This is a transcription that has been cleaned up and organized by DCRPC staff. It is based on a workshop given by Pete Griggs of Brosius Johnson and Griggs law firm in 2021 and includes personal examples and first-person references in a conversational style with some questions and responses.

Overview of Zoning

Number one - know your role, how you fit into the process, and what you can and can't consider.

Number two - whatever you're doing, make sure you rationalize your decisions.

Rationalize your decisions. Say why you're deciding and make sure you have a reasonable basis to do it.

Watching the BZA handle applications with "I like Joe, I know Joe. He has a store down there and I think it's just a good idea we go ahead and grant his variance. Everybody agree?" That's not good enough because you get in the habit of doing things the wrong way that's going to come back and bite you. Then you have an applicant who has seen the proceeding applications handled poorly and all of a sudden there is cross-examination, the township attorney is referencing a sample decision of a self-storage unit that was 11 pages long with rationalization of each "Duncan Factor" and then also denying their conditional use. So make sure that you do the things that you need to do to rationalize your decision.

Know your role, rationalize your decision. You do those two things and you're way ahead of the game.

Zoning

The general rule of thumb is that *townships only have those powers which are expressly given to them in the statute or that you can apply from those provisions that are expressly given to them.*

It's the opposite of a city. The cities can do whatever they want to do unless there's a law that says they can't do it. Townships are just the opposite. We can't do anything unless the statute says we can do it. So it's very difficult, so when you pick up the phone and you call the prosecutor or attorney's office and say, "hey can we do this?" The answer is, "well I need to find a statute that allows you to do it. If it doesn't exist or we can't apply from that statute, the answer is "no you can't."

There are no limited home-rule townships in Delaware County. Limited home-rule townships are just the opposite to the example above - they're more like cities. You can exercise your home-rule power just like a city. In that case, you CAN do it unless there's a law that prohibits it or it's one of the seven areas that are expressly laid out and you can't do it. (Under limited home-rule, it's "limited" for a reason.)

So what does this have to do with zoning? We can only have zoning based upon what the state allows us to do. So that delegation of power, or that authority rests in ORC 519. Everything that we can do is in the ORC. If it's not in here we can't do it. There's two kinds of limitations on 519.

One is a **constitutional** limitation. The United States Constitution and the State Constitution - the good news is that we're the government and we get the benefit of the doubt. So, our zoning regulations are presumed to be constitutional - we get a thumbs up until someone challenges us.

In the context of a BZA, and there is case law on this, you do not have the authority to make a determination as to whether or not your zoning regulations are constitutional. That's not up to you, so if you have an attorney that comes in front of you and starts arguing that it's unconstitutional you can't do this, and you can't do that. If

somebody's representing a neighbor that has made application to the BZA, you don't have the authority to judge whether it's constitutional. The first time that issue's brought up, is typically in the court of common pleas. So don't worry about a constitutional argument.

The other thing that I think we need to remember is zoning regulations are a **degradation of property rights**. They restrict property rights so if your zoning resolutions are ambiguous (this goes for either the Zoning Commission or the BZA). If they're ambiguous, the tie goes to the property owner. The court's going to construe it in the landowner's favor. If it's a toss-up on the merits, the court's going to construe it in favor of free use of property. So, make sure, particularly Zoning Commission, when you're drafting text that it's clear. You're going to see two ways that we see people challenging township zoning: the first one is that just reading the regulation itself, that it bears no relationship to a governmental interest. That's what they call the "on its face" test. If you just look at it, if you read the text on its face it's unconstitutional. Those days are gone. I mean we don't we don't see that anymore.

The second part of that is the "as applied," and that's when a taking is the issue - That "your zoning regulation as applied to me deprives me, the property owner." This is the key of all economically viable use of the property. What I want people to understand is you will have developers who like to throw the word "Taking" around. Just because you don't give them the amount of density that they want doesn't mean that it's a taking. "It's not the highest and best use of the property" – that's not the standard. The standard is if the rule has deprived the owner of all economically-viable use of the property. So the difference between 2 units an acre and 1.85 units per acre or whatever the case may be, that's not a taking. So you shouldn't feel threatened when you have a developer that says that.

We're seeing developers now challenge on some other things. They're challenging on not only the Taking issue, but they're now challenging a substantive Due Process issue. A procedural Due Process issue and an Equal Protection issue. Those first two issues generally are being chipped away by courts. They're saying that "no, a rezoning is a legislative act." A developer can't claim that a constitutional right has been taken away.

But the thing that's kind of starting to sink in as an Equal Protection argument is that "the Township has treated me differently than similarly situated property owners." We're seeing this with referendums. If several developments go through the rezoning process with no referendums filed and then all of a sudden somebody referendums the next one, the argument that's been made (and we don't have an actual case that says it's a violation) but what has happened is we've seen it get far enough into litigation where the court said "that could go to trial" and that should scare folks because when you're talking about a constitutional issue, if you lose you are paying attorney's fees.

There's one firm in central Ohio that pretty much does all these cases. Did everybody read what happened to Powell? They changed their charter the mortgage law firm sued them, long litigation history and Powell ended up paying 1.8 million dollars. $900,000 came from Powell itself, right out of their general revenue – the rest from insurance.

Same firm years ago challenged Liberty Township on "the Walmart case" which was more of a substantive Due Process issue. As of this workshop, developers are challenging Jerome Township at 42 and 33. Six developments were put on referendum and now there's a federal lawsuit so be aware of those issues.

You can do everything right as a Zoning Commission. The trustees can do everything right, everything meets the comp plan. It meets all the general development standards and it goes on referendum and now the community is still being sued. It's gotten to the point where the lawsuits are flying and the argument that they're making is

the residents have to have a rational basis for why they put it on referendum, instead of just not liking the project.

"Did the lawsuit happened before the vote or after the vote?"

It typically happens before the vote because they don't want that going on a ballot. There's a statute (ORC 505.07) that's in the general township statute and it allows the board of trustees to settle zoning litigation. It "re-zones" the property as part of a lawsuit settlement. That statute essentially defeats the right of referendum. It forces the township to make a decision between a couple million dollar price tag or settling the case. It's impossible to know which the residents would have chosen.

"Two quick questions, how did the other half get paid?"

Insurance. "then the equal protection under BZA are you seeing much there?" No because typically it's not a constitutional issue so what we've seen in terms of constitutional issues is just people filing for variances or use variances they don't get their variance, and then they appeal the BZA decision with the court of common pleas and they make an ancillary attack on the constitutional zoning where we often see it is they don't you don't have a comprehensive plan therefore your entire zoning is invalid. We've seen that in case you could be litigated but it's not as common in BZA the constitutional issues more so with the Zoning Commission.

There's been some arguments about why you do this if this happens elsewhere it's like well that's not our township that's not our whatever that's not the other properties and each BZA is specific to a property that variance is for. That particular hardship that particular property and so when they make that argument I kind of dismiss it. BZAs, when they always are worried about precedent. I mean I have yet to see two back patterns identical and I think you need to make sure you're viewing the application on its own merit and not worried about the rest of it. Because I think you get in trouble but that's a good point so that's the constitutional aspect of it, yes ma'am.

"If I heard you right, there's no constitutionally-protected right for developers to maximize the economic profit of a development plan?"

Correct.

"So the argument that they would have to make is that it deprives the property of all economic benefit?"

Exactly. What we're seeing is the argument for Highest and Best Use. Highest and best use is not the standard.

Non-conforming Uses

This could be a whole seminar in and of itself but the non-conforming use is a use that is no longer permitted. The key is that it has to be a lawful non-conforming use. So I have a use or a structure and it meets code and the township changes the rules of the game. So my use or my structure is no longer conforming. The key is that it's also still lawful. But let's say it never was conforming. It never was lawful. I violated the setbacks and then the township changes the rules of the game the property owner doesn't get the protection of being a lawful non-conforming status so a lot of times the BZA will be in charge of making a determination. So a zoning inspector may say "hey you're not a lawful non-conforming use." You appeal to the BZA. So sometimes you're going to see that argument in front of you.

Zoning Commission

Every time you change the code you have the risk of creating non-conforming situations so be aware of that when you start changing setbacks and lot sizes and all those things. I'm not saying you shouldn't if you're a good reason to do it do it but just be aware that you don't want to create a lot of non-conforming uses. What happens is typically it creates financing problems for people so let's say if my house burns down I have to build it in conformance with the regulations that are in existence at the time. I don't get the benefit of the doubt of what I previously had so a lot of times finance companies will send letters to zoning inspectors saying does this property meet zoning and the answer is "no it doesn't, but its lawful non-conforming."

"So, with that then, so if you have an established neighborhood where everything has to be a 0.3 acre and above. Well, in that established neighborhood someone is on 0.2 acres. So, when that 0.2 acre house burns down is there any way for that land to be grandfathered in, and could you put in a statute to allow someone to build on that lot?"

Your code can have language to address that situation, and non-conforming lots of record. I often find that non-conforming language was written a long time ago and is not addressed with code updates.

"Just to be clear though, when you have a house that was compliant or it's now non-conforming due to a change in the rule, insurance company says if burnt down it can't be rebuilt. In that situation can the BZA grant a variance?"

Absolutely. Because typically you may need an area variance and in the Duncan factors (remember Duncan factors are not an all-inclusive list) you're allowed to consider other things. The other thing that comes up a lot is you can have a lawful non-conforming use but if that use is voluntarily abandoned by the property owner, after two years that use is no longer considered lawful. So a lot of times the BZA will be involved in a determination of "did they abandon it or not." So that would most likely be an appeal from the zoning inspector's determination more than likely up to the BZA.

Outdoor advertising

It has to be a permitted use. In the industrial, business, trade, or ag districts it's got to be a permitted use. You can still regulate it, but it has to be a permitted use. Where we're seeing some issues is with electronic billboards. If you have a major thoroughfare in your township make sure you address it one way or the other.

Agricultural Exemptions

The ag exemption in Ohio is complicated and one fact on an ag situation can change the legal answer. Get all the facts - tell them everything up front because if you don't the answer may change. Townships don't have any authority to zone for agriculture, unless it's in one of two categories; a platted subdivision, or there are 15 or more (No Plat) lot splits adjacent or across the street.

One acre in size or less – township can prohibit agriculture.

Between two and five acres – township has the ability to regulate structures incident to that agricultural use and prohibit dairy and poultry husbandry.

Greater than five acres – township cannot regulate ag.

The key is making sure that agricultural activity is occurring on the land and that the structure is incident to that agricultural activity. There is no set amount of the structure that must be used for agriculture to be exempt. However, if it's 50 percent or more it's clearly going to be exempt for an agricultural use. When the agricultural

use of the structure becomes less than 50 percent those are court cases, and the closer it gets to zero the more likely you are to prevail.

An example case would be when someone intends to build a build a pole barn to park an RV, however they state they will raise chickens in the barn to allow for the exemption. It depends on whether or not you're willing to stand up and fight that issue, but those are the ones that are probably more successful where someone is just parking an RV. The judges here in Delaware County do a really good job and I think they're ahead of the curve with respect to zoning because there are some places where that isn't the case.

Agritourism

That's a fairly new law. It's a train wreck. Farm markets again are part of the mess. You **can't prohibit farm markets in any district in the township**. You **can regulate them in terms of setbacks and parking** and some other things. Townships must adopt regulations in their zoning code to actually regulate agritourism to take affirmative action. You can't just state in your code that you're going to follow ORC 519.211, that's not good enough. If you don't, you don't have any authority at all.

Cell Towers

The Prosecutor and RPC have great language on cell towers, but your only authority is going to be when it's in a residential district. There are really no fights anymore on cell towers. It's the law and the court cases are well settled, so the only authority is on residential uses. (See ORC 519.211).

Wind/Solar farms

Townships have no authority to regulate large wind farms - your only authority to regulate is with a "small wind farm", which is five megawatts or less. That's no more than about two of those big wind turbines. Solar farms are currently an extremely hot topic in Ohio and the statute doesn't even address it. There was a recent legislation called senate bill 52 that has given the County Commissioners some authority. The Commissioners can pass a resolution that says we don't want solar farms in this part of the county. Also, if someone files an application for wind and/or solar generation the County Commissioners may adopted a resolution (within 90 days after public meeting) that prohibits the construction and limits the boundaries of the facility, even if it's outside of the proposed area. (See ORC 303.62)

The kicker is, I don't think the county will because it is a direct windfall financially for counties because there's a tax structure where basically all the taxes get sent in PILOT (payment in lieu of taxes) payments. And that money goes directly into their general revenue fund. I think at a minimum it's about five to seven thousand per megawatt produced. Some counties are getting millions of dollars, so again be aware, but no township authority. If a solar array is proposed for an individual/residential use, your code could treat this as an accessory structure in order to regulate. But again, once it reaches the utility status there's no township regulation.

Creation and Function of Board of Zoning Commission (BZC) and Board of Zoning Appeals (BZA)

BZC and BZA - both bodies consist of **five members and two alternates**. The regular members have five-year terms. Every year somebody should be up for appointment. If that's not happening, try to figure it out and get back on schedule. Typically, where I see that is where somebody leaves and there's an appointment to an unexpired term and then they are just appointed for that five-year term, not the unexpired term and the schedule gets screwed up, so just be aware of that.

Alternates - there is no term established by statute so when the trustees are appointing alternates they should be putting in a term. The other thing that's interesting about the statute is when do alternates sit in a meeting? The statute says the trustees decide when alternates sit. I've often found that the appointing resolution sometimes is silent with respect to that so if the trustees have dictated whether alternates sit, you follow that. If they haven't, entities are responsible for having rules and procedures required by statute to have a procedure. You have plenty of places that have them here in Delaware County. Have your rules dictate when that individual sits.

When an alternate sits for a hearing, that alternate should stay with that application until it's concluded for the BZA. If, however, an alternate needed to be at the second hearing and missed the first one, and the Board wanted that alternate to be seated at the second meeting, then that individual should read the meeting minutes, read the transcript, and familiarize themselves with the record of the first part of the hearing. On the record, say "Mr. Chair, for the record, although I was not in the previous meeting, I'm now sitting and I familiarized myself with the previous record and understand the issues and I'm set to go."

Part of what we do as attorneys is we try to remove as many roadblocks as possible when you get sued because if you haven't gotten sued you will be eventually. Something's going to happen. We do not want to be arguing over a process issue because opposing counsel will do everything in its power to make the case about everything other than the facts of the case. They're going to argue Sunshine Law violations, Public Record violations, BZA members being biased, or obtaining evidence outside the hearing, everything they can do. It stinks.

"We asked the applicant if they were okay with the board member sitting in place of the alternate, if they would switch if the applicant was okay with them sitting on the board before we..."

And they probably always say yes, right? What would you do if they said no? They would probably lose the ability to have their case heard. You can do that, but I don't think it's necessary.

"So if there's a quorum, it should be legal?"

If it's a quorum it's legal. But what's the first thing out of your mouth before you start the hearing, to the applicants that are in front of you? Let them know (assuming you require three affirmative votes for passage) that if you have a full body you need three of five votes, but if you have a minimum quorum, you would need three out of three. "Do you wish to proceed?" If the applicant says "yes I'd like to proceed," they've essentially waived that argument. There have been cases where the judges have ruled on the merits, but the argument has been made that "nobody told me I didn't have a full Board, I had to have a super majority. If I had five…". I don't know. Maybe in fact maybe it plays out differently. So just be aware of that.

The last thing - for zoning purposes, **members have to live in the unincorporated area of the township**.

BZA Function

We talked about quasi-judicial so what does that mean? It means you're acting like a judge, but it also kind of gives you some key indications. It means that your decisions are direct appealed to the Court of Common Pleas and you may hear an attorney refer to it as a 2506 appeal. The reason it's called a 2506 appeal is because there's a statute with that reference in the ORC. It's a direct appeal to the Court of Common Pleas. As a member you should not be having what I'm going to call "ex parte communication" with applicants or witnesses. Everything that you do, all your conversations, even a question with the zoning inspector, needs to be on the record. All the evidence you hear, all the conversations you have with an applicant, with property owners, needs to be on the record. You cannot have conversations with those individuals outside the record or outside the hearing context.

Think of the judge who sits in criminal trial. Is he having a conversation with a prosecutor outside of that or the defense counsel or a witness? If he does he's going to get in trouble. So no outside conversation.

It also tells me that I have to run my hearing like a civil trial when needed. Simple rules of procedure don't apply to you. You need enough information with every case that when you feel that you have to be able to act and conduct it like a civil trial, you can. That radar should go up and you should be calling legal counsel if you have a feeling you're going to get caught off guard. Always feel free to continue the hearing. Counsel can come in and make sure you're doing things right.

The last thing - as a BZA member I can engage in private deliberations. Do not call it an executive session - it is not an executive session. As soon as you utter those words it confuses judges. They're going to go to the open meetings act and see that the BZA doesn't have that ability. It's not in the Sunshine Law but the Supreme Court has said that quasi-judicial governmental bodies have the ability to deliberate in private. A couple key points for those people that may question that. It is now in the "yellow book" that the attorney general puts out. They have a statement in there that the Supreme Court has determined that public bodies conducting quasi-judicial hearings may require privacy to deliberate. The first time that it happened in the state was in Liberty Township here in Delaware County. The BZA went into private deliberations, came out, denied the application, it got to court, the plaintiff argued it was a violation of the Sunshine Law and the Court of Appeals said no.

Here's the motion – "motion to recess into private deliberation for the purpose of considering the merits of the application. Second, vote." You all go back into a separate room. You don't take a formal vote. The purpose of that is to try to reach some consensus of what you're going to do with that application. Talk about what other evidence you may need. Maybe we need to call this person back up because I'm not sure that they're telling us the whole truth or I would have liked to ask this question and call the witness back up.

If you have an outline with the Duncan factors on it you can scratch out each one as you discuss them; then you just come back out and continue with the hearing. You can basically render a decision at that point if you want to, but use it to your advantage. Don't do it every time because you don't need to. But when you have that case where everybody's lawyered up, it's a good idea.

"Can both boards do the deliberation? And it says that the zoning officer cannot be included in that so..."

The answer for Zoning Commission is more than likely not. Because remember you have to figure out what role you're acting in when you're in the Zoning Commission. But if you're just rezoning property the answer is "absolutely not." Everything has to be on the record. Only BZA can go into private deliberations.

So the question becomes who the BZA can bring back into private deliberations with them? Legal counsel, or, the Township representative (Prosecutor, special counsel, whoever you use who is there with you that night).

The question that we often get is, can the zoning inspector go back in private deliberations? Always swear in your zoning inspector - they're your witness. I would never have a zoning inspector go back in private deliberations; potentially during a conditional use, but theoretically they're an adverse party, right?

Clearly, they are an appeal because they've rendered a decision and then someone's appealing their decision. So again, remove the roadblocks. Let's say someone has a question for the zoning inspector: make a list, come out, ask the question. If you need to go back into private deliberations, then do that.

"Are you saying that the zoning inspector should be sworn in when the hearing is started?"

Yes, if you do a mass swearing in, make sure the zoning inspector raises his or her right hand to tell the truth... You may ask why that's important. Remember I referenced statute 2506 – it has a list of things that BZA's have to do. If they don't do them, the applicant can supplement the record to the Court of Common Pleas. One of them states that all testimony has to be given under oath. If your zoning inspector is not sworn in, the first thing an attorney is going to do if they don't like your decision is to appeal. They are going to get a "second bite at the apple" with the Court of Common Pleas.

"If you do a mass swearing in, should you have each person when they come up to speak, verify that they in fact were sworn in?"

Yeah, make sure that you get verification when they come to speak up at the podium. I'm not opposed to mass swearing in. But again, get confirmation.

What do we hear at the BZA?

Appeals, variances, conditional uses, extraction of minerals.

Those are the four main case types. There was a fifth one that was added that dealt with surface mining and that's contained in 519.141 of the statute. It allows surface mining activities to be treated as conditional uses but only if your code allows for it. If your code doesn't provide for it you can't have it.

I had a conditional use permit with conditions granted. The individual was not following the conditions so the zoning inspector had the BZA hold a hearing. During that hearing the BZA concluded that they were going to revoke the conditional use permit. I told them you cannot do that, they said we don't care. They ended up in court. You do not have the authority to remove permits. Treat those issues as zoning violations.

Appeals

A zoning inspector issues or denies a permit, they make a determination on whether somebody needs a variance and they make a determination on whether something is or isn't agricultural. All those decisions can be appealed to the BZA. And then the individual has 20 days to appeal that decision.

Appeals may be taken by any person "aggrieved." That term is not defined in the statute, so what I would tell you is that it's obviously the applicant. It's obviously a contiguous, adjacent neighbor or someone directly across the street. Once you get outside of that, there's an argument that the individual does not have standing. That's complicated. We've won a lot of cases on standing, on lack thereof.

But once you get outside of that perimeter, an individual is required to show Special Harm - harm that is not unique to the community as a whole. So I had a gentleman who did not like a decision and he was in a subdivision where the BZA granted a variance. He appealed their decision and he just didn't like the way something looked. He was probably a quarter mile down the road. He didn't have standing so that's always difficult to try to figure out.

The Board of Trustees (unless it involves township property) do not have standing. Believe it or not, a lot of trustees sometimes don't like zoning inspector's decisions. Home Owner's Associations (HOA) is another one that we get a lot. Typically, an HOA doesn't have standing just because a lot is in that subdivision. However, the HOA may have standing if they have open space that they own and maintain that's next to it or similar.

When you get an application and the statute says that the appeal has to be decided in a reasonable period of time, there's nothing in the statute that says you have to have a hearing within 30 days. Your code may say something with respect to that and that's typically the general rule of thumb. All zoning departments have

timelines in terms of submitting things like that. Just be reasonable. But there is nothing in the statute, just a reasonable period of time.

You are required to give 10 days notice to “parties of interest.” That term is not defined in the statute. Your code may put a distance requirement in there that says 350 feet or 500 feet. But again, obviously the applicant gets it; contiguous, adjacent, directly across the street, are always going to get notice. Anything outside of that is up to you, and so if you want to put a 250 foot requirement on, that's fine.

Here's the downside for doing that and I've seen codes where it's 1,000 feet. I think arguably you're creating standing if you go outside contiguous, adjacent, directly across the street. Why else would you send somebody a notice a thousand feet away, or 500 feet? Maybe depending on safety concerns, but you think that person is going to be affected so we're going to give them notice. But you think that they're different than somebody that's one thousand and one foot away? So it goes back to that “special harm” argument. I'm a big fan of limiting it to contiguous, adjacent, directly across the street.

“What do you feel about putting zoning signs on property?”

People put signs up too, I don't have a problem with that. A lot of places do that. But it’s absolutely not required. Typically, that's a political discussion. I see it more frequently for rezonings than with BZA cases, but it's not required by statute.

“Does that change the standing argument that hey, you notified the public?”

We'll get into who you let speak during your BZA hearing. Just be aware, when you're a zoning inspector, of sending multiple zoning violations. I think if you don't do it right, the 20-day clock could just start over again. Remember, someone has 20 days to appeal your decision and if you keep issuing multiple zoning violations, are you theoretically giving the individual another 20 days to appeal your decision? I’m not saying you don't send the “nice” letter first and then the “why didn't you respond to me” and then maybe the third “nasty” letter. But at some point you need to state that it’s a final zoning violation notice. But make sure you track the 20 days. Let's say I send the notice, somebody doesn't come in, doesn't call me. Well, your only option at that point is to take them to court.

There's case law out there that when a property owner shows up with a certain defense, they are unable to argue those defenses because they failed to exhaust their administrative remedies. The appropriate time to make those arguments was to the BZA, but because they didn't, they’ve waived those arguments.

“Let me go back to a statement you just made about limiting who can testify. What happens, let’s say for an example a particular store wanted to open up on 23 and it's in front of a subdivision. Are you saying that nobody in that subdivision can testify or ask questions in regards to that?”

If a subdivision abuts the site, you're going to get some property owners that are going to have standing. But let's say at the other end of the subdivision, all the way in the back, it could be a mile away…I think legally you can determine who has standing in your BZA hearings and only allow those individuals to testify. It's difficult to do. My general advice is you don't limit testimony, you just take it.

Conditional Uses

Make sure your conditions relate - and this goes with variances as well - try to make sure it relates or has something to do with the actual application. Don't try to fix other problems that are not related to the

application, that they exist on the property. Make sure your codes that use the words “may grant a conditional use” don't put based upon a finding “shall grant.” Use the word “may,” be flexible.

Variances - Two types of variances: Use and Area.

Use Variance - if you're doing it right, you shouldn’t be granting use variances. A use variance is really a backdoor rezoning. The case law is a little bit scattered, but the BZA materials (right in the middle) are the standards. Your code may say the wording a little bit differently but those are the three things that courts will look at. If they do not meet any one of those you should deny it. The one that typically gets everybody is number two, which is what they call the self-imposed hardship.

A famous case is the Barlow family in Youngstown. They owned property that was zoned commercial and wanted to put a strip mall in. They didn't have enough land so they purchased property right next to it zoned residential. They didn't have the votes on city council to rezone it so they went to the BZA and the BZA granted a Use Variance for the residential land to allow the extension of the strip mall. The residents sued and won. The court said you created your own self-imposed hardship. Very rarely should you ever be granting use variances.

You have to allow people to come in and apply for them; you can't say “what are you doing, you're crazy,” you have to allow for it. There's a case out there where a township put “no Use Variances are permitted” in their code. That got struck down. You have to allow for it, but more than likely you shouldn't be granting it.

Area Variance - is a lesser standard, the impacts to the property are not as significant, and there are two districts in the state of Ohio, two court of appeals districts that do not follow the Duncan vs. Middlefield standing. They still fall under the Use Variance standard because that used to be the law for all variances until the supreme court stepped in with the Duncan vs. Middlefield case, which is why we call them the Duncan Factors. It said that it’s really unfair, if the impact is not that much when we're altering area requirements of zoning codes, to use the same standards as a Use Variance. We need to lessen the standard for approval.

The Duncan factors are a balancing test…just because you don't meet one doesn't mean you deny it. You as an individual BZA member may weigh certain factors more than others. That’s you're right. You may feel that three or four is enough. I always like to tell people to get the four. But there's a case out there that says three is enough because the court has said that the testimonies from the BZA felt that the factors they did meet significantly outweighed the other ones, and the court upheld it. Also, case law typically holds that a deviation of 25 percent or more is “substantial.” That's not the end of the analysis - just because the Variance is substantial doesn't mean that you ignore everything else.

Zoning Commission

When you're acting on a modification of a development plan where the property has been rezoned and now the applicant's coming back and modifying something or you're involved in that second step of a PUD, a Final Development Plan approval, I think you need to act more like the BZA. It's not legislative at that point and mostly what we do as a Zoning Commission is hear and vote on rezoning cases. Maybe we're floating the overlay cloud, and maybe we’re rezoning to an initial PUD. That is legislative, you are acting as a legislator so the rules of the game are different. I'm talking about Zoning Commissions under the trustees, so I'm going to group them together. That decision is not subject to direct appeal but it is subject to referendum.

When I'm acting in a legislative capacity subject to referendum - it means that I can have ex-parte communications with applicants and developers. I'm not telling you to violate the Sunshine Law, but if I’m the chairman and the developer picks up the phone and says “what do you think about this plan?” There is nothing illegal about that.

You may personally have a problem with doing that - you have to decide for yourself as a Zoning Commission member and a Trustee whether or not you want to take those meetings for individual applicants, completely up to you on what you want to do. I know a lot of people won't, but the really good developers know their vote before the hearing starts.

Private Deliberations (Zoning Commission)

I know this question was asked earlier - there's no executive session when you're all together as a group. Everything's gotta be on the record. You can't game plan behind the scenes.

"Real quick with the Zoning Commission hearings. What's your perspective on live streaming zoning hearings like on a township channel, Youtube or something?"

Moving forward, now that we no longer have the ability to conduct electronic meetings under the law, I think you can stream it but you should not be taking testimony remotely or the chat room, turn that off that's trouble.

One of the lawsuits that we're involved in, a public records request was made for all the comments the residents were making on the Facebook page, and those things are relevant because residents get nasty - people are mean today. Bad facts make bad law and those could be used against you, so turn them off don't answer questions. It's okay to stream, but definitely don't allow comments, don't take testimony, don't do any of that. Just allow the stream and that's it.

"Is that just for hearings or for regular meetings?"

What I'm telling people is that if someone wants to come in and talk to the township they need to personally appear. I think you can control the environment – there's an Attorney General opinion that allows you to control it within reason. So if you're space limited, it's no different than fire code or the Health District saying you have to keep social distance or whatever. You can implement those type of requirements, you're just gonna have to learn how to shuffle people in and out.

Comprehensive Plans

I don't think there's anybody who's been involved in more comprehensive plan lawsuits, supreme court cases than our office. On comp plans, your zoning text and your map are enough under the law to constitute a comprehensive plan. Practically, you should have a standalone comprehensive plan. You should be looking at every five to six years "do we need to tweak this based upon growth"? It's just a guide - a good guide, but just a guide. So your decision does not have to match, legally, what your comprehensive plan says. Should it? Well that depends.

What's your reason? Let's say I haven't updated my comprehensive plan in 15 years. At the time the plan was made there were no centralized utilities to that site, now there is. Probably a pretty good reason to deviate from the plan. Have a basis for doing it, but if your plan calls for it then that's your crutch. If there's a conflict between your comprehensive plan and some detail in your zoning resolution then the zoning resolution is the law, where the comprehensive plan is a guide.

Overlays and Comprehensive Plans

You can use an overlay almost like a mini comprehensive plan update for a smaller area. Rather than redoing a full-blown comprehensive plan update, if you want to steer or incentivize a certain area, you can create an overlay. We'll talk about a project in Jerome Township – the southwest portion of Jerome Township which goes to OH-161 all the way up to US-42 along US-33. They created an overlay called the Innovative Business District

overlay, floating a cloud that has everything they want to see, incentivize all the uses, all the standards, as the vision for this area. It's not a comprehensive plan update. A lot of people use overlays for economic development purposes.

There is no statute in the Ohio Revised Code (ORC) code that says how you update your comprehensive plan. We're all of the opinion that you follow the ORC 519.12 rezoning process. Get it to the Zoning Commission and hold some meetings on it and then you get Regional Planning Commission's (RPC) recommendation, they may be helping you do it… and then send it up to the trustees, and then the trustees approve it. You don't have to meet all the requirements of ORC 519.12, but that's the process that most people will use.

Zoning Amendments

Understand from a staff perspective with respect to legal notices there's a difference between when you are rezoning **10 parcels or less**. If you're doing that you're required prior to the Zoning Commission hearing to send out first class mail to contiguous and adjacent property owners and in addition to whoever else you have in your code. There's a list of seven things that your legal notice has to say. So whenever I'm involved in a really big rezoning, or when I'm gathering information from staff, I'm checking these things off.

"The Prosecutor's office has a form, with both the Zoning Commission and the trustees, with the notices that they would divvy out, whether it's under 10 parcels or above 10 parcels. It's literally done as a check list. If you want to see them, it's in the back of the prosecutor's township officials training manual in the forms, but you know, and you can always ask it for them. It's super easy."

So make sure you have that, and do it every time, it takes five minutes and run through that checklist.

"If the Comp Plan is just a guide and your decision does not need to be made based on it, if your rationale is in accordance with the Comp Plan, does that hold legal standing? So, if you deny an application and you say because it doesn't line with the Comp Plan that holds weight in court?"

We had an example - a developer came in, filed for rezoning, the development plan met the comprehensive plan, met all the general requirements of the code, checked every single box. Trustees denied it, they're in federal court right now. The first thing that they argued was the comprehensive, there's no basis to the plan.

"And then the opposite way is true?"

Exactly right. The comprehensive plan is a strong guide that should be utilized to your advantage. But if you're going to deviate from it you should have a good reason to deviate.

Once the Zoning Commission makes a recommendation to the trustees, how quickly do the trustees have to set it for hearing? The statute doesn't provide a time frame for when the Zoning Commission makes a recommendation – other than it says that the trustees shall receive that recommendation and upon receipt they have to set it for public hearing within 30 days. We typically say that when the Zoning Commission makes the recommendation and the paperwork's ready at that next regularly scheduled trustee meeting, we have the trustees "receive it" and set their meeting. If you really want to move something through quickly, the Zoning Commission can render a recommendation and the trustees have already called a special meeting next day or so to receive it, they can then set the hearing to meet the statute. Just don't let it go too long.

Calling the Roll

Always be prepared for an appeal. Understand the importance of the record because if you do everything right, the Court of Common Pleas is confined to the record that you've created. They can't take any additional

testimony, so that's why the record's important. In a highly contested or controversial case you need to have a sense of formality. You should all have a podium. I highly recommend a court reporter. The true cost of a court reporter is if you have to order the transcript. Here's the thing - if you have somebody who appeals your decision, you should be requesting the court to tax the cost of the record preparation to the losing party. The statute allows for that, so if a township denies a Variance, the applicant appeals it and they order the transcript and it costs $500 or $600 we go to court, everything's done right, and the township files a motion to tax the cost. If the applicant loses they have to pay the cost for that record preparation.

I've also used it as leverage to settle cases - I've had a few cases that the record preparation has been between $2,500 and $4,000 and I've used that as leverage to settle cases. But always have a court reporter there on the controversial cases - there's no reason not to. Tell your Trustees not to be cheap.

Limiting testimony - goes to the people that have standing – those that have an absolute right to testify. The people that don't have standing don't have an absolute right. The problem is how you go about determining that, so as a general rule of thumb I just let everybody testify and the good chair people know how to control people. You know if you get the guy that shows up to every BZA meeting and just argues about everything then you try to move them along the best you can. Let's say you have a group of residents that are all going to say the same thing. After the third one you say "all right folks I'm going to call the next person, but we've already heard a tremendous amount of testimony on how we're going to reduce property values, increase crime, it's going to create sound pollution and light pollution. If there's anybody that has anything different to say please feel free to come up." You can control the room, but again that's the hard part. General rule – let everybody talk.

Cross-examination

ORC 2506 allows for cross-examination. The question we often get is what if there is no attorney to talk? Typically, there are attorneys involved, but what if it's just two neighbors that absolutely hate each other - does the neighbor have the ability to cross examine the applicant? I think they do and this is where I would really try to figure out who has standing. But if I had the one guy that showed up to everything and he doesn't live close by, he's halfway across the township, I would not let him cross-examine anybody. Try to figure out where they live - is he contiguous or adjacent and maybe say, "you testified already, it appears you don't have standing, we're not going to let you cross-examine the applicant."

"What about the relevance of the argument … in other words they're just bickering over somebody letting his dog out - it has nothing to do with the requests that you're hearing."

Obviously, you want relevant testimony but that's a good point - how do you weigh evidence and do you give a little more weight to contiguous or adjoining property owners. I don't know how you can from a legal perspective or from just being a human being. Perhaps they're the ones that are directly impacted, so obviously how you weigh that testimony compared to somebody who doesn't have standing, who's a mile down the road should be different, but it's not the end-all be-all. I'm not saying just because a bunch of people show up that you deny somebody's application. You need to have tough skin at BZA. Sometimes you have to make unpopular decisions. Having 10 next-door neighbors show up and complain about an application – that's not a reason to deny.

"One other question around the timing, you generally don't establish a time limit for testimony? How do you control if you don't have a standing rule that says x amount of time and something goes haywire?

Again, this goes back to standing and trying to figure out who has it and who doesn't, which could be complicated. But I think worst case scenario if someone starts reading the Constitution to waste time and you

shut him down, I think that under that scenario the court is going to say you acted reasonably. You can direct him to the merits of the application. I think you can also at some point start questioning him about where he lives and ask him if he has standing and then shut him down. Or even, if he does have standing and he's just rambling, you can direct him to the relevancy of the application and then if he doesn't comply then you rule him out of order and tell him to sit down. If he doesn't do that and he starts throwing papers everywhere you call security and have him arrested for unlawful disturbance to the public meeting.

"The reason I ask is the appeal issue because you were talking about the issues for appeal and that would be like if you cut somebody off. Does that mean you're not hearing…?

That is one of the reasons listed in ORC 2506 where somebody could supplement the record. If I wasn't allowed to present I'll testify, but again you just have to you know, use common sense really on that issue. But I think if somebody's being completely unreasonable the courts will decide. We have a sample hearing format in there.

Exhibits, Petitions, Personal Comments and Speculation

Make sure that when you're getting exhibits in your labeling them, numbering them, and then they're made part of your records. Make sure you move to make them part of your record. Exhibits could be the application itself, the legal notices, any letters, you know that type of thing. Which goes to the next topic - **personal comments and speculation**.

Let's say that somebody sends a letter in but they don't show up. I think I would take that in, thank "Mrs. Jones" for sending a letter and make it an exhibit (Ex: exhibit A). But you can't question that letter, can you? Look at the property, or the applicant, I don't think you will assign it a lot of weight. The same way with petitions. I'm sure you've all been presented petitions before where everybody signs it. In my opinion, that's worth nothing. I would not rely on that one bit, unless they are there testifying. But think about what people actually say during your hearing, right? Did I just swear this person in and they told me that they were going to tell the whole truth, nothing but the truth, and then you hear them talk about crime, traffic, and reduce production of property value? More often than not it's all speculation.

Is there any factual basis for their statements? - if I stand up there and say, "because the self-storage unit is going to move in behind the subdivision, do you know how many people operate meth labs out of self-storage facilities, can you imagine the crime? It's crazy, you need to deny this application." That's my own personal opinion. But let's say the next person gets up, but this time they've hired an appraiser for real estate and they present you with an appraisal praising about a reduction of property values, that's some good stuff, right? I think you consider that.

Textbook BZA case example (from applicant's perspective) - township treated distribution facilities greater than 50,000 square feet as a conditional use and Fedex wanted to build a 150,000 square foot distribution facility. They had a logistics expert, sound expert from MIT, lighting expert, the real estate people there, traffic consultants, and a stack of documents that they submitted that was "this high" to this table. The residents appealed and I didn't get to use all that stuff because we got it kicked out on standing. BZA granted it, residents appealed it, there were some standing issues that got kicked, but that was textbook because everybody on there said "the traffic, you know, traffic oh my god the traffic". I have never seen such analysis on, I mean you think you've seen analysis as part of a planned development or rezoning. It was amazing what they did. They're in logistics, but they were able to show traffic peaks and times of the season; it was amazing what they did and that's the type of stuff that you really want to consider.

I think that's what's hard for BZA members - sometimes you have to get it out of people a little bit. You have to lead them down the right path sometimes, try to get the factual evidence and sometimes when you're doing area requirements, it's a little bit easier. That's the difference between what you should be considering and what often is reality. It's mostly personal.

A couple quick things; a legal doctrine called ***Res Judicata*** (i.e.: a matter that has been adjudicated by a competent court and may not be pursued further by the same parties.) I come in and get a variance from, or apply for a variance with Genoa Township. BZA denies it, three months pass, and I follow the exact same application again. Can I do that? The answer is no, unless there's a substantial change in circumstances.

Let's say initially I wanted to have a structure on the property and now I've reduced the structure by 25 percent. That probably qualifies. This is a substantial change in circumstances, but you can't just keep applying for the same thing over and over, that's BZA.

Reconsideration - do you guys know that the BZA has the ability to reconsider their own decision within 30 days of rendering their decision or until the time that an applicant or a property owner appeals your decision? Yeah, and you won't find that in a statute, but there is case law out there that says you have the ability to reconsider. I've only seen it a few times. I've seen it once where the BZA completely screwed up and it was almost like a redo to get to the right decision. Or if there's additional evidence that was not presented that could substantially change how the BZA decided, I think it's appropriate. I wouldn't be doing it often. Again, I've only seen it a handful of times in my 18 or 19 years. But if you do have that situation, you do have that ability - 30 days or until somebody appeals your decision, which could obviously be before, but once 30 days passes there's no right to appeal, you lose jurisdiction. Be careful with it.

"Can the applicant just ask for reconsideration without actually appealing?"

The answer is yes. Typically, the zoning inspector is the one that usually gets that request. There better be a reason behind the request. It shouldn't be "I just didn't like the decision". But again, they could ask all they want, doesn't mean you have to give it to them.

"With the 30 days. Is there any situation where someone comes in, they want an area variance, you grant it, the person says "fine, I'm going to start working on my structure." It's now been approved. What happens then?"

Proceed at your own risk.

"So that 30-day window is a preceded only?"

Yep, because the next-door neighbor, if he doesn't like it, it's too close to the property line, you have a right to appeal. That, and the court could basically come back and say that the BZA acted ***arbitrary and capricious*** (i.e.: a determination or action done without rational basis, or done in bad faith, or that it constituted disparate treatment, or that it was based on unlawful discrimination) in their decision.

"Buyer beware?"

Yeah, so proceeding at your own risk. I always tell people to wait till the appeal period ends before they start digging and moving dirt and stuff like that, but it's up to them. That's a great question. There at the end there's ORC 2506 (appeals), that's everything that I talked about, right? The reasons why a court can open up the record.

Conclusions of facts according to decisions - if you have a checklist, typically when you're dealing with area variances, you're going to have those Duncan Factors. You don't actually have to call them "conclusions of fact

and findings of law" because what courts have said is if you don't do that. They'd say "well, that's really what they are as long as you're going through them". But if you don't have conclusions of fact and finding of law a court can infer that you've done that analysis. Then they'll open the record back up. If you have a very controversial case contact your legal counsel, make sure they are sitting with you and either drafting your motion out or you guys conclude your hearing. Your legal counsel should write a decision for you. Then you come back and adopt that decision. I've never lost a case where a BZA has closed the hearing and then rendered a written decision after that. Why? Because a court is going to give deference to the BZA. They have to by law. They can only overturn your decision if it was arbitrary.

So again, in those controversial cases, make sure you have somebody there with you. That's BZA. Zoning Commission, got it easy, legislative, no requirement to swear anybody in, except for the Zoning Commission, and I can't point to a statute that said you have to swear people in. You may swear them in if you want, it doesn't hurt anything. Some people like to do it because it has that sense of formality to it.

Order of presentation

The order of presentation is typically presentation of Staff Report, applicant speaks, the public speaks, and rebuttal. The problem that you have to try to control when you're in the Zoning Commission is the bermuda triangle, right? Between Zoning Commission, public and developer, and trying to control that dialogue. You don't want somebody in the back of the room asking the developer who's sitting at the front of the room questions and the dialogue going back and forth. I like to make sure I'm keeping a running tab if I'm on the Zoning Commission of questions that the residents will raise during their public comment. Keep that tab and then allow the developer to rebut if you will, or get up and provide explanations. Try to have that communication be a two-way street and not the triangle; Zoning Commission, applicant, residents, and Zoning Commission, because it kind of gets unwieldy there when you have that triangle going.

Multiple meetings

There is a difference between a **Continuance** and a **Tabling**.

Continuance- you're continuing to a time, date, and place certain, and you don't have to re-advertise.

Tabling - contemplates you're not sure when that application is going to be back in front of you; there's no time, date, or place noted. If you table something more than likely, you're going to have to re-advertise. It's okay to table things if you don't know when it's going to be brought back up because the developer may not know. They may know they have a lot of work to do and may need a couple months so they request the tabling.

"So the ten day or whatever would still apply on that, same notifications?"

Yes.

"When you're tabling and then there's a required advertising, does that mean you have to send out notices again to the adjacent property owner…if you have less than 10 parcels?"

Yes, you're going to follow the statute, so you would have to send it out again to re-notify all required neighbors.

Regarding condominiums and condo associations; let's say there is a case where that site abuts a condo association. Do you send the notification to the entire condo association, everybody in that condo association? Think about the form of ownership. Condo owners have a legal interest in everybody else's unit in the condominium. I've never seen a case but theoretically, everyone in that association has an interest.

Always ask the applicant if they consent to the continuance. Ninety-nine percent of the time they're gonna say yes and it waives any argument that they may bring up later. If they say no, if you have a good reason why you want the continuance, I don't think it's fatal if you have a great reason to do it. But you want to take away the hurdles and arguments down the road.

"A lot of what I, we tend to run into and this is under the considerations before we hear stuff most of the time, it goes to Regional Planning and when they do this conditional approval that kind of contradicts or causes a lot more conflict in the meeting. How much do we pay attention to what the Regional Planning says versus the area people, the residents that are directly affected by it? And is there, I mean we want to do what's right legally but also you know the developer wants all those things and sometimes we have to say no."

What I will tell you, because I do some work for Regional Planning Commissions is they're there for a reason, they're the experts. I don't have a planning degree so there's a reason why they're making recommendations and even conditions, but it's up to you as a Zoning Commission to decide whether or not you're going to follow it. I would say I would, but again if you have a reason why you don't have to, it's not binding. That's difficult to answer, but I've been able to defend a lot of rezoning actions based upon what Regional Planning Commissions put in their recommendations because they're the experts. It's hard to argue against them, it really is. But sometimes there are policy issues that you, or maybe the trustees decide to make that contradict that, that happens. It's okay to deviate from it, again, if you have a reason.

"Yeah, something that's pretty new when we have issues, you know we're just educated guessers really. We're not really an expert and we know a lot of times the density number is the thing that kind of goes back and forth because they're asking for more. Yeah, it just helps to get that feedback."

Communication, yep, Communication.

"One more question. When it's going through Regional Planning do they reference the comp plan together with the overlays that are in place for the area?"

Yeah, we always look at that.

"Okay, even if the density that's being requested is much-much higher than what is in the comp plan, did I just let you know what's exactly what I'm asking for?"

They're always asking for more and sometimes they have an argument that the conditions have changed just like people saying that, or maybe things changed since the comp plan was put in place. Or maybe their argument will be condos generate less traffic than a single family house and fewer students and so we pick through all that.

"If we could go back a minute on that established ground rules for the rezoning hearings…you have sign in sheets, does that hold true for regular zoning hearings or BZA meetings?"

Yeah, I always like to have a sign in sheet. Is there a statute that says you have to? No. Then going back to the rezonings, when you're acting in the legislative capacity, you can put time limits on public comments. You can theoretically limit the number of people that speak. It's because we're acting in the legislative capacity where we have a lot of flexibility, so if you have a room full of people, I definitely recommend putting a time limit on people speaking. Not limiting the number of people but definitely putting an overall time limit. Most people will do five minutes and some people have gotten pretty creative with their little timers. It gets tedious sometimes.

Considerations

Obviously, the comp plan, recommendations from Regional Planning Commission, you may have a Thoroughfare Plan, schools, and traffic. Schools, as much as people want to think it's an appropriate consideration, it's really not. However, there is some case law that tends to hint that traffic in and of itself is also not a good single consideration. There's no case law that says traffic alone is enough, but it trends that way. It doesn't mean you can't address traffic situations, don't use that as your sole justification.

Standard Zoning District VS Planned Unit Development (PUD) – Conditional Approvals

Got enough gas stations? "You don't need more gas stations?" If you know someone wants to resign to the comp plan recommendation, say general business, "I want to rezone so that it matches the comp plan" and you say we don't want any more gas stations. We're going to come up with something else for this property. This is not appropriate, particularly when you're rezoning to a standard district, not a PUD. Don't put conditions on your approval for a standard district. I think you may tend to run into contract zoning (rezoning subject to conditions) when granting a zoning.

What happens if I don't do a, b, and c? You know, that contract zone state or district. Let's say you want to require the developer… we're going to grant this zoning on condition that you install landscaping, along this trend, and it's a request to a standard district? We're not talking about PUD. The rezoning is granted, I get my zoning, then I don't do the landscaping. Can I hold that it's not to my code? No, I can't do it. There're no contracts on it, right? It's a whole different ballgame, but just be aware of that. Let's say landscaping is a requirement for the approval and it's agreed upon, it's voted upon, etc. You're saying that the zoning inspector cannot go out and find that individual for not having the appropriate landscaping, so we're talking about it in the context of the Zoning Commission.

Zoning to a Standard District - the standard district basically says that these are the rules of the game. I resonate that those are my requirements, you can't add or tack things on that are extra on top of that. BZA is completely different; you can put all kinds of conditions on things. If we have a development standard in our zoning code for a particular zoning district, you can enforce those. But I'm talking about going above and beyond that. If there are landscaping requirements in your code, they must be followed, which is a perfect example.

Zoning to PUD - is so valuable because they allow you that flexibility with conflicts. Great news- welcome to township government. Bad news- you're subject to hypothesis laws which could either be a misdemeanor or a felony if you screw up. But the point I want to make is having a conflict is not illegal in and of itself, only when you act on it, that there's a problem, and what it generally governs is your personal interests. Those are your family and those of your business associates. Personal interest is easy; family, brothers, sisters, kids, spouse, parents… you're probably okay with. You know third cousin Eddie, LLC's… if you're part of an LLC you're up, you're a member, or you're a sole proprietor, would be a partnership your business associate could be an issue.

Ethics

Let's say Google is coming in, putting in a data facility. **I own or have a couple shares** of Google, that's not going to be enough. I mean you could grant your decision on that. Let's say your hospital is coming in to rezone and you sit on the board of directors of the hospital. Let's say this hospital has got tens of thousands of employees and I'm just a nurse. Probably okay, but here's the point, if you feel uncomfortable, at all cautious, call in your legal counsel before you do anything. Talk to them and they will be able to tell you, "I think you're fine - or - we're not sure, maybe we should make an informal call to the ethics commission and get their guidance", which is a great thing. I use them all the time, but that's what you need to do now even if they give you an informal opinion. The only absolute defense to an ethics violation is a formal written opinion, which they typically don't do. It very often and typically takes a long time to get, so if it's a toss-up, there's any doubt, sit it out.

It took me a long time to come up with that little slope, so it's not worth it and that's why we have alternates, right? Just sit out, someone else take care, I've had to recuse myself in the past so I really understand that process. So, my question is kind of going to be as general as I can make it. What if **my occupation** makes me potentially at risk? Here's an example: you're a lobbyist for an organization who is now standing in front of the commission as an applicant. That kind of gives me pause. I don't know how your legal counsel feels about that because typically a lobbyist may take direction directly from a board of directors. Because again, a lobbyist receives directions directly from the top of the food chain, right? They may have some inside information. I'd probably sit down or call the other commissioners, and I appreciate that because the lobbyists worked on behalf of that group that applicant who would benefit from it if not a position to vote on something to benefit, that applicant, I mean that's a real conflict in my opinion.

For the below two primary problems, there's a link to the ethics commission website (https://ethics.ohio.gov/). It's full of information; fact sheets that you can read and all the legalese stuff on there as well, it's really good.

1. When to recuse yourself

I have a couple family members that live in my township - if they are not adjacent properties but nearby, once you're advised on that… here's the rule. You can't use the authority or implements of your office to secure a thing of value that has a substantial and improper influence upon you as a public official. Thing of value means a definite financial benefit or detriment owed to you, your family, or your business associates. So how do you know if it's going to have a definite and direct benefit or detriment? What the ethics commissions have said is "**if you're contiguous, adjacent, directly across the street, you are to automatically recuse yourself**". Okay? Or your brother or sister, mom, dad, whatever. But then they say, "or nearby". So, what doesn't your body, the only ethics commission opinion, that defines that term says 150 feet. If you're within 150 feet, change one fact, and something could be different, like even in that 150 feet of opinion I would then ask you, "well does the township send another set to people outside of that?" If my brother or sister received one of those I would sit out. If my brother and sister are coming in to testify I would probably sit out.

Now if your brother or sister is one of those people that show up to everything that may be different. It just depends because I've had cases here in Delaware County where we've called, pick up the phone or the trustee who was a quarter of a mile down the road of a rezoning that was so significant, the rezoning was, and this trustee owned a lot of property. We would probably sit this one out if the ethics commission didn't feel good about this situation.

So again, if you have any questions talk to somebody about it and then, call the prosecutor's office. Talk to your legal counsel in those events and those guys may say "well, we're not sure. Maybe we should do a run by with the ethics commission." Just talk it over like that, that's fine. I think generally speaking if for not getting notices or not showing up, don't recuse yourself. So that's the rule – contiguous, adjacent, directly across, or nearby (within 150 feet), your family or your business, so you've got to recuse yourself.

2. Bribes

The second major category is - can't take bribes, right? For example, the Nationwide Realty Investors want to take you to their suite at the Ohio State game… different answer. I kind of followed the "25 rule" (https://ethics.house.gov/gifts). If it's something that's below 25 dollars and it's not happening all the time, I think you're okay. Take a cup of coffee or whatever. Sometimes I'll drive by some of my clients, they don't have the luxury, I just live right up the street, you know swing by with a hamburger, pick up cinnamon rolls, and I'll drop them off to some departments every now and then. Gifts like that are okay, if everybody's sharing them as well. But also make sure that your township doesn't have an ethics policy that is above and beyond state law. I

don't know about anybody here in the room, but I do have clients in other counties that have stricter rules; why is it prohibited for a trustee to attend a BZA meeting, or vice versa.

Legality VS Practicality

What I have in here is just more practical, not illegal. So again, we talked about **removing hurdles**. If I have a trustee who shows up to a BZA hearing and he didn't receive notice he doesn't have standing. He comes in and complains, and based upon his testimony the BZA denies it, and I'm the applicant's attorney. I'm going to argue undue influence.

"But what if they're not there to testify, and vice versa?"

That's fine. They have every right as anybody else. It's a public meeting, they can sit there. I'm not aware of any case law, but I've had the argument made and again, you don't want to pay your attorney hours and hours arguing over the trustee who showed up, and so I wouldn't do it. But just because of that, because I think it lends the argument, that there was undue influence. But having them show up and sit in the back is okay.

"Let me address it a different way. Let's say I'm a resident of ABC subdivision and I go to a trustees meeting and state that I am here as a resident of ABC and I'm here to testify based on that. But they know that I'm on the zoning board or the BZA or whatever."

They can do that, particularly if they identify themselves as "Pete Griggs, regular citizen". I'd be a little more hesitant in terms of a rezoning process because they will have a bite at the apple, you know, the trustee coming down to the Zoning Commission level and testifying. They need to wait because they're gonna get their bite at the apple. But what you described at the BZA, I can't argue with you. If I'm the property owner's attorney I still make the argument, but new influence, I just like the separation. You guys are appointed to do a job and I think the trustees need to let you do your job without interfering. I've also been around long enough to know that it happens all the time.

"In either direction, zoning speaking?"

In the other direction to. Let's say the recommendation comes out and you feel that now you want to go as a resident. I can't tell you that there's anything that points to that being wrong, but you had a bite at the apple already. Why didn't you make it part of your recommendation, right? And are you there speaking just as the individual? How can you separate that? I mean you have so much knowledge in your mind, are you really speaking as a resident or are you speaking as a member of the Zoning Commission? How can you, on an application you've already heard, how can you? I don't like it, but again, I can't say that it's illegal.

"If it's a zoning issue for a subdivision and you recuse yourself because you live there, and then go to the trustee meeting and again address yourself only as a resident."

That's okay, absolutely. You don't give up all your rights, so you can still apply for variances yourself, rezonings, you can testify. You can show up to general trustee meetings, fire, fixing the roads. Again, identify yourself as a regular citizen, you can testify on matters affecting you, so recuse yourself.

Your next-door neighbor applies for a variance, he had the right to testify. Now let's change the fact, your sister, I should recuse myself. But now I want to show up and testify on behalf of my sister. I can't do that, that's a no-no. But the key is just to make sure that you're identifying when you may have a conflict and making sure that you get a hold of somebody to walk through that process.

“I have a question, not about ethics but about a previous section. You talked about the contract zoning. I have a situation where the landowner has, it’s Ag and wants to rezone it to FR-1, okay? Something like that and there's a structure which it does not quite meet setbacks. Say you know it's going to be five feet closer to the line so that would be a you know a variance, okay? That consideration and so it does not meet the code for FR-1 but in exchange for that variance being granted they would double the amount of landscaping or add a little more open space is that contract zoning? or that could apply also to?”

If you're on the Zoning Commission, I don’t know how you could find another entity in terms of saying that they have to grant the variance. Let's say that you gave them the zoning, put conditions on there and then the BZA didn't grant variances.

“No, it wouldn't go to the BZA. I mean we could approve that as a variance correct, during the zoning process it doesn't automatically go to the BZA. It's an exception to the code.”

Yeah, only the only BZA has the ability to grant a variance, so if I’m rezoning to a standard district that's all I’m doing. You can't grant, so in the Planned Development (PD) context (I think what we call that) would be a divergence. You can't do that if your code allows you to do it as part of a PD. I'm okay with that but not on a standard district, not if it's rural residential, you can't. The Zoning Commission cannot be granting variances or deviations from the code. They can re-zone it and then if they have to do something that requires a variance it would apply to the BZA. That's how that would work.

“I think you just covered your end statement just because you're rezoning something to a straight district and it happens there's an existing structure on the property that would be rendered non-conforming that's not a reason to, A: require a variance or B: to deny the rezoning.”

Correct.

“You can create legal non-conformities by rezoning something to a straight district just know that you may eventually have to deal with it down the road under your non-conforming standards.”

Correct. So, that’s everything I wanted to run through, which is a lot and I’m out of time. But if you have questions I’m here.