Visiting a site during a peaceful Sunday afternoon may not be representative of traffic conditions during rush hour.
- Do not discuss the proposal with the property owner or neighbors while conducting a site visit. If the property owner is present, explain that you are only there to verify the conditions of the variance request.
- Do not go onto the site unless the property owner grants specific written permission or the site is otherwise available to the public (such as an existing shopping center). This can help avoid misunderstandings and problems with trespassing.
- Describe your site visit findings to the rest of the ZBA at the meeting so that they have the benefit of your observations.

*Reprinted from the APA- Michigan Zoning Board of Appeals TOOLKIT, published 2009.*

## **Links for more information:**

[Michigan Open Meetings Act](#)

[Americans with Disabilities Act](#)

[Michigan Association of Planning homepage](#)