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The Rocky Mountain Land Use Institute  
*Thirteenth Annual Conference*  
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Session Handouts  
To Accompany Home Study Audio CD

*for*

***Making the Record:  
The Top 10 Reasons Communities Lose in Court***

Original Presentation  
Friday, March 12, 2004

Moderator: Debra S. Kalish, Esq.  
Otten, Johnson, Robinson, Neff & Ragonetti, P.C.  
Denver, Colorado

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PRESENTER BIOGRAPHIES

**Debra S. Kalish, Esq.**, is an attorney with the Denver, Colorado, law firm of Holme, Roberts & Owen, where her practice emphasizes land use law and environmental matters related to development. Ms. Kalish is a planning commissioner for the City of Louisville, Colorado, and the Vice-Chair of the Environmental Law Section of the Colorado Bar Association. She also teaches Planning Law as an adjunct professor in the College of Architecture and Planning at the University of Colorado at Boulder. A graduate of the University of Colorado School of Law, Ms. Kalish holds an undergraduate degree in Environmental Psychology from Purdue University and a Master of Urban and Regional Planning from the University of Colorado at Denver College of Architecture and Planning.

**Gerald E. Dahl, Esq.**, is a partner in the Denver firm of Gorsuch Kirgis LLP. Mr. Dahl serves as Town Attorney for Wheat Ridge, Colorado. His specialties include local government and land use law. From 1984 through 1989, he served as general counsel for Alma and special counsel to a number of counties and municipalities on Colorado's western slope. From 1976 to 1978, he was associated with the Denver water law firm of White & Burke.

**C. Gregory Dale, AICP**, is a founding Principal with McBride Dale Clarion in Cincinnati, Ohio. Mr. Dale has extensive experience in planning, land use regulations and implementation. He has managed planning projects in states throughout the country, including Ohio, Kentucky, Indiana, Tennessee, Illinois, Kansas, Missouri, Wisconsin, Colorado, Georgia, and Oklahoma. He has served in a number of leadership positions with planning and community organizations and is a regular speaker at national, state, and local planning conferences and seminars. Mr. Dale's responsibilities with MDC include managing planning projects and activities for both public and private sector clients throughout the Midwest, including comprehensive plans, land use plans, and land use regulations. He speaks at numerous workshops and conferences for professional planners and planning commissions at the national, regional, state, and local levels. He authors a feature column for the *Planning Commissioner's Journal*, a national publication devoted to citizen planning board members.

Mr. Dale's education is through the University of Cincinnati, College of Design, Architecture, Art and Planning, with a Master of Urban Planning and Georgetown College (Georgetown, KY), with a B.S., Political Science and Sociology, cum laude. Mr. Dale also has taught periodically at the University of Cincinnati, College of Design, Architecture, Art and Planning, as an Adjunct Professor of Planning; the Northern Kentucky University, as an Instructor of Land Use Planning and Development; and the University of Cincinnati, College of Law, as a Lecturer of Planning Law.

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**Debra S. Kalish**

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*McBride Dale Clarion*

# The Top Ten Elements of Good Decision Making

1. Notice
2. Opportunity to Be Heard
3. Chairing a Good meeting
4. Full Disclosure
5. Site Visits
6. Unbiased Decisions
7. Timely Decisions
8. Complete Records
9. Clear Rules
10. Findings

# Notice

- Adequate and timely
- Should be reasonably calculated to apprise interested parties of a proposed action.
- Must allow time for all parties to prepare
- The average person must be able to understand the notice
- Legal requirements are *minimum* standards – you can exceed them

# Opportunity to be Heard

- All parties must have an opportunity to be heard.
- All public hearings must be open to the public.
- How can you ensure opportunity to be heard with large crowds?

# CHAIRING AND PARTICIPATING IN A PUBLIC MEETING

- Importance of strong chair or presiding officer
  - Sticks to the agenda and focuses discussion
  - Reminds board members of the time
  - Expedites discussion and action (example: "I'll entertain a motion on that.")
  - Knows the art of suggesting when the time is right to act
  - As a participant in meeting rather than as the chair, you can do the same thing

# CHAIRING AND PARTICIPATING IN A PUBLIC MEETING

- Conducting public hearing
  - Goal: that members and public attendees leave the hearing feeling that it was fair and that their views were heard and appreciated
  - Importance of explaining the rules for conduct of the hearing
  - Hearing rules
  - Make sure that attendees at the public hearing know they have the right to speak
  - Thank all the speakers for appearing

# CHAIRING AND PARTICIPATING IN A PUBLIC MEETING

- Policy questions
  - Whether to permit submission of written materials after the hearing (will delay the decision)
  - Whether to permit cross-examination: is the decision legislative (adoption of a general ordinance), or quasi-judicial (hearing and decision on liquor license application)?
  - Whether to (1) act at the end of the hearing; (2) continue the hearing to a date certain, or (3) continue for action only.

# Full Disclosure

- All parties must have full access to information, statements, and evidence relied upon by decision makers.
- Ex parte communications.
- Open meetings
- Open Records

# SITE VISITS

- The challenge: acquainting the body with the site without creating the problem of ex-parte contacts
- How ex-parte contacts can occur during a site visit
- Group site visits are likely open meetings under the applicable statute

# SITE VISITS

- **Ground rules for the site visit:**
  - **The visit is only for the purpose of acquainting the members of the body with the physical layout of the site.**
  - **No testimony or statements will be received during the site visit from anyone other than staff.**
  - **The body may not either: (1) deliberate among themselves during the site visit; or (2) receive any information from the applicant or others.**

# SITE VISITS

- **Ground rules for the site visit:**
  - **Do not permit "simple informational question," such as where property boundaries lie. If there are questions of information, the planning staff should answer them.**
  - **Engaging in deliberation during the visit or taking statements from the applicant or members of the public during the visit could invalidate the ultimate decision.**
  - **These rules are for the benefit of those who are not present and, most important, for the enforceability of the body's ultimate decision.**

# Unbiased Decisions

- The decision maker should be clear of bias or prejudice.
- Conflicts of interest must be identified and depending on the conflict, the commissioner or board member should be prepared to leave the meeting and not participate in discussions.

# Timely Decisions

- Establish set time limits
- Decisions should be made within a reasonable time period.
- The decision maker needs to avoid having the process used as a delaying tactic.

# Complete Records

- A full and clear record of the proceedings must be kept.
- Should include a record of the proceedings along with an evidence that is offered and relied upon by the decision makers.
- A non-involved party should be able to track the process in the future

# Clear Rules

- Establish clear rules at the beginning of the hearing including:
  - Order of speakers;
  - Time limits;
  - Where questions should be directed; and
  - Who will address questions and when.

# Findings of Fact

- What are they?
  - Findings of Fact are a citation of specific facts about the application that the board finds to be true and which led to its conclusion that the application conforms or fails to conform to applicable criteria.

# Findings of Fact

- Principles of Findings
  - You are not committees of compassion
  - Your decisions must be based on facts
  - The facts must address the standards
  - The burden of proof is on the applicant
  - Information is not the same thing as facts
  - Weighing of the evidence is your responsibility

# Findings of Fact

- Principles of Findings
  - You do not have to believe everything you hear
  - Opinions without a factual basis are without merit
  - Public sentiment is not a basis for decisions
  - You can rely on personal knowledge, but make it a part of the record

# Findings of Fact

- Tips for Finding the Findings
  - Use the application process to put the burden on the applicant
  - Staff - Your first line of defense
    - Staff reports
    - Pre-application meetings
  - Announce the rules at the beginning of the meeting

# Findings of Fact

- Encourage factual testimony
- Have the standards in front of you
- Ask questions designed to get evidence related to standards.
- Keep your records neat and complete
- Keep the evidence phase separate from the deliberation phase
- Deliberate the facts and standards
- Assess compliance explicitly

# Findings of Fact

- Make careful notions with stated reasons
- Use minutes carefully
- Have a “package” of application, records, staff report, motion and minutes
  - Lists the record
  - Lists the standards
  - Reflects the weighing of the evidence
  - Determines compliance
  - Clearly states the decision with any condition