

— PENNSYLVANIA. BUILT TO ADVANCE. —



# The Zoning Officer

PLANNING SERIES #9



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PLANNING SERIES #9

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# Table of Contents

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<b>I.</b>	<b>The Zoning Officer</b> .....	<b>1</b>
	Preface .....	1
<b>II.</b>	<b>Introduction</b> .....	<b>2</b>
<b>III.</b>	<b>Statutory Overview of Authority</b> .....	<b>3</b>
<b>IV.</b>	<b>Appointment</b> .....	<b>4</b>
<b>V.</b>	<b>Zoning Officer Duties</b> .....	<b>5</b>
<b>VI.</b>	<b>Zoning Administration</b> .....	<b>6</b>
<b>VII.</b>	<b>Zoning Permits</b> .....	<b>7</b>
<b>VIII.</b>	<b>Compensation and Dismissal</b> .....	<b>8</b>
	Compensation .....	8
	Dismissal .....	8
<b>IX.</b>	<b>Applications and Administrative Matters</b> .....	<b>9</b>
<b>X.</b>	<b>Notice Requirements</b> .....	<b>10</b>
<b>XI.</b>	<b>Inspections</b> .....	<b>11</b>
<b>XII.</b>	<b>Enforcement</b> .....	<b>12</b>
<b>XIII.</b>	<b>Hearings Before a Magisterial District Judge</b> .....	<b>14</b>
<b>XIV.</b>	<b>Subdivision and Land Development Ordinance Enforcement</b> .....	<b>15</b>
<b>XV.</b>	<b>Injunctions</b> .....	<b>16</b>
<b>XVI.</b>	<b>Permits</b> .....	<b>17</b>
	Revocation of Permits .....	17
	Permits Issued in Error .....	17
<b>XVII.</b>	<b>Registering Nonconformities</b> .....	<b>18</b>
<b>XVIII.</b>	<b>Preliminary Opinions</b> .....	<b>19</b>
<b>XIX.</b>	<b>Sequence of Zoning/Subdivision Approvals</b> .....	<b>20</b>
<b>XX.</b>	<b>Relationship with Zoning Hearing Board</b> .....	<b>21</b>
<b>XXI.</b>	<b>Suggestions for Zoning Changes</b> .....	<b>22</b>
<b>XXII.</b>	<b>Coordination</b> .....	<b>23</b>
<b>XXIII.</b>	<b>Codes</b> .....	<b>24</b>
	Pennsylvania Uniform Construction Code, Act 45 of 1999 .....	24
	Property Maintenance Codes .....	24
<b>XXIV.</b>	<b>Multimunicipal Zoning Enforcement</b> .....	<b>25</b>
<b>XXV.</b>	<b>Conclusion</b> .....	<b>26</b>
<b>XXVI.</b>	<b>Planning Assistance from DCED</b> .....	<b>27</b>
<b>XXVII.</b>	<b>Other Planning Assistance</b> .....	<b>28</b>

# I. The Zoning Officer

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## Preface

*The Zoning Officer (Planning Series Publication #9)* is one of a series of 10 planning publications produced by the Governor's Center for Local Government Services (Center) as a means to educate both professionals and non-professionals on the ways that planning and land use management are achieved within the commonwealth. The planning publications were first developed in the 1970s and in subsequent editions have been revised to incorporate differences in the overall planning viewpoint, offer up-to-date best practices, and reflect the latest changes in Pennsylvania planning law. Each publication addresses a specific planning or land use method enabled through the Pennsylvania Municipalities Planning Code (MPC), Act 247 of 1968, P.L. 805, as reenacted and amended, 53 P.S. § 10101, et seq., and used by municipalities throughout the commonwealth.

The Center's 10 Planning Series Publications are as follows:

- No. 1 – Local Land Use Controls in Pennsylvania
- No. 2 – The Planning Commission
- No. 3 – The Comprehensive Plan
- No. 4 – Zoning
- No. 5 – Technical Information on Floodplain Management
- No. 6 – The Zoning Hearing Board
- No. 7 – Special Exceptions, Conditional Uses and Variances
- No. 8 – Subdivision and Land Development in Pennsylvania
- **No. 9 – The Zoning Officer**
- No. 10 – Reducing Land Use Barriers to Affordable Housing

A zoning officer has an important responsibility in enforcing a municipality's zoning ordinance. *The Zoning Officer* publication is specifically designed to provide information to:

- Address the statutory authority of the zoning officer and the powers of enforcement associated with the position.
- Provide an overview of the duties of the zoning officer in administering a municipality's zoning ordinance in accordance with its literal terms, uses, and approving or denying applications for zoning permits.
- Describe the process for addressing zoning violations and enforcing remedies.
- Explain the relationship of the zoning officer with the municipality's zoning hearing board and his or her role in zoning hearing board hearings.

## II. Introduction

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The broad duty of the zoning officer is to administer the zoning ordinance. Pennsylvania courts characterize the zoning officer as the “gatekeeper;” that is, the individual vested with the responsibility to interpret and administer the zoning ordinance on behalf of the municipality. The MPC is the legislation that conveys planning authority and sets the ground rules that a municipality must follow, including the appointment of a zoning officer to administer the zoning ordinance.

A well-administered zoning enforcement program will ensure the zoning ordinance serves the community well and accomplishes the objectives intended by the governing body when it enacted the ordinance. Good enforcement procedures will maximize compliance – the real objective. Consistent and effective administration can minimize money spent on litigation and violations that “beat” the system. Inadequate or worse – negligent – administration will undermine the zoning ordinance. Even a bare bones zoning ordinance with few limitations can cause the solicitor to pull his or her hair out if the enforcement is casual and haphazard and potentially inconsistent and discriminatory.

### III. Statutory Overview of Authority

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Section 614 of the MPC requires that a zoning officer be appointed to administer a zoning ordinance. The zoning officer shall:

1. not hold any elective office in the municipality;
2. meet the qualifications established by the municipality;
3. be able to demonstrate to the satisfaction of the municipality a working knowledge of municipal zoning;
4. administer the zoning ordinance in accordance with its literal terms; and
5. not have the power to permit any construction of any use or change of use which does not conform to the zoning ordinance.

Section 614 of the MPC further provides that “zoning officers may be authorized to institute civil enforcement proceedings as a means of enforcement when acting within the scope of their employment.” However, such powers are available only when the municipality authorizes the zoning officer to institute enforcement proceedings, either generally or for a specific violation. The authorization should be included in the minutes of the governing body.

Section 613 of the MPC provides that zoning ordinances may include provisions requiring the zoning officer to identify and register nonconforming uses, structures and lots, together with the reasons why the zoning officer identified them as nonconformities.

## IV. Appointment

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The zoning officer is appointed by the governing board. Section 614 of the MPC provides that the Zoning Officer “shall not hold any elective office in the municipality.” Although there are no state licensing or educational requirements, the MPC requires the zoning officer to meet qualifications established by the municipality and to be able to demonstrate a working knowledge of zoning. A zoning officer should not be appointed based on politics or a willingness to accept meager compensation.

**The MPC expressly provides for the administration of the zoning ordinance by a zoning officer. Often the individual appointed as the zoning officer also serves as the municipal codes enforcement official. It is important that, when administering the zoning ordinance, the individual be identified as the zoning officer and that, when administering any ordinance or municipal code other than the zoning ordinance, the individual be identified as the codes official or other appropriate title.**

## V. Zoning Officer Duties

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It is the duty of the zoning officer to:

1. Administer the zoning ordinance and issue permits only where there is compliance with the provisions of the zoning ordinance.
2. Conduct inspections and surveys as prescribed by the governing body or ordinance to determine compliance or non-compliance with the terms of the zoning ordinance.
3. Enforce the zoning ordinance, including the issuance of enforcement notices and, where authorized by the governing body, the filing of summary citations with the magisterial district judge, and keep records of all enforcement activities.
4. Perform a review of applications for conditional uses, special exceptions, and variances for compliance with the zoning ordinance, and provide testimony at hearings on such applications. Where directed by the governing board, the zoning officer may be charged with receiving appeals and applications for conditional uses, special exceptions, and variances, forwarding them to the governing body or the zoning hearing board, as appropriate, scheduling hearings, advertising, posting notices, and issuing written notices of the hearings.
5. Perform a review of applications for subdivision and land development for compliance with the zoning ordinance, and provide review comments to the planning commission and governing body.
6. Upon the request of the planning commission, governing body, or zoning hearing board present facts, records or information to assist in making decisions.
7. When required by the zoning ordinance, identify and register nonconforming uses and structures and record the reasons for the nonconforming status.
8. Where authorized by the governing body, to take action on behalf of the municipality in any appropriate action or proceedings to prevent the unlawful erection, construction, reconstruction, alteration, repair, conversion, demolition, maintenance, or use of any building or structure, to restrain, correct, or abate such violation so as to prevent the occupancy or use of any building, structure, or land, or to prevent any illegal act, conduct, business, or use in or about such premises.
9. Revoke by order a permit issued under a mistake of fact or contrary to the law or the provisions of the zoning ordinance.
10. Keep records of all applications and plans for permits and the action taken thereon.
11. Maintain a map or maps showing the current zoning districts and overlay districts for all the land within the municipality. Upon request – via permit applications, or verbal and/or written requests – the zoning officer shall make determinations of any zoning map district boundary question.
12. Upon request, issue preliminary opinions under Section 916.2 of the MPC.

## VI. Zoning Administration

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Zoning administration begins with an application to the zoning officer for a zoning permit. Municipalities use zoning permits as a means for administering and enforcing the zoning ordinance. Zoning officers may also receive requests to determine whether a use is permitted by the zoning ordinance and if or how a particular requirement of the zoning ordinance applies. Such requests may be made in conjunction with a specific development or application for zoning approval, but may also be made by a landowner for property for which a development or application is not yet proposed. In responding to such request, the zoning officer administers the zoning ordinance and makes a determination. Such determinations are appealable to the zoning hearing board.

Under Section 614 of the MPC, a zoning officer is required to administer the zoning ordinance “in accordance with its literal terms, and shall not have the power to permit any construction or any use which does not conform to the zoning ordinance.” A zoning officer is not vested with any discretionary power to waive requirements or to tighten the ordinance to protect some perceived public need. If the application for a zoning permit meets the requirements of the zoning ordinance, as the zoning officer understands them, the application should be approved. If the application does not meet the requirements, a zoning officer, as required by the MPC, must make the determination to deny it. Additionally, a zoning officer may not reject or allow an application for a zoning permit based on a private deed restriction or restrictive covenant. Both are private matters and enforceable by those directly affected by the deed restriction or restrictive covenant.

Where the provisions of a zoning ordinance are capable of more than one meaning, a zoning officer will be required to interpret the provisions. Such interpretation should be made upon close consideration of the clear provisions of the zoning ordinance and the zoning ordinance as a whole. Such interpretation also should be mindful of the limitation in Section 603.1 of the MPC, that “[i]n interpreting the language of zoning ordinances to determine the extent of the restriction upon the use of the property, the language shall be interpreted, where doubt exists as to the intended meaning of the language written and enacted by the governing body, in favor of the property owner and against any implied extension of the restriction.”

In interpreting the ordinance and making determinations about zoning permit applications, a zoning officer may consult with the governing body and the municipal solicitor. This is a wise move particularly for proposed uses or development that will be highly visible to the public and/or controversial. However, the bottom line is that, according to the MPC, the zoning officer has the authority to make the determination. And, no matter the pressure from the governing body or the public, as noted previously, the zoning officer must literally interpret the ordinance and shall not permit uses or development that do not conform to the ordinance.

If the applicant or a concerned property owner disagrees with the zoning officer’s determination, his or her remedy is to appeal the determination to the zoning hearing board. If certain ordinance provisions are a source of chronic disagreements or harmful interpretations, the governing body should consider amending the ordinance.

## VII. Zoning Permits

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The zoning officer has exclusive authority to issue a zoning permit. A zoning permit, authorizes the recipient to use or occupy a tract of land or a structure; or to erect, alter or install a structure or sign which fully meets the requirements of the zoning ordinance. The zoning officer is responsible for reviewing the zoning permit application for compliance with the zoning ordinance (as well as cross-referencing the subdivision and land development ordinance pursuant to MPC Section 515.1(b)).

Typical language that municipalities may consider using in their zoning ordinances to stipulate the use and issuance of zoning permits is provided below.

### **Typical Ordinance Language Pertaining to Zoning Permits**

A Zoning Permit is a certification of property use and shall be required for any of the following:

1. Construction, reconstruction, erection, extension, enlargement, conversion, or structural alteration of any building, including accessory structures;
2. Change in use of an existing building or accessory structure to a use of a different classification;
3. Occupancy and Use of vacant land;
4. Change in the use of land to a Use of a different classification;
5. Any change in a nonconforming use;
6. The alteration or installation of a sign; and
7. Any temporary uses as defined herein.

*A zoning permit is issued subject to continued compliance with all requirements and conditions of this ordinance and other regulations enacted by the <Municipality>, all as in effect at the time of issuance of the zoning permit, and may be revoked for noncompliance.*

## VIII. Compensation and Dismissal

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### **Compensation**

The MPC does not address the mode of compensation for zoning officers. Salary, hourly rate, or commission based on the value of permits issued have been used. A salary or an hourly rate is most appropriate. A zoning officer may be part-time, and may work in two or more municipalities.

### **Dismissal**

Zoning officers may be fired for cause, just as any other municipal employee. Misfeasance – committing a lawful act in an unlawful manner, nonfeasance – failure to perform the duties of a zoning officer, and malfeasance – committing an unlawful act are reasons for dismissal. The municipality may also remove the zoning officer pursuant to the terms of his or her employment contract or agreement.

## IX. Applications and Administrative Matters

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It is essential that the zoning officer be knowledgeable of the zoning ordinance and accessible and comfortable working with the public. In most municipalities, the zoning officer addresses the initial concerns and questions of the public and processes all applications. Certain applications cannot be granted unless a variance or special exception is obtained from the zoning hearing board or the governing body approves a conditional use.

A zoning permit should be issued only when there is compliance with the zoning ordinance. If the use or structure is not clearly allowed, the zoning permit must be denied. Private contracts, deed restrictions, and other limitations on the use are not legal reasons for denial; only zoning ordinance reasons are sufficient. In applying the zoning ordinance, the zoning officer should use defined terms found in the zoning ordinance and use commonly accepted definitions for undefined terms. A checklist for other permits that may be required would help to inform and avoid delay for the landowner.

A number of other permits, such as a municipal or PennDOT highway occupancy permit, a sewer permit, and the related building and construction safety codes permits, might be necessary for a given zoning application. Final subdivision or land development approval may also have to be obtained after zoning approval and before a building permit can be issued. The zoning officer is responsible for recording and filing all applications and plans for permits and noting the action taken. These applications, plans, and documents shall be a public record. They are not secret or classified information.

**The Municipal Records Act, of January 18, 1968, P.L. 961. No. 428, and the Pennsylvania Historical and Museum Commission's Municipal Records Retention Manual establish procedures for records retention, including mandatory record retention and disposition schedules.**

**The Pennsylvania Right-to-Know Law, 65 P.S. § 67.101 et seq. (RTKL) applies to the records maintained by the zoning officer. Most requests will be submitted to the municipal open records officer for determination whether a responsive record is a "public record" and otherwise subject to a privilege or exception to disclosure. Unless an extension of time is warranted, the open records officer has five business days to respond to a request. In the event a request for a record is made to the zoning officer directly, the zoning officer should immediately notify the municipal open records officer of the request.**

A zoning officer should maintain a clear, logical, and accessible record system that should be cross-referenced with other building development and parcel records of the municipality. A given property or lot may have been created by a subdivision plan with conditions attached. Before a zoning or building permit is granted for such a lot, the zoning officer should be aware of those conditions and that determining that granting the permit will not violate any condition. Similarly, an existing lot, structure, or use might be nonconforming, and the reasons or degree of nonconformity ought to be documented on some type of central record system for easy checking anytime a zoning permit is sought. Related information concerning conditions attached to the grant of any conditional use, special exception, or variance should also be noted in the basic file system, as well as the history of any prior permits (or violation notices).

The database could be as simple as a card file or a small computer database. The tax map parcel number is probably the best point of reference for any system. Additional files could be cross-indexed various ways for administrative ease (e.g., by name of owner, by address or zoning district, etc.). A record system provides continuity to aid new employees, to assist the solicitor in building a solid case in the event of a legal appeal, to provide fairness and, not the least, to help prevent making costly mistakes. A little organization pays great benefits and helps to avoid the consequences of issuing a permit in error.

Maintaining the official zoning map or maps showing the current zoning districts and overlay areas, if any, is also a task of the zoning officer. Upon request – via permit applications, or verbal and/or written requests – the zoning officer shall make determinations of any zoning map district boundary question. Such determinations may be appealed to the zoning hearing board.

## X. Notice Requirements

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The zoning officer is often the municipal employee responsible for providing notice required by the MPC for public hearings on proposed zoning ordinances and amendments thereto and for zoning hearings conducted by the zoning hearing board and governing body.

Section 609 of the MPC specifies the procedures for enacting a zoning ordinance or zoning ordinance amendment. These procedures include the publication of notice in a newspaper of general circulation and written notice to individuals entitled by the MPC or by the municipal ordinance to such notice. It is important to note that whenever a zoning map or zoning map amendment is proposed, the municipality (in most cases by the zoning officer) must physically post notice of the public hearing conspicuously at points deemed sufficient by the municipality along the tract. This physical posting must be performed at least one week in advance of the public hearing in order to notify all potentially interested citizens. The municipality must also send public notices via first-class mail at least 30 days before the hearing date to all the real property owners within the area being rezoned. The zoning officer should keep a record describing the date(s) and extent or location of the notices posted.

## XI. Inspections

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Discovery of zoning violations, especially intermittent activities or activities not visible from the public rights-of-way, usually occurs by informant (complaint by a neighbor) or chance (while traveling to a meeting, lunch, etc.). Violations are also uncovered in the course of routine inspections undertaken as a matter of course during the development process, during building construction, and at the occupancy permit stage. Adhering to an inspection timetable and a compliance checklist for every project that has a zoning approval assures a uniform and comprehensive process. This type of record keeping helps the solicitor immensely when litigation is necessary.

Inspections should follow a routine procedure. Visual inspections of a property are always legal if made from the right-of-way, sidewalk, or other public place. The zoning officer must obtain consent from a responsible adult before entering a property, residence, or business. These are the first and foremost means of conducting inspections.

**If entering a property is critical to determine zoning ordinance compliance and consent is not given, the zoning officer would need to obtain an administrative search warrant from a magisterial district judge. An administrative search warrant differs from a search warrant obtained in a criminal investigation.<sup>1</sup>**

**The concept of administrative search warrants and their application in zoning enforcement may be unfamiliar to many zoning officers, their municipalities, and even their local magisterial district judges. Municipalities and their zoning officers should consult with their solicitors when considering such actions.**

Proper identification, preferably a badge and photo I.D. card, should be displayed. The zoning officer should explain the reason for the inspection and invite the owner or agent to accompany him or her on the inspection.

Conduct inspections during normal working hours or at least during daylight. Complete an inspection report, preferably on a pre-printed form, checking off various blocks and noting who granted permission for the inspection. Routine information always includes the address and owner of the property, the date and time of the inspection, and the name of any persons accompanying the zoning officer. Photographs can be valuable as evidence, so note whether any photographs were taken and make note of pertinent information related to each photograph (i.e., who, what, when, and where). The written record is important to document the inspection and its results and to demonstrate that a clear, established procedure exists and was followed.

Include the inspection report in the individual file for each property inspected. File other pertinent information, such as references to discussions, phone calls, or actions taken as recorded in planning commission or governing body minutes and copies of zoning hearing board decisions. An extra copy of the inspection is usually maintained chronologically by year, too, for administrative ease.

### References

1. To obtain an administrative search warrant the zoning officer must provide sufficient information for the magisterial district judge to conclude that issuance of the warrant is necessary and appropriate, that is that there is "probable cause."

## XII. Enforcement

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Many zoning violators are unaware that they have committed an offense. With a little luck, some diplomacy, and a friendly oral or written warning, the tactful zoning officer is likely to obtain compliance and avoid the need to initiate formal enforcement proceedings. The goal for the zoning officer should be compliance with the ordinance and not punishment for offenders.

If formal action is necessary, an enforcement notice may be sent by certified (or registered) mail, return receipt requested, or served personally upon the owner of record, directing that correction of all conditions found in violation be made within a stated period of time. According to Section 616.1 of the MPC, the notice must also be sent to any person who has filed a written request to receive enforcement notices regarding that parcel, and to any other person requested in writing by the owner of record. The zoning officer should tailor the compliance period according to the nature of the violation (e.g., requiring compliance within five, 10, or up to 30 days). If compliance is initiated but more time is needed, it would be prudent to grant an extension. The goal is not to fine or otherwise punish, but to gain compliance.

Section 616.1 of the MPC mandates that an enforcement notice state at least the following:

1. The name of the owner of record and any other person against whom the municipality intends to take action
2. The location of the property in violation
3. The specific violation with a description of the requirements that have not been met, citing in each instance the applicable provisions of the ordinance

*The following is a sample description of a specific violation for an enforcement notice:*

Section xxx of the Zoning Ordinance requires that a side setback of 10 feet be maintained from the property line and be kept clear of structures. You have constructed a covered porch that extends to within 5 feet of the side property line on your property. The construction of the covered porch within the side yard setback is in violation of Section xxx of the Zoning Ordinance.

4. The date before which the steps for compliance must be commenced and the date before which the steps must be completed

*Typical periods for compliance range from 10 to 30 calendar days from the date appearing on the face of the enforcement notice.*

5. That the recipient of the notice has the right to appeal to the zoning hearing board within a prescribed period of time in accordance with procedures set forth in the ordinance.

*Typical periods for compliance range from 20 to 30 calendar days from the date appearing on the face of the enforcement notice.*

6. That failure to comply with the notice within the time specified, unless extended by appeal to the zoning hearing board, constitutes a violation with sanctions clearly described.

Although it is not required, the enforcement notice could be imprinted with the municipal seal and notarized to make it appear more formal and increase its impact on the violator.

It is important to note that the violator of the zoning ordinance may appeal the enforcement notice to the zoning hearing board.

If the violation has not been corrected or abated, and no appeal has been taken from the enforcement notice, a municipality may “institute any appropriate action or proceeding to prevent, restrain, correct or abate such building, structure, landscaping or land, or to prevent, in or about such premises, any act, conduct, business or use constituting a violation.” Typically, this occurs by the filing of a civil complaint (a form prepared by the Administration Office of the Pennsylvania Courts for this purpose) with the magisterial district judge (although many communities routinely use the summary citation form to initiate these proceedings).

At this point, it is appropriate to interject a note concerning coordination by the zoning officer with the solicitor and governing body. Some municipalities delegate in advance to the zoning officer the authority to initiate enforcement proceedings. Other governing bodies may wish to be consulted or to have the solicitor review the violation file before any proceedings are initiated. A municipality should be inclined to the latter unless the zoning officer and/or staff are known to be knowledgeable and have a successful track record of enforcement with the magisterial district judge.

## **XIII. Hearings Before a Magisterial District Judge**

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For the hearing before the magisterial district judge, the zoning officer should prepare a case file that includes the zoning ordinance, property map, inspection records, oral and written warnings, or oral warnings and enforcement notices. The zoning officer should be prepared to offer oral testimony and exhibits in support of the enforcement action. Unless the zoning officer is experienced or the enforcement action is routine in nature, the solicitor should present the case.

**If the violator has not taken an appeal from the enforcement notice to the zoning hearing board, liability for violating the zoning ordinance has been established and cannot be reviewed in the proceeding before the magisterial district judge. Rather, the magisterial district judge is concerned with the issue of the appropriate sanction for such violation. The magisterial district judge is vested with discretion to fashion the appropriate judgment in the form of a monetary fine. The MPC contains no authority for imposition of a criminal penalty in a zoning enforcement action.**

## **XIV. Subdivision and Land Development Ordinance Enforcement**

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Whenever a subdivision or land development plan is presented to the municipality for review and approval, the zoning officer should review the plan for compliance with the requirements of the zoning ordinance. The zoning officer's review comments should be provided to the planning commission and governing body. Where the zoning officer determines that the proposed plan violates the zoning ordinance, the zoning officer should inform the applicant that conformance of the plan with the zoning ordinance is required.

## **XV. Injunctions**

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In certain circumstances, usually where there is a continuing zoning compliance problem, the municipality may, under Section 617 of the MPC, proceed directly to the county court of common pleas with an equity action seeking an injunction. Section 617 of the MPC authorizes action to “restrain, correct or abate violations to prevent unlawful construction, to recover damages and to prevent illegal occupancy of a building, structure or premises.” If an order for injunction is ignored, the violator will be held in contempt of court. Governing body approval is required to initiate an action for injunction. The matter is brought to the court by the solicitor. The zoning officer will furnish the records and provide testimony in court in most cases.

## XVI. Permits

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### Revocation of Permits

A permit issued under the Zoning Ordinance may be revoked by the zoning officer when the applicant falsifies, conceals, or misrepresents information to obtain the zoning permit, or carries on construction beyond the scope of the permit. Error on the part of the zoning officer in issuing a permit is another reason for a revocation and will be discussed later.

If work is still in progress, the zoning officer may first issue a “stop work” order. If work is completed, a “cease and desist” order would be used. In order to determine or confirm the reason for an alleged violation of the zoning permit and to arrange for corrective action, the zoning officer should seek to first meet with the permittee to informally resolve the violation. The zoning officer will take action to revoke the permit if compliance is not obtained as a result of the informal meeting. The permittee may take an appeal from the zoning officer’s determination to the zoning hearing board. If the permittee does not submit a proper application for a new zoning permit, an appeal from the revocation of the permit, or otherwise submit an application for relief (such as variance), and succeed on one or more of these actions, the municipality may proceed with the enforcement actions described in the earlier section titled Enforcement. Corrective action (which would be stated in the enforcement notice) can require the removal of completed improvements.

### Permits Issued in Error

If a zoning permit has been issued in error, the quicker it is revoked the better. There is no hard and fast rule governing when it is too late to revoke an erroneously issued zoning permit. Facts and circumstances become all important.

An individual to whom a zoning permit may have been issued in error may assert a claim under equity to a vested right in the permit. To establish a vested right in the permit, the permittee must assert and prove the following factors:

1. Due diligence by the permittee in attempting to comply with the law. This may include consulting or seeking the advice of the proper municipal officials such as the zoning officer, who should be expected to have knowledge about zoning. The permittee cannot simply “put his head in the sand” and offer a defense of ignorance of the requirements.
2. Good faith by the permittee throughout the proceedings. The permittee may claim an innocent belief that the use is permitted, but may not claim a vested right in the permit where he or she has deliberately disregarded the law or misrepresented or concealed relevant facts.
3. Expenditure of substantial unrecoverable sums in reliance on the permit and that enforcement of the ordinance would result in the hardship of the loss of the value of the expenditure.

The vested right to a permit issued in error is distinct from a claim to a “variance by estoppel” where there has been municipal inaction that amounts to an active acquiescence to an unlawful use. It is also distinct from a claim to “equitable estoppel” where a municipality intentionally or negligently misrepresents its position on a permit with reason to know that the landowner would rely upon that misrepresentation. All three theories of vested rights would typically be resolved in a proceeding before the zoning hearing board.

## XVII. Registering Nonconformities

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A nonconformity is a use or other condition of the property or structure that does not meet the requirements of the current zoning ordinance. The use or condition must have lawfully existed prior to the enactment of the regulation or requirement with which it does not conform. Examples of nonconformities are a business located in what is now a residential-only zoning district or an older home that does not meet the current requirement for yards or setbacks.

**The nonconformity must have existed prior to the adoption of the zoning ordinance, or amendment thereto, with which it does not conform. While inconsistent with the zoning ordinance or map, the nonconformity has a constitutionally-protected right to continue until abandoned.**

**A nonconforming use is “abandoned” only if there is both (i) actual abandonment and (ii) an intent to abandon. Without more, the mere offer to sell a property for a use other than the nonconforming use does not demonstrate the required intent to abandon the nonconforming use.**

Section 613 of the MPC, “Registration of Nonconforming Uses,” states that “zoning ordinances may contain provisions requiring the zoning officer to identify and register nonconforming uses, structures and lots together with the reasons why the zoning officer identified them as nonconformities.” Having a record of nonconforming conditions assists the zoning officer with future enforcement for violations of the zoning ordinance. As to registration of nonconformities, the courts have determined that a registration requirement provides the property owner with a means to document the existence of a lawful nonconforming condition and avoid having to bear the burden of proving its existence when faced with an enforcement action, but cannot be used to deny the claim to a lawful nonconformity merely because unregistered.

In such circumstances in which an individual is claiming a nonconformity not otherwise identified by the zoning officer, the burden of proof of establishing a nonconforming status is upon the party asserting it.

Record of the existence of a nonconforming use or condition is useful to the zoning officer when he or she is required to make a determination in response to a request to change from one nonconforming use to another or to expand a nonconforming condition. It is particularly useful when a zoning ordinance contains a provision that limits a change or expansion of a nonconforming use over time, such as allowing one or more expansions over time to a maximum of 50 percent of the original size.

## **XVIII. Preliminary Opinions**

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Section 916.2 of the MPC authorizes a zoning officer to issue a “preliminary opinion” to advance the date from which time a challenge to the ordinance or map under which a landowner proposes to build will run. The preliminary opinion allows the landowner to start the clock for an appeal challenging its compliance with the ordinance or map before submitting the formal application for development.

A preliminary opinion should not be confused with some sort of an “informal” opinion. To obtain this preliminary opinion, the developer has to submit plans and other materials that provide “reasonable notice of the proposed use or development;” however, a preliminary opinion does not require plans and other materials that meet the standards prescribed for preliminary or final subdivision or land development plans. Additionally, the plans and materials presented must provide a “sufficient basis for a preliminary opinion as to its compliance” with the ordinance or map.

If it is the preliminary opinion of the zoning officer that the use or development complies with the zoning ordinance or map, notice of such preliminary opinion must be published once a week for two consecutive weeks in a newspaper of general circulation. The notice must describe the use, the location, and where plans may be examined. Any parties opposing the use authorized by the preliminary opinion must file an appeal challenging the zoning ordinance or map within 30 days of the date the notice is published. If no appeal is taken from the zoning officer's preliminary opinion, there may be no appeal from a favorable preliminary approval of the development plan.

## **XIX. Sequence of Zoning/Subdivision Approvals**

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Zoning approval should precede subdivision or land development approval. While approval of a preliminary subdivision or land development plan can be obtained in advance of a zoning approval, a zoning approval must be obtained in advance of a final plan. The Pennsylvania Supreme Court stated that “[a]ny zoning problems must be considered at the planning stage for the purpose of approving or disapproving the plan. Otherwise, the governing body would not have the required information to make an informed decision” *Graham v. Zoning Hearing Board of Upper Allen Township*, 555 A.2d 79 (Pa. 1989).

## **XX. Relationship with Zoning Hearing Board**

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In most municipalities, the zoning officer processes applications and appeals to the zoning hearing board. The zoning officer usually arranges the scheduling of hearings, prepares the required notices, and provides the application and relevant information to the zoning hearing board, including the zoning officer's review comments. In performing these functions, the zoning officer is administering the zoning ordinance.

Because the zoning hearing board is a quasi-judicial board, once an application is filed, the zoning officer may not otherwise discuss the merits or substantive issues presented by the application or appeal with the members of the zoning hearing board.

At the hearing, the zoning officer typically testifies under oath regarding the submission, contents, and purpose of the application; the municipality's compliance with MPC-required hearing notice requirements; the zoning officer's review comments on the application's compliance with the requirements and standards of the zoning ordinance. The zoning officer, under any circumstance, should not prepare the zoning hearing board decision!

The zoning hearing board has no enforcement powers. The zoning hearing board does not have any jurisdiction to act as an enforcement officer even in respect to its own previously issued approvals or conditions. Where landowners violate specified conditions set by the zoning hearing board, the zoning officer is charged with the authority to enforce the zoning hearing board's decision, including, if deemed necessary, the issuance of a notice of revocation of the zoning hearing board's approval for noncompliance with the application to the zoning hearing board or conditions attached to its decision. The landowners would then be entitled to file a timely appeal with the zoning hearing board from the determination of the zoning officer.

## **XXI. Suggestions for Zoning Changes**

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The zoning officer is likely to be the first person to spot problems with the zoning ordinance that require a legislative solution. The zoning officer should report difficulties to the planning commission and governing body and offer solutions. Sometimes minor adjustments to the zoning ordinance are needed, and other times new provisions should be added to deal with new phenomena or circumstances. Examples of yesteryear's new zoning subjects include convenience stores, big box retail stores, and cellular communication towers and facilities.

Variances tend to be improperly and frequently granted when a zoning map change or textual revision might be the appropriate action. Frequent and similar variance requests, especially in the same geographic area, may signal the need to study a zoning amendment. The zoning officer is encouraged to consult with the solicitor when facing a new or unfamiliar problem. A clarifying legislative solution may save wear and tear on the zoning hearing board and more appropriately express the land use policy of the governing body.

## XXII. Coordination

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Zoning is one of the most important community planning tools to carry out a community's comprehensive plan. Consistent zoning enforcement will help achieve those planning goals, but a zoning officer cannot be expected to discover every violation or discover each violation immediately. Some violations are not readily apparent (e.g., a double occupancy in a single-family zone). But zoning does not operate in a vacuum.

Pennsylvania's statewide Uniform Construction Code (UCC) requires close coordination between the municipal zoning officer and building code official, given that the UCC building permit should not be issued prior to zoning approval. Further, a vigilant building code official can bring zoning violations that may go unnoticed for years to the zoning officer's attention. The zoning officer should, of course, reciprocate when building code violations are detected during the course of normal business and zoning inspections. Coordination requires both officers to be somewhat familiar with the other's duties and respective regulations. After all, building, housing, and safety codes are related tools that utilize the same police power to attain common community development objectives.

## XXIII. Codes

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In small rural communities in particular, zoning officers are often dual-hatted to serve as both the municipal zoning officer and building codes official. Where this occurs, the zoning officer is often generically dubbed the codes enforcement officer, which is strongly discouraged because the zoning officer is a specifically-titled appointment and vested with legal authority under the MPC. Only the individual appointed as zoning officer may administer the zoning ordinance; only as the codes official may the same individual administer the building or other codes.

### **Pennsylvania Uniform Construction Code, Act 45 of 1999**

The Pennsylvania Legislature's passing of the Pennsylvania Construction Code Act, Act 45 of 1999, 35 P.S. §§7210.101-7210.1103, paved the way for the enactment of the Uniform Construction Code (UCC) that replaced and standardized the various forms of building codes administered by municipalities. The building codes adopted through Act 45 consist of most of the International Code Council's 2009 code series. This series includes the International Building Code (IBC) and the International Residential Code (IRC) and replaces what are commonly known as the BOCA and CABO building codes respectively. The Pennsylvania Department of Labor & Industry has been designated as the lead agency to facilitate implementation of the code and prepare the requirements regulating training, certification and administration.

The Pennsylvania Department of Labor and Industry administers the UCC and according to the Department, "Over 90% of Pennsylvania's 2,562 [sic]<sup>1</sup> municipalities have elected to administer and enforce the UCC locally, using their own employees or via certified third party agencies (private code enforcement agencies) that they have retained. In these municipalities, the Department has no code enforcement authority, except where the municipality lacks the services of a person certified as an "Accessibility Inspector/Plans Examiner."<sup>2</sup> The Department is however responsible for all commercial code enforcement in municipalities that chose to "opt-out" of adopting the UCC.

For those municipalities that have elected to administer and enforce the UCC locally, many rely on their zoning officer for technical guidance and expertise (or the zoning officer may be dual-hatted as the building code official). Therefore, zoning officers should take it upon themselves to become familiar with the UCC and proactively coordinate with the municipalities designated building code official.

A listing of all of Pennsylvania's municipalities and their decisions regarding local enforcement of the UCC can be accessed through the Department's UCC Municipal Elections and Contact Information webpage.

More information on the UCC, as well as "training and certification requirements" and "administrative and enforcement regulations" prepared by the Department of Labor and Industry, can be accessed through their website at [www.dli.state.pa.us](http://www.dli.state.pa.us).

### **Property Maintenance Codes**

The importance of the property maintenance code, formerly referred to at various times as an "existing structures" code or "housing" code, has been increasingly recognized in recent years. The property maintenance code sets responsibilities for cleanliness of structures, for the disposal of garbage and rubbish, and for other activities needed to keep the structure and surrounding area in livable condition. Since this code applies to existing structures, no permits are required, and it is the responsibility of the building code enforcement officer to originate a systematic inspection of all dwellings in the community.

Even though these types of codes may appear to be complex, the adoption, implementation and enforcement further enhances solid community development. It should be noted that the MPC empowers local planning agencies to prepare and present building and housing codes.

### **References**

1. The current number of municipalities is 2,561.
2. Uniform Construction Code. Pennsylvania Department of Labor and Industry. Retrieved May 20, 2014 from [http://www.portal.state.pa.us/portal/server.pt/community/uniform\\_construction\\_code/10524](http://www.portal.state.pa.us/portal/server.pt/community/uniform_construction_code/10524)

## XXIV. Multimunicipal Zoning Enforcement

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In many municipalities, the zoning officer is not a full-time position, and it may be hard to find qualified and interested candidates. Pennsylvania law allows two or more municipalities to have a joint or shared zoning officer.

- Intergovernmental Cooperation Law (Act 177 of 1996) – Act 177 provides municipalities with broad authority to exercise any power or function under its code or charter cooperatively with other municipalities via an intergovernmental agreement. There are a number of joint zoning officer positions throughout Pennsylvania, and several of these are administered through councils of governments (COG) such as the Cambria-Somerset COG, Central Keystone COG, Jefferson Morgan Regional COG, and Pottstown Area COG.
- Article VIII-A allows two or more municipalities to enact a joint municipal zoning ordinance and in the ordinance to specify the number of zoning officers to be appointed to administer the ordinance pursuant to Section 614 of the MPC. The ordinance may designate a separate zoning officer to administer the ordinance for each participating municipality, or may designate a single zoning officer to administer the ordinance throughout the jurisdiction of the ordinance.

## XXV. Conclusion

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The job of zoning officer is tough and demanding. The job is complex, requiring numerous skills, not the least of which is communications proficiency. A zoning officer must be impartial and “thick-skinned.” Without a zoning officer to properly administer the zoning ordinance, the public benefit a zoning ordinance is intended to achieve will be undermined. The information in these pages should answer many questions for the novice zoning officer and offer some reassurances to those more experienced with zoning administration.

## XXVI. Planing Assistance from DCED

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DCED's Governor's Center for Local Government Services (Center) provides a full range of technical and financial services to all of Pennsylvania's local governments. The Center is the principal state agency responsible for helping with planning and land use matters discussed in this publication.

Local government officials, planners, and other interested individuals have several sources of assistance from the Center:

- **Toll-free telephone number** – 888-223-6837. Callers will be connected with staff that has knowledge of planning, land use, zoning, subdivision and land development, and the PA Municipalities Planning Code.
- **Website** – [www.newPA.com/local-government](http://www.newPA.com/local-government). There are helpful pages under Community Planning, plus information on the topics listed below.
- **Publications** – [www.newPA.com/local-government/publications](http://www.newPA.com/local-government/publications). This and the other nine Planning Series publications listed in the Preface can be downloaded and printed for free, or hard copies can be purchased at cost. The website also has publications with suggested provisions for floodplain management ordinances, plus publications on many topics from fiscal management to intergovernmental cooperation to open meetings.
- **Training** – <https://palocalgovtraining.org>. DCED provides funding for local government training programs via the PA Local Government Training Partnership. There are training courses, videos, and online instruction on a variety of topics, including planning and land use, plus ten fact sheets on planning and land use topics.
- **Land use law library** – [www.landuselawinpa.com](http://www.landuselawinpa.com). DCED and the PA Local Government Training Partnership maintain an online library of significant court cases on zoning, subdivision and land development, and other land use topics.
- **Planning and land use eLibrary** – <http://elibrary.pacounties.org>. DCED and the County Commissioners Association of Pennsylvania maintain an online library of comprehensive plans, zoning ordinances, and subdivision and land development ordinances in effect in Pennsylvania counties, cities, boroughs, and townships.
- **Financial assistance** – [www.newPA.com/find-and-apply-for-funding](http://www.newPA.com/find-and-apply-for-funding). Currently DCED provides funding for local government planning through the Municipal Assistance Program. MAP offers up to 50 percent grants for costs of undertaking comprehensive plans, zoning ordinances, subdivision and land development ordinances, and more.

## XXVII. Other Planning Assistance

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Assistance and training on planning and land use are available from other sources:

- **County planning agencies** – Pennsylvania counties have a long tradition of being a source of capacity and expertise in planning and land use. Currently, every county has a planning commission, department, or both, or other agency like a development department that handles planning matters. Every county has staff involved in planning. Many county planning agencies offer assistance to local governments in their counties.
- **American Planning Association (APA)** – The Pennsylvania Chapter has an annual conference with many speakers and sessions on topics from local to national interest, plus training workshops and other educational events and information: <http://planningpa.org>. The national organization has an annual conference, publications, and a variety of audio, web, and e-learning resources: [www.planning.org](http://www.planning.org).
- **Local government associations** – In addition to programs through the PA Local Government Training Partnership, Pennsylvania's statewide associations representing different categories of local governments also offer annual conferences and training programs, including planning and land use, to their member local governments.
- **Penn State Extension** – Statewide Extension programming includes courses, webinars, and publications on community issues including planning and land use. Within that is the Pennsylvania Municipal Planning Education Institute which offers training programs on planning, zoning, and subdivision and land development: <http://extension.psu.edu/community>.
- **Universities and colleges** – Several Pennsylvania universities and colleges offer degree programs in planning. Others offer planning-related courses in geography or design degrees. Many have a community service objective and assist community groups and local governments with faculty and/or student service projects.

**Pennsylvania Department of Community & Economic Development  
Governor's Center for Local Government Services**

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