



Municipal Planning In Alabama

A Manual for Members of Planning Commissions and Boards of Adjustment

Alabama Planning Institute 1994

MUNICIPAL PLANNING IN ALABAMA

**A
MANUAL
FOR
MEMBERS OF
PLANNING COMMISSIONS
AND
BOARDS OF ADJUSTMENT**

**The Alabama Planning Institute
1994**

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CONTENTS

PREFACE

ACKNOWLEDGMENTS

INTRODUCTION

1

The Police Power
Enabling Legislation
The Code of Alabama
The Scope of Municipal Planning
The Code, the Commission, and the Board
The Purpose of This Manual

THE LOCAL PLANNING SYSTEM

5

The Actors in the Planning System
Roles and Relationships
The Courts
The Commission and the Board

THE PLANNING COMMISSION

8

Statutory Powers of the Commission
Members Responsibilities and Expectations

THE BOARD OF ADJUSTMENT

13

Statutory Powers of the Board
Members Responsibilities and Expectations

COMPREHENSIVE PLANNING	16
Statutory Provisions	
The Planning Process	
The Comprehensive Plan	
Comprehensive and Regulatory Planning	
THE ZONING ORDINANCE	23
Statutory Provisions	
Contents of the Ordinance	
Special Provisions and Approaches	
Performance Zoning	
Nonconformities	
Administering the Ordinance	
Enforcing the Ordinance	
Challenges and Appeals	
THE SUBDIVISION REGULATIONS	42
Statutory Provisions	
Contents of the Regulations	
The Approval Process	
Enforcement Actions	
Covenants, Easements, and Transfers	
Appeals	
DECISION MAKING	50
The Elements of Decision Making	
Legal Requirements	
Public Scrutiny	
Access to the Process	
Risk Management	
CONCLUSION	59

PREFACE

The **Alabama Planning Institute** is a training and professional development service for planners, local officials, and others interested in community planning and growth management in Alabama. The Institute is cosponsored by the Alabama Chapter of the American Planning Association and the Alabama League of Municipalities. The Institute regularly offers seminars, workshops, and short courses focussing on topics of continuing and current concern at locations throughout the state.

In July, 1987, Bill Matthews and I offered our first Institute workshop on the powers, duties, and responsibilities of planning commissions and boards of adjustment in Alabama. Since then we have presented this workshop several times each year to audiences ranging from 35 to over 100 people, most of whom serve on either a local commission or board. In each of these workshops the emphasis has been upon the importance of the Code of Alabama as the source of authority for the work of the members of commissions and boards.

Initially, those attending the workshops were given a copy of the **Alabama Planning Handbook**. This is an excellent reference, published in 1988 by the Center for Governmental Services at Auburn University. However, this publication is now out of print. In addition, workshop participants frequently requested copies of the materials used in the workshops; and these were more narrowly focussed than the broad range of topics discussed in the Handbook.

This manual has been prepared in response to these requests. It is specifically written for those citizens throughout the state who are members of commissions and boards serving Alabama's small and medium sized towns and cities. Its purpose is to provide them with a ready reference to the powers they have and the functions they can perform under the authority of the Code of Alabama.

This manual is in fact dedicated to these members. They serve their local communities as volunteers. They have to make very difficult decisions under highly contentious circumstances. And they are criticized far more often than they are commended. And yet many of them have still given up a Thursday evening to attend an Institute workshop and to enliven it with their questions, comments, and enthusiasm. They represent a tremendous resource, both for their individual communities and for the state as a whole!

Robert J. Juster
Auburn, Alabama
September, 1994

ACKNOWLEDGMENTS

In late 1993, Bill Matthews, Director of Continuing Education at the University of North Alabama and Coordinator for the Institute workshops, conceived the idea of preparing a manual containing the basic material discussed at the powers and responsibilities workshops. He approached the Alabama Department of Economic and Community Affairs (ADECA) to discuss the possibility of getting financial support for such a manual. Both Don Reid and Linda Reilly of ADECA's Planning and Economic Development Division were very interested in the project and with their support a contract was awarded to the University of North Alabama in November, 1993.

Members of local commissions and boards who have attended the workshops were involved in the preparation of the manual in two ways. The comments they made on their evaluation sheets, filled out at the end of each workshop, highlighted points that needed clarifying or reinforcing. In addition, a first draft of the manual was given to those attending a workshop on April 8, 1994, in Dothan. They were asked to comment specifically on this draft, and many of them did so.

The final draft of the manual was submitted to several planners, attorneys, and university faculty throughout Alabama. They subjected the draft to a critical review and made a number of suggestions that were incorporated into the text.

The responses of all those who reviewed the various drafts of the Manual were extremely helpful, and their interest in the project is greatly appreciated.

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INTRODUCTION

Throughout most of the 20th Century, municipal governments in America have had the inherent power to influence development within, and in some cases beyond, their corporate boundaries. During the second half of this Century, most such governments have acted to take advantage of these powers to inspire, influence, and regulate the development of their land as a counterpart to their investments in public facilities and services.

Elected officials, employed personnel, appointed citizens, and representatives of the many and varied groups within the community at large, have become increasingly involved, directly or indirectly, in these local planning efforts. Although most of them are not aware of it, they do so under the broad authority of the police power of the state.

The Police Power

The police power is the inherent right of the state to take such actions as are deemed necessary to establish, preserve, and protect the **public health, safety, and welfare**. It is a power that pervades any society that is governed by the rule of law.

The legislature, the duly elected, accountable, and representative body of the community, determines how and when the police power can be used. Exercising the police power involves recognizing and giving precedence to the needs of the community, the common good, the public interest. This may at times result in the restriction of some individual rights or actions affecting either or both persons and property. But these restrictions are considered a negligible and justifiable loss in comparison to the benefits accruing to the community as a whole. The police power requires that a community determine acceptable and appropriate public purposes through its regular political processes. The power of government is then used to achieve those purposes

The police power is not inherent to local governments. They must derive this power from the state, either by general or specific statutes. Typically, the state constitution allows the state to delegate powers to its units of local government. Thus, there must be a constitutional authorization and enabling statutes or acts of the state legislature. The police power is then activated by the adoption of appropriate ordinances and regulations by the local legislative body.

Under the powers delegated to them by the state, local governments can perform a wide range of functions. These include the raising of revenue and expenditure of funds; the provision of a variety of public services; the purchase of property

The Scope of Municipal Planning

The various sections in Chapter 52 of the Code of Alabama cover a lot of ground. Fundamentally, they allow cities to create a local **planning system** and empower the entities in that system to perform **comprehensive and regulatory** planning.

The Planning System. The Code allows cities to appoint a planning commission and a board of adjustment and to employ staff to carry out planning activities. When a city takes advantage of this authority, a local planning system is created. This system contains several entities, each of which performs certain functions as specified in the Code. When the entities comprising the local planning system are in place, they are authorized, and in some cases required, to undertake both comprehensive and regulatory planning.

Comprehensive Planning. Comprehensive planning is essentially the formulation of developmental policies for the future of the city and its surrounding area. It is the vehicle for establishing the goals the community wishes to achieve as it moves into the future. In current terminology, it involves the creation of a vision of what the citizens and their elected leaders want their community to be and become. Its scope is broad, including all the services for which the city is responsible.

Regulatory Planning. Regulatory planning provides some of the most important means for implementing the comprehensive plan. It establishes regulations and guidelines for the conversion of undeveloped land to accommodate urban activities, for the use of such land when it is converted, and for the redevelopment of existing built-up areas. Through their regulatory powers, cities can influence the actions of the private investors who are the driving force behind urban change.

Complementary Activities. Comprehensive and regulatory planning are complementary activities. The community's comprehensive plan establishes the broad goals and policies that are implemented in part through various regulatory devices and through the application of such general regulations to specific sites and immediate proposals.

The Code, the Commission and the Board

The current version of the Code was adopted by the Legislature in 1975. In 1985, a Replacement Volume was published which included all changes and additions made by the Legislature through its 1985 Regular Session. Annual supplements have been issued since then which update the 1985 edition.

THE LOCAL PLANNING SYSTEM

Under the authority of Chapter 52 of the Code of Alabama, three municipal entities -- the council, the commission, and the board -- are assigned statutory responsibilities for local planning. These bodies are further authorized to employ support staff to assist them in carrying out their responsibilities. The decisions and actions of any of these four bodies is in turn subject to review by the courts.

The Actors in the Planning System

In fulfilling their various responsibilities, four entities -- **the council, commission, board, and staff** -- interact with one another. In doing so, they create a **local planning system**. In effect, each of them is an actor and plays a distinctive role within this system.

The City Council. The members of the council are the elected representatives of the community. They are directly accountable to the citizens and are charged by law with running the city. They do this by adopting policies governing the current operation and the future development of the city, by employing the personnel required to implement those policies, and by obtaining and allocating the resources necessary to support such implementation.

In relation to planning, the council creates the commission and the board, adopts the regulations that control and influence the development of the city, and authorizes the funding of projects that will carry out the policies embodied in the city's comprehensive plan. In doing so, they receive advice and recommendations from the other entities in the local planning system; but in the final analysis, the council makes the decisions. It is the critical link in the system. Without strong and continuous support from the council, the local planning system will not function effectively.

The Planning Commission. Except for the largest cities, municipal commissions in Alabama consist of nine members -- six appointed citizens, one administrative official, and two elected officials. These members are responsible for preparing the comprehensive plan, advising the council on developmental policies and issues, and administering developmental regulations. Their role is mainly advisory, except in relation to the city's subdivision regulations for which they have decision making power.

The Board of Adjustment. The board consists of five regular and two supernumerary members. Their responsibilities are limited to the adjudication of appeals from the decisions of a city's administrative officials and acting on

departments within the city government, and with critical organizations and individuals in the community at large.

The Courts

Any decision made by the entities in the local planning system can be challenged or appealed on either procedural or substantive grounds. When this happens, the **courts** review, and sometimes modify or nullify, such decisions. The judgments handed down by the courts can have a major influence upon how responsibilities are defined and how the planning system operates.

The involvement of the courts is intermittent and is triggered only by a challenge or an appeal. Even so, the decisions they make in response to such challenges and appeals can establish precedents that change the relationships among the entities within, or the outputs of, the local planning system. Their influence in this respect has increased significantly in recent years. Especially during the last decade, access to sound legal advice has become an important requirement for everyone involved in the local planning process.

The Commission and the Board

In keeping with its overall purpose, the following sections of this Manual will describe the roles and responsibilities of the **commission** and the **board** as they are currently defined by the Code. As necessary and appropriate, such descriptions will refer to the council, staff and courts.

office. Some councils rotate the appointments of their representatives, having one member serve for one year and then appointing another member for a year, etc.

The administrative official serves for a period of time coterminous with the term of office of the mayor. Here also, some mayors appoint an administrative official to serve for a full four years; others may alternate appointments. The term "administrative official" has been construed by the courts to mean a middle or upper level manager. Thus the fire chief or an officer in the fire department would qualify to serve on a commission; but a fireman would not.

The citizen appointees serve for six years with no limitation upon reappointment. A 1989 Legislative Act requires that no more than half of these appointees shall be from or represent the development industry, i.e. real estate professionals, land developers, homebuilders, and officials of lending institutions.

The Code requires that for cities of not less than 175,000 nor more than 275,000 population the citizen members be residents and qualified electors of the city. While it does not stipulate the qualifications of appointed members for cities with less than 175,000 population, it is recommended that they be residents, that as far as possible they represent a cross-section of the city's population, and that they understand and be willing to accept the responsibilities of membership.

Section 11-52-4. This section requires that the commission organize itself so that it can operate properly. It **must** elect a chairperson and such other officers as it deems necessary. All officers serve for one year and are eligible for re-election. The commission is also **required** to hold at least one regular meeting every month, and to keep a public record of its proceedings.

Section 11-52-5. This section essentially states that the commission can use the funds appropriated for it by the council to employ staff and consultants, and obtain the equipment and space needed to carry out its work. In practice, the expenses involved in performing planning functions are authorized and disbursed through the city's general fund. However, it is not unreasonable to have the planning budget include funds specifically earmarked for the members of the commission. Such funds can be used to provide memberships in such organizations as the American Planning Association, and support the attendance of members at seminars and similar meetings.

Section 11-52-6. Subsection (a) is a general grant of power allowing the commission to prepare and execute the comprehensive plan. Other subsections address the following:

The purpose of this review is to ensure that public projects are consistent with the city's comprehensive plan. It is a potentially powerful device for implementing the plan because public projects and facilities have a major influence upon private investments and upon the actual development that takes place within the urban area; the review power is a **statutory** requirement; and, the need for a two-thirds majority makes it difficult for the council to ignore a negative recommendation.

Section 11-52-31. This section states that the commission shall adopt regulations governing the subdivision of land.

Section 11-52-32. This section gives the commission the power to administer and enforce the city's subdivision regulations after they have been properly adopted.

The combined effect of Sections 31 and 32 is to require the commission to adopt, and then to administer and enforce, the city's controls over the subdivision of land within its corporate limits and its planning jurisdiction. While most of its other responsibilities are advisory, in relation to the subdivision of land the commission is the decision making body.

Members Responsibilities and Expectations

When the mayor appoints a person to serve on the commission, both the individual and the city should be prepared to accept certain responsibilities.

In agreeing to serve as a member of a commission, each individual should be prepared to:

- devote the time necessary to perform the duties of a commission member. At a minimum this requires attending one meeting a month. At times it will require attending other meetings, including public hearings on contentious issues.
- read and consider carefully all material prepared by staff, consultants, applicants, and others relating to proposals and issues coming before the commission.
- treat everyone who comes before the commission with fairness and courtesy, no matter how obnoxious their manner, how far out their ideas, or how obvious their self interest.
- attempt always to identify the public interest in any issue, proposal, or policy which is being considered by the commission.

THE BOARD OF ADJUSTMENT

The board is known by various names including board of adjustment, board of zoning adjustment, zoning board of adjustment, and zoning board of appeals. Regardless of the exact title, its purpose is the same.

Statutory Powers of the Board

Only two sections in Chapter 52 of the Code of Alabama relate to the board. They are, however, quite detailed and spell out the powers of the board with considerable precision.

Section 11-52-80(a). This subsection allows the council to appoint a board. While such appointment is not mandatory, normal due process considerations indicate that some appeals body other than the council is required.

Under this subsection, the board consists of five members and two supernumerary members appointed by the council, each of which serves a three year term. The two supernumerary members are needed because of the voting requirements described in subsection (e).

It is recommended that the supernumerary members be encouraged to attend all meetings so that they become familiar with the proceedings of the board. They could be needed during a meeting, or they may be needed at a subsequent meeting when an issue has been deferred. If a member slot becomes vacant, the supernumerary members should be the first people considered for filling such a vacancy.

Section 11-52-80(b). This subsection requires that the board adopt rules of procedure or bylaws to govern its operation. Although not specified, it also implies, and common sense dictates, that the board should elect at least a chairperson. Other officers, especially a vice chairperson, are also essential for the proper conduct of the board's affairs.

The legislation states that the board shall meet at the call of the chairperson. Depending upon the number of applications received, it is a good idea for the board to hold regular monthly meetings with the option to cancel any time there is no business to transact.

The board is required to hold all its meetings in public and to keep minutes of all meetings, including the vote of each member on all matters upon which they act. All decisions should therefore be recorded with a roll-call vote.

The board is frequently described as the "safety valve" for the planning system. It is the body given the power to waive and/or modify the zoning regulations in those situations where a literal interpretation and enforcement of them would virtually render property useless. Such situations are bound to occur when general regulations are applied across the board to an entire city, and there must be a mechanism for dealing with them.

At the same time, it is important that the board exercise its powers carefully and responsibly. The indiscriminate approval of variances, for example, could amount to rezoning without legislative action and undermine the ability of a city to use its zoning ordinance as a device for implementing its comprehensive plan. Arbitrary reversals of considered judgments made by administrative officials could subvert the process of administering and enforcing the zoning ordinance.

It should also be noted that once the board is created there is no formal relationship between it and the council. The board derives its powers directly from the Code, and the council cannot modify such powers.

Section 11-52-9. This section addresses both the preparation and the purposes of the plan. With regard to preparation it requires the commission to "make careful and comprehensive surveys and studies of present conditions and future growth". Thus the Code requires that the city's plan be based upon a foundation of information and analysis.

The general purpose of the plan is defined as "guiding and accomplishing a coordinated, adjusted and harmonious development of the municipality and its environs which will, in accordance with present and future needs, best promote . . . general welfare."

It emphasizes that the plan should promote "efficiency and economy in the process of development." This includes the following more specific concerns:

- Provision of adequate facilities for traffic.
- Adequate provision for light and air.
- Promotion of healthful and convenient distribution of population.
- Promotion of good civic design.
- Wise and efficient expenditure of public funds.
- Provision of public utilities and other public requirements.

Although phrased in the rather stilted language of the 1920s model legislation, these purposes clearly relate to the public health and welfare. And in doing so they define planning by local governments as a legitimate exercise of the police power. While emphasizing the physical development of the city, they also allow local governments to exercise broad powers in relation to such development.

Section 11-52-10. This section states that the plan can be adopted in its entirety or in parts. Such parts can be based on content, such as the land use element or the public services element, or they can be based on geographical areas such as downtown, business districts, or residential communities.

The commission must hold at least one public hearing before adopting the plan. The commission can dispense with this public hearing before acting on the plan if the plan is going to be submitted to a city council which will hold a public hearing before adopting the plan. However, it would be very unwise for a commission to avoid holding at least one, and preferably several, public hearings prior to adoption.

- Application of the development standards to current and projected data to define both present and future problems and potentials.

The output of these tasks should be a document, or series of documents, that present their results in terms of potentials and opportunities for future change and an assessment of the city's ability to exploit them. In particular, these outputs should clearly emphasize the major indicators of changes such as population and employment, the relationships among these indicators and demands for land and public services, and the capacity of the natural environment to absorb and sustain change.

2. Participatory Activities. In this second stage the outputs of the initial tasks become the basis for community review. This requires an open participatory system through which members of the community, both individually and through their various organizations, can express their views on the way that future change should be directed. It is in reality a complex series of activities requiring the dissemination of information, broad and constructive discussion, and reaching consensus on fundamental and potentially contentious questions and issues. It will include:

- Formulating developmental goals and policies through a process of consensus building.
- Evaluating alternative ways of accommodating anticipated urbanization in relation to community goals and policies.
- Selecting that alternative, or combination of alternatives, that best seems to be capable of fulfilling community goals.

The selected alternative(s) then becomes the basis for the preparation of a **draft plan**.

3. Legislative Decisions. Initially the draft plan must be subjected to public meetings and to formal public hearings. The input from these hearings must be considered and, if appropriate, reflected in modifications to the draft plan. The draft, as modified, must then be formally adopted by the planning commission. While under Alabama law this is all that is required, as a practical matter the adopted plan should be recommended to and adopted by the city council. This is the only way in which it can become an official statement of public developmental policy.

Following adoption, the plan should be given wide publicity and be reproduced in a readily accessible document. And the means to implement it, including the zoning ordinance and the subdivision regulations, must be adopted and/or revised

- The location and type of the major elements in the city's transportation/communications network.
- The location and scope of all facilities through which the city provides services to its citizens.

The emphasis in this definition is upon the plan as an "official public statement." As such, the plan should:

- Articulate the city's policies relating to its physical development.
- Establish the principles and standards which the city wishes to be reflected in its development and which it will use in its efforts to guide such development.
- Define the quality and quantity of public services that will be provided to support development.
- Provide a continuous and consistent frame of reference for both public and private investment in development.
- Serve as the basis for defining the public interest in the preparation of any regulation and in the application of a regulation to a specific property and/or situation.

The emphasis of this definition is **not** upon the plan as an ideal pattern or layout for the city in some distant future year. It is instead a set of goals and policies designed to guide both public and private decision makers in such a way that their current decisions will contribute toward the realization of the type of community its citizens want.

Comprehensive and Regulatory Planning

The Code gives Alabama cities a fair amount of guidance concerning the content of a comprehensive plan. It is not as complete in addressing the process through which the plan is prepared. Yet in many ways, the process is more important than the end product. If, through a process resembling that outlined above, a community can discover its shared values and express them in developmental goals and policies, it will have established a powerful link between planning and action. Such a link will provide a basis for the public and private sectors to work together to create an investment environment that will encourage development and redevelopment that is consistent with the city's overall policies and goals.

THE ZONING ORDINANCE

The zoning ordinance is arguably the most important device for implementing a city's comprehensive plan and is a major element in regulatory planning activities. It provides the city with the means to define the type and intensity of uses permitted on any piece of property and can be instrumental in implementing the city's developmental goals and policies.

Preparing the initial zoning ordinance in draft form is typically the responsibility of the commission. Adopting the ordinance is the responsibility of the council. Changing the map and amending the text require a recommendation from the commission with final action taken by the council. Reviewing administrative appeals, and considering applications for special exceptions and variances, are the responsibilities of the board.

Statutory Provisions

The allocation of responsibilities with respect to the zoning ordinance is addressed in Article 4 of Chapter 52 of the Code.

Section 11-52-70. This section is essentially the basic grant of power under which a city can adopt and enforce a zoning ordinance. It consists of one long sentence, but that sentence is followed by an extensive listing and summary of court cases which considerably expand and interpret that basic power.

Section 11-52-71. This section to some extent repeats 11-52-70 with one significant addition. It allows the regulations to vary among zoning districts, but requires also that they be uniform within zoning districts

Section 11-52-72. This section begins with a critical statement; namely, that zoning regulations **shall** be made in accordance with a comprehensive plan. In other words, the zoning ordinance does not stand alone. It should be related to a comprehensive plan. Common sense suggests that such a relationship can best be shown if the plan is reasonably up to date. A city can hardly meet this requirement by claiming that its 1994 zoning ordinance is in accordance with a plan that was adopted in 1980!

The section then relates the authority to zone to the police power by stating that the purposes of the regulations are to:

- Lessen congestion in the streets.
- Secure safety from fire and panic.

Section 11-52-76. This section requires the council to establish the manner in which the requirements shall be adopted and the boundaries of the districts determined, enforced, and amended. It emphasizes that these actions are accomplished by adopting ordinances.

Section 11-52-77. This section sets out the procedure to be followed by the city in adopting its zoning ordinance. It requires that the ordinance be first published in full, then in synopsis a week later; and that this be accomplished at least 15 days prior to the council meeting at which it will be considered. Publication must be in a newspaper of general circulation. If there is no such newspaper, the ordinance must be posted in at least four "conspicuous places" within the city. No action can be taken until after a public hearing has been held.

Section 11-52-78. This section requires that the procedures noted above for adoption of the ordinance, also be followed when the ordinance is amended. Such amendments occur whenever the text is changed in some manner, or whenever property is rezoned and the boundaries of zoning districts are changed.

Section 11-52-79. This section allows the city to appoint a zoning commission to recommend the regulations and the boundaries of the zoning districts. When such a commission is appointed, the council cannot hold hearings or take action on a proposed ordinance until it has received the final report from the commission. This section also allows a planning commission to carry out all the functions of a zoning commission.

General Comments. These nine sections of the Code empower cities to adopt, administer, enforce, and amend regulations that significantly influence the use of land within their boundaries. Their footnotes contain the summaries of numerous legal decisions extending over many years which clarify, and occasionally confuse, the application of these powers by Alabama cities.

Based on the model legislation, on the early zoning ordinances, and on the various new techniques that have emerged from time to time, cities have evolved a relatively standard format for their zoning ordinances. This format, and some issues relating to administration and enforcement, are discussed in the following sections.

Contents of the Ordinance

A zoning ordinance consists of two elements -- a text and a map. The text sets forth the requirements and procedures, and describes the zoning districts and the uses permitted within them. The map shows the geographical location of the zones. The text has no validity without the map, and vice versa.

Dimensional Requirements. These provisions relate to the intensity of development permitted on a given piece of property. They include:

- Density of residential development, usually expressed in dwelling units per acre.
- Floor area ratios for nonresidential uses.
- Setbacks from property lines for main and accessory structures.
- Limitations on the heights of structures.
- Limitations on site coverage.

Parking and Loading. These sections specify the minimum amounts of off-street parking that are required for various use classifications. Residential parking is usually defined in terms of number of spaces per dwelling unit for single family housing; and per bedroom for multi family housing.

Nonresidential parking and loading requirements are more complicated and can vary considerably by particular uses and are generally specified on that basis. They are usually expressed as ratios based on measures such as total floor space, customer service area, number of employees on the largest shift, or number of seats (in a restaurant, for example).

Administration and Enforcement. This part of the ordinance defines who is responsible for administration and enforcement. It describes the procedures to be followed in amending the ordinance, interpreting its regulations, or appealing any decision made under its provisions. It also establishes the penalties for violating the ordinance.

General Provisions. This is a small, but important, part of the ordinance. It should include two critical sections. One of these should state that the provisions of the ordinance are to be considered the minimum requirements for the public health or welfare. The other should state that if any section is found to be unconstitutional or invalid, that finding only affects the specific section and does not affect any other section or provision of the ordinance.

Special Provisions and Approaches

Apart from the basic residential, commercial, and industrial zoning districts, a number of other zones and regulations have been incorporated into zoning ordinances during the past 50 years. Their general purpose is to add flexibility, and/or to accommodate some new form of development.

Resource Protection. In response to increasing concerns for the potential adverse impacts of development upon the natural environment, some zoning ordinances are now including protection standards. These standards are applied to such natural features as the shorelines of lakes and ponds, wetlands, drainageways, floodplains, ravines, steep slopes, mature woodlands, and prime agricultural lands.

These standards place limits upon the amount of such areas that can be cleared for development purposes. For example, an ordinance might specify that no more than 40 percent of those portions of a development site that have a slope of 12 - 15 percent can be cleared, developed, or regraded; no more than 30 percent of areas with a slope of 15 - 30 percent; and no more than 15 percent of areas with a slope greater than 30 percent.

Landscaping Requirements. Some ordinances require that the sites for certain uses, generally multi family and nonresidential projects, be landscaped. Minimum amounts of landscape materials will be specified for front, and sometimes other, yards; for parking areas; and for the site in general. These are usually expressed in terms of canopy trees, understory trees, evergreens/conifers, and shrubs. An appendix to the ordinance will generally list the various species of landscaping materials recommended for use in fulfilling these requirements.

In a prescriptive zoning ordinance, the landscaping standards are incidental requirements intended mainly to achieve aesthetic purposes. In a performance zoning ordinance, as described below, landscaping is an integral element in the performance standards and is intended to act as a buffering element between adjoining uses.

Performance Zoning

The great majority of municipal zoning ordinances are based on the principle that most urban uses are incompatible and should be separated from one another. Not only are residential, commercial, and industrial uses separated, but the various uses within those categories are further subdivided. Thus within the residential classification, single family districts are separated from those allowing duplexes; and within the commercial classification, neighborhood business zones are separated from community business zones. And within each zone, permitted uses are specified in considerable detail. These can be termed **prescriptive** zoning ordinances.

During the past 50 years urban activities have become highly varied and complex. To accommodate them, prescriptive ordinances have been amended to include more zones, and the geographic locations of these zones as shown on the zoning map have proliferated. The result is that cities with prescriptive ordinances

The **Neighborhood Conservation** zone is applied to residential areas existing at the time the ordinance is adopted. Its purpose is to prevent such areas becoming nonconforming and to protect existing residential neighborhoods. No new NC zones are created following initial adoption of the ordinance. Change is expected to occur through infill development.

The **Commercial Conservation** zone is applied to business and commercial districts, other than downtown or malls, existing at the time of adoption. No expansion or creation of new CC zones will be allowed. Changes are expected in the form of infill and redevelopment.

The **Urban Core** zone is applied to the specialized central or downtown area and to existing major commercial centers such as regional malls. Redevelopment and infilling are the expected form of urban change.

The **Estate** zone is applied to areas where it is desirable or appropriate to encourage low density residential development. These areas often have limited public services available and are generally located on the outskirts of the city.

The **Development District** zone allows a wide range of activities, virtually any use except agricultural or industrial. It is applied to those areas which are intended to accommodate most of the city's anticipated growth over the next 20-25 years. Periodically, say every five years, land needs will be evaluated and additional areas zoned Development District. These additional areas will come mainly from the Rural zones.

The **Industrial** zone includes all existing industrial areas plus the land appropriate and needed for future industrial uses over the next 20-25 years.

The zoning districts are defined geographically in relation to the type of change anticipated and/or desired within each part of the urban area. The comprehensive plan, the availability of existing or proposed public services, and the development trends and market factors will all be considered in delineating the zoning map.

Within zoning districts, the intensity of actual or potential development on a specific site is measured through such factors as residential density or commercial floor area ratios, the amount of impervious surfaces, the traffic generation characteristics, the height and bulk of structures, the extent of exterior storage, and the hours of operation. Based on the combination of these factors the site will be assigned a **land use intensity (LUI)** class ranging from I through XI.

Most cities limit the expansion of a nonconformity. In some cases, this limitation is absolute, in others some expansion on a site may be allowed.

Some cities make provision for the amortization of nonconformities. There are problems with this approach, especially that of determining the amortization period. This approach has apparently worked best with relatively simple structures on leased property, such as billboards. For buildings and complex uses, it is more difficult to determine a defensible time period.

Most cities require uninterrupted use or occupancy for a nonconformity to continue in existence. In these cases, the ordinance will specify that if a use is discontinued or a building is vacant for a period of time, often one year, then it loses its nonconforming status. Any subsequent use of the site and/or structure must be in conformity with the ordinance. Similarly, if a nonconforming structure is damaged beyond a certain point, many cities require that any rebuilding must meet the requirements of the ordinance.

One useful approach to such problems is to establish a register of nonconformities. Ideally this should be done when the ordinance first goes into effect, but it can be done at any time. Such a register can clearly establish whether or not a use or site has a bona fide nonconforming status. This is an important determination. A nonconforming use is a legal use. A use that is not consistent with the ordinance but does not have nonconforming status is an illegal use. A city has the means to require that an illegal use be brought into compliance with the ordinance or discontinued.

Administering the Ordinance

From time to time the ordinance will have to be amended, appeals will have to be adjudicated, and requests for special exceptions and variances will have to be considered. In all these cases, the staff are responsible for the initial work: accepting applications, assembling the required information, and making the arrangements for the required hearings. The entities involved and the procedures to be followed in making a decision will vary.

Amending the Ordinance. Some amendments involve changes or additions to the text. These will generally be initiated by the commission and do not occur very often. More common and numerous are amendments to the zoning map. A property owner and/or a developer who wants to use a parcel in a way that is not permitted by the ordinance will submit a request to have the property rezoned to a district that will permit their proposed use. Occasionally the commission may recommend amendments to the map. Regardless of whether the amendment is to the text or the map, the procedure is the same.

- How specific requirement such as setbacks, floor area ratios, or site coverage limitations apply to a specific proposal and/or site.

If an applicant disagrees or is not satisfied with the interpretation or decision of the city official, he or she can appeal to the board. The process is as follows:

1. The aggrieved party files notice of appeal with the official whose decision is being appealed and with the board. The Code says such an appeal shall be filed within a "reasonable time." Fifteen (15) days seems to be a reasonable time and is the same as the time period specified in the Code for appealing a decision of the board.
2. The board gives public notice and sets a public hearing on the appeal. Again, the Code states that the hearing shall be held within a "reasonable time." In this case within thirty (30) days seems to be accepted as reasonable.
3. After holding a public hearing, the board makes its determination concerning the appeal. It can affirm the decision of the administrative official, reverse it, or modify it.

Special Exceptions. Special exceptions are sometimes referred to as conditional uses or some similar term. The term refers to a use that is compatible with and related to the uses that are permitted by right in a zoning district. However, because of its nature it requires additional review and must comply with some additional standards so that it does not have a harmful impact on the surrounding area

In a single family zone, for example, single family houses will be permitted by right. On the other hand, schools, churches, fire stations or parks might be considered as special exceptions. They are needed to provide service to the residents of the area, but they can also be disruptive as land uses. The procedure for reviewing them is as follows:

1. The property owner files an application for approval of the special exception with the board.
2. The board gives notice and sets a public hearing on the application, within a reasonable time.
3. Following the hearing, the board approves, approves with modifications or conditions, or disapproves the request.

process. They are not considered by the council which is the only body empowered to amend the ordinance.

For this reason many states do not permit use variances. However, the Alabama Supreme Court has determined that use variances are legal. But it has also stated that such variances should be measured against rigorous standards, and they should be granted sparingly.

The process for considering variances is as follows:

1. The property owner files an application for a variance with the board.
2. The board gives public notice and sets a date for a public hearing on the application.
3. The board holds a public hearing on the application.
4. After the public hearing the board approves, approves with conditions, or disapproves the variance.

The critical concern with either type of variance is determining whether the strict application of the ordinance will result in **unnecessary hardship** for the property owner.

By its nature, a zoning ordinance places a hardship on many property owners in a city because it places restrictions on the use of property. To qualify for a variance, any such hardship must be proved to be unnecessary, virtually unique. In practice, the term "unnecessary hardship" is vague, but it has been made more specific through a long series of legal decisions.

The most widely used test for determining whether or not a hardship is unnecessary originated with a decision in 1939 by the Supreme Court of the State of New York. In the case of **Otto versus Steinhilber**, the New York court applied a three-stage test.

1. The board must first determine that the land in question cannot yield a reasonable return if used in compliance with the zoning ordinance. Two points need emphasizing here. The hardship must arise from the specific characteristics of the land, not from any actions or characteristics of the owner. Failure to yield a "reasonable return" is not proved by showing that the property could produce a greater return with a variance rather than in its present state.

is not permitted, the expansion of a nonconforming use, or an addition to a structure which violates setback requirements.

Although enforcement is the responsibility of city personnel, the commission members should be aware of the procedures and also concerned that enforcement is in fact occurring.

Enforcement Considerations. A basic requirement for effective enforcement is that the city have a clearly articulated procedure for eliminating violations. This should include:

- The assignment of responsibilities for inspecting and verifying a violation when it is observed or reported.
- A formal notification to the property owner spelling out the nature of the violation, the action required to correct it, and setting a time limit for such correction.
- A reinspection to determine whether or not the violation has been, or is being, brought into compliance.
- If no compliance or satisfactory progress toward compliance has occurred, sending a second notification warning of legal action for continued noncompliance.
- Taking legal action against the property owner if compliance has not occurred within a specified time after the second notice.

This is a generic enforcement process. The details will vary according to the practices and available personnel in any given city. For example, some cities have established systems in which enforcement officials can issue citations or tickets for violations.

But the important consideration is that there be a process and that it be used every time a violation is found. Failure to correct violations undercuts the credibility and validity of the city's regulatory measures and procedures. It is also unfair to the vast majority of owners and developers who abide by the rules.

Enforcement Actions. Ideally, the enforcement of regulatory provisions or approval conditions should occur without resort to legal action. However, in some cases a city may have to go to court to obtain compliance. Enforcement actions relating to the zoning ordinance are usually initiated in the district or municipal court.

Any party involved in the trial can appeal the decision of the circuit court to the **Alabama Court of Civil Appeals**. This court has no discretionary jurisdiction and must therefore hear any appeal. The judgment of the Appeals court can be appealed to the **Alabama Supreme Court**. However, this court has discretionary jurisdiction and can decide whether or not to hear the appeal.

Public Purpose. It should be noted again that the Code requires that the zoning ordinance be based upon the city's comprehensive plan. This is especially relevant to the growing tendency to litigate land use and zoning questions and decisions.

Challenges to land use decisions frequently raise questions as to whether the regulation itself, or its application to a specific property, is directly related to a legitimate public purpose. One powerful way to assert such a relationship is to show that the regulation, and/or a specific decision made under its authority, implements and is consistent with the goals and policies set forth in the comprehensive plan. Showing that the plan and the ordinance are interconnected and mutually compatible can go a long way toward substantiating the legitimacy of an ordinance and its administration.

Section 11-52-32(b). This subsection first states that any plat that is approved by the commission is deemed to be an amendment or an addition to the city's comprehensive plan. Adoption or amendment of such plan requires six affirmative votes (Section 11-52-10). Thus approval of a subdivision also requires six affirmative votes.

It also states that approval of a plat does not in itself result in the acceptance of any street or other public space shown on the plat. The normal procedure is that when a plat has been given final approval by the commission, it is taken to the council. The council then adopts a resolution accepting the dedication of the street rights-of-way and drainage and utility easements within the city.

Section 11-52-33. This section states that lots in a subdivision cannot be sold or transferred until the final plat has been approved by the commission and recorded in the county probate office. The city may obtain an injunction to enjoin any such sale or transfer and obtain payment of a penalty.

Contents of the Regulations

Article 2 of the Code is written in fairly general terms. Thus, individual subdivision regulations vary in format among cities throughout the state. However, any such regulation should contain the following elements.

Preamble. As with the zoning ordinance, the purpose of this part of the regulation is to establish its relationship to the police power. References to the Code will emphasize this relationship.

Definitions. Legal and surveying terms used in the regulations are defined here. In addition, any everyday words that are used in an unusual or very specific fashion will be explained.

Design Standards. Sections 11-52-30 and 31 of the Code state that subdivision regulations may provide for the proper arrangement of streets, the provision of open space, the control of population density, and the minimum size of lots. These purposes are translated into **design** standards relating to:

- The functional classification of streets.
- Maximum length of blocks and culs-de-sac.
- Relationship of width to depth for lots.
- Relationship of streets to topography.

Pre-application. This is an informal and optional step which allows the developer to discuss a proposed subdivision with various city officials. In the process, the developer gains an understanding of the city's requirements, and the city officials get an early warning of the potential project.

If this process identifies problems, they can be discussed and resolved before the developer has invested a great deal of resources in the project and before starting the formal review. It is clearly understood that neither the developer nor the commission are bound by the pre-application review, and no approval of the project is implied or intended.

Preliminary Plat. This is the first, and most critical, stage of the formal review process. The developer submits scale drawings of the proposed subdivision, prepared by a surveyor registered in the State of Alabama, and showing:

- The layout of the streets, blocks, lots and the connections to and/or from adjoining property.
- The topography and significant natural features on the site.
- The proposed layout of water and sewer lines, utilities, and surface drainage facilities.

The preliminary plat will be considered by the commission at a properly announced public hearing. After the hearing, the commission can approve the plat, approve it with conditions and/or revisions, or disapprove it.

Preliminary approval does not constitute acceptance of the subdivision by the city. It recognizes that the subdivision meets the standards established by the regulations and allows the developer to proceed with the construction of the improvements.

Engineering Plans. These are the construction plans for building the subdivision. They should be submitted to and approved by the city engineer. When the plans are approved construction can begin, and during construction the work will be inspected for compliance with the city's improvement standards.

Performance Bonding. In some cases a developer may not want to complete the installation of all improvements prior to recording the final plat and selling lots. A common reason for this is that construction traffic can tear up the wearing surface of a residential street. This can be avoided if the laying of the final wearing surface of the street is delayed until most or all of the houses are built. The construction traffic actually helps to compact the base of the street.

which requires that for subdivisions outside the city in the extraterritorial jurisdiction the stricter standards must apply.

When the administrative officials have signed the plat, it will be placed on the agenda of the council. The council will then adopt a resolution accepting the streets as public rights-of-way and accepting any public easements and will authorize the mayor to sign the plat if the subdivision is located within the city.

Recording. At this point, the developer can take the approved and signed final plat and have it recorded in the county probate office. Copies of the recorded plat are then given to the city. The developer can now legally sell or transfer individual lots.

To ensure proper recording and submission of required copies, it is a good idea not to assign official street numbers until the final plat has been recorded. A street address is required before power can be provided to a lot and a building permit issued. Making address assignments contingent upon submission of copies of the recorded plat enables city officials to verify that it has actually been recorded.

Enforcement Actions

Enforcement of the regulations involves inspecting subdivisions during construction to ensure that they are being built in accordance with the regulations and in conformity with the approved plat and any conditions attached to such approval. Enforcement also includes taking action against any illegal subdivisions created within the city's planning jurisdiction or the sale of lots prior to recording of the final plat.

Such enforcement issues can often be resolved through negotiation. However, in some cases it will be necessary to take legal action. In such cases, the commission can file a petition with the appropriate circuit court seeking to enjoin the transfer of lots and the imposition of the penalties allowed by state law.

Covenants, Easements, and Transfers

Although the commission's responsibility relates to the subdivision of land, the creation of streets and lots raises several other matters that often have to be considered.

Covenants. Covenants, also called restrictive covenants or deed restrictions, are a legal device for controlling the structures and/or activities that can be placed on a parcel of land. At first sight, they seem to be the same as zoning, but there is a significant difference. The purpose of zoning is to control

Metes and Bounds Transfers. A metes and bounds description of a piece of property involves a survey and a legal description. The latter is a written description of the boundary of the property, beginning and ending at the same point, and giving the dimensions and compass bearings of each segment of the boundary. Such descriptions are commonly found in deeds.

Section 11-52-33 of the Code states in effect that wherever a local government is exercising the authority to enforce subdivision regulations, transfers of property must be by reference to a properly approved subdivision plat. In other words, wherever subdivision regulations are in force, a transfer using only a metes and bounds description is illegal. However, in many cases county probate offices continue to record transfers by such descriptions. Nevertheless, transfers in this manner are subject to the same penalties as selling lots before recording a final plat.

Appeals

Any decision of the commission relating to the consideration and approval of a subdivision can be challenged or appealed. Such appeals can be filed by owners of the property being subdivided, adjoining owners, or in some cases by neighborhood and/or homeowners associations.

As with appeals under the zoning ordinance, appeals relating to the subdivision regulations are filed with the appropriate circuit court. Appeals of circuit court decisions can be taken to and heard by the Court of Civil Appeals; and decisions of the Appeals court can be submitted to, but may or may not be heard by, the Alabama Supreme Court.

The same comments that were made earlier about the relationship between the zoning ordinance and the comprehensive plan can be made about the subdivision regulations. Although there seems to be much less litigation about subdivision decisions as compared to zoning decisions, similar challenges can be made. And establishing a strong relationship between the regulations and their implementation and the goals and policies in the comprehensive plan can be an important factor in establishing whether or not the regulations and/or their application to a specific situations have a strong relationship to a legitimate public interest.

of witnesses," neither the board nor the commission is a court of law. Thus, normal rules of evidence do not apply; but both bodies require relevant information to enable them to exercise their judgment and support their final decision.

Facts and Opinions. According to Webster's Dictionary facts are, "pieces of information presented as objective reality." Such information clearly is the most important requirement in making a decision. For land use issues, some facts can be obtained. These include documentation of existing conditions on a site and its immediate vicinity and a record of changes over a given period of time. These data are a basic requirement and include:

- Surveys, legal descriptions, deeds, tax maps.
- Current and historical land use maps, surveys, and tabulations.
- Surveys of structural conditions and quality.
- Maps, aerial photographs, general photographs, surveys and reports relating to the physical characteristics of property.
- Traffic volume counts.

The staff should be responsible for assembling, organizing, and analyzing information of this kind which is available within the city. In addition, applicants, consultants, other city and external agency personnel can provide relevant data. In this respect, neither the commission nor the board should hesitate to require applicants to submit detailed, accurate, and current information of any kind that they feel they need to make a decision. It is not unreasonable, for example, to require a current property survey and/or site plan prepared by a qualified professional rather than try to make a decision on the basis of a 50 year- old tax map and a rough freehand sketch drawn to no discernible scale.

Commission or board members may have personal knowledge about a property, or know other people who have such knowledge. If so, they should make such information available to other members and enter it into the record relating to the specific decision. A visit to the property and the surrounding area is also an excellent way for members to gain an understanding of the current conditions and issues. If such visits are made, this fact and any significant points they reveal should be noted in the record.

If necessary, the commission and board can require that data they feel necessary be provided. If during a hearing it becomes apparent that additional information

These considerations of perspective and precedent reinforce the need to compile and retain careful and complete records relating to each decision. They also stress again the importance of the comprehensive plan. Reference to the plan is the best way to place an individual decision into its proper perspective. The plan should take precedence over precedents.

Orientation toward the Future. Both the commission and board encounter a major problem because their decisions are not based solely on historical and current information. Their primary responsibility is to evaluate and consider the future implications of a present decision. Hard data concerning the future is difficult to come by. Much of what is discussed in this context is at best the projection of present trends, at worst an uninformed guess. However, some estimates can be made based on reasonable and defensible assumptions.

Some ordinances, for example, require that for projects of a certain scale and/or type applicants must submit traffic impact reports, environmental assessments, or feasibility studies. In addition, estimates of the amount and costs of public services can be made in relation to the anticipated scale and scheduling of a proposed development. However, the overriding concern of the commission and the board should be whether or not any proposal, decision, or recommendation is consistent with, and will advance, the city's developmental goals and policies.

Legal Requirements

Statutory requirements relating to decision making such as minimum time for giving public notice, where to publish such notices, and voting requirements, are specified in the enabling legislation. These should be incorporated into bylaws and followed meticulously. Such legislative directives are surprisingly few in number, and they need to be amplified. This is especially true of standards designed to ensure that the decision making process is clearly understood and accessible to any interested person or group in the city. The following are indicative of some additional requirements that should be considered.

Notification. The commission and board should adopt procedures that ensure that all parties directly affected by a forthcoming decision receive personal, timely, and formal notification of meetings. At a more general level, such devices as posting signs on property, publishing the agenda in a local paper a week or more ahead of a meeting, and publicizing the meeting on local radio stations and/or public service cable TV channels if they are available, should be used to let the community at large know what is happening.

Public Record. Adequate and relevant information is a basic requirement for decision making and for evaluating the appropriateness of a specific decision. As a policy or plan evolves, or as a specific issue or application moves through

occur, and specify the time and place for further action. Arrangements should be made to notify all interested parties directly of these facts.

Reconsideration of Decisions. To avoid being worn down, or have the opposition worn down, by a persistent petitioner, the commission or board should formulate rules for reconsidering any matter which has already been decided. The bylaws should identify what conditions must be met before an item will be reconsidered. They can, for example, stipulate a minimum period of time which must elapse before an issue which has already been decided can be reconsidered.

If it is claimed that conditions have changed and/or new information is available, these claims should be considered first. If the members are then satisfied that the situation is different and warrants reconsideration, a new hearing date can be set in accordance with the appropriate rules.

Access to the Process.

Decisions of the commission and board must be made in public. The specific steps to be taken, and the relevant standards to be applied, will vary according to the particular questions being addressed. The process should be open to participation by all concerned individuals and organizations. In this context, effective and constructive participation in the decision making process requires that all participants:

- Understand the issues being considered and the factors that are relevant to resolving it.
- Understand the process through which a decision will be reached and at what stage of the process it currently rests.
- Be encouraged to express their views in conformance with the basic standards required for the conduct of meetings and the nature of the issue.

Some minimum methods for conducting meetings that will facilitate such participation include:

- Commission and board meetings should be scheduled at a time that is convenient for the public and in a location that is appropriate for the anticipated audience. This may mean that the location of meetings will occasionally have to be changed if the expected crowd is larger than the regular meeting place can handle.

to a broad segment of the urban population. There will often be winners and losers. In highly contentious cases such as a rezoning for a major project, the parties often become polarized and compromise and settlement becomes difficult if not impossible.

In such situations, one or more of the parties may resort to litigation as a means of achieving their objectives. When this occurs, the courts essentially become a part of the local planning system and play a critical role in resolving developmental issues. In effect, they make the final decision. Thus the potential for such litigation has become an additional factor for councils, commissions, and boards to consider as they make their decisions.

There is no sure way to avoid land use litigation. Nevertheless, there are some prudent precautions that a city can take to ensure that it has a defensible position if an issue ends up in court.

A basic requirement is that the local planning bodies have access to legal advice. This would, of course, be essential if an appeal or a suit is actually filed against them. But a preventive approach, for example having the ability to refer a question to the city attorney, would be even better. In addition, cities in Alabama do have the opportunity to submit questions to, and get an opinion from, the State Attorney General. Such opinions are advisory only and do not therefore have the force of law. Nevertheless, they can provide a local body with guidance, provide references to relative case law and appellate decisions, and identify cities which have experienced similar situations.

There are also steps that the planning bodies can take themselves. A fundamental requirement is that each entity in the local planning system be able to identify a legitimate public purpose for any action it takes or any decision or recommendation that it makes.

A second suggestion is that whether formulating policies and regulations, and in particular when applying them to specific situations, the planning entities should consider carefully whether or not they are reasonable. It should be clear, both in practice and on the record, that the ends relate to a clearly identifiable public purpose and that the means of achieving them are appropriate and reasonable.

Thirdly, when imposing conditions upon a proposed development the commission and board should make sure that any such conditions do not create an undue burden upon the project or require the developer to shoulder a responsibility that should more appropriately be assumed by the community as a whole. This concern underlies much of the current land use litigation and emphasizes the need to review such situations with legal counsel.

CONCLUSION

Chapter 52 of Title 11 of the Code of Alabama, 1975, as amended, is now 60 years old and is showing its age. The amendments that have been made over the years have been few in number and limited in effect, and they have added none of the innovations that other states, including several in the Southeast, have made available to their local governments.

Nevertheless, for those Alabama cities wishing to exert some degree of control over their future development, the Code still provides them the essential statutory authority to do so. It allows the council to create the institutions which together form the local planning system; and, when it is in place, allows the system to perform the essential and complementary functions of comprehensive and regulatory planning.

Within the local planning system considerable responsibility is placed upon the appointed citizens who serve on the commission and the board. Their fundamental task is to balance competing views of development -- the individual view that land is a commodity to be used for maximum gain versus the community view that land is a resource to be used carefully and with respect for the public interest. They perform this balancing act in a public arena in which increasingly contentious interest groups and individuals pursue their highly specific objectives with vigor; where the general attitudes toward government are ambiguous, if not hostile; and where the threat of litigation is constant.

Under these circumstances, Alabama's cities are fortunate that some of their citizens will commit their time and effort to making decisions which involve difficult choices, which rarely make everyone happy, and often make some people mad.

If it does nothing else, it is hoped that this Manual will emphasize that the work done month after month by the members of a commission or board is founded on a powerful constitutional, statutory, and legal base.