
The Rocky Mountain Land Use Institute
Thirteenth Annual Conference

Session Handouts
To Accompany Home Study Audio CD
for
***Training Boards and Commissions
for Informed and Legal Decision-Making***
Original Presentation
Friday, March 12, 2004

Moderator: Eric H. Bergman
Director
Office of Smart Growth and Community Development
Department of Local Affairs
Denver, Colorado

Panelists: Gerald E. Dahl, Esq.
Partner
Gorsuch Kirgis, LLP
Denver, Colorado

C. Gregory Dale, AICP
Principal
McBride Dale Clarion
Cincinnati, Ohio

The Rocky Mountain Land Use Institute
University of Denver College of Law
2255 E. Evans Ave., Suite 404
Denver, CO 80208
Phone: (303) 871-6319 ? Fax: (303) 871-6051 ? Email: rmlui@law.du.edu
Website: www.law.du.edu/rmlui

All rights reserved. No part of these materials may be reproduced in any form or by any means, electronic or mechanical, including photocopying, or by any information storage and retrieval system, without permission from the publisher.

The Rocky Mountain Land Use Institute
Thirteenth Annual Conference

PRESENTER BIOGRAPHIES

Eric Bergman is Director of the Office of Smart Growth in the Colorado Department of Local Affairs. The office provides technical and financial assistance to local governments throughout Colorado in the areas of land use planning and growth management and is involved in related legislative and policy issues. Eric holds a B.A. in Philosophy from the University of Colorado at Boulder and a Master of Environmental Studies from the Evergreen State College in Olympia, Washington. Prior to working in state government, Eric spent four years as the Director of Research and Communications for Colorado Counties, Inc. He lives in Westminster with his wife, Sandra, and their two boys, Cole and Porter.

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.



DEPARTMENT OF LOCAL AFFAIRS OFFICE OF SMART GROWTH

The Office of Smart Growth, established in 2000, provides the following services and programs to assist local governments in the areas of growth management and land use planning:

- **Colorado Heritage Planning Grant Program.** The office administers a grant program designed to recognize and reward those communities cooperatively planning to manage growth. Grants are awarded to multi-jurisdictional projects around the state. Past projects include: open space buffers, TDR programs, impact fee studies, agricultural preservation efforts, wildfire mitigation, regional housing authorities, and revenue sharing methodologies.
- **Intergovernmental Land Use Dispute Resolution Program.** The office maintains an online list of qualified alternative dispute resolution professionals with experience in local land use planning who are available to assist local governments in resolving land use disputes. The Office also provides local government guides to alternative dispute resolution (ADR) to assist local officials and staff in the land use mediation process.
- **Colorado Heritage Best Practices Reports.** The office publishes a series of reports detailing best practices around the state in the following subject areas:
 - ❑ Intergovernmental Agreements
 - ❑ Land Use and Growth Management
 - ❑ Preservation of Open Spaces, Farms and Ranches
 - ❑ Natural Hazards Planning and Mitigation
- **Information and Technical Assistance.** The office acts as a clearinghouse for information and resources on a variety of land use issues. Staff is available to provide technical assistance to local governments and planning commissions, including workshops and other types of outreach and training.
- **Office of Smart Growth Website.** The office maintains a website containing information on the programs listed above, a land use planning library, information for planning commission members, and links to other growth management and land use web sites. The website address is: www.dola.state.co.us/SmartGrowth
- **Office of Smart Growth Listserv.** The office e-mail listserv provides updates on workshop offerings, new programs and publications, grant funding information, and hosts local government RFQs and RFPs for planning projects. To join the listserv, go to the Office of Smart Growth website.

If you have questions, please contact the Office of Smart Growth staff:

Eric Bergman: 303.866.4552/eric.bergman@state.co.us
Andy Hill: 303.866.3785/andy.hill@state.co.us
Charlie Unseld: 303.866.2353/charles.unseld@state.co.us

TOP 10 SIGNS THAT YOUR BOARD NEEDS TRAINING

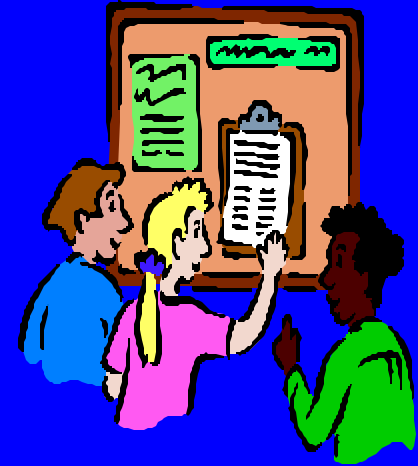
Gerald E. Dahl

(303) 376-5019

Gdahl@Gorsuch.com

www.gorsuch.com

IMPROPER NOTICE

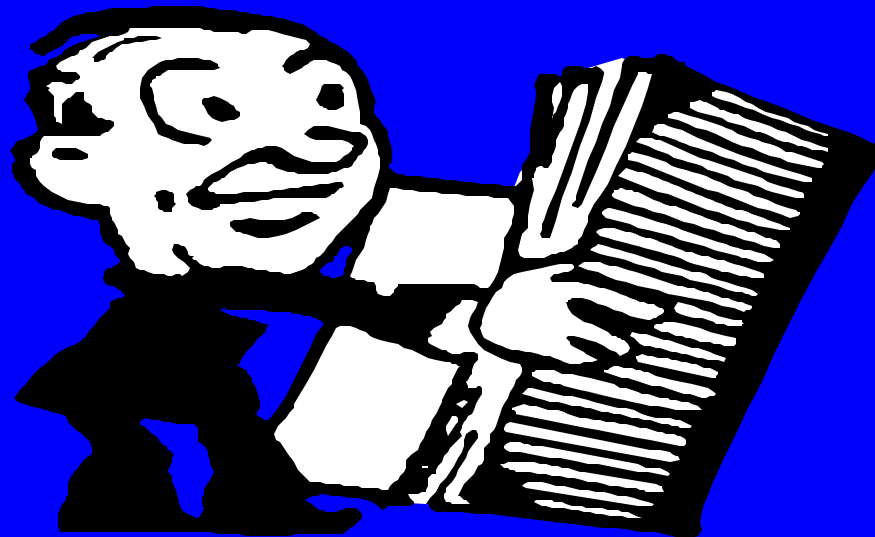


◎ Just before the hearing, the clerk asks "Should we have published any notice for this meeting?"

- ❑ Lack of notice is one of the leading reasons for reversal (or at least a remand to do it over again)
- ❑ Minimum standards: statutory and case law
- ❑ Rezoning hearing notices: when to use a map in addition to the legal description or street address

IMPROPER NOTICE Cont.

- ❑ Review your code and standardize multiple and/or conflicting notice requirements
- ❑ Consider developing a graph or chart in the code to show these items



BIAS AND PREJUDGMENT



◎ During the rezoning hearing, a board member says "I've never liked this developer, and I can't see myself ever supporting a project of his"

- ❑ Distinguishing between bias and simple familiarity with the project or applicant
- ❑ When and how to express and act on personal opinions

BIAS AND PREJUDGMENT Cont.

- ❑ Sometimes, board members are required to serve on the planning commission and see the application twice
- ❑ Public officials are also policy makers, who are expected to make certain public statements: help them to draw the line between quasi-judicial and legislative matters
- ❑ When and how to advise a board member to step down



CONFLICTS OF INTEREST

◎ "He ain't heavy, he's my brother-in-law"

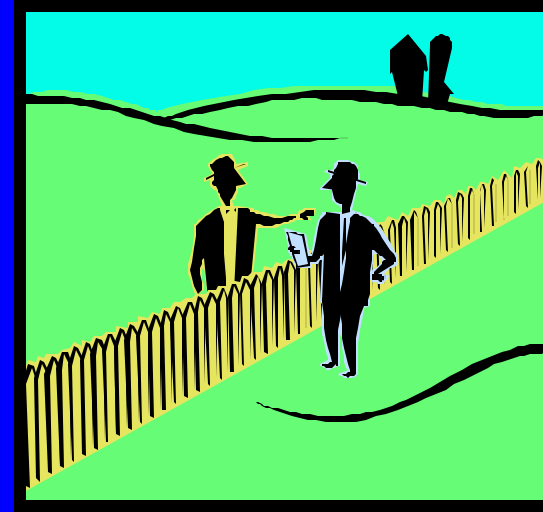
- ❑ Defining the limits of conflict of interest in your jurisdiction: case law, statutes, local charter, or ordinance
- ❑ Helping your officials to draw a bright line



CONFLICTS OF INTEREST

Cont.

- ❑ Family relationships and financial connections
- ❑ Distinguishing the "appearance of impropriety" from a true conflict of interest ("Doesn't council member X live across the street from this development?")



CONFLICTS OF INTEREST

Cont.

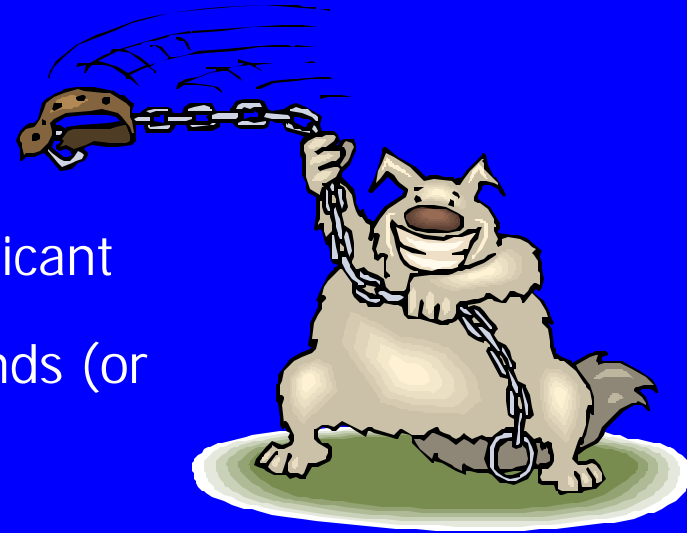


- Clear rules for how to deal with a conflict of interest:
 - ❖ Disclose, step down, don't vote
 - ❖ If voting anyway, make disclosure to Secretary of State and clerk to the governing body
 - ❖ "Q" and "A" on the record to establish lack of bias and that the member can render an impartial decision

CONFLICTS OF INTEREST Cont.

□ What are the safe harbors?

- ❖ Any legislative matter
- ❖ General laws (leash laws, zoning ordinance, building code)
- ❖ Lack of financial connection
- ❖ Member is next door neighbor of applicant
- ❖ Board member and applicant are friends (or not)



◎ **Note: all of these fact patterns lack a financial connection**



AVOIDING *EX-PARTE* CONTACTS

- ◎ Board member asks whether it is all right if she had lunch with the applicant last week
 - *Ex-parte* contacts defined: Communications between the board members and either the applicant or opponents outside the public hearing. Remember that these contacts are only a problem when the board is acting in a quasi-judicial capacity
 - Includes written material and e-mail

AVOIDING *EX-PARTE* CONTACTS Cont.

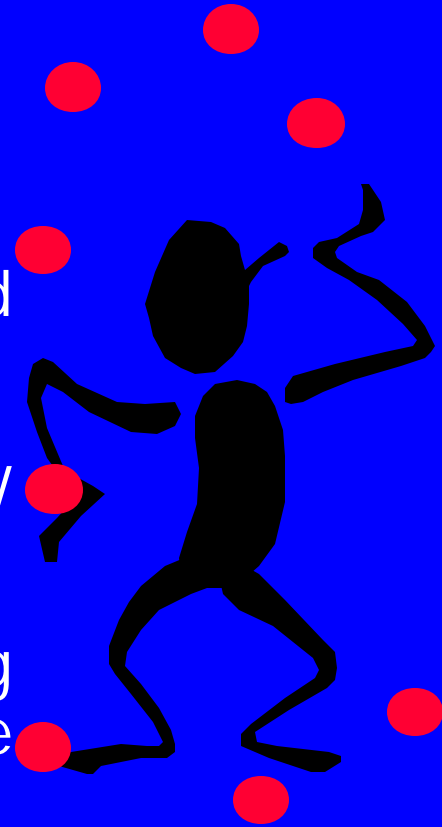
- ❑ Stress the importance of avoiding *ex-parte* contacts.
 - ❖ Deprives everyone of the benefit of that testimony
 - ❖ If extreme, could result in invalidating the body's decision



AVOIDING *EX-PARTE* CONTACTS Cont.

☐ Tricks to avoid *ex parte* contacts

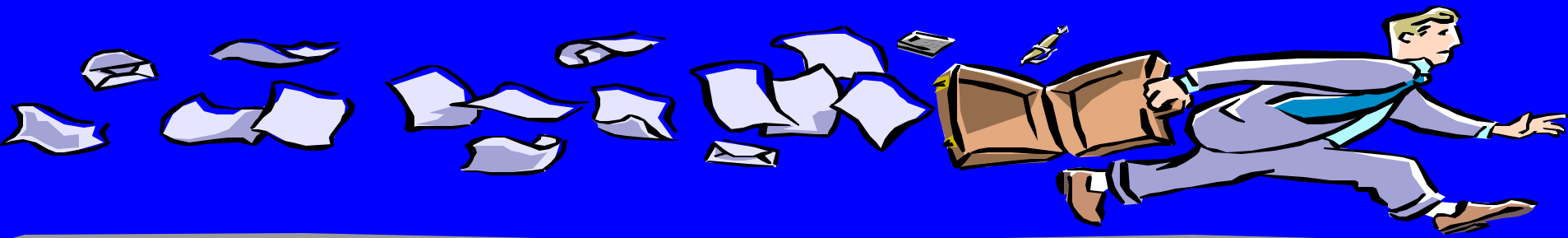
- ❖ Stop going to the grocery store
- ❖ Tell the person that everyone should have the benefit of their statement
- ❖ Tell them that city/town/county attorney said so
- ❖ Tell them the result of your listening is that you will not be able to vote (appeal to self interest)



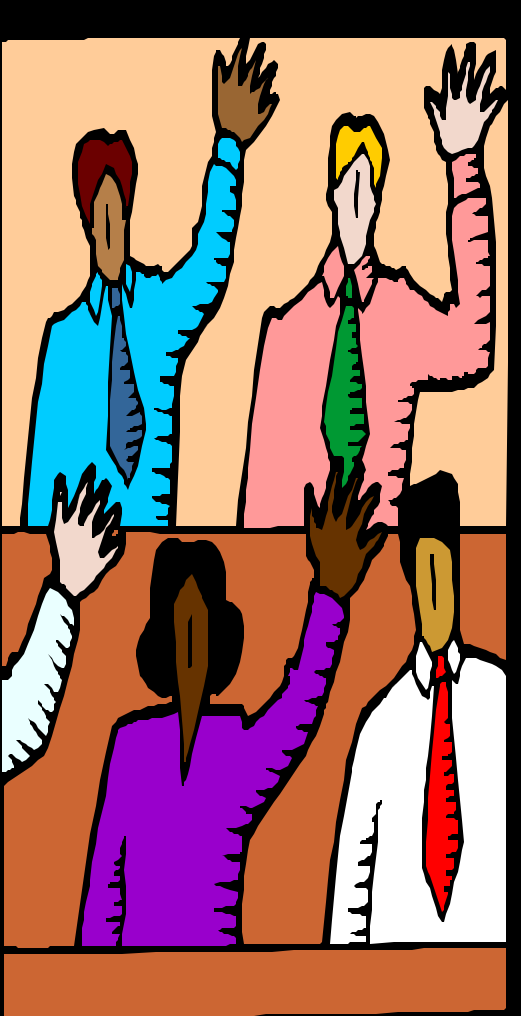
AVOIDING *EX-PARTE* CONTACTS Cont.

□ What to do when it happens anyway

- ❖ If the contact is minor, disclose it at the beginning of the meeting and answer the question that you can render an impartial decision.
- ❖ If not, disclose, step down, don't vote
- ❖ Leave the hearing room



CONDUCTING A FAIR HEARING

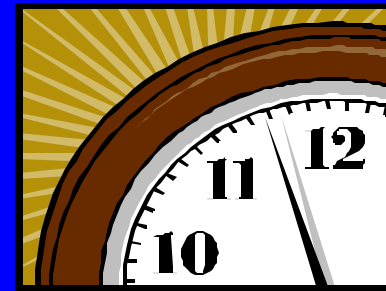


◎ "I've heard enough already, let's vote."

- ❑ Help your officials remember to keep their eye on the prize: that everyone leaves the hearing feeling it was fair and their views were heard and appreciated
- ❑ Work with the chair to develop and announce a simple list of rules at the beginning of each hearing.

CONDUCTING A FAIR HEARING Cont.

- Develop techniques for dealing with large and unruly crowds
- Time limits and other tricks
- Avoiding duplicative testimony: Is it worth discouraging it?
- Never forget to thank people for testifying
- Timely decision making: Tell the audience when you will decide, then do it



CONDUCTING A FAIR HEARING Cont.

□ What the Planning Commission is not:

- ❖ A committee of compassion
- ❖ An applause-o-meter
- ❖ The applicant's unpaid staff
- ❖ The mechanic who has to "fix" the application



CONDUCTING A FAIR HEARING Cont.

□ What the Planning Commission is:

- ❖ An independent, unbiased review
- ❖ A recommending body
- ❖ An integral part of the system of representative democracy



CONDITIONS OF APPROVAL AND OTHER EXTRACTIONS

◎ "I move the application be approved, conditioned upon the property owner cleaning up that mess at his gas station across town."

□ Help your board members understand the basic elements of recent case law governing its exactions and conditions:

❖ Nollan vs. California Coastal Commission: Is there a legitimate governmental purpose for the condition? Is that purpose actually served by the condition?

CONDITIONS OF APPROVAL AND OTHER EXTRACTIONS Cont.

- ❖ Dolan vs. City of Tigard: Is the condition or exaction roughly proportionate to the impact created by the development?
- ❖ Beaver Meadows vs. Larimer County: Is the exaction or condition authorized by your local regulations? ("Find it in the book.")

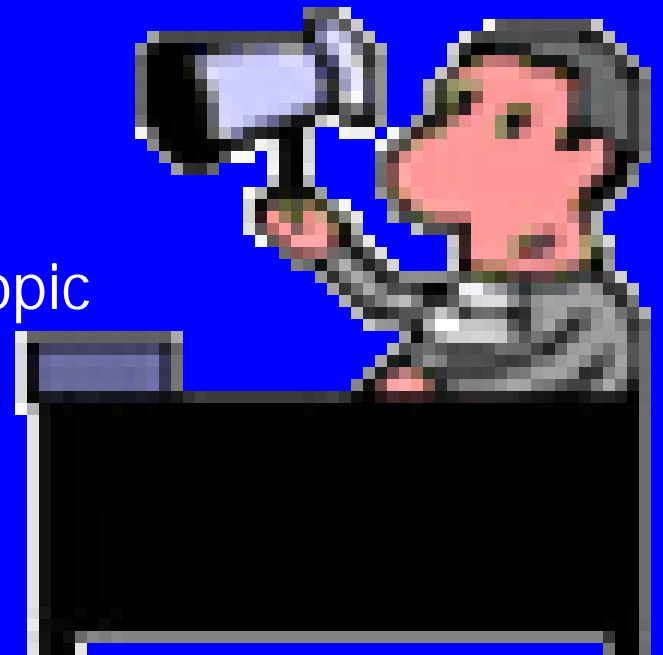
❑ Debunk the "highest and best use" myth

WHO IS IN THE CHAIR?

◎ "Sitting in a meeting of this group is like waiting for Godot"

□ Develop a strong chair or presiding officer, who:

- ❖ Sticks to the agenda
- ❖ Focuses discussion on the topic





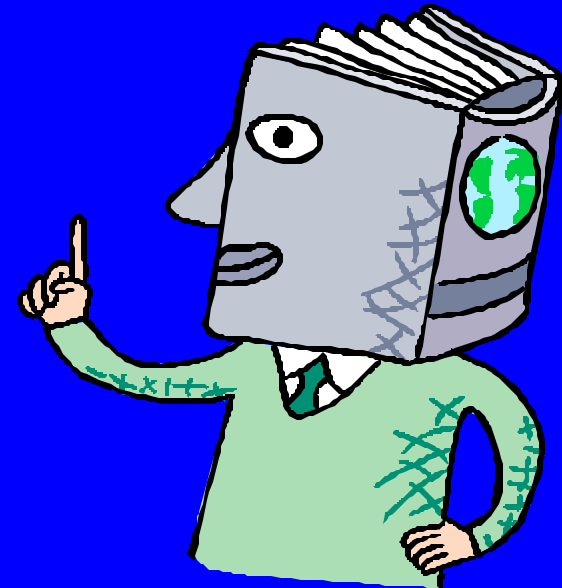
WHO IS IN THE CHAIR? Cont.

- ❖ Reminds members of the time
- ❖ Expedites discussion: "I'll entertain a motion on that," or "Is that a motion?"
- ❖ *Knows the art of suggesting when the time is right to act*
- ❖ Avoids taking the trip to Abilene
- ❑ Help members understand that they too have the right to move the meeting along.

WHO IS IN THE CHAIR?

Cont.

- ❑ How to use an agenda with time frames to gain some control over the meeting.
- ❑ Roberts Rules of Order: Does your community use them as a guide, or as a roadblock?



DEFENSIBLE FINDINGS & DECISION

◎ "I move the application be denied because it's the wrong building in the wrong place"

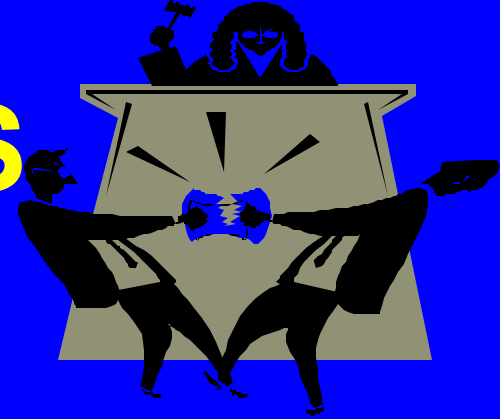
□ Stressing the extreme importance of well-documented findings in support of the decision:

❖ Simple form of written findings can be a staff report with a motion referring to the reasons in the report.

❖ When to suggest that the city attorney or staff be directed to prepare findings for the board's review and approval at a later meeting.



DEFENSIBLE FINDINGS & DECISION Cont.



- ❑ The good news: generally the courts will not substitute their judgment for yours unless you have clearly abused your discretion.
- ❑ Help the judge to apply this standard by articulating the decision and its basis clearly.
- ❑ Oral motions with amendments: how to add conditions and reasons to the main motion
- ❑ Keeping the hearing record: when to consider using a shorthand reporter

SITE VISITS

◎ "Why can't the applicant serve hors d'oeuvres?"

- The objective: For the body to get a physical sense of the property and the proposal
- The pitfall: The site visit becomes a series of *ex-parte* contacts between the members of the public body and the applicant and/or opponents



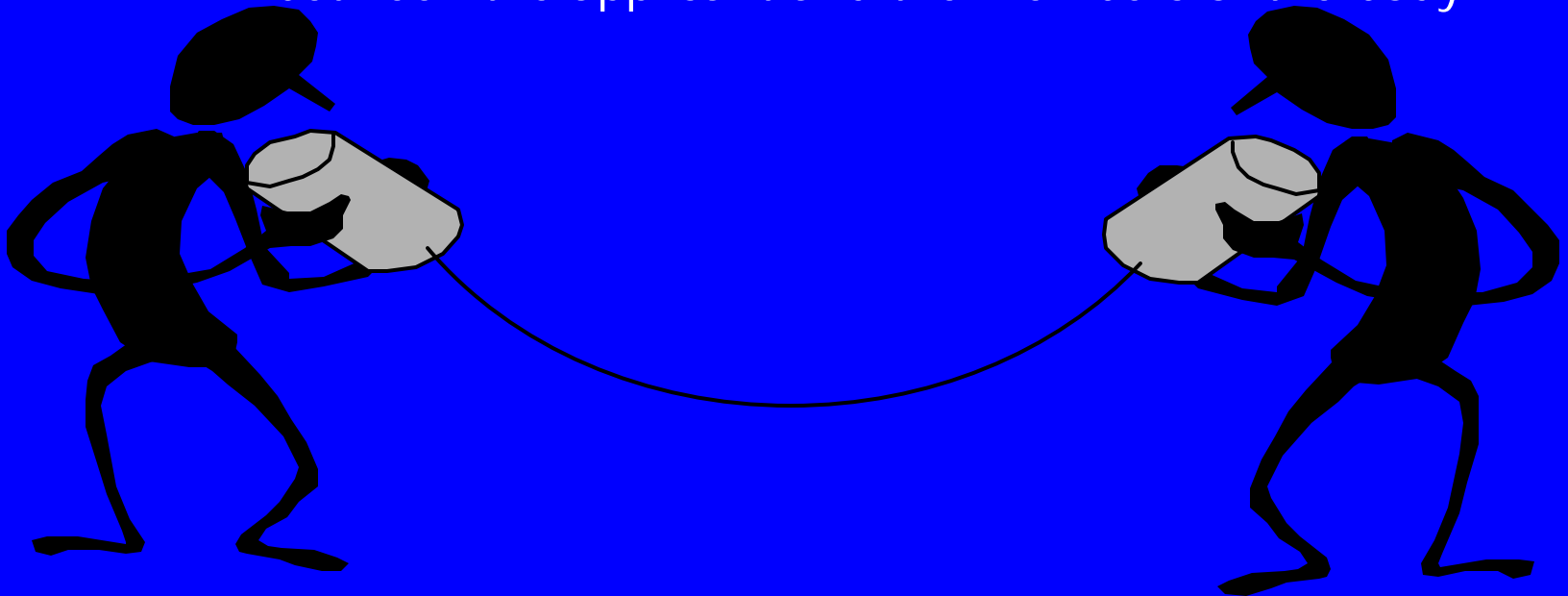
SITE VISITS

- The solution: Enforce some basic safety rules:
 - Suggest that the members visit the site individually and anonymously
 - Staff "pre-visits" the site with the applicant, such that the applicant need not be present on the day of the visit
 - Comply with Open Meetings Act notice requirements and be ready to advise any public that shows up that no testimony will be taken



SITE VISITS Cont.

- If the applicant is present, avoid the slippery slope of "just a question of information"
- Similarly, avoid letting staff become a "human telephone" between the applicant and the members of the body



APPLYING THE COMPREHENSIVE PLAN

◎ "The Comp Plan is only a guide, right?"

□ Help the Commission understand what the comprehensive plan is:

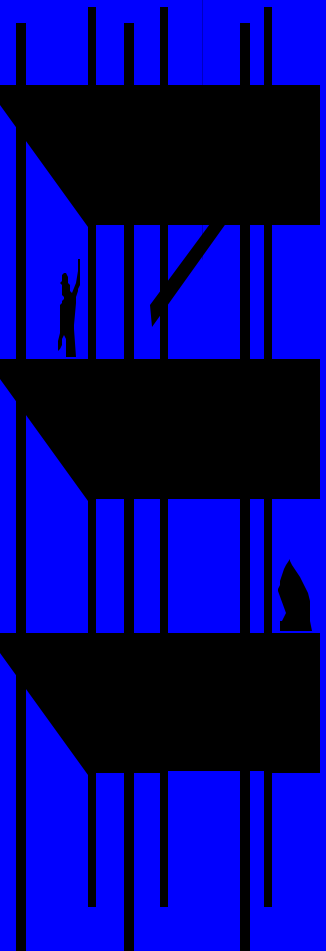
- ❖ Comprehensive, in topic and in area
- ❖ General: as contrasted with implementing regulations
- ❖ Long-range



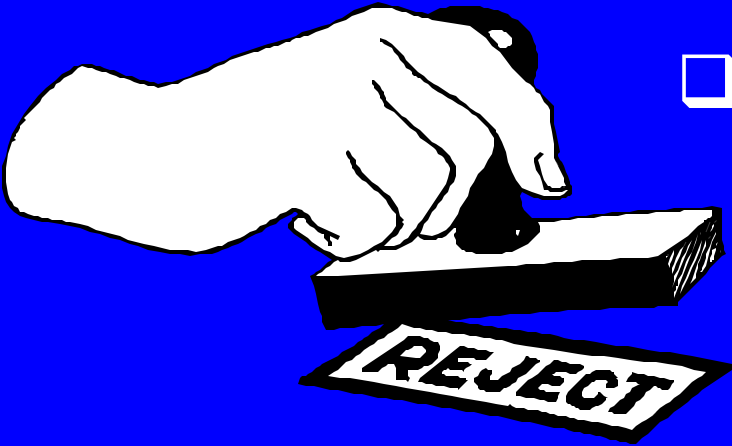
APPLYING THE COMPREHENSIVE PLAN Cont.

□ How is the comprehensive plan used?

- ❖ As a lens through which to review rezoning and development proposals
- ❖ As a framework for new or amended regulations
- ❖ As a basis for capital improvement decision
- ❖ As a means of influencing private sector investment and development decisions
- ❖ In Colorado, to satisfy the "three-mile plan" annexation law requirement of Sec. 31-12-105, C.R.S.



APPLYING THE COMPREHENSIVE PLAN Cont.



□ How and when to base project denial on the comprehensive plan

❖ When the regulation specifically makes compliance with the plan a basis for approval/denial

❖ When the plan statements are specific and relevant to the project

❖ When there is at least one other code-based reason for denial

