



Skagit County Planning & Development Services

DALE PERNULA, AICP *Director*

JACK MOORE, CBCO *Building Official*

Short Course Supplement: Background on land use and planning law for the Skagit County Planning Commission

updated November 24, 2014

Introduction.....	1
Creation of the Planning Agency	2
Scope of Authority.....	2
Legislative Process Overview.....	4
Conflicts of Interest and Recusal.....	6
Open Government Trainings Act.....	7
Open Public Meetings Act.....	8
Public Records	10
More Resources.....	11

Introduction

This document provides general background information on state and local land use law and procedures for Planning Commissioners.

Land use law is a complex and evolving area of law, with many overlapping—and sometimes conflicting—state and local requirements. For advice on specific matters, consult your deputy prosecuting attorney.¹

¹ This document was prepared by Ryan Walters, Skagit County Civil Deputy Prosecuting Attorney.

Creation of the Planning Agency²

The Skagit County Board of Commissioners established the county planning department by [Resolution 3078](#) in 1961 pursuant to [RCW 36.70.040](#),³ which reads:

By ordinance a board may, as an alternative to and in lieu of the creation of a planning commission as provided in RCW 36.70.030, create a planning department which shall be organized and function as any other department of the county.

The Board created the Planning Commission in the same resolution. The relevant section of [RCW 36.70.040](#), which defines the duties and authority of the Planning Commission, reads as follows:⁴

...When such department is created, the board shall also create a planning commission

which shall assist the planning department in carrying out its duties,

including assistance in the preparation and execution of the comprehensive plan and recommendations to the department for the adoption of official controls and/or amendments thereto.

Based on the foregoing, the Planning Commission's role is to work with the Planning and Development Services Department ("PDS" or "the Department"); it has no supervisory authority over the Department.

Scope of Authority

The Planning Enabling Act, originally adopted in 1959, vests the Planning Commission with authority to assist the Department with two areas: the comprehensive plan and "official controls," which are defined as:

"Official controls" means legislatively defined and enacted policies, standards, precise detailed maps and other criteria,

all of which control the physical development of a county or any part thereof or any detail thereof,

and are the means of translating into regulations and ordinances all or any part of the general objectives of the comprehensive plan.

Such official controls may include, but are not limited to, ordinances establishing zoning, subdivision control, platting, and adoption of detailed maps.⁵

² The "Planning Agency" is the planning department together with its planning commission. [RCW 36.70.020](#)(13).

³ RCW Chapter 36.70, the Planning Enabling Act, includes several other organizational methods for a planning department and planning commission. Skagit County has chosen the system identified in [RCW 36.70.040](#).

⁴ The author has added line breaks in excerpts from the statutes to improve readability of long sentences.

⁵ [RCW 36.70.020](#)(11).

Today, the term “development regulations” is more commonly used than “official controls.” The Growth Management Act defines the term as:

“Development regulations” or “regulation” means the controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments thereto...⁶

Some examples of matters that are *not* within the scope of the Planning Commission’s authority are:

- Adoption of building codes
- Adoption of health codes
- Amendment of public participation plan
- Docketing of comprehensive plan amendments
- Administration or supervision of the planning department
- Code enforcement

Legislation vs. Permit

Land use functions at Skagit County are divided into two spheres: legislative functions and administrative or quasi-judicial permit processing functions. The legislative land use process is described by [SCC Chapter 14.08, Legislative Actions](#). Permit processing is largely governed by [SCC Chapter 14.06, Permit Procedures](#). The table below shows which bodies issue recommendations, make decisions, or decide appeals, for each type of matter. “HE” means Hearing Examiner.

	Type	Examples	Recommend	Decision	Appeal
Admin/Quasi-Judicial	I	Admin Special Use Permits	—	Staff	HE ⇔ Board ⇔ Court
		Final subdivisions ≤ 4 lots	—	Staff	HE ⇔ Board ⇔ Court
		Prelim subdivisions < 9 lots	—	Staff	HE ⇔ Board ⇔ Court
		Admin Interpretations	—	Staff	HE ⇔ Board ⇔ Court
	II	HE Special Use Permits	Staff	HE	Board ⇔ Court
		Prelim subdivisions ≥ 9 lots	Staff	HE	Board ⇔ Court
III	Prelim subdivisions > 50	HE	Board	Court	
Legislative	—	Comprehensive plan and map amendments	Planning Commission	Board	GMHB ⇔ Court
	—	Development regulations			

As the table demonstrates, *all* of the Planning Commission’s responsibilities are related to legislative functions, not administrative or permit decisions. Skagit County Code makes Planning staff, the Hearing Examiner, and the Board of Commissioners responsible for permit decisions.

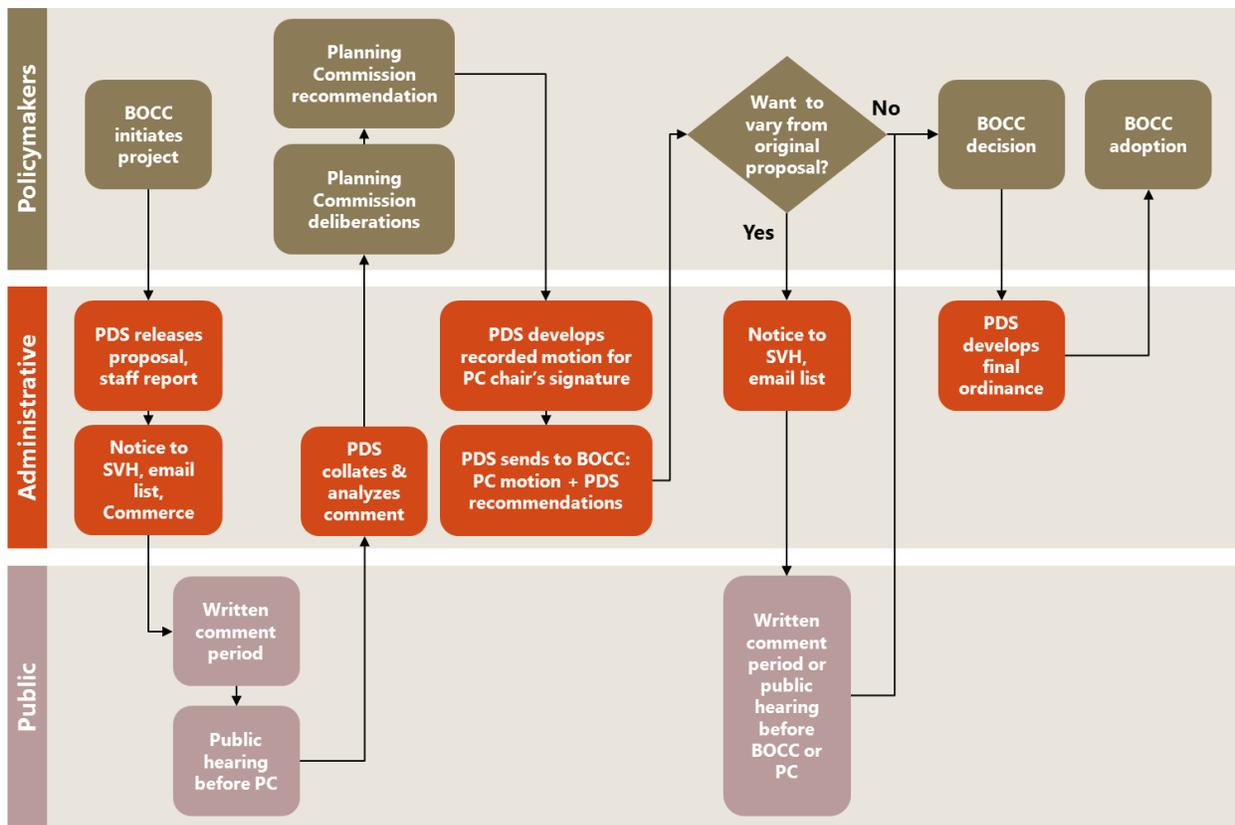
⁶ [RCW 36.70A.030\(7\)](#).

Legislative Process Overview

The process for adoption of land use legislation is described in SCC Chapter 14.08, Legislative Actions, and is based on requirements found in the Planning Enabling Act (RCW 36.70) and the Growth Management Act (RCW 36.70A). Generally, the process has four components:

- Proposal
- Public Comment
- Recommendation
- Decision

The flowchart below illustrates the process described in SCC Chapter 14.08:



Proposal

When a draft proposal is completed, it is released with a **Notice of Availability**. The notice, which is published as a legal notice in the Skagit Valley Herald, includes the following:

- Short description of proposal
- Dates of written comment period
- Method of commenting
- Date of public hearing
- Statement of SEPA threshold determination

Public Comment

The Growth Management Act makes early and continuous public participation a requirement.⁷ GMA Goal 11 provides that counties should “Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.” Opportunities for public comment typically take two forms: written comments and public hearings. All land use legislation proposals have a written comment period and a public hearing before the Planning Commission.

Recommendation

After the public hearing, the Planning Commission deliberates on the proposal and the comments, and makes a recommendation on how to proceed and what changes, if any, to make to the proposal. Department staff then develops a “recorded motion” that describes the Planning Commission’s recommendation.

The Planning Enabling Act at [RCW 36.70.040](#) describes the process and recorded motion as follows:

...To this end, the planning commission shall conduct such hearings as are required by this chapter and

shall make findings and conclusions therefrom which shall be transmitted to the department ...

A recorded motion should include **findings of fact**, and **reasons for the recommendation**.

- The **findings of fact** are facts that the Planning Commission believes to be true and that support its recommendation on the proposal.
- The **reasons for the recommendation** is an explanation of the Planning Commission’s rationale in making its recommendation.
- If the Planning Commission wants to include other notes or requests to the Department or Board of Commissioners in the recorded motion, it should do so in another section.

The Planning Commission chair signs the recorded motion to indicate that it reflects the determination of the Planning Commission as a whole. Consistent with [RCW 36.70.040](#), the Department “...shall transmit the [recorded motion] on to the board with such comments and recommendations it [the department] deems necessary.”

Decision

After it receives the recorded motion, the Board of County Commissioners has three options: it can reject the proposal and adopt nothing; it can adopt a version of the original proposal; or it can decide it wants to adopt something else. If it chooses this third option, it must first allow for additional public comment, consistent with [RCW 36.70A.035\(2\)\(a\)](#):

Except as otherwise provided in (b) of this subsection,

if the legislative body for a county or city chooses to consider a change to an amendment to a comprehensive plan or development regulation,

⁷ [RCW 36.70A.140](#).

and the change is proposed after the opportunity for review and comment has passed under the county's or city's procedures, an opportunity for review and comment on the proposed change shall be provided before the local legislative body votes on the proposed change."

RCW 36.70A.035(2)(b) provides a list of exceptions from the default requirement to offer additional opportunity for review and comment.

Conflicts of Interest and Recusal

Planning Commissioners, like most government officials, need to be careful to avoid conflicts of interest in their work. Not every "interest" presents a real conflict; we refer to statutes and rules to determine if an actual conflict exists, or if there is any other rule that would require a Planning Commissioner to step aside for a decision.

Planning Commission Bylaws Constraints on Conflicts of Interest

The [Planning Commission's bylaws](#) contain rules regarding conflicts of interest. Article VII, Section 2 provides guidance for legislative matters:⁸

Any member of the Commission who in his or her opinion has a pecuniary interest in any matter before the Commission that would prejudice his or her actions shall so publicly indicate and shall step down, leave the hearing room and refrain from voting and any manner of participation with respect to the matter in question so as to avoid any possible conflict of interest or violation of the appearance of fairness.

If a member of the Commission or his/her immediate family has a pecuniary interest in the matter at hand but does not think that this would prejudice his/her opinion the member should publicly disclose this interest on the record prior to the start of the hearing and allow persons to challenge his/her participation in the hearing. If so challenged the member shall step down, leave the hearing room and refrain from voting and any manner of participation with respect to the matter in question. If not challenged the member may participate.

The bylaws also contain a section on conflicts of interest for quasi-judicial matters, but as described below, that section never applies.

No Quasi-Judicial Matters, so Appearance of Fairness Never Applies

The Appearance of Fairness Doctrine is a judicially created rule, partially codified and limited by statute at [RCW chapter 42.36](#), to ensure due process in **quasi-judicial** proceedings. The doctrine has stringent rules to ensure not just actual fairness, but the very appearance of fairness (hence the name). During the pendency of a quasi-judicial matter, Planning Commissioners must be careful to avoid *ex parte* communications about the matter, or must disclose such communications. Most quasi-judicial matters also are allowed only one open-record public hearing per proposal.⁹

⁸ Bylaws Article VII, Section 1 provides rules for quasi-judicial matters that no longer apply.

⁹ [RCW 36.70B.050](#).

This document doesn't go into detail about Appearance of Fairness rules because the most important constraint on the doctrine is that it *does not apply to legislative matters*.¹⁰ As described above in the discussion of the Planning Commission's scope of authority, the Planning Commission deals exclusively with legislative matters, therefore the Appearance of Fairness doctrine never applies to it.¹¹ Similarly, the restraints on *ex parte* communications and open or closed record hearings do not apply.

Even Site-Specific Comprehensive Plan Map Amendments Are Legislative

Recent case law has made clear that even site-specific comprehensive plan map amendments are legislative matters. In *Stafne v. Snohomish County*,¹² the Washington Supreme Court found that Stafne's request for a site-specific comprehensive plan map amendment was a legislative discretionary act. That's also consistent with the exclusion of comprehensive plan map amendments from the Local Project Review Act; per the definition of "project permit" in RCW 36.70B.020, "site-specific rezones authorized by a comprehensive plan" are the only type of rezone subject to the act. In Skagit County, where we have a unified comprehensive plan/zoning map, rezones are never authorized by the comprehensive plan because the comprehensive plan must always be modified to accomplish a rezone, and are therefore not permit decisions within the meaning of the Local Project Review Act.¹³

Open Government Trainings Act

New legislation in 2014, codified at RCW _____, requires each member of the Planning Commission, as a "governing body" of a "public agency" as defined under the Open Public Meetings Act, to receive open government training:

- no later than 90 days after the date the member takes office;
- at intervals of no more than four years as long as the individual is a member of the Commission.

Other government entities and officers require training in additional open government statutes, but the Planning Commission needs only OPMA training to comply with the statute. This memo and the associated presentation from County legal staff complies with the requirement.

Planning Department staff will keep records of which Planning Commissioners have received such training and on which dates. Planning Commissioners do not need to receive records training but information on the records retention laws and Public Records Act is included here for good measure.

¹⁰ [RCW 42.36.030](#).

¹¹ Unless the law changes, or a particularly atypical situation arises. If that happens, Planning or legal staff will notify Planning Commissioners in advance.

¹² *Stafne v. Snohomish County*, 174 Wn.2d 24 (2012).

¹³ The one exception to this general rule is zoning districts within city Urban Growth Areas. If a proposal to rezone within a city's UGA comes forward, we will provide additional advice on Appearance of Fairness Doctrine at that time.

Open Public Meetings Act

Despite the emphasis that the legislation receives, the Open Public Meetings Act is written very poorly. Each section must be carefully unpacked in order to find the rules applicable to the Planning Commission. Officials are advised to take heed to the penultimate line of the statute, which provides that the OPMA is to be liberally construed to accomplish its purposes.¹⁴

RCW 42.30.030 provides that “All **meetings** of the **governing body** of a **public agency** shall be open and public...”

- “**Public agency**” means ... (c) any subagency including...**planning commissions**...
- “**Governing body**” means the multimember board... or other policy or rulemaking body of a public agency, or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment.
- “**Meeting**” means meetings at which **action** is taken.¹⁵
- “**Action**” means the transaction of the official business of a public agency by a governing body including but not limited to: receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and **final actions**...
- “**Final action**” means a collective positive or negative decision, or an actual vote by a majority of the members of a governing body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance.

Reading all of these definitions together, the OPMA directs Planning Commissioners to be careful to avoid discussing Planning Commission business in any group of five or more members, or in any committee of any size that takes public testimony or comment, outside of a public meeting that has been properly noticed. A quorum constitutes the Planning Commission, and any discussion of business constitutes “action.”

Public Notice Requirements

Notice is required in some form for all meetings of the Planning Commission. Staff provides notice of Planning Commission meetings consistent with the statute; additionally, they also distribute notices via the PDS listserv.

- **Regular meetings**¹⁶ are those that occur consistent with the schedule of meetings published on the PC website at the beginning of each calendar year and provided to the local newspaper. No special notice of the meeting is required, but the meeting agenda must be posted online at least 24 hours in advance.¹⁷
- **Special meetings** are any meetings that are not regular meetings.¹⁸ Every Planning Commissioner must be notified; e-mail is sufficient notice. A notice of the special meeting

¹⁴ [RCW 42.30.910](#).

¹⁵ [RCW 42.30.020](#).

¹⁶ See RCW 42.30.075.

¹⁷ [RCW 42.30.077](#).

¹⁸ [RCW 42.30.080](#).

must be sent to the newspaper, posted on the website, and displayed at the main entrance of both the County Commissioners Administrative Building and the site of the meeting, if different.¹⁹ Final action at a special meeting is limited to the topics listed on the agenda.²⁰

Neither type of meeting requires advertising via a purchased newspaper legal notice.

Votes

All votes must be public, including votes to elect the Planning Commission chair and vice chair. No votes are allowed by secret or written ballot.²¹

Committees

Committees that don't include a quorum of the Commission are not regulated by the Open Public Meetings Act, *except* that the statute elevates a committee (even one that doesn't include a quorum) to the status of the full body when it "acts on behalf of the [Planning Commission], conducts hearings, or takes testimony or public comment."²² Planning Commission committees therefore need to avoid taking any of those actions.

Additionally, given the Growth Management Act emphasis on public process, the Planning Commission should avoid creating any formal committees that meet in unadvertised meetings for any discussion of comprehensive plan amendments or development regulations.

Serial Meetings and Meetings via Email

A discussion need not be in person to be a meeting; case law has established that an email discussion among a quorum or more can constitute a meeting.²³ Meetings can also occur by relaying communications among a quorum or more through a third party.

While sending an email from one individual Planning Commissioner to the entire group is permitted, a subsequent reply-to-all is legally dubious. The best practice, when sending a message to the group, is to put the "#PlanningCommission" address in the BCC box, rather than the To box, and to remind members not to reply-to-all.

Executive Sessions

The OPMA allows governing bodies to meet outside of public view in special circumstances that are defined in the Act and are intended to be narrowly construed. Except perhaps in very unusual circumstances, none of these exceptions apply to the work of the Planning Commission. The Planning Commission is advised to never enter executive session.

Violations

The statute establishes personal liability for a \$100 civil penalty per person per violation, plus additional liability for costs and attorneys' fees.²⁴ Violation of the Open Public Meetings Act

¹⁹ RCW 42.30.080(2).

²⁰ RCW 42.30.080(3).

²¹ [RCW 42.30.060\(2\)](#).

²² [RCW 42.30.020\(2\)](#).

²³ [Wood v. Battle Ground School District, 107 Wn. App. 550 \(2001\)](#).

constitutes malfeasance and could lead to removal of a commissioner from the Planning Commission by the Board of County Commissioners.

Public Records

Planning Commissioners are subject to the state public records statutes, including the records retention laws in RCW Chapter 40.14 and the Public Records Act, RCW Chapter 42.56. Violations of the Public Records Act are punished much more severely than any of the open government statutes discussed earlier,²⁵ so the Planning Commission must pay close attention and strictly comply with the following advice to avoid liability.

Retain Records

As a general rule, any writing involving Planning Commission business that you generate or receive is a public record, and you should retain it or give it to the Department for retention. An exception to this rule is that you do not need to retain *copies* of documents that are already held by the County (e.g. agendas, minutes, plans).

Use Your County Email Address

Special considerations apply to email. As a general rule, you should use *only* your County email address to send and receive emails related to Planning Commission business. That way, all your email and its metadata is retained on the County email servers and is accessible in the event of a public records request. If you do receive email at your personal email address, you should:

- Retain the mail in a special folder for county messages in your private email account. This preserves the metadata that does not follow a message when you forward it.
- Forward the message to your County email account.
- Reply to the sender only from your County email account, and ask the sender to only email your County email address.

If you have a smartphone or tablet, you can access your County email from that device using Exchange ActiveSync instead of, or in addition to, the Outlook Web Access client.²⁶ Any message you read using either technology is synced to the County server, so you don't have to worry about managing records retention yourself. Ask the Department for server names and assistance configuring your device.

Retain Every Email You Receive

You should retain every email you receive, even if it's sent to you from inside the County, because the County currently lacks an email archiving and retention system and every message may have different metadata. In Outlook Web Access, you may click "delete" on any message in your inbox to send it to your Deleted Items folder, but don't permanently delete messages from the Deleted Items or empty your Deleted Items folder.

²⁴ [RCW 42.30.120](#).

²⁵ Violations of the PRA may be punished by up to \$100 per day per record, plus reasonable attorney fees. [RCW 42.56.550](#).

²⁶ POP and IMAP access to the County server are not available or allowed.

More Resources

The gold standard of planning law backgrounders for Washington State municipal governments is the [Department of Commerce's Short Course on Local Planning](#), which they offer several times per year around the state. Commerce also publishes a sophisticated and comprehensive online resource guide.

Relevant Statutes and Rules

- [RCW 36.70](#), Planning Enabling Act
- [RCW 36.70A](#), Growth Management Act; see also [WAC 365-196](#)
- [RCW 90.58](#), Shoreline Management Act; see also [WAC 173-18](#) and [173-20](#)
- [SCC 14.02](#), General Provisions
- [SCC 14.08](#), Legislative Actions

Other Planning and Land Use Statutes

The Planning Commission doesn't regularly deal with these statutes, but they are important to land use law and permitting.

- [RCW 36.70B](#), Local Project Review Act (aka Regulatory Reform)
- [RCW 36.70C](#), Judicial Review of Land Use Decisions (aka the Land Use Petition Act)
- [RCW 42.36](#), Appearance of Fairness Doctrine
- [RCW 58.17](#), Subdivisions
- [RCW 43.21C](#), State Environmental Policy Act; also see the [Ecology SEPA Handbook](#)

Other Relevant Statutes

- [RCW 40.14](#), Preservation and Destruction of Public Records
- [RCW 42.30](#), Open Public Meetings Act
- [RCW 42.56](#), Public Records Act